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SEMINOLE TRIBE, THE ELEVENTH AMENDMENT, AND THE POTENTIAL EVISCERATION OF *EX PARTE YOUNG*

VICKI C. JACKSON*

In its 1996 decision, Seminole Tribe v. Florida, the Supreme Court, reversing itself, held that Congress lacks Article I power to abrogate states' Eleventh Amendment immunity from suit in federal court. In exploring the decision's ramifications, Professor Jackson contends that it may foreshadow more pervasive, and more troubling, shifts in the balance of power between state and federal governments, and among the federal, judicial, legislative, and executive branches. In particular, the Court's dubious reasoning in Seminole Tribe may have severe repercussions on the federal courts' ability to enjoin state officials from violating federal law in the future. The availability of such equitable relief, under the so-called Ex parte Young doctrine, has long been accepted as a necessary counterbalance to the states' Eleventh Amendment immunity from federal jurisdiction. While the new restrictions on Congress's power would seem to make the availability of such relief more important than before, Professor Jackson examines how the Court's unfortunate analysis in Seminole Tribe may presage a substantial limitation of the Ex parte Young doctrine in the federal courts. Professor Jackson concludes by articulating the dangers that such a course might pose to federal courts' role in maintaining the rule of law and the supremacy of federal law.

* Professor of Law, Georgetown University. B.A., 1972, J.D., 1975, Yale University. I am grateful for comments received from Susan Bloch, Bill Eskridge, Barry Friedman, Larry Kramer, Dan Meltzer, Judith Resnik, Roy Schotland, Mike Seidman, Jane Stromseth, Bob Taylor, Mark Tushnet, Carlos Vázquez, participants in the Georgetown University Law Center Faculty Research Workshop, and from my co-panelists, Akhil Amar and David Currie, and others at the American Association of Law Schools, Federal Courts Section presentation in January 1997. The research assistance of Cindy Akard, Amy Bowler, Adam Lewis, J.C. Scott, and Eli Weiss is gratefully acknowledged. With so much good advice, I regret any remaining errors, which are all mine.

INTRODUCTION

More than a decade ago, Professor David Shapiro criticized the Supreme Court's decision on the scope of the Eleventh Amendment in *Pennhurst State School & Hospital v. Halderman*,¹ characterizing that decision as an "unforced error."² Last term, in *Seminole Tribe v. Florida*,³ the Court made at least two more "unforced errors."

First, the Court held that Congress lacks power, acting under its Article I regulatory powers, to abrogate states' immunity from suit in federal courts.⁴ Overruling the decision in *Pennsylvania v. Union Gas*⁵ that the power to regulate interstate commerce permitted such abrogation, the Court held that a state's sovereign immunity from suit in federal courts was an unstated, but implicit, constitutional immunity that Congress could not overcome.⁶ It thus found unconstitutional provisions in the Indian Gaming Regulatory Act⁷ (IGRA) that authorized tribes to sue states to compel them to negotiate over gambling regulation on tribal lands.⁸

Second, the Court held that an injunction against the state's Governor under the *Ex parte Young*⁹ doctrine, prospectively to enforce the requirements of the statute, was not available.¹⁰ Describing *Ex parte Young* as a "narrow" exception to Eleventh Amendment immunity, it cautioned against permitting an *Ex parte Young* action to go forward in light of the existence of a detailed statutory enforcement scheme.¹¹ The Court was unmoved by the fact that the detailed scheme of IGRA could no longer be enforced directly against the State, as Congress had specified, since the courts are not "free to rewrite the statutory scheme" to try to achieve results Congress would have wanted had it known of the constitutional problem.¹²

These two holdings each represent a substantial and, in Professor Shapiro's words, "unforced" error. Until the 1880s, the Eleventh Amendment's effect in constraining federal jurisdiction over actions

¹ 465 U.S. 89 (1984).

² David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61, 75 (1984).

³ 116 S. Ct. 1114 (1996).

⁴ See *id.* at 1124-32.

⁵ 491 U.S. 1 (1989).

⁶ See *Seminole Tribe*, 116 S. Ct. at 1127-32.

⁷ 25 U.S.C. §§ 2701-21; 18 U.S.C. §§ 1166-68 (1994).

⁸ *Seminole Tribe*, 116 S. Ct. at 1119 (invalidating 25 U.S.C. § 2710(d)(7)(A)(i) (1994) insofar as it grants jurisdiction over unconsenting state).

⁹ 209 U.S. 123 (1908).

¹⁰ See *Seminole Tribe*, 116 S. Ct. at 1132-33.

¹¹ See *id.* at 1132 (finding that in past, Court has "refused to supplement that scheme with one created by the judiciary").

¹² See *id.* at 1133.

against state officers for violations of federal law had been limited by such doctrines as the "party of record" rule.¹³ In response to concerted southern efforts to repudiate public debt,¹⁴ the Court, in a series of cases culminating in *Hans v. Louisiana*,¹⁵ held that the seemingly limited language of the Eleventh Amendment¹⁶ embodied a broad constitutional principle protecting the states from any form of privately initiated suit in federal court.¹⁷

¹³ See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857-60 (1824) (upholding federal jurisdiction over suit to restrain state officials from collecting tax from federal entity and to recover proceeds unlawfully taken; although "direct interest of the State in the suit, as brought, [was] admitted," nonetheless Eleventh Amendment was, "of necessity, limited to those suits in which a State is a party on the record"); see also *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220-22 (1872) (upholding jurisdiction over suit against state officer on similar rationale). But see *Governor of Ga. v. Madrazzo*, 26 U.S. (1 Pet.) 110, 123-24 (1828) (action against Governor in his official capacity, and inter alia, seeking funds in state treasury and alleging no violation of any act of Congress, treated as action against State). For more thorough treatments of the early development of Eleventh Amendment doctrine, see David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 6-22 (1972); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1045-87 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983).

¹⁴ See John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History 58-89* (1987) (arguing that Court's Eleventh Amendment jurisprudence substantially changed direction in response to compromise of 1876 election, end of Reconstruction, and southern debt repudiation). For a somewhat critical view of Orth's claims, see Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 Colum. L. Rev. 212, 218-39 (1988) (reviewing John V. Orth, *The Judicial Power of the United States—The Eleventh Amendment in American History* (1987)).

¹⁵ 134 U.S. 1 (1890).

¹⁶ The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment's enactment was prompted by the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which upheld original jurisdiction in the Supreme Court over a contract action by a citizen of South Carolina against the State of Georgia. *Hans* can be read to assert that the Eleventh Amendment is not the sole source of state immunity from suit in federal court, but rather that Article III itself was intended to preclude suits from being brought against states (at least without their consent) in the federal courts. On this view, the Supreme Court's decision in *Chisholm* was in error, and the Eleventh Amendment did not change the Constitution but instead reaffirmed an original understanding which *Chisholm* mistakenly ignored. While I recognize the claim that Article III is the source of the states' immunity, for convenience I will refer in this essay, as the Court frequently does, to "Eleventh Amendment immunity." For more detailed discussion of whether Article III originally contemplated suits against states, see, e.g., Gibbons, *supra* note 13, at 1895-914.

¹⁷ In *Hans*, the Court held that the Eleventh Amendment barred a citizen of Louisiana from suing his own state on a federal question, notwithstanding that the language of the Eleventh Amendment does not refer to a state's own citizens and thus does not reach this alignment of parties. See *Hans*, 134 U.S. at 9-11, 14-15. Subsequent decisions have held that the Eleventh Amendment protects states from suits by foreign states, see *Monaco v.*

The correctness of *Hans* has long been questioned, by scholars and judges alike, as unwarranted by the constitutional text and as unduly restrictive of federal judicial power to vindicate the supremacy of federal law.¹⁸ But rather than simply adhere to some minimal understanding of *Hans* in the name of stare decisis, the Court in *Seminole Tribe* expanded the reach of this constitutional doctrine of nonaccountability. The extension of *Hans* to obstruct any power in Congress to permit private individuals to sue states in federal courts for violations of laws enacted pursuant to Congress's Article I powers over interstate, foreign, or Indian commerce, copyright, or bankruptcy is a significant interference with democratically exercised national power. The impact of the Court's second error—concluding that the action against Florida's Governor could not be supported by *Ex parte Young* and was thus barred by the Eleventh Amendment—is also substantial, with the potential to influence not only Eleventh Amendment issues, but also the availability of equitable relief for violations of federal law more generally, as well as the relationship between the courts and the political branches in the design of remedial schemes. The analysis of *Ex parte Young* in this statutory context may simply be confused, or it may threaten more generally the availability of federal courts as enforcers of the supremacy of federal law as against state officials.

