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SEMINOLE SPEAKS TO SOVEREIGN IMMUNITY AND *EX PARTE* YOUNG

WAYNE L. BAKER*

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.¹

Justice Holmes' explication of sovereign immunity is straightforward and succinct within the narrow province of law-maker and subject. When a state is sued for a violation of a federal law, however, the state's sovereign immunity implicates matters of paramount constitutional importance including supremacy, federalism, separation of powers, judicial activism and restraint, and both Tenth² and Eleventh Amendment³ considerations. To evade state sovereign immunity, a suit for prospective relief for violations of federal law may proceed against a named state official, under the "fiction" of *Ex parte Young*.⁴ The United States Supreme Court recently addressed these issues in *Seminole Tribe of Florida v. Florida*.⁵

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¹ *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (affirming decree of foreclosure and sale, sovereign cannot be sued).

² See U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

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.*

⁴ 209 U.S. 123 (1908) (holding that suits against individuals or state officers to prevent enforcement of unconstitutional state statute do not violate federal constitution); see *infra* notes 93-130 and accompanying text.

⁵ 116 S. Ct. 1114 (1996) (refusing to apply *Ex parte Young* and holding that Congress lacked authority to abrogate state's sovereign immunity under Indian Commerce Clause).

INTRODUCTION

The following analysis will examine the *Seminole* decision by focusing on the huge disparity between the majority and minority opinions in two specific areas: (1) Eleventh Amendment sovereign immunity, and (2) the "fiction" of *Ex parte Young*. Whether critiqued as juridicially sound, or as a drastic departure from established precedent, *Seminole* strikes a blow for states' rights and federalism.⁶ The Eleventh Amendment stands at the vanguard of state autonomy. "The stakes involved in interpreting the Eleventh Amendment are very high. Virtually the entire class of modern civil rights litigation plausibly might be barred by an expansive reading of the immunity of the states from suit in federal court."⁷ Clearly, *Seminole's* implications go far beyond the reservations' boundaries.

I. THE INDIAN GAMING REGULATION ACT, CONGRESS' GRANT OF JURISDICTION?

In 1988 Congress passed the Indian Gaming Regulation Act⁸ (hereinafter "IGRA"). This law was passed in response to the decision in *California v. Cabazon Band of Mission Indians*,⁹

⁶ See, e.g., *Another Judicial Victory for Authority of the States*, L.A. TIMES, Mar. 29, 1996, at B8 (noting controversy surrounding *Seminole* decision); Joan Biskupic, *High Court Bolsters State's Rights*, WASH. POST, Mar. 28, 1996, at A1 (noting that Supreme Court has attempted in recent years to correct encroachment of Congress on states' rights); *Commentator Claims Court's Decision in Seminole Case Is Part of States' Rights Campaign Aimed at Liberalism*, WEST'S LEGAL NEWS, Apr. 9, 1996, at 2978, available in 1996 WL 259681; Marcia Coyle, *Court Decides Gambling Case in States' Favor*, NAT'L L.J., Apr. 8, 1996, at A12 ("The court is incredibly concerned about federalism and about defining as clearly and properly as possible the relationship between the federal and state governments.") (quoting constitutional scholar Michael J. Gerhardt, of the Marshall-Wythe School of Law, College of William and Mary); Frank J. Murray, *High Court Revives States' Rights Against Lawsuits*, WASH. TIMES, Mar. 28, 1996, at A1 (discussing "landmark victory for states' rights"); David G. Savage, *High Court Curbs Federal Lawsuits Against the States*, L.A. TIMES, Mar. 28, 1996, at 1 (explaining that Supreme Court's endorsement of states' rights and state sovereign immunity will have far-reaching effects on federalism); Herman Schwartz, *Supreme Court Opens New Round in Federal-State Fight*, L.A. TIMES, Apr. 7, 1996, at M2, (explaining that *Seminole* is part of continuing "campaign to expand states' rights" at expense of liberalism and welfare state).

⁷ P. LOW & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 808 (2d ed. 1989).

⁸ Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (1994)).

⁹ 480 U.S. 202 (1987) (establishing distinction between prohibitory laws and regulatory laws — state law which prohibits conduct falls within state's criminal jurisdiction, while states' general promotion of certain conduct is considered regula-

which allowed Indian gaming in California. In California, gambling is regulated, not prohibited, and thus falls outside the express statutory grant of state criminal jurisdiction.¹⁰ The *Cabazon* decision prompted a heated debate over the state's role in regulating Indian gaming.¹¹ In response Congress enacted IGRA to "provide clear standards or regulations for the conduct of gaming on Indian lands ... [and] to promote tribal economic development, tribal self-sufficiency, and strong tribal government."¹² IGRA granted Indian tribes the "exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."¹³ The regulatory scheme requires the state to conduct "good faith" negotiations with a tribe in order to arrive at a compact prescribing the conditions under which the gaming activities will be conducted.¹⁴ A tribe that believes the state has failed to negotiate in good faith may seek an order in federal district court¹⁵ requiring the state and the tribe to conclude the compact within a sixty-day period.¹⁶

tory law). This decision followed a line of cases that began with *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (allowing Indian tribe to conduct bingo without interference from Florida State government).

¹⁰ See 18 U.S.C. § 1162 (1994) (establishing "[s]tate jurisdiction over offenses committed by or against Indians in the Indian Country").

¹¹ Indian matters have always fallen exclusively under federal province, and it is a long-established tradition that unless authorized by an act of Congress, the jurisdiction of state governments and the application of state laws do not extend to Indian lands. See 25 U.S.C. § 2701(5) (1994); but see *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984) (holding state-court jurisdiction would not interfere with Indians' right to self-government).

¹² 25 U.S.C. § 2701(3),(4).

¹³ 25 U.S.C. § 2701(5). An important part of IGRA, the "good faith" negotiations requirement, was later declared unconstitutional by the United States Supreme Court in *Seminole Tribe of Florida v. Florida*, holding that suits brought because of a failure to engage in such negotiations would violate state sovereign immunity. See 116 S. Ct. 1114, 1132-33 (1996).

¹⁴ 25 U.S.C. § 2710(d)(3)(A).

¹⁵ See 25 U.S.C. § 2710(d)(7)(A)(i).

¹⁶ See 25 U.S.C. § 2710(d)(7)(B)(iii). If an Indian tribe and the State fail to agree on a compact, the "Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." 25 U.S.C. § 2710(d)(7)(B)(iv). Upon the mediator's determination, the State may either consent to the compact within sixty days, or refuse to consent, in which case the Secretary of the Interior will provide procedures, consistent with the proposed compact selected by the mediator, to regulate the Indian tribe's class III gambling. See *id.* § 2710(d)(7)(B)(v)-(vii).

II. THE SEMINOLE DECISION

The Seminole Tribe of Florida (hereinafter the "Tribe") brought suit in federal district court against the State of Florida and its governor, alleging that the State violated IGRA by failing to conduct good faith negotiations regarding gaming activities to be conducted on the Tribe's land.¹⁷ The State moved to dismiss the action pursuant to the Eleventh Amendment of the United States Constitution, asserting that Congress cannot lawfully enforce the "good faith" requirement by providing a judicial remedy against the State.¹⁸ The Tribe maintained that Congress abrogated the States' immunity in enacting IGRA.¹⁹ The State stipulated that the statutory language of IGRA²⁰ expressed a

¹⁷ See *Seminole Tribe of Fla. v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114, *cert. denied*, 116 S. Ct. 1416 (1996).

¹⁸ See *id.* at 656; see also *supra* note 3.

