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COMMENT

THE SOVEREIGN IMMUNITY "EXCEPTION"

Henry Paul Monaghan*

I. INTRODUCTION

*Seminole Tribe v. Florida*¹ is the 1995 Term's illustration of the importance that a narrow, but solid, five-Justice majority² of the Supreme Court attaches to the constitutional underpinnings of "Our Federalism."³ In *Seminole Tribe*, this majority declared that Congress lacks authority under its Article I, Section 8 regulatory powers to subject unconsenting states to suits initiated in federal court by private persons.⁴ The very same majority had previously made clear its intention to implement the original constitutional understanding of a national government of limited powers,⁵ especially when the national government attempted to "commandeer" state legislative and administrative processes.⁶ This aversion to federal commandeering of state organs of government⁷ moved the *Seminole Tribe* Court to build on its decision in *United States v. Lopez*⁸ and further curb Congress's Com-

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¹ 116 S. Ct. 1114 (1996).

² The majority consisted of the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas. It has broken ranks only once. In *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), Justice Kennedy provided the fifth vote for a holding that states could not impose term limits or any qualifications for congressional office other than those set forth in the Constitution. See *id.* at 1852-66, 1872-75; see also Kathleen M. Sullivan, *The Supreme Court, 1994 Term — Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 78-81 (1995) (arguing that both the majority and the dissent in *Thornton* resorted to structural default rules regarding the balance of power between the states and the federal government because such rules act as a needed tiebreaker between an ambiguous text and history).

³ *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (explaining that the concept of "Our Federalism" represents a system in which the national government seeks to vindicate and protect federal rights and interests in ways that do "not unduly interfere with the legitimate activities of the States").

⁴ See *Seminole Tribe*, 116 S. Ct. at 1122, 1128 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

⁵ See *United States v. Lopez*, 115 S. Ct. 1624, 1626, 1634 (1995).

⁶ See *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)) (internal quotation marks omitted).

⁷ Again, the same majority assembled in *Seminole Tribe* as in *New York* (although this time minus Justice Souter) and those Justices were understandably concerned with Congress's direction to a state governor "to bargain in good faith." See *infra* p. 109.

⁸ See *Lopez*, 115 S. Ct. at 1630-33 (holding that the Gun-Free School Zones Act, which prohibited possession of a gun in a school zone, exceeded Congress's Commerce Clause authority because the proscribed activity did not substantially affect interstate commerce).

merce Clause power⁹ — this time by withdrawing federal court remedial avenues for enforcement of a federal right against an unconsenting state.¹⁰

This Comment argues that, although *Seminole Tribe* inflates the rhetoric of “inherent state sovereignty,” the majority in fact left firmly in place the fundamental reality of state accountability in federal court for violation of federal law. After a brief overview of Eleventh Amendment doctrine and a review of the statute involved and the opinions in the case, this Comment presents other, more plausible rationales that the Court could have followed in *Seminole Tribe* and that could have led to either affirming or reversing the court of appeals. Next, the Comment outlines why I believe that the Court chose to forgo these admittedly easier possible avenues and instead based its decision on “background postulates” of state sovereign immunity from federal court suit. Essentially, I argue that *Seminole Tribe* reflects the Court’s desire to confront the federal-state relation question directly and to make a statement about state autonomy. Finally, I argue that, despite this symbolic statement to the contrary, little has changed after the *Seminole Tribe* decision because the rule of *Ex parte Young*¹¹ remains in full force. In suits for prospective relief, states are still accountable in federal court — through their officers — for the violation of federal law. In that sense, sovereign immunity has become a rare exception to the otherwise prevailing system of state governmental accountability in federal court for violations of federal law, an exception that many, including this author, find difficult to justify.

II. SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

The origin and development of the doctrine of state sovereign immunity have been presented many times.¹² It seems more helpful here to survey briefly the peaks and valleys of the legal landscape when *Seminole Tribe* reached the Eleventh Circuit and the Supreme Court.

⁹ Although *Seminole Tribe* arose under the Indian Commerce Clause, rather than the Interstate Commerce Clause, its effects clearly apply to both because it overruled *Union Gas*.

¹⁰ See *Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting) (noting that the majority’s decision not only precluded a federal remedy for the statute at issue, but also prevented Congress from providing a federal forum in a broad range of actions against the states). But see *Seminole Tribe*, 116 S. Ct. at 1131 nn.14 & 16 (pointing to three alternative methods of ensuring the states’ compliance with federal law).

¹¹ 209 U.S. 123 (1908).

¹² There seem to be nearly as many accounts as there are legal historians. For an excellent survey of the entire subject, including the relevant literature, see RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994–1105 (4th ed. 1996) [hereinafter HART & WECHSLER], and RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 16–50 (Supp. 1996) [hereinafter HART & WECHSLER SUPPLEMENT].

A. The Text of the Eleventh Amendment

The Eleventh Amendment provides: "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."¹³ On its face, the amendment says nothing about sovereign immunity at all. In essence, it reads as a restriction on Article III's grant of jurisdiction to the federal courts.¹⁴ Some have read this restriction to foreclose all Article III jurisdiction if a citizen of another state sues a state, even if the suit is prosecuted under federal rather than state law. Others take a "diversity" view: the amendment simply repeals pro tanto one of the original grants of diversity jurisdiction.¹⁵ For them, the amendment is simply a limitation on party-based (state/noncitizen, state/alien) federal jurisdiction under Article III.¹⁶ Under neither interpretation does the text support the notion that a state cannot be sued by *its own citizens* in federal court.

B. Hans v. Louisiana

*Hans v. Louisiana*¹⁷ held that a private person could not assert federal rights against a state *eo nomine* in the federal court without its consent — even if the plaintiff wished to sue his own state.¹⁸ Depend-

¹³ U.S. CONST. amend. XI.

¹⁴ See U.S. CONST. art. III, § 2.

¹⁵ See, e.g., David L. Shapiro, *The Supreme Court, 1983 Term — Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 67 (1984); see also *Seminole Tribe*, 116 S. Ct. at 1150 n.8 (Souter, J., dissenting) (endorsing the "diversity" view); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 286 (1985) (Brennan, J., dissenting) ("Those who have argued that the Eleventh Amendment was intended to constitutionalize a broad principle of state sovereign immunity have always elided the question of why Congress would have chosen the language of the Amendment as enacted to state such a broad principle."). See generally HART & WECHSLER, *supra* note 12, at 1052–55 (discussing the "diversity" interpretation of the Eleventh Amendment as reflected in *Atascadero* and *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987)).

¹⁶ The origins of this approach extend back to *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). After holding that the Eleventh Amendment did not bar appellate jurisdiction over the case before it, the Court stated that should the Court "be mistaken [in this], the error does not affect the case" because the action, involving Virginians suing their *own* state, was outside the scope of the Amendment. *Id.* at 412. *Hans v. Louisiana*, 134 U.S. 1 (1890), rejected this analysis as dicta. See *id.* at 20.

¹⁷ 134 U.S. 1 (1890).

¹⁸ See *id.* at 15. The *Hans* doctrine, however, does not bar the Supreme Court's appellate jurisdiction over suits initiated in state courts, a rule that has its origin in *Cohens*, see 19 U.S. at 405–11. In fact, even prior to *Cohens*, the Court had exercised appellate jurisdiction in controversies between private persons and states, most notably in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For an excellent discussion of the interaction between the Supreme Court's appellate jurisdiction and the Eleventh Amendment, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 13–29 (1988). The Court reaffirmed *Cohens* in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 48 (1990): "The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from the state courts." *Id.* at 31.

ing upon one's understanding of history, *Hans* either created or revived the doctrine of state sovereign immunity.

In *Hans*, a state citizen sued under the district court's then recently conferred federal question jurisdiction based upon the state's failure to pay bond interest. The claim was that a state constitutional amendment barring interest payments on its bonds violated the Contracts Clause.¹⁹ The Court concluded that the Eleventh Amendment precluded suits by in-state plaintiffs, quoting Hamilton's well known remarks in *The Federalist No. 81*:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. 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 States²⁰

The *Hans* Court acknowledged that the Eleventh Amendment was not literally applicable.²¹ But the Court treated the amendment as expressing a general understanding that the majority in *Chisholm v. Georgia*²² (another bondholder suit, albeit one based on the state law of assumpsit) had wrongly failed to recognize state sovereign immunity.²³ "This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court [in *Chisholm*]."²⁴

In fact, the real force of the *Hans* Court's analysis rested upon a controversial reading of the Eleventh Amendment: in the Court's terms, the amendment barred federal court suits by noncitizens even when suing on federal rights.²⁵ On that premise, the Court concluded that it

¹⁹ See U.S. CONST. art. I, § 10, cl. 1. The *Hans* Court seemed to assume that (in modern terms) the clause created an implied right of action.

²⁰ *Hans*, 134 U.S. at 13 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)). Hamilton was speaking specifically of a narrow but important concern: debt collection suits. He argued that by adoption of the Constitution, states would not be "divested of the privilege of paying their own debts in their own way." THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although it has acknowledged the crucial role of fiscal concerns in the passage of the Eleventh Amendment, the Supreme Court has noted that the amendment also "emphasizes the integrity retained by each State in our federal system." *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 400 (1994).

²¹ See *Hans*, 134 U.S. at 10.

²² 2 U.S. (2 Dall.) 419 (1793).

²³ Like *Hans*, *Chisholm* was a suit against a state by a private person based upon a state default on its bond obligations. Unlike *Hans*, however, the suit was based entirely on state common law; no Contracts Clause claim was discussed. See *id.* at 420, 428; Hart & Wechsler, *supra* note 12, at 1047.

²⁴ *Hans*, 134 U.S. at 11.

²⁵ See *id.* at 10-11. The *Hans* Court noted that it had been "clearly established" in other cases that suits by noncitizens against a state were barred, even if they involved a federal question, *id.* at 10, but the Court in those cases may have been assuming that no constitutional Contracts Clause claim was being made. See HART & WECHSLER, *supra* note 12, at 1055 n.22.

would be anomalous ever to allow a state to be sued by its own citizens in federal court:

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 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.²⁶

For the commentators urging a diversity view, however, any independent doctrine of sovereign immunity exists only as a matter of federal "constitutional" common law, which the courts may enforce only absent contrary direction by Congress.²⁷ Under this conception, *Hans* is downgraded to a default, "clear-statement rule" — a federal common law rule operative only until Congress clearly abrogates it.²⁸ Yet this interpretation of *Hans* seems quite strained.²⁹ The decision contains no suggestion that Congress could have altered the result by being clear about its intention to do so.³⁰

C. *The Scope of Congressional Abrogation of State Immunity*

Nonetheless, the Court has recognized at least one area in which Congress can override state sovereign immunity in federal court. In *Fitzpatrick v. Bitzer*,³¹ the Court established that Congress could abrogate state sovereign immunity when implementing the enforcement

²⁶ *Hans*, 134 U.S. at 15.

²⁷ See Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–30 (1975).

