

10-18-2012

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### Recommended Citation

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# Comment

## SEMINOLE TRIBE V. FLORIDA

GORDON G. YOUNG\*

### INTRODUCTION

In *Seminole Tribe v. Florida*,<sup>1</sup> the Supreme Court once again split closely in a case concerning federalism,<sup>2</sup> this time confronting issues of state sovereign immunity.<sup>3</sup> *Seminole* is the Court's latest contribution to what has proved to be a difficult and confusing course of decisions attempting to harmonize the supremacy of federal law with the states' sovereign immunity from suit in federal court.<sup>4</sup> Some such im-

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1. 116 S. Ct. 1114 (1996) (5-4 decision).

2. See *United States v. Lopez*, 514 U.S. 549, 550 (1995) (5-4 decision) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority); *New York v. United States*, 505 U.S. 144, 149 (1992) (6-3 decision) (concluding that Congress did not have the constitutional power to compel states to provide for the disposal of radioactive waste generated within their borders); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985) (5-4 decision) (holding that Congress did not exceed the boundaries of the Commerce Clause in affording mass transit employees the protections of the Fair Labor Standards Act); *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (5-4 decision) (holding that the Commerce Clause did not empower Congress to enforce provisions of the Fair Labor Standards Act against the states in areas of traditional governmental functions), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision).

3. *Seminole*, 116 S. Ct. at 1114, 1116, 1119 (splitting 5-4 over issues concerning states' immunity from suits brought against them in federal court by private individuals).

4. The following is a chronological sequence including most of the main cases prior to *Seminole*. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451-52 (1793) (finding that the Supreme Court had original jurisdiction in a suit filed by a citizen of one state against another state; the Eleventh Amendment was enacted to change this result, see *infra* note 7); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) (holding that the Eleventh Amendment did not apply to a writ of error as such a writ was not a "suit" within the meaning of the Amendment); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) (concluding that the Eleventh Amendment was limited to suits in which a state is a party of record, thus allowing a suit against state officials); *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 124 (1828) (dismissing a suit against the Governor of Georgia based upon actions undertaken in his official capacity as a suit against a state under the Eleventh Amendment); *Louisiana v. Jumel*, 107 U.S. 711, 728 (1883) (finding that the Eleventh Amendment barred a suit by Louisiana bondholders seeking to require state officials to honor contractual obligations to collect a property tax and devote its proceeds to paying state bonds); *In re Ayers*, 123 U.S. 443, 507 (1887) (concluding that the Eleventh Amendment barred the lower court's enjoining of state officials from bringing suit to recover taxes paid by taxpayers with the interest coupons from state bonds); *Lincoln County v. Luning*, 133 U.S. 529,

munity—generically referred to below as “state immunity”—may have existed under the original Constitution,<sup>5</sup> or it may have been created, restored, or augmented by enactment of the Eleventh Amendment<sup>6</sup> shortly after the Supreme Court’s decision in *Chisholm v. Georgia*.<sup>7</sup> *Chisholm* denied that a state was immune from a federal court suit brought against it under state contract law by a citizen of another

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530-31 (1890) (holding that the Eleventh Amendment does not bar an individual’s suit in federal court against a county for nonpayment of a debt); *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890) (holding that each state possesses immunity from a suit brought against it by one of its citizens in federal court based on federal law); Ex parte *Young*, 209 U.S. 123, 163-65 (1908) (holding that the Eleventh Amendment did not bar suit for injunctive relief against a state official seeking to enforce an unconstitutional act); *Parden v. Terminal Railway*, 377 U.S. 184, 196 (1964) (5-4 decision) (concluding that Alabama had constructively consented to a federal court negligence action under the Federal Employees Liability Act brought by an employee of a state-owned railway because Congress, in enacting the Act, had intended to subject a state to such suits); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (5-4 decision) (finding that a suit against a statewide agency is considered a suit against the state under the Eleventh Amendment); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Eleventh Amendment did not bar an award of retroactive retirement benefits and attorney’s fees allowed by Title VII, as the Eleventh Amendment was limited by the enforcement provisions of Section 5 of the Fourteenth Amendment); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) (5-4 decision) (concluding the Eleventh Amendment prohibited federal courts from ordering state officials to conform their conduct to state law); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989) (deciding that Congress has the authority to create a cause of action against a state in federal court for monetary damages when legislating pursuant to the Commerce Clause), *overruled by Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (5-4 decision). For a good account of these cases, see RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1041-1105 (4th ed. 1996).

5. This is the majority’s position in *Seminole*. See *Seminole*, 116 S. Ct. at 1122, 1127-31. The dissenters disagreed with this position as a matter of original interpretation of the document—one of the major differences between the two camps. See *id.* at 1136-42 (Stevens, J., dissenting) (rejecting an original state sovereign immunity as implicitly required by the Constitution, but finding that some voluntary judicial restraint to protect states was acceptable); *id.* at 1156-58 (Souter, J., dissenting) (same).

6. U.S. CONST. amend. XI. State immunity was “created” by the Eleventh Amendment, if one agrees with the dissenters in *Seminole* that the Eleventh Amendment created a limited form of such immunity that had not previously existed. *Seminole*, 116 S. Ct. at 1136-37 (Stevens, J., dissenting). This immunity was quite limited and provided the states no protection from suits brought against states to enforce federal law. *Id.* at 1141. On the other hand, however, if one agrees with the *Seminole* majority, the states entered the union with complete immunity from federal court suits brought by citizens of any state under any of the Article III jurisdictional grants. *Seminole*, 116 S. Ct. at 1122. On this broad view, the Eleventh Amendment “restored” the small state immunity destroyed by *Chisholm*’s erroneous reading of the Constitution, thus augmenting what had remained after that decision. *Seminole*, 116 S. Ct. at 1130; see also *infra* notes 91-97 and accompanying text.

7. 2 U.S. (2 Dall.) 419 (1793). “A constitutional amendment to overrule *Chisholm* was introduced in the Senate only two days after the decision” in *Chisholm* was announced. FALLON ET AL., *supra* note 4, at 1048.

state.<sup>8</sup> In response to *Chisholm*, the Eleventh Amendment<sup>9</sup> was enacted five years later.<sup>10</sup>

I will discuss in greater detail the multiplicity of judicial and scholarly views as to the meaning of this Amendment—protecting a state from suits brought *by citizens of other states*. I will also discuss the existence of an additional form of immunity protecting a state from suits brought *by its own citizens*. Although this additional and controversial immunity obviously is not traceable to the words of the Eleventh Amendment, the Supreme Court first recognized it in *Hans v. Louisiana*,<sup>11</sup> and a majority of the Court continues to recognize it.<sup>12</sup> The Court's frequent shorthand references to both bodies of state immunity—Eleventh Amendment immunity and *Hans* immunity—as “Eleventh Amendment immunity”<sup>13</sup> have created some confusion.

*Seminole* offers a clearer, if controversial, explanation for *Hans*'s extratextual immunity by concluding that the original Constitution implicitly contemplated that states were generally to be free of all private suits in federal court, whether brought against a state by its own

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8. *Chisholm*, 2 U.S. (2 Dall.) at 451-52 (Opinion of Blair, J.). The Justices in *Chisholm* delivered their opinions *seriatim*.

9. The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another *State*, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI (emphasis added).

10. See FALLON ET AL., *supra* note 4, at 1048.

11. 134 U.S. 1, 20-21 (1890) (holding that each state possesses immunity from a suit brought by one of its citizens in federal court). When referring to this second sort of state immunity separately, the words “*Hans* immunity” will be used for clarity.

12. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996) (5-4 decision) (stating that each state is a sovereign entity and may not be sued by an individual without the state's consent).

13. While careful reading of most Supreme Court opinions on the subject makes clear that *Hans* immunity is not based on the Eleventh Amendment, a casual reader could easily be confused by isolated passages: “Thus, in *Hans v. Louisiana*, the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the [Eleventh] Amendment do not so provide.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). “Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts.” *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). That *Edelman* more properly involved *Hans* immunity and not Eleventh Amendment immunity is evident from the fact that *Edelman* was not a suit against a state by citizens of different states, as the Amendment specifies, but was a suit against Illinois by its own citizen-welfare recipients. This seems implicit in the Supreme Court opinion in *Edelman*, but is even clearer in the opinion of the court below. See *Jordan v. Edelman*, 472 F.2d 985, 990 (7th Cir. 1973).

Passages in *Hans* itself can easily be mistaken as statements that a state's immunity from suits by its own citizens comes from the Amendment, see, e.g., *Hans*, 134 U.S. at 10-12, although a more careful reading would convince otherwise. See *infra* note 92.

citizens or by citizens of other states.<sup>14</sup> The Eleventh Amendment, on this view, simply restored the part of this original immunity that the Supreme Court erroneously rejected in *Chisholm*—that barring suits by citizens of other states—so that after its passage, states were once again exempt from federal suits brought by citizens of any state.<sup>15</sup>

*Seminole* would be merely interesting if it just offered the first reasonably clear and official explanation of the existence of *Hans* immunity. Of real concern is *Seminole's* expansion of both sorts of state immunity. One of the two major sections of the *Seminole* majority opinion imposes reasonably clear and significant limits on Congress's previously recognized power to eliminate both sorts of state immunity.<sup>16</sup> In the other major section, the majority may well have started the process of limiting another longstanding doctrine that denies the protections of state immunity to certain suits brought against state officers to enforce federal law.<sup>17</sup>

The first of these two doctrines, which *Seminole* clearly limits, is that of abrogation—the power of Congress to override state immunity in order to subject a state to suit in federal court. Abrogation was first recognized in *Fitzpatrick v. Bitzer*.<sup>18</sup> In that case, the Supreme Court first found that Congress possessed the power to abrogate state immunity pursuant to the Enforcement Clause of the Fourteenth Amendment.<sup>19</sup> *Fitzpatrick* suggests that the powerful policies of the Fourteenth Amendment repeal any earlier constitutional immunities posing a threat to realization of the aims of this Reconstruction Amendment.<sup>20</sup> The reasoning of *Fitzpatrick* suggests the possibility that other amendments enacted after the original Constitution and the Eleventh Amendment—particularly the Thirteenth and the Fif-

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14. *Seminole*, 116 S. Ct. at 1122, 1129-31.

15. See *id.* (discussing this original understanding of the Eleventh Amendment).

16. *Id.* at 1123-32 (limiting, in Part II of the majority opinion, Congress's power to abrogate state immunity); see *infra* Part II.B.

17. *Seminole*, 116 S. Ct. at 1132-33 (rejecting, in Part III of the majority opinion, suit against a state officer under the doctrine of *Ex parte* Young, 209 U.S. 123 (1908)); see *infra* Part II.C.

18. 427 U.S. 445 (1976).

19. *Id.* at 456 ("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." (citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459 (1945))).