Fully assessing the impact of *Seminole Tribe* on the federal law of remedies for state wrongdoing and on the powers of Congress and the federal courts is difficult, because other means may be available to Congress and the federal executive branch to provide alternative remedies. But the possible availability of other mechanisms for maintaining effective enforcement of legitimate federal law in the face of state recalcitrance, while reassuring, should not mislead us as to the statist assumptions of *Seminole Tribe*.

States have been immunized from suits by private individuals in the federal courts to enforce federal laws enacted pursuant to Congress's Article I, section 8 powers. And the importance of litigation decisions by the federal government has been magnified, since under current doctrine, federal agencies may sue states in the national courts; the Eleventh Amendment does not bar actions brought by the

Mississippi, 292 U.S. 313, 330-32 (1934), and from suits in admiralty, see *Ex parte New York*, 256 U.S. 490, 497-502 (1921). Both of these types of suits would seem to be excluded from the reach of the Eleventh Amendment on any literal reading of its text, as compared with the original text of Article III.

¹⁸ See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259-90 (1985) (Brennan, J., dissenting); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1466-91 (1987).

United States.¹⁹ Under *Seminole Tribe*, Congress cannot diffuse to private citizens the power to enforce federal laws enacted under Article I powers against states in federal courts. Thus, the power of state governments and, relative to individuals, the power of the federal government's political branches have been enhanced at the cost of the power of individuals to hold government to account through judicial means. By limiting the jurisdiction of the lower federal courts to hear such claims, moreover, the Court risks undermining the important role the federal courts, as a whole, can play in assuring the supremacy of federal law.²⁰

Finally, *Seminole Tribe* must be considered as part of the broader canvass of federalism on which the Court has been working since 1990. While the Eleventh Amendment may appear to provide a textual anchor to express the strong intuitions of several members of the Court that a less centralized form of governance is preferred and/or contemplated by the Constitution, no coherent principle yet ties together the Court's emerging federalism jurisprudence, other than this intuition in favor of more limits on federal power. In *New York v. United States*²¹ the Court invalidated a federal law because it "commandeered" state government into enacting a federal regulatory scheme, confusing the political accountability of federal and state governments.²² In *United States v. Lopez*,²³ the Court invalidated a fed-

¹⁹ See *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

²⁰ By limiting the power of the lower federal courts to hear claims against states where they are based on statutes enacted pursuant to Congress's Article I powers, the Court has further consolidated its own power as the *sole* federal court with jurisdiction to review state court decisions. That is, at least some of the kinds of questions that might have been brought in the lower federal courts under the rule of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), may in the future be brought in state courts, and the federal questions therein subject to review by the Supreme Court. In this sense—expanding the reach of its own power vis-à-vis the lower federal courts—*Seminole Tribe* can be seen to parallel other doctrines that limit the opportunities of lower federal courts to adjudicate federal claims asserted against state or local governments. See, e.g., *Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (stating that "new" claims generally cannot be heard on federal habeas corpus in lower federal courts; "new" claims can be heard by Supreme Court on direct review of state court judgments); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985) (holding no constitutional violation of takings clause occurs by mere fact of taking, so long as State has procedure for compensation that property owner can use).

²¹ 505 U.S. 144 (1992).

²² See *id.* at 176. While the Court's emphasis on political accountability in *New York* may appear strangely at odds with its endorsement in *Seminole Tribe* of the nonaccountability of sovereign governments before courts, both decisions may be informed by a mistrust of the institutional capacity for self-restraint of the political branches (and of the lower federal courts).

²³ 115 S. Ct. 1624 (1995).

eral ban on gun possession near schools because it regulated noncommercial activity traditionally subject to state regulation and not connected with sufficient particularity to interstate commerce.²⁴ Political accountability, enclaves of state regulation, and judicial nonaccountability are the notes sounded in these three decisions—notes that do not readily blend into a harmonic whole. In its intuitive efforts to reassert limits to federal authority, the Court has failed to articulate an understandable federalism doctrine, one that focuses adequately on Congress's perceived lack of restraint.²⁵ While *New York* and *Lopez* may provide the tools from which such doctrine can emerge, *Seminole Tribe* is a clear mistake from which the Court should retreat as quickly as possible.

I

THE EXTENSION OF THE "HANS" VIEW OF ELEVENTH
AMENDMENT IMMUNITY

The Court's first holding in *Seminole Tribe* represents an "extension"²⁶ of *Hans v. Louisiana*²⁷, which had concluded that a nontextual constitutional immunity protected a state from suits by its own citizens in federal courts.²⁸ The great weight of contemporary scholarship concludes that the Eleventh Amendment does not require that states enjoy a jurisdictional immunity from suits in federal courts by their own citizens on federal claims,²⁹ and divides over whether *Hans* was

²⁴ See *id.* at 1630-32.

²⁵ For an interesting effort to reconceptualize the success of "federalism" in the United States as the product of American political parties at work, see Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1522-42 (1994) (arguing that party ties that bind state and federal legislators help ensure distribution of governing power between state and federal governments).

²⁶ *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1145 (1996) (Souter, J., dissenting).

²⁷ 134 U.S. 1 (1890).

²⁸ See *id.* at 9-11, 14-15.

²⁹ See, e.g., Orth, *supra* note 14, at 73-77, 133-34; Amar, *supra* note 18, at 1475-84; Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 *U. Pa. L. Rev.* 515, 538-46 (1977) [hereinafter Field, *Part One*]; Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 *U. Pa. L. Rev.* 1203, 1211-12 (1978); Fletcher, *supra* note 13, at 1069-87, 1130-31; Gibbons, *supra* note 13, at 1892-94, 1934-39; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 *Yale L.J.* 1, 4 (1988); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 *Harv. L. Rev.* 1342, 1353-55 (1989); Calvin Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 *U. Chi. L. Rev.* 61, 66 (1989); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 *Sup. Ct. Rev.* 1, 10-13; see also James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 *Cal. L. Rev.* 555, 562 (1994). For contrary views, see, e.g., William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 *Harv. L. Rev.* 1372, 1373 (1989) (arguing for adherence to *Hans* as constitutional doctrine).

correct or incorrect on other grounds, for example, in light of the then-existing jurisdictional statutes.³⁰

A Court which in 1987 came within a vote of overruling *Hans* (to the extent it stood for a fixed constitutional barrier to such suits)³¹ voted in *Seminole Tribe* not only to adhere to *Hans* but to broaden its application. In *Hans*, there was no statute, jurisdictional or otherwise,

Even those who seek to build coherent doctrine by accepting and expanding upon *Seminole Tribe's* reasoning recognize the persuasiveness of the more limited understanding of the Amendment rejected by the *Seminole Tribe* majority. See, e.g., Carlos Manuel Vázquez, What Is Eleventh Amendment Immunity? 106 Yale L.J. 1683, 1694-97, 1733 n.230 (1997).

³⁰ Compare, e.g., Field, *Part One*, supra note 29, at 537-38, 543-44 (Eleventh Amendment means that jurisdictional provisions that track language of Article III should not be deemed on their own to abrogate states' common law immunity, and thus *Hans* was correct), with Engdahl, supra note 13, at 30-32, and Orth, supra note 14, at 74-81 (both arguing that *Hans* was an erroneous extension of immunity). Scholars are also divided on whether the Amendment should be understood to bar federal question claims by out-of-state citizens. Compare Massey, supra note 29, and Laurence C. Marshall, supra note 29, (both arguing that literal words prohibiting "any" suit by certain prohibited parties should be applied to bar all claims made by those parties), with Jackson, supra note 29, at 49-50 & n.196 (acknowledging argument but defending diversity view as best accounting for Amendment's peculiar language), and William A. Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. Chi. L. Rev. 1261, 1274, 1276-89 (1989) (arguing that text of Eleventh Amendment does not have clear prohibitory meaning that Marshall and Massey attribute to it, but rather means that state-citizen diversity head in Article III fails to authorize such actions, leaving unaffected federal question head of jurisdiction and thus possibility of private suits against states under federal law).

