CONSTITUTIONAL LAW—SOVEREIGN IMMUNITY—CONGRESS'S ARTICLE I POWERS MAY NOT ABROGATE STATE SOVEREIGN IMMUNITY GRANTED BY THE ELEVENTH AMENDMENT AND *EX PARTE YOUNG* IS INAPPLICABLE TO SUITS BROUGHT UNDER THE INDIAN GAMING REGULATORY ACT—*Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

The concept of sovereign immunity[1] predates the formation of a federal government[2] in the United States.[3] Initially founded on the belief

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[1] *See* John F. Duffy, Comment, *Sovereign Immunity, The Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 295 (1989) (describing sovereign immunity as a "constitutional doctrine . . . [that] prohibits a federal court from entertaining any suits in which a sovereign entity, either a state or the United States, is named as defendant unless the sovereign has consented to be sued") (footnotes omitted). Duffy explains that this grant of immunity is not absolute because there are several limiting doctrines, such as statutory consent. *See id.* at 298; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 173 (2d ed. 1988) (commenting that sovereign immunity is a controversial limitation on the jurisdiction that federal courts may exercise over state defendants); BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (defining sovereign immunity as a "judicial doctrine which precludes bringing suit against the government without its consent"). *See generally* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 78-88 (1988) (discussing the Eleventh Amendment's constitutional breadth and the background of sovereign immunity jurisprudence in the United States).

Professor Tribe questions whether the Eleventh Amendment actually constitutionalizes sovereign immunity. *See* TRIBE, *supra*, at 173. Tribe does, however, consider the Eleventh Amendment to be at the core of the controversy between state sovereignty and federalism. *See id.* Tribe explains:

> The [E]leventh [A]mendment lies at the center of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights. The Supreme Court has negotiated this tension both by resort to legal fictions and through complex and often counterintuitive interpretations of the [E]leventh [A]mendment that have made that amendment far more controversial than its language would, on its face, suggest.

Id. Professors John Nowak and Ronald Rotunda agree with Tribe's definition of sovereign immunity, adding that the jurisdictional bar of the Eleventh Amendment expands and contracts by virtue of the Supreme Court's interpretation devices. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §2.11, at 44 (5th ed. 1995). Professors Nowak and Rotunda qualify their interpretation of the Eleventh Amendment as a grant of sovereign immunity by explaining that the Amendment only prevents suits from being heard in federal court. *See id.* As such, some federal rights may still be vindicated in state court. *See id.* This, of course, begs the question of whether state judges, who rely on the state for their sustenance, should be entrusted with the sole power to adjudicate these federal claims. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1951 (1983)

that the King enjoyed immunity from all private suits,[4] some scholars argue that the Tenth Amendment[5] incorporated sovereign immunity into

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("'*circumstances of the states themselves being parties*, it might, . . . be plausibly argued, that the judges of the state courts were not free from bias'") (quoting Hunter v. Martin, 18 Va. (4 Munf.) 11, 11 (1814)).

[2] *See* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1146 (1996) (Souter, J., dissenting) (citing CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 5 (1972)) (dating sovereign immunity to at least the thirteenth century); *see also* Employees of Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 288 (1973) (Marshall, J., concurring in the result) ("Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment.").

For purposes of Eleventh Amendment jurisprudence, a federal government is defined as a "system of government administered in a nation formed by a union or confederation of several *independent states*." BLACK'S LAW DICTIONARY 611 (6th ed. 1990) (emphasis added); *see also* Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (explaining that the Eleventh Amendment represents the understanding that while the states are part of a union they still retain some of the privileges of individual sovereigns, particularly sovereign immunity). Tension results from this relationship between state governments and the federal government because while there are times when a state may properly invoke its sovereign immunity there are also instances when that immunity must be relinquished in the interest of preserving federalism. *See Employees*, 411 U.S. at 286 (noting that the Constitution dictates a delicate balance between state and federal power).

[3] *See* Edelman v. Jordan, 415 U.S. 651, 660-61 n.9 (1974) (noting that various members of the Constitutional Convention, particularly James Madison, John Marshall, and Alexander Hamilton, objected to the idea of subjecting states to suits brought by private individuals). *But see* Welch v. Texas Dep't of Highways & Pub. Transp., 438 U.S. 468, 505 (1987) (Brennan, J., dissenting) (explaining that there is little evidence suggesting that the Framers of the Constitution were against subjecting nonconsenting states to suit); Christopher T. Graebe, *The Federalism of James Iredell in Historical Context*, 69 N.C. L. REV. 251, 254-58 (1990) (suggesting that some of the Framers argued that Article III granted jurisdiction over suits in which a state was a party).

[4] *See* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U.L. REV. 1121, 1124-25 (1993) (discussing the common-law fiction that the "King can do no wrong" and the actual implication of that statement—that while the King can certainly do wrong there was no higher authority to whom the King would answer); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437, 446 (1793) (Iredell, J., dissenting) (discussing the historical roots of state immunity from compulsory suits). *But see* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1, 3 (1963) (noting that in practice, the doctrine of sovereign immunity rarely barred private suits in England prior to 1789 because the petition of right, a device designed to allow relief against the government and specifically the King, was available).

Justice Holmes offered an alternative explanation of the sovereign immunity doctrine stating that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[5] *See* U.S. CONST. amend. X. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*; *see also* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 66 (1989) (explaining the view that the Tenth Amendment secured the states' right to

the Constitution.[6] Others claim the protection of sovereign immunity did not derive from the Constitution or the Bill of Rights but rather from the adoption of the Eleventh Amendment.[7] Regardless of its genesis, ratification of the Eleventh Amendment and, arguably, the constitutionalization of the sovereign immunity defense can be traced to the Supreme Court's decision in *Chisholm v. Georgia*,[8] a controversial ruling that allowed a citizen to sue the State of Georgia for satisfaction of a debt.[9]

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sovereign immunity and that the Eleventh Amendment primarily regarded only jurisdictional concerns). *But see* Duffy, *supra* note 1, at 297 n.16 (noting that sovereign immunity was conferred on the states via the Eleventh Amendment).

[6] *See Chisholm*, 2 U.S. (2 Dall.) at 445-46 (Iredell, J., dissenting) (explaining that individual states, by adopting the Constitution, did not completely forfeit their sovereignty). *But see id.* at 452 (Blair, J., concurring) ("A State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, [s]he has, in that respect, given up her right of [s]overeignty."); *id.* at 476 (Jay, C.J., concurring) (stating that the words of the Constitution are "expre[s]s, po[s]itive, free from ambiguity, and without room for . . . implied expre[ss]ions").

[7] *See* U.S. CONST. amend. XI. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

The language of the Eleventh Amendment is silent on the issue of sovereign immunity. *See* Gibbons, *supra* note 1, at 1894, 1895. Based on the language of Article III, the Constitution did not initially provide for sovereign immunity and the addition of the Eleventh Amendment did not explicitly grant states immunity from all suits in federal court. *See id.* Some critics maintain that the text should be read as written, without embellishment from originalists who contend that the Amendment was fashioned to provide states with sovereign immunity. *See* Michael P. Kenny, *Sovereign Immunity and the Rule of Law: Aspiring to a Highest-Ranked View of the Eleventh Amendment*, 1 GEO. MASON INDEP. L. REV. 1, 11-12 (1992). Kenny explains:

> [t]here is absolutely no reason to believe, therefore, that the drafters and ratifiers of the Eleventh Amendment intended to immunize states from federal or constitutional causes of action. Moreover, had the drafters and ratifiers intended such broad immunity, it is more reasonable to assume that they would have drafted an amendment that would have expressly barred suits by citizens of the defendant state . . . . Such an amendment, in fact, was proposed but was rejected.

Id. (footnote omitted).

[8] 2 U.S. (2 Dall.) 419 (1793).

[9] *See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1262, 1263 (1989) [hereinafter Fletcher, *The Diversity Explanation*] (noting that although scholars generally agree that the Eleventh Amendment was passed in response to *Chisholm*, debate abounds over the original intent of its authors). There are several theories regarding analysis of the Eleventh Amendment. *See id.* Among these theories include the diversity theory, the plain meaning theory, and the more traditional interpretation based on the Supreme Court's decision in *Hans v. Louisiana*. *See id.* at 1261-63; William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131, 131 (1990) [hereinafter Fletcher, *Exchange*]; *see also* Hans v. Louisiana, 134 U.S. 1, 10 (1890) (interpreting the Eleventh Amendment as a constitutional grant of sovereign immunity).

Supporters of the diversity theory insist that, based on the historical roots of the Eleventh Amendment, the Amendment intended to bar jurisdiction only in diversity of citizenship cases and not all private suits. *See* Fletcher, *The Diversity Explanation*, *supra*, at 1264. William Fletcher, for example, noted that when the Eleventh Amendment was ratified, the authors intended to repeal Article III's grant of diverse citizen-state jurisdiction over state defendants. *See* Fletcher, *Exchange*, *supra*, at 131 ("The diversity explanation holds that the Eleventh Amendment was intended to repeal the part of [the] state-citizen diversity clause of Article III that had conferred party-based jurisdiction over unconsented suits brought against the states by out-of-state citizens or aliens." (footnote omitted)). As an advocate of the diversity theory, John J. Gibbons stressed that the Supreme Court should acknowledge its earlier "misinterpretation" of the Eleventh Amendment as a constitutional grant of sovereign immunity and overrule *Hans*. *See* Gibbons, *supra* note 1, at 2004.

Plain meaning advocates, in contrast, suggest that the Eleventh Amendment should be read as it is written. *See* Steven Breker-Cooper, *The Eleventh Amendment: A Textual Solution*, 38 WAYNE L. REV. 1481, 1483 (1992) (arguing that the Eleventh "[A]mendment can be understood if only it is read literally"); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1342 (1989) (noting that "[t]he amendment could hardly be clearer in precluding federal jurisdiction only in suits brought against a state by 'Citizens of another State, or by Citizens or Subjects of any Foreign State'"); Massey, *supra* note 5, at 65 ("I propose that we take Eleventh Amendment text and the history of its enactment at face value. The amendment sought to create a party based *denial* of jurisdiction to the federal courts that sweeps across all the jurisdictional heads of Article III"). Unfortunately, these textualists do not agree about what the words of the Eleventh Amendment actually mean. *See, e.g.*, Fletcher, *Exchange*, *supra*, at 132 (comparing the interpretations offered by both Marshall and Massey).

