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The past several years have witnessed a five Justice majority of the Supreme Court enunciating increasingly severe limitations upon Congress' Article I powers. One effort by these five Justices has emanated from a unique explication of the Eleventh Amendment which began with Seminole Tribe v. Florida in 1996 and was expanded by three decisions announced on June 23, 1999. This Quartet of decisions has significantly limited congressional power. This doctrine, the author contends, represents a revival of the Calhounian nullification doctrine which was a primary intellectual underpinning of southern secession in the last century. [Justice Souter asserts that it is a revival of "industrial due process."] The article examines the doctrine as explicated by Seminole Tribe and its progeny as it establishes severe limits on Congressional power, enunciates an undefined doctrine of concurrent sovereignty between the states and the federal government, declares that the use of property is not within the ambit of the Due Process Clause of the Fourteenth Amendment, and reallocates the demarcation of the separation of powers by declaring that federal courts will not only ask what Congress did, but also...
why Congress did it, and whether Congress had sufficient evidentiary support to do it. The article surveys the impact this Quartet of decisions may have upon environmental law by examining the impact upon the jurisdictional reach of the Clean Water Act, whether a state may be held liable as a potentially responsible party under CERCLA by a private party, whether there is a new basis to challenge the National Ambient Air Quality Standards of the Clean Air Act, the implications for takings litigation, and the potential impact upon delegated authority and citizen suits. With the advent of the Calhounian Quartet, the article concludes, one is sailing upon uncharted seas without a compass, much less a global positioning system.

INTRODUCTION

As the 1998–99 term of the Supreme Court ended, the Court issued three decisions1 amplifying its 1996 decision in Seminole Tribe v. Florida.2 This Quartet of decisions redefined the boundaries of the Eleventh Amendment,3 established a penumbral doctrine of state sovereignty, and expanded the scope of judicial review of congressional enactments. The spirit of John C. Calhoun4 appeared to be hovering over the five Justice majority as they fleshed out a new Calhounian5

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3 See 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." Id.

4 See Biographical Directory of the United States Congress 1774–1989, S. Doc. No. 100–34 (U.S. G.P.O. 1989) at 729. Mr. Calhoun, 1782–1850, a native of South Carolina, as well as a lawyer and graduate of Yale College, served as a member of the U.S. House of Representatives (1811–17), a member of the U.S. Senate (1832–43 and 1845–50), Secretary of War (1817–25), Secretary of State (1844–45), and Vice President (1825–32). See id.

5 See John Niven, John C. Calhoun and the Price of Union 179 (1988). The "Nullification Doctrine" asserted that a state could nullify an act of Congress (or other federal intrusion) with which it disagreed and first came to prominence as a means of opposing the Jacksonian "tariff of abominations." See id. Nat Turner's rebellion in 1831 caused Calhoun to begin to assert this doctrine as a means of preserving slavery. See id. At the heart of this shift was a Southern "fear" that the industrialized North would insist on emancipation of the slaves and the creation of this "constitutional" doctrine was a means of preventing this from occurring from the federal level. See id. at 197. The Calhounian
doctrine which allows states to functionally nullify federally created remedies through the assertion of an Eleventh Amendment and/or sovereign immunity bar as well as establishing new parameters of judicial review which rip asunder congressional prerogatives.

This Article explores the impacts of the Quartet of decisions upon environmental law. First, the Quartet of decisions are examined. Next, the Article clarifies two threshold issues common to all of the environmental law implications of the decisions. Finally, the impact of this Calhounian Quartet upon various aspects of environmental law is explored.

I. THE CALHOUNIAN QUARTET

A. A Reverse in Course: Seminole Tribe v. Florida

1. Background

The Seminole Tribe of Florida, a federally recognized tribe headquartered in Florida, brought an action against the State of Florida and its Governor in U.S. District Court under the Indian Gaming Regulatory Act. The plaintiff also brought the action pursuant to 28 U.S.C. §§ 1331 and 1362. The defendants sought dismissal on the grounds that the action was barred by the Eleventh Amendment. It was not disputed that the state had not consented to be sued. The court denied the motion, and an interlocutory appeal on this issue was taken to the U.S. Court of Appeals for the Eleventh Circuit.

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See Seminole Tribe III, 517 U.S. at 51-52.


See Seminole Tribe III, 517 U.S. at 55.

See Seminole Tribe I, 801 F. Supp. at 663.

See Seminole Tribe v. Florida, 11 F.3d 1016, 1020 (11th Cir. 1994) [hereinafter Seminole Tribe II].
The court combined this case with one from Alabama, and found that although there was the requisite congressional intent to abrogate a state's Eleventh Amendment immunity, Congress did not possess the power to abrogate based solely upon the Indian Commerce Clause. The court also held that Congress had not acted pursuant to the enforcement clause of the Fourteenth Amendment by finding that a protected liberty or property interest was not present. The court finally disallowed the action against the Governor under the doctrine of Ex parte Young. The Supreme Court granted certiorari to consider the following two questions:

1. Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and
2. Does the doctrine of Ex parte Young permit suits against a State's Governor for prospective injunctive relief to enforce the good-faith bargaining requirement of the Act?

2. The Majority Opinion

Five Justices joined the majority opinion which was delivered by the Chief Justice. The Court, citing Green v. Mansour, first examined whether Congress had abrogated the states' Eleventh Amendment immunity applying the following two-part test: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' . . . ; and second, whether Congress has acted 'pursuant to a valid exercise of power . . . .'" Although the Indian Gaming Regulatory Act did not expressly state an intent to abrogate, the fact that a state was the only defendant authorized by the statute was sufficient to meet the first part of the inquiry.
The Court stated that the focus was on the second part of the test: whether there was a "valid exercise of power" by Congress. The Seminole Tribe asserted that finding a power to abrogate should be based upon the fact that prospective injunctive relief was being sought rather than monetary damages. This argument was rejected rather summarily by citing Cory v. White and Hess v. Port Authority Trans-Hudson Corp., as being dispositive of the issue. The Court specifically stated that the type of relief sought was irrelevant to the second part of the test. Also unpersuasive was the Seminole Tribe's assertion that, because the statute granted states a power they did not possess (an ability to regulate Indian gaming in specified circumstances), the abrogation was justified as being the other side of the grant of power. The Court used the analogy provided by Atascadero State Hospital v. Scanlon that the receipt of federal funds in and of itself did not establish consent to be sued and thus power to abrogate.

The Court specifically recognized that the Fourteenth Amendment provided a basis for abrogation because Section 1 limited the powers of the states and Section 5 specifically provided Congress with enforcement authority. Since the Seminole Tribe, however, did not assert that the statute in question was enacted pursuant to Section 5 of the Fourteenth Amendment, the majority did not consider this issue further.

The focus of the Court's inquiry therefore was limited to whether Congress had authority to abrogate pursuant to the Indian Commerce Clause. The Court began by stating that under the rationale of Pennsylvania v. Union Gas Co, there was no reason to distinguish between the Interstate Commerce Clause and the Indian Commerce

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22 Seminole Tribe III, 517 U.S. at 58 (citing Green, 474 U.S. at 68).
23 See id.
24 See id. (citing Cory v. White, 457 U.S. 85, 90 (1982)).
26 See id.
27 See Seminole Tribe III, 517 U.S. at 58.
28 See id. at 58–59.
30 See id.
31 U.S. Const. amend. XIV, §§ 1, 5.
33 See id. at 60.
34 See id.
35 See id. at 63 (citing Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).
36 U.S. Const. art. I, § 8, cl. 3.
Clause. The Court viewed the Eleventh Amendment as a limitation upon the jurisdictional grant of power in Article III of the Constitution which could be abrogated by the Fourteenth Amendment. The question, then, was whether Union Gas provided a rationale for congressional abrogation pursuant to powers elucidated in Article I of the Constitution without the additional authority of the Fourteenth Amendment.

The Court began by stating that Union Gas was an anomaly. The Court found that the Fourteenth Amendment, because it was adopted after the Eleventh Amendment, acted as a limitation upon the limitation contained in the Eleventh Amendment and altered the pre-existing balance between state and federal power. The Court then found that since the rationale of Union Gas was based solely upon congressional authority found in Article I, there was no authority to abrogate a state's Eleventh Amendment immunity from suit in this instance. The majority continued to refer to Union Gas as a plurality decision and held that considerations of stare decisis were inapposite. The Court then proceeded to explicitly overrule Union Gas. To state this holding rather simply, the Court held that the Eleventh Amendment modified all previously adopted provisions to the extent that they provide a basis for Congress to provide Article III remedies for private parties against a state. Put another way, the Eleventh Amendment trumps all previously adopted constitutional provisions within its purview. The Court appeared to endorse a state's ability to waive its immunity through participation in a legitimately regulated activity which was indistinguishable from that conducted in the private sector as explicated in Parden v. Terminal Railway. The Court's holding was sweeping: even when Congress has exclusive authority over an area, this authority is restricted by the Eleventh Amendment. In a footnote, the Court dismissed as "misleadingly overbroad" Justice Stevens' concern that a right without a remedy was be-

37 See Seminole Tribe III, 517 U.S. at 63. The majority refers to the "plurality" opinion in Union Gas. See id.
38 See id. at 65.
39 See id.
40 See id.
41 See id. at 65–66.
42 See Seminole Tribe III, 517 U.S. at 66.
43 See id.
44 See id.
45 See id. (citing Parden v. Terminal Ry., 377 U.S. 184, 197–98 (1964)).
46 See id. at 72.
ing created in the areas of bankruptcy, copyright, and antitrust.\textsuperscript{47} The action against the State of Florida was dismissed for lack of Article III jurisdiction.\textsuperscript{48}

The final issue before the Court was whether there was jurisdiction to enforce the statute against the Governor notwithstanding the Eleventh Amendment.\textsuperscript{49} The Seminole Tribe was seeking prospective injunctive relief under the doctrine of \textit{Ex parte Young}\textsuperscript{50} to end a "continuing violation of federal law" by requiring the Governor to negotiate pursuant to the statute.\textsuperscript{51} The Court found that, since the statutory remedial scheme was less stringent than that in \textit{Ex parte Young}, there was no congressional intent to provide this remedy as demonstrated by the extensive remedial scheme in the statute at issue.\textsuperscript{52} The \textit{Ex parte Young} remedy was unavailable notwithstanding the fact that the Court had just held the lesser congressional remedy unconstitutional. If a lesser remedy exists, \textit{Ex parte Young} is not available.\textsuperscript{53}

3. The Dissents

Two dissents, one by Justice Stevens\textsuperscript{54} and the other by Justice Souter joined by Justices Ginsburg and Breyer,\textsuperscript{55} vigorously took issue with the majority decision. Justice Stevens found that there was cause for debate as to whether Congress has the power to ensure that such a cause of action may be enforced in federal court by a citizen of another State or a foreign citizen. There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued.\textsuperscript{56}

\textsuperscript{47} See Seminole Tribe III, 517 U.S. at 72.
\textsuperscript{48} See id. at 73.
\textsuperscript{49} See id.
\textsuperscript{50} 209 U.S. 123 (1908).
\textsuperscript{51} See Seminole Tribe III, 517 U.S. at 73.
\textsuperscript{52} See id. at 75–76.
\textsuperscript{53} See id. It is worth noting that the Seminole Tribe subsequently began conducting gaming operations. See Seminole Tribe II, 181 F.3d at 1239. Florida sued, but their claim was dismissed under a doctrine of Indian sovereign immunity. See id. at 1245. Florida's contention of the Tribe's constructive waiver of its immunity was also unsuccessful. See id. at 1242–43. An \textit{Ex parte Young}-type action was barred as was an implied cause of action. See id. at 1248–49.
\textsuperscript{54} See Seminole Tribe III, 517 U.S. at 76–100.
\textsuperscript{55} See id. at 85–100.
\textsuperscript{56} Id. at 78.
After an extensive examination of history and previous decisions, Justice Stevens stated that he would limit the Eleventh Amendment bar to its literal terms and find that Congress has the authority to make the federal courts available to remedy violations of federal law by a state or its officials. Justice Souter found the majority rationale to be "fundamentally mistaken" and examined the origins of the Eleventh Amendment at length. The gravamen of Souter's dissent was that the Eleventh Amendment "did not affect federal-question jurisdiction." Justice Souter concluded that the majority had abdicated its constitutional responsibilities.