²⁸ HART & WECHSLER SUPPLEMENT, *supra* note 12, at 43; cf. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989) (opinion of Brennan, J.) (warning against an exaggerated reading of *Hans*), *overruled by Seminole Tribe*, 116 S. Ct. 1114 (1996). Justices Stevens and Souter appealed to this theory in their *Seminole Tribe* dissents. They argued that *Hans* dealt only with a constitutionally implied cause of action based on the Contracts Clause, and therefore never addressed the question of Congress's power to abrogate immunity; as a result, there was no constitutional barrier to congressional abrogation. See *Seminole Tribe*, 116 S. Ct. at 1137–39 (Stevens, J., dissenting); *id.* at 1153 (Souter, J., dissenting).

²⁹ "*Hans* was not expressing some narrow objection to the particular federal power by which Louisiana had been haled into court, but was rather enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their sovereign prerogative of immunity." *Union Gas*, 491 U.S. at 37 (Scalia, J., concurring in part and dissenting in part).

³⁰ "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States The suability of a State without its consent was a thing unknown to the law." *Hans*, 134 U.S. at 15–16. Only after its constitutional discussion did the *Hans* Court also note that Congress "did not intend to invest its courts with any new and strange jurisdiction." *Id.* at 18.

³¹ 427 U.S. 445 (1976).

provisions of Section 5 of the Fourteenth Amendment.³² In an opinion by then-Justice Rehnquist, the Court stated: "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."³³ Given the history of states' discrimination against minorities, the Court correctly viewed a federal forum — and Congress's ability to provide one — as part and parcel of congressional remedial authority under Section 5 of the Fourteenth Amendment.

*Pennsylvania v. Union Gas Co.*³⁴ is the only other decision directly recognizing congressional power to abrogate a state's Eleventh Amendment immunity in suits by private parties, this time under the Interstate Commerce Clause.³⁵ The *Union Gas* plurality opinion produced considerable confusion, however, because Justice Brennan advanced justifications that pointed in quite different directions. The plurality noted that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."³⁶ Justice Brennan insisted that "the congressional power thus conferred would be incomplete without the authority to render States liable in damages."³⁷ The states had, therefore, necessarily surrendered a degree of their sovereign immunity in 1789 as part of the constitutional plan.³⁸ Seemingly, this explanation would apply to all exercises of congressional regulatory authority under Article I, Section 8. However, Justice Brennan also said that "[i]t would be difficult to overstate the breadth and depth of the com-

³² See U.S. CONST. amend. XIV, § 5.

³³ *Fitzpatrick*, 427 U.S. at 456. This reasoning was reiterated in *Seminole Tribe*. See *Seminole Tribe*, 116 S. Ct. at 1125. Although this rationale would apply to legislation based upon all amendments framed as limitations on state authority, it might be inapplicable to congressional legislation enforcing the Thirteenth Amendment. That amendment does not solely "embody limitations on state authority"; it applies to the federal government and private persons as well. See U.S. CONST. amend. XIII, § 1.

³⁴ 491 U.S. 1 (1989). Writing for the *Union Gas* plurality, Justice Brennan built upon his dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which he had advanced his view that the amendment was wholly inapplicable to litigants asserting a federal right: [The Eleventh Amendment was adopted simply] to remedy an interpretation of the constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the *state law* of sovereign immunity on *state law* causes of action brought in federal courts The original constitution did not embody a principle of sovereign immunity as a limit on the federal power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.

Id. at 289 (emphasis added).

³⁵ See *Union Gas*, 491 U.S. at 19–20 (opinion of Brennan, J.).

³⁶ *Id.* at 16.

³⁷ *Id.* at 19.

³⁸ See *id.* at 19–20. For Justice Brennan, Article III did not constitutionalize state immunity, the Eleventh Amendment did not reinstate it, and Article I powers were layered over common law state sovereign immunity such that immunity could be abrogated.

merce power,"³⁹ suggesting that congressional power over interstate commerce was unique. Justice White's enigmatic concurrence provided the necessary fifth vote.⁴⁰ Although he agreed with the result, he added, without explanation, that he did "not agree with much of [Justice Brennan's] reasoning."⁴¹ Largely relying on *Hans*, four Justices dissented, in an opinion authored by Justice Scalia.⁴²

III. IGRA

Seminole Tribe concerned the Indian Gaming Regulatory Act ("IGRA").⁴³ IGRA stems from the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*,⁴⁴ which held that various federal enactments did not authorize enforcement of state legislation regulating Indian tribes' operation of bingo and poker games on their reservations.⁴⁵ The Court found the state legislation to be "civil/regulatory," as opposed to "criminal/prohibitory,"⁴⁶ and only the latter category of legislation fell within the federal statute's jurisdictional grant.⁴⁷ *Cabazon* created a regulatory vacuum, because "existing Federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands."⁴⁸ After considerable debate concerning the appropriate state role in the regulation of gambling on Indian reservations, Congress enacted IGRA. The primary legislative purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."⁴⁹ The Act defines classes of Indian gaming,⁵⁰ establishes the National Indian Gaming Commission to monitor and regulate some forms of Indian

³⁹ *Id.* at 20.

⁴⁰ *See id.* at 45 (White, J., concurring in part and dissenting in part).

⁴¹ *Id.* at 57. "Doesn't a Justice who casts the deciding vote have some obligation to provide an explanation that is intelligible to the legal community?" HART & WECHSLER, *supra* note 12, at 1102.

⁴² *See Union Gas*, 491 U.S. at 29 (Scalia, J., concurring in part and dissenting in part). Justice Scalia was joined by the Chief Justice and Justices O'Connor and Kennedy.

⁴³ Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (1994)).

⁴⁴ 480 U.S. 202 (1987).

⁴⁵ *See id.* at 221-22.

⁴⁶ *Id.* at 209.

⁴⁷ *See id.* at 207-11.

⁴⁸ 25 U.S.C. § 2701(3) (1994).

⁴⁹ *Id.* § 2702(1). The Act also aimed to shield Indian gambling from the influence of organized crime "and other corrupting influences," to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to ensure that gaming "is conducted fairly and honestly by both the operators and players." *Id.* § 2702(2). Nonetheless, IGRA had an unanticipated by-product: it spurred gambling. One letter to the editor of the *New York Times* stated that IGRA "has backfired." Nicholas Goldin, *Tribal Casinos Catalyzed Gambling's Spread*, N.Y. TIMES, June 10, 1996, at A16 (letter to the editor) ("It is unlikely that Congress anticipated such a profound social and economic fallout from its decision to encourage tribal gambling.").

⁵⁰ *See* 25 U.S.C. § 2703(6)-(8).

gaming,⁵¹ and provides a tribal-state "compacting" procedure through which states may participate in the regulation of Indian gaming.⁵²

IGRA divides Indian gaming into three "classes,"⁵³ the most important of which is class III.⁵⁴ Class III gaming includes house banking games like baccarat, chemin de fer, and blackjack, casino games like roulette, craps, slot machines, horse and dog racing, and lotteries.⁵⁵ So far as pertinent here, class III gaming activities are lawful on Indian lands if those activities are authorized (1) by an ordinance or resolution that is adopted by the governing body of the Indian tribe, (2) located in a state that permits such gaming, and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."⁵⁶

For class III gaming, IGRA prescribes a negotiating process. Upon receiving a request to form a tribal-state compact, a state "shall negotiate with the Indian tribe in good faith to enter into such a compact."⁵⁷ However, to ensure that no covered state could preclude or unreasonably delay lawful Indian gaming, IGRA provides tribes with a remedy in the federal courts if no mutually satisfactory compact is achieved. IGRA states specifically:

[T]he United States district courts shall have jurisdiction over —

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] . . . or to conduct such negotiations in good faith⁵⁸

After a tribe has introduced evidence that no tribal-state compact has been concluded and that the state did not respond to the tribe's request to negotiate, or did not respond in good faith, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith."⁵⁹ The district court may take into account factors

⁵¹ See *id.* §§ 2704–2709.

⁵² See *id.* § 2710(d).

⁵³ Class I gaming, which is governed and regulated solely by individual Indian tribes, see *id.* § 2710(a)(1), includes little more than "social games solely for prizes of minimal value." *Id.* § 2703(6). Class II gaming, which is subject to certain federal regulations, see *id.* § 2710(b), includes bingo and comparable games, see *id.* § 2703(7)(A)(i), as well as non-banking card games where allowed by state law, see *id.* §§ 2703(7)(A)(ii)(I)–(II), 2703(7)(B).

⁵⁴ Class III includes "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8).

⁵⁵ See *id.*; 25 C.F.R. § 502.4 (1996).

⁵⁶ 25 U.S.C. § 2710(d)(1)(A)–(C). Certain additional minor requirements also apply. See *Seminole Tribe*, 116 S. Ct. at 1120.

⁵⁷ 25 U.S.C. § 2710(d)(3)(A). The Secretary of the Interior is authorized to approve any tribal-state compact resulting from a successful negotiation process. See *id.* § 2710(d)(8)(A). The Secretary may disapprove such a compact only if the compact violates any provision of IGRA, another federal law, or any trust obligations of the United States to Indians. See *id.* § 2710(d)(8)(B)(i)–(iii). The Secretary must publish notice of any approved tribal-state compact in the Federal Register. See *id.* § 2710(d)(8)(D).

⁵⁸ *Id.* § 2710(d)(7)(A)(i).

⁵⁹ *Id.* § 2710(d)(7)(B)(ii).

such as “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.”⁶⁰

The district court’s role is unusual. If the court concludes that a state failed to negotiate in good faith, the court “shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.”⁶¹ If they fail to do so, each party must submit to a court-appointed mediator a proposed compact containing its “last best offer.”⁶² At this point, the district court’s role apparently comes to an end.

The mediator selects the compact that “best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court.”⁶³ Once the mediator has submitted the selected compact to the state and the tribe, the state has sixty days within which to consent to that compact.⁶⁴ If the state does consent, the compact is treated as a tribal-state compact entered into by agreement.⁶⁵ If the state does not consent, “the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures”⁶⁶ for the class III gaming “which are consistent with the proposed compact selected by the mediator, . . . the provisions of [IGRA], and the relevant provisions of the laws of the State.”⁶⁷

IV. THE DECISION

After negotiations had broken down between Florida officials and the Seminole tribe — largely over the question of which types of gam-

⁶⁰ *Id.* § 2710(d)(7)(B)(iii)(I). A state’s demand for taxing authority over the tribe or Indian land, however, is evidence of a failure to negotiate in good faith. *See id.* § 2710(d)(7)(B)(iii)(II).

⁶¹ *Id.* § 2710(d)(7)(B)(iii). The National Labor Relations Act, of course, requires good faith in employment bargaining. *See* 29 U.S.C. § 160(e) (1994); *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2120–21 (1996). The relevance of labor law precedents would have had to be considered in this context. Interestingly, by the time the Supreme Court issued its opinion in *Seminole Tribe*, the district court had found that the Governor had bargained in good faith. *See Seminole Tribe*, 116 S. Ct. at 1122 n.6.

⁶² 25 U.S.C. § 2710(d)(7)(B)(iv).

⁶³ *Id.*

⁶⁴ *See id.* § 2710(d)(7)(B)(v)–(vii).

⁶⁵ *See id.* § 2710(d)(7)(B)(vi).

⁶⁶ *Id.* § 2710(d)(7)(B)(vii).