Proponents of the *Hans* interpretation, in contrast, suggest that the immediate passage of the Eleventh Amendment indicated an overwhelming disapproval of states being subjected to suits by private individuals. *See* Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1044 (1994). According to advocates of this view, the immediate passage of the Eleventh Amendment clearly indicated the Framers's intent to shield states from suit even though the language did not explicitly grant states the privilege of sovereign immunity. *See* Fletcher, *The Diversity Explanation*, *supra*, at 1291. Furthermore, advocates of the *Hans* theory, including a majority of present Supreme Court members, maintained that *Hans* and its progeny did not significantly threaten federal interests. *See* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1156 (1989). Althouse suggests that based on the dictates of stare decisis, the present Supreme Court will continue to follow *Hans* in its Eleventh Amendment interpretation unless there is a significant showing that adherence to *Hans* will detrimentally affect federal interests. *See id.*

Justice Scalia, a supporter of the *Hans* interpretation, explained that overruling *Hans* would conflict with the dictates of stare decisis and require the Supreme Court to overrule and disapprove of numerous cases. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 34-35 (1989) (Scalia, J., dissenting). In addition, Justice Scalia argued that Congress relied on Eleventh Amendment immunity when it created certain legislation. *See id.* at 35 (Scalia, J., dissenting). Laurence Tribe, in his analysis of the Eleventh Amendment, stated that "restoring an historically correct understanding of the [E]leventh [A]mendment, would inevitably disrupt the entire complex of doctrines . . . surrounding the balance of power between the states and the federal government." *See* TRIBE, *supra* note 1, § 3-25, at 175 n.8 (citation omitted) (noting that although the diversity jurisdiction

Today, the Eleventh Amendment limits private actions brought against states in federal court[10] by preventing the exercise of both diversity of citizenship jurisdiction[11] and federal question jurisdiction[12] over state defendants.[13] In so acting, the Amendment safeguards the integrity and dignity of states as sovereigns.[14] Left unchecked, however, the Eleventh Amendment could provide total immunity for a state's actions against its own citizens and those of other states.[15] Consequently, the United States Supreme Court has created a number of legal fictions[16]

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interpretation of the Eleventh Amendment is well-supported, the Supreme Court is unlikely to change its current analysis of Eleventh Amendment jurisprudence).

[10] *See* Massey, *supra* note 5, at 62. The Eleventh Amendment is a "presumptive jurisdictional bar to private claims in federal court against states." *Id.*

[11] *See* 28 U.S.C. § 1332 (1994). Section 1332 provides a forum in federal court for citizens of different states to settle their disputes. *See id.*

[12] *See id.* § 1331. Section 1331 grants federal courts jurisdiction over cases involving conflicts "arising under the Constitution, laws, or treaties of the United States." *Id.*

[13] *See, e.g.*, Green v. Mansour, 474 U.S. 64, 68 (1985) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) ("The Eleventh Amendment confirms that 'the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.'"); *see also* U.S. CONST. art. III, § 2 (providing that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State . . . . [and] all Cases . . . in which a State shall be a Party . . . ").

[14] *See* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993); *In re* Ayers, 123 U.S. 443, 505 (1887).

[15] *See generally* Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212 (1988) (reviewing JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987)) (dealing with the concern that the jurisdictional bar of the Eleventh Amendment impairs a state's public accountability and that violations of federal law may go unchecked). *See also* Erwin Chemerinsky, *Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term*, 39 DEPAUL L. REV. 321, 344 (1990) (stating that the present debate between members of the Supreme Court focuses on the importance of state immunity and the role of state accountability); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 62 (1984) (stating that the idea of the government being accountable to the public for its actions "is at war" with the Supreme Court's present interpretation of the Eleventh Amendment as the constitutional embodiment of the sovereign immunity doctrine.)

[16] *See* BLACK'S LAW DICTIONARY 894 (6th ed. 1990) (defining a legal fiction as a "situation contrived by the law to permit a court to dispose of a matter"). The usage of legal fictions has been criticized by several commentators. *See* Gibbons, *supra* note 1, at 2003-04 (arguing that the interpretation of the Eleventh Amendment has been largely political and that "the amendment's contours were shaped not by doctrinal reasoning but by the political exigencies of the times."); *see also* Massey, *supra* note 5, at 69, 71 (suggesting that these legal fictions, adopted to stop states from trampling on individual federal rights, may indeed create more problems then they solve).

Justice Brennan criticized the Supreme Court's usage of legal fictions in *Atascadero State Hospital v. Scanlon* where the Justice suggested that the Court should simply correct

to discourage states from behaving inappropriately.[17] These legal devices disguise suits against the states by permitting citizens' recourse against their state governors or alternatively by implying the state's consent to suit.[18] The Supreme Court's employment of these legal fictions has led

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its Eleventh Amendment interpretation rather than rely on judicially-constructed legal fictions. *See* 473 U.S. 234, 258 (1985) (Brennan, J., dissenting). Justice Brennan further explained:

> The Court's sovereign immunity doctrine has other unfortunate results. Because the doctrine is inconsistent with the essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land—it has led to the development of a complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur.

Id. at 255-56 (Brennan, J., dissenting).

Presently, a state may not be subjected to suit in federal court. *See* U.S. CONST. amend. XI. Its officers, acting in their official capacity however, may be sued for injunctive relief, though generally not for money damages. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 89-90 (1989). Regarding money damages, prospective relief is allowed while retroactive relief is denied. *See* Edelman v. Jordan, 415 U.S. 651, 664-65 (1974). The Supreme Court has also on occasion implied state consent to suit thereby waiving a state's Eleventh Amendment immunity when certain claims would otherwise be barred. *See, e.g.*, Parden v. Terminal Ry., 377 U.S. 184, 192-93 (1964) (noting that Alabama agreed to suit when it chose to engage in the operation of an interstate railroad).

[17] *See* Duffy, *supra* note 1, at 295. Historically, the Supreme Court has authorized suits against states in several situations: (1) suits authorized by the state legislature effecting a kind of waiver of sovereign immunity or otherwise consented to by a state; (2) suits based on violations of federal law by individual state actors acting under color of law; and (3) suits allowed by Congress. *See id.* at 295, 299; *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989) (allowing abrogation of the Eleventh Amendment defense based on Congress's Commerce Clause powers); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (allowing abrogation of the Eleventh Amendment defense based on the Fourteenth Amendment); *Parden*, 377 U.S. at 189, 192-93 (finding an implied waiver of consent based on the state's operation of an interstate railroad); *Ex parte* Young, 209 U.S. 123, 159, 160 (1908) (holding that an officer suit may be maintained against state officials when the defendant acts beyond his authority and the plaintiff is seeking injunctive relief); Clark v. Barnard, 108 U.S. 436, 447 (1883) (holding that voluntary appearance of state defendants confers jurisdiction via consent).

[18] *See, e.g.*, *Ex parte Young*, 209 U.S. at 159, 160 (allowing a suit in which the defendant officer acted beyond his authority and the plaintiff sought injunctive relief); *Parden*, 377 U.S. at 189, 192-93 (finding an implied waiver of consent when a state operates an interstate railroad).

It is permissible for the federal government to sue a state. *See* United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (states are not shielded from suits by the federal government). The Supreme Court also permits sister states to sue each other. *See* South Dakota v. North Carolina, 192 U.S. 286, 316 (1904) (states consent to suits by other states based on a mutual concession of a right to sue). Additionally, Congress may intervene and abrogate state sovereign immunity. *See* Dellmuth v. Muth, 491 U.S. 223, 228 (1989); *accord Atascadero*, 473 U.S. at 238. *But see* Massey, *supra* note 5, at 63-64. Massey states:

to conflicting interpretations of the Eleventh Amendment's scope.[19] Allowing states the option of consenting to suit[20] has further compromised the Eleventh Amendment's supposed jurisdictional bar to suits brought by private citizens.[21] Ultimately, this has forced federal courts to determine when, for the purposes of Eleventh Amendment analysis, a state is being sued[22] and thus whether a state defendant may utilize the sovereign immunity defense.[23]

> [i]f the [Eleventh] [A]mendment constitutionalized state sovereign immunity, it did so not by creating a waivable immunity doctrine, but by carving out of the federal judicial power a class of cases: private claims against states. As a result of this prohibition upon subject matter jurisdiction, the federal judiciary lacks any constitutional authority to hear and decide such cases. It is a miraculous doctrine that enables either Congress or a litigant state to confer this authority.

Id. (footnote omitted).

[19] *See* Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1351 (1989). Although the meaning of the Eleventh Amendment is heavily disputed, stare decisis presents a separate problem of whether history mandates acceptance of the *Hans* interpretation of the Amendment. *See* Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV., 1260, 1260, 1261-62 (1990). Justice Brennan, noting the conflicting interpretations, stated that:

> [t]he doctrine that thus has been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system . . . . The Court has aggressively expanded its scope. [ ] Yet the [Court's] current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

Atascadero, 473 U.S. at 302 (Brennan, J., dissenting) (citations omitted).

[20] *See, e.g.*, Parden v. Terminal Ry., 377 U.S. 184, 192-93 (1964) (explaining that the State of Alabama necessarily consented to suit by operating an interstate railroad); Clark v. Barnard, 108 U.S. 436, 447 (1883) (suggesting that state defendants consent to suit when they voluntarily appear in court).

[21] *See* Massey, *supra* note 5, at 64. Allowing states to consent creates another problem in Eleventh Amendment analysis; arguably, if the Eleventh Amendment alters Article III's grant of jurisdiction to federal courts, then a party's consent would be irrelevant. *See* Althouse, *supra* note 9, at 1160-61. For an in-depth discussion of states consenting to private suits and judicially implied consent, see *supra* note 17 and accompanying text.

[22] *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 47-48 (explaining that although the state is entitled to Eleventh Amendment protection, subdivisions of the state such as municipal corporations and school boards may not invoke the Eleventh Amendment's jurisdictional bar). The distinction is made that "[i]f an entity is . . . merely [an] instrumentality of state government it shares the immunity, but . . . if it is a politically independent unit," then the suit may proceed without raising an Eleventh Amendment issue. *Id.*

[23] *See* Althouse, *supra* note 9, at 1139. Althouse explains "[t]hat *Hans* and *Young* make such an unattractive and troublesome pair . . . for the majority of the Court [and

Recently, this debate has crystallized over the analysis of states' relations with Indian Tribes.[24] The unique position of Indian Tribes as "dependent sovereigns"[25] has confused dispute resolution between these two entities[26] and created additional controversy in the on-going Eleventh

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that] both decisions uphold important constitutional values that cannot be sacrificed. The cost of this awkward coexistence is severe doctrinal disarray." *Id.* at 1140 (footnotes omitted). The Supreme Court's steadfast commitment to these clearly conflicting decisions places Eleventh Amendment jurisprudence in a constant state of "confusion, contradiction, and incoherence." *Id.* at 1139. *But see* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1122, 1132 (1996) (stating that both *Ex parte Young* and *Hans* are still valuable precedents).

The legal fictions that make up the Eleventh Amendment doctrine are necessary to balance individual state sovereignty with federal interests. *See* Althouse, *supra* note 9, at 1139. Yet, there remains the concern that any distinction between allowing a suit against a state and an *Ex parte Young* action against a state officer is illusory. *See id.* at 1168; *see also* Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126 (1996) (stating that "*Ex parte Young*, long ago confirmed that citizens seeking prospective relief in suits against 'the state' could simply recast their complaints as suits against state officials" thereby adjudicating their claims in a federal forum (footnote omitted)). Theories on congressional abrogation have led only to further incoherence in Eleventh Amendment interpretation. *See* Althouse, *supra* note 9, at 1168.