1. Background

Mr. Alden and other probation officers employed by the State of Maine commenced an action in federal court pursuant to the Fair Labor Standards Act (FLSA) seeking overtime pay and prospective relief. The action was pending when Seminole Tribe was decided and the complaint was dismissed on the basis of that decision. Mr. Alden and the others filed a complaint in state court seeking the same relief pursuant to the FLSA. The action was dismissed as being barred by the Eleventh Amendment and an appeal was taken to the Supreme Judicial Court (SJC) of Maine. Maine's highest court found that Maine had not consented to be sued in its own courts by private parties even when the claim "derives from federal law." The Maine SJC further concluded that the Eleventh Amendment precluded Congress from making an unconsenting state subject to suit in its own courts.

57 See id. at 98.
58 Id. at 100.
59 See Seminole Tribe III, 517 U.S. at 102.
60 See id. at 185.
61 See Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201–219 (1994). An aggrieved employee may bring an action against a state or private employer in either state or federal court to obtain back pay illegally withheld as well as prospective relief to prevent future violations. See 29 U.S.C. § 216(b). The U.S. Department of Labor may also bring an action in federal court on behalf of aggrieved employees for back pay and prospective relief. See id. § 216(c).
62 See Alden v. Maine, 715 A.2d 172, 173 (Me. 1998) [hereinafter Alden I].
64 See Alden I, 715 A.2d at 172.
65 See id.
66 See id. at 174.
pursuant solely to Article I powers. The dissent would have found that there was a valid enactment under the Interstate Commerce and Supremacy Clauses.

2. The Majority Opinion

Justice Kennedy's holding in the Court's majority opinion was uncomplicated: Congress does not have Article I power to subject nonconsenting states to suits for damages in state courts, and Maine had not consented in this instance. The specific constitutional basis for the holding, however, was ethereal, as exemplified by the following excerpt:

[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

The Court went on to state that this was implicitly confirmed by the Tenth Amendment. This state sovereignty was preserved in two ways:

First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Govern-

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67 See id. at 175.
68 See id. at 176–79 (interpreting U.S. CONST. art. IV).
70 Id. at 2246–47.
71 See id. at 2247.
ments would exercise concurrent authority over the people . . . ”

The Eleventh Amendment did not “redefine” federal judicial power but only reconfirmed a state’s sovereign immunity from suit without its consent.73

The Court did not define the issue as the primacy of “substantive federal law,” but rather as the implementation of a statute consistent with state sovereignty.74 The Court appeared to say that Congress may enact laws pursuant to one of the enumerated powers binding the states, but Congress cannot provide a means of enforcing any private rights created by such laws absent a state’s consent. This creates a right without a private party remedy. This formulation, however, does not appear to limit the enforcement authority by the United States or by another state.75

In reaching its conclusion, the Court examined several previous decisions76 and determined that the question of whether Congress has power to abrogate sovereign immunity within a state’s courts was one of first impression.77 The Court found that a state’s sovereign immu-

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72 Id.
73 See id. at 2251.
74 See Alden II, 119 S. Ct. at 2255–56.
75 See id. at 2257.
76 The Court asserted that Will v. Michigan Department of State Police, 491 U.S. 58 (1989), stood for the proposition that 42 U.S.C. § 1983 did not create a cause of action against a state in that instance. See id. at 2257. Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991), was a stare decisis decision that found that states which entered the railroad business after the enactment of the statute at issue had impliedly consented to suit. See id. at 2257–58. The Court further explained that sovereign immunity was not raised in that case and was not authority to the contrary of this holding. See id. at 2258. Nevada v. Hall, 440 U.S. 410 (1979), stands for the proposition that a state may subject another state to a suit for damages in that state’s courts. See id. at 2258–59. Reich v. Collins, 513 U.S. 106 (1994), stands for the proposition that when a state appears to provide a post deprivation remedy for taxes collected in violation of federal law it cannot deny that remedy. See id. at 2259 (“in this context, due process requires that State to provide the remedy it promised”). Implicit in this explanation is that a state does not have to provide any remedy and may use its sovereign immunity to bar a vindication of federal rights. Howlett v. Rose, 496 U.S. 356 (1990), holds that “a state court could not refuse to hear a [42 U.S.C.] § 1983 case against a school board on the basis of sovereign immunity” because the school board has no basis to assert this immunity since it was not an arm of the state. See id. at 2259–60. Apparently it is permissible for Congress to commandeer a state’s court for vindication of federal rights so long as the defendant is not a state. See id. This appears to be somewhat logically inconsistent with the Court’s opinion.
77 See id. at 2260.
nity within its own courts was absolute, save for the *Ex parte Young*\(^7\) exception:

The exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.\(^7\)

A congressional power to allow suits against a state in its own courts was found too offensive to the states.\(^8\) Congress thus has no power to abrogate immunity from suit by a private party against a state in its own courts.\(^8\)

The Court then asserted that this does not give a state a license to disregard "valid" federal law or the Constitution and propounded two limits on a state’s sovereign immunity.\(^8\) The first limit involves a state that consents to be sued.\(^8\) By ratifying the Constitution, states have consented to be sued by other states and/or by the Federal Government.\(^8\) For example, Congress may authorize suits by private parties against nonconsenting states pursuant to the Fourteenth Amendment, Section 5.\(^8\) The second limit is that suits are not barred against "lesser entities" such as municipal corporations or an entity which is not an "arm of the state."\(^8\) Thus, some suits against state officers may not be barred.\(^8\) Money damages also may be available against a state officer so long as the funds do not come from the state’s treasury.\(^8\)

\(^7\) 209 U.S. 123 (1908).

\(^8\) *Alden II*, 119 S. Ct. at 2263. The "Doctrine" of *Ex parte Young* is discussed in Section II, *infra*.

\(^8\) *See id.* at 2263–64. This is somewhat illogical in light of its approval of allowing Congress to require a state’s courts to hear federal question cases when the defendant is not the state. *See id.* at 2259–60. Again, it appears that it is permissible for Congress to commandeer a state’s courts for vindication of federal rights so long as the defendant is not a state. *See id.* This appears to be somewhat logically inconsistent with the majority opinion.

\(^8\) *See id.* at 2266.

\(^8\) *See id.*

\(^8\) *See id.* at 2267.

\(^8\) *See Alden II*, 119 S. Ct. at 2267.

\(^8\) *See id.*

\(^8\) *See id.* What constitutes a state or arm of the state is discussed at length in Section II.

\(^8\) *See id.* This is discussed in Section II as part of *Ex parte Young*.

\(^8\) *See id.* at 2267–68. The usefulness of this remedy is limited to the insurance policy carried. It may act to functionally preclude the affluent from holding state office. Will only the judgement-proof seek to hold office?
Finally, the Court appeared to leave open a potential challenge to a state’s assertion of sovereign immunity on the basis of a denial of equal protection of the laws:

[T]here is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action. To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit. 89

The majority opinion contained no guidance as to whether this assertion has any practical substance.

The Court maintained that it was not altering congressional authority to bind states by “substantive rules of federal law.”90 Thus, it may be inferred that the FLSA’s application to the states remains, but an aggrieved party has no individual remedy. The Court noted that the United States may still bring an enforcement action91 against a state for violating federal law, but this assertion ignores the practical, political reality that Executive Branch officials make political judgments about whether to bring actions against states. If another state or the Executive Branch is unwilling to vindicate valid federal rights, there will clearly be rights without remedies.

3. The Dissent

In dissent, Justice Souter vigorously disputed the proposition that sovereign immunity existed beyond the explicit terms of the Eleventh Amendment:92

This Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States, but if the present majority had a defensible position one could at least accept its decision with an expectation of sta-
bility ahead. As it is, any such expectation would be naive. The resemblance of today's state sovereign immunity to the Lochner era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's latest essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.93

C. June 23, 1999, Round Two: College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board

1. Background

College Savings Bank marketed a patented deposit contract to satisfy future college expenses.94 In this action, College Savings Bank alleged violations of § 43(a) of the Lanham Act95 as well as the common law tort of unfair competition.96 After Seminole Tribe, Florida Prepaid moved to dismiss both complaints as being barred by the Eleventh Amendment.97 The district court found that the 1992 congressional amendments contained an explicit abrogation of Eleventh Amendment immunity.98 The court also found that Florida Prepaid qualified to assert the Eleventh Amendment bar as an "arm of the state"99 and that Florida Prepaid had not "constructively waived" its immunity.100 The second inquiry was whether the Lanham Act

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93 Id. at 2294–95.
96 See College Sav. Bank, 919 F. Supp. at 758. There was also a parallel action for patent infringement which is discussed in the next section. See id. at 757.
98 See id. at 420–21.
99 Id. at 413. The "arm of the state" doctrine which the court examined at length was not an issue before the Supreme Court. This doctrine is discussed at length in Section II.
100 Id. at 416.
amendments were enacted pursuant to the Section 5 enforcement clause of the Fourteenth Amendment. The court found that since there was no protected property interest at stake, there was no valid constitutional basis for congressional abrogation of the Eleventh Amendment. The Court of Appeals for the Third Circuit affirmed the lower court decision. The Supreme Court granted certiorari to consider whether there was a valid abrogation of the Eleventh Amendment, and also whether a state waives its immunity automatically when it engages in post-enactment regulated activities.

2. The Majority Opinion

Justice Scalia delivered the opinion for the same five Justices who composed the majority in Seminole Tribe and Alden and he recited the statutory provisions which explicitly abrogated not only Eleventh Amendment immunity but also any other doctrine of sovereign immunity. The Court first focused on whether there was a deprivation of property within the due process ambit of Section 1 of the Fourteenth Amendment. The question was whether “(1) a right to be free from a business competitor’s false advertising about its own product, and (2) a more generalized right to be secure in one’s business interests” was property under Section 1 of the Fourteenth Amendment. The Court defined protected property as including “the right to exclude others.” The Court conceded that other provisions of the Lanham Act—the trademark infringement provisions—created protected property because of the right to exclude others from use. The Court summarily found that the false advertising provisions at issue “bear no relationship to any right to exclude

101 See id. at 426.
103 See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353 (3d Cir. 1997) [hereinafter College Sav. Bank II]. The patent act part of the case proceeded on a separate appellate track and is the subject of the next decision to be discussed.
105 See id.
106 See id. at 2224.
107 See id.
108 Id.
110 See id.
The Court also held that although business assets were protected property, the activity of doing business and making a profit were not business assets and thus were not protected property interests.\textsuperscript{112}

Since the Court found there was no valid abrogation of immunity under the Fourteenth Amendment, it then turned to whether there was a voluntary waiver by Florida Prepaid.\textsuperscript{113} There was no question that Florida Prepaid had not expressly consented to be sued or that it had invoked the jurisdiction of the court.\textsuperscript{114} The gravamen of the issue was whether by voluntarily engaging in an activity virtually indistinguishable from private commercial activities and with the knowledge of the strictures of the Lanham Act, Florida Prepaid had impliedly or constructively waived its immunity.\textsuperscript{115} The Court then examined what it characterized as the "constructive waiver doctrine"\textsuperscript{116} and expressly overruled it.\textsuperscript{117} The Court also examined whether Congress may validly condition a state's participation in proprietary or market activities upon waiving its sovereign immunity.\textsuperscript{118} The Court did not find apposite the "market participation" decisions pursuant to the dormant commerce clause doctrine.\textsuperscript{119} The Court stated that conditioning the approval of an interstate compact upon a waiver of immunity was permissible.\textsuperscript{120}

\textsuperscript{111}Id. at 2224–25. Preventing false advertising prohibits a violator from intruding into one's ability to market a product and make a profit as well as preventing an intrusion into the general public's right to expend their funds without being deprived of their property by false advertising. Evidently, the deprivation of money by proscribed activity is not protected property.