¹⁹ Three Eleventh Amendment exceptions exist. See *Seminole*, 801 F. Supp. at 657. First, Congress may abrogate the State's immunity where it possesses the power. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23 (1989), *overruled by Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996). Second, a state may consent to suit in federal courts or waive its immunity impliedly. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Third, state officers may, under certain circumstances, be sued in their official capacities to obtain prospective relief. See *Ex parte Young*, 209 U.S. 123 (1908).

Until *Seminole*, the Supreme Court recognized Congressional abrogation of states' rights pursuant to its plenary interstate commerce power in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Union Gas operated a coal gassification plant which resulted in a deposit of coal along a river. During an excavation intended to control flooding, Pennsylvania struck such deposit, which resulted in coal seeping down the river. After the Environmental Protection Agency declared it a hazardous waste site, the United States and the state government cleaned up the spill. Upon reimbursing the state for its expenses, the United States government brought suit against Union Gas Co. for reimbursement. Union Gas Co., in turn, sued the Commonwealth, arguing it was at least partly responsible for such costs. The district court ruled that Eleventh Amendment state sovereign immunity barred the suit. Though the United States Court of Appeals for the Third Circuit initially agreed, it changed its decision following a remand in light of an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). As such, the Court of Appeals ruled that Pennsylvania could be held monetarily responsible for damages in a lawsuit and the Supreme Court affirmed. See *id.*

The Supreme Court held that Congress had the authority to override state sovereign immunity under Section Five of the Fourteenth Amendment, but Congress must make its intent to do so unmistakably clear. The express language in CERCLA established the Congressional intent to hold states liable for monetary damages rather than precluding all suits due to state immunity. See *id.* *Union Gas*, however, was overruled by *Seminole Tribe of Florida v. Florida*. See *supra* note 5.

²⁰ The United States district courts shall have jurisdiction over- (i) any cause of action initiated by an Indian tribe arising from the failure of a

clear intent to abrogate state immunity, but challenged whether Congress could exercise this power consonant with the Indian Commerce Clause.²¹ The district court reviewed the historical support for Congressional plenary power over Indian affairs, and found that pursuant to *Pennsylvania v. Union Gas Company*²² Congress has the power to abrogate the States' immunity pursuant to the Indian Commerce Clause.²³

The *Seminole* decision, and a parallel Alabama case,²⁴ were consolidated on appeal to the United States Court of Appeals for the Eleventh Circuit.²⁵ The circuit court dismissed the cases, holding that Congress did not possess the power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment sovereign immunity when enacting IGRA. As a result, federal courts were without authority to exercise subject matter jurisdiction over suits brought under IGRA.²⁶ Chief Judge Tjoflat's methodical analysis eliminated state consent,²⁷ Congress-

State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith

25 U.S.C. § 2710(d)(7)(A)(i).

²¹ See U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power ... [t]o regulate Commerce with ... the Indian Tribes." *Id.*

²² 491 U.S. 1 (1989), *overruled by* *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996). Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States. *See id.* at 14.

²³ See *Seminole*, 801 F. Supp. at 661 (explaining that since Supreme Court has held Congress may abrogate State's immunity under Interstate Commerce Clause, and both Interstate and Indian Commerce Clauses are derived from same constitutional clause, same would apply to Indian Commerce Clause).

²⁴ See *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991) (holding Eleventh Amendment barred nonconsensual suit against Alabama and that Congressional authority granted by Indian Commerce Clause was insufficient to abrogate state's Eleventh Amendment immunity). In a separate cause of action recorded as *Poarch Band of Creek Indians v. Alabama*, 784 F. Supp. 1549 (S.D. Ala. 1992), the court rejected an action for equitable relief against the governor and the state under either 42 U.S.C. § 1983 or the *Ex parte Young* doctrine for alleged violations of IGRA.

²⁵ *Seminole*, 11 F.3d 1016 (11th Cir. 1994).

²⁶ See *id.* at 1019. An issue raised for the first time on appeal and therefore not considered by this court or the Supreme Court was a Tenth Amendment challenge. The defendants averred that IGRA coercively forces the states to negotiate with Indian tribes, and this coercive interference of a reserved state power violates the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144 (1992). See *Seminole*, 11 F.3d at 1019; see also *supra* note 2.

²⁷ Consent may arise in three circumstances: (1) express consent through legislative enactment; (2) "plan of the convention" consent derived from the state's ratification of the Constitution; and (3) consent to suit as a prerequisite to participation in a federal program. *Seminole*, 11 F.3d at 1021-22.

sional abrogation,²⁸ and application of the *Ex parte Young* doctrine²⁹ as impediments to the application of the Eleventh Amendment sovereign immunity defense. The court concluded that notwithstanding the sovereign immunity defense, the statute provides a remedy for the Tribe,³⁰ which "conforms with IGRA and serves to achieve Congress' goals"³¹

III. CHIEF JUSTICE REHNQUIST WRITES FOR THE SUPREME COURT

The Supreme Court granted certiorari³² to determine two issues: first, whether the Eleventh Amendment prohibits Congress' authorization of suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursu-

²⁸ The court applied a two-part inquiry to determine if Congress intended to abrogate the States' immunity and whether Congress possessed the power under the Constitution to do so. *See id.* at 1023-26. The court found that Congress expressed the requisite intent but lacked the necessary power. *See id.* Determining that Congress enacted IGRA under the Indian Commerce Clause, and not under Section Five of the Fourteenth Amendment or the Interstate Commerce Clause as asserted by the tribes, the court did not allow Congress to abrogate state immunity, and distinguished *Union Gas* as applicable when Congress legislates under the Interstate Commerce Clause. *See id.* at 1025-27. The purposes underlying the Interstate Commerce Clause, "to place limits on the state in order to 'maintain[] free trade among the States'" differs from that of the Indian Commerce Clause, "to provide Congress with plenary power to legislate in the field of Indian affairs" sufficiently to justify distinct treatment. *Id.* at 1027 (alteration in original) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

²⁹ The United States Supreme Court, in *Ex parte Young*, 209 U.S. 123 (1908), held that a state official must have some connection with the alleged unconstitutional act in order to make the official a party to the suit. The Supreme Court reasoned that if the officer is not involved with the enforcement of the act, then to make the officer a party would "merely mak[e] him ... a representative of the State, and thereby attempt[] to make the State a party." *Young*, 209 U.S. at 157. Furthermore, the Court held that where the discretion of an officer in the exercise of his duties is concerned, courts may not dictate the exercise of such discretion. Rather, the court may direct the state officer to perform ministerial duties. *See id.*; *see also* Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1686 (1997) (explaining that *Ex parte Young* establishes that state official does not have Eleventh Amendment immunity from suits seeking prospective enforcement of federal law). The court in *Seminole* indicated that the *Ex parte Young* doctrine was inapplicable to compel an executive official to undertake a discretionary task if the suit is, in reality, against the state. Consequently, the court concluded that the facts in *Seminole* precluded an application of the *Ex parte Young* doctrine. *See Seminole*, 11 F.3d at 1028-29.

³⁰ "If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures" 25 U.S.C. § 2710(d)(7)(B)(vii) (1994).

³¹ *Seminole*, 11 F.3d at 1029.