³¹ See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 463, 475-78 (1987) (assuming arguendo Congress has power to abrogate states' Eleventh Amendment immunity, Congress had not done so with sufficient clarity in Jones Act or Federal Employer Liability Act (FELA)). The Court in *Welch* was evenly divided on whether *Hans* should be regarded as good law. Justice Powell, joined by Chief Justice Rehnquist and Justices White and O'Connor, discussed the question at length, concluding that *Hans* was good law and that the principle of immunity applied in admiralty. See *id.* at 478-93. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that the history of the Eleventh Amendment did not support *Hans's* result and that *Hans* should be overruled or "at minimum confine[d] . . . to its current domain." *Id.* at 521 (Brennan, J., dissenting).

In the middle, and in a moment of uncharacteristic indecision, stood Justice Scalia. After noting that the question whether to overrule *Hans* had first been raised by an amicus, and had been addressed only briefly in the respondent's brief and at oral argument, Justice Scalia wrote:

I find both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.

Id. at 496 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia decided the case on statutory grounds alone, concluding that Congress would have relied on *Hans* in legislating, that the statutes could not therefore be interpreted "as though the assumption [that *Hans* was correct] never existed," *id.*, and, accordingly, that the statutes (broadly applicable to maritime employees) could not have been intended to reach states, see *id.*

that specifically addressed whether a state could be sued.³² IGRA, by contrast, specifically authorized such suits in language meeting the Court's previously developed "clear statement" requirement.³³ *Seminole Tribe* extends *Hans*'s nontextual constitutional immunity to situations where Congress has, with absolute clarity, sought to subject states to suits in federal courts in order to carry out the goals of federal regulation of Indian tribes.

In the enforcement of some statutory schemes, for example copyright, the award of damages or other comparable relief may be the only effective remedy for the protection of rights for which Congress has an expressly enumerated power to provide.³⁴ In the matter of gaming on tribal lands, Congress exercised its plenary and enumerated power over the regulation of commerce with Indian tribes to authorize greater state involvement than states constitutionally could exercise without Congress's permission.³⁵ To assure fair achievement

³² See *Hans*, 134 U.S. at 9-10. *Hans* involved a constitutional challenge to recover amounts due on state-issued bonds, and jurisdiction was invoked under the general "federal question" statute. See *id.* at 9, 19-21.

³³ See 25 U.S.C. § 2710(d)(7) (1994). Both the lower courts and the Supreme Court agreed that the statute met the "clear statement" requirement, see *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1123-24 & n.8 (1996), articulated in such earlier Eleventh Amendment cases as *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (Congress may abrogate states' constitutionally secured immunity from suit in federal court only by making its intention "unmistakably clear in the language of the statute"). See also *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) (same); *Dellmuth v. Muth*, 491 U.S. 223, 230-32 (1989) (same); *Pennsylvania v. Union Gas*, 491 U.S. 1, 7 (1989) (same); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 471 (1987) (same). Apart from *Atascadero* and *Dellmuth*, all of these cases involved exercises of Congress's Article I powers and in all the Court at least assumed, *arguendo*, that Congress had power to subject states to suit if it spoke clearly enough.

³⁴ See Copyright Remedy Clarification Act, 7 U.S.C. § 511 (1994) (abrogating states' immunity from suit under federal Copyright Act, based on findings that, *inter alia*, injunctive relief not adequate in light of magnitude of actual and potential infringements by state institutions, including universities, see H.R. Rep. No. 282, pt. 1, at 8 (1990), reprinted in 1990 U.S.C.C.A.N. 3949, 3956); cf. 11 U.S.C.A. § 106 (Supp. 1997) (abrogating sovereign immunity of governmental units with respect to identified provisions of bankruptcy laws).

³⁵ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (states not authorized to regulate gambling on Indian reservations). It was this decision that prompted the enactment of IGRA, in an effort by Congress to permit states to have some regulatory authority. Under IGRA, "class III gaming," such as slot machines, casino games, and lotteries, is permitted on an Indian reservation only pursuant to a compact between the tribe and the state in which the reservation is located. See 25 U.S.C. § 2710(d)(1)(C) (1994). In addition, IGRA imposes federal standards that must be met and limits tribal gaming to those states that permit others to engage in the gaming activities in question. See *id.* § 2710(d)(1)(B). States have a duty to negotiate in good faith with an Indian tribe that seeks to permit such gambling, see *id.* § 2710(d)(3)(A), and tribes may sue in federal court on "any cause of action . . . arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." *Id.* § 2710(d)(7)(A)(i). IGRA goes on to specify that if the trial court finds that the State has failed to negotiate in good faith, the

of all its goals, Congress authorized federal court involvement.³⁶ The Court's holding—unforced by history, constitutional text, original understanding, and *stare decisis*—significantly interferes with the scheme established by Congress.³⁷

Having previously written at length on the "*Hans*" view of state sovereign immunity, I will not belabor my view that the *Seminole Tribe* Court erred in reaching its conclusion,³⁸ but will briefly turn to the likely effects of *Seminole Tribe*'s anti-abrogation holding on federal jurisdiction and Congress's power.

The degree of interference with Congress's powers to ensure judicial enforcement of substantive federal law applicable to the states is arguably tempered by a number of factors. First, under *Seminole Tribe* Congress may still be able to establish substantive causes of action against states enforceable in state courts.³⁹ While the question of

court "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." *Id.* § 2710(d)(7)(B)(iii). If no compact is agreed to within that time, then the statute provides that a court-appointed mediator will choose between "last best offer" proposals from the tribe and the State. See *id.* § 2710(d)(7)(B)(iv). If the State consents to the mediator's choice, then the mediator's choice is "treated as a Tribal-State compact" for purposes of IGRA. *Id.* § 2710(d)(7)(B)(vi). If the State does not consent, then the mediator "shall notify the Secretary [of the Interior who] . . . shall prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." *Id.* §§ 2710(d)(7)(B)(vii), (vii)(II).

³⁶ But cf. *Seminole Tribe*, 116 S. Ct. at 1144-45 (Stevens, J., dissenting) (implying that jurisdiction was unconstitutional on ground that judgment was advisory in nature because of Secretary of Interior's power to authorize gaming on Indian lands in event that court appointed mediator's proposal was not accepted by State).

³⁷ Cf. S. Rep. No. 100-446, at 1-2 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3071 (noting that IGRA is outgrowth of several years of discussions among tribes, states, gaming industry, Congress, and administration); *id.* at 13, reprinted in 1988 U.S.C.C.A.N. 3071, 3083 (stating that IGRA represents best effort to accommodate interests of "both sovereign entities, states and tribes").

³⁸ See Jackson, *supra* note 29, at 32-39 (arguing that Amendment was directed solely at diversity based heads of jurisdiction, leaving unimpaired federal question jurisdiction; noting that this theory best accounts for Supreme Court's power to review); see also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. Cal. L. Rev. 51, 53 (1990) (diversity theory comports with fundamental understanding that judicial power of national government should be as broad as legislative power).

³⁹ See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-05 (1991) (holding that FELA, which *Welch* held did not abrogate Eleventh Amendment immunity from suit in federal court, see *supra* note 31, did create a federal cause of action applicable to states and enforceable against states in state court actions); see also *Aaron v. Kansas*, No. 96-3095, 1997 U.S. App. LEXIS 14522, at *14 (10th Cir. June 17, 1997) (agreeing that employee can bring FLSA suit in state court because "state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law"); *In re NVR L.P.*, 206 B.R. 831, 843 (Bankr. E.D. Va. 1997) (*dicta* that Congress may abrogate common law sovereign immunity of states in state courts under Congress's Article I powers); *Wilson-Jones v. Cavinness*, 99 F.3d 203, 211 (6th Cir. 1996) (holding Eleventh Amendment bars Fair Labor Standards Act (FLSA) claims against State in federal courts; noting that states may be

whether state courts must entertain certain suits against states that are barred from federal court by the Eleventh Amendment is not entirely clear,⁴⁰ at least some state courts will likely be available to hear such

sued for FLSA violations in state courts). But see Vázquez, *supra* note 29, at 1717-22 (arguing that *Seminole Tribe* may embody a substantive theory of constitutional immunity from liability that would preclude creation of federal causes of action against states). For my disagreement with Professor Vázquez's reading of *Seminole Tribe*, see *infra* note 176.