\textsuperscript{112}See id. at 2225. Apparently, the asset is protected property, but the use of the asset is not protected. If the use is not protected, then what value does the asset practically have? Wasn't this settled by the Statute of Uses in 1535? For a discussion of this Statute see, Avisheh Avini, Comment, The Origins of the Modern English Trust Revisited, 70 Tul. L. Rev. 1139, 1140, 1143–47 (1996).

\textsuperscript{113}See College Sav. Bank III, 119 S. Ct. at 2226.

\textsuperscript{114}See id. The Eighth Circuit held that submitting a proof of claim in a bankruptcy action by a state entity constituted a valid waiver of sovereign immunity by invoking the jurisdiction of the court. See In re Michael S. Rose, No. 98–3440, 1999 U.S. App. LEXIS 18481, at *12 (8th Cir. Aug. 9, 1999).

\textsuperscript{115}See College Sav. Bank III, 119 S. Ct. at 2226.

\textsuperscript{116}Id. (citing Parden v. Terminal R. of Ala. Docks Dept., 377 U.S. 184 (1964)).

\textsuperscript{117}See id. at 2228.

\textsuperscript{118}See id. at 2226–28.

\textsuperscript{119}Id. at 2228, 2230.

\textsuperscript{120}See College Sav. Bank III, 119 S. Ct. at 2231. This was recently explicated in Entergy Arkansas, Inc. v. Nebraska, No. 98CV3411, 1999 U.S. Dist. LEXIS 14643 (D. Neb. Sept. 22, 1999), where the court found that the compact did not allow suits by private parties. The
ing of the receipt of funds upon agreeing to a waiver but included the qualification that the financial inducement, if sufficiently substantial, could become coercive to the point of being prohibited. The Court effectively proscribed implied or constructive waiver when it stated:

In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

3. The Dissents

In a brief dissent, Justice Stevens asserted that goodwill, a widely recognized form of property, is the “substantive equivalent” of “the activity of doing business or the activity of making a profit.” He went on: “A State’s deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause.” Justice Stevens also recognized that the majority should have focused on whether there was a reasonable basis to abrogate to prevent violations of the law rather than creating what was in effect a presumption of congressional invalidity.

Justice Breyer, joined by all the dissenters, argued that it was permissible for Congress to condition a state’s participation in a “federally regulated activity” upon waiving its immunity from private suit in federal courts. He asserted that Seminole Tribe and its progeny compact, however, explicitly allowed suits against Nebraska by the interstate entity. See infra, note 172 and accompanying text.

121 See College Sav. Bank III, 119 S. Ct. at 2231.
122 Id. The impact was immediate. A case of major impact in the telecommunications field was dismissed and the Court’s holding in AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999), of a few weeks prior was effectively rendered a nullity. See Wisconsin Bell, Inc. v. Public Serv. Comm’n of Wis., No. S99-2061, 1999 U.S. Dist. LEXIS 10884, at *5 (W.D. Wis. July 12, 1999).
124 See id.
125 See id.
126 See id. Although this article will subsequently discuss the impact of this quartet of decisions on environmental law, the implications in other areas should be obvious. States routinely participate in the interstate securities market by issuing and purchasing securities. Are they now immunized from being sued for fraud or other transgressions in the federal courts by private purchasers or sellers? If a state agrees to waive its immunity as part of an issuance of a security, may it subsequently withdraw that consent? Will a private party
threaten the ability to enact economic legislation vital to the realities of the twenty-first century. If Congress has the power to create "substantive rights," Breyer reasoned, it must also have the "subsidiary power" to create private remedies to enforce those rights. Justice Breyer specifically asserted that the ability to allow a private remedy against a state as a water polluter was now quite questionable. He surmised that Congress may need to create an "enforcement bureaucracy" or add conditions to the receipt of federal funds to accomplish the purpose.


1. Background

The background to this decision was partially described above. The district court found that Congress explicitly intended to abrogate a state’s immunity under the Patent and Plant Variety Protection Remedy Clarification Act. The question was whether the provision at issue was a protected property interest within the ambit of the Fourteenth Amendment and the court began with the unremarkable assertions that a patent was property and that the unlicensed use of a patent was a taking of property. Florida Prepaid asserted that patent infringement was not within the ambit of the Fourteenth Amendment. The court, however, concluded that a patent was Fourteenth Amendment property and that Congress had the power pursuant to the Section 5 enforcement clause to waive a state’s immunity for the purposes of a private remedy for patent infringement. The motion to dismiss on the grounds that the action was

in such a transaction want to be limited to only being subject to the courts of the issuing state with all the dangers inherent in a locally elected (usually) judiciary? Will prudent purchasers of such securities demand an interest premium to cover the greater risk of having the federal courts’ doors closed as well as that of a state’s treasury?

127 See id. at 2238.
129 Id.
130 Id. at 2240.
133 See id. at 423.
134 See id.
135 See id.
136 See id. at 425–26.
barred by the Eleventh Amendment was denied. After the court of appeals affirmed the lower court's decision, the U.S. Supreme Court granted Certiorari to determine if there was a valid enactment to enforce the Fourteenth Amendment's due process clause.

2. The Majority Opinion

The Chief Justice delivered the opinion for the same five Justice majority as the other three cases of the Quartet. There was no dispute that Florida Prepaid had not expressly consented to be sued, and since College Savings had decided the issue of implied or constructive consent, the sole issue was whether there was a valid congressional abrogation pursuant to the Fourteenth Amendment. The Court found that Congress intended to explicitly abrogate pursuant to the Fourteenth Amendment.

The Court stated that the test was whether the statute at issue was an "appropriate" means of enforcement under City of Boerne v. Flores. It found that "for Congress to invoke section five, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." The offensive conduct was characterized as patent infringement by states and the use of Eleventh Amendment immunity to bar remediation. The Court asserted that the legislative history did not reveal any pattern of patent infringement by the states. It must be noted that the Court was not examining the legislative history to determine the meaning of the statutory language (i.e., legislative intent). Rather, the Court was examining the basis upon which Congress made the determination that a statute was needed to determine, in the Court's opinion, whether that basis was

139 See id.
140 See id. at 2204.
141 See id. at 2204–05.
142 See id. at 2205.
143 Florida Prepaid, 119 S. Ct. at 2206 (citing City of Boerne v. Flores, 521 U.S. 507, 519 (1997)). It should be noted that the Court did not use any of the traditional Fourteenth Amendment analyses—i.e., strict scrutiny, rational basis, etc.—but instead used the "appropriate" standard. See id.
144 See id. at 2207.
145 See id.
146 See id. at 2207–08.
“appropriate.”147 In other words, it was not inquiring into what Congress did, but why it did it, a surprising and radical intrusion by the allegedly co-equal judicial branch into a core legislative function.148

The Court asserted that “a State’s infringement of a patent, through interfering with a patent owner’s right to exclude others, does not by itself violate the Constitution.”149 The issue is whether a state provides either no remedy or inadequate remedies.150 It found significant that Congress barely explored the adequacy of state remedies.151 Negligent conduct by a state which deprives a private party of property “does not violate the Due Process Clause of the Fourteenth Amendment.”152 Congress, the Court continued, had not limited the relief to only those situations where a state’s remedies were inadequate.153 The Court concluded:

The statute’s apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under the regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after Seminole Tribe.154

3. The Dissent

Justice Stevens delivered the dissent which was joined, again, by Justices Souter, Ginsburg, and Breyer.155 He noted that for 200 years

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147 See id.
148 See Florida Prepaid, 119 S. Ct. at 2207–08. It is “clear” that this analysis will be applied to congressional Fourteenth Amendment enactments seeking to enforce Section 1 “due process” rights via its Section 5 authority, but does this presage a hunting license for the federal courts to question the basis of statutes and choices made by Congress enacted pursuant to Article I of the Constitution? Are the federal courts to replace the judgements made by Congress that a statute is necessary with a court’s judgement that there is inadequate evidence of a need for congressional action or that the congressional choice between alternatives was inappropriately made?
149 Id. at 2208. This appears to state that depriving one of a use of property is not a proscribed activity within the ambit of the Fourteenth Amendment under consideration. See id.
150 See id.
151 See id. at 2209. In footnote nine, the Court stated that in Florida an aggrieved party may seek payment from the legislature or a court action for “a takings or conversion claim.” See id. n.9.
152 Id. at 2210.
153 See Florida Prepaid, 119 S. Ct. at 2210.
154 Id. at 2211.
155 See id.
patent infringement issues had been the exclusive prerogative of the federal courts. After examining the history of patent infringement and the constant congressional effort to insure national uniformity, the dissent concluded that it was appropriate for Congress to "close a potential loophole" and enact legislation to insure a national uniform scheme. After examining the hearing records and other congressional documents, the dissent found a more than adequate factual basis for the legislation at issue.

**E. Quartet Conclusions**

This Quartet of decisions has significantly affected the understanding of the role of states within the Constitutional scheme. A state, or an arm of a state, is now immune from suit without its explicit consent unless Congress has explicitly abrogated a state's immunity pursuant to the Fourteenth Amendment. The abrogation must be supported by evidence on the record which demonstrates extensive evil to be corrected. The courts will now scrutinize congressional action to determine not only what Congress meant in a statute but also why it made the decision. There is now a residual state sovereignty beyond the reach of Congress except, perhaps, to remedy Fourteenth Amendment violations. The use of an asset to do business is not within the parameters of the Section 1 Due Process Clause of the Fourteenth Amendment. The remedy of *Ex parte Young* is not available to invoke the jurisdiction of the federal courts when Congress has prescribed an extensive remedial scheme even if that scheme is found to be unconstitutional. It appears that Congress cannot condition a state's participation in an activity upon its agreement to waive Eleventh Amendment immunity except for an interstate compact or upon receipt of federal funds, but the latter cannot be coercive.

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156 See id.
157 Id. at 2212–13.
158 See *Florida Prepaid*, 119 S. Ct. at 2214–16.
159 See id. at 2219.
II. Threshold Issues

This section explores certain issues that are common to the examination of the impact of these decisions on various aspects of environmental law. These were not issues in the Quartet before the Court, but they appear to be integral to an understanding of the impact to be discussed in the next section. It is reasonable to assume that the Quartet did not alter, for the most part, current law in each of these areas. Where changes appear to have occurred, they are noted.

A. State or Arm of the State

In order to invoke the Quartet as a bar, the defendant must qualify as a state or an arm of a state. None of the Quartet appear to have altered current judicial doctrine on this issue. Recent Supreme Court decisions generally have considered whether an entity established by an interstate compact is an arm of the state, but decisions in the lower federal courts have been more wide-ranging.