[24] *See* Richard Monette, *When Tribes Sue States: How "Federal Indian Law" Offers an Opportunity to Clarify Sovereign Immunity Jurisprudence,* 14 QUINNIPIAC L. REV. 401, 433 (1994) (suggesting that the Supreme Court seize the opportunity presented by the cases between states and tribes to clarify its position on Eleventh Amendment jurisprudence); *see also* Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 128 (1993) (noting the conflict among courts regarding whether Congress possesses the power to abrogate state sovereign immunity in cases involving tribal and state disputes).

Suits brought by tribes have generally been barred by the Eleventh Amendment with three significant exceptions: (1) Congress's ability to abrogate state sovereign immunity on behalf of the tribes; (2) state consent to suit or waiver of its Eleventh Amendment immunity; and (3) application of the *Ex parte Young* doctrine. *See* William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act*, 21 HASTINGS CONST. L.Q. 71, 77-78 (1993). In *Blatchford v. Native Village*, the Supreme Court held that sovereign immunity barred suits brought by Indian Tribes. *See* 501 U.S. 775, 779-80, 782 (1991). Writing for the majority, Justice Scalia explained that the Supreme Court already ruled on the applicability of sovereign immunity to suits brought by foreign sovereigns. *See id.* at 781 (citing Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934)).

[25] *See* Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power,* 27 U.S.F. L. REV. 419, 419 (1993). The history of tribal sovereignty is one of inconsistencies; while tribes are referred to as "domestic-dependent sovereigns," Congress and the Supreme Court have treated tribes as "wards" of the United States. *See* Mike McBride III, *Oklahoma's Civil-Adjudicatory Jurisdiction Over Indian Activities in Indian Country: A Critical Commentary on* Lewis v. Sac & Fox Tribe Hous. Auth., 19 OKLA. CITY U. L. REV. 81, 99 (1994). The Supreme Court has continually recognized the congressional policy of fostering self-government for Indian tribes; Congress, however, maintains a sort of trust relationship with tribes, often legislating on their behalf. *See id.* at 97-98.

Amendment debate.[27] Some scholars believe that the Supreme Court's treatment of suits brought by Indian Tribes against states may provide a resolution to many Eleventh Amendment questions.[28]

Against this backdrop, the Supreme Court, in *Seminole Tribe v. Florida*,[29] considered whether states enjoy Eleventh Amendment immunity in suits brought by Indian Tribes in federal court.[30] The Court resolved the issue in favor of Florida, declaring that states were entitled to Eleventh Amendment protection from suits brought by Indian Tribes.[31] Overruling *Pennsylvania v. Union Gas Co.*,[32] the Supreme Court concluded that Congress acting under its constitutionally enumerated powers lacked the legislative authority to abrogate a state's Eleventh Amendment sovereign immunity.[33] The Supreme Court gave effect to that policy by simply declaring that federal courts lacked subject matter jurisdiction[34] over this dispute.[35]

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[26] *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 697 (1989) (conceding that the federal courts have faced difficulty in establishing the correct application of federal jurisprudence in cases concerning federal Indian law).

[27] *See* Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 55 (1995) (noting that conflicting judicial interpretations of the Eleventh Amendment have led to an impasse in the negotiations between tribes and states on the gaming issue). Gambling on Indian reservations provided many tribes with new opportunities and has been hailed by its supporters as the "new buffalo." *See id.* at 53. Proponents of Indian gaming have expressed concern that extension of the Eleventh Amendment to suits brought by Indian tribes will kill the "new buffalo." *See id.* By refusing to negotiate the tribal-state compact required under IGRA, states are "killing the new buffalo" and essentially preventing tribes from reaping the economic benefits of operating casinos on Indian lands. *See id.* at 55-58.

[28] *See* Monette, *supra* note 24, at 433.

[29] 116 S. Ct. 1114 (1996).

[30] *See id.* at 1122.

[31] *See id.* The majority denied jurisdiction based on several points. *See id.* First, Florida did not consent to the lawsuit. *See id.* Second, Congress may not, pursuant to its Article I powers, abrogate Eleventh Amendment immunity. *See id.* Finally, *Ex parte Young* actions were not available in this case. *See id.*

[32] 491 U.S. 1, 3 (1989) (5-4 decision).

[33] *See Seminole*, 116 S. Ct. at 1131-32. Chief Justice Rehnquist, writing for the majority, explained that the Eleventh Amendment immunized Florida from suit and Congress may not, based on its enumerated powers, infringe on that grant of immunity. *See id.* at 1131. The Eleventh Amendment was intended as a check on Article III jurisdiction, and, therefore, Congress may not bypass the constitutional limits placed on jurisdiction through its Article I powers. *See id.* at 1131-32. Furthermore, the exception furnished by *Ex parte Young* was not available in this case because Congress already provided an enforcement scheme under IGRA. *See id.* at 1132, 1133.

[34] *See* BLACK'S LAW DICTIONARY 1425 (6th ed. 1990) (defining subject matter jurisdiction as a "court's power to hear and determine cases of the general class or category to which proceedings in question belong; the power to deal with the general subject involved in the action").

In 1991, the Seminole Tribe of Florida, in preparation of opening a gambling casino on their reservation,[36] attempted to negotiate a tribal-state compact[37] with Florida pursuant to the Indian Gaming Regulatory Act (IGRA).[38] When Florida declined the opportunity to enter into such

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[35] *See Seminole*, 116 S. Ct. at 1131-32 (citing Standard Oil Co. v. Montecatini Edison S. p. A., 342 F. Supp. 125, 129 (D. Del. 1972)).

[36] *See id.* at 1121. There has been a great deal of debate on the issue of Indian gaming. *See* Bisset, *supra* note 24, at 73. Critics claim that allowing gaming on Indian lands will invite the involvement of organized crime. *See id.* Gaming industry executives complain that the new competition will interfere with their business. *See id.* In addition, state officials argue that the gaming will attract a great deal of money to the reservations which cannot be taxed. *See id.* In contrast, supporters of Indian gaming contend that allowing Indian gaming offers tribes an opportunity at achieving self-governance and economic independence. *See* Marc S. Feinstein, Cheyenne River Sioux Tribe v. South Dakota, *Indian Gaming, and the State's Eleventh Amendment Immunity: Where Will the Conflict in the Circuits Fuse?*, 39 S.D. L. REV. 604, 631 (1994); *see also* Edward P. Sullivan, Note, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1111-12 (1995) (noting that tribal supporters "contend [that] IGRA allows tribes to obtain long-overdue self sufficiency that, in turn, instills tribal members with self worth" (footnote omitted)). The revenue from gaming provides tribes with the funds to build schools, health facilities, and other necessities. *See* Christopher J. Moore, Comment, *What is Good for the Goose is Good for the Gambler: How the Indian Gaming Regulatory Act Fails to Abrogate State Immunity and Protects Tribal Immunity*, 21 OHIO N. U. L. REV. 1203, 1203 (1995). While this has not resulted in immediate prosperity for all tribes, there is hope that many tribes will enjoy success similar to that of the Pequot Tribe's Foxwoods Resort Casino in Connecticut. *See id.* at 1203-04.

[37] *See* 25 U.S.C. § 2710(d)(3) (1994). A tribal-state compact, required by IGRA, is a bargain struck by the tribe and the state where that tribe's reservation is located, which governs the operation of certain gaming activities. *See* Marianne T. Caulfield, Comment, *Will it Take a Move by the New York Yankees for the Seneca Nation to Obtain a Class III Gaming License?*, 44 CATH. U. L. REV. 279, 280 (1994).

[38] *See* 25 U.S.C. § 2710(d)(1)(C) (1994). In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA), which provides a statutory basis for state supervision of Indian gaming. *See Seminole*, 116 S. Ct. at 1119; 25 U.S.C. § 2702 (1994). The act was intended to get around the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, which precluded state intervention in tribal gaming. *See Seminole*, 116 S. Ct. at 1124-25; *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221 (1987) (noting that tribal interest in gaming outweighs California's "interest in preventing the infiltration of the tribal bingo enterprises by organized crime"); Seminole Tribe v. Florida, 11 F.3d 1016, 1019 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996) (noting that "[i]n order to achieve a compromise between the interests of the states and the interests of the Indian tribes, Congress" enacted IGRA).

IGRA provides a role for states in the regulation of Indian gaming activities. *See id.* The act does this by classifying gaming activities in one of three categories. *See* 25 U.S.C. § 2703(6)-(8) (1994). Class I gaming involves primarily social or traditional games, usually for minimal stakes, that are "in connection with, tribal ceremonies or celebrations." § 2703(6). These games are self-regulated. *See id.* § 2710(a)(1). Class II gaming includes bingo, nonbank card games, and card games that operated prior to the passage of the IGRA. *See id.* § 2703(7). Generally, these activities are legal within the state and regulation is primarily by the tribes, with a supervisory role for the federal government. *See id.* § 2710(c)(3)-(6). Class III gaming covers all other types of

a compact,[39] the tribe sought to achieve the same result by suing the State and its Governor in federal court pursuant to the enforcement provisions of IGRA.[40]

The district court refused to grant the State's motion to dismiss,[41] based on its claim of Eleventh Amendment immunity, in light of recent precedent allowing a similar suit.[42] Florida immediately filed an interlocutory appeal[43] from the district court's denial of their motion to dismiss.[44] On appeal, the United States Court of Appeals for the

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gambling such as casino games, slot machines, and lotteries. *See id.* § 2703(8). Various requirements must be met for a tribe to engage in Class III gaming: (1) the tribe's governing body must pass appropriate legislation to allow Class III gaming, which the National Gaming Commission must approve; (2) the gambling must be legal within the state where the Indian land is located; and (3) the gaming must be conducted in accordance with a Tribal-State compact. *See id.* § 2710(d)(1)(A)-(C).

[39] *See Seminole,* 116 S. Ct. at 1121. States have a duty to negotiate tribal-state compacts in good faith and failure to negotiate is regarded as bad faith. *See* § 2710(d)(7)(A)(*i*). IGRA provides in pertinent part:

> The United States district courts shall have jurisdiction over . . . 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 purposes of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

Id. This grant of jurisdiction, however, is restricted by § 2710(d)(7)(B)(*i*), which requires tribes to wait a minimum of 180 days after the initial petition for a tribal-state compact before filing suit against the state. *See id.* § 2710(d)(7)(B)(*i*).

[40] *See Seminole,* 116 S. Ct. at 1121. The State of Florida filed a motion to dismiss, invoking Eleventh Amendment sovereign immunity as a defense. *See id.* The district court denied the motion and the State took an interlocutory appeal. *See id.* The Eleventh Circuit reversed the lower court's decision, stating that sovereign immunity based on the Eleventh Amendment shielded Florida from suit. *See id.*

[41] *See* Seminole Tribe v. Florida, 801 F. Supp. 655, 656 (S.D. Fla. 1992), *rev'd,* 11 F.3d 1016 (11th Cir. 1994), *aff'd,* 116 S. Ct. 1114 (1996); *see also* FED. R. CIV. PROC. 12(b)(1). Rule 12(b)(1) requires dismissal of a case if the court lacks subject matter jurisdiction. *See id.*

[42] *See Seminole,* 801 F.Supp. at 660. The district court employed a two-step analysis for congressional abrogation, asking first whether Congress clearly intended to abrogate the Eleventh Amendment immunity and then whether Congress had the constitutional authority to do so. *See id.* Finding that the congressional intent to abrogate sovereign immunity was clear, the district court held that Congress acted appropriately when it abrogated Florida's sovereign immunity pursuant to its power under the Indian Commerce Clause. *See id.* at 657-58; *see also* U.S. CONST. art. I, § 8, cl. 3 (providing in part that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[43] *See* BLACK'S LAW DICTIONARY 815 (6th ed. 1990) (defining interlocutory appeal as "[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits").