Another possibility worth noting is that of state waiver of Eleventh Amendment immunity to suits in federal courts. Particularly in the context of states' amenability to suit under multi-state compacts, the Court has applied the doctrine that states have the power to waive their Eleventh Amendment immunity and subject themselves to the jurisdiction of federal courts. See, e.g., *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959). Rigorous clear statement rules protect states from findings of waivers, see, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (state did not consent to suit in federal court by accepting funds under federal Rehabilitation Act since there was not clear intent to condition participation on state waiver of constitutional immunity); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 99 (1984) (state consent to suit in federal court must be "unequivocally expressed"); but cf. *Parden v. Terminal Ry.*, 377 U.S. 184, 190-92 (1964) (suggesting that states constructively consent to suit in federal court by operating in area under federal regulation), overruled in part by *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987), as does the rule that a state's waiver of immunity from suit in state court does not entail a waiver of immunity from suit in federal court, see *Smith v. Reeves*, 178 U.S. 436, 445 (1900).

Cases like *Atascadero* suggest, however, that Congress may condition a state's receipt of federal funds on its consent to be sued in federal court in connection with the funded programs, cf. *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) (upholding conditions on federal spending that, *inter alia*, are related to the objects of the program), a possibility left open by *Seminole Tribe*. While such programs may provide practical tools for the accomplishment of Congress's goals, as a formal matter they do not permit the mandatory enforcement of regulatory legislation.

⁴⁰ *General Oil v. Crain*, 209 U.S. 211, 226-27 (1908), stands for the proposition that state courts must entertain such suits, though its reasoning was, even on the date of issue, somewhat problematic. See Jackson, *supra* note 29, at 30-31 & n.130, 38 & nn.157-58 (discussing *General Oil*). For a more recent case clearly upholding state court jurisdiction over a federal cause of action barred from the lower federal courts by the Eleventh Amendment, see *Hilton*, 502 U.S. at 203-05 (finding state owned railway subject to FELA action in state court); see also *Reich v. Collins*, 115 S. Ct. 547, 549-50 (1994) (notwithstanding "the sovereign immunity States traditionally enjoy in their own courts," state must provide for "clear and certain" retroactive remedy for taxes collected in violation of federal law and without prior opportunity to challenge); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31, 51 (1990) (Eleventh Amendment does not bar Supreme Court review of state court judgment in taxpayer suit against state; Constitution requires states to provide meaningful refund remedy for unconstitutional taxes where taxpayer must pay first and litigate later); cf. *Howlett v. Rose*, 496 U.S. 356, 375 (1990) (overturning state court judgment which had denied jurisdiction over 42 U.S.C. § 1983 claim against school board on state sovereign immunity grounds).

Under these cases, there clearly are limits on the authority of state courts to assert jurisdictional barriers based in state law to the adjudication of federal claims. But neither *Howlett* nor *McKesson* squarely presented the issue of a state court asserting the sovereign immunity of a state itself as a bar to the exercise of jurisdiction. In *Howlett*, the defendant was a local school board, not protected by the Eleventh Amendment. See *id.* at 359-60, 376. In *McKesson*, the State did not assert immunity from the jurisdiction of its own courts on the tax issues. See *McKesson*, 496 U.S. at 49 n.34 (noting that State waived its sovereign

claims.⁴¹ Particularly in states with popularly elected judges,⁴² however, the independence of their judgments and their willingness to enforce federal laws that may be unpopular in their state may be less than that of federal Article III-protected judges.⁴³

Second, under existing doctrine the U.S. government may bring actions against states, in federal courts, unencumbered by Eleventh Amendment limitations.⁴⁴ Some have suggested that statutes could be structured to permit or require the United States to assert claims, in essence, on behalf of or for the benefit of individuals.⁴⁵ The closer

immunity from suit through section 215.265 of the Florida Statutes). Similarly in *Hilton*, the state court had concluded that the federal statute did not create a cause of action for damages against a state agency; it did not invoke state sovereign immunity as such. See *Hilton*, 502 U.S. at 200-01. *Reich*'s dicta, while squarely on point, did not correspond to the ground on which the state court had relied in denying relief. See *Reich*, 115 S. Ct. at 551 (state court had relied on taxpayer's failure to assert prepayment challenge).

⁴¹ For an example of a state court entertaining a federal action against the State, see *Maine v. Thiboutot*, 448 U.S. 1 (1980); see also *supra* note 39. The Constitution itself contemplates that states will maintain court systems. See U.S. Const. art. VI, §§ 2, 3 (Supremacy Clause and oath of office both applicable to state court judges); see also Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Courts*, 59 *Notre Dame L. Rev.* 1145, 1163-65 & n.76 (1984) ("[T]he key to determining the obligation of the state courts to hear federal claims . . . is that every state has a court of general jurisdiction, with common law and equitable powers . . ."). Under the nondiscrimination principle of *Testa v. Katt*, 330 U.S. 386, 394 (1947), state courts may not refuse to exercise jurisdiction over claims because of their federal character if they may exercise jurisdiction under state law over analogous claims. In *Howlett*, the Court relied on this principle to hold that Florida could not invoke its own sovereign immunity law to bar a 42 U.S.C. § 1983 action against a school board in its courts, since Florida courts, through waivers of sovereign immunity, exercised jurisdiction over similar state law claims. See *Howlett*, 496 U.S. at 361-63, 378-79. Moreover, virtually all states have either abandoned or waived sovereign immunity with respect to some tort and contract claims. See, e.g., La. Const. art. XII, § 10(A) ("Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property."). Such waivers of immunity would lay the basis for a discrimination claim if state courts refuse to entertain analogous federal claims against states. Only if the United States Constitution is construed as giving states an affirmative, substantive immunity from privately enforceable federal liabilities, as Professor Vázquez suggests, could a contrary result be reached. See Vázquez, *supra* note 29, at 1717. And it is difficult to imagine that those who designed a Constitution in which the judicial power was coextensive with the legislative power, and who believed that the supremacy of federal law required judicial enforcement, would have authorized substantive regulation of states without full judicial power to enforce.

⁴² See 30 *Council of State Governments, The Book of the States 190-92* (1994) (indicating that at least 24 states have elected judges, 10 states have appointed judges, and 16 states have appointed judges who must stand for "retention" elections).

⁴³ See generally Steven B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. Rev.* 759 (1995); see also Stephen P. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 *N.Y.U. L. Rev.* 308 (1997).

⁴⁴ See cases cited *supra* note 19.

⁴⁵ See Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 *Tex. L. Rev.* 539 (1995). The current Fair Labor Standards Act

such a scheme comes to a mere *parens patriae* suit and the more control individuals are given over initiating litigation, however, the more likely it will stumble into a jurisdictional trap and be rejected.⁴⁶

A third factor possibly tempering the impact of *Seminole Tribe* is the doctrine that Eleventh Amendment immunity applies only to "states" and not to local governments.⁴⁷ This is a well known anomaly of Eleventh Amendment jurisprudence, anomalous because local governments derive their authority and power from the State and are treated as state actors for purposes of the Fourteenth Amendment. This anomaly has a destabilizing potential in two opposite directions. First, a Court determined to expand protection of government actors from suit could abandon the distinction and include local governments within the Eleventh Amendment immunity.⁴⁸ Alternatively, the Court could constrict immunity by narrowing the definition of the

permits such actions by the United States, with payment of proceeds recovered to the injured parties. See 29 U.S.C. § 216(c) (1994). Siegel goes beyond this to suggest that, given the power of the United States itself to sue a state to enforce federal law, Congress could also authorize both *qui tam* actions by private attorneys or litigants, in which proceeds could be in part shared with the United States, and direct actions by individuals. See Siegel, *supra*, at 551, 564-66.

⁴⁶ See *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (although Eleventh Amendment does not bar suit by another state, see *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), states cannot simply assert private rights to evade Eleventh Amendment). Siegel distinguishes such cases because, unlike a state, which has no legislative jurisdiction over the action of another state, the United States government, acting under its constitutional powers, does have its own interest in regulating the conduct of the states. See Siegel, *supra* note 45, at 554. According to Siegel, the United States is thus vindicating its own interests whether it sues directly, provides for a *qui tam* action to vindicate federal law, or authorizes an injured person to sue directly. See *id.* at 553-55, 562 n.128. The Supreme Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) (expressing doubt that United States can delegate its federal exemption from state sovereign immunity to Indian tribes), suggests that Siegel's argument will be less successful as statutory schemes move closer to giving non-U.S. parties control over the litigation.