1. Supreme Court Parameters

There is little question that counties and municipal corporations are not within the ambit of the Eleventh Amendment.\textsuperscript{161} Examining whether a local school board was an arm of the state or more akin to a municipal corporation, the Court held that the answer depended in part upon the nature of the entity under a state’s law.\textsuperscript{162} The Court considered several “significant” factors: that the school board was one of many similar entities; that it received a significant portion of money and some guidance from the state board of education; that the local school board, however, had “extensive” powers to issue bonds, albeit authorized by state law; and, that the school board could impose taxes authorized by state law but the decision to actually levy was the local board’s.\textsuperscript{163} Balancing all these factors, the Court held that the “school board was more like a city or a county than it [was] an arm of the state.”\textsuperscript{164}

\textsuperscript{161} See Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Moor v. County of Alameda, 411 U.S. 693, 717–21 (1973).
\textsuperscript{163} See id.
\textsuperscript{164} See id.
Exercising a "slice of state power" is not sufficient to qualify a governmental entity as an arm of a state.\(^{165}\) The size of the "slice" is not specified, but being a direct liability of a state's treasury is considered very significant.\(^{166}\) In the instance of an entity created by interstate compact, if the entity acts more like a county or municipality, then this factor weighs towards it not being an arm of the state.\(^{167}\) If the primary source of funds for an entity is local government, then it probably is not an arm of the state.\(^{168}\) Landuse planning is traditionally a local function and may be indicative that an entity is not an arm of the state.\(^{169}\) The fact that a state cannot veto rules made by an entity is also indicative that the entity is not an arm of the state.\(^{170}\) Finally, that a state is "forced" to sue an entity to impose its will, is also indicative that the entity is not an arm of the state.\(^{171}\)

Regarding the formation of an interstate compact, it appears that there must be an explicit intent to create an entity within the ambit of the arm of the state doctrine.\(^{172}\) The Court searches for such an intent through fact-specific inquiries. That a governor may veto the actions of members of an interstate body is not dispositive.\(^{173}\) Even the fact that the salaries and administrative expenses of the entities may come from the participating states if revenues are insufficient is not dispositive\(^{174}\) when the states have provided no authority to pledge their credit, to draw upon tax revenue, to impose any charge upon either state, or to render either state subject to liability for any judgment rendered against the interstate entity.\(^{175}\) The fact that implementing legislation by the participating states does not refer to the interstate entity as a "state agency" also indicates that the entity is not an arm of


\(^{166}\) See id. In this case, a state's treasury was not directly liable. See id. at 402.

\(^{167}\) See id. at 401.

\(^{168}\) See id. at 401–02.

\(^{169}\) See id. at 402.

\(^{170}\) See Lake Country Estates, 440 U.S. at 402.

\(^{171}\) Id.

\(^{172}\) See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 43 (1994). The "other side" of this doctrine is whether an interstate compact-related entity possessing the authority to sue and be sued in federal court may sue a compact state notwithstanding the Eleventh Amendment. A court recently found that the Eleventh Amendment was not a bar under the terms of the compact at issue. See Entergy Ark., Inc. v. Nebraska, No. 98–CV–3411, 1999 U.S. Dist. LEXIS 14553, at *2 (D. Neb. Sept. 15, 1999).

\(^{173}\) See Hess, 513 U.S. at 37.

\(^{174}\) See id.

\(^{175}\) See id. at 37–38.
the state,176 but this is mitigated by repeated state court references to
the entity as a state agency.177 Even if the entity’s functions are those
traditionally performed by both state and municipal governments,
this does not resolve the issue simply because some of the functions
are “state-like.”178 The significant factor in such a case, however, is the
absence of state financial responsibility for the entity and the fact that
for many years the entity has received no funds from either state.179
Access to a state’s treasury, it may be concluded, is a significant factor
so long as that access is not discretionary.180 Finally, the Court has
recognized that a state’s legal liability for judgments against a state
university system is dispositive for Eleventh Amendment purposes,
notwithstanding a liability insurance policy to indemnify a state’s
 treasury.181

2. The Courts of Appeal

The Second Circuit appears to have narrowed the ambit of the
arm-of-the-state doctrine at least as far as public universities are con­
cerned.182 It has identified the two most important factors as “the ex­
tent to which the state would be responsible for satisfying any judge­
ment,” and “the degree of supervision exercised by the state” over the
entity.183 The Second Circuit distinguished district court decisions that
rested upon the obligation of the state to indemnify individuals
affiliated with the entity from the issue of whether the state was re­
quired to satisfy any judgments against the entity.184

The Third Circuit, considering whether the administrative and
policy making functions of a district attorney qualify as an arm of the

176 Id. at 44–45.
177 See id. at 45.
178 Hess, 513 U.S. at 45.
179 See id.
180 In Auer v. Robbins, the Court found that the fact that a governor appointed four of
the five members of the entity’s governing board was not dispositive because a city, not the
state, was financially liable and that, beyond the appointments, the state exercised no fur­
ther control. See 117 S. Ct. 905, 908 n.1 (1997). This would appear to reinforce the impli­
cation that the liability of a state’s treasury is the most significant factor to be considered,
but this should not be overstated. See id.
182 See generally Pikulin v. City Univ. of N.Y., No. 98–9236, 1999 U.S. App. LEXIS 9208
(2d Cir. May 13, 1999).
183 Id. at *4.
184 See id. at *5; see also Rosa R. v. Connelly, 889 F.2d 435, 437 (2d Cir. 1989), cert. denied,
496 U.S. 941 (1990); Trotman v. Palisades Interstate Park Comm’n, 557 F.2d 35, 38 (2d Cir.
1977).
state, explicated a three factor inquiry: “(1) the source of the funding—i.e., whether payment of any judgement would come from a state’s treasury, (2) the status of the agency/individual under state law, and (3) the degree of autonomy from state regulation.” The party asserting immunity as an arm of the state has the burden of establishing these factors. Whether a function is typically a state or a local function is part of the second-factor inquiry. The most important factor is the liability of a state’s treasury—as liability decreases it becomes less likely that an entity meets this factor. The second factor requires determining whether state law treats the entity as a surrogate of the state or as independent. It appears that discretionary decisions made by an entity pursuant to state law do not meet the second factor. Considering the autonomy factor, the Third Circuit found that a limited ability of a state “after cumbersome proceedings” to supersede an entity was not sufficient. General supervisory control of a state appellate court over all who appear in court including the entity at issue was also insufficient to establish a lack of autonomy. The three factors are to be considered together when making a determination as to whether an entity has established itself as an arm of the state.

Applying this balancing test, the Third Circuit held that in the instant case the office of the district attorney did not meet the test as an arm of the state.

Considering whether a university and its governing board qualified as an arm of the state, the Fifth Circuit propounded a six-factor test:

(1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local,

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186 Id. at 347.
187 See id.
188 See id.
189 See id. at 348.
190 See Carter, 181 F.3d at 348–49.
191 See id. at 353.
192 Id. at 353–54.
193 See id. at 354.
194 See id. at 354–55.
195 See Carter, 181 F.3d at 355.
as opposed to state-wide problems; (5) whether the entity has authority to sue and be sued in its own name; [and] (6) whether the entity has the right to hold and use property.\textsuperscript{197}

After examining each factor, the court found that the test was met, notwithstanding that the university did not meet factors five and six.\textsuperscript{198}

Subsequently, the court utilized the same six-factor test described above\textsuperscript{199} when it considered whether a state board regulating a profession was an arm of the state.\textsuperscript{200} The entity appeared to be part of the executive branch of the state.\textsuperscript{201} The board, however, was financially independent of the state’s treasury.\textsuperscript{202} The board regulated an activity on a state-wide, rather than local, basis.\textsuperscript{203} Although the board adopted rules pursuant to state statutes, no part of the state had supervisory authority over the content of those rules.\textsuperscript{204} The board’s ability to sue and be sued was found to be quite limited and ambiguous.\textsuperscript{205} The ability of the board to hold and use property was found to be too ambiguous to be helpful.\textsuperscript{206} The court found persuasive the broad grant of state power, the composition of board members who serve at the pleasure of the governor, and the board’s state-wide jurisdiction in holding that the board was an arm of the state.\textsuperscript{207}

The Fifth Circuit also examined the same six factors and found that an expressway commission was not an arm of the state.\textsuperscript{208} The fact that at some future point the property could revert to the state was found to be inconsequential.\textsuperscript{209} The commission financed its own operations and only received state funds for the retirement of revenue bonds which were not obligations of the state.\textsuperscript{210} There was no other

\textsuperscript{197} Id. at 452.
\textsuperscript{198} See id. at 456. The Fifth Circuit also held that “Congress has not expressly waived sovereign immunity for [42 U.S.C.] § 1983 suits.” Id. at 453.
\textsuperscript{200} See id. at 1034. The members of the board were also individually sued. See id.
\textsuperscript{201} See id. at 1035.
\textsuperscript{202} See id. at 1038.
\textsuperscript{203} See id.
\textsuperscript{204} See Earles, 139 F.3d at 1038.
\textsuperscript{205} See id.
\textsuperscript{206} See id. at 1038–39.
\textsuperscript{207} See id. at 1039.
\textsuperscript{209} See id. at 347.
\textsuperscript{210} See id. at 346.
activity which could be construed as imposing liability on the state.211 There, the balance was found to be against finding this commission to be an arm of the state.212 The Sixth Circuit also recently considered this issue. In one case an eye bank sought to invoke immunity based upon its operation under state law.213 The court found it dispositive that the eye bank was a private nonprofit corporation and that the state had no financial involvement and that the state treasury had no liability for any judgement.214

The Ninth Circuit has considered various iterations of this issue under a five-factor test:215

[1] whether a money judgement would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.216

The district court only considered the first factor and the court found it sufficient in this case to hold that a university was an arm of the state.217

Recently, the Tenth Circuit also reexamined the issue extensively and promulgated its own “rule.”218 First, the court concluded that a federal court may give deference to a state court rationale as to whether an entity is an arm of the state, but state court rulings are not dispositive.219 The court then set forth the factors to be considered: (1) state control of the entity;220 (2) designation under state law;221 (3) state court interpretations of its law;222 (4) fiscal independence (or lack thereof) from the state;223 and, (5) state treasury liability for any

211 See id.
212 See id. at 348.
213 See Brotherton v. Cleveland, 173 F.3d 552, 561 (6th Cir. 1999).
214 See id. The court surveyed “arm of the state” decisions. See id. at 560–61.
216 Id. (quoting ITSI TV Prod., Inc. v. Agricultural Ass’ns, 3 F.3d 1289, 1292 (9th Cir. 1993)).
217 See id. at *8.
219 See id.
220 See id. at 978–79.
221 See id. at 979–80.
222 See id. at 980.
223 See Duke, 127 F.3d at 980.
judgements. These factors are to be weighed together with more weight given to the liability of a state’s treasury. The Tenth Circuit also stated that it would raise the issue of an Eleventh Amendment bar sua sponte because the issue went to the Article III power to adjudicate.

The Tenth Circuit found that the entity was an arm of the state, but then went on to find that, notwithstanding the fact that Utah had appeared in court and never raised the Eleventh Amendment bar, there was no waiver (i.e., consent) because there was nothing in the statutes of Utah indicating an express consent to be sued. This holding explicitly prevented officials of a state from making a policy decision to submit to the jurisdiction of the federal courts without establishing a basis for that decision either in the state’s constitution or statutes. The court also found that while a county exists at the “whim” of the state, this is not sufficient to qualify it as an arm of the state.