[44] *See* Seminole Tribe v. Florida, 11 F.3d 1016, 1020 (11th Cir. 1994), *aff'd,* 116 S. Ct. 1114 (1996); *see also* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 148 (1993) (providing an immediate interlocutory appeal when a claim of Eleventh Amendment immunity is denied).

Eleventh Circuit consolidated the *Seminole* case with a similar suit[45] and considered the Eleventh Amendment argument on its merits.[46] The Eleventh Circuit reversed the district court's decision and held that Congress lacked the power to abrogate a state's Eleventh Amendment immunity by reference to the Federal Constitution's Indian Commerce Clause.[47] The Eleventh Circuit concluded that the district court lacked jurisdiction despite clear Congressional intent to abrogate state immunity in the federal statute.[48] Given the discretionary nature of negotiating a tribal-state compact, the appellate court further held that the tribe could not maintain an *Ex parte Young* action against Florida's Governor.[49]

Noting the growing confusion[50] regarding the scope of state immunity afforded by the Eleventh Amendment, the Supreme Court

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[45] *See Seminole*, 11 F.3d at 1018; *see also* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 562 (S.D. Ala. 1991) (finding that Congress does not have the power to abrogate the Eleventh Amendment pursuant to its Indian Commerce Clause powers). Chief Judge Alex T. Howard, Jr. of the United States District Court for the Southern District of Alabama, held, in this factually similar case, that states are shielded from tribes' suits because of the Eleventh Amendment. *See Poarch Band*, 776 F. Supp. at 562. In a related decision, the district court held that actions under both the *Ex parte Young* doctrine and 42 U.S.C. § 1983 were not available to confer jurisdiction in the *Poarch Band* case. *See* Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1552-53 (S.D. Ala. 1992).

[46] *See Seminole*, 11 F.3d at 1019. Unlike the decision reached by the *Seminole* district court, other federal courts in the Eleventh Circuit have resolved the issue differently by recognizing a state's claim of Eleventh Amendment immunity. *See Poarch Band*, 776 F. Supp. at 562 (holding that the Eleventh Amendment bars suits brought pursuant to IGRA); *see also Poarch Band*, 784 F. Supp. at 1553 (holding that suits against the Governor are also barred). The Eleventh Circuit consolidated *Seminole* and *Poarch Band* because the legal issues were essentially the same. *See Seminole*, 11 F.3d at 1018.

[47] *See Seminole*, 11 F.3d at 1019. The Eleventh Circuit questioned the plurality decision in *Pennsylvania v. Union Gas Co.*, and suggested that "a majority of the present [Supreme] Court [might] disagree with *Union Gas*." *Id.* at 1027. Drawing a distinction between the Interstate Commerce Clause and the Indian Commerce Clause, the appellate court concluded its Eleventh Amendment analysis by limiting the *Union Gas* holding to congressional abrogation authorized by the Interstate Commerce Clause. *See id.*

[48] *See id.* at 1019. The Supreme Court agreed with the Eleventh Circuit's reasoning and stated that Congress's intent to abrogate state immunity was clearly based on IGRA's numerous references to states as defendants. *See id.*

[49] *See Seminole*, 11 F.3d at 1028-29. For an in-depth discussion of the *Ex parte Young* doctrine see *infra* notes 59-66 and accompanying text.

[50] *See* Jeffrey B. Mallory, Note, *Congress' Authority to Abrogate a State's Eleventh Amendment Immunity from Suit: Will* Seminole Tribe v. Florida *Be Seminal?*, 7 ST. THOMAS L. REV. 791, 812 (1995) (describing the intercircuit conflict regarding Eleventh Amendment immunity from suits brought under the Indian Gaming Regulatory Act); *see also* Feinstein, *supra* note 36, at 605 (noting the conflicting decisions of the circuit courts).

In 1993, the Eighth Circuit held that Congress, pursuant to its Indian Commerce Clause powers, can abrogate a state's Eleventh Amendment Immunity. *See* Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 280-81 (8th Cir. 1993). The Ninth and

granted certiorari.[51] The Court, holding that Congress may not, pursuant to its Article I powers, abrogate the sovereign immunity granted to the states by the Eleventh Amendment and that *Ex parte Young* actions are precluded by IGRA,[52] affirmed the Eleventh Circuit's dismissal.[53]

The Supreme Court's Eleventh Amendment analysis began with the case of *Hans v. Louisiana*.[54] The controversial case, decided in 1890, has arguably governed Eleventh Amendment jurisprudence for the last century.[55] The *Hans* Court determined that the Eleventh Amendment clearly barred suits brought by out-of-state individuals, and tacitly forbade all private actions against a non-consenting state, even those brought by its own citizens.[56] Dismissing Hans's argument that the text

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Tenth Circuits agreed and allowed similar suits. *See* Spokane Tribe v. Washington, 28 F.3d 991, 993 (9th Cir. 1994); Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1432 (10th Cir. 1994). In contrast, the Eleventh Circuit ruled that Congress cannot abrogate sovereign immunity based on its Indian Commerce Clause powers. *See Seminole*, 11 F.3d at 1028.

[51] *See* Seminole Tribe v. Florida, 115 S. Ct. 932 (1995).

[52] *See Seminole*, 116 S. Ct. at 1132. The Supreme Court explained:

> [w]here 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 . . . . where Congress has prescribed a detailed remedial scheme . . . a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Id. (citations omitted). Therefore, the majority argued that because Congress already established a remedial scheme in IGRA, the Supreme Court should not apply the *Ex parte Young* doctrine. *See id.* at 1132, 1133.

[53] *See id.* at 1122.

[54] 134 U.S. 1 (1890).

[55] *See Seminole*, 116 S. Ct. at 1122 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"). Hans initially filed suit in federal court alleging that the State of Louisiana had violated Article 1, § 10 of the Federal Constitution. *See Hans*, 134 U.S. at 1, 3; *see also* U.S. CONST. art. I, § 10 (stating that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"). By failing to pay the value of bonds and the attached interest coupons, Hans claimed that Louisiana impeded his federal right to contract. *See Hans*, 134 U.S. at 3.

The conflict centered on a recent amendment of the Louisiana State Constitution, which stated that "'the coupon of said consolidated bonds falling due the First of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government.'" *Id.* at 2. The amended Louisiana Constitution, Hans claimed, had impaired an earlier contract made between the State and bond holders. *See id.* at 3. The attorney general responded to Hans's claim by stating that the federal district court did not have jurisdiction over the claim because the State did not consent to suit and sovereign immunity barred the action. *See id.* The federal district court agreed with the attorney general and dismissed the case. *See id.* at 4.

[56] *See Hans*, 134 U.S. at 10. The *Hans* Court explained that although the text of the Eleventh Amendment does not preclude citizens from bringing suits against their own

of the Eleventh Amendment should be interpreted as written,[57] the Supreme Court held that a state could not be subjected to suit without its consent.[58]

Two decades later in *Ex parte Young*,[59] the Supreme Court relaxed its Eleventh Amendment position and allowed federal jurisdiction over a state-officer defendant.[60] Recognizing the need for an exception to the

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states, the spirit and intent of the Eleventh Amendment was clear; to bar all private actions against states. *See id.* The Court stated that:

> "[i]t 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 general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union."

Id. at 13 (quoting THE FEDERALIST NO. 81, 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The *Hans* Court continued by criticizing the majority in *Chisholm* for closely observing "the letter of the Constitution, without regard to former experience and usage." *Id.* at 12. Justice Iredell, the *Hans* Court stated, correctly interpreted the role of sovereign immunity and the Union's intent not to create new causes of action previously unrecognized. *See id.*

[57] *See id.* Textualists have criticized the liberties the *Hans* Court took with the language of the Eleventh Amendment. *See* Marshall, *supra* note 19, at 1345, 1349. The Court suggested that it was not unreasonable to believe that the Eleventh Amendment means exactly what it says. *See id.* at 1351.

Ann Althouse, an adherent to textualism, stated that "[*Hans*] took the distinctly limited language of the [E]leventh [A]mendment and conjured up an entirely new dimension in which it could operate, excluding all federal question cases without regard to the plaintiffs' citizenship." Althouse, *supra* note 9, at 1156. It seems unlikely that the Supreme Court would render the same decision in *Hans* today that it did in 1890. *See id.* Nevertheless, the Court seems intent on upholding precedent. *See id.* Therefore, modern interpretations of the Eleventh Amendment unfortunately rely on the historical rendition given in 1890 by the *Hans* Court rather than an interpretation from 1798 when it was actually adopted. *See* Gibbons, *supra* note 1, at 1893. This has led to further historical debate between diversity theorists and *Hans* devotees. *See* Marshall, *supra* note 19, at 1350.

[58] *See Hans*, 134 U.S. at 16. In addition, the *Hans* Court held that the Article III language granting concurrent jurisdiction to federal courts and state courts indicated that Congress did not intend to invest federal courts with a new and special jurisdiction. *See id.* at 18. Reasoning that state courts could not entertain a suit instituted by an individual against an unconsenting state, the *Hans* Court found that federal courts also lacked that power. *See id.* at 18-19. The Supreme Court also responded to Hans's reliance on *Cohens v. Virginia*, which reviewed a case in which the state was a defendant. *See id.* at 19 (citing 6 U.S. (6 Wheat.) 264, 410 (1821)). The *Hans* majority noted that the *Cohens* Court reviewed the Virginia Supreme Court decision based on its appellate jurisdiction and did not attempt to use federal jurisdiction to hear the case. *See id.* The *Hans* Court explained that reliance on *Cohens* here was incorrect because *Cohens* dealt with the Supreme Court's appellate jurisdiction. *See id.* The *Hans* majority concluded the analysis by adopting Justice Iredell's rationale in the *Chisholm* dissent. *See id.* at 18-19 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 445-46 (1793) (Iredell, J., dissenting)).

[59] 209 U.S. 123 (1908).

