Pennsylvania v. Union Gas lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.[95] Chief Justice Rehnquist, writing for a 5–4 majority, concluded *Union Gas* had deviated from a line of cases, tracing back to *Hans v. Louisiana*,[96] that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[97] Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[98] Subsequent cases have upheld this interpretation.[99]

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[100] which was "based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," remains good law.[101] This ruling has led to a significant number of cases that examined whether a statute that might be applied against non-state actors under an Article I power, could also, under section 5 of the Fourteenth Amendment, be applied against the states.[102]

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[95] 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a state in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

[96] 134 U.S. 1 (1890).

[97] 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

[98] 517 U.S. at 72–73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in Hans v. Louisiana was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." Id. at 160.

[99] College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (the Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid).

[100] 427 U.S. 445 (1976).

[101] *Seminole Tribe*, 517 U.S. at 65–66.

[102] *See* Fourteenth Amendment, Congressional Definition of Fourteenth Amendment Rights, *infra*.