³² *Seminole Tribe of Fla. v. Florida*, 513 U.S. 1125 (1995).

ant to the Indian Commerce Clause, an issue which had produced divergent circuit court decisions;³³ and second, whether the doctrine of *Ex parte Young* permits suits against a State's governor for prospective injunctive relief to enforce the good faith bargaining requirement mandated by IGRA. Chief Justice Rehnquist penned a five to four majority opinion³⁴ deciding the first issue in the affirmative, the second issue in the negative, and affirming the Eleventh Circuit's dismissal of petitioner's suit.³⁵

A. Upholding States' Eleventh Amendment Sovereign Immunity

The Court's analysis of the first issue focused on whether IGRA was passed pursuant to a valid exercise of Congressional power, i.e., a constitutional provision granting Congress the power to abrogate the Eleventh Amendment. The Court rejected petitioner's reasoning that the prospective nature of the relief sought,³⁶ and/or the statutory grant in IGRA to the states of a power that they would not otherwise have had,³⁷ supports a finding of the abrogation power. The Court reiterated the power of Congress to abrogate pursuant to Section Five of the Four-

³³ In accord with the Eleventh Circuit's holding in *Seminole*, that the Eleventh Amendment barred Indian tribes from bringing suit against the State, is *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994). Cases holding that the action was not barred by the Eleventh Amendment include: *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); and *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994).

³⁴ Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens filed a dissenting opinion, and Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined. See *Seminole*, 116 S. Ct. at 1119.

³⁵ See *id.* at 1122.

³⁶ See *id.* at 1124.

[T]he type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "prevent[] federal court judgments that must be paid out of a State's treasury[;]" it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

Id. (alteration in original) (internal citations omitted).

³⁷ Notwithstanding IGRA's grant of some measure of authority over gaming on Indian lands to the state not otherwise provided in the Constitution, "[t]he Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority." *Seminole*, 116 S. Ct. at 1125. Although Justice Rehnquist's opinion turns on Congressional lack of power to abrogate the Eleventh Amendment, this particular statement by the Chief Justice goes against his reasoning in past opinions. See *infra* note 133 and accompanying text.

teenth Amendment,³⁸ while reversing its previous acknowledgment of authority to abrogate originating in the Interstate Commerce Clause.³⁹ In so doing, the Court explicitly overruled *Pennsylvania v. Union Gas Company*.⁴⁰

Relying upon a history of interpreting the Eleventh Amendment that reaches beyond its words, Chief Justice Rehnquist cited *Hans v. Louisiana*⁴¹ for the premise that underlying the Eleventh Amendment is a presupposition that each State is a sovereign entity in our federal system, and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."⁴² The decision in *Hans* was founded upon the "jurisprudence in all civilized nations,"⁴³ not just the English common law, and the Court there cautioned that strict devotion to the text of the Eleventh Amendment would "strain the Constitution and the law to a construction never imagined or dreamed of."⁴⁴

³⁸ Section Five of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Justice Rehnquist's majority opinion in *Fitzpatrick* states:

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. at 456.

³⁹ See U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States" *Id.*

⁴⁰ 491 U.S. 1 (1989) (finding power to regulate interstate commerce incomplete without authority to render States liable in damages).

⁴¹ 134 U.S. 1 (1890) (holding that Constitution contained no right for *Hans* to sue State of Louisiana to recover amount of State bonds he purchased and that States had sovereign immunity from suits by its own citizens).

⁴² *Id.* at 13 (quoting THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The passage continues: "This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal." THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton).

⁴³ *Hans*, 134 U.S. at 17 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)).

⁴⁴ *Id.* at 15. The court expounded:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in

The *Seminole* majority explained the distinction between abrogation of States' sovereign immunity pursuant to the Fourteenth Amendment and pursuant to Article I. The Court stated, "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."⁴⁵ *Fitzpatrick v. Bitzer*⁴⁶ cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."⁴⁷ Article III circumscribes the outer limits of federal court jurisdiction and the Eleventh Amendment restricts the exercise of that judicial power. "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction . . . [therefore] [e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."⁴⁸

To a legal novice it would strain credulity to imagine a constitutional amendment, subject to two centuries of interpretation, resulting in variegated viewpoints amongst Supreme Court Justices. Unfortunately, this decision reinforces the Eleventh Amendment's recondite reputation.⁴⁹ One should not be mis-

the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Id.

⁴⁵ *Seminole*, 116 S. Ct. at 1128 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1996)). The theory that the Fourteenth Amendment imposes a limitation upon the Eleventh Amendment was explicitly rejected by the court in *Ex parte Young*, discussed *infra*, and effectively overrules decades of case law. See also *infra* notes 115-22 and accompanying text.

⁴⁶ 427 U.S. 445 (1976) (finding that, through Fourteenth Amendment, Congress could validly provide for legislative waiver of Eleventh Amendment sovereignty protection for States to permit suits by private citizens in areas where it would normally be impermissible).

⁴⁷ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 42 (1989) (Scalia, J., dissenting) (disagreeing with plurality's reliance on *Fitzpatrick* for support to limit protection of Eleventh Amendment), *overruled by Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, *cert. denied*, 116 S. Ct. 1416 (1996).

⁴⁸ *Seminole*, 116 S. Ct. at 1131-32.

⁴⁹ "The [E]leventh [A]mendment is one of the Constitution's most baffling pro-

guided by the unequivocal language of the amendment.⁵⁰ Three distinct interpretations have developed⁵¹ from statutory enactments⁵² and judicial decisions.⁵³ Even the history of the amendment's ratification reveals disparate interpretations amongst the Framers.⁵⁴

1. Limiting the Coverage of the Eleventh Amendment: Justice

visions" William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033 (1983).

⁵⁰ See *supra* note 3.

⁵¹ The three interpretations are: (1) as a restriction on federal court subject matter jurisdiction; (2) as a reinstatement of common law immunity; and (3) as a limit only on diversity suits against state governments. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 374-81 (2d ed. 1994). Another commentator has suggested four possible interpretations of the text of the Eleventh Amendment:

(1) The Amendment barred diversity actions brought by a citizen of one state against another state[;] (2) The Amendment (plus any penumbra) barred both diversity actions and federal question actions by a citizen of one state against another state, unless Congress made clear that the federal statute at issue was designed to abrogate state sovereign immunity[;] (3) The Amendment (plus any penumbra) barred both diversity actions and federal question actions by any citizen against any state, including the citizen's own state, unless Congress made clear that the federal statute at issue was designed to abrogate state sovereign immunity[; and] (4) The Amendment (plus any penumbra) barred both diversity actions and federal question actions by any citizen against any state, including the citizen's own state, and the immunity may not be abrogated by a congressional act.

Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2239 (1996).

⁵² "Arising under" jurisdiction as currently codified in 28 U.S.C. § 1331 was not enacted until 1875, seventy-seven years after the Eleventh Amendment was adopted, and therefore "it seems unlikely that much thought was given to the prospect of federal question jurisdiction over the States." *Seminole*, 116 S. Ct. at 1130. Contrary to this pronouncement, Justice Souter, in his dissent, asserts that "Article III, of course, provided for such [federal question] jurisdiction, and early Congresses exercised their authority pursuant to Article III to confer jurisdiction on the federal courts to resolve various matters of federal law." *Id.* at 1152 n.12 (Souter, J., dissenting) (internal citations omitted).

⁵³ In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court interpreted the breadth of the Eleventh Amendment to include federal question suits against a state by its own citizens, finding that it would be "anomalous" to allow states to be sued by their own citizens. *Id.* at 10.

⁵⁴ In *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Court's historical analysis revealed that "[a]t most, then, the historical materials show that—to the extent this question was debated—the intentions of the Framers and Ratifiers were ambiguous." *Id.* at 483-84. Nor have judicial precedents illuminated the amendment. See, e.g., *Malone v. Bowdoin*, 369 U.S. 643 (1962). "[T]o reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task." *Id.* at 646.

Stevens' Dissent

Justice Stevens disagreed with the majority's reasoning on numerous fronts. Questioning the Court's conclusions as illogical, Justice Stevens warned against the decision's far-reaching implication of "prevent[ing] Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."⁵⁵ These concerns have been shared by commentators⁵⁶ and courts⁵⁷ alike. According to Justice Stevens, the

⁵⁵ *Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting). *But see id.* at 1131 n.16. Justice Rehnquist criticizes Justice Stevens' conclusion as "exaggerated both in its substance and in its significance [and] misleadingly overbroad." *Id.* State compliance with federal law is maintained through injunctive relief under *Ex parte Young* in order to remedy a state officer's ongoing violation of federal law. Moreover, "it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes" *Id.* "Although the copyright and bankruptcy laws have existed practically since our nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." *Id.* at 1132 n.16.