[60] *See id.* at 155-56, 167. The legislature of Minnesota passed legislation that fixed railroad rates. *See id.* at 128. Stockholders in the railroad companies instituted actions

Eleventh Amendment grant of state sovereign immunity, the Supreme Court crafted the *Ex parte Young* fiction.[61] While a direct action cannot be brought against a state in federal court, the Supreme Court explained, suits against renegade state officers were permissible.[62] The *Ex parte Young* Court explained that state officers who violated federal laws were not acting in their official capacity because states cannot authorize violations of federal law.[63] Distinguishing suits brought against the state from suits brought against individual state actors,[64] the Supreme Court commented that the sovereignty interest of individual states was not implicated when a state officer was sued in federal court.[65] Thus, parties seeking to frustrate a state's claim of sovereign immunity under the Eleventh Amendment could bring an *Ex parte Young* action against a state official.[66]

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against Edward T. Young, the Minnesota Attorney General, alleging that the Act was an unconstitutional taking because the mandatory rates were too low. *See id.* at 129, 130. Temporary restraining orders were issued restricting the railway companies from publishing the rates and prohibiting Young from enforcing the Act. *See id.* at 132. The circuit court granted the plaintiff a preliminary injunction that Young violated and was sanctioned with an order of contempt. *See id.* at 133, 134. Young filed a petition for a writ of habeas corpus and the court ordered him to show cause. *See id.* at 135. He responded by claiming protection under the Eleventh Amendment. *See id.* at 134. The Supreme Court rejected Young's claim of immunity, stating:

> [i]f the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart him any immunity.

Id. at 159-60 (citing *In re* Ayers, 123 U.S. 443, 507 (1887)).

[61] *See* Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 545 (1995) (stating that "sovereign immunity . . . created a new series of problems[,] . . . . [f]oremost among these was the problem of how federal law was ever to be enforced against the states"). The *Ex parte Young* fiction relies on the theory that a state officer is not acting as an agent of the state when his actions violate federal law. *See id.* at 546. As a result of this theory, a state official may be stripped of Eleventh Amendment immunity whenever his actions constitute a violation of constitutional or federal rights. *See id.* For an in-depth discussion of the *Ex parte Young* fiction, see generally Althouse, *supra* note 9.

[62] *See Ex parte Young*, 209 U.S. at 154. The *Ex parte Young* Court stated:

> "[i]t is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment."

Id. (quoting Smyth v. Ames, 169 U.S. 466, 518-19 (1898)).

[63] *See id.* at 159, 159-60.

[64] *See id.* at 155-56.

[65] *See id.* at 159.

[66] *See* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1196 (1988) (noting the paradox that a state defendant denied Eleventh Amendment

Despite *Ex parte Young*, however, the Supreme Court generally adhered to its holding in *Hans*, and twenty-six years later in *Principality of Monaco v. Mississippi*[67] expanded its interpretation of the Eleventh Amendment to shield states[68] from actions brought by foreign governments.[69] The *Principality of Monaco* Court distinguished foreign government suitors from the federal government or a sister state, which

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protection may, for the same behavior, incur liability as a state actor for Fourteenth Amendment violations).

Ex parte Young is limited in two ways: First, it may not be used to coerce a state officer's performance of discretionary tasks and, second, it may not be employed when for all intents and purposes the suit is really against the state. *See Ex parte Young*, 209 U.S. at 157, 158-59. Courts may only compel performance when the officer owes a duty. *See id.* at 158. *Ex parte Young*, therefore, does not encompass discretionary acts. *See id.* The *Ex parte Young* Court explained that "[t]he general discretion regarding the enforcement of the laws when and as [the state officer] deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps toward the enforcement of an unconstitutional enactment." *Id.* at 159. When an injunction is issued in this context, it only bars the officer from performing unconstitutional actions. *See id.* The Supreme Court in *Ex parte Young* asserted:

> [i]n making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

Id. at 157.

The Supreme Court also held that *Ex parte Young* may not be employed when the intention is really to sue a state. *See id.* A suit is considered to be against a state when the judgment is satisfied by using state funds or when the judgment impermissibly limits the government's actions. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 n.11 (1984) (explaining that suits are regarded as against a state when the damages are paid from state funds or alternatively when the judgment granted affects the state's ability to act independently).

[67] 292 U.S. 313 (1934).

[68] *See id.* at 330. The *Principality of Monaco* Court agreed with James Madison that Article III, § 2, cl. 1 of the United States Constitution only grants federal jurisdiction over suits brought by a foreign state against a consenting state. *See id.* Reasoning that an action by a foreign state does not differ from one brought by a private individual, the Court upheld Mississippi's Eleventh Amendment immunity. *See id.* The Court continued by explaining that a foreign state has a reciprocal benefit in that it also enjoys immunity from suit brought by a state. *See id.*

[69] *See* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1156-57 (1996) (Souter, J., dissenting); *see also Principality of Monaco*, 292 U.S. at 322. The Principality sought permission to bring suit against Mississippi after the State refused to redeem bonds it had issued. *See id.* at 317. Mississippi pled a number of defenses including that the Eleventh Amendment barred the proposed suit. *See id.* at 318-19. Although the text of the Eleventh Amendment does not explicitly preclude such suits, the *Principality of Monaco* Court held that the spirit of the Amendment insists that "a State may not be sued without her consent." *Id.* at 321. The *Principality of Monaco* Court relied on *Hans*, indicating that the mere mention of a suit arising under Article III does not confer jurisdiction over a nonconsenting state. *See id.* at 322.

may proceed against another state under the plan of convention theory.[70] That theory, the Court explained, rests on the belief that states implicitly waived or consented to such suits by joining the Union.[71] Accordingly, foreign governments who are independent entities and who have not submitted to the power of the U.S. Government, cannot utilize the plan of convention waiver to sue a state.[72] Furthermore, the Court explained, a foreign government enjoys immunity from actions brought against it in the United States.[73] Therefore, the Court stated, the plan of convention theory does not apply to foreign sovereigns.[74]

Forty-two years later in *Fitzpatrick v. Bitzer*,[75] the Supreme Court tempered its interpretation of the Eleventh Amendment by holding that the enforcement provisions of the Fourteenth Amendment[76] necessarily limit state sovereign immunity.[77] By making states more accountable to

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[70] *See Principality of Monaco*, 292 U.S. at 322-23. Justice Hughes explained that "waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates." *Id.* at 330. The plan of convention theory suggests that, by ratifying the Constitution, the states agreed to mutually consent to suit. *See id.* at 328-29. The theory also concludes that states submit to suits brought by the federal government. *See id.* at 329.

[71] *See id.* at 328-29.

[72] *See id.* at 330.

[73] *See id.*

[74] *See id.* at 323, 330, 331. The Supreme Court concluded that the Principality of Monaco was in no better position to sue the State of Mississippi than the private individuals who donated the bonds. *See id.* at 332. The Court therefore denied the application to bring suit. *See id.*

[75] 427 U.S. 445 (1976).

[76] *See* U.S. CONST. amend. XIV. The Fourteenth Amendment provides in relevant part that:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. § 1. The majority explained that the Eleventh Amendment is essentially limited by the Fourteenth Amendment. *See Fitzpatrick*, 427 U.S. at 456. The Fourteenth Amendment contemplates a role for federal regulation of state powers and, as such, limitations on the defense of Eleventh Amendment immunity is appropriate. *See id.*

[77] *See Fitzpatrick*, 427 U.S. at 448. Fitzpatrick initiated this action pursuant to Title VII of the Civil Rights Act of 1964. *See id.* On behalf of all male employees and retirees, he alleged that certain portions of Connecticut's statutory benefit plan discriminated on the basis of sex. *See id.* The district court granted injunctive relief but denied retroactive benefits and damages because the court believed that allowing recovery against the State's treasury would violate *Edelman v. Jordan*. *See id.* at 449-50 (citing Edelman v. Jordan, 415 U.S. 651, 667-68 (1974)). On appeal, the Supreme Court held that damages normally precluded by *Edelman* are necessarily allowed under the Fourteenth Amendment. *See id.* at 456-57.

the people,[78] and ensuring that federal rights are protected, the *Fitzpatrick* Court explained that the Fourteenth Amendment altered the balance of state and federal power.[79] Therefore, the Court noted, Congress, acting pursuant to its Fourteenth Amendment powers, is free to abrogate Eleventh Amendment sovereign immunity.[80]

A decade later in *Atascadero State Hospital v. Scanlon,*[81] the Supreme Court opened the door for expansion of its *Fitzpatrick* holding by contemplating how Congress indicates its intention to abrogate state Eleventh Amendment sovereign immunity.[82] The *Atascadero* Court

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[78] *See id.* at 453. The terms of the Fourteenth Amendment contemplate limits of state powers and mandate respect for the federal rights of individuals. *See id.*

[79] *See id.* at 454. The Supreme Court expressed the importance of maintaining a balance of power in the federal system. *See id.* In addition, the *Fitzpatrick* Court noted that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456 (footnote omitted) (citations omitted).

[80] *See id.*; *see also* U.S. CONST. amend. XIV, § 5 (providing that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[81] 473 U.S. 234 (1985).

[82] *See id.* at 236. The respondent, Scanlon, who suffered from both diabetes and blindness in one eye, filed suit against Atascadero State Hospital charging that the hospital violated the Rehabilitation Act of 1973. *See id.* (citing Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994)) (providing that federally funded programs may not discriminate against handicapped individuals). The hospital, arguing that it was a state entity, sought a dismissal of the case based on the Eleventh Amendment's grant of immunity. *See id.* The district court dismissed the action because Scanlon failed to make out a prima facie case under the Rehabilitation Act. *See id.* On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. *See id.* (citing Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982)).

The Supreme Court granted certiorari and vacated the Ninth Circuit's decision. *See id.* at 236-37. On remand, the Ninth Circuit held that the Eleventh Amendment was not applicable in this case because the State consented to suit when the hospital accepted federal funds. *See id.* at 237; *see also* Scanlon v. Atascadero State Hosp., 735 F.2d 359, 361 (9th Cir. 1984) (citing Edelman v. Jordan, 415 U.S. 651, 672 (1974)). As a result of an intercircuit conflict, the Supreme Court granted certiorari. *See Atascadero,* 473 U.S. at 237 (citing Atascadero State Hosp. v. Scanlon, 469 U.S. 1032 (1984)).

The Supreme Court rejected Scanlon's three arguments that the suit should be allowed. *See id.* at 240. The majority in *Atascadero* began by stating that California's Constitution, which has a provision allowing waiver of the Eleventh Amendment, did not waive immunity in this case. *See id.* at 241; CAL. CONST. art. III, § 5. Next the *Atascadero* Court explained that Congress did not clearly express in the statutory language its intent to abrogate the Eleventh Amendment grant of sovereign immunity. *See* 473 U.S. at 246. Finally, the *Atascadero* Court explained that receipt of federal funds was not conditioned on California's consent to suit. *See id.* at 247. The majority in *Atascadero* stressed that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 242. The Court further stated that "the fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion." *Id.*

concluded that Congress must make its intention to abrogate the Eleventh Amendment unmistakably clear and that such intent will be found by focusing solely on the language of a statute.[83]

Although the *Atascadero* majority did not explicitly hold that Congress may abrogate state sovereign immunity under its plenary powers, Justice Brennan alluded to that possibility in the dissenting opinion.[84] Criticizing the Supreme Court's Eleventh Amendment doctrine as lacking both a textual basis and a historical foundation,[85] Justice Brennan opined that the Court's Eleventh Amendment interpretation[86] was unclear as to exactly when Congress had the power to abrogate a state's sovereign immunity.[87] Justice Brennan did argue, however, that the Constitution was clear.[88] The grant of power in Articles I and III, according to Justice Brennan, was unmistakable and Congress could subject states to federal jurisdiction as long as that grant of jurisdiction did not conflict with another constitutional provision.[89] Justice Brennan concluded by stating that the Eleventh Amendment could not act as a limit on Congress's lawmaking authority.[90]

Answering the invitation extended by Justice Brennan in *Atascadero*, the Supreme Court, in *Pennsylvania v. Union Gas Co.*,[91] held that Congress may abrogate Eleventh Amendment immunity under its plenary powers, specifically the powers granted to Congress under the

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[83] *See Atascadero*, 473 U.S. at 243.