It is possible for some kinds of federal law to be enforced through litigation brought by one state against another, subject to *parens patriae* limitations. See *Wyoming v. Oklahoma*, 502 U.S. 437, 451-52 (1992) (upholding original jurisdiction over Commerce Clause challenge to state tax). Thus, one might consider such actions as yet another mechanism for the enforcement of federal law against states, but one possibly limited in effectiveness to the vindication of rights relating to interstate movement or equality between resident and nonresident persons or entities.

⁴⁷ See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

⁴⁸ In *Pennhurst State School & Hospital v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984), the Court appeared to be moving in this direction by vacating remedial orders entered against county officials. See *id.* at 123-24. The Court only assumed *arguendo* that these officials were not immune under the Eleventh Amendment, and justified the vacatur on the grounds that state law contemplated cooperation between the county and state officials. See *id.* For recent affirmation of the conventional rule, see *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 402 (1994) (citing *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-01 (1979), for proposition that only states, and not other sub-federal governments, are immune).

state and excluding, for example, state universities (which most case law now treats as part of the state).⁴⁹ But this would be tinkering at the margins in some sense, and at the present time it appears that neither alternative is more likely than the other, or than maintaining the (somewhat muddled) status quo.⁵⁰

A fourth approach builds on the distinction drawn in *Seminole Tribe* between Congress's powers under Article I, which are limited by state sovereign immunity, and Congress's powers under the Fourteenth Amendment (and presumably other post-Civil War Amendments). The Court in *Seminole Tribe* specifically seemed to preserve the holding in *Fitzpatrick v. Bitzer*⁵¹ that Congress does have power to abrogate states' immunity from suit in carrying out its powers under Section Five of the Fourteenth Amendment.⁵² The important question now (assuming this dividing line holds) is how far Congress's powers go. More specifically, do they extend to providing a cause of action in a federal forum for the protection of those liberty or property interests created by the pre-Civil War Constitution, or by federal laws enacted under Article I powers, if these interests are protected

⁴⁹ See, e.g., *Mascheroni v. Board of Regents*, 28 F.3d 1554, 1559 (10th Cir. 1994) (holding that state university enjoys Eleventh Amendment immunity); *Hutsell v. Sayre*, 5 F.3d 996, 999-1003 (6th Cir. 1993); *Kaimowitz v. Board of Trustees*, 951 F.2d 765, 767 (7th Cir. 1991); *Dube v. State Univ.*, 900 F.2d 587, 594 (2d Cir. 1990); *BV Eng'g v. U.C.L.A.*, 858 F.2d 1394, 1395 (9th Cir. 1988); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985); see also *Regents of Univ. of Cal. v. Doe*, 117 S. Ct. 900, 902 (1997) (reversing Ninth Circuit decision which had held that state university was divested of Eleventh Amendment immunity by virtue of Federal Department of Energy's agreement to indemnify state against costs of litigation). But see *Kovats v. Rutgers*, 822 F.2d 1303, 1312 (3d Cir. 1987) (finding state university not part of state for Eleventh Amendment purposes because of institution's history as private school and amount of independence it retained once it became state university).

⁵⁰ To illustrate the muddle, compare *Hess*, 115 S. Ct. at 404-05 (emphasizing whether judgment would be paid out of state treasury), with *Lake Country Estates*, 440 U.S. at 400-02 (setting forth multifactor analysis for determining whether bistate agency is arm of state for Eleventh Amendment purposes, including function performed by agency; whether function is one usually performed by local governments; intent of creating state parties and of Congress; appointment authority; funding source; liability for judgments; and veto power in states). *Hess*, which found that the defendant was not immune under the Eleventh Amendment, placed great weight on the financial responsibility for liabilities of multi-state agencies created by compact, see *Hess*, 115 S. Ct. at 402-04, over the objection of Justice O'Connor, who argued that the inquiry for Eleventh Amendment purposes should be whether the state exercises political control over the entity, see *id.* at 411 (O'Connor, J., dissenting) ("An arm of the State . . . is an entity that undertakes state functions and is politically accountable to the State . . .").

⁵¹ 427 U.S. 445 (1976).

⁵² See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1125-28 (1996); *Bitzer*, 427 U.S. at 456.

under the Due Process Clause (or other clauses) of the Fourteenth Amendment?⁵³

⁵³ The lower courts are already confronting this question in a wide range of enactments. For example, in *Genentech Inc. v. Regents of University of California*, 939 F. Supp. 639 (S.D. Ind. 1996), the court held that the patent statute, which abrogated immunity of states in part pursuant to section five of the Fourteenth Amendment, could not authorize an action to declare the state's patent invalid. In dicta, however, the court stated that Congress's power under the Fourteenth Amendment was sufficient to authorize an action in federal court against the state for infringing a patent owned by the plaintiff, as the patent was a form of property protected by the Due Process Clause. See *id.* at 643-44. And in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 948 F. Supp. 400 (D.N.J. 1996), the court upheld abrogation of immunity on a patent infringement claim, though not on a Lanham Act claim (regarding the former but not the latter as reaching protected property rights). In the 1992 Act under which *Genentech* and *College Savings* were decided, Congress had specifically invoked the Fourteenth Amendment as a basis for its actions. See 35 U.S.C. §§ 271(h), 296 (1994).

With respect to FLSA, which did not explicitly invoke the Fourteenth Amendment, courts have been less inclined to uphold abrogation on that basis. See, e.g., *Wilson-Jones v. Caviness*, 99 F.3d 203, 207-11 (6th Cir. 1996) (FLSA's authorization of suit against state in federal court found unconstitutional exercise of commerce power under *Seminole Tribe*, and could not be upheld under section five of the Fourteenth Amendment because no strong logical connection existed between FLSA's goals and the Fourteenth Amendment's antidiscrimination concerns); *Chauvin v. Louisiana*, 937 F. Supp. 567, 570 (E.D. La. 1996) (holding that FLSA jurisdictional provision could not be upheld under Fourteenth Amendment). By contrast, courts have been more sympathetic to the claim that the Equal Pay Act's abrogation of states' immunity could be upheld as an exercise of Congress's section five powers. See, e.g., *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Ussery v. Louisiana*, No. 95-2064, 1997 U.S. Dist. LEXIS 5775 (W.D. La. Apr. 25, 1997). Conflicting decisions are being reached on other federal statutes, such as the Age Discrimination in Employment Act. Compare *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540 (10th Cir. 1997) (upholding abrogation of immunity), with *Humenansky v. Board of Regents*, 958 F. Supp. 439 (D. Minn. 1997) (rejecting claim that abrogation can be upheld as exercise of Fourteenth Amendment power). The Equal Protection, Due Process, and Privileges and Immunities Clauses have been invoked, with mixed success, to sustain the abrogation of state immunity in bankruptcy proceedings. Compare *In re NVR L.P.*, 206 B.R. 831, 842 (Bankr. E.D. Va. 1997) (rejecting privileges and immunities argument), with *In re Straight*, No. 96-CV-0184-J, 1997 U.S. Dist. LEXIS 7400 (Bankr. D. Wyo. May 15, 1997) (accepting argument based in part on Privileges and Immunities Clause). The lower courts, as this noncomprehensive sample suggests, are struggling both with whether to consider Congress's power under the Fourteenth Amendment (does Congress need to indicate an intent to have relied on it, or should the Court look to any power that might reasonably be relied on to sustain the law?) and with the substantive scope of the Fourteenth Amendment and Congress's related powers.