20. *Id.* at 455-56. Justice Rehnquist's opinion in *Fitzpatrick* was based on the timing and substance of the Fourteenth Amendment, particularly Section 5, explicitly granting Congress the power to enforce the Amendment by appropriate legislation. *Id.* at 456. The emphasis was on how the Amendment was designed to alter the pre-existing balance of federalism. *Id.* at 454-55.

teenth Amendments—also permit congressional abrogation.<sup>21</sup> *Fitzpatrick's* logic seemed limited to congressional powers created after the original Constitution and the Eleventh Amendment—powers that plausibly permit an override of any state immunity contained in those earlier sources of law.<sup>22</sup> In *Pennsylvania v. Union Gas Co.*,<sup>23</sup> however, a majority of the Court permitted Congress to abrogate state immunity under part of the original Constitution—the Interstate Commerce Clause<sup>24</sup>—thereby subjecting states to certain private-party damages suits in federal court.<sup>25</sup>

*Seminole's* clearest and most striking effect is to overrule *Union Gas*.<sup>26</sup> This restores the case law to a position prohibiting Commerce Clause-based abrogation,<sup>27</sup> a position widely criticized by academic writers in the years before *Union Gas* allowed such abrogation.<sup>28</sup> *Seminole's* restoration of the earlier widely criticized view has important real-world consequences. For example, the *Seminole* view precludes Congress from subjecting states to private lawsuits under environmental laws such as Superfund.<sup>29</sup>

*Seminole's* effect on another limitation of state immunity—the nearly century-old doctrine identified with *Ex parte Young*<sup>30</sup>—is less

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21. Like the Fourteenth Amendment, the Thirteenth and Fifteenth Amendments reflect powerful post-Eleventh Amendment policies, designed to change the balance of federalism, and contain similar provisions that permit congressional enforcement by appropriate legislation. See U.S. CONST. amend. XIII; U.S. CONST. amend. XV.

22. See *supra* note 20 and accompanying text.

23. 491 U.S. 1 (1989), overruled by *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (5-4 decision).

24. U.S. CONST. art. I, § 8, cls. 1 & 3 ("The Congress shall have Power . . . [t]o regulate commerce . . . among the several States . . .").

25. *Union Gas*, 491 U.S. at 5.

26. *Seminole*, 116 U.S. at 1128 ("We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.").

27. *Id.*

28. During the decade preceding *Union Gas*, many distinguished academics endorsed the broader position that state immunity had no application to suits brought to enforce federal law. See, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 549 (1977) (opining that the Eleventh Amendment should not stop Congress from imposing suit upon states); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) (stating that the Supreme Court should find "that Congress can eliminate state immunity with respect to any subject on which it has legislative authority").

29. The Court in *Union Gas* held that Congress, in enacting the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), intended to hold states liable in a federal court for damages, and further held that Congress had the authority to create such a cause of action. *Union Gas*, 491 U.S. at 5.

30. 209 U.S. 123, 167-68 (1908) (holding that the Eleventh Amendment did not bar federal suits to enjoin state officers from enforcing an unconstitutional state law).

clear than its effect on Congress's power of abrogation. The *Ex parte Young* limit on state immunity, unlike abrogation, is an internal one. It places certain suits outside the definition of suits against states and, thus, outside the protection of state immunity.<sup>31</sup> This class of suits, which seek to compel state officers prospectively to abide by federal law, are maintainable in federal court.<sup>32</sup> The *Ex parte Young* doctrine is widely regarded as a legal fiction because the suits it excludes from state immunity often are, from any realistic perspective, suits against states.<sup>33</sup> These are suits aimed at thwarting official enforcement of state policy made by legitimate state organs of government.<sup>34</sup>

It is this second part of the *Seminole* opinion concerning the *Ex parte Young* doctrine<sup>35</sup> that causes the most concern and, therefore, will receive the most attention below. In that portion of its opinion, the majority limits *Ex parte Young* in ways that are difficult to understand.<sup>36</sup> The formulaic language of the majority opinion discussing *Ex parte Young* seems relatively tame because, on the surface, it appears only to deny injunctive suits against state officers for violation of those federal statutes that Congress itself intended not be enforced by such a suit.<sup>37</sup>

The circumstances of *Seminole*, however, make the majority opinion seem ominous. As discussed below, the implausible lengths to which the majority went in finding congressional intent to forbid injunctive enforcement suggest that the Court might be moving toward allowing *Ex parte Young* suits to enforce federal statutes only to the extent that the statutes expressly provide for such enforcement.<sup>38</sup> Most likely, the end point of such a movement would fall short of a clear statement requirement, but would reflect a greatly increased

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31. *Id.* at 167 (stating that, when a state official seeks to enforce a state law violative of the Federal Constitution, "[t]he sovereignty of the State is, in reality, no[t] involved").

32. *Id.* at 168.

33. See, e.g., PETER W. LOW & JOHN CALVIN JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 887 (3d ed. 1994) (characterizing *Ex parte Young* as "rest[ing] on a fictional tour de force").

34. By contrast, suits seeking to compel a state to pay reparations from its treasury for a past wrong, whether formally against states as named parties or against state officers, are within state immunity and cannot be maintained in federal court. See *Edelman v. Jordan*, 415 U.S. 651, 663, 666-71 (1974) (citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944)).

35. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1132-33 (1996) (5-4 decision).

36. *Id.*

37. *Id.* at 1132 ("Nevertheless, we think that . . . where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*").

38. See *infra* notes 166-167 and accompanying text.

willingness to find implied congressional preclusion of injunctive relief.

The opinions and the split among the Justices in *Seminole* are reminiscent of the Court's uneven course regarding possible Tenth Amendment limits on Congress's powers to regulate the states under the Commerce Clause. In those cases, the Court first found few, if any, limits.<sup>39</sup> Then it reversed course, finding special protection for states.<sup>40</sup> Next it changed direction again, suggesting that no, or almost no, limits exist beyond the practical ones imposed by virtue of the states' representation in Congress.<sup>41</sup> Most recently, in *New York v. United States*,<sup>42</sup> the Court changed its view again, finding that the Tenth Amendment does indeed limit what Congress can do directly to states using its commerce powers.<sup>43</sup>

Like *Garcia v. San Antonio Metropolitan Transit Authority*, and at least arguably *New York v. United States*, *Seminole* overrules by a narrow margin a recent case, itself decided by a narrow majority.<sup>44</sup> *Seminole* also reverberates with *United States v. Lopez*,<sup>45</sup> which pertained to a closely related strand of federalism—the general limits on Congress's regulatory powers, whether aimed at states or private individuals. For the first time in nearly half a century, *Lopez* enforced a limit on congressional power to regulate private activities under the Interstate Commerce Clause and began to define a sphere in which state regula-

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39. See *Maryland v. Wirtz*, 392 U.S. 183, 198-99 (1968) ("[The Court] will not carve up the commerce power to protect enterprises . . . simply because those enterprises happen to be run by the States for the benefit of their citizens."), overruled by *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision).

40. See *National League*, 426 U.S. at 852 (holding that the Commerce Clause did not give Congress the power "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions").

41. See *Garcia*, 469 U.S. at 556-57 (holding that the basic limits on the federal commerce power are those restraints that are inherent in all congressional action and are provided for through state participation in federal governmental action).

42. 505 U.S. 144 (1992).

43. *Id.* at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."). Admittedly, *New York v. United States* is ambiguous, as it remains to be seen whether the special Tenth Amendment protections that it recognizes for states are large or limited.

44. *Id.* at 177 (finding a violation of the Tenth Amendment seven years after *Garcia*, a 5-4 decision, suggested strongly that the political process rather than judicial review should provide the safeguard for the states). *Seminole's* 5-4 vote overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which the Court also split 5-4. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1128 (1996) (5-4 decision); *Union Gas*, 491 U.S. at 5.

45. 514 U.S. 549 (1995) (5-4 decision).



tory powers are exclusive.<sup>46</sup> As with the *Garcia-New York v. United States* line of cases and *Lopez*, the stakes of federalism in *Seminole* seem high to the Justices. Justice Souter's dissenting opinion in *Seminole* is one of the longest in recent decades.<sup>47</sup>

Part I of this Comment describes the statutory scheme that gave rise to the *Seminole* case, as well as the events of the case itself. Part II.A is a brief description of the history and current status of the two sorts of sovereign immunity—Eleventh Amendment immunity and *Hans* immunity—that the Supreme Court recognizes as protecting the states from most federal court suits brought against them by private parties. It is written primarily for those who lack a firm grounding in these extremely complicated doctrines. Parts II.B and C speculate about the heart of *Seminole*, which is its limitation of two exceptions to both sorts of state immunity. Part II.B addresses the implications of *Seminole's* new limits on Congress's power to abrogate state immunity. Part II.C addresses *Seminole's* possible limitation of the doctrine of *Ex parte Young*, which views certain suits against state officers as outside the protection of state immunity.

## I. THE CASE

The issues of judicial federalism that were raised, and to some degree resolved, in *Seminole* arose from the necessity of interpreting and determining the constitutionality of the Indian Gaming Regulatory Act (the Gaming Act),<sup>48</sup> passed in 1988. The Gaming Act prohibited Indian tribes from conducting certain gambling operations unless they met a number of requirements.<sup>49</sup> Among these was the requirement that a compact between the state and the tribe authorize the operations.<sup>50</sup>

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46. *Id.* at 563-64 (rejecting the Government's argument that Congress can regulate all activities that might portend violent crime, and rejecting a similar argument that Congress could regulate any activity it found related to individual economic productivity).

47. *Seminole*, 116 S. Ct. at 1145-85 (Souter, J., dissenting) (encompassing forty pages in the *Supreme Court Reporter*).

48. 25 U.S.C. §§ 2701-2721 (1994).

49. *Id.* § 2710(d)(1). This provision states:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian Tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this Section, and (iii) is approved by the Chairman, (B) located in a state that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect.

*Id.*

50. *Id.* § 2710(d)(3).

The law required states, at a tribe's request, to negotiate the terms of such a compact in good faith.<sup>51</sup> If negotiations failed to occur for 180 days after the tribe's request, the Gaming Act provided that a tribe could bring a federal court action against the state to compel negotiation and conclusion of a compact.<sup>52</sup> In such an action, the burden was on the state to prove that it negotiated in good faith.<sup>53</sup> If the state failed to meet this burden, the statute required the district court to order conclusion of a compact within sixty days.<sup>54</sup>

The Seminole Tribe of Florida (the Tribe) brought such a suit against the State of Florida and its governor, after the latter had flatly refused negotiations.<sup>55</sup> The State argued that Congress could not constitutionally abrogate its immunity with a statute grounded in the Constitution's Indian Commerce Clause.<sup>56</sup> The federal district court rejected this argument, and Florida took an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit, which reversed on the narrow ground that Congress possesses no power of abrogation under the Indian Commerce Clause.<sup>57</sup> The court of appeals also rejected the Tribe's alternative argument. This was that, after dismissal of the State as a named party, the suit could go forward as an *Ex parte Young* suit compelling a state officer (the governor) to comply prospectively with federal law.<sup>58</sup>

The Supreme Court granted certiorari<sup>59</sup> to resolve the following two issues:

(1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes *against States* for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and

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51. *Id.* § 2710(d)(3)(A).