[84] *See id.* at 253 (Brennan, J., dissenting). Justice Brennan acknowledged "that the supposed lack of judicial power may be remedied . . . by express congressional abrogation pursuant to the Civil War Amendments . . . or perhaps pursuant to other congressional powers." *Id.* (footnote omitted) (citations omitted).

[85] *See id.* at 257 (Brennan, J., dissenting).

[86] *See id.* at 258 (Brennan, J., dissenting) (noting that the Supreme Court's interpretation of the Eleventh Amendment results in a disturbing paradox: federal courts must deny jurisdiction to cases that arise from a state actor's violation of a federal law or right).

[87] *See id.* at 257 (Brennan, J., dissenting) (noting that it is "impossible to determine to what extent the principle of state accountability to the rule of law [is balanced with] the Court's sovereign immunity doctrine").

[88] *See Atascadero*, 473 U.S. at 290 (Brennan, J., dissenting).

[89] *See id.* Justice Brennan explicitly stated:

> If Congress acting within its Article I or other powers creates a legal right and remedy, and if neither the right nor the remedy violates any provision of the Constitution outside Article III, then Congress may entrust adjudication of claims based on the newly created right to the federal courts—even if the defendant is a State. Neither Article III nor the Eleventh Amendment imposes an independent limit on the lawmaking authority of Congress.

Id.

[90] *See id.*

[91] 491 U.S. 1 (1989).

Interstate Commerce Clause.[92] In *Union Gas*, the plurality found that Congress clearly expressed an intention to abrogate the states' Eleventh Amendment immunity.[93] Believing that Congress was acting under a valid grant of authority, the *Union Gas* plurality reasoned that states waived their Eleventh Amendment immunity by ratifying the Constitution, thereby relinquishing power over interstate commerce to Congress.[94]

The decision of *Seminole Tribe v. Florida*[95] returned Eleventh Amendment analysis to its pre-twentieth century state when the United States Supreme Court determined that the Amendment protects both a state and its officers from suits expressly permitted by Congress under its Article I powers.[96] Moreover, the *Seminole* Court explicitly discouraged the use of judicially fashioned remedies for state violations of federal rights when Congress, through statutory provisions, had already provided curative procedures.[97]

Chief Justice Rehnquist, writing for the majority, found that Congress intended the federal statute at issue to provide a role for states

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[92] *See id.* at 3. Seeking to recover the costs it expended by cleaning up the environmental wastes caused by the Union Gas Company, the United States sued Union Gas pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *See id.* at 6; *see also* 42 U.S.C. § 9604 (1994) (stating the remedial powers available to the President under CERCLA); *id.* § 9606 (authorizing suits to recover monies expended on clean up). The Union Gas Company impleaded the Commonwealth of Pennsylvania, charging that the State's actions exacerbated the damages. *See Union Gas,* 491 U.S. at 6. The district court dismissed Union Gas's claim, stating that the Eleventh Amendment barred the suit. *See id.* The Third Circuit affirmed the district court, explaining that the language of CERCLA did not clearly express Congress's intent to abrogate the Eleventh Amendment. *See id.* The Supreme Court granted certiorari, vacated the Third Circuit's decision, and remanded the case based on the Superfund Amendments and Reauthorization Act of 1986 (SARA). *See id.* On remand, the Third Circuit determined that in light of SARA, CERCLA did intend to abrogate the Eleventh Amendment immunity. *See id.* Furthermore, the Third Circuit found that Congress may abrogate the Eleventh Amendment pursuant to its Commerce Clause power. *See id.* The Supreme Court again granted certiorari. *See* Pennsylvania v. Union Gas Co., 485 U.S. 958 (1988).

[93] *See Union Gas*, 491 U.S. at 13 (noting that CERCLA, as amended by SARA, clearly expresses Congress's intent to abrogate states' Eleventh Amendment sovereign immunity).

[94] *See id.* at 14. The plurality in *Union Gas* explained that "'[b]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.'" *Id.* (quoting Parden v. Terminal Ry., 377 U.S. 184, 192 (1964)) (other citations omitted).

[95] 116 S. Ct. 1114 (1996) (5-4 decision).

[96] *See id.* at 1129. The Supreme Court explains that the question of Congress's ability to abrogate the Eleventh Amendment has remained open, save the decision in *Union Gas*. *See id.* Therefore, the *Seminole* Court reasoned that "fidelity to [the Supreme Court's] century-old doctrine," first opined in *Hans*, is necessary. *Id.*

[97] *See id.* at 1132.

in controlling Indian gaming.[98] Discussing IGRA's guidelines for tribal gaming, the Chief Justice explained that the statute granted federal jurisdiction to all controversies arising under its provisions.[99] The *Seminole* Court focused on two questions raised by this conflict: (1) whether congressional intent to abrogate sovereign immunity in IGRA was clear and if that abrogation was constitutionally sanctioned; and (2) whether, alternatively, the doctrine of *Ex parte Young* may be used to bring suit against the Governor of Florida if the Eleventh Amendment barred federal jurisdiction under IGRA.[100]

Describing the 1890 decision in *Hans v. Louisiana*, Chief Justice Rehnquist began the *Seminole* Court's Eleventh Amendment analysis.[101] Chief Justice Rehnquist explained that the *Hans* Court correctly interpreted the Eleventh Amendment as a jurisdictional bar to private actions brought against states in federal court.[102] Although the language of the Eleventh Amendment literally does not grant the states sovereign immunity, Chief Justice Rehnquist insisted that the principles and postulates behind the Constitution demand it.[103] The *Hans* Court's interpretation, the Chief Justice posited, was more historically accurate than the explanation offered by Justice Souter's *Seminole* dissent.[104] Chief Justice Rehnquist noted that the *Hans* Court, working from a closer vantage point, better understood the legislative reaction to *Chisholm v. Georgia*.[105] Therefore, the Chief Justice concluded that adherence to the *Hans* interpretation of the Eleventh Amendment was appropriate.[106]

Next, the *Seminole* majority discussed *Atascadero State Hospital*, which was the first Eleventh Amendment case to apply the Supreme

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[98] *See id.* at 1119 (noting that Congress passed IGRA to provide a role for states in the governance of Indian gaming); *see also* Mark C. Wenzel, Note, *Let the Chips Fall Where They May: The Spokane Indian Tribe's Decision to Proceed with Casino Gambling Without a State Compact*, 30 GONZ. L. REV. 467, 467 (1995) (noting the reasons Congress listed for passing IGRA were to encourage "'tribal economic development, self-sufficiency, and strong tribal governments.'" (footnote omitted)).

[99] *See Seminole*, 116 S. Ct. at 1119; *see also* 25 U.S.C. § 2710(d)(7)(A)(*i*) (1994) (granting federal courts jurisdiction over claims arising under IGRA).

[100] *See Seminole*, 116 S. Ct. at 1122.

[101] *See id.* (citing Hans v. Louisiana, 134 U.S. 1, 15 (1890)).

[102] *See id.* at 1127-28.

[103] *See id.* at 1129 (citing Principality of Monaco v. Mississippi, 292 U.S. 313, 321-23 (1934)).

[104] *See id.* at 1130. Chief Justice Rehnquist chided Justice Souter for submitting a "dissent . . . [that] disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events." *Id.* at 1129-30.

[105] *See Seminole*, 116 S. Ct. at 1130.

[106] *See id.* at 1127-28, 1129.

Court's interpretational device known as the "clear statement" rule.[107] Continuing, the Chief Justice noted that *Dellmuth v. Muth*[108] severely narrowed the clear statement rule by requiring that the statutory language of the legislative act in question indicate Congress's intent to abrogate the Eleventh Amendment.[109] Chief Justice Rehnquist explained that given the Eleventh Amendment's essential role in the constitutional framework, nothing short of an unmistakably clear expression of congressional intent to abrogate that immunity will suffice.[110] Utilizing the above principles of Eleventh Amendment jurisprudence, the majority determined that Congress intended to abrogate the Eleventh Amendment when it passed IGRA.[111]

The majority next distinguished the Court's opinion in *Fitzpatrick v. Bitzer* from the present case.[112] Chief Justice Rehnquist began by explaining that the congressional abrogation in *Fitzpatrick* was valid because it was based on the Fourteenth Amendment.[113] The Chief Justice then explained that the Fourteenth Amendment, which specifically reserves the right to enforce federal laws against state defendants, changed the balance between federal and state power.[114] The Court concluded its discussion of *Fitzpatrick* by noting that the case should not be read as a limitation on sovereign immunity.[115]

After concluding its review of Eleventh Amendment jurisprudence, the *Seminole* majority overruled *Union Gas* and considered whether congressional intent to abrogate state sovereign immunity in IGRA was

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[107] *See id.* at 1123; *see also* Christopher T. Handman, Note, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress's Exceptions Clause Power*, 106 YALE L.J. 197, 218 (noting that "[t]he Supreme Court's 'clear statement' rule in Eleventh Amendment sovereign immunity cases . . . . is predicated on two concerns: [first] to provide clear notice to those who may be affected by Congress's actions and [second] to ensure that Congress seriously deliberates whether to trump a constitutional right.").

[108] 491 U.S. 223, 227-28 (1989).

[109] *See Seminole*, 116 S. Ct. at 1123 (citing *Dellmuth*, 491 U.S. at 227-28).

[110] *See id.*

[111] *See id.* at 1124.

[112] *See id.* at 1128.

[113] *See id.* The *Seminole* Court explained:

> *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause [or Indian Commerce Clause], viz, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment.

Id. (citation omitted).

[114] *See Seminole*, 116 S. Ct. at 1128.