⁵⁶ *See, e.g.*, Mark Browning, *Seminole Tribe of Florida v. Florida: A Closer Look*, 15 JUN AM. BANKR. INST. J. 10, 10 (1996) (suggesting that *Seminole* will impact actions involving state governmental agencies in bankruptcy, environmental, and health care provider litigation, state tax determinations, and contract and tort claims); Stephen W. Sather, et al., *Borrowing From the Taxpayer: State and Local Tax Claims in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 201, 230-31 (1996) (finding *Seminole* applicable to Bankruptcy Code, and concluding that § 106 of Bankruptcy Code "cannot be used to abrogate immunity guaranteed the States under the Eleventh Amendment"); *see also* Stephen L. Kass and Jean M. McCarroll, *Private Enforcement After Seminole*, N.Y. L.J., Apr. 26, 1996, at 2 (suggesting that "[i]t is environmental enforcement, however, that is most directly threatened by *Seminole*, for no other body of regulatory law has relied so prominently, and successfully, on private parties to monitor and enforce state compliance with federal requirements").

⁵⁷ The First and Tenth Circuits have affirmed dismissals of suits brought against the states of Kansas and Maine, respectively, by former and present state employees under the Fair Labor Standards Act (hereinafter "FLSA"). The courts followed the reasoning of *Seminole* and held that because FLSA was passed pursuant to the Interstate Commerce Clause and because Congress does not have authority under the Interstate Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, to abrogate a state's Eleventh Amendment immunity from suit, there can be no cause of action in federal court under FLSA against the states. *See, e.g.*, *Blow v. Kansas*, 929 F. Supp. 1400 (D. Kan. 1996), *aff'd*, 116 F.3d 489 (10th Cir. 1997); *Adams v. Kansas*, 934 F. Supp. 371 (D. Kan. 1996), *aff'd*, 116 F.3d 489 (10th Cir. 1997); *Mills v. Maine*, Civ. No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997); *see also* *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), *cert. granted*, 116 S. Ct. 1667 (1996) (Supreme Court granted *certiorari*, vacated judgment, and remanded copyright case against state-funded University of Houston

Eleventh Amendment may raise concerns over Congressional power to ensure enforceability in a federal forum, but it does not stand as a jurisdictional bar to Congressional authority.⁵⁸ Justice Stevens embraced Justice Brennan's interpretation of the Eleventh Amendment as a restriction applying only to suits premised on diversity jurisdiction.⁵⁹ The majority's reliance upon *Hans* was misguided in Justice Stevens' opinion, and *Hans*' precedential value should be limited to its facts, a contractual litigation between a citizen of a state and that state. Justice Stevens' analysis supports constitutional supremacy, thus "in all cases to which the judicial power does not extend—either because they are not within any category defined in Article III or because they are within the category [explicitly] withdrawn from Article III by the Eleventh Amendment—Congress lacks the power to confer jurisdiction on the federal courts,"⁶⁰ otherwise, the plenary powers of Congress are paramount. There is no rationale, therefore, for the majority's distinction between statutes enacted pursuant to the power granted Congress in Article I or those enacted to enforce the provisions of the Fourteenth Amendment.⁶¹

2. Historical Analysis of the Eleventh Amendment: Justice Souter's Dissent

Justice Souter's scholarly and thorough⁶² dissent, joined by Justices Ginsburg and Breyer, attempts to dispel the historical myth of the Eleventh Amendment. The history of "the debate addressed only the question whether ratification of the Constitution would, in diversity cases and without more, abrogate the state sovereign immunity [T]here was no textual support for contending that Article III or any other provision would 'constitutionalize' state sovereign immunity"⁶³ Countering

to 5th Circuit for consideration of *Seminole* issues); *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 404 (D.N.J. 1996) (involving state-funded institution raising *Seminole* as defense to patent infringement claims).

⁵⁸ See *Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting).

⁵⁹ See *id.* at 1136 (Stevens, J., dissenting) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting)).

⁶⁰ *Id.* at 1141 (Stevens, J., dissenting).

⁶¹ See *id.* at 1142.

⁶² Souter's dissent is substantially longer in length and breadth, undertaking an elaborate historical survey of the Eleventh Amendment.

⁶³ *Id.* at 1147-48 (Souter, J., dissenting).

the revisionist conclusions surrounding the reaction to *Chisholm v. Georgia*,⁶⁴ Justice Souter suggests the decision was reasonable, and the legislatures' reaction was not a "shock of surprise" leading to the immediate proposal and adoption of the Eleventh Amendment.⁶⁵

In analyzing the Amendment's text, Justice Souter proffers two plausible readings,⁶⁶ and he believes, as does Justice Stevens, in "reading the Eleventh Amendment solely as a limit on citizen-state diversity jurisdiction ... [this position is buttressed by] the views of John Marshall,⁶⁷ ... the history of the Amendment's drafting, and ... its allusive language,"⁶⁸ as well as the writings of numerous contemporary scholars.⁶⁹

Justice Souter's dissent dissected and rejected the holding of *Hans* and what he termed the majority's "elevation[] of judi-

⁶⁴ 2 U.S. (2 Dall.) 419 (1793) (granting default judgment for plaintiff, South Carolina citizen, against state of Georgia, for value of clothing supplied during Revolutionary War, rekindled antifederalist fears and served as impetus for enacting the Eleventh Amendment).

⁶⁵ *Seminole*, 116 S. Ct. at 1148 n.5 (Souter, J., dissenting) (discussing history of Court's opinion in *Chisholm v. Georgia* and the adoption of Eleventh Amendment).

⁶⁶ The Eleventh Amendment acts to (1) "repeal[] the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant"; and (2) "strip[] the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit." *Id.* at 1149 (Souter, J., dissenting).

⁶⁷ *Id.* at 1151-52. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall stated that the Eleventh Amendment had no effect on the federal courts' jurisdiction based on the "arising under" provision of Article III and concluded that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case." *Id.* at 383. Marshall further explained that "[o]ne of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals." *Id.*

⁶⁸ *Seminole*, 116 S. Ct. at 1152 (Souter, J., dissenting) (explaining that Eleventh Amendment was drafted without specifically limiting federal question jurisdiction in suits against states, although there was at least one proposal made prior to Amendment's drafting which would have expressly provided this limitation). Justice Souter therefore concluded that the Eleventh Amendment "simply does not apply" to the plaintiffs in the case at bar because they are citizens of the State they are suing. *Id.* at 1152.