52. *Id.* § 2710(d)(7)(A)(i) and (B)(i).

53. *Id.* § 2710(d)(7)(B)(ii).

54. *Id.* § 2710(d)(7)(B)(iii). On failure of these negotiations, the statute provided that the tribe and the state each submit a proposed compact to a federal court-appointed mediator who would then select the best of the two according to vaguely specified criteria. *Id.* § 2710(d)(7)(B)(iv).

55. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1121 (1996) (5-4 decision).

56. *Id.* at 1126.

57. *Seminole Tribe v. Florida*, 11 F.3d 1016, 1026 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996) (5-4 decision).

58. *Id.* at 1028-29.

59. *Seminole Tribe v. Florida*, 115 S. Ct. 932 (1995).

(2) Does the doctrine of *Ex parte Young* permit suits against a State's governor for prospective injunctive relief to enforce the good faith bargaining requirement of the Act?<sup>60</sup>

The Court answered both questions in favor of state immunity.<sup>61</sup> It answered the first in the affirmative, finding no congressional power to abrogate under the Indian Commerce Clause,<sup>62</sup> and holding that the more significant Interstate Commerce Clause likewise provides no such power.<sup>63</sup> It answered the second in the negative, disallowing the suit under *Ex parte Young*.<sup>64</sup>

## II. A CLOSER LOOK AT THE OPINIONS AND AT WHERE *Seminole* May Lead

The *Seminole* Court, splitting 5-4, displays the essentially bipolar division on issues of federalism typical of the Court in recent years.<sup>65</sup> Nevertheless, *Seminole* produced none of the fragmentation within the Court's various ideological camps that is typical in such cases.<sup>66</sup> The clarity of the alignment and positions of the Justices is unusual. The

60. *Seminole*, 116 S. Ct. at 1122 (emphasis added). Note again that under state immunity, as explicated by the Court, suits against states as named parties are forbidden, regardless of relief sought, unless immunity was appropriately abrogated. See *Edelman v. Jordan*, 415 U.S. 651, 663, 672 (1974) (5-4 decision). On the other hand, suits against states of officers, in which the state is not a named party, were a more complicated matter. The latter were treated as suits against the state if they, in effect, sought damages for past wrongs, but as not against the state if they sought only prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123, 159-50 (1908).

61. *Seminole*, 116 S. Ct. at 1133.

62. *Id.* at 1122, 1126-28, 1131.

63. The *Seminole* Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had permitted abrogation under the Interstate Commerce Clause. *Seminole*, 116 S. Ct. at 1126-28, 1131; see also *id.* at 1131-32 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

64. *Seminole*, 116 S. Ct. at 1133.

65. See *supra* note 2 and accompanying text.

66. For example, in *United States v. Lopez*, 514 U.S. 549 (1995) (5-4 decision), Chief Justice Rehnquist delivered the opinion of the Court, but five additional opinions were filed. Justice Kennedy filed a concurring opinion in which Justice O'Connor joined. *Id.* at 568-83 (Kennedy, J., concurring). Justice Thomas filed a separate concurring opinion. *Id.* at 584-602 (Thomas, J., concurring). Justices Stevens and Souter filed dissenting opinions, *id.* at 602-03 (Stevens, J., dissenting); *id.* at 603-15 (Souter, J., dissenting). Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined. *Id.* at 615-31 (Breyer, J., dissenting). Similarly, in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision), then-Associate Justice Rehnquist wrote the majority opinion, *id.* at 835-56, and Justice Blackmun wrote a concurrence. *Id.* at 856 (Blackmun, J., concurring). Justice Brennan filed a dissenting opinion in which Justices White and Marshall joined, *id.* at 856-80 (Brennan, J., dissenting), and Justice Stevens filed a separate dissenting opinion. *Id.* at 880-81 (Stevens, J., dissenting).

Chief Justice wrote an opinion of the Court for himself and four of the associate Justices.<sup>67</sup> The majority opinion clearly rejects, if not always for clear reasons, both the abrogation and *Ex parte Young* justifications for the Tribe's suit.<sup>68</sup> *Seminole* produced no concurring opinions. Justice Souter's dissent, in favor of the Tribe's suit, both on abrogation and *Ex parte Young* grounds, was formally joined by Justices Ginsburg and Breyer.<sup>69</sup> Justice Stevens concurred de facto in Justice Souter's dissent,<sup>70</sup> but dissented separately to offer further arguments of his own.<sup>71</sup> Two gauges of the high stakes involved and potential bitterness among the Justices are the breathtaking length of Justice Souter's opinion, and his unusual and dramatic reading of portions of it from the bench.<sup>72</sup>

A. *The Opinions and the Sources and Scope of State Immunity*

1. *Some Background.*—To understand the significance of *Seminole*, it is important to recognize the origin and nature of the state immunity that it clarified and then limited. This matter involves two sources of immunity. One of these—Eleventh Amendment immunity—is based on text, and its existence is uncontroversial, although its scope is a matter of dispute.<sup>73</sup> The other is *Hans* immunity, which a majority of the current Court controversially alleges to have been implicitly a part of the original Constitution.<sup>74</sup> Each of these immunities is subject to a variety of interpretations as to their scope and as to the possibility of congressional override.

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67. *Seminole*, 116 S. Ct. at 1119. Chief Justice Rehnquist delivered the opinion of the Court in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *Id.*

68. *Id.* at 1133.

69. *Id.* at 1145-85 (Souter, J., dissenting).

70. *Id.* at 1145 (Stevens, J., dissenting) ("For these reasons, as well as those set forth in Justice S[outer]'s opinion, I respectfully dissent.").

71. *Id.* at 1133-45.

72. See David G. Savage, *High Court Curbs Federal Lawsuits Against the States*, L.A. TIMES, Mar. 28, 1996, at A1, available in 1996 WL 5254981 ("In a rare occurrence, Justice David H. Souter read parts of his dissent from the bench. In written form, it ran to 92 pages."). "Perhaps the [set of opinions] of greatest length in the history of the Court is *Buckley v. Valeo*, 424 U.S. 1 (1976)." Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 176 (1995). As downloaded from LEXIS, all of the opinions in *Buckley* taken together are 197 pages; those in *Seminole* are 95 pages. The main opinion in *Buckley*, the per curiam opinion, however, is 135 pages, or roughly 45,500 words, according to the WordPerfect 6.1 wordcount process. By itself, Justice Souter's dissent in *Seminole*, at 105 pages and roughly 32,500 words, is slightly over seventy percent of the *Buckley* per curiam opinion.

73. See *infra* notes 87-106 and accompanying text.

74. *Seminole*, 116 S. Ct. at 1130.

Some Justices have found the applicability of state immunity dependent on the Article III jurisdictional grant upon which suit is sought to be maintained against the state—whether suit is sought to be maintained in federal court based on the assertion of a federal cause of action against the state, or whether federal jurisdiction is based solely on the plaintiff's citizenship in another state or in a foreign nation.<sup>75</sup> Conversely, some Justices view state immunity as applicable to suits brought under any federal jurisdictional grant.<sup>76</sup> Similarly, the legitimacy of congressional abrogation may depend upon the particular power that Congress invokes in creating a private cause of action against states.<sup>77</sup> These views can and have appeared in a bewildering variety of permutations. I deal below with the major permutations identified with the various *Seminole* opinions.<sup>78</sup> Because the distinctions are subtle, I have provided a summary chart at the end of this section to assist those unfamiliar with doctrines of state immunity.

*Chisholm v. Georgia*<sup>79</sup> was a contract action brought in federal court by a citizen of South Carolina against the State of Georgia.<sup>80</sup> The plaintiff attempted to ground federal jurisdiction upon that portion of Article III, Section 2<sup>81</sup> that grants federal jurisdiction in "Controversies . . . between a State and Citizens of another State."<sup>82</sup> The Court found that federal jurisdiction did indeed exist, despite Geor-

75. *Id.* at 1136-37 (Stevens, J., dissenting) (arguing that Eleventh Amendment immunity applies only to certain diversity suits and not to suits brought to enforce federal laws); *id.* at 1146, 1150 (Souter, J., dissenting) (reaching the same conclusion).

76. *Seminole*, 116 S. Ct. at 1122 ("[F]ederal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))).

77. See *infra* notes 120-123 and accompanying text; see also *Seminole*, 116 S. Ct. at 1131-32 (stating that Article I cannot be used to avoid constitutional limits on federal jurisdiction).

78. See *infra* notes 87-106 and accompanying text.

79. 2 U.S. (2 Dall.) 419 (1793).

80. *Id.* at 419 (statement of plaintiff's counsel).

81. U.S. CONST. art. III, § 2, cl. 1. This provision states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—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;—between Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.*

82. Article III, Section 2, Clause 1 provides for federal court jurisdiction in only nine categories of cases. *Id.* These include not only the familiar jurisdictional grants for cases involving federal questions and the diverse state citizenship of private parties, but also

gia's argument that the grant implicitly recognized state sovereign immunity and was most properly read as allowing jurisdiction only in suits by states *as plaintiffs* against citizens of other states.<sup>83</sup>

The Eleventh Amendment's narrow focus as a response to *Chisholm* is inferable not only from its timing,<sup>84</sup> but also from its language:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>85</sup>

This language closely tracks those provisions of Article III that seem to grant federal courts jurisdiction of suits against states solely because they are sued by citizens of other states or by foreign citizens.<sup>86</sup> Thus, the Eleventh Amendment seems aimed at limiting those particular grants of Article III and not at limiting the grant that allows federal court suits arising under federal law, which presumably remains available even when a state is a party-defendant.

Despite the Amendment's language, in 1890 the Court held, in *Hans v. Louisiana*,<sup>87</sup> that a federal cause of action brought against Louisiana by one of its own citizens fell within state sovereign immunity.<sup>88</sup> This holding is problematic for two reasons. First, and most obviously, the words of the Amendment specifically bar suits brought against a state *by citizens of other states*, not suits brought against a state by its own citizens.<sup>89</sup> Second, if the Eleventh Amendment merely amends the Article III jurisdictional grants that formerly permitted suits between states and citizens of other states or foreign citizens, it would seem to leave untouched suits of any sort brought under the other jurisdictional grants in Article III. Most particularly, the Amendment seems to leave untouched federal question suits (such as *Hans* itself) in

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seven more obscure grants. *Id.* Among these seven is a grant permitting federal courts to hear "[C]ontroversies . . . between a State and Citizens of another State." *Id.*

83. *Chisholm*, 2 U.S. (2 Dall.) at 469 (Opinion of Cushing, J.).

84. See *supra* notes 6-10 and accompanying text.

85. U.S. CONST. amend. XI.

86. In relevant part, Article III reads: "The judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2. Another portion extends the judicial power "to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States." *Id.*

87. 134 U.S. 1 (1890).

88. *Id.* at 14-15.