[115] *See id.* (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., dissenting)).

clear.[116] Noting that congressional intent to abrogate the Eleventh Amendment immunity was explicit,[117] the Chief Justice next considered whether Congress's abrogation of the Eleventh Amendment grant of sovereign immunity was constitutionally permissible.[118] Chief Justice Rehnquist determined that Congress, acting pursuant to its Indian Commerce Clause powers, did not have the authority to enact the IGRA provision that abrogated Eleventh Amendment immunity.[119]

Drawing a distinction between the two types of cases where the Supreme Court had previously allowed Eleventh Amendment abrogation, the majority explained that only the Fourteenth Amendment confers congressional authority to override the Eleventh Amendment.[120] Comparing the two, the Chief Justice explained that abrogation based on Article I powers, such as the Indian Commerce Clause, was a perversion of the Framers' original intent.[121] According to Chief Justice Rehnquist, the Framers would not have barred federal jurisdiction over a state with the Eleventh Amendment while at the same time allowing Congress to abrogate that immunity under its Article I powers.[122] Chief Justice Rehnquist further distinguished the Fourteenth Amendment from other congressional powers by explaining that the Amendment clearly provided a role for congressional enforcement of federal rights.[123] Therefore, the Chief Justice reasoned that abrogation of a state's Eleventh Amendment immunity based on Fourteenth Amendment enforcement powers was

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[116] *See id.* at 1123-24, 1128.

[117] *See id.* at 1123-24, 1124. In addition, the majority relied on the findings of the lower court and "virtually every other court that has confronted the question that Congress has in § 2710(d)(7) provided an 'unmistakably clear' statement of its intent to abrogate." *Id.* at 1123-24 (footnote omitted).

[118] *See id.* at 1124.

[119] *See Seminole*, 116 S. Ct. at 1133.

[120] *See id.* at 1128. The Chief Justice noted that the Fourteenth Amendment's power to abrogate the Eleventh Amendment rests in part on the date of its passage. *See id.* The Court explained that the Fourteenth Amendment clearly contemplated the federal government's restriction of state power, and consequently, the Eleventh Amendment's jurisdictional bar is necessarily lifted. *See id.* Chief Justice Rehnquist explained that the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.*

[121] *See id.* at 1130. Chief Justice Rehnquist criticized Justice Souter's dissent, commenting that the Justice mischaracterized statements made by several of the framers. *See id.*

[122] *See id.* at 1128. The Chief Justice explained that the plurality in *Union Gas* relied on the erroneous belief that "Congress could under [its] Article I [powers] expand the scope of the federal courts' jurisdiction [permitted] under Article III." *Id.*

[123] *See id.* at 1125. The majority explained that "through the Fourteenth Amendment, federal power extend[s] to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allow[s] Congress to abrogate the immunity from suit guaranteed by [the Eleventh] Amendment." *Id.*

permissible.[124] Chief Justice Rehnquist cited both the faulty logic of the *Union Gas* plurality opinion[125] and the problems that lower courts have faced in their application, as motivation for the majority's decision not to apply it as precedent.[126] The Supreme Court then overruled *Union Gas*, the only case that found congressional authority to abrogate state Eleventh Amendment sovereign immunity under the Interstate Commerce Clause.[127]

Next, the *Seminole* majority considered whether the *Ex parte Young* doctrine should be applicable in cases such as the present one.[128] Chief Justice Rehnquist explained that judicially crafted remedies like *Ex parte Young* should be administered cautiously.[129] Furthermore, the Chief Justice suggested that IGRA provides an adequate remedial scheme for tribes to gain state cooperation, or alternatively, to bypass state authority to engage in tribal gaming by application to the Secretary of the Interior.[130] Chief Justice Rehnquist noted that interference by the Supreme Court, specifically through an authorization of suit under *Ex parte Young*, would undercut the enforcement provisions of IGRA.[131] The *Seminole* majority continued by comparing the relatively mild sanctions authorized under IGRA with the more severe sanctions

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[124] *See Seminole*, 116 S. Ct. at 1125.

[125] *See id.* at 1127. The Chief Justice stressed that there was no majority decision in *Union Gas*. *See id.* Noting that only three justices supported Justice Brennan's plurality opinion, Chief Justice Rehnquist emphasized that Justice White wrote separately to explain that while he agreed with the plurality in result he explicitly rejected its rationale. *See id.* In addition, the Chief Justice stated that lower courts have struggled and strained to correctly apply the *Union Gas* plurality's rationale. *See id.*

[126] *See id.*

[127] *See id.* at 1131. The Chief Justice stated that:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Id. (footnote omitted).

[128] *See id.* at 1132.

[129] *See id.*

[130] *See id.* at 1132-33; *see also* Schweiker v. Chilicky, 487 U.S. 412, 431 (stating that when Congress establishes remedial provisions, the Supreme Court should defer to these statutory remedies). The *Seminole* Court stated that Congress had clearly provided such remedial procedures for enforcement in the present case. *See* 116 S. Ct. at 1133. Therefore, the majority concluded that the only issue remaining was whether an *Ex parte Young* action should be permitted. *See id.* at 1132.

[131] *See Seminole*, 116 S. Ct. at 1133.

available in *Ex parte Young* actions.[132] The *Seminole* majority concluded that if Congress intended for tribes to sue under *Ex parte Young*, then the enforcement provisions of IGRA would be rendered completely unnecessary.[133]

Chief Justice Rehnquist concluded the Court's opinion by proclaiming that the Eleventh Amendment may only be abrogated by Congress pursuant to its Fourteenth Amendment enforcement powers and that the *Ex parte Young* doctrine is inapplicable in this case.[134] Consequently, the *Seminole* Court held that it lacked subject matter jurisdiction over the tribe's suit, and accordingly, affirmed the Eleventh Circuit's dismissal.[135]

Justice Souter, joined by Justices Ginsburg and Breyer, rejected the majority's conclusion that the Eleventh Amendment shields states from suits explicitly authorized by Congress under its plenary powers.[136] Furthermore, Justice Souter stated that the majority's determination that the *Ex parte Young* doctrine is not applicable to this case cannot be justified.[137]

Justice Souter characterized the majority's interpretation of the Eleventh Amendment as fundamentally misguided.[138] Justice Souter began the dissent's analysis by recounting the early history of sovereign immunity and its development in colonial America.[139] Explaining the debate among the Framers regarding sovereign immunity, Justice Souter

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[132] *See id.* The Chief Justice stated that "[b]y contrast with [the modest sanctions provided in IGRA], an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* Chief Justice Rehnquist continued by asking why, if *Ex parte Young* relief was available in the present case, a tribe would endure the more time-consuming provisions of IGRA enforcement for significantly lesser relief? *See id.*

[133] *See id.*

[134] *See id.*

[135] *See id.*

[136] *See Seminole*, 116 S. Ct. at 1145 (Souter, J., dissenting).

[137] *See id.* at 1181 (Souter, J., dissenting).

[138] *See id.* at 1145 (Souter, J., dissenting).

[139] *See id.* at 1147 (Souter, J., dissenting). *See generally id.* at 1165-69 (Souter, J., dissenting) (discussing the debate among the Framers concerning sovereign immunity). Justice Souter suggested that while some of the Framers were at odds regarding the importance of sovereign immunity, the fact that the Constitution itself is silent on the issue of sovereign immunity indicates that states did not enjoy immunity for breaches of federal law. *See id.* at 1147 (Souter, J., dissenting). The Justice stated that the Eleventh Amendment's text provided immunity only from suits brought in federal court based on diversity of citizenship jurisdiction. *See id.* at 1146 (Souter, J., dissenting). Justice Souter explained that the Framers were wary of granting state governments total immunity and that their "hostility to the implicit reception of common-law doctrine as federal law" made it unlikely that they would have supported a total bar of actions against states. *Id.*

contended that disagreement centered around the availability of diversity jurisdiction as a means of haling a state into federal court.[140] While this conflict was settled by *Hans*, Justice Souter argued that the *Hans* Court misread Justice Iredell's dissent in *Chisholm v. Georgia*, and thus erroneously applied it to federal question cases.[141] Justice Iredell's dissent in *Chisholm*, according to Justice Souter, focused on the Judiciary Act of 1789 rather than on the constitutional limits of Article III.[142] Justice Souter opined that Justice Iredell's dissent dealt with sovereign immunity as an aspect of federal common law[143] rather than as a tenet of constitutional law.[144] Therefore, Justice Souter explained, when the Supreme Court applied Justice Iredell's reasoning in *Chisholm* to *Hans*, the *Hans* error was born.[145] Justice Souter concluded this section of the dissent by stating that neither the historical roots of the Eleventh

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[140] *See id.* at 1150 (Souter, J., dissenting). Justice Souter explained that:

> The Framers may, as Madison, Hamilton, and Marshall argued, have contemplated that federal courts would respect state immunity law in diversity cases, but the generalized principle of immunity that today's majority would graft onto the Constitution itself may well never have developed with any common clarity and, in any event, has not been shown to have existed.

Id. at 1164 (Souter, J., dissenting).

Justice Souter returned to the question of how the Framers perceived adoption of the common law and sovereign immunity. *See id.* at 1165 (Souter, J., dissenting). Speaking at length on the views of both Madison and Hamilton, the Justice established that the Framers did not believe that all the principles of English common law were tacitly incorporated into the Constitution. *See id.* at 1164-65 (Souter, J., dissenting). Justice Souter then explained that the rationale behind common-law sovereign immunity, that a sovereign as the font of law may not be sued, does not apply to states when there is a claim based on federal law because the federal government rather than the state is the source of authority. *See id.* at 1170-71 (Souter, J., dissenting). The Justice concluded that:

> [g]iven the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights.

Id. at 1171 (Souter, J., dissenting).

[141] *See Seminole*, 116 S. Ct. at 1149 (Souter, J., dissenting) (explaining that Justice Iredell's dissent in *Chisholm* did not contemplate the limits or jurisdiction available under Article III, but focused on the Judiciary Act of 1789). Justice Souter maintained that federal question suits in which a state is a party are permissible in spite of the Eleventh Amendment. *See id.* at 1151-52 (Souter, J., dissenting). The Justice pointed out that Theodore Sedgwick, a representative of Massachusetts, introduced an Amendment barring federal question claims and that Congress rejected it in favor of the present Eleventh Amendment. *See id.* at 1150 (Souter, J., dissenting).

[142] *See id.*

[143] *See id.* at 1160 (Souter, J., dissenting).

[144] *See id.*

[145] *See id.* at 1149 n.7, 1153 (Souter, J., dissenting) (referring to the decision in *Hans* as a "century-old mistake").

Amendment nor its text supported the reading that the Amendment barred all actions brought by citizens against states.[146]

Justice Souter then turned to the role of precedent in Eleventh Amendment analysis.[147] Explaining the political environment in which *Hans* was decided,[148] Justice Souter insisted that present Eleventh Amendment analysis stems from *Hans*'s legal error.[149] This error, Justice Souter explained, was compounded when the *Principality of Monaco* decision expanded the Supreme Court's interpretation of the Eleventh Amendment to exclude all private suits.[150] Justice Souter complained that the faulty logic utilized in the *Hans* decision now plagued Eleventh Amendment jurisprudence as precedent.[151] The Justice further commented that the *Seminole* Court committed a serious error by constitutionalizing *Hans*.[152] Justice Souter argued that the Supreme Court should recognize the *Hans* decision as an example of federal common law.[153] Such a course, Justice Souter opined, would satisfy the strictures of stare decisis.[154]

Justice Souter further contended that the majority erred by failing to apply *Ex parte Young* to this case.[155] Justice Souter suggested that the majority in *Seminole*, by attempting to destroy *Ex parte Young's* role in Eleventh Amendment jurisprudence, had disturbed decades of precedent.[156] Furthermore, Justice Souter stated that the *Seminole* majority gave no adequate explanation for its failure to apply *Ex parte Young*.[157] Justice Souter argued that utilizing *Ex parte Young* jurisdiction here would not be supplemental to Congress's remedial scheme because

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[146] *See Seminole*, 116 S. Ct. at 1165, 1185 (Souter, J., dissenting) (stating that "the *Hans* Court and the Court today cannot reasonably argue that something like the old immunity doctrine somehow slipped in as a tacit but enforceable background principle") (citation omitted).