One effect of *Seminole Tribe* is clear: it will increase litigation over the source of Congress's authority to enact legislation. In addition to the cases cited, compare *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 788-89 (N.D. Ala. 1996) (holding that Age Discrimination in Employment Act not valid exercise of Fourteenth Amendment power and thus suit against state entity must be dismissed), with *Mayer v. University of Minn.*, 940 F. Supp. 1474, 1479-80 (D. Minn. 1996) (upholding jurisdiction under Americans with Disabilities Act and Vocational Rehabilitation Act as valid exercises under section five of Fourteenth Amendment). For further discussion, see Meltzer, *supra* note 29, at 49-50; Vázquez, *supra* note 29, at 1745-63. And in resolving the many questions concerning the substantive scope of Congress's powers under section 5 of the Fourteenth Amendment and thus its power to provide for abrogating Eleventh Amendment immunity in various

If so, Congress could, in effect, provide a federal forum for adjudicating at least some claims against the State, derived from statutes enacted under Article I.⁵⁴ While some have argued that such an approach should be ruled out because it would be wholly inconsistent with *Seminole Tribe*,⁵⁵ that is not necessarily the case.⁵⁶ Such reasoning ignores barriers to legislative action arising from conscientious legislators' deliberations⁵⁷ and gives inadequate weight to the greater

settings, lower courts will need to consider carefully the implications of the recent decision in *Boerne v. Flores*, 65 U.S.L.W. 4612 (June 25, 1997) (holding that Religious Freedom Restoration Act was unconstitutional as attempt by Congress to use its section 5 powers impermissibly to redefine, rather than to enforce, the substantive rights protected by section 1 of the Fourteenth Amendment).

⁵⁴ Treating patent rights, or the right to receive a federal minimum wage, as "property" does not at first glance seem to pose serious analytical difficulty, though how broadly or narrowly the terms property or liberty might be defined remains contested. But as the Court noted in *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), "[t]he Fourteenth Amendment protects only against deprivations without due process of law" and existing state law remedies may satisfy the requirements of procedural due process. Under *Parratt*, might Congress only be able to abrogate immunity and provide a federal forum in those instances where it found (or could reasonably find) that the available state court processes failed to provide "due process" for hearing a plaintiff's federal claim? Could abrogation and authorization of federal jurisdiction thus be contingent on available state remedies? And, assuming a gap between "adequate" (for due process purposes) state court remedies and "ideal" remedies for vindication of the underlying federal right, how far would this Fourteenth Amendment solution go in permitting a federal forum for claimed violations of the underlying Article I property right? For further discussion, see Vázquez, *supra* note 29, at 1753-59.

⁵⁵ For arguments that this approach would permit Congress to authorize federal jurisdiction over any matter that could be the subject of legislation under Article I merely by invoking the Fourteenth Amendment, thus rendering *Seminole Tribe* meaningless, see Vázquez, *supra* note 29, at 1744-46; see also Meltzer, *supra* note 29, at 49 n.230.

⁵⁶ For one thing, it is unclear whether every statutory right will be treated as involving either a plausible equal protection or privileges and immunities claim or as creating a liberty or property right. See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400 (D.N.J. 1996) (patent statute creates property rights, but not Lanham Act's prohibition of false advertising). Compare Vázquez, *supra* note 29, at 1747-48, 1752 (any statute with mandatory obligations creates property rights), with Meltzer, *supra* note 29, at 49-50 (implicitly distinguishing patent rights and minimum wage rights). To the extent that a statute is not regarded as creating a property or liberty right protected by the Fourteenth Amendment (or as involving a possible violation of other requirements of the Fourteenth Amendment), then Congress's power to abrogate state sovereign immunity under the Fourteenth Amendment would presumably not be available.

⁵⁷ Telling Congress that it can act only when it finds (or seeks to avoid) a due process or equal protection violation may, at least for conscientious members, act as a brake on action that might otherwise occur. Clear statement rules are sometimes justified in part as designed to assure legislative deliberation on questions deemed particularly sensitive to federal-state relations. See Jackson, *supra* note 38, at 86-89. *Seminole Tribe* does not disturb existing requirements that Congress make clear its intent to abrogate (where it has the power) in "unmistakably clear" terms. If Congress seeks to rely on its Fourteenth Amendment powers to enforce rights against states created in part under Article I, courts might require a clear statement not only of intent to abrogate but of Congress's reliance on its section five powers. See *supra* note 53.

power over remedies such a doctrine might accord to state court systems.⁵⁸ Whether the current Court would accept such an understanding as a basis for congressional abrogation of state sovereign immunity is, though, uncertain at best.

Which brings me to a fifth possible limitation on the anti-accountability effects of *Seminole Tribe*, and the one to which the next section of this essay is devoted—the availability of the *Ex parte Young* action or, more generally, of equitable relief in federal court to restrain state and local officials from violations of federal law.

II

THE POTENTIAL EVISCERATION OF *EX PARTE YOUNG*: “THE DOUBLE PROGENY OF THE SAME EVIL BIRTH”?⁵⁹

The Court's second error in *Seminole Tribe* has the potential to be even more pernicious to the rule of law and to successful federalism than its first. The harshness of the *Hans* immunity rule has long been mitigated by the availability of injunctive relief against state officers to prevent violations of federal law.⁶⁰ Such suits against state

⁵⁸ Congress might, for example, structure jurisdictional statutes so as to give the states a “first shot” at providing judicial relief. See, e.g., Tax Injunction Act, 28 U.S.C. § 1341 (1994) (providing that federal courts lack jurisdiction to enjoin tax collection where “plain, speedy, and efficient remedy” is found in state courts); Johnson Act, 28 U.S.C. § 1342(4) (1994) (same provision with regard to public utility rates); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (federal courts cannot adjudicate Fourth Amendment claims on habeas corpus if state courts have provided opportunity for their full and fair litigation). Thus a jurisdictional doctrine that permits Congress, under section five of the Fourteenth Amendment, to abrogate immunity where states fail to provide appropriate process for the vindication of liberty or property interests created by federal law under Article I, may well take a very different shape in the world of practice than the jurisdictional regime of *Union Gas*.

⁵⁹ *Poindexter v. Greenhow*, 114 U.S. 270, 291 (1885). The “double progeny” to which *Poindexter* referred were “absolutism” and “communism,” both of which, the Court suggested, would follow from the inability to impose judicial sanctions on “individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State.” *Id.* In so writing, the Court was explaining why the “distinction between the government of a State and the State itself is important,” *id.* at 290, and “essential to the idea of constitutional government,” *id.* at 291, and, accordingly, why the state's immunity did not preclude issuance of judicial relief against the defendant government officer charged with collecting taxes for the State. The “double progeny” of *Seminole Tribe* to which I am referring are its twin errors in first, extending the scope of *Hans*'s view of Eleventh Amendment immunity to preclude Congress from subjecting states themselves to suit in federal court, and second, at the same time narrowing the availability of prospective injunctive relief against the State's officer.

⁶⁰ See, e.g., *Sterling v. Constantin*, 287 U.S. 378, 393 (1932) (upholding injunction against Texas Governor who imposed martial law and introduced production controls on oil drilling). Additionally, government officers can be sued individually for damages caused by their violations of the plaintiffs' rights. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (suit against state Governor for damages from civil rights violations); *Biv-*

officers are not regarded as suits against the State for purposes of the Eleventh Amendment. While referred to as the "*Ex parte Young*" doctrine, its roots far predate that 1908 decision, in both U.S. law and its English antecedents.⁶¹ Availability of such relief has long fulfilled the function of assuring that, for violations of rights, there is some remedy available, even if not a perfect remedy or a remedy that is in fact available to all who are injured.

Under *Ex parte Young*, a suit to secure future compliance with federal law, brought against a state officer, is not regarded as one against the State for purposes of the Eleventh Amendment.⁶² Early cases laid the rationale on traditional distinctions in English and U.S. law between acts of the sovereign and acts of individuals.⁶³ *Ex parte Young* itself explained this on ultra vires grounds—the presumption that a state official who acts in violation of superior federal law was not authorized by the State to do so because, as a constitutional matter, the State cannot so authorize. By the early 1970s, the rule had crystallized that the Eleventh Amendment does not bar suit against a

ens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (suit against federal law enforcement officers for money damages from Fourth Amendment violations). In such actions for damages, however, courts have recognized "qualified immunities" that prevent recovery, except where the defendants' acts were clearly in violation of well established rules at the time they were committed. See *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

⁶¹ See, e.g., *Poindexter*, 114 U.S. at 273-74, 288-97 (upholding jurisdiction over suit against officer responsible for collecting state tax and who levied on plaintiff taxpayer's property); *United States v. Lee*, 106 U.S. 196 (1882) (upholding jurisdiction over suits against Army officers to try title to land and rejecting U.S. claim that its sovereign immunity barred action). For discussion of the English cases that provided relief against officers of the king, without the king's consent and notwithstanding the king's sovereign immunity, see Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *Harv. L. Rev.* 1 (1963).