⁶⁹ See *id.* at 1150 n.8 (Souter, J., dissenting); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 4 (1988) (concluding that Eleventh Amendment does not "supply" or "imply" a Constitutional immunity for States as to claims arising under federal law).

cially derived rules to the status of inviolable constitutional law[s].”⁷⁰ Although a cogent interpretation of the *Hans* holding could expand the sovereign immunity protection to include suits by a citizen of a State against that State and suits based upon federal question jurisdiction, Justice Souter elucidated that the anomaly addressed in *Hans* never existed.⁷¹ The consequence of *Hans*, Justice Souter suggested, is “when a State injured an individual in violation of federal law no federal forum could provide direct relief.”⁷² Citing historical analysis, Justice Souter advanced political motivations for the *Hans* decision including sacrificing sovereign immunity jurisprudence to preserve the power of the Contract Clause as well as preventing potential noncompliance with the federal courts’ judgments by hostile state governments.⁷³

Challenging the conclusion that sovereign immunity is “constitutional in stature and therefore unalterable,”⁷⁴ Justice Souter described the precedential language of *Hans* and its progeny, relied upon by the majority, as *obiter dicta*,⁷⁵ and the prece-

⁷⁰ *Seminole*, 116 S. Ct. at 1153 (Souter, J., dissenting). Justice Souter explained that the majority’s ruling had bolstered the century old incorrect reasoning of *Hans*. *See id.*

⁷¹ “[T]he supposed anomaly of recognizing jurisdiction to entertain a citizen’s federal question suit, but not one brought by a noncitizen” was fictitious as “federal question cases are not touched by the Eleventh Amendment, which leaves a State open to federal question suits by citizens and noncitizens alike.” *Id.* at 1154 (Souter, J., dissenting). This reasoning is of course consistent with Souter’s limited textual interpretation of the Eleventh Amendment.

⁷² *Id.* Souter explains that *Hans* took away the balance of judicial power under Article III, along with the guarantees set forth in the Constitution, and damaged the force of statutes passed by Congress pursuant to its power under Article I. *See id.*

⁷³ *See Seminole*, 116 S. Ct. at 1155 (Souter, J., dissenting) (citing John L. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2000 (1983)). Gibbons explained that *Hans* was decided during extremely turbulent times. During the Compromise of 1877, the Union had agreed to withdraw its troops from the South. However, this left the Federal Judiciary without much power. The Supreme Court was wary that the States would not obey a ruling against them, which would expose the weakness of the Court. Gibbons further stated that “[a]fter the Act’s passage, the Supreme Court, whenever it considered ordering relief to which local resistance might be anticipated, had to take into account the President’s readiness to enforce the decree.” *Gibbons, supra*, at 1981.

⁷⁴ *Seminole*, 116 S. Ct. at 1156.

⁷⁵ *See id.* Souter explained that *Hans* is dicta, due to the fact that there have been cases in which the Supreme Court has acknowledged that the Eleventh Amendment by itself does not bar a suit with a federal question brought by a state citizen. *See id.*

dential language ignored as binding.⁷⁶ He also revealed corollary inconsistencies inherent in the Court's interpretation of the Eleventh Amendment.⁷⁷

To further discredit the majority's reliance on *Hans*, Justice Souter weaved an intricate analysis of the origin, applicability, and adoption of the common law in our young nation.⁷⁸ The sovereign immunity relied upon in *Hans*, Justice Souter asserted, originated in the English common law,⁷⁹ and the states adopted "only so much of the common law as they thought applicable to their local conditions."⁸⁰ On the national level, numerous factors informed against complete textual incorporation of the common law in the Constitution.⁸¹ There were strong anti-English hostilities,⁸² fears that "constitutionalizing" the common law would render it immutable,⁸³ and moreover, the common law had devel-

⁷⁶ See *id.* at 1157-59. Souter explained that in many Court decisions sovereign immunity has been referred to as a "background principle,' 'postulate,' or 'implicit limitation,' and as resting on the 'inherent nature of sovereignty,' rather than any explicit constitutional provision." *Id.* at 1158 (internal quotations and citations omitted).

⁷⁷ If the Eleventh Amendment is a restriction on federal courts' subject matter jurisdiction, which cannot be waived, then that is inconsistent with a State's accepted authority to consent to suit. Additionally, if federal question suits are barred by the Eleventh Amendment, Supreme Court appellate jurisdiction over issues of federal law arising in lawsuits brought against the States in state court would not lie. See *id.* at 1158.

⁷⁸ See *id.* at 1160-61 (explaining that although statutes affected the importance of sovereign immunity, this doctrine was not included as part of the national codification and that most Americans understood sovereign immunity as deriving from English common law, the reception of which was lukewarm at best). Souter finds it unfathomable that sovereign immunity was inadvertently excluded from the Constitution. See *id.* at 1165.

⁷⁹ See *Seminole*, 116 S. Ct. at 1160.

⁸⁰ *Id.* at 1162 (Souter, J., dissenting) (internal citations omitted). It was generally understood that not all of English common law was to be adopted in America. See *id.*

⁸¹ Interestingly, throughout the Constitution, "common law" only appears in Article I and the Seventh Amendment. See *id.* at 1163. Additionally, the 1787 draft contained no provision for adopting the common law at all, although States specifically made reference to the common law in their Constitutions. See *id.*

⁸² See *id.* at 1162 (Souter, J., dissenting). In a letter to John Breckenridge dated January 15, 1802, James Monroe wrote, "[T]he application of the principles of the English common law to our constitution' should [sic] be considered 'good cause for impeachment.'" *Id.* (quoted in 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800-1815, 59 (1919)).

⁸³ *Seminole*, 116 S. Ct. at 1164 (Souter, J., dissenting) (noting that due to fact that there were different types of colonies, ruled by different governing principles, and each evolving with different circumstances, there was no central common law throughout the colonies, and thus no common law rule addressing state sovereign

oped differently in each of the several states making "general federal reception impossible."⁸⁴ The Framers did not wish to usurp state sovereignty by granting unduly broad jurisdiction to the federal courts through adoption of a federal common law covering the entire field of legislation.⁸⁵ Accordingly, Justice Souter dismissed the notion of sovereign immunity as an enforceable background principle.⁸⁶

To substantiate his posture that federal question cases are outside the realm of the Eleventh Amendment, Justice Souter examined the Federalist Papers and the applicability of sovereign immunity in a dual-sovereign system.⁸⁷ Quoting Chief Justice Marshall, as to "each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other,"⁸⁸ Justice Souter concluded, "[t]he very idea of a federal question depended on the rejection of the simple concept of sovereignty from which the immunity doctrine had developed; under the English common law, the question of immunity in a system of layered sovereignty simply could not have arisen."⁸⁹

3. How Sovereign Immunity Is Defined Today

If all that were at stake was an exercise in historical inter-

immunity) (citing R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 7 (1938)).

⁸⁴ *Id.*

⁸⁵ *See id.* at 1165 (Souter, J., dissenting) (citing Madison in *Debates on Alien and Sedition Acts, Alien and Sedition Laws*). Though this may support Souter's position that the Framers were against general federal reception of the common law, it also strongly suggests that the Framers intended to retain sovereign immunity, whether denominated as a common law doctrine or not.

⁸⁶ *See id.*

⁸⁷ *See id.* at 1166-67 (Souter, J., dissenting). Justice Souter explained that the majority construed Hamilton's statements in Federalist No. 81 incorrectly. *See supra* note 42. What Hamilton was referring to was a diversity suit under a federal question. *See id.*

⁸⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819) (discussing constitutionality of law passed by legislature of Maryland which imposed tax on Bank of the United States). In finding the Maryland law unconstitutional, Marshall stated that "the government of the Union, though limited in its powers, is supreme within its sphere of action." *Id.* at 405.

⁸⁹ *Seminole*, 116 S. Ct. at 1172. Souter further asserted that the majority deprived its citizens of the opportunity to enforce federal rights in accordance with Congressional intent. *See id.* at 1173. Souter rejected the view that since there is no federal question statute, there is no jurisdiction in the federal courts. Souter inquired, "In the end, is it plausible to contend that the plan of the convention was meant to leave the National Government without any way to render individuals capable of enforcing their federal rights against an intransigent state?" *Id.*

pretation, the drastic polarization of the Justices' Eleventh Amendment interpretation would not be so disconcerting. An unadorned synopsis of their respective positions, however, reveals the dramatic gap that separates the two sides. The majority's analysis would exempt the States from all suits by a citizen of that state or another state, absent the State's consent, except where the underlying statute contains a clear legislative statement of Congressional intent to abrogate the States' immunity, and Congress enacted the statute pursuant to the power granted in Section Five of the Fourteenth Amendment. Conversely, Justices Stevens' and Souter's dissenting opinions would only exempt the States from suits by citizens of another state when diversity of citizenship was the sole basis for subject matter jurisdiction.⁹⁰ In an era of expansive federal government, *Seminole* provides a strong measure of restraint in the name of "Our Federalism."⁹¹ However, in light of the Justices' diametrically opposed positions evident throughout this fractured opinion, all that can be assured is that *Seminole* has preserved Eleventh Amendment jurisprudence as doctrinally open for rich scholarly debate.