⁶⁷ *Id.* § 2710(d)(7)(B)(vii)(D). In his dissent, Justice Stevens suggested that the limited role of the federal courts authorized by IGRA was jurisdictionally vulnerable because of the role subsequently played by the Executive Branch. *See Seminole Tribe*, 116 S. Ct. at 1144–45 (Stevens, J., dissenting) (citing 25 U.S.C. § 2710(d)(7)(B)) (“[I]f the District Court determines that the State’s inflexibility constitutes a failure to negotiate in good faith, . . . the maximum sanction that the Court can impose is an order that refers the controversy to a member of the Executive Branch of the Government for resolution.”). This concern is unfounded. The Executive Branch cannot revise a court’s order or determinations. *See* HART & WECHSLER, *supra* note 12, at 104–06; *see also* Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2022–24 (1996) (discussing the history of the rule against executive revision of judicial decisions). *See generally* HART & WECHSLER, *supra* note 12, at 104–15 (collecting cases on finality of judicial decisions).

bling were permitted under Florida state law⁶⁸ — the tribe sued the state and its Governor. The defendants secured interlocutory review of the district court's denial of their motion to dismiss.⁶⁹

In the Court of Appeals for the Eleventh Circuit, the tribe advanced several arguments about why the suit against Florida could be maintained, each of which was rejected in an opinion by Chief Judge Tjoflat.⁷⁰ The court first rejected the tribe's claims that Florida had consented to suit by adopting its own constitution, by ratifying the United States Constitution, and by participating in IGRA negotiations.⁷¹ The court then turned to the decisive issue: congressional power to abrogate state sovereign immunity under the Indian Commerce Clause. After rejecting several "preliminary" arguments,⁷² the court of appeals addressed *Union Gas*.⁷³ Openly dubious of the plurality opinion in *Union Gas*,⁷⁴ and recognizing that "a majority of the present Court [might] disagree with *Union Gas*,"⁷⁵ the court of appeals confined the scope of *Union Gas* to the Interstate Commerce Clause.⁷⁶

⁶⁸ See Brief of Respondents at 3-4, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Seminole Tribe* (No. 94-12).

⁶⁹ See *Seminole Tribe*, 116 S. Ct. at 1121.

⁷⁰ See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1022-29 (11th Cir. 1994).

⁷¹ See *id.* at 1021-23.

⁷² The tribe first claimed that IGRA had been enacted pursuant to the Fourteenth Amendment, because Congress had in effect set up a licensing system, such that the tribal license constituted both "liberty" and "property" within the meaning of the Fourteenth Amendment. See *id.* at 1025. But this argument "ignore[d] the discretionary nature of the compacting process envisioned by IGRA . . . [which] does not create an entitlement to operate gambling operations" that the Fourteenth Amendment would protect. *Id.* The court of appeals next rejected the tribe's claim that the statute was based not on the Indian Commerce Clause, but on the Interstate Commerce Clause itself, thereby bringing *Union Gas* directly into play. See *id.* at 1025-26. The court of appeals observed that although concerns about the role of organized crime were expressed in the statute, its aim was not to remove a burden on interstate commerce, but to ensure that Indian tribes benefited from the legislation. See *id.* at 1026.

⁷³ See *id.* at 1026.

⁷⁴ See *id.* at 1026-27 & n.12.

⁷⁵ *Id.* at 1027.

⁷⁶ See *id.* According to the court of appeals, this conclusion was "bolstered by the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause." *Id.* The court of appeals relied upon the reasoning in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), in which the Supreme Court stated that the two clauses "have very different applications." *Seminole Tribe*, 11 F.3d at 1027 (quoting *Cotton Petroleum*, 490 U.S. at 192) (internal quotation marks omitted). The purpose of the Interstate Commerce Clause was to promote free trade among the states, whereas the "central function" of the Indian Commerce Clause was "to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (quoting *Cotton Petroleum*, 490 U.S. at 192) (internal quotation marks omitted). The court of appeals also read *Union Gas* narrowly, granting "federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* This claim finds no support in the Supreme Court's previous decisions, as both the tribe and the United States pointed out in their briefs. See Brief for Petitioner at 21-23, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 29-30, *Seminole Tribe* (No. 94-12).

With *Union Gas* out of the way, the court of appeals assumed that state sovereign immunity followed as a matter of course.⁷⁷

A. *Rejecting Union Gas*

The Supreme Court affirmed, in an opinion by the Chief Justice.⁷⁸ For the majority, *Seminole Tribe* was simply a replay of *Union Gas*, which in turn was a judicial aberration that had to be overruled.⁷⁹ In order to reach the constitutional question, however, the Court had to address the preliminary issue of Congress's "clear intent" to abrogate.⁸⁰ Although the Court adhered to its requirement that Congress make its intention to abrogate state immunity "unmistakably clear in the language of the statute,"⁸¹ the Court did not require Congress to refer explicitly to the Eleventh Amendment in the statute. Instead, the Court found that "the numerous references to the 'State' in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through IGRA to abrogate the States' sovereign immunity from suit."⁸²

The Court was then ready to address head on the constitutional issue of Congress's power to abrogate state immunity. The Court first stated that it had found that private parties could summon unconsenting states to federal court under only two provisions of the Constitution⁸³ and that only the *Union Gas* Commerce Clause exception was implicated here. Both the tribe and the United States had sought to avoid substantial reliance upon *Union Gas*, apparently fearing that it might fail to command support. They had argued instead that the Indian Commerce Clause provides a firm basis for congressional au-

⁷⁷ See *Seminole Tribe*, 11 F.3d at 1028.

⁷⁸ See *Seminole Tribe*, 116 S. Ct. at 1133.

⁷⁹ "In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law." *Id.* at 1128.

⁸⁰ The majority also noted at the outset that, in a suit brought directly against a state, any difference in the type of relief sought — an important distinction when state officials are sued, see *Edelman v. Jordan*, 415 U.S. 651, 663–71 (1974) — was irrelevant when the question was whether the Eleventh Amendment barred a suit that named the state. See *Seminole Tribe*, 116 S. Ct. at 1124. This doctrine defies explanation, even though it is surely supported by the Court's case law. See *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (holding that the Eleventh Amendment barred the district court's injunction against the state and the Board of Corrections absent Alabama's consent to the filing of such a suit). Why principles that govern suits against state officials — which largely turn on the nature of the relief sought — are irrelevant simply because the state (rather than its official) appears on the caption of the complaint is not apparent. See HART & WECHSLER, *supra* note 12, at 1073 (questioning the justification for making federal court jurisdiction depend on whether the state or a state officer is the named defendant). The majority instructed us, however, that this result was necessary "to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 116 S. Ct. at 1124 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

⁸¹ *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted).

⁸² *Seminole Tribe*, 116 S. Ct. at 1124.

⁸³ See *id.* at 1125 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989) (opinion of Brennan, J.)).

thority. They had emphasized that congressional authority over Indian affairs is plenary; that, unlike the tepid restrictions of the dormant commerce clause, the Constitution leaves little room for any independent operation of state law on tribal reservations; and finally, and perhaps most importantly, that the United States has special responsibilities to the Indian tribes.⁸⁴ Their efforts to break free from the chains of *Union Gas* failed. After rather laconically addressing some of the arguments advanced,⁸⁵ the majority concluded that, for Eleventh Amendment purposes, "no principled distinction [can be] drawn between the Indian Commerce Clause and the Interstate Commerce Clause."⁸⁶

That conclusion was the prelude to *Union Gas*'s demise. Even though the principal dissent of Justice Souter disclaimed any reliance on *Union Gas* because of its lack of an authoritative opinion⁸⁷ (and, perhaps more importantly, because the dissent's reasoning differed considerably from that employed by the *Union Gas* plurality⁸⁸), the majority went out of its way to reject *Union Gas*.⁸⁹ The majority acknowledged, as the dissents insisted, that the text of the Eleventh Amendment itself did not literally apply,⁹⁰ but the majority emphasized that "[b]ehind the words of the constitutional provisions are postulates which limit and control."⁹¹ The Eleventh Amendment simply confirmed a "background principle" of state sovereign immunity in existence at the time of the framing of the Constitution, a principle that Congress cannot abrogate.⁹²

The Court then held that there was also no available remedy for the tribe against the Governor under IGRA:

⁸⁴ See Brief for Petitioner at 12-23, 31-36, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 22-30, *Seminole Tribe* (No. 94-12).

⁸⁵ See *Seminole Tribe*, 116 S. Ct. at 1126.

⁸⁶ *Id.* at 1127.

⁸⁷ See *id.* at 1145 (Souter, J., dissenting).

⁸⁸ Compare *id.* at 1145-85 (focusing on federal question jurisdiction in the Eleventh Amendment context), with *Union Gas*, 491 U.S. at 13-23 (focusing on the Interstate Commerce Clause as abrogating the immunity of states).

⁸⁹ The majority noted that the *Union Gas* plurality "reached [its] result without an expressed rationale agreed upon by a majority of the Court," *Seminole Tribe*, 116 S. Ct. at 1127; the decision "created confusion among the lower courts that have sought to understand and apply the deeply fractured decision," *id.*; and the plurality's rationale "deviated sharply from [the Court's] established federalism jurisprudence and essentially eviscerated our decision in *Hans*" by converting it into no more than a clear statement requirement, *id.* The Court added that the effect of *Union Gas* was to allow Congress to expand the jurisdiction of the lower federal courts beyond what was permitted by Article III (the limited Fourteenth Amendment exception notwithstanding). See *id.* at 1127-28. Finally, the Court noted that Justice Souter's dissent made no effort to defend the decision in *Union Gas*. See *id.* at 1128.

⁹⁰ See *id.* at 1122, 1129.

⁹¹ *Id.* at 1129 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)) (internal quotation marks omitted).

⁹² *Id.* at 1131.

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary . . . Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies . . .⁹³

Finding that Congress had not created a claim for relief against state officials, and refusing to imply one on its own, the Court found that the district court lacked jurisdiction to provide the relief that the tribe sought.⁹⁴

B. The Dissents

Justice Stevens's dissent reiterated the essentials of Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon*.⁹⁵ Much of Justice Stevens's dissent consisted of meticulous analyses of Justice Iredell's opinion in *Chisholm v. Georgia* and of the majority opinion in *Hans v. Louisiana*, through which he sought to show that neither opinion had erected a constitutional foundation for sovereign immunity.⁹⁶ Justice Stevens insisted that the Court's "fundamental error" was "its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity 'has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.'"⁹⁷ Although he suggested that, as a matter of stare decisis, he would adhere to a judge-made federal common law doctrine of sovereign immunity,⁹⁸ that common law doctrine could not bar Congress from abrogating state immunity when it clearly expressed its intention to do so.⁹⁹

Joined by Justices Ginsburg and Breyer, Justice Souter wrote a thorough dissent.¹⁰⁰ After disclaiming any reliance upon *Union*

⁹³ *Id.* at 1132.

⁹⁴ *See id.*

⁹⁵ 473 U.S. 234 (1985). Although Justice Stevens had joined the *Atascadero* dissent, he acknowledged that reasonable people could conclude that the text of the Eleventh Amendment might bar even federal question actions brought against a state by noncitizens. *See Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting).