89. See U.S. CONST. amend. XI.

which the Constitution permitted federal jurisdiction based on the presence of federal issues in the case, regardless of the nature or citizenship of the parties.<sup>90</sup> On this view, even if the plaintiff in *Hans* had been a citizen of another state, his federal question action against Louisiana could have proceeded in federal court unimpeded by the Eleventh Amendment.

2. *Seminole's View of the Sources and Scope of State Immunity.*—The majority opinion in *Seminole* clarifies *Hans*. At times, the *Hans* opinion implausibly suggests that the Eleventh Amendment compelled the Court's result.<sup>91</sup> At other times the opinion suggests an alternative, more intelligible view based on the notion that the original, un-amended Constitution implicitly guaranteed the states immunity from federal court suits brought against them by the citizens of *any* state.<sup>92</sup> This alternative reading of *Hans* is the one endorsed by the *Seminole* majority,<sup>93</sup> and it rests upon two crucial premises. First, the *Seminole* Court perceives the Eleventh Amendment as merely a correction of *Chisholm's* mistaken view that the Constitution permits federal courts to hear suits against states brought *by citizens of other states*.<sup>94</sup> Second, because no similar mistake had destroyed the original, implicit immunity protecting a state against any federal suit brought *by its own citizens*, that immunity continued to exist without need of support from a constitutional amendment.<sup>95</sup> Thus, the *Seminole* majority believes that the Constitution's *original*, implicit state immunity prohibited citizens of *any* state from bringing *any* federal court suit against a state.<sup>96</sup> The

90. *See id.*

91. *See, e.g., Hans*, 134 U.S. at 10-12 (relying heavily on the Amendment's text).

92. A more careful reading of the passages in *Hans* suggests that the immunity recognized was based on an original constitutional understanding that states are generally not suable in federal court by their own citizens or those of other states: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." *Id.* at 10.

93. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996) (5-4 decision) ("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.'" (quoting *Hans*, 134 U.S. at 15)).

94. *Id.* at 1130 ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is "to strain the Constitution and the law to a construction never imagined or dreamed of." The text dealt in terms only with the problem presented by the decision in *Chisholm . . .*" (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934) (quoting *Hans*, 134 U.S. at 15) (citation omitted))).

95. *Id.* at 1122; *see also supra* note 91.

96. *Seminole*, 116 S. Ct. at 1127-31. The Court stated:

"[N]either the literal sweep of the words of Clause one of § 2 of Article III [permitting Congress to give federal courts jurisdiction over suits arising under

majority thus believes that, excepting a brief interlude between *Chisholm* and the Eleventh Amendment, this sweeping immunity has continued to this day.<sup>97</sup>

The *Seminole* dissenters have a different view of state immunity, particularly regarding its status as an unyielding constitutional protection that is untouchable by Congress. The dissenters posit that a proper understanding of the *original* Constitution leads to the conclusion that a state had no immunity from suits in federal court brought by a citizen of any state to enforce federal law.<sup>98</sup> Although all of the dissenters reject the majority's recognition of an implicit constitutional immunity that yields to no congressional action,<sup>99</sup> they are willing to accept the existence of a federal common law immunity that can be removed by express statutory language indicating Congress's intent to create a federal action against the states.<sup>100</sup> This view seems to represent a compromise with *stare decisis*—a reasonable way to reconcile the dissenters' view of federalism with *Hans* and other cases that indisputably recognized some type of state immunity extending beyond that conferred by the Eleventh Amendment. Although the majority sees such extratextual immunity as an unconditional guarantee to the states, the dissenters see it as a court-made prudential doc-

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federal law], nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent."

*Id.* at 1129 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 321 (1934) (first alteration in original)). The Court noted that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 1131.

97. *Id.* at 1131.

98. See, e.g., *id.* at 1150 (Souter, J., dissenting); see also *id.* at 1151 (stating that the Eleventh Amendment had no effect on federal question jurisdiction (citing *Cohens v. Virginia*, 6 U.S. (6 Wheat.) 264 (1821))). Justice Souter also concluded that *Hans* did not prohibit Congress from abrogating state sovereign immunity in federal question suits. *Id.* at 1153-59.

99. See *id.* at 1134 (Stevens, J., dissenting) ("There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear."); *id.* at 1146 (Souter, J., dissenting) (stating that the majority's decision that state sovereign immunity may not be abrogated by Congress is directly at odds with the view that the common law was always subject to legislative amendment).

100. See *id.* at 1139 (Stevens, J., dissenting) ("No one has ever suggested that Congress would be powerless to displace the other common-law immunity doctrines that this Court has recognized as appropriate defenses to certain federal claims . . ."); *id.* at 1173 (Souter, J., dissenting) (expressing a willingness to recognize a congressionally displaceable, not constitutionally required, immunity that federal courts accord states as a matter of comity).



trine.<sup>101</sup> For the dissenters, *Hans* immunity is not based on the text of the Eleventh Amendment or on any constitutional requirement. It is based on the Supreme Court's choice to decline jurisdiction in the interest of federalism, a judicial choice similar to that underlying the abstention doctrines.<sup>102</sup>

Beyond their differences as to the existence of an implied, original, and absolute constitutional bar to federal suits against states by citizens of any state, the *Seminole* majority and the dissenters differ as to the meaning and scope of the one explicit source of state immunity—the Eleventh Amendment. For the majority, the Eleventh Amendment restores the original, absolute immunity from federal suits brought against states by citizens of other states, after *Chisholm* had destroyed such immunity by misreading the Constitution.<sup>103</sup> In the majority's view, such original immunity extended to all federal suits, including those brought to enforce federal law. Thus, the immunity that the Eleventh Amendment restored also extends to federal question suits.<sup>104</sup> The *Seminole* dissenters have a dramatically different view. They conclude that the Eleventh Amendment imposes no limitation on federal question jurisdiction because its language and history show that its sole aim was to bar diversity suits against the states.<sup>105</sup> These are suits involving state law, such as *Chisholm*, brought against states under the clause of the Constitution that appears to allow federal jurisdiction over any suit between a state and citizens of other states.<sup>106</sup>

The great complexity of the immunity addressed in *Seminole* is attributable to a wide variety of possible views, each of which is a permutation created by the interplay of two possibly overlapping sources of immunity. In turn, the scope and nature of each part of immunity law is subject to varying interpretations. The chart below summarizes the views of the majority and those of the dissenters in *Seminole*.

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101. See *id.* at 1139 (Stevens, J., dissenting); *id.* at 1173 (Souter, J., dissenting).

102. See *id.* at 1139 (Stevens, J., dissenting); *id.* at 1173 (Souter, J., dissenting).

103. See *Seminole*, 116 S. Ct. at 1130 (“[T]he decision in *Chisholm* was contrary to the well-understood meaning of the Constitution.”).

104. See *id.* at 1129 (“[A]lthough a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is . . . against a State, without her consent, by one of her own citizens.” (quoting *Monaco v. Mississippi*, 242 U.S. 313, 322 (1934))); see also *id.* at 1131-32 (“The Eleventh Amendment restricts the judicial power under Article III . . .”).

105. See, e.g., *id.* at 1150 (Souter, J., dissenting) (“The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses.”).

106. See U.S. CONST. art. III, § 2, cl. 1.

## FEDERAL COURT SUITS BARRED

IN THE VIEW OF WHICH JUSTICES	Citizens of State A Sue State B Under State Law	Citizens of State A Sue State A Under State Law	Citizens of State A Sue State B Under Federal Law	Citizens of State A Sue State A Under Federal Law
Majority	Barred— Originally barred by implicit constitutional immunity, which was rejected in <i>Chisholm</i> , but restored by the Eleventh Amendment. Congress cannot lift bar. <sup>107</sup>	Barred— by implicit constitutional immunity, which exists to this day, never impaired by judicial decision. Congress cannot lift bar. <sup>108</sup>	Barred— Originally barred by implicit constitutional immunity, which was rejected in <i>Chisholm</i> , but restored by the Eleventh Amendment. Congress cannot lift bar except when it acts under the Fourteenth Amendment and possibly other Reconstruction Amendments. <sup>109</sup>	Barred— by implicit constitutional immunity, which exists to this day, never impaired by judicial decision. Congress cannot lift bar except when it acts under the Fourteenth Amendment and possibly other Reconstruction Amendments. <sup>110</sup>

## FEDERAL COURT SUITS BARRED

IN THE VIEW OF WHICH JUSTICES	Citizens of State A Sue State B Under State Law	Citizens of State A Sue State A Under State Law	Citizens of State A Sue State B Under Federal Law	Citizens of State A Sue State A Under Federal Law
Dissenters	Barred by the Eleventh Amendment. Congress cannot lift bar. <sup>111</sup>	Not barred by immunity because Eleventh Amendment does not address suits against a state by its own citizens. Unlikely to be cognizable in federal court under any Article	Not barred by Eleventh Amendment. But barred by federal common law immunity unless Congress expressly overrides under any of its legislative	Not barred by Eleventh Amendment, for two separate reasons. First, the Amendment is seen as not applicable to federal question suits. Second, the Amendment

107. See *supra* notes 103-104 and accompanying text.

108. See *supra* notes 94-97 and accompanying text.

109. See *supra* notes 18-29, 103-104 and accompanying text.

110. See *supra* notes 18-29, 94-97 and accompanying text.

111. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1146 (1996) (5-4 decision) (Souter, J., dissenting) ("The adoption of the Eleventh Amendment soon changed the result in [*Chisholm*] . . . ."); see also *id.* at 1136 (Stevens, J., dissenting) ("[T]he Eleventh Amendment's jurisdictional restriction is best understood to apply only to suits premised on diversity jurisdiction . . . .").

## FEDERAL COURT SUITS BARRED

IN THE VIEW OF WHICH JUSTICES	Citizens of State A Sue State B Under State Law	Citizens of State A Sue State A Under State Law	Citizens of State A Sue State B Under Federal Law	Citizens of State A Sue State A Under Federal Law
		III jurisdictional grant, because it is neither a diversity suit nor a federal question suit. <sup>112</sup>	powers. <sup>113</sup>	is not applicable to suits against a state by its own citizens. But barred by federal common law immunity unless Congress expressly overrides. <sup>114</sup>

B. *The Significance of Seminole's View of Abrogation*

*Seminole's* narrowest holding is that the Indian Commerce Clause does not permit Congress to abrogate state immunity.<sup>115</sup> Although some advocates unsuccessfully have attempted to limit *Seminole's* holding in this way,<sup>116</sup> the case simply cannot be read so narrowly. The *Seminole* majority concluded that, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."<sup>117</sup> The majority did not shrink from announcing the implications of this conclusion: If the Indian Commerce Clause is at least as potent than the Interstate Commerce Clause, yet does not permit abrogation, then *Union Gas* must have been wrong in its conclusion that the latter empowered Congress to write abrogating legislation.<sup>118</sup> Lest there be any doubt, the Court stated: "We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled."<sup>119</sup>

112. See *id.* at 1156 (Souter, J., dissenting) (concluding that the Eleventh Amendment is not applicable in a suit brought against a state by its own citizen); see also *supra* notes 98-105 and accompanying text.