B. Ex parte Young After Seminole

In light of the Court's expansion of the Eleventh Amendment, the primary mechanism to circumvent sovereign immunity—via injunctive relief against a state officer—assumes ut-

⁹⁰ Of course, in either interpretation, the States would not be subject to "suit[s] by] ... Citizens or Subjects of any Foreign State" as included in the Eleventh Amendment. U.S. CONST. amend. XI.

⁹¹ See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (holding that federal courts cannot stay or enjoin pending state court criminal proceedings). *Younger* popularized the phrase "Our Federalism" in the jurisprudential vernacular. The Court defined it as

a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

most importance. It is therefore necessary to examine the rule in *Ex parte Young*⁹² and the *Seminole* spin.

A successful suit brought against a state official under *Ex parte Young* would enjoin the implementation of official state policy, thus creating what has been termed the "fiction" of *Ex parte Young*.

W[hen you] sue the government ... you must falsely pretend ... that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, the relief is against the sovereign.⁹³

Fiction or not, the jurisprudential magnitude of *Ex parte Young* cannot be overstated.⁹⁴ Professor Charles Wright has deemed it "indispensable to the establishment of constitutional government and the rule of law,"⁹⁵ and "one of the three most important decisions the Supreme Court of the United States has ever handed down."⁹⁶ It offers an "effective mechanism for providing relief against unconstitutional conduct by state officers and for testing, in the federal courts, the constitutionality of the state statutes under which they act."⁹⁷ One noted commentator

⁹² 209 U.S. 123 (1908).

⁹³ Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 435 (1962).

⁹⁴ Although considered the seminal decision, the Court previously considered these issues in cases leading up to *Ex parte Young*. In *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall determined that federal courts have jurisdiction as long as the State is not a named party on the record, however, relief might be denied if the official was only a nominal party. *Accord In re Ayers*, 123 U.S. 443 (1887) (holding that acts not constituting individual wrongs done by state officers, if something that only State, through its officers, could do, in substance provided basis for suit against State and therefore prohibited by the Eleventh Amendment).

⁹⁵ CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 312 (5th ed. 1994). Wright concedes, however, that *Ex parte Young* was, in fact, a fiction and seemed to be in conflict with earlier law. "It is only doubtfully in accord with the prior decisions. It was greeted with harsh criticism by the country when it was decided and for years thereafter." *Id.* at 311.

⁹⁶ WRIGHT, ET. AL., *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* 2d § 4231, at 559-60 (2d ed. 1988) (explaining that *Ex parte Young* established power of federal courts to "enforce the Constitution against state legislative and executive action"). [Editor's Note: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) are the other two cases.]

⁹⁷ See WRIGHT, *supra* note 96 at § 3524, at 154. The fiction of *Ex parte Young*

concluded that "without *Young*, federal courts often would be powerless to prevent state violations of the Constitution and federal laws."⁹⁸

1. A Review of *Ex parte Young*

In *Ex parte Young*,⁹⁹ the state of Minnesota passed multiple Acts substantially reducing the rates for railroad freight and passenger travel within the State, while providing severe penalties for violations.¹⁰⁰ The railroad companies' stockholders commenced suit in equity in federal court on the day before the Acts were to take effect, naming the State Railroad Commission and Edward T. Young, the attorney general of Minnesota, among others, as defendants.¹⁰¹ The suit alleged that the rate orders were deprivations of property without due process of law and equal protection of the laws, in violation of the Constitution and the amendments thereof.¹⁰² The circuit court of the United States for the district of Minnesota issued a temporary restraining order, followed by a preliminary injunction, preventing the railway company from publishing and reducing rates and restraining the attorney general from enforcing the Acts' remedies and penalties.¹⁰³

Young, in a motion to dismiss the court order, averred that the court had no jurisdiction over him as attorney general because the State of Minnesota did not consent to suit, and therefore the suit, which in actuality was a suit against the state, was barred by the Eleventh Amendment.¹⁰⁴ The motion was denied.¹⁰⁵ Young filed a petition for, and was granted, a writ of mandamus in state court commanding the railway company to immediately

has been applied to a wide variety of situations. See, e.g., *Gay Students Servs. v. Texas A & M Univ.*, 612 F.2d 160 (5th Cir.), *reh'g denied*, 620 F.2d 300 (5th Cir.), *cert. denied*, 449 U.S. 1034 (1980) (involving state instrumentalities).

⁹⁸ CHEMERINSKY, *supra* note 51, at 393.

⁹⁹ 209 U.S. 123 (1908).

¹⁰⁰ See *Ex parte Young*, 209 U.S. at 127, 148. According to the Act, any common carrier who violated the Act was guilty of a misdemeanor and would receive a fine of at least \$2500 for the first offense and no less than \$10,000 for a second offense. See *id.* People who could be punished under the Act included all railroad companies, their officers, agents, and representatives. See *id.* at 128.

¹⁰¹ See *id.* at 129. All of the defendants in the action, except the railway company, were citizens of the State of Minnesota. See *id.*

¹⁰² See *id.* at 130-31, 144-45.

¹⁰³ See *id.* at 132, 148-49.

¹⁰⁴ See *id.* at 132.

¹⁰⁵ See *id.*

publish and adopt the rates as scheduled in the Acts.¹⁰⁶ In response, the circuit court issued an order to show cause to Young for violating the injunction, and thereafter held him in contempt.¹⁰⁷ Young filed a writ of habeas corpus and certiorari to the Supreme Court.¹⁰⁸

The United States Supreme Court ruled against Young and held that the Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law.¹⁰⁹ The Court decided that the provisions of the Acts "relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."¹¹⁰

The Court proceeded to discuss whether an injunction may lie, and after reviewing previous precedents stated that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."¹¹¹ The named officer must have a duty to enforce the unconstitutional state law because "it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party."¹¹² The Court stressed that the named officer's connection with enforcement of the act, "is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists."¹¹³

As to whether the suit, alleging Fourteenth Amendment violations is, in effect, one against the state of Minnesota, not the Attorney General, and therefore in violation of the Eleventh

¹⁰⁶ See *id.* at 133-34.

¹⁰⁷ See *id.* at 134.

¹⁰⁸ See *id.* at 126.

¹⁰⁹ See *id.* at 155-56.

¹¹⁰ *Id.* at 148.

¹¹¹ *Id.* at 155-56.

¹¹² *Id.* at 157.

¹¹³ *Id.*

Amendment, Justice Peckham declared, in what has become an often quoted pronouncement:

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.¹¹⁴

Interestingly, in the Court's analysis, the Eleventh and Fourteenth Amendments interplay in equipoise.¹¹⁵ Ironically, *Seminole's* majority opinion takes the opposite stance, stating that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that [Section] 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment."¹¹⁶ This analysis in *Ex parte Young* presents a conundrum, for the Fourteenth Amendment requires a showing of state action, yet the attorney general's action was deemed the illegal act of a state official, not affecting the state in its sovereign or governmental capacity.¹¹⁷ Thus, if the officer acted on behalf of the state, the Eleventh Amendment bars suit,

¹¹⁴ *Id.* at 159-60.