⁹⁶ *See Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting); *see also id.* at 1136 ("There is a special irony in the fact that the error committed by the *Chisholm* majority was its decision that this Court, rather than Congress, should define the scope of the sovereign immunity defense."). Justice Stevens also insisted that "*Monaco* is a most inapt precedent for the majority's holding today," *id.* at 1139, because that "case concerned a purely state law question to which the State had interposed a federal defense," *id.*

⁹⁷ *Id.* at 1142 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25 (1989) (Stevens, J., concurring)).

⁹⁸ *See id.* at 1142-44.

⁹⁹ *See id.* at 1144.

¹⁰⁰ Justice Souter's dissent, which was both exhaustive and exhausting, surveyed materials that no litigant had called to the Court's attention. *See id.* at 1145-85 (Souter, J., dissenting).

Gas,¹⁰¹ Justice Souter silently rejected the plurality's reasoning in that case and instead endorsed a version of the *Atascadero* dissent.¹⁰² In a bold move, he attacked *Hans* directly,¹⁰³ employing a lengthy analysis of the historical origins of sovereign immunity, numerous citations to commentators' analyses of the reception of the English common law into the United States, and a discussion of the nature of "We the People" who founded the Constitution.¹⁰⁴ Justice Souter concluded that the Eleventh Amendment bars litigation based on the status of the parties only — and only when they are suing on non-federal claims. The amendment, he argued, has no applicability to Article III federal question jurisdiction.¹⁰⁵ Like Justice Stevens, Justice Souter concluded that *Hans* could be preserved as a matter of *stare decisis*¹⁰⁶ but that it had no applicability when Congress clearly intended to abrogate state immunity.¹⁰⁷

Justice Souter further argued that, even if the Eleventh Amendment shielded the state from suit, the doctrine of *Ex parte Young*¹⁰⁸ should provide relief for the tribe against the state Governor. Emphasizing the jurisdictional — rather than remedial — nature of the *Young* rule,¹⁰⁹ Justice Souter maintained that Congress's mentioning of the word "State" in the statutory scheme should "not limit the possible defendants to States and is quite literally consistent with the possibility that a tribe could sue an appropriate state official for a State's failure to negotiate."¹¹⁰

¹⁰¹ See *id.* at 1145 (noting that *Union Gas* did not produce a majority opinion). Justice Souter also may have rejected the *Union Gas* plurality because he disagreed with its rationale. See *supra* note 88 and accompanying text. Abandoning *Union Gas* troubled Justice Stevens. See *Seminole Tribe*, 116 S. Ct. at 1142 n.15 (Stevens, J., dissenting).

¹⁰² See *id.* at 1145 (Souter, J., dissenting).

¹⁰³ See *id.* at 1153–56, 1159–78. "A critical examination of [*Hans's* holding] will show that it was wrongly decided, as virtually every recent commentator has concluded." *Id.* at 1153.

¹⁰⁴ The majority dismissed Justice Souter's discussion as "disregard[ing] our case law in favor of a theory cobbled together from law review articles and [the dissent's] own version of historical events." *Seminole Tribe*, 116 S. Ct. at 1129–30. According to the majority, *Hans* was correctly decided, and, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Id.* at 1129. The majority emphasized post-*Hans* case law, which, although involving no direct "holdings," radiated *Hans's* conception of sovereign immunity. See *id.* at 1130. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Id.* at 1129. Justice Souter attacked this reliance on precedent by insisting not only that *Hans* did not deal with the power of Congress to abrogate state sovereign immunity, but also that "[t]he exact rationale to which the majority refers, unfortunately, is not easy to discern." *Id.* at 1156 (Souter, J., dissenting).

¹⁰⁵ See *Seminole Tribe*, 116 S. Ct. at 1150 (Souter, J., dissenting).

¹⁰⁶ See *id.* at 1159.

¹⁰⁷ See *id.* at 1159–60.

¹⁰⁸ 209 U.S. 123 (1908).

¹⁰⁹ See *Seminole Tribe*, 116 S. Ct. at 1182, 1184 (Souter, J., dissenting) ("*Young* did not establish a new cause of action It stands, instead, for a jurisdictional rule").

¹¹⁰ *Id.* at 1183. In this regard, Justice Souter analogized IGRA to the federal habeas corpus regime under 28 U.S.C. § 2254, which requires "'the State,' by 'order directed to an appropriate

V. OTHER POSSIBLE AVENUES

Had the Court forgone the path that it chose to pursue, other avenues — leading either to affirmance or reversal — would have been available to provide the Court with a firmer foundation upon which to base a decision than did the logic of *Hans*. First, the Court could have recognized Indian tribes as independent sovereigns, thus placing them outside the scope of the Eleventh Amendment's text. Second, the Court could have distinguished between the Indian and Interstate Commerce Clauses on the basis of their different histories and purposes. (This option would have postponed the fight over *Union Gas*.) Finally, the Court could have reached the same result (with the same states' rights rhetoric) by looking to the Tenth Amendment implications of IGRA.¹¹¹

A. Indian Tribes as "Independent Sovereigns"

The status of the plaintiffs could have been an important factor in *Seminole Tribe*. In *Blatchford v. Native Village of Noatak*,¹¹² an Indian tribe argued that, whatever the status of suits by individuals against states, the doctrine of sovereign immunity had no applicability to suits by "sovereigns against sovereigns."¹¹³ *Hans* notwithstanding, suits against a state can be maintained by the United States and by sister states. In *Principality of Monaco v. Mississippi*,¹¹⁴ the Court explained that the first exception was "inherent in the constitutional plan";¹¹⁵ the second was "essential to the peace of the Union" and a "necessary feature in the formation of a more perfect Union."¹¹⁶ How-

State official,' to produce the state court record if an indigent habeas petitioner argues that a state court's factual findings are not fairly supported in the record." *Id.* (quoting 28 U.S.C. § 2254(e) (1994)). This analogy, however, is suspect because the federal habeas statute mentions an order directed to a state official, and because habeas corpus claims have historically been understood as suits against the warden. Congress's directive to sue a "State" under IGRA lacks that text and history and was therefore properly construed to mean a suit against the state, but not against state officers.

¹¹¹ Respondents asserted such an objection based on the Tenth Amendment before the Eleventh Circuit, but the court refused to consider it because it had been raised for the first time on appeal. See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1019 n.2 (11th Cir. 1994). The Supreme Court followed the same path, see *Seminole Tribe*, 116 S. Ct. at 1126 n.10, even though, in principle (albeit an increasingly diminishing one), respondents could defend the judgment on any ground consistent with the record. See *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996).

¹¹² 501 U.S. 775 (1991).

¹¹³ *Id.* at 780. On the distinctive aspects of tribal immunity from suit, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978). On the shrinking idea of tribal sovereignty, see L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 889–94 (1996), which argues that the consent paradigm is replacing older, territorial conceptions of tribal sovereignty.

¹¹⁴ 292 U.S. 313 (1934).

¹¹⁵ *Id.* at 329.

¹¹⁶ *Id.* at 328–29; accord *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 33 (1989) (Scalia, J., concurring in part and dissenting in part) (following *Principality of Monaco* and stating that the

ever, the *Principality of Monaco* Court went on to hold that this reasoning would not justify suits by foreign nations against individual states.¹¹⁷ The tribe in *Blatchford* insisted that *Principality of Monaco* was distinguishable because Indian tribes were "more like States than foreign sovereigns."¹¹⁸ The Court rejected the analogy:

What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. . . . [I]f the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.¹¹⁹

In *Blatchford*, however, the Court did not have to decide whether Congress could abrogate immunity — finding instead that Congress had not shown an "unmistakably clear intent" to do so.¹²⁰ In *Seminole Tribe*, the United States argued that Congress could abrogate state sovereign immunity, at least in situations implicating the rights of another sovereign — in this case, an Indian tribe.¹²¹ None of the three opinions in *Seminole Tribe* mentioned this argument. Yet, to my mind, this argument is a persuasive one, and one that the historic approach to state sovereign immunity could readily have absorbed.

B. *The Different Natures of the Indian and Interstate Commerce Clauses*

In *Seminole Tribe*, the tribe argued that the existence of the Indian Commerce Clause, as well as the fact that the Eleventh Amendment mentions nothing about suits by Indian tribes, meant that there was an implicit constitutional understanding that the Eleventh Amendment should not bar such suits:

Added now is another facet — the Indian Commerce Clause. "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." The relation of the Indian Commerce Clause and the Eleventh Amendment

existence of a waiver of state immunity against suits by the United States and other states is inherent in the constitutional plan).

¹¹⁷ See *Principality of Monaco*, 292 U.S. at 330–31. Suits against county and other local government subdivisions are also excepted. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

¹¹⁸ *Blatchford*, 501 U.S. at 782.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 786 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)) (internal quotation marks omitted). The Court avoided directly confronting the issue of congressional abrogation in *Blatchford* by holding that the judicial "clear statement" requirement was not satisfied, meaning that Congress's intention to abrogate the states' sovereign immunity was far from unambiguous. See *id.* at 786–88. The Court also refused to interpret 28 U.S.C. § 1362, the grant of federal jurisdiction in cases involving Indian tribes, to effectuate a bypass of state sovereign immunity. See *id.* at 783–84.

¹²¹ See Brief for the United States as Amicus Curiae Supporting Petitioner at 26, *Seminole Tribe* (No. 94-12).

need not be anomalous or complex. The plain language of the Eleventh Amendment excludes tribes. The plain language and history of the Indian Commerce Clause supports a surrender of state sovereignty. *Hans v. Louisiana* need not, and does not, preclude the Seminole Tribe's federal court suit against the State of Florida.¹²²

Evolution of doctrine in the sovereign immunity context has occurred, as in other areas of constitutional law, in the common law mode.¹²³ Given the fact that the language of the amendment does not forbid federal court jurisdiction, and that the Indian Commerce Clause has been interpreted elsewhere as giving Congress plenary authority with respect to the Indian tribes,¹²⁴ the Court could have readily accommodated the interests of the tribe in a very narrow holding based on the Indian Commerce Clause while saving the *Union Gas* fight for another day.¹²⁵

Unfortunately, in sweeping away arguments based on the special nature of Indian tribes, the Court once again posited an intractable "there-ness" of an historical and unyielding principle of state sovereign immunity. The Court's approach perpetuates the belief that the doctrine of sovereign immunity is an historical given, an article of faith incapable of and not needing justification, neither as to its existence nor as to its scope.¹²⁶ In our time, however, state sovereign immunity is largely a body of judge-made law. "*Hans v. Louisiana* and *Ex parte Young* have forged powerful doctrines; the latter an acknowledged fiction, the former constructed on language which does not support its scope."¹²⁷ Precedents have "accreted" and the Eleventh Amendment is now "barnacled with case law."¹²⁸ Case law, however, is a process of accommodating competing interests, and the special nature of the Indian tribes and the

¹²² Brief for Petitioner at 36, *Seminole Tribe* (No. 94-12) (citation omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886)). Another argument raised by the tribe and the United States was that the Indian tribes were a "special charge" or "dependency" of the United States. Brief for the United States as Amicus Curiae Supporting Petitioner at 24, *Seminole Tribe* (No. 94-12). This argument draws upon an analogy to a *qui tam* action which, it was argued, would not be barred by the Eleventh Amendment. *See id.*

¹²³ *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 393 (1981). This common law approach, however, should never go so far that the doctrine is irreconcilable with the text — the approach taken by the Court in *Hans* (and in *Seminole Tribe*). *See id.*

¹²⁴ *See* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

¹²⁵ Although less defensible, the Court could also have taken the position of the Eleventh Circuit — simply confining *Union Gas* to the Interstate Commerce Clause and finding no abrogation possible under the Indian Commerce Clause. Such a result would undoubtedly have seemed anomalous and would generally have signaled that *Union Gas*'s days were numbered, but it would have avoided the overruling of *Union Gas* until the question was squarely before the Court.