113. See *supra* notes 98-106 and accompanying text.

114. See *supra* notes 98-107 and accompanying text.

115. *Seminole*, 116 S. Ct. at 1126-28, 1131 (finding no distinction between the Indian Commerce Clause and the Interstate Commerce Clause, and overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which allowed Congress to abrogate state immunity under the Interstate Commerce Clause).

116. See, e.g., *Chauvin v. Louisiana*, 937 F. Supp. 567, 567-68 (E.D. La. 1996) (rejecting plaintiff's attempt to so limit *Seminole's* abrogation holding).

117. *Seminole*, 116 S. Ct. at 1126.

118. *Id.* at 1126-28.

119. *Id.* at 1128.

Is the *Seminole* majority right? My sympathies are with the position of Justice Souter's dissenting opinion and the vast majority of commentators that a federal cause of action trumps state immunity.<sup>120</sup> For others, the answer will depend both on their theory of constitutional interpretation and on the facts of federalism, historical and current, made relevant by that interpretive view. The majority Justices' views as to these matters are unlikely to change in ways affecting state immunity jurisprudence, although appointment of new Justices may make the *Seminole* dissent the view of a future majority in a pattern reminiscent of the Court's wildly swinging Tenth Amendment jurisprudence.<sup>121</sup>

Instead of entering the debate on the correctness of the majority's view of original state immunity, I want to engage in some speculation as to the future. I want to consider where *Seminole* might lead. First, might the abrogation holding be at least slightly narrower than it appears? Is it possible that the *Seminole* majority might find that some provisions of the original Constitution—other than the Indian and Interstate Commerce Clauses—support legislation abrogating state immunity? For example, might the Foreign Commerce Clause be seen as sufficiently more potent than the Interstate Commerce Clause, and even the Indian Commerce Clause,<sup>122</sup> to permit Congress to create causes of action against the states and in favor of private parties, thus abrogating state immunity? Although nothing in the *Seminole* majority opinion clearly rules out this possibility, the Court's distinction of Fourteenth Amendment abrogation stresses both the potency of the Fourteenth Amendment and the changes wrought in American federalism after the Civil War.<sup>123</sup> In short, the majority seems to believe that, under the original Constitution, state immunity trumped all arguable congressional powers that might have permitted suits against states in federal court.<sup>124</sup>

Of more interest are possibilities that *Seminole* might be broader than it seems. First, could it be the initial step in a series of decisions limiting Congress's abrogation power? Although it does not seem ut-

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120. *Id.* at 1145 (Souter, J., dissenting). For a list of articles discussing the source and scope of sovereign immunity under the Constitution and the Eleventh Amendment, see *id.* at 1150 n.8.

121. See *supra* text accompanying notes 39-43.

122. U.S. CONST. art. I, § 8, cls. 1 & 3 ("The Congress shall have Power . . . [to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

123. *Seminole*, 116 S. Ct. at 1125, 1128 (discussing the rationale for abrogation under the Fourteenth Amendment).

124. See *supra* notes 103-104 and accompanying text.

terly irrational to worry about whether Congress's power to abrogate state immunity under its power to "enforce" the Fourteenth Amendment will be the next domino to fall, this seems unlikely even if the Court's composition remains the same. Nothing in the opinion gives that impression. It is worth noting that Chief Justice Rehnquist, who wrote the majority opinion in *Seminole*,<sup>125</sup> also wrote the opinion in *Fitzpatrick v. Bitzer*,<sup>126</sup> which established the legitimacy of congressional abrogation under Section 5 of the Fourteenth Amendment.<sup>127</sup> In *Seminole*, Chief Justice Rehnquist's opinion offers not the slightest hint of a forthcoming retrenchment regarding Congress's Fourteenth Amendment powers. Indeed, the Court takes great care to explain why the rationale it believes supports Fourteenth Amendment abrogation simply is not available in cases of abrogation under provisions of the original Constitution.<sup>128</sup> This explanation is entirely consistent with the reasoning of *Fitzpatrick* itself, which rested on arguments that the Fourteenth Amendment was special in timing and substance.<sup>129</sup>

A more interesting possibility is that the narrow limitation of Congress's abrogation powers will force a showdown on other Eleventh Amendment issues and, indeed, on related Tenth Amendment<sup>130</sup> issues of state immunity from congressional regulation. Congress may attempt to accomplish through state waiver of sovereign immunity what it cannot through abrogation. Early cases explained that, while state immunity deprives a federal court of subject matter jurisdiction, an immunity defense is unusual because it can be waived by the state, unlike the great mass of defects in subject matter jurisdiction.<sup>131</sup> In some cases, courts found implied waiver of state immunity against federal court suits connected with a federal program or regulatory scheme because of what the courts perceived as the state's voluntary entanglement with the program or scheme.<sup>132</sup> As the Court devel-

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125. *Seminole*, 116 S. Ct. at 1119, 1126-28.

126. 427 U.S. 445 (1976).

127. *Id.* at 447, 456.

128. *Seminole*, 116 S. Ct. at 1128 ("Fitzpatrick was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment . . . operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." (citing *Fitzpatrick*, 427 U.S. at 454)).

129. *Fitzpatrick*, 427 U.S. at 453-56.

130. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

131. See, e.g., *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (stating that Eleventh Amendment immunity is a privilege that can be waived); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) (holding that voluntary appearance by state waived immunity).

132. See, e.g., *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (5-4 decision), *overruled by* *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (5-4 decision),

oped its abrogation jurisprudence, it seems to have shied away from constructive waivers, which are simply abrogation with a different label.<sup>133</sup> Actual but implied waivers may now be impossible due to a clear statement requirement similar to that for abrogation.<sup>134</sup>

Nonetheless, nothing in the implied waiver or abrogation cases addresses limits on express waivers induced by federal pressure. After *Seminole*, Congress cannot wield abrogation as a tool over most of its regulatory domain; so it will certainly try to induce a valid state waiver if and when it wishes to subject states to federal court actions establishing substantive federal liability to private persons. This tactic raises an Eleventh Amendment aspect of what will likely become a pivotal issue in the current struggle over American federalism: Which constitutional protections may states waive, and how is the validity of such a waiver tested? In *New York v. United States*,<sup>135</sup> Justice O'Connor made clear that which could never be doubted: Some of the Constitution's structural protections for states cannot be waived.<sup>136</sup> Determining which limits the states may bargain away, and to what degree, is a vast and serious scholarly enterprise far beyond the scope of this Comment.

Still, it is worth noting that such waiver issues generally may be the next situs of the struggle over federalism. If *United States v. Lopez*<sup>137</sup> is the beginning of a serious attempt to limit federal regulatory power, any such limits are nearly worthless without concomitant limits on the alternative forms in which regulatory desires may express

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limited by *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991). In *Parden*, the Court held that the State of Alabama had impliedly consented to federal court jurisdiction by participating in the railroad industry. The finding of an implied waiver was a two-step process. First, the Court decided that, in enacting the Federal Employer's Liability Act (FELA), Congress intended to abrogate the sovereign immunity of state-owned common carriers. *Id.* at 190. The Court then determined that, by operating an interstate railroad after the enactment of FELA, Alabama necessarily consented to suit in federal court as authorized by that Act. *Id.* at 192. In later cases, the Court held that Congress may induce waiver of a state's sovereign immunity "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Eventually, *Parden* was explicitly overruled to the extent that it was inconsistent with this clear statement requirement. *Welch*, 483 U.S. at 478.

133. See, e.g., *Atascadero*, 473 U.S. at 246-47 (refusing to find a state's consent to federal suit by its participation in a federal program funded under a statute).

134. See *Welch*, 483 U.S. at 475-76 (requiring a clear statement to abrogate).

135. 505 U.S. 144 (1992).

136. *Id.* at 182 ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

137. *United States v. Lopez*, 514 U.S. 549, 551-52 (1995) (5-4 decision) (holding unconstitutional, as beyond Congress's Commerce Clause powers, a particular federal law prohibiting firearms within specified distances of state schools).

themselves. Often Congress possesses other tools to reach a regulatory result by taxing and offering money to the states to induce their cooperation. So, for example, if Congress could not prohibit guns near schools (*Lopez*), it almost certainly, under existing law, could raise taxes and offer the money back to the states so long as *they* prohibited guns near schools.<sup>138</sup> Like the pressure in a champagne bottle with a weak cork, pressures for federal regulation will take the path of least resistance. Unless corresponding limits are placed on spending powers, any federal impulse to control a specific matter will be achieved through Congress's spending powers.

From a states' rights point of view, such incentives are similar to bribes, but particularly odious bribes paid with money originally stolen from the victim. Consequently, I expect an attack from these quarters on the liberal Spending Clause cases like *South Dakota v. Dole*<sup>139</sup> in an attempt to seal hermetically federal spending power within limits analogous to the limits on Congress's direct regulatory power under the Interstate Commerce Clause.<sup>140</sup> The objective is likely to be a convergence of Commerce Clause and Spending Clause limits by reading the Constitution to prohibit congressional control of regulatory outcomes through conditional federal spending that could not be controlled through direct regulation.<sup>141</sup> The arguments are difficult to articulate fully, but they will be forcefully made, absent a drastic change in the Court's composition.

This struggle could have implications for state sovereign immunity cases; indeed, it could partially develop in such cases. It is not difficult to imagine the Court developing a stricter scrutiny for federal statutes that offer states participation in a federally funded program on the condition that they waive their immunity from federal suits brought to enforce the requirements of the program.

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138. Cf. *South Dakota v. Dole*, 483 U.S. 203, 209-12 (1987) (allowing Congress much greater latitude to regulate indirectly by attaching conditions to grants, rather than to regulate directly under the Commerce Clause).

139. 483 U.S. 203 (1987).

140. Justice Brennan's dissent in *Dole*, for example, reasoned that Congress cannot condition a federal grant in a manner that abridges a power reserved to the states. *Id.* at 212 (Brennan, J., dissenting).

141. Justice O'Connor's dissent in *Dole* focused on the limits imposed by the Spending Clause. She reasoned that there are four separate limitations on the spending powers: (1) the expenditure must be for the general welfare; (2) the conditions must be unambiguous; (3) they must be reasonably related to the purpose of the expenditure; and (4) the legislation must not violate any constitutional prohibition. *Id.* at 213 (O'Connor, J., dissenting). She believed that the restriction at issue in *Dole*—that states raise the drinking age to twenty-one—was not sufficiently related to the purpose of the legislation to which it was attached—namely, funding for interstate highways—and that it infringed on the rights granted to the states by the Twenty-First Amendment. *Id.* at 213-18.