⁶² Scholars have different views on the degree to which *Ex parte Young* should be regarded as an innovation in the law of sovereign immunity. Compare Engdahl, *supra* note 13, at 55 n.275 (*Ex parte Young* rested on established law permitting actions against government's agents), with David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 *S. Ct. Rev.* 149, 155-56 (*Ex parte Young* was innovative in concluding that state officer is stripped of authority and not acting for State in violating superior federal law, when constitutional provision assertedly violated, by its terms, limits only the state).

⁶³ See, e.g., *Poindexter*, 114 U.S. at 288 (the state officer acting on an unconstitutional law "stands . . . stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence"). Earlier still, in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 849-56 (1824), Chief Justice Marshall had relied on the "party of record" rule in permitting federal jurisdiction over an action to enjoin state officials from collecting a tax on an instrumentality of the United States. *Osborn*, one of the foundation cases in the law of federal courts, did not treat the Eleventh Amendment as a bar because the named defendants in the action for injunctive relief were state officers, rather than the State itself. See *id.* at 849-50. For a critique of *Osborn*, see Currie, *supra* note 62, at 150-51.

state officer for prospective relief against ongoing violation of federal law, but does preclude retroactive relief in the nature of damages against the officer where the judgment is directed at the state treasury.⁶⁴

In *Pennhurst State School & Hospital v. Halderman (Pennhurst II)*⁶⁵ the Court began the modern retrenchment from the *Ex parte Young* doctrine,⁶⁶ a doctrine that has been referred to by generations of jurists and scholars as “indispensable to . . . the rule of law.”⁶⁷ In *Pennhurst II*, the closely divided Court held that injunctions against state officers for prospective relief based on *state* law were barred by the Eleventh Amendment. It recast the basis for the *Ex parte Young* doctrine on the demands of national supremacy—the felt need to provide relief against ongoing violations of federal law in balancing the constitutional rule of the supremacy of federal law against the constitutional rule of state sovereign immunity.⁶⁸

While *Pennhurst II* was correct in its intuition that the Eleventh Amendment had a different role to play with respect to federal questions than with respect to issues of state law alone, it was criticized at the time for abandoning the moorings for the system of equitable relief against state officers on which depended in practical terms the accountability of government.⁶⁹ The danger of this step is illustrated by the Court’s reasoning in *Seminole Tribe*.

After concluding that the action against the State itself violated the Eleventh Amendment, the Court turned to the question of whether injunctive relief could be directed at the Governor of Flor-

⁶⁴ See *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); accord *Green v. Mansour*, 474 U.S. 64, 68 (1985).

⁶⁵ 465 U.S. 89 (1984).

⁶⁶ See *id.* at 105-06.

⁶⁷ Charles Alan Wright, *Law of Federal Courts* 292 (4th ed. 1983); see *Seminole Tribe*, 116 S. Ct. at 1180 (Souter, J., dissenting) (referring to *Ex parte Young*’s “foundational role in American constitutionalism”); Erwin Chemerinsky, *Federal Jurisdiction* 393 (2d ed. 1994); cf. Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 146-49 (1972) (noting far-reaching implications of *Ex parte Young*).

⁶⁸ See *Pennhurst II*, 465 U.S. at 105.

⁶⁹ See *id.* at 163-66 & n.48 (Stevens, J., dissenting) (criticizing Court for casting aside “well-settled respected doctrine” that had limited reach of sovereign immunity, “a relic of medieval thought,” and for entering “sea of undisciplined lawmaking”). In 1988, I criticized *Pennhurst II* for justifying the “fiction” of *Ex parte Young*, “not by reference to the unfairness of the doctrine of sovereign immunity, nor by reference to the traditional range of remedies available at common law against officers, but rather solely by reference to the superior demands of the Constitution in the face of prohibited state conduct.” Jackson, *supra* note 29, at 60; see *id.* at 60 & n.241 (warning that “[t]his shift from more traditional formulations may herald a willingness on the part of the Court to jettison other traditional remedies [including relief on federal law grounds against state officers] against governmental officers in the name of its own unmoored sense of balance, impairing significantly the range of remedies available to cure governmental misconduct”).

ida.⁷⁰ The Court's principal articulated reason for rejecting an *Ex parte Young* action in *Seminole Tribe* was that the detailed remedial provisions of the statute suggested that Congress would not want the "more complete" *Ex parte Young* remedy.⁷¹ The Court explained that the duty to negotiate, which the plaintiffs sought to enforce against the Governor, was passed "in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)."⁷² Invoking a line of decisions on when to recognize an implied constitutional cause of action, the Court noted that the same general principle should be applied in deciding "whether a remedy should be created . . . [and] whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer."⁷³ That principle is the following: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."⁷⁴

Moreover, the Court assumed an *Ex parte Young* action would differ substantially and detrimentally to the interests of the states, from the form of action prescribed in section 2710(d)(7). The intricate provisions of section 2710(d)(7), the Court concluded, are of so careful and limited a nature that it would be inappropriate to permit "an action . . . under *Ex parte Young* [which] would expose that official to

⁷⁰ See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1132 (1996). The Solicitor General's amicus brief had argued first that relief against the Governor was appropriate under *Ex parte Young* and that this obviated the need to reach the Eleventh Amendment question concerning the action against the State itself. See Brief for the United States as Amicus Curiae Supporting Petitioner at 8-9, 19 n.5, *Seminole Tribe* (No. 94-12). The Court did not attend to the Solicitor General's suggestions, either on the merits or as to the order of decision. A more judicially restrained Court might well have first exhausted this possibility. As will be argued below, to the extent that the Court is correct in its analysis of the availability of injunctive relief against the Governor, its conclusion must be supported on statutory, not constitutional, grounds. See *infra* text accompanying notes 93-106.

⁷¹ See *Seminole Tribe*, 116 S. Ct. at 1133. The Court of Appeals gave two reasons for rejecting an *Ex parte Young* action against the Governor—first, that the acts which the tribe sought to compel were "discretionary" and thus not subject to injunction, and second, that the suit was "in reality" one against the State because the IGRA imposes duties only on the state. See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994). The state respondents, in support of the Court of Appeals's judgment, also argued that *Ex parte Young* should be available only on an allegation of an *unconstitutional* state law or an unconstitutional action by a state officer. See Brief of Respondents at 35-36, *Seminole Tribe* (No. 94-12). Neither the Court of Appeals nor the respondents advanced the argument on which the Supreme Court principally relied in upholding dismissal of the request for injunctive relief against the Governor.

⁷² *Seminole Tribe*, 116 S. Ct. at 1132.

⁷³ *Id.*

⁷⁴ *Id.*

the full remedial powers of a federal court, including, presumably, contempt sanctions.”⁷⁵ If section 2710(d)(3)’s duty to negotiate could be enforced in an *Ex parte Young* suit, the Court reasoned, the authorization for a specific action in federal court under section 2710(d)(7) “would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of section 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*.”⁷⁶

The majority’s reasoning, then, turns on a characterization of the *Ex parte Young* action and a conclusion about Congress’s intent. In both of these respects, the reasoning is flawed.

A. *The Nature of an Ex parte Young Order*

As the principal dissent suggests, the majority nowhere explains its assumption that an *Ex parte Young* injunction would be broader than the statutory remedy,⁷⁷ and that assumption appears to be unfounded.

Ex parte Young has at least two aspects. First, as discussed above, the *Ex parte Young* doctrine holds that a suit against an officer for prospective relief vindicating federal law is not regarded as a suit against the state for purposes of the Eleventh Amendment.⁷⁸ Second,

⁷⁵ *Id.* at 1133.

⁷⁶ *Id.*

⁷⁷ See *id.* at 1181-83 (Souter, J., dissenting) (rejecting as having “no basis in law” Court’s assumption that “*Ex parte Young* provides a free-standing remedy not subject to the restrictions otherwise imposed on federal remedial schemes”). Indeed, in note 17, the majority asserts that Congress could authorize an *Ex parte Young* action in a more limited remedial scheme. See *id.* at 1133 n.17 (“[W]e do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme.”).