¹²⁶ For a dramatic recent example of this mindset, see *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), overturning the district court's imposition of fees and costs on the United States for prosecutorial misconduct. For the court of appeals, the doctrine of sovereign immunity was "mandatory and absolute," *id.* at 764, and "must be applied mechanically, come what may," *id.*

¹²⁷ Brief for Petitioner at 36, *Seminole Tribe* (No. 94-12).

¹²⁸ Shapiro, *supra* note 15, at 61. Although it overturned *Union Gas*, *Seminole Tribe* left most of the important case law in place.

unique nature of the congressional power under the Indian Commerce Clause could readily have moved the tribe past the Eleventh Amendment bar.

C. The Tenth Amendment

The Tenth Amendment may have provided a more secure foundation for the Court's federalism concerns with IGRA.¹²⁹ Although not free from controversy, the "anti-commandeering" doctrine of *New York v. United States*¹³⁰ is much more defensible on textual, structural and historical grounds than *Hans*. IGRA speaks specifically to states and orders them to bargain with Indian tribes. It seemingly rearranges state lawmaking authority by superseding the Florida state law that requires legislative approval of Indian tribe compacts.¹³¹ In that sense it looks like a directive to a state legislature to ratify a court-initiated compact. (Could Congress provide that a governor's consent alone was a sufficient state commitment for the purposes of federal law?) Moreover, even if state law allowed a governor alone to conclude a compact, federal "commandeering" of a state's executive process raises political accountability questions similar to those that were raised in *New York*.¹³² Finally, IGRA interferes with the state's judicial pro-

¹²⁹ The Tenth Amendment provides: "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." U.S. CONST. amend. X. In *New York v. United States*, 505 U.S. 144 (1992), the Court explained its Tenth Amendment concerns as follows:

The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id. at 156-57.

¹³⁰ See *New York*, 505 U.S. at 161-66.

¹³¹ Florida argued that, "[i]f the legislature assumed the role of negotiator with the Tribes, the Legislature could not be sued under *Ex parte Young* because the Legislature is unquestionably 'the State.'" Brief of Respondents at 31, *Seminole Tribe* (No. 94-12). This claim is exaggerated; the legislature is no more "the state" than is the executive or the Florida Supreme Court. Cf. *Quern v. Jordan*, 440 U.S. 332, 355 (1979) (Brennan, J., concurring in the judgment) (noting that the Fourteenth Amendment grants Congress the power to enforce its prohibitions whether they be disregarded by the legislative, executive or judicial branches of the state); *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 286 (1913) (stating that the Fourteenth Amendment is "addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power").

¹³² The Court will have an opportunity to address the issue of federal commandeering of state law enforcement mechanisms in the 1996 Term. On June 18, 1996, the Court granted certiorari in *Printz v. United States* and *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 2521 (1996), to review a Ninth Circuit determination that the 1993 Brady Handgun Violence Control Act, Pub. L. No. 93-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)), could validly require state and local law enforcement officials to make "reasonable efforts" to ascertain whether prospective handgun buyers are legally disqualified from possessing handguns. See Recent Case, 109 HARV. L. REV. 1833, 1838 (1996) ("[T]he textual and structural underpinnings of our federal system suggest that under the *New York* rule, courts should hold

cess: federal court resolution of what state gaming law permitted would raise complex problems involving the interface of such interpretations with subsequent interpretations by the state courts.¹³³

VI. RHETORIC

The Supreme Court, however, chose to defend its result on the "background postulates" of "inherent state sovereignty." Why? Perhaps the Court's reasoning reflects a visceral feeling among the majority of the Court that the role of the states in our federal structure has been so diminished as to become unintelligible. This feeling would generate an instinctive reaction to protect — indeed, to create — a role for the states, even if that role became merely symbolic. One can readily understand this majority's Tenth Amendment concerns. The concept of a national government of limited powers was an important and pervasive aspect of the original understanding both in the Constitutional Convention and in the ratification debates.¹³⁴ And defining

federal co-optation of the states' enforcement mechanisms . . . unconstitutional."); see also *ACORN v. Edwards*, 81 F.3d 1387, 1392-94 (5th Cir.) (holding that the Lead Contamination Control Act violates the Tenth Amendment by requiring states to establish programs for removal of lead contaminants from schools and day care centers), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174). For a criticism of the Brady Act on policy grounds, see James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 101-04 (1995).

¹³³ The United States, however, sought to salvage the entire act by claiming that IGRA was simply an example of conditional preemption. See Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Seminole Tribe* (No. 94-12). The states were invited to participate, and if they did not, the only "penalty" suffered was the forfeit of any role in the regulation of Indian gaming. Assuming that this kind of legislation is valid, the submission of the United States is not a fair description of IGRA. Indeed, the government made that clear when, in responding to a claim that *Ex parte Young* did not involve discretionary duties, it emphasized the "mandatory" character of the duty to negotiate in good faith. See *id.* at 16. Respondents correctly argued that the United States sought to have it both ways. See Brief of Respondents at 33-34, *Seminole Tribe* (No. 94-12).

¹³⁴ In the Constitutional Convention, moderate nationalists ensured a constitutional plan in which the states would play a vital role. See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 139-47 (1996). For an excellent study of the subject, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 57-93 (1996). After describing the debates over representation in the Senate and in the House of Representatives, see *id.* at 57-83, Rakove states that, "[i]n the end, the framers could not avoid treating the states as constitutional elements of the polity; nor could they deny that simple residence in a state would establish the most natural bond of civic loyalty." *Id.* at 78. In addition, the state-centered and countermajoritarian amendment process of Article V was designed to make alterations in the terms of union difficult, notwithstanding the competing principle that the Constitution must provide for a realistic mechanism for change. See Monaghan, *supra*, at 143-46. Nonetheless, during the state ratification debates, fears of a powerful new "consolidated" national government were widely expressed by the Constitution's opponents. See RAKOVE, *supra*, at 181-88; Monaghan, *supra*, at 147-56. "Federalists" of all shades (including both Madison and Hamilton, the federalists of *The Federalist*) countered by defending the Constitution as creating a national government of only limited powers, thus adopting the view of the Convention's moderate nationalists. See Monaghan, *supra*, at 149-51. "Responding quickly to Anti-Federalist sentiment, the Federalists deflected the state-centered attack

the proper limits on national power has been an important and contested issue throughout our history,¹³⁵ as both the Civil War¹³⁶ and the New Deal¹³⁷ graphically demonstrate.

Independent of the Tenth Amendment context, however, the majority's Eleventh Amendment federalism concerns are far more difficult to explain. The *Seminole Tribe* majority recognized that nothing in the language of the Eleventh Amendment (or in Article III) bars federal court suits to enforce federal rights brought against unconsenting states by their own citizens.¹³⁸ However, the majority fell back upon *Principality of Monaco* for the proposition that "[b]ehind the words of the constitutional provisions are postulates which limit and control."¹³⁹ These "postulates" include the notion that controversies must have a justiciable character and that states are immune from suit without their consent, except in instances in which such immunity was surrendered in the constitutional plan.¹⁴⁰

But even if these "postulates" exist, what is their significance or role when Congress clearly acts to abrogate state sovereign immunity? *Seminole Tribe* acknowledged that, with one exception, the Court had not applied these postulates to the question of congressional power to abrogate state sovereign immunity, but it concluded that "consideration of that question must proceed with fidelity to this century-old doctrine."¹⁴¹ I believe that the Court rejected clear constitutional text in preference to unarticulated and debatable historical explanations because of the power of symbolism. This may have the effect of making the other, political branches of the federal government — and the people — aware that the status of states should be treated with extra care when constructing future legislation. In this regard, the "advisory

by, in effect, embracing it." *Id.* at 149. See generally RAKOVE, *supra*, at 188–201 (discussing the federalists' theoretical and practical arguments in support of their conception of federalism).

¹³⁵ For an elegant and wide-ranging exploration and defense of the contemporary importance of "Our Federalism," see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

¹³⁶ See *id.* at 28.

¹³⁷ See, e.g., *United States v. Darby*, 312 U.S. 100, 123–24 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–38 (1937).

¹³⁸ See *Seminole Tribe*, 116 S. Ct. at 1122. *Seminole Tribe* thus continues the general practice, begun in *Hans v. Louisiana*, 134 U.S. 1 (1890), of relying on the amendment to support an expansive notion of state sovereign immunity, despite acknowledging that the amendment's language does not provide textual support for such a broad reading. See also *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974) (noting the divergence between the amendment's text and the doctrine).

¹³⁹ *Seminole Tribe*, 116 S. Ct. at 1129 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)); see also *id.* at 1122 (explaining that the principle of state sovereignty, and the corollary principle that no state can be sued by an individual without its consent, make up the two-part "presupposition" underpinning the text of the Eleventh Amendment). But see *id.* at 1152 n.13 (Souter, J., dissenting) (arguing that an appeal to background principles and postulates ordinarily cannot overcome the plain meaning of the constitutional text, especially the relatively clear jurisdictional provisions of Article III).

¹⁴⁰ See *id.* at 1129 (quoting *Principality of Monaco*, 292 U.S. at 322–23).

¹⁴¹ *Id.*

character"¹⁴² of the Court's opinion may well work as a catalyst for political and social change.

VII. REALITY

Despite their symbolism, constitutional conceptions of state sovereign immunity have no apparent reality. In the main, the Eleventh Amendment is concerned only with forum selection: should states be sued in state or federal courts? Although state courts are available — indeed required — to hear suits against states for the violation of federal claims, a federal forum also generally remains available for suits against states via their officers. Therefore, it is only in rare instances that a state will be unaccountable for its wrongs in any court of law.

A. Defensible Justifications for Sovereign Immunity?

Seminole Tribe relied heavily, if not exclusively, on the principle of sovereign immunity to support its interpretation of the Eleventh Amendment. Although courts and commentators have offered several justifications for the concept on both functional and historical grounds, none appears convincing. Indeed, any doctrine of state sovereign immunity strains both the traditional conception of the rule of law, which emphasizes governmental accountability to courts of law,¹⁴³ and national supremacy, which generally presumes that Congress can entrust enforcement of whatever rights it can validly create to the national courts.¹⁴⁴ *Seminole Tribe* offered no functional justification whatsoever for its vigorous protection of state sovereign immunity; in-

¹⁴² *Id.* at 1145 (Stevens, J., dissenting).