B. The Ex parte Young Doctrine

The Ex parte Young doctrine provides a means of obtaining prospective relief notwithstanding the Eleventh Amendment bar. The classic components of this doctrine have been stated as follows:

First, federal courts have no jurisdiction to entertain a suit that seeks to require the state official to comply with state law—only allegations of federal law are sufficient . . . .

Second, the doctrine will not go so far as to allow federal ju-

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224 See id. at 980–81.
225 See id. at 981; accord Elam Constr., Inc. v. Regional Transp. Dist., 129 F.3d 1343, 1345 (10th Cir. 1997), cert. denied, 118 S. Ct. 1363 (1998).
227 See id. at 1420 n.1.
228 See id. at 1421–22. The continued vitality of this decision is somewhat in doubt because the court recently held that if a state removes a case to federal court from state court, proceeds to litigate and then seeks to assert an Eleventh Amendment bar in oral argument before the Court of Appeals, a waiver will be found. See Sutton v. Utah St. Sch. for the Deaf & Blind, 173 F.3d 1226, 1233–36 (10th Cir. 1999). It is quite possible that this decision is based primarily upon the court’s annoyance with the state and should be limited to its facts. See id.
229 See V-1 Oil Co., 131 F.3d at 1421–22.
risdiction over a suit that seeks to address past wrongs—only ongoing violations are covered.\textsuperscript{232} Third, the doctrine does not allow a federal court to declare past state conduct unconstitutional when the only purpose for such a declaratory judgement would be its res judicata effect in a subsequent state-court proceeding; such a declaration would have the effect of adjudicating the liability issues in a damages action against the state even though a direct federal suit for damages would be barred by the Eleventh Amendment.\textsuperscript{233} And fourth, although the doctrine will allow injunctive relief that might have some ancillary effect on a state treasury, it does not allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable.\textsuperscript{234}

\emph{Seminole Tribe}, discussed above, added a new qualification to this doctrine: if Congress enacts a statutory scheme more limited than this doctrine, then the statutory scheme prevails even if it is found unconstitutional.\textsuperscript{235} Thus, when a taxpayer alleges that a state tax violates the Fourteenth Amendment's equal protection and due process clauses as a taking of property, the federal court door is closed because of the lesser remedy of the Tax Injunction Act.\textsuperscript{236} It further appears that when a specific federal statute (the lesser remedy) is found to be constitutionally infirm as a result of \emph{College Savings}, a more general federal statute is not available to provide jurisdiction.\textsuperscript{237}

\textsuperscript{232} \textit{Id.} at 1189 (citing Papasan v. Allain, 478 U.S. 265, 277-78 (1986)).
\textsuperscript{233} \textit{Id.} (citing Green v. Mansour, 474 U.S. 64, 73 (1985)).
\textsuperscript{234} \textit{Id.} (citing Edelman v. Jordan, 415 U.S. 651, 668 (1974)).
\textsuperscript{237} \textit{See} Wisconsin Bell, Inc. v. Public Serv. Comm’n of Wis., No. S99-2061, 1999 U.S. Dist. LEXIS 10884, at *26--*27 (W.D. Wis. July 12, 1999). In \textit{Waste Management Holdings, Inc. v. Gilmore}, the court held that \textit{Ex parte Young} was available to challenge the validity of a statute which violated the dormant commerce clause. \textit{See} No. Civ. A. 3:99-CV-425, 1999 U.S. Dist. LEXIS 13508, at *14--*16, *19 (E.D. Va. Aug. 30, 1999). Ultimately, there was no statutory remedial scheme available, or at least it was not mentioned by this decision. \textit{See} \textit{id}.
The other additional qualification which closes the federal court door arises when the injunctive relief sought implicates special sovereignty interests. In this instance the issue concerned title to land. In another case, a plaintiff sought to eliminate a public access road to Lake Michigan from a platted lot. In such a dispute, state law required joinder of the state because of laws governing access to navigable waters and public trust waters. An unconstitutional taking was part of the allegations in the complaint. The court found that the state’s interests at issue implicated special sovereignty interests. The court also found that the state’s interests were so inextricably bound into the complaint that the action could not proceed without the state’s presence. Thus, the entire action was dismissed. A state’s tax collection system also has been held to implicate a special sovereignty interest. A state’s property interest in future lease payments, however, has been found to be insufficient. A medical school’s admission policy also does not implicate such interests. The unanswered question is whether Alden and the other cases decided on June 23, 1999, have extended these attributes of special sovereignty, but the expansive language in these cases gives rise to the inference that it has widened.

239 See id.
240 See MacDonald v. Village of Northport, 164 F.3d 964, 966 (6th Cir. 1999).
241 See id. at 968.
242 See id. at 967.
243 See id. at 972–73.
244 See id. at 973.
245 See MacDonald, 164 F.3d at 973.
246 See ANR Pipeline, 150 F.3d at 1194. This court found two infirmities. See id.
248 See Buchwald v. University of N.M. Sch. of Med., 159 F.3d 487, 495 n.6 (10th Cir. 1998).
III. IMPLICATIONS FOR ENVIRONMENTAL LAW

A. The Jurisdictional Reach of the Clean Water Act

The Clean Water Act (CWA)\(^\text{250}\) is the principal means of regulating the pollution of surface water nationwide. The CWA's jurisdictional reach is determined by the definition of "navigable waters" as meaning "waters of the United States."\(^\text{251}\) The principal decision interpreting the meaning of this term is *United States v. Riverside Bayview Homes, Inc.*\(^\text{252}\) This decision stated that waters of the United States included adjacent wetlands\(^\text{253}\) as well as waters within the ambit of the Commerce Clause.\(^\text{254}\) The expansive determination of the legislative intent of this term is regarded as dicta, because the land at issue was adjacent to a navigable waterway and the question was whether "waters of the United States" included the wetlands adjacent to this navigable waterway.\(^\text{255}\) The expansive and somewhat vague language in the decision, however, has been subsequently interpreted to mean that waters not traditionally considered navigable—"virtually all surface waters in the country"—are included within the definition.\(^\text{256}\) This may also be considered dicta because the holding concerned whether the CWA savings clause preserved certain state actions.\(^\text{257}\) It also may be asserted that this was not dicta because if the waters were not within the ambit of the CWA, the issue of preemption need not have been considered. The latter assertion is not entirely persuasive because the waterway at issue was Lake Champlain.\(^\text{258}\) There is very strong support, in any event, for the proposition that Congress intended that any waterway draining into a navigable water, including adjacent wetlands, was within the statutory coverage of the CWA.\(^\text{259}\) The Supreme Court, however, has not spoken to the issue of how far up the waterway chain Congress' constitutional authority exists.

The question in light of the Quartet is whether Congress has the authority to extend jurisdiction as far as it did in the CWA. Is there a

\(^{251}\) Id. § 1362 (7).
\(^{252}\) See 474 U.S. 121, 121 (1985).
\(^{253}\) See id. at 137–39.
\(^{254}\) See id. at 133.
\(^{255}\) See id. at 135, 137–39.
\(^{257}\) See id. at 486, 498–99.
\(^{258}\) See id. at 483–84.
\(^{259}\) See Riverside Bayview, 474 U.S. at 137–39.
point where a water of the United States moves beyond the authority of Congress and becomes a sovereign part of the state? It should be remembered that *Alden* propounded a doctrine of "fundamental aspect[s] of ... sovereignty" that states had before the ratification of the Constitution and were not altered by that document or any amendments to it.\(^{260}\) The Court went on to explicate a system which reserved sovereignty to the states\(^{261}\) and propounded the system of concurrent jurisdiction.\(^{262}\) *Alden* placed a limit on the Commerce Clause power of Congress.\(^{263}\) The nature of that limit remains unclear.\(^{264}\) Is there some point where state sovereignty trumps congressional authority? Is there a point where a nonnavigable tributary moves from being subject to congressional pre-eminence into a state's jurisdiction? It may be possible to infer from *Coeur d'Alene* that such a point exists. In *Coeur d'Alene*, the Court found that a state's jurisdiction over submerged lands implicated an essential attribute of sovereignty.\(^{265}\) It is not much of a stretch to assert that at some point the dominant federal interest in nonnavigable waters ends and that of the states begins. If that line exists, where is it drawn?

A second question is whether this new doctrine of state sovereignty will inhibit the power of the federal government to regulate ground water. Does this revived doctrine of state sovereignty preclude federal efforts to prevent the pollution of ground water? The implications of such a restriction upon the CWA should be obvious: preventing the application of the CWA to pollutants entering waters under state sovereignty would be a severe blow to environmental protection across the nation.

B. *May a State Be Held Liable as a CERCLA Potentially Responsible Party by a Private Party?*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^{266}\) provides that a state may be held liable to private parties in two circumstances: damages resulting from "gross
negligence or intentional misconduct” when attempting respond to an emergency or threatened release of a hazardous substance so long as the facility is not state owned,267 and where a state is deemed to be an “owner or operator”268 or a person269 within the reach of CERCLA liability.270 The statute specifically seeks to segregate those instances when a state is acting as a governmental entity (responding to an emergency or threat to public health and safety) and those instances when it is no different than a private party subject to liability.271 In the instance of citizens suits, a state retains its Eleventh Amendment immunity.272 For the purposes of this discussion, it will be assumed that the state, or an arm of the state,273 has not expressly consented to be sued and that it has raised a defense of the Eleventh Amendment as a bar to liability because the relief sought is money damages.

The threshold question is whether there is an express intent of Congress to abrogate this immunity.274 Unlike the statutes at issue in College Savings and Florida Prepaid, there is no explicit intent to abrogate.275 As noted above, one section explicitly states that the Eleventh Amendment is not waived.276 Another section limits liability where the entity is exercising traditional state functions.277 The section at issue, where a state or arm of the state may be found liable as a potentially responsible party, explicitly seeks to make such entities liable but does not state that immunity is waived.278 This would appear to be sufficiently similar to the situation described in Seminole Tribe279 to meet the threshold question.

The issue then becomes whether CERCLA was enacted pursuant to a valid congressional power pursuant to the Fourteenth Amendment, which is the only basis available.280 The interest being asserted

267 Id. § 9607 (d) (2).
268 Id. § 9601 (20).
269 See id. § 9601 (21).
270 See id. § 9607 (a)–(m).
271 See 42 U.S.C. §§ 9607 (d) (2), 9601 (20) (D), 9601 (21).
272 Id. § 9659 (a) (1).
273 See discussion supra Section II, A.
277 See id. § 9607 (d) (2).
278 See id. § 9601 (20) (D).
280 See id. at 59.
is a federally-created accrued cause of action. It is well established that a state-created accrued cause of action is property within the ambit of the Fourteenth Amendment.\textsuperscript{281} A unanimous Court reaffirmed this principle as recently as 1996.\textsuperscript{282} The property which was sought to be protected in \textit{College Savings} and \textit{Florida Prepaid} was not characterized by the Court or the litigants as an accrued cause of action.\textsuperscript{283} It must be stated, however, that the decisions just cited concerned state-created accrued causes of action.\textsuperscript{284} If the Supremacy Clause is to have any meaning, it follows that federally, statutorily created accrued causes of action are property within the ambit of the Fourteenth Amendment.