¹¹⁵ *See id.* at 149. In addressing the effect of the Fourteenth Amendment on the Eleventh Amendment, the Court declared:

[A] decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.

Id. at 150.

¹¹⁶ *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1125, *cert. denied*, 116 S. Ct. 1416 (1996); *accord supra* text accompanying note 38.

¹¹⁷ *See supra* text accompanying note 114.

if the officer acted illegally, there is no state action and no constitutional violation.¹¹⁸ In addition, by allowing each amendment to stand alone, "state action" lost its signification, and is rendered polysemous.

Young's conundrum may have presented just another chapter of fiction, as the Court grappled with and resolved this issue. In *Barney v. City of New York*,¹¹⁹ four years before *Ex parte Young*, the Court decided that an action beyond the authority of the state officer, unauthorized by state law, did not satisfy state action for Fourteenth Amendment purposes.¹²⁰ However, the Court in *Home Telephone & Telegraph v. City of Los Angeles*,¹²¹ five years after *Ex parte Young*, determined that a state actor's action is state action for purposes of the Fourteenth Amendment notwithstanding the actor's violative conduct is outside the purview of Eleventh Amendment immunity.¹²² This has remained the rule to date.

The Court in *Young* highlighted that the power to enjoin a state official does not include the power to enjoin courts from proceeding in a case properly before it.¹²³ The petitioner also challenged the order because the statute empowered the attorney general in his discretion to attempt its enforcement or not, and therefore "the court cannot interfere to control him as attorney general in the exercise of his discretion."¹²⁴ The Court acknowledged that it could not control the exercise of the discretion of an officer, but because the injunction at issue restrained the officer from enforcing an unconstitutional legislative enactment, no affirmative action of any nature was directed.¹²⁵ "An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."¹²⁶ Addressing the fear of a flood of similar litigation, the Court imposed the restriction "that no injunction ought to be granted un-

¹¹⁸ See CHEMERINSKY, *supra* note 51, at 393.

¹¹⁹ 193 U.S. 430 (1904) (dismissing suit against city where Board acted outside scope of its authority in constricting railroad in proximity to plaintiff's residence).

¹²⁰ See *id.*

¹²¹ 227 U.S. 278 (1913) (reinstating complaint against state board that lowered telegraph rates, regardless of whether board's act was authorized).

¹²² See CHEMERINSKY, *supra* note 51, at 393.

¹²³ 209 U.S. at 163.

¹²⁴ *Id.* at 158.

¹²⁵ See *id.* at 159.

¹²⁶ *Id.*

less in a case reasonably free from doubt."¹²⁷

Justice Harlan, the sole dissenter, quickly spotted the apparent fiction, pronouncing:

the suit ... was, as to the defendant Young, one against him *as, and only because he was*, attorney general of Minnesota. No relief was sought against him individually, but only in his capacity *as* attorney general. And the ... object of seeking such relief was *to tie the hands* of the state so that it could not ... test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the 11th Amendment the suit brought in the Federal court was one, in legal effect, against the state,—as much so as if the state had been formally named on the record as a party,—and therefore it was a suit to which, under the Amendment, so far as the state or its attorney general was concerned, the judicial power of the United States did not and could not extend.¹²⁸

The years to follow provided the courts with numerous opportunities to refine and define the circumstances in which a suit against a state official will go forward.¹²⁹ Generally, the decisions have reaffirmed the application of *Ex parte Young*.¹³⁰

IV. SEMINOLE REJECTS APPLICATION OF *EX PARTE YOUNG*

In *Seminole*, Chief Justice Rehnquist, swift and terse, ruled out application of the doctrine of *Ex parte Young* to the Tribe's suit against Governor Chiles. The alleged violation of federal law was the Governor's failure to bring the State into compliance with IGRA, specifically, to negotiate in good faith with an Indian tribe toward the formation of a compact.¹³¹ However, the Court held that Congress provided a "carefully crafted and intricate remedial scheme"¹³² in 25 U.S.C. § 2710(d)(7), and "where Con-

¹²⁷ *Id.* at 166.

¹²⁸ *Id.* at 173-74 (emphasis in original).

¹²⁹ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (granting relief against state officials on basis of state law, whether prospective or retrospective did not fall within *Ex parte Young*); *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that Eleventh Amendment bars retroactive relief even though state official is named defendant). See generally 13 WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3524 (2d ed. 1984).

¹³⁰ See WRIGHT, *supra* note 129.

¹³¹ See 25 U.S.C. § 2710(d)(3).

¹³² *Seminole*, 116 S. Ct. at 1132. The intricate remedial scheme required: (1) a court finding the State failed to negotiate in good faith; (2) at which time the Court may only issue an order requiring the parties to conclude a compact within 60 days; (3) failure to do so only requires each side to submit a proposed compact to a media-

gress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.¹³³ The Court failed to explain how the remedial scheme would proceed absent court involvement, when in fact a federal court must find that a state failed to negotiate in good faith to initiate IGRA's regulatory scheme.¹³⁴ Allowing a suit directly against the Governor, the Court reasoned, would effectively render the statutory scheme superfluous.¹³⁵ Furthermore, the statutory language of IGRA does not manifest a clear Congressional intent to authorize suit against a state official.¹³⁶

Addressing the apparent incongruity of Congress intending to abrogate state sovereign immunity, yet without constitutional authority to do so, and Congress not intending to allow suit against a state officer, but having the authority to do so, the Court tartly concluded, "[n]or are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [25 U.S.C.] § 2710(d)(7) was beyond its authority."¹³⁷ The Chief Justice specifically repudiated Justice Souter's allegation,¹³⁸ noting, "we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young*

tor who will choose accordingly; and (4) if the State does not accept the mediator's decision, the Secretary of Interior will prescribe regulations. See 25 U.S.C. § 2710(d)(7)(A), (B).

¹³³ *Seminole*, 116 S. Ct. at 1132. Rehnquist's analysis is consistent with his prior "bitter sweet" jurisprudence. In *Arnett v. Kennedy*, Rehnquist asserted that the procedural right was tied to the substantive right, and therefore the courts should not read a procedural guarantee mandated by the Constitution into the explicit statutory language where some procedural safeguards were included. See *Arnett*, 416 U.S. 134, 153-54 (1974).

¹³⁴ See 25 U.S.C. § 2710(d)(7)(A).

¹³⁵ See *Seminole*, 116 S. Ct. at 1133. The Court reasoned that given a choice between the intricate scheme of relief under 25 U.S.C. § 2710(d)(7) and the full remedial powers of the federal courts under *Ex parte Young*, the obvious and natural choice would be to opt for the latter "more complete and more immediate relief." *Id.*

¹³⁶ See *id.* at 1133 n.17. The Court held that unlike particular statutes, which lower courts have found Congress implicitly authorized under *Ex parte Young*, the text of IGRA, taken as a whole, "repeatedly refers exclusively to 'the State.'" *Id.*

¹³⁷ *Id.* at 1133.