¹⁴³ See, e.g., HART & WECHSLER, *supra* note 12, at 1002 ("Many scholars have argued that the doctrine of sovereign immunity, as it had evolved in England prior to 1789, was less about *whether* the Crown or its agents could be sued, than about *how*."); Shapiro, *supra* note 15, at 62; see also *Seminole Tribe*, 116 S. Ct. at 1142-44 (Stevens, J., dissenting) (discussing the "questionable heritage" of the sovereign immunity doctrine and its unsuitability in a democratic nation).

¹⁴⁴ The Court established this presumption over 150 years ago:

[T]he legislative, executive and judicial power of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. . . . [Article III] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818-19 (1824); see also *Seminole Tribe*, 116 S. Ct. at 1154 (Souter, J., dissenting) (arguing that *Hans* "destroyed the congruence of judicial power under Article III with the substantive guarantees of the Constitution, and with the provisions of statutes passed by Congress in the exercise of its power under Article I"). However, in his *Union Gas* opinion, Justice Scalia countered:

[T]he Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws. But since the Constitution does not deem this to require that private individuals be able to bring claims against the *Federal Government* for violation of the Constitution or laws . . . it is difficult to see why it must be interpreted to require that private individuals be able to bring such claims against the *States*.

Pennsylvania v. Union Gas Co. 491 U.S. 1, 33-34 (1989) (Scalia, J., concurring in part and dissenting in part) (citations omitted), *overruled by Seminole Tribe*, 116 S. Ct. 1114 (1996).

stead, it chose to rely on the particularly dissatisfying rationale of the "inherent nature" of a sovereign's immunity from suit.

1. *"Inherent" and Historical Rationales for Sovereign Immunity.* — As did the Court in *Hans*, the *Seminole Tribe* majority cited *The Federalist No. 81* for the proposition that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."¹⁴⁵ The historical conception of "sovereignty" itself is problematic enough,¹⁴⁶ but the word "inherent" is both meaningless and misleading. At least in the context of the historical conception of sovereignty, the word has no content; the "inherent" unamenability of sovereigns to suit is an attribution made by the writer, not a "property" of the "entity" described. In fact, in a democratic republic, it is not apparent why the presumption is not completely reversed. Should not accountability to the people — both to the majority at the polls and to wronged individuals in the courts — be "inherent in the nature of sovereignty"?

In the early years of the Republic, some justices believed that the doctrine of sovereign immunity was incompatible with our republican institutions. In *Chisholm v. Georgia*,¹⁴⁷ Chief Justice Jay expressed concern that the feudal doctrine of sovereign immunity was antagonistic to the idea that sovereignty resides in the people:¹⁴⁸ "The same feudal ideas run through all [of Europe's] jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here . . ."¹⁴⁹ Justice Wilson thought the concept of sovereign immunity conflicted with the rule of law underlying our republican form of government.¹⁵⁰ Indeed, Justice Wilson believed that the idea of state sovereignty had an inaccurately symbolic quality to it: "The states, rather than the people, for whose sakes the states exist, are frequently the objects which attract and arrest our principal attention. . . . Sentiments and expressions of this inaccurate kind prevail in our common . . . language."¹⁵¹ The current Court, however, still clings to these formalistic (or perhaps medieval) "[s]entiments and expressions"¹⁵² of state sovereignty — the same ones

¹⁴⁵ *Seminole Tribe*, 116 S. Ct. at 1130-31 n.13 (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

¹⁴⁶ See Monaghan, *supra* note 134, at 165-69.

¹⁴⁷ 2 U.S. (2 Dall.) 419 (1793).

¹⁴⁸ See *id.* at 470-73 (opinion of Jay, C.J.).

¹⁴⁹ *Id.* at 471. "[A]t the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves" *Id.* at 471-72.

¹⁵⁰ See *id.* at 461-66 (opinion of Wilson, J.).

¹⁵¹ *Id.* at 462. "A State I cheerfully admit, is the noblest work of man: But man himself, free and honest, is, I speak as to this world, the noblest work of God." *Id.* at 463.

¹⁵² *Id.* at 462.

that Justice Wilson (a member of the Committee on Detail at the Constitutional Convention¹⁵³) rejected over two hundred years ago.¹⁵⁴

2. *Executive Discretion as a Rationale for Sovereign Immunity.* — Apart from the “inherent” justifications, and the now infrequently voiced expressions of concern for the public fisc,¹⁵⁵ a number of scholars have posited that sovereign immunity is necessary to prevent excessive judicial interference with executive discretion.¹⁵⁶ The crux of this argument is that the government could never accomplish its work — at least democratically — if its citizens were continually forcing it into court to account for its actions.¹⁵⁷ Of course, the “executive discretion” rationale does not explain why immunity is in fact the exception rather than the rule, or even why other measures — such as limiting the damages available in suits against the sovereign — would not be equally effective. Instead of offering any empirical proof, the partisans of this argument assert its validity without considering the extensive areas in which a sovereign has consented to liability and has still been able to carry out the democratic will. In the federal context, for example, Congress has extensively waived sovereign immunity for the United States.¹⁵⁸ Congress and the courts have never let the immunity of the United States present a significant litigation barrier, ex-

¹⁵³ See Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 57 n.20 (1962).

¹⁵⁴ This sovereignty rhetoric seems particularly pointless in the waiver context, in which the Court has insisted that waivers of sovereign immunity be strictly construed. For example, last Term in *Lane v. Pena*, 116 S. Ct. 2092 (1996), the Court, by a 7-2 majority, held that the United States had not waived its sovereign immunity to a damage claim based upon an executive agency's violation of the Rehabilitation Act of 1973 and its amendment. See *id.* at 2100. The Court acknowledged that the petitioner's various arguments had “superficial appeal,” *id.* at 2096, and were “not without some force,” *id.* at 2100, and that “[t]he statutory scheme on which [petitioner] hinge[d] his argument is admittedly somewhat bewildering,” *id.* at 2098. The Court, however, rejected any finding of waiver because there was no waiver “unequivocally expressed in statutory text,” and because “a waiver . . . [must] be strictly construed, in terms of its scope, in favor of the sovereign.” *Id.* at 2096; see also John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 776-80 (arguing that this harsh doctrine as applied to the federal government's waivers only took firm hold in 1991).

¹⁵⁵ For a rare defense of sovereign immunity as a legislative trade-off between compensation for litigants and other legitimate demands on the public fisc, see Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 937 (1988). Whatever the merits of this argument, protection of the public fisc certainly did not appear to be a major concern of the Court in *Seminole Tribe* (after all, did the state not stand to *gain* money for its treasury if it had concluded a compact?), or in the 1995 Term. See *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2472 (1996) (deciding a contract dispute claim against the United States even though the government's potential liability ran into the billions of dollars).

¹⁵⁶ Professor Woolhandler describes this as a “discretion” model of sovereign immunity, the purpose of which is to protect “the decisionmaking processes of the official.” Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 398 (1987). As others have observed, sovereign immunity is a heavy, “blunt” tool for allaying such concerns. See, e.g., Shapiro, *supra* note 15, at 79.

¹⁵⁷ See Woolhandler, *supra* note 156, at 411.

¹⁵⁸ See, e.g., Administrative Procedure Act, 5 U.S.C. § 702 (1994); Tucker Act, 28 U.S.C. §§ 1346, 1491 (1994); Federal Tort Claims Act, 28 U.S.C. § 2675 (1994).

cept in suits for money damages.¹⁵⁹ The difference between holding the United States liable and holding a state liable (on a federal claim) is, therefore, a question of judicial federalism — whether states should be held liable for federal claims in *federal* court — rather than one of the merits of sovereign immunity itself.

B. Reich and the Availability of State Courts

In large measure, the Eleventh Amendment operates only as a forum selection clause. Because the Eleventh Amendment doctrine prohibits federal claims against states sued in their own name from being heard in federal court, it necessitates that plaintiffs either recast their claims as suits against state officers or bring them in state court. In *Reich v. Collins*,¹⁶⁰ decided in the 1994 Term, a unanimous Court made clear that state courts must provide adequate relief when state officials deprive persons of their property in violation of federal law, irrespective of “the sovereign immunity States traditionally enjoy in their own courts.”¹⁶¹ Congress may now be forced to remove certain suits against unconsenting states from exclusive federal jurisdiction, perhaps in areas such as copyright and bankruptcy.¹⁶² In this way,

¹⁵⁹ See HART & WECHSLER, *supra* note 12, at 1027–41. In 1976, Congress waived sovereign immunity in suits seeking relief other than money damages against federal agencies and officials, and specifically authorized naming the United States as a defendant. See Pub. L. No. 94-574, § 1, 90 Stat. 2721, 2721 (1976) (amending 5 U.S.C. § 702); HART & WECHSLER, *supra*, at 1036–39. But cf. *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (holding that Congress did not waive sovereign immunity in a damage suit under § 504(a) of the Rehabilitation Act of 1973); Nestor M. Davidson, Note, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 COLUM. L. REV. 1203, 1206–26 (1996) (discussing the significant gaps in the scope of governmental waivers in the tort context).

¹⁶⁰ 115 S. Ct. 547 (1994).

¹⁶¹ *Id.* at 549. To the extent that the Court “suggested” in a footnote, see *Seminole Tribe*, 116 S. Ct. at 1131 n.14, that state “consent” is necessary to suit in state court, see HART & WECHSLER SUPPLEMENT, *supra* note 12, at 46, the suggestion is plainly wrong. However, the relief that the state courts must provide in such cases is not necessarily a money judgment. In tax refund cases, such as *Reich*, the state may satisfy its constitutional duty by retroactively eliminating any impermissible discrimination. See HART & WECHSLER, *supra* note 12, at 850–52. Of course, in claims for damages, a suit in state court is ordinarily cast against state officials, not the state, such that state sovereignty issues may not be implicated at all. See, e.g., *Reich*, 115 S. Ct. at 547. Nonetheless, suits against “the state” and state-wide entities are not uncommon. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612–14 (1981) (coal producers and some of their utility customers suing the state in state court for refunds of severance taxes).

¹⁶² See Susan D. Raively, Note, *Copyright Infringement Suits Against States: Is the Eleventh Amendment a Valid Defense?*, 6 CARDOZO ARTS & ENT. L.J. 501, 504 (1988) (“If the Supreme Court maintains its current policy of upholding eleventh amendment immunity, a state could plead the eleventh amendment and not be sued for copyright infringement.”). Copyright presents the most salient illustration. A copyright is property and, as such, is protected by federal legislation and the Fourteenth Amendment against state interference. Due to infringements at the state university level, Congress amended federal copyright law to ensure that copyright holders could sue state entities. See Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified at 17 U.S.C. §§ 501(a), 511 (1994)). The Fifth Circuit sustained the legislation on the authority of *Union Gas*, but the Supreme Court vacated and remanded in light of *Seminole Tribe*. See *Chavez v. Arte Publico Press*, 59 F.3d 539, 546 (5th Cir. 1995), *vacated and remanded*,

the federal government may come to rely upon state courts, with the possibility of Supreme Court review,¹⁶³ to enforce these federal rights against the states.¹⁶⁴

C. *The Continuing Vitality of Ex Parte Young*

*Ex parte Young*¹⁶⁵ long ago confirmed that citizens seeking prospective relief in suits against "the state" could simply recast their complaints as suits against state officials¹⁶⁶ and bring them in federal court, "notwithstanding the obvious impact on the State itself."¹⁶⁷

116 S. Ct. 1667 (1996). Given the exclusive nature of federal court jurisdiction, a copyright plaintiff cannot sue state entities in state court and hope to rely on the line of authority that requires a state to provide effective redress for impairing a federally created property right.