[147] *See id.* at 1152-53 (Souter, J., dissenting).

[148] *See id.* at 1155 (Souter, J., dissenting). When *Hans* was decided, a number of states owed Civil War debts, which they did not intend to repay and thus the decision was most likely influenced by the political tensions of the day. *See id.* n.16.

[149] *See id.* at 1159-60 (Souter, J., dissenting).

[150] *See id.* at 1156-57 (Souter, J. dissenting) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

[151] *See Seminole*, 116 S. Ct. at 1159 (Souter, J., dissenting).

[152] *See id.* at 1153 (Souter, J., dissenting) ("[The Supreme] Court's further step today of constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law.").

[153] *See id.* at 1184 (Souter, J., dissenting).

[154] *See id.*

[155] *See id.* at 1178, 1181 (Souter, J., dissenting).

[156] *See Seminole*, 116 S. Ct. at 1180 (Souter, J., dissenting).

[157] *See id.* at 1181 (Souter, J., dissenting).

the majority had already struck down those provisions as violative of the Eleventh Amendment.[158] Dwelling on *Ex parte Young*'s jurisdictional nature, Justice Souter suggested that IGRA's mention of the state as a defendant did not foreclose the use of the officer suit fiction.[159] Urging the *Seminole* majority to return to the correct interpretation of the Eleventh Amendment, Justice Souter concluded his opinion by stating that the precedent, the history, and the text of the Eleventh Amendment itself all demand that the Supreme Court exercise jurisdiction over this dispute.[160]

In a separate dissent, Justice Stevens supported Justice Souter by characterizing the majority's decision as "profoundly misguided."[161] Commenting that this decision is really about congressional power, Justice Stevens expressed his concern that the majority had needlessly broken with precedent and, as a result, unduly restricted the power of Congress.[162] Criticizing the majority's analysis as both illogical and unjustifiable, Justice Stevens opined that the majority's sweeping interpretation of the Eleventh Amendment was based on the incorrect assumption that the Eleventh Amendment was intended to shield states from all private suits, regardless of their subject matter.[163]

Justice Stevens recounted the history of the Eleventh Amendment and its development by the judiciary.[164] Endorsing Justice Brennan's

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[158] *See id.* at 1182-83 (Souter, J., dissenting). Justice Souter noted that *Ex parte Young* jurisdiction would not supplement IGRA, but rather that *Ex parte Young* would provide "the sole jurisdictional basis for an Article III court's enforcement of a clear federal statutory obligation, without which a congressional act would be rendered a nullity in a federal court." *Id.* at 1182 (Souter, J., dissenting).

[159] *See id.* at 1183 (Souter, J., dissenting).

[160] *See id.* at 1185 (Souter, J., dissenting).

[161] *See Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting).

[162] *See id.* at 1133, 1134 (Stevens, J., dissenting); *see also* Monaghan, *supra* note 23, at 121 (stating that the *Seminole* opinion is representative of the Supreme Court's desire to return to an interpretation of the Constitution that recognizes individual states as sovereigns). Monaghan argues that:

> the [Supreme] 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.

Id.

[163] *See Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting). Justice Stevens explained that the Court's reliance on the false belief that the Eleventh Amendment was intended to shield states from most private suits, has compounded this mistake with the erroneous conclusion that the Amendment abrogates Congress's power to subject states to suit, save the "narrow . . . exception of statutes enacted pursuant to . . . the Fourteenth Amendment." *Id.*

[164] *See id.*

textualist interpretation of the Eleventh Amendment,[165] the Justice explained that the Eleventh Amendment should be read as written.[166] Justice Stevens argued that the *Seminole* majority's reliance on *Hans* and *Principality of Monaco* was misplaced.[167] The Justice concluded the analysis of precedent by suggesting that the Court could correct its interpretation of the Eleventh Amendment without overruling *Hans*.[168]

Justice Stevens concluded the dissent by stating that the majority's decision may not prevent the tribe from operating a casino in light of the Eleventh Circuit's analysis of IGRA.[169] The Justice chided the majority for its interpretation of the Eleventh Amendment.[170] The Supreme Court, in the Justice's opinion, should rely on analysis of the Constitution and congressional dictates rather than blind devotion to precedent.[171]

Once again the Supreme Court has shied away from an opportunity to end the confusion surrounding the Eleventh Amendment.[172] By

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[165] *See id.* at 1136 (Stevens, J., dissenting).

[166] *See id.*

[167] *See id.* at 1137, 1139, 1140 (Stevens, J., dissenting). Justice Stevens opined that "it is quite startling to learn that the *reasoning* of *Hans* and [*Principality of*] *Monaco* . . . should have a *stare decisis* effect on the question of whether Congress possesses the authority to provide a federal forum . . . . [i]n light of the [Supreme] Court's development of a clear statement line of jurisprudence . . . ." *Id.* at 1140 (Stevens, J., dissenting) (citations omitted).

[168] *See Seminole*, 116 S. Ct. at 1137 (Stevens, J., dissenting). Despite the majority's contention that "precedent compels" adherence to *Hans*, Justice Stevens maintained that "*Hans* did not announce a constitutionally mandated jurisdictional bar." *Id.*

[169] *See id.* at 1144 (Stevens, J., dissenting). Justice Stevens explained that the Eleventh Circuit read IGRA as providing the Seminole Tribe with recourse to the Executive branch. *See id.*

[170] *See id.*

[171] *See id.* Justice Stevens castigated the *Seminole* majority by stating:

> While I am persuaded that there is no justification for permanently enshrining the judge-made law of sovereign immunity, I recognize that federalism concerns—and even the interest in protecting the solvency of the States that was at work in *Chisholm* and *Hans*—may well justify a grant of immunity for federal litigation in certain classes of cases. Such a grant, however, should be the product of a reasoned decision by the policy-making branch of our government. For this Court to conclude that time-worn shibboleths iterated and reiterated by judges should take precedence over the deliberations of the Congress of the United States is simply irresponsible.

Id.

[172] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301-02 (1985) (Brennan, J., dissenting). Justice Brennan explained that the Supreme Court has relied on *Hans* for too long. *See id.* The Justice pointed out that many states have done away with state immunity in state-law actions. *See id.* at 302 (Brennan, J., dissenting). Justice Brennan stated that "current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct." *Id.*

perpetuating the *Hans* interpretation of the Eleventh Amendment and curtailing the usage of the *Ex parte Young* doctrine in this case, the *Seminole* Court has insured that this area of constitutional law will remain confused and misunderstood.[173] Treating the Eleventh Amendment as a subject matter bar, the Supreme Court has even put into question whether courts are now obliged to raise the Eleventh Amendment issue sua sponte.[174]

Ironically, application of state immunity in this case may not keep the Indian Tribes from opening casinos. The *Seminole* Court's holding that this controversy cannot be adjudicated in federal court may have completely removed states from any part of that decision-making process based on the provision in IGRA that allows tribes to petition the Secretary of the Interior if negotiations with a state are unsuccessful.[175] Alternatively, this decision may prove to ensure that tribes have no remedy under IGRA. Either way, the states are in essentially the same position that they were in after the Supreme Court's decision in *Cabazon*—unable to regulate tribal gaming.[176]

What will be the impact of this decision on Eleventh Amendment jurisprudence beyond tribal gaming? The *Seminole* Court's conclusion will, no doubt, further limit state accountability.[177] Moreover, the ruling raises questions about the enforceability of federally-created rights.[178]

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[173] *See* Gibbons, *supra* note 1, at 1891 ("The [E]leventh [A]mendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law."); *see also* Massey, *supra* note 5, at 71 (noting the problematic character of present Eleventh Amendment law).

[174] *See* BLACK'S LAW DICTIONARY 1424 (6th ed. 1990) (defining sua sponte as "[o]f his or its own will or motion; voluntarily; without prompting or suggestion").

[175] *See Seminole,* 116 S. Ct. at 1122 n.4 (explaining that the Eleventh Circuit read IGRA, after striking the statute's grant of federal jurisdiction, as allowing tribes "recourse to the Secretary of the Interior"); *id.* at 1144 (Stevens, J., dissenting). *But see id.* at 1133 n.18 (stating that the majority expresses no opinion concerning the Eleventh Circuit's substitute remedy).

[176] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987) (holding that in states where gambling is permitted, tribes may conduct gaming activities without state interference).

[177] *But see* Monaghan, *supra* note 23, at 122 (noting that the Eleventh Amendment is really about "forum selection" and that state courts are available to hear many of the cases that are barred from federal courts by the Eleventh Amendment).

[178] *See Seminole,* 116 S. Ct. at 1134 (Stevens, J., dissenting). Justice Stevens voiced concerns that the majority precludes not only Indian tribe suits but also "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." *Id.* (footnote omitted).

The Chief Justice responded to Justice Stevens's concerns by noting that states are rarely parties to these types of federal law claims and that any damages from restricting federal jurisdiction in these cases would be minimal. *See id.* at 1131-32 n.16. In

Certainly there are federally-created rights that states will now be free to violate with impunity. For example, individuals with patent or copyright infringement claims against individual states may be denied a forum because the federal courts have exclusive jurisdiction over them.[179] Additionally, the decision in *Seminole* will allow states to claim Eleventh Amendment immunity whenever an action does not arise under the Fourteenth Amendment. No remedy will be available and the unfortunate result is that certain individual federal rights will be completely unprotected. By overruling *Pennsylvania v. Union Gas Co.*, the Supreme Court has ensured that this controversy[180] will remain in the forefront of constitutional litigation.

While the autonomy this decision guarantees for states no doubt enhances their sovereignty,[181] this contrived reading of the Eleventh Amendment will probably not further state authority. Decisions like *Seminole* may in fact undercut congressional confidence in the ability of individual states to handle federal issues. After all, Florida's behavior in this case indicated that states cannot be trusted to act in good faith when Congress provides a role for them in an area of federal concern. Unable to rely on states to respect federally-created rights or keep a bargain, the federal government may have no choice but to exclude states from these decisions. Ultimately, this will diminish the role that states can play in areas of national concern.

Colleen F. Walsh

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addition, Chief Justice Rehnquist explained that other remedies for state violations of federal law are available. *See id.* at 1130 n.14.

[179] *See* 28 U.S.C. § 1338 (1994).

[180] *See* Chemerinsky, *supra* note 15, at 323 (recounting the muddled and confused history of the Eleventh Amendment and the Supreme Court's application of the doctrine of sovereign immunity).

[181] *See* Monaghan, *supra* note 23, at 121.