The first potentially pertinent part of the Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."\textsuperscript{285} There is recent evidence that this dormant clause may be receiving new life.\textsuperscript{286} Whether this presages bringing the protection of property within the ambit of this clause will be a cause for speculation and litigation. The more pertinent part is found in clause three which states: "nor shall any State deprive any person of life, liberty or property, without due process of law."\textsuperscript{287} A "person" includes natural persons as well as the unnatural, such as corporations.\textsuperscript{288} CERCLA, as was the case in \textit{College Savings} and \textit{Florida Prepaid}, vests exclusive original jurisdiction in the courts of the United States.\textsuperscript{289} A state's assertion of

\textsuperscript{283} The author has searched the record and can find no such characterization. It is not possible to cite a nullity.
\textsuperscript{284} See \textit{Florida Prepaid}, 119 S. Ct. at 2207-08; \textit{College Sav. Bank III}, 119 S. Ct. at 2224-26. One somewhat recent decision held that a "legal cause of action" created by federal legislation was property within the ambit of the Fifth Amendment to the United States Constitution, and is subject to just compensation. See Alliance of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (citing Cities Serv. Co. v. McGrath, 342 U.S. 330, 335-36 (1952), and Ware v. Hylton, 3 U.S. (3 Dall.) 199, 245 (1796)).
\textsuperscript{285} U.S. CONST. amend XIV, § 1, cl. 2.
\textsuperscript{286} See Saenz v. Roe, 119 S. Ct. 1518, 1530 (1999) (recognizing a constitutional right to travel in the Fourteenth Amendment).
\textsuperscript{287} U.S. CONST. amend. XIV, § 1, cl. 3.
\textsuperscript{289} See CERCLA, 42 U.S.C. § 9613(b) (1994). There has been almost no litigation on the meaning of this section—probably because the language is explicit and unambiguous. Cf. Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1385 (5th Cir. 1989); Ameri-
the Eleventh Amendment bar serves to deprive a private party of the accrued cause of action because no forum is open to the party.

The Quartet decision most on point appears to be *Florida Prepaid*, where the Court held that a violation occurs "only where the State provides no remedy, or only inadequate remedies . . . ." 290 Functionally, the statute at issue in *Florida Prepaid* was identical to the provision in CERCLA because the federal courts were vested with exclusive jurisdiction 291 to remedy property deprivations by states. 292 This should be the end of the inquiry, but the Court formulated a new inquiry into the basis of the congressional determination. 293 Thus, it would be necessary to examine the congressional hearing records to determine whether states generated CERCLA-covered waste, and whether states asserted the Eleventh Amendment as a bar to recovery by private parties. Given the extensive hearing record for CERCLA, 294 the first part of the question should be easy to establish upon any reasonable interpretation. 295 It is difficult to imagine, however, how the hearing records would be able to provide the evidentiary basis for the second part of the question just propounded. How can there be testimony that a state is asserting a bar to a statute which has not been enacted? It is improbable that it would be possible to overcome the hurdle set forth in *Florida Prepaid*. 296

Still, none of the Quartet prevents a suit by the United States. Indeed, *Alden* notes that the United States has the power to enforce the Fair Labor Standards Act against a state. 297 CERCLA also vests en-

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290 See *Florida Prepaid*, 119 S. Ct. at 2208.
291 See id. at 2203.
292 See id. at 2208.
293 See id. at 2207 (citing City of Boerne v. Flores, 521 U.S. 507, 519 (1997)). The Court contends that it may determine if the legislative remedy, though facially within congressional constitutional prerogatives, is proportionally congruent to the injury being prevented. See id.
295 The author must question, however, whether there will be a reasonable interpretation given that the Court in *Florida Prepaid* found an inadequate basis because there was insufficient evidence of patent infringement by the states. See 119 S. Ct. at 2207.
296 See Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 962 F. Supp. 131, 133–35 (N.D. Ind. 1997) (finding that such a claim was barred by the Eleventh Amendment and that there was no waiver by the state). CERCLA actions for response costs were found barred by the Second Circuit based on the Quartet in Burnette v. Carothers. See Nos. 98-7835, -9003, 1999 U.S. App. LEXIS 22277, at *13–*16 (2d Cir. Sept. 13, 1999).
forcement authority in the United States where a state engages in prohibited behavior. A private party seeking to hold liable under CERCLA an entity which can plead the Eleventh Amendment may utilize CERCLA's Citizen Suit provisions by suing the United States to compel enforcement. Such an approach would have obvious shortcomings.

C. Is There a New Basis to Challenge the Clean Air Act's National Ambient Air Quality Standards?

The Clean Air Act's (CAA)[301] effectiveness is largely based on the process of setting national ambient air quality standards (NAAQS)[302] pursuant to CAA sections 108 and 109.[303] In the development of the NAAQS, the effects of pollution on "public health or welfare" are the major considerations.[304] Furthermore, the risk to ecosystems "may" be considered.[305] The overriding consideration in setting the primary NAAQS is protecting public health after allowing for an adequate margin of safety.[306] Secondary NAAQS standards are promulgated to protect the "public welfare."[307]

The setting of these standards is supposed to focus solely on public health; economic and technical feasibility are irrelevant.[308] The

299 See id. § 9659.
301 Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (1994).
303 42 U.S.C. §§ 7408-7409.
304 Id. § 7408(a) (1) (A), (a) (2).
305 Id. § 7408(g).
306 See id. § 7409(b) (1).
307 Id. § 7409(b) (2).
term welfare includes "effects on economic values" but this has been held to refer only to the economic costs of pollution. Congress has therefore been seen to have made a deliberate choice to preclude any consideration of economic and technological feasibility in setting the NAAQS standards.

The CAA may now be open to challenge under the new review formulation set forth in Florida Prepaid. The preclusion of consideration of economic or technological feasibility was a policy choice by Congress that was not subject to review because it was within its constitutional powers under Article I. The setting of the § 109 NAAQS standards are at the center of the CAA statutory scheme.

In Florida Prepaid, the Court found that Congress acted pursuant to a valid constitutional basis, but that the facts considered by Congress were insufficient to support the policy choice made by Congress. It must be noted that Section 5 of the Fourteenth Amendment was the provision at issue. The unanswered question is whether this presages a new requirement that a federal court must now examine the factual basis upon which a congressional policy choice was made pursuant to other constitutional congressional powers rather than the traditional inquiry into what Congress meant a statute to say, not why it said it. Dicta in Florida Prepaid have created an inference that this may not be the "rule" for "proper Article I concerns," but the question remains whether there should be any differentiation in the method of constitutional review based upon the provision at issue.

Assuming that there is a new rule, this means that a court now has a license to examine whether, in its opinion, Congress had an adequate factual basis to exclude the consideration of economic im-

309 42 U.S.C. § 7602(h).
310 See Lead Indus., 647 F.2d at 1148 n.36; Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1118 (D.C. Cir. 1979), cert. denied sub nom. General Motors Corp. v. Costle, 446 U.S. 952 (1980).
311 See American Petroleum Inst., 665 F.2d at 1185; Lead Indus., 647 F.2d at 1149.
312 See Lead Indus., 647 F.2d at 1150.
314 See Reitze, supra note 302, at 33–35.
315 See Florida Prepaid, 119 S. Ct. at 2205–06.
316 See id. at 2210.
317 See id.
318 Cf. Lead Indus., 647 F.2d at 1150.
319 See Florida Prepaid, 119 S. Ct. at 2211.
pacts and technological feasibility under CAA sections 108–109. In *Florida Prepaid*, the majority gave no consideration to the patent infringement litigation engendered by the immunization from liability caused by *Seminole Tribe* which was noted by the dissent. This implies that the only evidence a court will consider is the information utilized by Congress at the time it made its decision. It appears that this will consist of hearing records. Thus, if there is a new standard of review, and logic provides no reason to differentiate between constitutional provisions, the hearing records from the 1970 CAA will now be examined to determine if Congress made the “appropriate” choice, in the opinion of the unelected federal judiciary, when it decided to exclude economic and technological feasibility from consideration when setting CAA § 109 national ambient air quality standards.

**D. Implications for Takings**

This section explores the implications of the Quartet for the issue of governmental takings. In some instances, the implications are direct. In others, they are more inferential. It should be noted at this point that the Fifth Amendment Takings Clause is made applicable to the states only through the Fourteenth Amendment.

*Seminole Tribe* clearly states that the Eleventh Amendment acts to modify judicial power within the ambit of Article III of the Constitution. Without more, this would have effectively eviscerated the “just compensation” part of the Takings Clause because it is well established that access to a state’s treasury is a critical factor in triggering the

521 See *Florida Prepaid*, 119 S. Ct. at 2215 (Stevens, J., dissenting).
522 See id. at 2207–09. This is akin to a court reviewing a law clerk’s legal memorandum to determine if the court below had an adequate basis.
524 Although this section has focused on the central provision of the CAA, it should be obvious that this new rule is available to challenge any statutory provision. The issue is not whether Congress acted within its constitutional parameters but whether it had an adequate basis for its decision.
525 U.S. CONST. amend. V.
526 The Fifth Amendment states, in pertinent part: “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.
528 See *Seminole Tribe III*, 517 U.S. at 65, 73.
The crucial addition is the incorporation via the Fourteenth Amendment which the Court held modifies the Eleventh Amendment bar. The Court, however, spoke of congressional power to abrogate the Eleventh Amendment shield pursuant to the Fourteenth Amendment's Section 5. Thus, unless Congress has acted through statute to confer jurisdiction on the federal courts, including the Supreme Court, to enforce the Takings Clause, then the federal courts may be without jurisdiction. A statute must explicitly seek to utilize the Fourteenth Amendment's Section 5, assuming that it has a valid basis in Section 1, in order to confer jurisdiction on the federal courts. The question becomes whether the jurisdictional statutes make the waiver explicit. The author finds none that make such a waiver.

Assuming that the jurisdictional statutes do make an explicit waiver, the test propounded by Florida Prepaid comes into play. The hearing records must demonstrate that states are engaging in nefarious activity at the time the statute is enacted in order for it to be a valid enactment pursuant to the Fourteenth Amendment. Additionally, states must provide either no remedy or only inadequate remedies in order for Congress to invoke the Fourteenth Amendment as the basis for legislative action. Alden propounds the existence of a residual state sovereignty unless limited by the Constitution. The extent of this state sovereignty is unclear beyond the facts of Alden, but it appears that the Court intended it to extend beyond the facts of the decision.

Nollan v. California Coastal Commission is a reasonable point at which to begin. The Constitution of California provides as follows:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be per-
mitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to navigable waters of this State shall always be attainable for the people thereof.\textsuperscript{337}

Although the Court found this provision unavailing,\textsuperscript{338} the question to be asked is to what extent \textit{Alden} may have altered it. It appears logical that to determine the nature of state sovereignty one should look to a state’s constitution, and it may be possible to assert that California’s constitution reserves certain “rights” over land analogous to the dominant navigational servitude enjoyed by the federal government.\textsuperscript{339} This would be consistent with the concurrent sovereignty doctrine propounded in \textit{Alden}.

It may be asserted that in 1879 California established a dominant servitude as part of its residual sovereignty. Although the owner of the land at that time may have had a claim for compensation, it is reasonable to assert that the subsequent purchasers took title subject to that servitude.\textsuperscript{340} It is to be presumed that the California legislature acted pursuant to its constitution. If retaining servitudes upon land is not an \textit{Alden} attribute of sovereignty, then it is difficult to imagine what else this doctrine contains. Thus, an implementing statute enacted pursuant to a state’s constitutional provision which retains a servitude cannot be a taking.\textsuperscript{341} Whether the Court will accept the logical extension of \textit{Alden} is another matter.

In \textit{Nollan}, the Court characterized the action as “permanent physical occupation.”\textsuperscript{342} The question arises whether it is not better characterized as a restriction on use in that the state “took” part of the use of the asset. Under this formulation, the question arises as to

\textsuperscript{337} \textit{Id}. at 847–48. The provision was adopted in 1879. \textit{See id}. at 847.