¹³⁸ Justice Souter responded that the statutory limitations apply whether the suit was brought against the State or a state officer, since "Congress has just as much authority to regulate suits when jurisdiction depends on *Young* as it has to regulate when *Young* is out of the jurisdictional picture." *Id.* at 1183; see *infra* note 157 and accompanying text.

over a cause of action with a limited remedial scheme."¹³⁹

A. Justice Souter Responds in Dissent

Justice Souter in dissent first suggests the rule of *Ex parte Young*, being historically rooted in our jurisprudence, "should not be easily displaced, if ... at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies."¹⁴⁰ For Justice Souter, the applicability of *Young* should be the baseline default position, rather than the majority's requirement of a clear showing of Congressional intent to allow suit to proceed against a state officer.¹⁴¹ Thus, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"¹⁴² Comparing *Seminole* to *Young* and its progeny, Justice Souter finds no meritorious distinction, for the relief requested is not retrospective,¹⁴³ and although *Young* involved a negative injunction—precluding official action—affirmative injunctions ordering an official to act have also been countenanced by this Court.¹⁴⁴

Justice Souter addressed *in seriatim* the majority's three reasons why the intricate procedures of IGRA displace the rule of *Ex parte Young*: [1] "[t]he procedures ... implicate a rule against judicial creativity in devising supplementary procedures; ... [2] applying *Young* would nullify the statutory procedures; ... [and] [3] the statutory provisions ... reveal a congressional intent to preclude the application of *Young*."¹⁴⁵ In support of the first rea-

¹³⁹ *Seminole*, 116 S. Ct. at 1133 n.17. Thus, the majority simply holds that although Congress could have authorized federal jurisdiction under *Ex parte Young*, such was not the case here with IGRA. *See id.*

¹⁴⁰ *Id.* at 1180.

¹⁴¹ *See id.* (noting that *Ex parte Young* and its doctrine "play[] a foundational role in American constitutionalism").

¹⁴² *Id.* at 1181 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

¹⁴³ *See Edelman v. Jordan*, 415 U.S. 651 (1974) (establishing that *Young* doctrine may not be used to allow suits for retrospective monetary awards). Justice Souter noted this limitation on the scope of the doctrine as being the only one recognized by the Court since *Young* was first decided. *See Seminole*, 116 S. Ct. at 1178. However, since the case involves prospective relief, this limitation is irrelevant. *See id.* at 1181.

¹⁴⁴ *See, e.g., Quern v. Jordan*, 440 U.S. 332 (1979) (requiring state officials to notify welfare beneficiaries of availability of past benefits); *Milliken v. Bradley*, 433 U.S. 267 (1977) (order requiring Michigan officials to pay money from state treasury to fund education plan).

¹⁴⁵ *Seminole*, 116 S. Ct. at 1181.

son Justice Rehnquist cites *Schweiker v. Chilicky*,¹⁴⁶ however Justice Souter readily distinguishes *Chilicky* as seeking a supplemental remedy, requiring an affirmative justification based upon a *Bivens*¹⁴⁷ model.¹⁴⁸ *Young* provides prospective enforcement of federal law, not retrospective monetary relief. Specifically, "*Young* would not function here to provide a merely supplementary regime of compensation to deter illegal action, but the sole jurisdictional basis for an Article III court's enforcement of a clear federal statutory obligation, without which a congressional act would be rendered a nullity in a federal court."¹⁴⁹

Conversely, *Bivens* detailed two situations in which causes of action for constitutional violations would not exist: (1) where there are "special factors counseling [sic] hesitation in the absence of affirmative action by Congress,"¹⁵⁰ and (2) if Congress specified an alternative mechanism providing an equally effective substitute.¹⁵¹ The language of *Bivens* contains its own exceptions,¹⁵² one of which accommodated *Chilicky*,¹⁵³ however, no

¹⁴⁶ 487 U.S. 412 (1988). Claimants whose social security disability benefits were terminated during disability reviews, but were later restored, brought action for money damages against the state official who administered social security disability benefits programs, alleging the terminations violated claimants' Fifth Amendment rights. The Supreme Court held that improper denial of disability benefits, allegedly resulting from due process violations in administration of continuing disability review programs, did not give rise to claims for money damages against government officials who administered program. The specific language relied upon was "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 423.

¹⁴⁷ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Court held that the petitioner whose Fourth Amendment rights were violated when he was subjected to illegal search and seizure by Federal Agents was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation." *Id.* at 397. Recognizing that the Fourth Amendment did not explicitly provide for money damages as a remedy for the consequences of its violation, the Court nevertheless held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

¹⁴⁸ See *Seminole*, 116 S. Ct. at 1181.

¹⁴⁹ *Id.* at 1182.

¹⁵⁰ *Bivens*, 403 U.S. at 396.

¹⁵¹ See *id.* at 397 (finding no Congressional mandate that injury from Fourth Amendment violation be remitted to another remedy).

¹⁵² *Id.* at 396-97.

¹⁵³ *Chilicky*, 487 U.S. at 412-13. The Court held that the first limitation of *Bivens* applied, determining that such "special factors" include statutory mechanisms which provide relief. *Id.*

analogy to *Ex parte Young* is apposite.

Secondly, the Court proffered that utilization of *Young* would allow litigants to ignore the "intricate procedures" of IGRA. *Young*, Justice Souter counters, does not establish a new cause of action, rather it provides a jurisdictional basis to proceed against the state officer.¹⁵⁴ The procedural intricacies of IGRA still have to be complied with, *Young* simply establishes the jurisdiction needed to challenge enforcement of those procedures. Souter offered in analogy the statutory restrictions of 28 U.S.C. § 2254(b) circumscribing habeas corpus petitions, in which case the restrictions apply, notwithstanding that *Young* effectively provides the jurisdictional basis.¹⁵⁵ Thirdly, the Court suggests that Congress intended that IGRA displace *Young*.¹⁵⁶ Justice Souter propounds the opposite conclusion.¹⁵⁷ Finally, Justice Souter refers to the time honored traditions of "read[ing] ambiguous statutes to avoid constitutional infirmity," and "choos[ing] any reasonable construction of a statute [rather than] ... confront a contested constitutional issue."¹⁵⁸ Implementation of either doctrine, he asserts, would require *Young's* application.¹⁵⁹

CONCLUSION

Surprisingly, the Court did not discuss the discretionary analysis that was critical to the Eleventh Circuit's decision and extensively relied upon in respondent's briefs to the Supreme Court.¹⁶⁰ Souter brings to light the all important fact that the

¹⁵⁴ See *Seminole*, 116 S. Ct. at 1182 ("It stands, instead, for a jurisdictional rule by which paramount federal law may be enforced in a federal court by substituting a nonimmune party (the state officer) for an immune one (the State itself).").

¹⁵⁵ See *id.* at 1182-83. Interestingly, the majority in *Ex parte Young* also analogized to the habeas corpus statute wherein a state prisoner can be discharged from custody via service of the writ on the state officer illustrating federal supremacy. *Ex parte Young*, 209 U.S. 198 (1908).

¹⁵⁶ See *Seminole*, 116 S. Ct. at 1183.

¹⁵⁷ Citing IGRA's jurisdictional provision: "[t]he United States district courts shall have jurisdiction over ... any cause of action ... arising from the failure of a State to enter into negotiations ... or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i). The State is clearly not the only possible defendant authorized by this statute. See *Seminole*, 116 S. Ct. at 1183.

¹⁵⁸ *Id.* at 1184; see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979).

¹⁵⁹ *Seminole*, 116 S. Ct. at 1184.

¹⁶⁰ See Brief for the Respondent, *Seminole*, 116 S. Ct. 1114 (1996) (No. 94-12), available in 1995 WL 271443.

doctrine of *Ex parte Young* provides the court jurisdiction and does not alter or foreclose IGRA's statutory remedies. The majority's *Young* analysis appears result driven. Allowing the Tribe to proceed against the Governor of Florida would have taken the bite out of the Court's Eleventh Amendment interpretation. Yet unlike the Court's Eleventh Amendment analysis, the opinion does little to change the applicability of *Ex parte Young*, and Congress can easily empower future legislation by creating a private right of action against state officials, notwithstanding a limited remedial scheme. Congress may be hindered in enforcing legislation directly against the states, however it is expected that individual rights will be preserved as the fiction of *Ex parte Young* will remain the blueprint to enjoin state officers acting in violation of the law.