C. *The Significance of the Seminole Majority's View of the Ex parte Young Doctrine*

1. *The Ex parte Young Doctrine*.—The second part of *Seminole* concerns a doctrine identified with *Ex parte Young*,<sup>142</sup> although long antedating it.<sup>143</sup> In *Ex parte Young*, the Court permitted an injunctive suit brought by a private party against a state officer to force the officer prospectively to comply with the Constitution.<sup>144</sup> Had the state been a named party, the Eleventh Amendment would have barred the suit.<sup>145</sup> It would also have been barred if the plaintiff had sought damages from the state treasury, even though the officer and not the state was the party-defendant.<sup>146</sup> *Ex parte Young* found state sovereign immunity no bar to a limited class of federal suits—those seeking to compel state officers prospectively to adhere to federal law.<sup>147</sup> It did so by indulging in the fiction that the suit was not against the state.<sup>148</sup> The fictitious nature of *Ex parte Young* is clear beyond question. It permits a federal court to stop a state officer from following the clear commands of state legislation.<sup>149</sup> Because most legislation is not self-executing, state policy often can be realized only by executive enforcement. *Ex parte Young* permits federal courts to interfere with acts of state government. Those courts may do so not just to enforce conventional Federal Bill of Rights provisions. Cases after *Ex parte Young*, and language in that case,<sup>150</sup> indicate that the fiction extended to permit suits seeking to stop state officers from violating federal statutes.<sup>151</sup>

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142. 209 U.S. 123 (1908).

143. See, e.g., *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) (holding that the Eleventh Amendment applies only to cases in which a state is a named party). For a discussion of early cases, see *Ex parte Young*, 209 U.S. at 150-56. For additional cases, see 13 CENTURY EDITION OF THE AMERICAN DIGEST, *Courts* § 844.5, at 2571-75 (1899).

144. *Ex parte Young*, 209 U.S. at 155-56 (“[I]ndividuals who, as officers of the state . . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.”).

145. See *Osborn*, 22 U.S. (9 Wheat.) at 857; see also *Ex parte Young*, 209 U.S. at 150-51 (discussing the “party of record” rule); FALLON ET AL., *supra* note 4, at 1063-65 (citing cases and discussing the same rule).

146. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (5-4 decision).

147. *Ex parte Young*, 209 U.S. at 155-56.

148. *Id.* at 159-66; see *supra* notes 30-34 and accompanying text.

149. This was true in *Ex parte Young* itself, in which a federal injunction was sought against the state attorney general’s enforcement of a state statute. *Ex parte Young*, 209 U.S. at 149, 159-60.

150. *Id.* at 167 (stating such a suit “is no new invention”).

151. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1133 n.17 (1996) (5-4 decision) (recognizing that private suits seeking injunctions to enforce statutory causes of action can be asserted against state officials under the doctrine of *Ex parte Young*); *Ray v. Atlantic*



*Ex parte Young* has been viewed as necessary for a healthy judicial federalism.<sup>152</sup> Without it, the enforcement of federal rights, and particularly the Fourteenth Amendment for much of its history, would have been severely limited. Absent *Ex parte Young*, enforcement would be possible in three ways. First, those whose federal rights are violated in state judicial actions can interpose federal defenses in the state court, with such federal review as the certiorari and habeas corpus statutes permit.<sup>153</sup> Second, those wishing to assert federal rights as plaintiffs presumably can enforce them in state courts, with the possibility (remote in modern times) of review in the Supreme Court.<sup>154</sup> Third, federal officers can enforce federal rights in federal court.<sup>155</sup> Difficulties exist with all three of these alternatives to *Ex parte Young* suits. Even Justice Scalia, a devotee of state interests in the struggles over judicial federalism, has cited *Ex parte Young* injunctions as legitimate, and as a method of reconciling state sovereign immunity with valid federal limitations on how states may treat individuals.<sup>156</sup>

2. *The Portion of Seminole Concerning Ex parte Young*.—Having concluded that the state could not be made a party to the suit in *Seminole* by abrogation,<sup>157</sup> the Court considered whether the suit could proceed as an *Ex parte Young* suit to force the Governor of Florida into prospective compliance with the Gaming Act's requirement of good-faith negotiation with the Tribe.<sup>158</sup> The basis of the Court's conclu-

Richfield Co., 435 U.S. 151, 155, 156 n.6 (1978) (affirming that suits against state officials may be brought in federal court to enjoin enforcement of unconstitutional state laws).

152. Even the majority in *Seminole* recognizes *Ex parte Young* suits as one important way of realizing the Supremacy Clause's goal. *Seminole*, 116 S. Ct. at 1131 n.14, 1132 n.16; see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., concurring and dissenting), *overruled by Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (5-4 decision).

153. The Supremacy Clause requires state courts to give effect to defenses of federal law. U.S. CONST. art. VI, cl. 2.

154. The Supremacy Clause requires state judges to enforce federal law. *Id.*; see *Testa v. Katt*, 330 U.S. 386, 390-92 (1947) (unanimous decision) (affirming that state courts cannot ignore federal laws).

155. The Eleventh Amendment is no barrier to suits by the United States government. Thus, where federal rights provisions for individual rights nevertheless allow the federal government to bring suit to enforce them, the Eleventh Amendment is no obstacle. See *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (permitting a United States Attorney General's suit against a state to enforce the federal voting rights of African Americans); Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

156. *Union Gas*, 491 U.S. at 34 (Scalia, J., concurring and dissenting) ("Of course federal law can give, and has given, the private suitor many means short of actions against the State to assure compliance with federal law. He may obtain a federal injunction against the state officer, which will effectively stop the unlawful action, see *Ex parte Young* . . .").

157. See *supra* notes 62-63 and accompanying text.

158. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1132-33 (1996) (5-4 decision).

sion that the suit could not proceed is difficult to understand.<sup>159</sup> Certainly, the Court did not repudiate *Ex parte Young*, and it showed no sign of doing so even as to federal statutory claims against state officers. Indeed, if that doctrine is viewed as exempting from immunity any otherwise proper suit to compel a state officer to comply with federal law, then one could say that the *Ex parte Young* doctrine itself was not limited at all. Rather, one might read *Seminole* as finding an *Ex parte Young* suit unavailable because of the lack of a cause of action—a prerequisite to any suit in federal court.<sup>160</sup> The Court concluded that Congress, in creating the Gaming Act, intended that there be no injunctive remedy against state officers.<sup>161</sup> Viewed this way, the Tribe lost for the simplest of reasons—failure to state a claim upon which relief can be granted. At one point, the Court stated:

Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act. Although one might argue that the text of [the Gaming Act], taken alone, is broad enough to encompass both a suit against a State (under an abrogation theory) and a suit against a state official (under an *Ex parte Young* theory), subsection (A)(i) of [the Act] cannot be read in isolation from subsections (B)(ii)-(vii), which repeatedly refers exclusively to “the State.”<sup>162</sup>

The implications of this reading are minor for plaintiffs asserting federal *constitutional* rights, because congressional intent to restrict remedies rarely will stop an action to force state officers to comply with the Constitution.<sup>163</sup> For plaintiffs seeking federal court enforce-

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159. The Court reasoned that Congress had specified a detailed remedial scheme in case of violation of the statute. *Id.* By so doing, Congress indicated its intent to exclude the broader remedies allowed by *Ex parte Young*. *Id.* This remained true even after the specific remedy was held to be unconstitutional. *Id.*

160. The principle that a court cannot grant relief without a cause of action—a legal rule of which the plaintiff is a beneficiary or authorized enforcer—is basic to our system of laws. It leaves its traces in rules such as Fed. R. Civ. P. 12(b)(6) providing for federal courts to dismiss lawsuits brought by those with no legal claim to relief. In *Seminole*, the Gaming Act was the sole asserted source of plaintiffs’ right to an injunction. If the Gaming Act was read as not creating a cause of action in favor of the Tribe, therefore, the latter’s suit could not be maintained.

161. *Seminole*, 116 S. Ct. at 1133.

162. *Id.* at 1133 n.17.

163. *But see* Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Monaghan argues that some of the Supreme Court’s Constitution-based decisions stem from a legitimate choice that the Constitution gives the Court regarding remedies for violations of specified rights. For example, both

ment of federal *statutory* rights against states, the decision is potentially of much more importance, even on the limited "failure-to-state-a-cause-of-action" reading of *Seminole*. The importance is submerged because, on the surface, it is not surprising that when Congress creates a new right, Congress should be substantially in charge of the remedies for its denial. Although there are exceptions even to this proposition,<sup>164</sup> surely if Congress intends that there not be an injunctive remedy for the violation of a new statutory duty, normally Congress should be able to enact that policy.<sup>165</sup> On this reading, the troubling aspect of *Seminole* is not that the majority enforced a clear congressional policy against private injunctive relief under a particular statute. It is, rather, that the congressional intent to rule out injunctive relief in the Gaming Act was far from clear (indeed, any intent was probably to the contrary), and that the Court performed contortions to read a policy excluding injunctions into the statute. Particularly troubling is what those contortions may portend for future *Ex parte Young* suits brought to enforce federal statutes.

Despite its recognition that Congress had attempted (in its view, unconstitutionally) to subject the states to federal coercive action to compel negotiations, the majority refused to conclude that an *Ex parte Young* suit was a lesser included remedy.<sup>166</sup> Generally, suits against state officers have been permitted to enforce federal statutory obligations that in the literal terms of the statute are obligations of the state itself. Indeed, that is the whole point of *Ex parte Young* suits.<sup>167</sup> The Court, however, offered two arguments suggesting that *Seminole* differs from such suits. First, the Court placed some emphasis on the fact

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the Court-imposed *Miranda* warnings and the exclusionary rule may reflect the Court's choice of remedies for violations of the relevant Fourth Amendment rights, a choice possibly subject to congressional displacement by statute providing an alternative and acceptably effective remedy. *Id.* at 18-20.

164. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In that case, the Court rejected the State's argument that the state legislature may specify the procedures for deprivation of a property right created by state statute, stating that "[t]he right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" *Id.* at 541 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

165. If, under the circumstances of a case, the statute created a vested constitutional right (e.g., granted federal land), then Congress's power to deny relief might become controversial. See *supra* note 160.

166. *Seminole*, 116 S. Ct. at 1132-33.

167. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (noting that, while injunctions against state officers have obvious fiscal consequences for the state, such expense is an inevitable effect of *Ex parte Young's* permissible purpose).

that the express federal cause of action created by the Gaming Act—the one ruled unconstitutional—was against the state and not its officers.<sup>168</sup> The Court suggested that the creation of one express remedy in the Gaming Act was a strong indication that Congress intended no other remedies.<sup>169</sup> This seems wrong. In the 1988 (pre-*Union Gas*) world of the Gaming Act, *Ex parte Young* suits were the background norm, and abrogation under the Commerce Clause was unusual—arguably unconstitutional—and required express language if it was permitted at all. Thus, an attempt at an accurate reading of Congress's intent suggests that the remedy against the state was made express in order to augment, rather than supplant, the usual injunctive remedy against state officers. It is hard to believe that Congress would not have intended that the usual *Ex parte Young* suit against an officer be available in the event that state immunity be held to preclude any remedy against the state.