\textsuperscript{338} \textit{See id}. at 832.


\textsuperscript{340} A subsequent purchaser should pay less for the property because it is subject to the dominant servitude, and thus have no claim for a taking even if the servitude is not asserted for years.

\textsuperscript{341} \textit{Cf}. \textit{U.S}. v. \textit{Cherokee Nation}, 480 U.S. 700 (1987). In this case, the exercise of the dominant navigational servitude, which effectively destroyed the “property interests” of the complainant, was not found to be a taking even though the assertion of the servitude had lain dormant for years. \textit{See id}. at 708.

\textsuperscript{342} 483 U.S. at 833.
whether there is now property being taken after the decision in *College Savings*. In *College Savings*, the Court held that the activity of using an asset, which was conceded to be property, to do business and make a profit was not a protected property interest implicating the Fourteenth Amendment Due Process Clause.\(^{343}\) In *Florida Prepaid*, the Court found that a state interfering with the right to exclude others did not by itself violate the Fourteenth Amendment.\(^{344}\) Thus, if the purported taking is the deprivation of the use of an asset, then under the logic of *College Savings* there can be no proscribed taking. It is conceded that the property at issue in *Nollan* was realty and that in *College Savings* it was not, but where is the logical distinction after *Eastern Enterprises v. Apfel*?\(^{345}\) It should be further noted that in both *Nollan* and *College Savings* the deprivation of use was present as well as future and not based upon retroactive conduct. It is not clear from *College Savings* how much use the complainant lost.

In a recent federal district court decision, a plaintiff filed an action against a village alleging a taking and against the state as required by state statute.\(^{346}\) A platted, but unconstructed, street passed by plaintiff's property to a lake and provided, evidently, considerable public access.\(^{347}\) A state official was made a defendant to the suit as required by state law.\(^{348}\) The gravamen of the relief sought was prospective in nature.\(^{349}\) The court, in dismissing the state and state official as defendants, found that the Eleventh Amendment barred the action and that *Ex parte Young* did not apply because of the “special sovereignty interest” at issue.\(^{350}\) The entire action was ultimately dismissed, but it is not clear whether the action against the village failed because the state was an indispensable party.\(^{351}\) Applying the foregoing analysis to

\(^{343}\) See *College Sav. Bank III*, 119 S. Ct. at 2225.
\(^{344}\) See *Florida Prepaid*, 119 S. Ct. at 2208.
\(^{345}\) 118 S. Ct. 2131 (1998). A plurality found an economic taking. See *Whalin*, supra note 294, at 701. *College Savings Bank III* also undermines the rationale of this decision because the deprivation found by the plurality was money from doing business based upon past activity. See 118 S. Ct. at 2149. The distinction may be that in *College Savings Bank III*, the economic injury was caused by reasonably present and future conduct, but, on the other hand, the money “being taken” from *Eastern Enterprises* was present and future revenues. See *id*.
\(^{346}\) See *MacDonald v. Village of Northport*, 164 F.3d 964, 966 (6th Cir. 1999).
\(^{347}\) See *id.*, at 966–67.
\(^{348}\) See *id.*, at 970–71.
\(^{349}\) See *id*.
\(^{350}\) *Id.*, at 972–73.
\(^{351}\) See *MacDonald*, 164 F.3d at 973. This circuit subsequently found that an action against state officials in their official capacities could go forward under the *Ex parte Young* exception when the state officials were acting under federal statutory delegated authority. See *Michigan...*
Tigard and Lucas v. South Carolina Coastal Council, it may be possible to question their continued vitality as well.

E. Delegated Authority and Citizens’ Suits

This part will examine to what extent the Quartet has altered the ability of a citizen to sue a state pursuant to citizens’ suit provisions in federal law, as well as the ability to sue a state, or arm of a state, when a permittee has a dispute with such an entity operating a federal program under delegated authority. Numerous federal environmental statutes allow a state to administer the federal program upon agreeing to specified conditions. Many of the same statutes also contain specific provisions for citizens’ suits but many also condition them on not waiving whatever Eleventh Amendment bar may be available.


One commentator has questioned whether delegation may be conditioned upon a state, in effect, volunteering to waive its Eleventh Amendment immunity. If delegation may be analogized to a "gratuity," in that the federal government will conduct enforcement if a state does not seek delegation, then it would seem to meet the parameters of College Savings which, admittedly in dicta, noted with approval congressional conditioning of an interstate compact upon a state's agreeing to waive its Eleventh Amendment immunity. The Court did not, however, view this as coercive even though a state cannot enter into a compact without congressional approval. The non-coercive argument for such requirements would appear to be enhanced as a result of the numerous specific declarations of non-abrogation previously noted. The credence given to this dicta is somewhat mitigated when one recalls that Seminole Tribe seemingly approved constructive waiver


See Alfred R. Light, He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law, 4 THE ENVTL. LAWYER 779, 808–13 (1998).

See College Sav. Bank III, 119 S. Ct. at 2231. New Star Lasers v. Regents of the University of California, No. Civ. S–99–428, 1999 U.S. Dist. LEXIS 13411 (E.D. Cal. Aug. 26, 1999), found an acceptance of a gratuity waiver where the entity filed for a patent and thereby accepted the benefits of patent ownership as well as the detriment of a challenge in federal court to that patent's validity. See id. at *9–*11. This court held that this was not an "otherwise lawful activity" which gave rise to the now overruled constructive waiver doctrine. See id. at *6–*7. The vitality of this decision must be questioned because there is no indication that the state entity affirmatively and explicitly accepted a waiver as a condition of receiving a patent. See id.

See id. 359 See note 355 and accompanying text. Some support for this assertion is found by the recent decision of In re Innes, No. 97–3363, 1999 U.S. App. LEXIS 20059 (10th Cir. Aug. 24, 1999). This was an adversarial bankruptcy case in which a state university participated in the Perkins Loan Program in a "contract" with the U.S. Department of Education which required the university to defend dischargeability claims. See id. at *1, *4. Abrogation was not an issue. See id. at *6. The court first found that Kansas had not expressly waived its immunity by its constitution or by statute. See id. at *9. The court then examined whether a state may waive its immunity by "affirmative conduct in the context of a federal program" and then found that when a state operates a program under delegated authority it may contractually waive its immunity. See id. at *9, *14–*15. The remaining issue was whether Kansas law precluded the consummation of such a contract by the state entity, and the court found no such preclusion. See id. at *26.
in dicta.\textsuperscript{360} \textbf{College Savings} has ended any assertion that when a state, or an arm of a state, participates in a federally regulated activity it has waived its Eleventh Amendment immunity\textsuperscript{361} subject to the qualification for specific waiver noted above. The question now to be addressed is whether a state, or an arm of a state, may be sued absent express consent.

One preliminary matter should be addressed. \textit{Middlesex County Sewerage Authority v. National Sea Clammers Ass'n}\textsuperscript{362} concerned an action alleging implied causes of action under the CWA, MPRSA\textsuperscript{363} and 42 U.S.C. § 1983.\textsuperscript{364} The Court found no implied remedy under the CWA or MPRSA based upon the extensive remedial scheme.\textsuperscript{365} The Court also found that the extensive remedial scheme under both statutes precluded an action pursuant to 42 U.S.C. § 1983.\textsuperscript{366} It should be remembered that \textit{Seminole Tribe} specifically excluded an action pursuant to \textit{Ex parte Young} because the statute at issue had an extensive remedial scheme even though it had just found it unconstitutional.\textsuperscript{367} Even

\textsuperscript{360} See \textit{Seminole Tribe III}, 517 U.S. at 66. The Eighth Circuit recently explored this in \textit{Bradley v. Arkansas Department of Education} in the context of the Individuals with Disabilities Education Act (IDEA) and the Rehabilitation Act (RA). See No. 98–1010, 1999 U.S. App. LEXIS 20831, at *2 (8th Cir. Aug. 31, 1999). The court held that IDEA validly abrogated a state's immunity. \textit{See id.} at *3–*4. It also held, however, that IDEA was invalid as not appropriate because "Congress did not adequately identify the constitutional transgressions it sought to remedy." \textit{Id.} at *13. In dicta, the court went on to find that IDEA exceeded Congress' Fourteenth Amendment enforcement powers. \textit{See id.} at *17. The court did hold that there was an explicit contractual waiver of immunity for IDEA claims by the state's participation in IDEA. \textit{See id.} at *20. The court then found that the RA was not appropriate because it sought to protect statutory rights rather than constitutional rights. \textit{See id.} at *29–*30. The court then found the receipt of federal funds contractual waiver of RA was invalid because the waiver was overly broad and proscribed coercion. \textit{See id.} at *34–*35. This court did not, however, examine whether the state's waiver of IDEA was valid under that state's law in contrast to \textit{In re Innes}. See No. 97–3363, 1999 U.S. App. LEXIS 20059, at *9, *14–*15.

\textsuperscript{361} See \textit{College Sav. Bank III}, 119 S. Ct. at 2233.

\textsuperscript{362} 453 U.S. 1 (1981).


\textsuperscript{364} \textit{See Clammers}, 453 U.S. at 19.

\textsuperscript{365} \textit{See id.} at 18.


if the remedial scheme is more modest, the use of *Ex parte Young* may be precluded.\textsuperscript{368} If an environmental statute has been found to preclude a 42 U.S.C. § 1983 claim under *Clammers*, then it is no stretch to assert that an *Ex parte Young* action is also precluded under the Quartet. In each of the Quartet cases the plaintiff was also seeking prospective relief in the form of an order requiring the state entity to obey a valid federal statutory right, and the Court precluded prospective relief in each instance.\textsuperscript{369}

A recent decision based solely on *Seminole Tribe* is instructive.\textsuperscript{370} The plaintiff brought an action against EPA and the state agency which operated the CWA § 404 program under delegated authority.\textsuperscript{371} The court found that there was no abrogation of the Eleventh Amendment by the CWA,\textsuperscript{372} and that the action could not be maintained under the *Ex parte Young* exception.\textsuperscript{373} In another action alleging that a state was a CWA polluter,\textsuperscript{374} the *Ex parte Young* exception was found to be available based upon the inference regarding CWA citizens' suits found in a footnote in *Seminole Tribe*.\textsuperscript{375} In another decision alleging that a state was a CWA, RCRA and CERCLA polluter, a citizen suit was found barred by the Eleventh Amendment when state officials were sued in their official capacities.\textsuperscript{376}

Absent express consent, it appears that the federal court door is closed, leaving plaintiffs only the alternative of an action against the

\textsuperscript{368} *See* id. at 75.

\textsuperscript{369} *Cf.* Alsbrook *v.* City of Maumelle, No. 97–1825, 1999 U.S. App. LEXIS 16945 (8th Cir. en banc July 23, 1999). The Eighth Circuit, under the Quartet, dismissed against a state entity and its officials a Title II, American with Disabilities Act claim as not being a proper exercise of congressional Fourteenth Amendment section five power (Equal Protection Clause enforcement). *See* id. at *28. The court also dismissed a related 42 U.S.C. § 1983 claim because of the extensive federal statutory remedial scheme, even though it had already stated that statutory remedies were unavailable. *See* id. at *34. A contrary decision on the same question was reached in *Martin v. Kansas*. *See* Nos. 98–3102, 98–3118, 1999 U.S. App. LEXIS 19707 (10th Cir. Aug. 19, 1999).

\textsuperscript{370} *See* Michigan Peat *v.* EPA, 175 F.3d 422, 428 (6th Cir. 1999); Rowlands *v.* Pointe Mouille Shooting Club, No. 98–1514, 1999 U.S. App. LEXIS 16372 (6th Cir. July 14, 1999) (reaching same result under RCRA).