The *Seminole Tribe* majority, however, was entirely untroubled by these concerns. It pointed out, in footnotes, that *prospective* relief against state officials to ensure future compliance with federal law is available under *Ex parte Young*, see *Seminole Tribe*, 116 S. Ct. at 1131 n.14, but that "there is no established tradition in the lower federal courts of allowing enforcement of [copyright laws] against the States." *Id.* at 1131 n.16. Possible solutions may be that Congress could invoke the Fourteenth Amendment or authorize qui tam actions on behalf of the United States by private copyright holders. See Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 556-64 (1995); cf. HART & WECHSLER, *supra* note 12, at 316-22 (suggesting state capacity to sue based on *parens patriae* claims for relief). Whether the *Seminole Tribe* majority would permit so transparent an evisceration of its holdings is unclear. Congress could, of course, amend the statute to remove the federal court exclusivity bar when the state is a defendant, or when the state treasury is expected to make payment. See *Papasan v. Allain*, 478 U.S. 265, 278 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official . . . that was illegal under federal law is barred even when the state official is the named defendant."). If a federal proceeding resulted in a determination of liability, normal preclusion principles would take hold; thus, the state court could not redetermine the liability determination or the amount of damages. Congress might also be able to grant federal courts the power to stay the state court proceeding to ensure that federal courts make liability determinations. See 28 U.S.C. § 2283 (1994).

¹⁶³ See *supra* note 18.

¹⁶⁴ See, e.g., *Reich*, 115 S. Ct. at 549; *Ward v. Board of County Comm'rs*, 253 U.S. 17, 21-23 (1920); *General Oil Co. v. Crain*, 209 U.S. 211, 226-28 (1908).

¹⁶⁵ 208 U.S. 123 (1908). It is important to note that although this doctrine is often referred to as the *Ex parte Young* doctrine, *Young* did not "establish" the doctrine. It simply reconciled, or rationalized, the Court's prior precedents. See *id.* at 150-60 (reviewing prior cases in which the Court attempted to discern whether the suit in question had been brought against the state or one of its officials). *Young's* author, Justice Peckham, also wrote *Lochner v. New York*, 198 U.S. 45 (1905). Although *Lochner* established the Fourteenth Amendment as a basis for suit against state economic legislation, *Young* ensured an adequate judicial mechanism for such suits by limiting the applicability of Eleventh Amendment immunity in certain instances. However, *Young* took pains to make clear that it was not sacrificing the Eleventh Amendment for the sake of the Fourteenth: "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." *Young*, 209 U.S. at 150. As discussed below, it seems quite clear that *Young* effected a substantial limitation on Eleventh Amendment immunity, notwithstanding Justice Peckham's opinion to the contrary.

¹⁶⁶ See *Young*, 209 U.S. at 149-50. The opinion's opening sentence stated that the Court understood fully the "great importance of the case, not only to the parties now before the court, but also to the great mass of the citizens of this country." *Id.* at 142.

¹⁶⁷ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984) (construing *Young*). However, *Pennhurst* repudiated decades of settled understanding and held that the *Young* doctrine does not apply to (and thus the Eleventh Amendment bars) suits against state officials to

Young sapped state sovereign immunity of any real bite, leaving only a narrow domain within which to operate.¹⁶⁸ *Young*'s well-known fiction is that, when a state official violates valid federal law, he is "stripped of his official or representative character and [is] subjected in his person to the consequences of his individual conduct."¹⁶⁹ Everyone now recognizes that nothing but a fiction is involved,¹⁷⁰ one designed, as the Court subsequently recognized, "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"¹⁷¹ *Young* is "an exception" (a massive, judge-made exception) to the Eleventh Amendment.¹⁷²

To characterize *Young* as an exception, however, gets matters nearly backward: the Eleventh Amendment is an exception to *Young*.¹⁷³ Because *Young* explicitly proceeded on the premise that the Fourteenth Amendment had not narrowed the Eleventh Amendment,¹⁷⁴ the Court's reasoning extended to the prospective vindication

compel their compliance with state law. See *id.* at 103-06. In the *Pennhurst* Court's view, because a federal court's grant of relief against state officials on the basis of state law does not vindicate the supreme authority of federal law, and because such an action represents a great intrusion on a state's sovereignty, the justification for the *Young* doctrine "disappears" in the context of state law. See *id.* at 106. See generally Shapiro, *supra* note 15, at 84-85 (criticizing *Pennhurst* for approaching the sovereign immunity doctrine with an unjustified deference and for substantially limiting the accountability of government officials to individuals harmed by a violation of state law).

¹⁶⁸ The narrow domain consists, *inter alia*, of suits that for some reason cannot be recast against a state official, see *Seminole Tribe*, 116 S. Ct. at 1132; suits in which the official's duty is only discretionary, see *Young*, 209 U.S. at 158; suits in which the only remedy requested is retrospective money damages that would be paid from the state treasury, see *Edelman v. Jordan*, 415 U.S. 651, 664-71 (1974); and suits against a state official for a violation of state law, see *Pennhurst*, 465 U.S. at 103-06. (In the second example, the doctrine is, of course, unnecessary.)

¹⁶⁹ *Young*, 209 U.S. at 160. The Eleventh Amendment thus did not bar a suit against a state officer:

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. 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.

Id. at 159.

¹⁷⁰ Although some have recognized "a fictive quality" inherent in the *Young* doctrine, CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD M. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3524, at 154 (2d ed. 1984), it is, on the contrary, a "fiction that there ever existed a broad doctrine of sovereign immunity that, outside of a few specific areas, barred relief at the behest of individuals complaining of government illegality." HART & WECHSLER, *supra* note 12, at 1015-16.

¹⁷¹ *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). Professor Shapiro has indicated that the fiction might be a "silver lining" that prevents a troublesome enlargement of sovereign immunity. Shapiro, *supra* note 15, at 84-85.

¹⁷² *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). "The doctrine of *Ex parte Young* . . . is regarded as carving out a necessary exception to Eleventh Amendment immunity." *Id.*

¹⁷³ See HART & WECHSLER, *supra* note 12, at 1015-16.

¹⁷⁴ See *supra* note 165.

of all federal rights, including rights created under Article I, Section 8. The law reports are, accordingly, full of suits against public officials to enforce federal statutory rights.¹⁷⁵ *Seminole Tribe* will have no significant impact on the actual authority of federal courts to enforce these federal laws prospectively against states in suits by private persons. In *Seminole Tribe*, the tribe named the Governor of Florida as an additional defendant;¹⁷⁶ both the tribe and the United States relied heavily on *Young*.¹⁷⁷ Indeed, the United States opened its argument with a discussion of *Young*'s applicability to the case and suggested that the Court need not even address the issue of the state's suability.¹⁷⁸ Although the *Seminole Tribe* majority ultimately found *Young* inapplicable,¹⁷⁹ the Court gave no indication that it intended to question *Young*. Quite to the contrary, the majority reaffirmed *Young* in several instances.¹⁸⁰ Thus, the Court's opinion should not radiate much uncertainty in the *Young* context.¹⁸¹

Yet *Seminole Tribe*'s majority, despite professing fidelity to *Young*, did find *Young* to be something of a public relations problem. If the suit could be maintained against the Governor but not against the state, then when all was said and done the Court's sharp divisions over sovereign immunity concerned only the caption on the tribe's complaint.¹⁸² Confronted with *Young*, the Eleventh Circuit had asserted that *Young* did not authorize suits to force an official "to undertake a discretionary task."¹⁸³ The court of appeals stressed that governors had discretion under IGRA not only over the content of a

¹⁷⁵ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 653 (1974).

¹⁷⁶ See *Seminole Tribe*, 116 S. Ct. at 1121.

¹⁷⁷ See Brief for Petitioner at 23-31, *Seminole Tribe* (No. 94-12); Brief for United States as Amicus Curiae Supporting Petitioner at 12-19, *Seminole Tribe* (No. 94-12).

¹⁷⁸ See Brief for the United States as Amicus Curiae Supporting Petitioner at 12-19, *Seminole Tribe* (No. 94-12); *id.* at 19 n.5.

¹⁷⁹ See *Seminole Tribe*, 116 S. Ct. at 1132-33.

¹⁸⁰ See *id.* at 1131 nn.14 & 16, 1133 n.17.

¹⁸¹ Hopefully, the Court will reassert the validity of *Young* in *Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), *cert. granted*, 116 S. Ct. 1415 (1996), which involves a suit against the state and state officials by individuals who assert a federal claim to possession or ownership of property and who seek to quiet title in the tribe to beds, banks and waters of all navigable water courses within the 1873 boundaries of the tribe's reservation. See *id.* at 1247. The district court dismissed the tribe's complaint, and the court of appeals affirmed dismissal with respect to the state. See *id.* at 1247-48. The court of appeals also held that the state officials could be required to comply with federal law for the future. See *id.* at 1251. For a discussion of the possible preclusive effect in state court of federal court determinations of state liability, see note 162 above.

¹⁸² Cf. David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 151 n.11 ("People are not likely to amend constitutions just to change captions on complaints.").

¹⁸³ *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994) (citing *Young*, 209 U.S. at 158).

potential compact but also (it believed) over whether to bargain at all.¹⁸⁴

The discretion argument bristles with difficulties. At the remedial stage, for example, state implementation of federal court decrees often assumes the exercise of significant discretion by state officials.¹⁸⁵ Framed, however, in terms of the underlying substantive obligation, the discretion argument becomes more attractive: the negotiating "duty" IGRA imposed is, as respondents suggested, too indefinite in nature to be capable of judicial enforcement.¹⁸⁶ If that is so, IGRA would violate Article III's case or controversy requirement, not the Eleventh Amendment.¹⁸⁷

Before the Supreme Court, respondents relied upon the Eleventh Circuit's discretion analysis.¹⁸⁸ The tribe and the United States countered that there was a federal statutory requirement that the Governor negotiate in good faith. The Governor had discretion as to the terms of the compact, not over whether to negotiate.¹⁸⁹ Whatever the merits of this controversy, the majority avoided it. Instead, drawing on its *Bivens* jurisprudence,¹⁹⁰ the Court concluded that Congress intended IGRA's remedial scheme to be exclusive: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."¹⁹¹ Otherwise, the limited duty and the "quite modest set of sanctions" Congress imposed would be "superflu-

¹⁸⁴ See *id.* at 1028–29. The court of appeals also concluded that IGRA authorized a suit against the state, rather than an officer, because it did not directly impose duties on any specific state officer. See *id.* at 1029. The *Young* doctrine was thus inapplicable. See *id.*

¹⁸⁵ Legislative redistricting provides a good example. Cf. *Vera v. Bush*, No. CIV. A. H-94-0277, 1996 WL 442314, at *12–*13 (S.D. Tex. Aug. 6, 1996) (ordering interim redistricting of congressional districts after Texas failed to adopt a remedial redistricting plan despite a Supreme Court ruling that current voting districts were unconstitutional).