The *Seminole* Court's second argument requires more thought, but it too ultimately fails. Here the emphasis was not on the fact that the only express remedy ran against the state itself, but on what the majority suggested was the carefully crafted and limited nature of that remedy.<sup>170</sup> The Court analogized *Seminole* to *Schweiker v. Chilicky*,<sup>171</sup> a case in which the Court refused to imply a damage remedy for constitutional violations, reasoning that Congress had supplied a carefully crafted, limited, yet adequate, remedy.<sup>172</sup> As in *Chilicky*, the *Seminole*

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168. *Seminole*, 116 S. Ct. at 1132-33 & n.17.

169. The Court noted that the limited remedy provided in § 2710(d)(7) of the Gaming Act—a court order directing good-faith negotiations—was contrary to any possible congressional intent to expose state officers to the “full remedial powers” of an *Ex parte Young* suit. *Id.* at 1132-33.

170. *Id.* The Court's logic was similar to that employed in cases brought under 42 U.S.C. § 1983 (1994) in which the Court has concluded that a specific and carefully crafted set of remedies should be seen as supplanting a more general source of rights. Section 1983 purports to provide remedies for state violations of federal constitutional and statutory rights. The issue has been whether § 1983's damage remedy is available for violations of statutes that have no similar provision for damages. This question became particularly acute after the Court became less willing to imply private damage remedies under statutes that made no mention of them. Section 1983 offered a way around these rulings, if interpreted as expressly augmenting the remedies of federal statutes that were silent on the damages issue. In several cases, the Court found that carefully crafted statutory schemes were, for that reason, intended to stand alone, unaugmented by § 1983—that is, the Court believed there was reason to find that Congress deliberately opted out of § 1983's umbrella. *See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981) (finding § 1983 relief precluded by a statute establishing specific remedies unavailable to individual plaintiffs and refusing to imply additional remedies as causes of action).

171. 487 U.S. 412 (1988).

172. *Id.* at 423.

Court concluded that the nature of the express remedial scheme in the Gaming Act counseled similar restraint.<sup>173</sup>

What was it about the Gaming Act that suggested that no *Ex parte Young* injunction should be available? Apparently it was the fact that the only express remedy Congress provided against the states for failure to negotiate with a tribe was mediation, in which the state was under no enforceable obligation to participate. (Its failure to do so, however, might result in federal preemption of the state's powers to regulate the tribe's activities.)<sup>174</sup> In the Court's view, an *Ex parte Young* injunction would be much harsher, exposing state officers, particularly governors, to the possibility of a contempt order.<sup>175</sup>

There are many difficulties with this analysis. First, it is unclear that Congress did not intend for federal courts to use contempt when faced with a blatant violation of its order compelling a state to negotiate in good faith. Surely the availability of an injunction is to be the usual and reasonable assumption with respect to state officers' wilful refusal to follow federal judicial commands directed to the state.<sup>176</sup> Indeed, as Justice Stevens suggests, if the federal court's order requiring a state (or its officer) to negotiate was not ultimately enforceable by contempt, then the court's order requiring negotiation would seem advisory and, thus, a violation of Article III.<sup>177</sup> This further suggests a reading of the Gaming Act that permits the usual contempt sanction for extreme cases, but which presumably is to be applied with the utmost regard for states' rights in cases in which the relief sought is equitable.

The best reason for the denial of injunctive relief in *Seminole* would build upon the constitutionally troubling nature of the specific

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173. *Seminole*, 116 S. Ct. at 1132-33.

174. *Id.*

175. *Id.* at 1133. The Court reasoned that, if *Ex parte Young* actions were allowed under the original statute, Indian tribes would have no incentive to "suffer through the intricate scheme" of the Gaming Act. *Id.*

176. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 690 (1978) ("In exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan*, federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced."). In *Hutto*, the Court implied that both criminal and civil contempt proceedings against state officials are proper to enforce an *Ex parte Young* order. *Id.* at 690-91. *Ex parte Young* itself was a petition for a writ of habeas corpus brought by a state official who had been held in contempt for disobeying a federal court injunction. *Ex parte Young*, 209 U.S. 123, 126-34 (1908) (statement of the case). Thus, contempt sanctions were the natural and expected consequence for violation of an *Ex parte Young* injunction when Congress enacted the Indian Gaming Regulatory Act.

177. *Seminole*, 116 S. Ct. at 1144-45 (Stevens, J., dissenting) (chiding the majority opinion as possibly advisory, given judicial involvement in intermediate stages of a procedure beginning and ending in the executive branch).

obligation sought to be enforced against the state. The Gaming Act may be a special case in which enforcement with an injunction would be inappropriate. If so, contrary to the suggestion in *Seminole*, the plausible reasons for this conclusion are not expandable to cover every case involving a specially crafted alternative set of remedies. If an injunction was inappropriate in *Seminole*, the reasons stem from truly unusual aspects of the Gaming Act, which imposed on the state (or its officers) a duty to negotiate the content of *state* law, as opposed to a duty to follow preemptive federal law.<sup>178</sup> If an express congressional command that a state negotiate the content of state regulation violates the Tenth Amendment, then, of course, an *Ex parte Young* suit seeking that relief would do so as well. Such a conclusion would have been a narrow, and more acceptable, reason for excluding the Tribe's *Ex parte Young* suit, if it sought such an order enforceable by contempt sanctions.

In *New York v. United States*,<sup>179</sup> a majority, essentially coextensive with that of *Seminole*, struck down a federal law passed under the Interstate Commerce Clause as violating New York's Tenth Amendment immunity from legislation invading its basic sovereignty.<sup>180</sup> The vice in the statute was its requirement that a state legislature enact, *as state law*, a specified federal policy.<sup>181</sup> Although differences exist between these two cases, there is also kinship between the law in *New York v. United States* and the Gaming Act that held center stage in *Seminole*. The law at issue in *Seminole* pressures a state, whose policy is absolutely to the contrary, either to change its mind as to what *state* law will be or to go through the charade of negotiation. *New York v. United States* makes clear that Congress cannot force the former result; the Tenth Amendment also plausibly forbids requiring an unwilling state, and particularly its governor, to do the latter. Indeed, the notion of negotiation in good faith seems to entail the requirement that a state temporarily abandon its stated policy decision against a compact so as to be flexible. Thus, Congress can often preempt, imposing substantive requirements on the states, but it is not clear that it can pressure states to negotiate the content of state law when they wish not to do so.

Although the *Seminole* Court may have been concerned about these aspects of the Gaming Act, it regarded these issues as not officially before it.<sup>182</sup> Even assuming the Court could not have directly

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178. *Id.*; see also *supra* notes 50-54 and accompanying text.

179. 505 U.S. 144 (1992).

180. *Id.* at 166, 177.

181. *Id.* at 159-66.

182. *Seminole*, 116 S. Ct. at 1126 n.10.

considered these arguments,<sup>183</sup> they could have been made indirectly dispositive. Assuming that Congress *can* expressly require a state to negotiate, special Tenth Amendment *concerns* might have been made the reason that an *Ex parte Young* suit was not available to coerce a state to comply with federal law. The Court could have stated that, even if constitutionally possible, such an arrangement is a drastic intrusion into states' rights, and the usual willingness to imply a right to indirect enforcement against state officers is inappropriate.<sup>184</sup> Perhaps *Seminole* can be limited in this way as a clear statement rule for certain *Ex parte Young* suits posing unusually serious threats to federalism. The *Seminole* Court, however, never suggests this rationale or the limits it would impose. As it stands, *Seminole* is more general, prohibiting indirect relief against state officers even though such relief does not raise serious Tenth Amendment questions.

In short, *Seminole's* limiting effect on *Ex parte Young* suits apparently is not confined to those that raise Tenth Amendment concerns. Rather, it extends to at least some suits that are aimed merely at requiring state officers to comply with indisputably valid federal statutes. What does *Seminole* portend for such suits? At least in statutory cases, *Seminole* may be the first step toward a narrower view of the availability of federal court injunctions to enforce federal statutory rights against the states. Either as to all such cases generally, or as to subsets, a majority of the Court may begin to scrutinize statutes for evidence of Congress's intent that the statutory rights it created against the states not be enforceable by injunctions. Because the course of Supreme Court appointments is extremely difficult to predict, a miserly approach to *Ex parte Young* injunctions may develop and possibly intensify over the next several years.<sup>185</sup> One might even imagine *Seminole* developing into a federal statutory jurisprudence requiring clear statu-

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183. The Court has on occasion raised similar constitutional objections, neither briefed, nor even raised, below. A major issue of federalism was decided by the Court on its own initiative in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). It was whether to overrule *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had concluded that the grant of diversity jurisdiction often justified federal courts in making and applying a general federal common law, rather than state law, to issues that would have been determined by state law in state court suits. Justice Butler's dissent in *Erie*, rejecting the overruling of *Swift*, makes clear that the issue was not placed before the Supreme Court by the parties. *Erie*, 304 U.S. at 81-88 (Butler, J., dissenting).

184. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (establishing a presumption against reading a statute to encroach on essential political functions of states, even if constitutionally permissible, and requiring a plain statement in the statute in order to accomplish such a result).

185. See, e.g., Al Kamen, *Withholding Judges*, WASH. POST, Mar. 28, 1997, at A27, available in 1997 WL 10009665 (indicating that the President may well have trouble getting judicial appointments confirmed, especially important ones).

tory permission as a prerequisite to an *Ex parte Young* suit. Because of its context, there is a particularly troubling passage in the opinion of the *Seminole* Court, which could be read as requiring some sort of affirmative congressional "authorization" to procure an injunction against state officers who violate federal statutory rights: "Contrary to the claims of the dissent, we do not hold that Congress *cannot authorize* federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act."<sup>186</sup>

The passage would not have caught my eye, except that it appears in an opinion straining to find evidence that Congress intended to exclude *Ex parte Young* relief under the Gaming Act.<sup>187</sup> There are a variety of ways to read the passage, some quite benign and limited to circumstances in which an apparently comprehensive set of remedies is created by the statute itself. Moreover, of course, the authorization to which the Court refers might include the implied and the express varieties. Still, one wonders whether, in a later opinion, the Court might build on these statements to hold that some express or very clear (even if implied) congressional authorization is a necessary prerequisite to any *Ex parte Young* suit brought to enforce federal statutory rights.

Such a holding would be the reverse of a reasonable jurisprudence of remedies for state action violating an individual's federal statutory rights. The default assumption should be that any party possessing a primary statutory right, who meets the tests of equity, can procure an injunction to enforce federal law, even in cases in which the defendant is a state officer.

Against this view, some arguments could be made, but they are not very persuasive. First, some might argue that the Supreme Court cases limiting judicial implication of causes of action are contrary to this view.<sup>188</sup> These cases are better read, however, as prohibiting the

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186. *Seminole*, 116 S. Ct. at 1133 n.17 (emphasis added).

187. See *supra* notes 157-184 and accompanying text.

188. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The Court stated: As our recent cases—particularly *Cort v. Ash*, 422 U.S. 66 [(1975)] demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent.