\textsuperscript{371} *See* Michigan Peat, 175 F.3d at 424.

\textsuperscript{372} *See* id. at 428.

\textsuperscript{373} *See* id.

\textsuperscript{374} *See* Froebel *v.* Meyer, 13 F. Supp. 2d 843, 844–45 (E.D. Wis. 1998).

\textsuperscript{375} *See* id. at 853–54 (citing *Seminole Tribe III*, 517 U.S. at 75 n.17). The author must question whether this survives the repudiation of constructive waiver in *College Savings Bank III*.

federal government, in most instances the EPA. The gravamen of such a claim would be that the federal agency did not ensure that the state operating under delegated authority properly fulfilled its duties, but such a suit would be fraught with difficulties. 577

There may be one window which is open at least for a time. In United States ex rel. Stevens v. Vermont Agency of Natural Resources, 578 an employee filed an action alleging that the state agency falsified claims for grants to operate federal programs under delegated authority. 579 The action was brought on behalf of the United States under the federal False Claims Act. 580 Upon an examination of the legislative history, the court found that a state was a person within the ambit of the act. 581 Vermont then challenged the jurisdiction of the court by asserting the Eleventh Amendment as a bar. 582 The court found that the real party in interest in a False Claims Act case is the United States, which has the option of intervening, taking over the case, and then either dismissing it or proceeding forward. 583 Since the action is in legal reality between the United States and a state, the Eleventh Amendment does not apply. 584 The Supreme Court has granted certiorari to this case, however, leaving the continued vitality of this avenue in doubt.

If the Court does uphold this action, then a new avenue for one aggrieved by a state's operation of a statute under delegated authority is available. If it is possible to demonstrate that a state is not fulfilling its duties under its delegated authority by properly enforcing the law, then it may be possible to sue under the False Claims Act alleging that the state filed a false claim in seeking funds to administer the law at

578 162 F.3d 195 (2nd Cir. 1998), cert. granted, 119 S. Ct. 2391 (1999) (presenting the following questions to the Court: "(1) Whether a state is a "person" subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act?; and (2) Whether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting state"). On November 19, 1999, the following question was added to the two listed directly above: "Does a private person have standing under Article III to litigate claims of fraud upon the government?" See Supreme Court Collection at <http://supct.law.cornell.edu/supert/html/111999.ZR.html>.
579 See id. at 198.
582 See Stevens, 162 F.3d at 199.
583 See id. at 201.
584 See id. at 202. A contrary conclusion was reached in United States ex rel. Foulds v. Texas Tech University. See 171 F.3d 279, 294 (5th Cir. 1999).
issue because it was not properly enforcing that law under its delegated authority. According to Stevens, the Eleventh Amendment bar will not apply because the action is being brought by the United States.\textsuperscript{385}

**CONCLUSION**

The Calhounian Quartet will almost certainly have a significant impact upon environmental law and this article is intended only to begin the discussion. The immediate major adverse impact is in the area of intellectual property which is the cornerstone of current American economic growth and the "industry" which will be the center of economic growth in the new century.\textsuperscript{386} An enforceable system of intellectual property rights is key to a nation's effectiveness in the new economy.\textsuperscript{387} This potential negative economic impact caused the author to forecast, incorrectly as it turned out,\textsuperscript{388} that the Court would step back from the economic precipice and limit, or overturn, *Seminole Tribe*. Reversal of the Civil War was not anticipated.

The sweeping restructuring of the constitutional structure presented by the Quartet is probably not at an end. The Court has granted *certiorari* to three cases which will provide the opportunity to either extend the sweep, or to pull back.\textsuperscript{389} What seemed farfetched

\textsuperscript{385} See Foulds, 171 F.3d at 294.

\textsuperscript{386} See generally LESTER C. THUROW, BUILDING WEALTH: THE NEW RULES FOR INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY (1999).

\textsuperscript{387} See id. at 116–25, 261–62.

\textsuperscript{388} The author was not alone. See John T. Cross, Intellectual Property and the Eleventh Amendment After *Seminole Tribe*, 47 DEPAUL L. REV. 519, 522–23 (1998).


(1) Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals; and (2) Whether the extension of the Age Discrimination in employment Act of 1967, 29 U.S.C. § 621 et seq., to the States was a proper exercise of Congress' power under section five of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.
one year ago is the new reality, at least for as long as current majority holds.

Where a state, or an arm of a state, has aggrieved a private party and violated federally-created statutory rights, there is likely to be no remedy (assuming that there is no consent to be sued) if the relief sought is retroactive and impacts a state’s treasury. In the instance of prospective relief, it appears likely that there is also no remedy. It should be remembered that in each of the Quartet, prospective relief was sought to keep a state from violating valid federally created statutory rights, and prospective relief was denied in each instance.

Just as Clammers stands for the proposition that 42 U.S.C. § 1983 is not available for environmental suits where the statute provides an extensive remedial scheme, the Quartet holds that the existence of a comprehensive remedial scheme, even if it is unavailable to the aggrieved party because of the Eleventh Amendment, precludes Ex parte Young remedies. Since all of the federal environmental statutes allow the United States the discretion to bring an action against a state entity for enforcement, the existence, at least in theory, of this remedy should preclude the use of Ex parte Young. Since the federal government does not, and will not, have unlimited prosecutorial resources, it will use its discretion to select which actions to bring. These policy choices will reflect the viewpoint of the administration in power. Whether these choices will reflect the priorities of the aggrieved private party is quite another matter.

The rewriting of property law, assuming that the Court in College Savings meant what it said, to exclude the use of property from the ambit of the Fourteenth Amendment’s Due Process Clause undermines several previous takings decisions. If destroying the use is not within the ambit, then states are now free to regulate uses without being concerned with a takings claim. States also have a second arrow in their quiver because the jurisdictional statute, 28 U.S.C. § 1255, does not abrogate of the Eleventh Amendment, explicitly or otherwise, and the Quartet clearly states that Article III is modified by the Eleventh Amendment. This would preclude the Court from granting certiorari to review such a decision of a state’s highest court, again assuming the Court meant what it said in the Quartet, until Congress enacts an explicit abrogation of the Eleventh Amendment pursuant to sufficient

Supreme Court Collection, supra this note; see also Stephen J. Wermeil, Fall Docket Already Presents A Wide Variety of Hot-Button Issues, LEGAL TIMES, July 12, 1999, at S35.

See Clammers, 453 U.S. at 21. The preclusive nature of the Quartet may lead to further expansion of Clammers. See id.
evidence of protected Fourteenth Amendment violations. It is unlikely that Nollan, Lucas, and Tigard could now even reach the Supreme Court until the statutory infirmity is removed.

Potentially even more problematic is the new standard of judicial review set forth in Florida Prepaid. Although any legislative action at issue will be examined to determine if it is within the ambit of the Fourteenth Amendment, it does not use any of the traditional code-words—i.e., strict scrutiny, rational basis, etc. Thus, it is not unreasonable to conclude that the statute will be examined under general "rules." It should be remembered that in Florida Prepaid, the Court found the statute at issue to be within the parameters of congressional power, but the infirmity was that Congress did not have sufficient evidence, according to the majority, at the time it made its judgement to make the judgement it did. It is one matter to ask what Congress (or any other legislative body, for that matter) did in order to determine if it fits within Constitutional parameters; it is quite another to ask why and how Congress made its decision in order to determine if Congress had sufficient evidence to make its decision and if it was "appropriate." The Court did not explicate an evidentiary standard for review—i.e., substantial evidence, preponderance of the evidence, etc.—so one is sailing on uncharted seas without a compass, much less a global positioning system.

This standard may provide the federal courts with a hunting license to challenge all environmental statutes to determine whether the evidence at the time they were enacted supported the legislation Congress made and the Executive signed. Several of the core elements of major environmental statutes were enacted more than twenty years ago. The standard the majority would apply is not the knowledge gained during the past twenty plus years but the evidence at the time the decision was made. Although the Clean Air Act was the primary focus of this Article's examination, the same analysis applies to any of the federal environmental statutes. In the author's opinion,

this amounts to a thinly-veiled usurpation of the Separation of Powers doctrine.

This Article has considered the impact of state sovereign immunity upon the CWA and other federal environmental protection statutes, and concludes that the ethereal doctrine of state sovereignty enunciated in *Alden* may serve as a basis to limit the jurisdictional reach of federal environmental statutes. As the United States enters the twenty-first century as the dominant economic, political, and military nation, one may well ponder why a Supreme Court majority has chosen to leap into the eighteenth century instead.

**ADDENDUM**

On January 11, 2000, the Supreme Court further ratified the Calhounian Quartet in *Kimel v. Florida Board of Regents*, a decision regarding whether the Age Discrimination in Employment Act of 1967, as amended, validly abrogated a state's sovereign immunity. Although some of the plaintiffs sought prospective relief, there appears to be no indication that the Court considered whether the remedy of *Ex Parte Young* was available. Instead, the Court specifically cited state age discrimination statutes in a footnote, leading to the inference that since other remedies are available, the *Ex Parte Young* remedy is not. The Court reiterated the amorphous concurrent sovereignty doctrine, but placed it this time within the penumbra of the Eleventh Amendment, finding that there was a sufficiently explicit Congressional intent to abrogate from defining employers as including "public agencies."

The fundamental issue in *Kimel* was whether there was a valid Congressional abrogation of immunity pursuant to Section 5 of the Fourteenth Amendment. Using the test applied in *Florida Prepaid*,

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592 2000 U.S. LEXIS 498 (January 11, 2000) [hereinafter *Kimel*].
594 See *Kimel* at *14.
595 See id. at *54 n.1.
596 See id. at *20.
597 Id. at **21–22. All of the Justices joined in this conclusion save Justices Thomas and Kennedy. See id. at **8–9, 62, 67–68.
598 See id. at *33.
599 See *Kimel* at **37–38.
the Court held that the ADEA was not such a valid abrogation.\textsuperscript{400} The Court next held that age classifications did not implicate special Equal Protection concerns and were subject only to rational relationship review.\textsuperscript{401} The Court then examined "why Congress acted" to determine if it had sufficient evidence to reach its legislative conclusion,\textsuperscript{402} and made the evidentiary "ruling" that Congress had insufficient evidence of nefarious activity by states.\textsuperscript{403} 

As has been discussed in this article, and as in the previous Calhounian Quartet cases, the Court in \textit{Kimel} left the statutory rights created by the ADEA intact, but precluded private party remedy.\textsuperscript{404} It should be noted that the ultimate basis of the decision was somewhat confused—the Court stated both that the ADEA is not a valid exercise of Congressional Article I power,\textsuperscript{405} and that the abrogation of state sovereignty through imposition of a private party remedy is invalid.\textsuperscript{406} Nevertheless, the decision in \textit{Kimel} largely reinforces the analysis and conclusions of this article.

\textsuperscript{400} See \textit{id}. at *38.
\textsuperscript{401} See \textit{id}. at **38-40. It must be noted that the Court stated, although in dicta, that only race and gender classifications implicate special Equal Protection scrutiny—national origin and religious affiliation were not mentioned. \textit{See id}. at **38-39.
\textsuperscript{402} \textit{Id}. at **49-52.
\textsuperscript{403} \textit{Id}. at *53.
\textsuperscript{404} \textit{See Kimel} at *53.
\textsuperscript{405} \textit{See id}.
\textsuperscript{406} \textit{See id}. This issue was even further clouded by the Court's citation of remedies supplied by state statutes, implying that there are no Federal rights available at all. \textit{See id}. 