¹⁸⁶ See Brief of Respondents at 32–33, *Seminole Tribe* (No. 94-12). Respondents argued that if the state could refuse to negotiate, willingness to negotiate would itself be discretionary. Therefore, negotiating "is not a ministerial duty for which a mandatory injunction will lie." *Id.* at 32.

¹⁸⁷ The complaint must assert a claim of right sufficiently definite to be judicially enforceable. See *Wright v. City of Roanoke Redevel. & Hous. Auth.*, 479 U.S. 418, 430–32 (1987) (holding that an enforceable right must be "sufficiently specific and definite"); see also Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 243, 248 (1991) (comparing the nature of enforceable primary federal statutory rights with those enforceable under § 1983).

¹⁸⁸ See *Seminole Tribe*, 11 F.3d at 1028–29; Brief of Respondents at 31–35, *Seminole Tribe* (No. 94-12).

¹⁸⁹ See Brief for Petitioner at 25–29, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 15–17, *Seminole Tribe* (No. 94-12).

¹⁹⁰ In *Bivens*, the Court held that the petitioner was entitled to money damages from federal officers for injuries resulting from federal agents' Fourth Amendment breach. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

¹⁹¹ *Seminole Tribe*, 116 S. Ct. at 1132.

ous" because *Young* provided "more complete and more immediate relief," including sanctions for contempt.¹⁹²

At first blush, the *Seminole Tribe* Court's analysis of *Young* is unconvincing.¹⁹³ Surely Congress would prefer some federal court remedy to no remedy.¹⁹⁴ And why should *Young* necessarily entail a remedial scheme different from IGRA's? Jurisdiction to hear (which *Young* helps to secure by removing the Eleventh Amendment bar) and the appropriate remedy, once jurisdiction is exercised, result from different inquiries. IGRA could be read to define the scope of the available rights and remedies. Yet this analysis might raise a further problem, namely, the extent to which Congress can eliminate the contempt power once it decides to confer jurisdiction on the federal courts.¹⁹⁵ Or is the response that no "contempt" could occur because the duty to negotiate was, as the United States said, a "conditional one"?¹⁹⁶

The majority was correct in rejecting an underlying action against the Governor in *Seminole Tribe*, although I would put its point differently: the suit against the Governor failed to state a claim for relief.¹⁹⁷ To see why, we must return to *Young* itself. Simplified, *Young* involved railroad shareholders seeking to enjoin the state attorney general from enforcing state railroad rates on the ground that they were confiscatory.¹⁹⁸ State law precluded any other effective way to make such a challenge.¹⁹⁹ *Young* did more than simply rationalize the Court's prior precedents limiting state sovereign immunity; it also necessarily assumed the existence of an implied right of action for equitable relief against state officials. This right was grounded in the

¹⁹² *Id.* at 1132-33.

¹⁹³ Though the Court may have been concerned that a federal court might have held the Governor in contempt for following state law, *Young* creates the same predicament.

¹⁹⁴ See HART & WECHSLER SUPPLEMENT, *supra* note 12, at 47.

¹⁹⁵ "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 116 S. Ct. 1777, 1780 (1996).

¹⁹⁶ Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Seminole Tribe* (No. 94-12).

¹⁹⁷ Justice Souter's dissent acknowledged that *Young* could be limited in actions based on federal statutes, but he vigorously denied that IGRA had done so. See *Seminole Tribe*, 116 S. Ct. at 1180-81 (Souter, J., dissenting). Justice Souter argued that "[n]o clear statement of intent to displace the doctrine of *Ex parte Young* occurs in IGRA." *Id.* at 1181. He also claimed that Congress could not "possibly have intended to jeopardize the enforcement of the statute by excluding application of *Young*'s traditional jurisdictional rule." *Id.* at 1184. He objected to any doctrine of implied congressional displacement of *Young*. See *id.* at 1180. Justice Souter's approach, however, would cause a dramatic shift in the Court's jurisprudence; the Court apparently would have to return to the days before *Cannon v. University of Chicago*, 441 U.S. 677 (1979), see *infra* note 203, when it regularly inferred causes of action from statutes. Such a change is unwarranted. In promulgating IGRA, Congress was aware of its obligation to create a remedy; still, it chose not to act to give a claim for relief against state officials. Given this legal landscape, it is not clear under Justice Souter's reasoning how Congress would *not create* a remedy if it wished.

¹⁹⁸ See *Young*, 209 U.S. at 145-47.

¹⁹⁹ See *id.*

Constitution; the Court thereby established the existence of "arising-under" jurisdiction.²⁰⁰ Whether the right of action was created by the Constitution itself or was simply a matter of constitutional common law need not be explored here.²⁰¹ This portion of *Young*, however, is not relevant when a suit is based on a federal statute, nor are *Bivens* and its progeny, except by way of analogy. The crucial issue in *Seminole Tribe* was whether the tribe stated a cognizable statutory claim for relief against the Governor. Even if IGRA imposed a concrete duty on the Governor and established a "primary right" in the tribe, a right of action against the Governor must exist to sustain a lawsuit.²⁰² IGRA creates no such privately enforceable remedial right of action, either expressly or by implication.²⁰³ Given the Court's current aversion to inferring causes of action in statutes, Congress's failure to create an express private right of action against state officials implies that Congress did not intend there to be one. Moreover, albeit more tenuously, IGRA can also be interpreted as foreclosing use of § 1983 to provide the requisite remedial right.²⁰⁴

²⁰⁰ See *id.* at 145 (declaring that the circuit court had jurisdiction over the case because "it involved the decision of Federal questions arising under the Constitution of the United States"); cf. HART & WECHSLER, *supra* note 12, at 1065 (questioning whether the *Young* court "recognized a judicially implied federal cause of action for injunctive relief under the Fourteenth Amendment"). There was no diversity jurisdiction in *Young*. See *Young*, 209 U.S. at 143.

²⁰¹ Cf. Monaghan, *supra* note 27, at 23-25 (arguing that *Bivens* is an example of constitutional common law). In the absence of "an exclusive federal remedy that is as effective as the fullest state remedy[,]" . . . federal courts should invalidate any effort to preempt state remedies." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1519 (1987).

²⁰² See Monaghan, *supra* note 187, at 238-41 (criticizing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), which seemed to dispense with any right of action analysis in a suit for declaratory and equitable relief based upon claims of federal preemption); see also HART & WECHSLER, *supra* note 12, at 947-48, 1137 (discussing *Shaw* and questioning whether there is "an implied federal declaratory and injunctive remedy that does not depend on the existence or interpretation of the Declaratory Judgment Act").

²⁰³ The Court is unlikely to find implied rights of action in newly minted legislation. See *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) ("Congress, at least during the period of the enactment . . . , tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself. . . . [T]he ball, so to speak, may well now be in [Congress's] court."); *id.* at 749 (Powell, J., dissenting) ("[W]e should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist."); HART & WECHSLER, *supra* note 12, at 841 (stating that "post-*Cannon* decisions recognizing a new implied right of action are extremely rare"). By contrast, statutes that were enacted during the heyday of implied rights of action continue to receive the benefit of that fact. See *Morse v. Republican Party*, 116 S. Ct. 1186, 1211 (1996) (opinion of Stevens, J.) (arguing that evaluation of whether a private right of action exists under the Voting Rights Act depends on the legal context at the time Congress enacted the act); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982).

²⁰⁴ Although implied preemption of § 1983 claims is not favored, see Monaghan, *supra* note 187, at 247-48, the Court's finding that the remedial scheme in IGRA was particularly comprehensive would also argue that § 1983 actions are foreclosed. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981) (ruling that the existence of "express remedies" in a statute "demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be avail-

Seminole Tribe does not disturb the doctrine of *Young*. Unless Congress provides otherwise, *Young* permits prospective federal court relief against state officials.²⁰⁵ If the reality is that state officials can still be held accountable under *Young* and under statutory schemes that furnish remedies against state officials (provided that these remedies do not violate other constitutional provisions, such as the Tenth Amendment), then being unable to sue the state *eo nomine* in federal court will prevent a federal forum only in rare situations,²⁰⁶ like *Seminole Tribe*, in which Congress has provided a remedy against the state but not against the state officials. In such cases, however, the plaintiffs may still have recourse in state courts under *Reich* and like cases, assuming no exclusive federal jurisdiction.

VIII. CONCLUSION

At the bottom of the current state sovereign immunity debate, how much beyond mere symbolism — a factor I do not underestimate in constitutional law — is at stake? *Seminole Tribe*'s majority declared that it is an "indignity" to subject a state to the judicial tribunals of the United States at the "instance of private parties."²⁰⁷ The idea that a state, an utterly abstract entity, has feelings about being sued by a private party when "its" highest officials are regularly so sued surely strains credulity.²⁰⁸ Indeed, in another federalism case, the Court suggested that states serve as functional entities in the constitutional context: "The Constitution does not protect the sovereignty of States for the benefit of the states or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state government for the protection of individuals."²⁰⁹

In rejecting Justice Souter's examination of the English common law origins of sovereign immunity, the *Seminole Tribe* majority claimed that *Hans v. Louisiana* "found its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations,'"²¹⁰ and once again quoted from *The Federalist No. 81*: "sovereign immunity 'is the general sense and the

able under § 1983"); HART & WECHSLER, *supra* note 12, at 1134-37 (discussing the Court's decision in *Middlesex County Sewerage*, "statutory supersession" of remedies under § 1983, and the availability of § 1983 remedies in cases in which a federal statute preempts state law).

²⁰⁵ See *supra* p. 130-31.

²⁰⁶ See *supra* note 168.

²⁰⁷ *Seminole Tribe*, 116 S. Ct. at 1124 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) (internal quotation marks omitted).

²⁰⁸ Justice Stevens noted, in my view correctly, that "preventing 'indignity' . . . is an 'embarrassingly insufficient' rationale for the [constitutional] rule" of state sovereign immunity. *Seminole Tribe*, 116 S. Ct. at 1143 (Stevens, J., dissenting) (quoting *Puerto Rico Aqueduct*, 506 U.S. at 151 (Stevens, J., dissenting)).

²⁰⁹ *New York v. United States*, 505 U.S. 144, 181 (1992).

²¹⁰ *Seminole Tribe*, 116 S. Ct. at 1130 (quoting *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) (internal quotation marks omitted)).

general practice of mankind.”²¹¹ We are not informed of the contemporary practice of “civilized nations,” nor, indeed, even of what nations come within this ambit. Hamilton wrote to assuage general fears that the new government might compel the states to follow the “civilized” course of actually paying their just debts.²¹² The majority’s devotion to this doctrine of state sovereign immunity is, accordingly, mystifying.²¹³ In the end, *Seminole Tribe* simply perpetuates a questionable line of reasoning, the negative effects of which may in any event be circumvented. State sovereign immunity remains the exception, not the rule, the rhetoric of state sovereignty notwithstanding.

²¹¹ *Id.* (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

²¹² See THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²¹³ Any real federalism concerns can be accommodated by doctrines less “blunt” than sovereign immunity. See Shapiro, *supra* note 15, at 79.