*Id.* at 688. *Cort* and *Cannon* are widely seen as supplanting an earlier judicial willingness to recognize private rights of action under statutes that, on their surface, provide only for enforcement by organs of government, an approach exemplified by *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), a unanimous decision, in which the Court upheld a private party's



courts from recognizing any rights in those who Congress did not intend to be beneficiaries of a particular statute, rather than as limiting the courts' power to fashion remedies for those found to be congressionally intended beneficiaries.<sup>189</sup> Even if the anti-implied cause of action cases are read as limiting the courts' choice of remedies for those who are properly found to be statutory rights holders, those cases seem to be largely confined to prohibiting the remedy of damages when not contemplated by Congress.<sup>190</sup>

Some of the confusion in the cases and commentary may stem from a view that some federal statutory rights are, by their very nature, negative and not affirmative. This is the view in which some rights can be used as defenses to court actions brought against the holder of a federal right as defendant, but cannot be used by the holder as a plaintiff seeking legal or equitable relief. Occasionally, federal statutory rights, expressed as preemption claims against state action, have been viewed this way.<sup>191</sup> This paradigm of negative versus affirmative rights is wrong.<sup>192</sup> Instead, any federal right that can be used nega-

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right to sue under § 14(a) of the Securities Exchange Act of 1934. *Id.* at 430-31; see FALLON ET AL., *supra* note 4, at 839-40.

189. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992) ("The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."). One might argue that this view requires more than just a plaintiff with a federal right (which might be assertable solely as a defense), but rather a plaintiff with a cause of action. Such arguments are unsound, particularly as to claims for equitable relief. See *infra* notes 191-197 and accompanying text.

190. See FALLON ET AL., *supra* note 4, at 844 & n.11 (suggesting that private access to injunctive relief may be more readily inferable than access to a remedy for damages). *Cort* seems particularly concerned with limiting the Court's powers to infer a cause of action for damages. See 422 U.S. at 79-80 (noting that the criminal statute at issue had no indication that civil enforcement was available to anyone). Other cases have readily inferred that access to equitable relief (when equitable requirements are met) inheres in the possession of a federal statutory defense to judicial actions brought under state law. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-19 (1979); see also *infra* note 195 and accompanying text.

191. See Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 237-39 (1991).

192. Cases such as *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908), and *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), and some academic literature on them have created a misimpression. See Monaghan, *supra* note 191, at 237-39 (citing *Skelly* and *Mottley* in passages which suggest that the existence of a federal statutory right does not necessarily entail the possibility of a federal cause of action for any affirmative relief, including injunctions). In *Mottley*, a railroad had issued lifetime passes to the plaintiffs. *Mottley*, 211 U.S. at 150. A later federal statute arguably sought to make such passes illegal. *Id.* at 151. The Mottleys sued in federal court, under state contract law, to specifically enforce their bargain. *Id.* at 150-51. In the plaintiffs' view, the fact that the railroad would almost certainly raise the federal statute as a defense caused the case to come within the statute granting federal trial courts jurisdiction over suits arising under the Constitution, treaties,

tively as a defense can be used affirmatively in a suit for an injunction or declaratory judgment as long as the tests of equitable need are met. From this perspective, a right is not inherently negative or positive; rather, the circumstances of the case in which it is asserted determine whether equitable relief may be allowed or denied as unnecessary or too burdensome.<sup>193</sup>

There are three virtues to the view that the possibility of injunctive relief inheres in a federal constitutional or statutory right. First, it reduces the complexity of federal rights analysis (collapsing negative and affirmative rights) except where Congress has mandated such a

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and laws of the United States. *Id.* at 152. Although the lower courts proceeded with the case, the Supreme Court ordered dismissal, holding that a case does not arise under federal law if that law does no more *in the case* than provide a defense. *Id.* It is crucial that the Court had no occasion to determine whether the railroad might have used the federal statute as the basis of an injunctive action in some other circumstances.

In *Skelly*, the Court determined that the Declaratory Judgment Act did not permit federal jurisdiction over a suit that, absent the Act, would involve federal law only as a defense. *Skelly*, 339 U.S. at 671-72. The Court clarified that the Declaratory Judgment Act could not be used to circumvent cases like *Mottley*. *Id.* According to *Skelly*'s logic, the railroad in *Mottley* could not have procured a declaration of its statutory right against Mottley, because in any other plausible suit between those two parties, those rights could have been used only as a defense to state action. The reason that declaratory and injunctive relief was unavailable was not that the railroad's right was inherently limited to defensive use (it was not so limited), but rather, that any assertion of the railroad's rights in injunctive form would have failed the equitable tests of reasonable need for relief. It is ludicrous to believe the railroad could have obtained an injunction to stop the Mottleys from simply presenting their passes to a conductor. Self help—refusal to honor the ticket—followed by defense to any lawsuit brought against the railroad would be fully adequate to protect any rights the latter possessed under the federal statute. In short, in the extremely unlikely event that the railroad needed an injunction to protect its rights, nothing in *Mottley* or *Skelly* indicates that an injunction or a declaratory judgment would have been unavailable.

The distinction between federal rights that merely create defenses to state court actions and those that will sustain an action in federal court is unnecessary. Absent some indication of real congressional intent to limit remedies, there is no such *a priori* division of cases. Statutes *creating rights in individuals* authorize equitable relief where necessary to minimally acceptable enforcement. It is a case-by-case, or perhaps a category-by-category, equitable determination whether an injunction is an appropriate remedy for violation of a statute. Federal constitutional provisions are often found to create rights that can be asserted as either a defense, or affirmatively in an action for an injunction, depending, in the latter case, on whether equitable requirements are met. See *Younger v. Harris*, 401 U.S. 37, 54-55 (1971) (finding that the First Amendment permits both defensive and injunctive relief against state criminal proceedings contrary to its requirements, but that equitable principles preclude the latter unless defending the state proceedings will produce irreparable harm). Even indulging in the assumption that it is more difficult to determine who has a primary right under a statute than under a constitutional provision, there is no good reason why statutory jurisprudence should be different in terms of providing minimally adequate enforcement once a rights holder is identified.

193. Some rights may be practically, rather than inherently, negative, because of the great likelihood that using them defensively will provide an adequate legal remedy. See the discussion of *Mottley* and *Skelly*, *supra* note 192 and accompanying text.

distinction. Second, this view seems as consistent with the unruly case law as any other. For example, in *Transamerica Mortgage Advisors, Inc. v. Lewis*,<sup>194</sup> once the Court determined that a private person had a right to have a contract treated as void under federal law, the Court easily found an implied right to equitable relief—rescission and restitution—though not to damages, stating:

In the case of § 215 [of the Investment Advisers Act of 1940], we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited.<sup>195</sup>

Likewise, the legal consequences of the voidness of preempted state statutes or executive action have not been limited to negating court actions brought against the rights holder.<sup>196</sup> Typically, when the Court has denied injunctive relief on grounds that the plaintiff has no

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194. 444 U.S. 11 (1979).

195. *Id.* at 18.

196. My position is that a federal court has inherent remedial power to provide injunctive relief or the lesser declaratory judgment remedy, unless Congress has specifically excluded such relief under a statute. Some have argued to the contrary that many rights are negative only, see *supra* notes 189-192 and accompanying text, and that it is only the umbrella provisions of § 1983 that convert such rights into rights to affirmative relief by providing:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994) (emphasis added). Professor Monaghan takes this position, seeing § 1983 as crucial. See Monaghan, *supra* note 191, at 250-51 (arguing that often it is only § 1983 that provides a right to sue to those with a federal right). In my view, § 1983 is not necessary, because the courts possess adequate inherent remedial power. See *supra* notes 191-192 and accompanying text. The courts have frequently allowed private parties injunctive relief against preempted state laws without invoking § 1983. See, e.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n.20 (1983) (noting that § 502(a)(3) of ERISA provides such a remedy); FALLON ET AL., *supra* note 4, at 844 & n.11. The Court may have settled this matter in favor of broad judicial remedial powers to protect federal-rights holders the year following Monaghan's article. See *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992), and particularly the quotation from it appearing in note 189, *supra*.

cause of action under a statute, the Court's opinion indicates the plaintiff is not a federal rights holder in any sense of those words.<sup>197</sup>

Third, and most important, seeing potential injunctive relief as an ordinary incident of a federal statutory right seems to put those whom Congress intends to have federal rights in the position Congress would want them to occupy. On occasion Congress might not intend that a minimal federal rights holder—one who can assert a defense under federal law—would also have a remedy for damages. But the ordinary assumption should be that such a person could enjoin future violations of her rights when the right at issue is recognized by a court, and the gravity and probability of harm from future violations outweigh opposing equitable considerations, including those of federalism.

This portrait of a federal court's remedial powers suggests that *Seminole* would have matters backwards if it is read as ultimately requiring specific statute-by-statute authorization (even implied authorization) for *Ex parte Young* suits. It would be wrong because, once rights are established, it should take a clear signal from Congress to stop the courts from providing minimally adequate remedies for their realization. Anything less than a presumption of meaningful enforcement would be a regrettable tilting of the balance between the interests favoring enforcement of federal law and those favoring states' rights—a balance struck between *Hans* and *Ex parte Young* and maintained over the following ninety years.

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197. See, e.g., *California v. Sierra Club*, 451 U.S. 287, 294-95 (1981). The Court stated:

Neither the Court of Appeals nor respondents have identified anything in the legislative history suggesting that § 10 [of the Rivers and Harbors Appropriation Act of 1899] was created for the especial benefit of a particular class. On the contrary, the legislative history supports the view that the Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures.

*Id.*; see also, e.g., *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 457 (1974). In that case, the Court stated:

In light of the language and legislative history of § 307(a) [of the Rail Passenger Service Act of 1970], we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision, however, is explicitly limited to "a case involving a labor agreement." Thus, no authority for the action the respondent has brought can be found in the language of § 307(a).

*Id.*

## CONCLUSION

*Seminole's* position as to the breadth of Congress's abrogation powers seems largely clear. None of Congress's powers under the original Constitution carries with it the power to abrogate state immunity. Almost equally clear is Congress's continuing authority to abrogate, using its powers to enforce the Fourteenth Amendment and probably using its powers to enforce the Thirteenth and Fifteenth Amendments. It would be good for American federalism if the *Ex parte Young* portions of *Seminole* were read as simply stating an equitable rule of refusing injunctions that skirt too close to Tenth Amendment limits. In *Seminole* itself, a court order requiring the governor of one of the United States to negotiate state policy seems problematic. Indeed, if decided on this basis, *Seminole's* refusal of injunctive relief seems correct. *Seminole*, however, offers no textual hint that it is so limited. The reasons the *Seminole* Court gives for finding a congressional "intent" to exclude injunctive enforcement of congressionally created rights under the Gaming Act are so implausible as to suggest that the Court may be willing in the future to find such exclusionary intent in a variety of statutory schemes. Even worse, the implausibility may indicate that such exclusionary "intent" is generated by something approaching a clear statement rule, requiring, as a prerequisite to injunctive enforcement, some strong affirmative indication that Congress contemplated such a remedy. This would turn on its head the traditional and appropriate presumption that federal rights are to be adequately enforced.