⁷⁸ See *Ex parte Young*, 209 U.S. 123, 150-56 (1908) (discussing judicial history of Eleventh Amendment and concluding that state officials can be enjoined by a federal court from commencing proceedings to enforce an unconstitutional act). While *Ex parte Young* involved a claim based on a violation of the Constitution itself, its reasoning has apparently been accepted by the Court in cases arising under federal statutory law as well. Cf. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 & n.6 (1978) (upholding jurisdiction over injunction action against state officers to declare state law invalid on grounds of federal preemption; rejecting invitation to overturn or limit *Ex parte Young*’s rule that Eleventh Amendment does not bar suit in federal court to enjoin enforcement of state law alleged to be unconstitutional). Since the Supremacy Clause is the principle which makes federal statutory law supreme over competing commands of state law, it seems reasonable to assume that the application of *Ex parte Young* in a preemption case like *Ray* means that it is the federal source of the law, not its constitutional character, that *Ex parte Young* seeks to vindicate. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 103 (1984) (stating that under *Ex parte Young*, “federal-law allegation” strips state officer of official authority for Eleventh Amendment purposes, while alleged violation of state law does not). The *Pennhurst II* Court concluded that the *Ex parte Young* doctrine was necessary to “vindicate federal rights and hold state officials responsible to ‘the supreme author-

the *Ex parte Young* doctrine appears to stand as well for the proposition that an implied cause of action for injunctive relief to enforce federal law will be available when a court otherwise has jurisdiction over the case.⁷⁹ Whether deliberately or not, the Court conflated these two aspects of the *Ex parte Young* doctrine.

The plaintiffs in *Seminole Tribe* did not rely on the implied cause of action aspect of the *Ex parte Young* doctrine. Rather, they relied on the Eleventh Amendment avoidance aspect of *Ex parte Young*. In the petitioner's brief on the merits, while there is no explicit discussion of the nature of the remedy sought in reliance on *Ex parte Young*, the strong implication is that the injunction sought was that—and only that—authorized by the IGRA statute. Thus, petitioner's brief states:

The Seminole Tribe's suit, seeking injunctive relief to compel a state official to comply with federal law, 25 U.S.C. § 2710 (d)(7)(B)(iii), falls squarely within the doctrine of *Ex parte Young*. It seeks only a prospective remedy to end a continuing violation of federal law—a remedy that does nothing more than vindicate the federal interest in assuring the supremacy of that law.⁸⁰

By citing to section 2710(d)(7)(B)(iii), the brief refers, not to that portion of the statute establishing the initial duty to negotiate in good faith,⁸¹ but rather to the portion authorizing a federal court action and

ity of the United States.” *Id.* at 105 (quoting *Ex parte Young*, 209 U.S. 123, 160 (1903)); see also *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (noting petitioner's concession that under *Ex parte Young* federal court could prospectively enjoin compliance with federal welfare regulations). But see *infra* notes 156-57. For an interesting perspective (albeit somewhat dated by its assumption that *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), had established Congress's power to abrogate states' immunity on federal statutory claims), see Ann Althouse, *When to Believe A Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 *Hastings L.J.* 1123, 1158, 1172 (1989) (suggesting, in light of *Union Gas*, that *Ex parte Young* should be limited to constitutional claims, but that retroactive as well as prospective relief be awardable against state officers).

⁷⁹ See Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 935 (2d ed. 1973) (*Ex parte Young* recognized implied equitable cause of action under federal law); Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1181 (3d ed. 1988) (implied equitable action under Fourteenth Amendment); Meltzer, *supra* note 29, at 38 (“*Young* in effect recognized an implied federal cause of action for an injunctive remedy against state officials whose conduct violates the Fourteenth Amendment.”). The “cause of action for injunctive relief” recognized in *Ex parte Young* is important not only insofar as the Constitution was found to provide an affirmative cause of action, but also in that it was the injunctive remedy that was afforded. See *infra* notes 99, 133-34 and accompanying text.

⁸⁰ Brief for Petitioner at 25, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (No. 94-12).

⁸¹ 25 U.S.C. § 2710(d)(3) is the provision establishing the underlying duty. It provides: Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activi-

relief against the State.⁸² The implication of this argument was that the plaintiffs sought that which the statute authorized—no more.

Moreover, while contempt sanctions have been available to enforce injunctions against state officers,⁸³ it is not clear that any of the parties to this litigation believed (as the Court assumed) that contempt sanctions were available in an action against the Governor but not in an action against the State as a whole. Both parties, to the contrary, appeared to assume that the form of relief ordered would be identical in an action nominally against “the State” and one nominally against “the Governor.” Petitioner’s brief, responding to the Court of Appeals’s objection to an *Ex parte Young* order against the Governor as one that would compel a discretionary act, asserted that “[i]f a compact is not concluded within the sixty-day period, the court will then order mediation . . . an order which the state can disregard if it is willing to give up the limited right to regulate Indian gaming granted by Congress.”⁸⁴ It goes on to say that the tribe “sought the remedy provided by IGRA” and argued that granting relief would not compel performance of a discretionary act “because the obligation to negotiate in good faith is not discretionary.”⁸⁵ It was the respondents who argued that if the State refuses to participate, it “risks a finding of contempt”—but the State appeared to make this argument with respect to the statutory cause of action against the State itself.⁸⁶

ties. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

25 U.S.C. § 2710(d)(3)(A) (1994).

⁸² See 25 U.S.C. § 2710(d)(7)(B)(iii) (1994) (specifying that if court finds state failed to negotiate in good faith, “the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period”). While the remedy is described as an order to “the State,” as an incorporeal entity the State can only act through agents like its governor. It is important to emphasize that the jurisdictional section could easily be read to encompass a claim against a governor, or any other state official with responsibilities to carry out state obligations under the Act. 25 U.S.C. § 2710(d)(7)(A)(i) (1994) provides that “[t]he United States district courts shall have jurisdiction over—(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.” *Id.* (emphasis added). Jurisdiction is conferred over “cause[s] of action . . . arising from” failures of states to enter into negotiations. See *id.*

⁸³ Most famously, such sanctions were upheld in *Ex parte Young* itself. See *Ex parte Young*, 209 U.S. at 168.

⁸⁴ Brief for Petitioner at 26, *Seminole Tribe* (No. 94-12).

⁸⁵ *Id.* at 26-27 (emphasis added).

⁸⁶ The Act provides that the State “shall negotiate.” 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate, or negotiate in good faith, then it will be subject to the coercive process of the federal courts. 25 U.S.C. § 2710(d)(7)(A)(i). The coercive elements of IGRA, requiring the states to negotiate under pain of federal court compulsion, reduce the States to mere administrative subdivisions of the federal government. . . . Petitioner asserts that the State can simply refuse to participate. . . . But that course risks a finding of contempt By

In short, the majority's assumptions that the relief available in an *Ex parte Young* action is different from that available in an action under IGRA against the Governor, and that the range of coercive powers of the federal court would necessarily be greater in an action against a state official under *Ex parte Young* than in an action under IGRA, are simply unsupported.⁸⁷ The Court's assertion that contempt would be available in an *Ex parte Young* action but not under the statute seems to be made entirely of whole cloth, being inconsistent with the contentions of both parties and unsupported by any citation in the Court's opinion.⁸⁸

B. Congress's Intent in IGRA

Having determined (erroneously) that the legislative scheme provided a more narrow remedy against the State than would be available under an "*Ex parte Young*" injunction against the Governor, the Court then made the further claim that it could not, under these circumstances, seek to determine what Congress would have wanted done if it had known that it could not authorize an action against the State itself.⁸⁹

subjecting the States to the choice of negotiating and entering into a compact or being subject to the coercive orders of the District Court, IGRA violates the Tenth Amendment. The relief sought under IGRA against the Governor directs him in the exercise of his discretion; no such relief is available under *Ex parte Young* absent an allegation of an unconstitutional State law or an unconstitutional action by State officers.

Brief of Respondents at 34-35, *Seminole Tribe* (No. 94-12). This passage appears in a section of Respondents' brief entitled, "The Seminole Tribe Cannot Avoid Florida's Eleventh Amendment Sovereign Immunity Simply By Invoking *Ex parte Young* and Naming the Governor," *id.* at 27, and a subsection entitled, "The Acts Which Are Mandated by IGRA Involve Discretion," *id.* at 31. Yet the claim about contempt seems to involve a more general Tenth Amendment challenge to IGRA, whether it is construed to apply to the state or to the governor.

⁸⁷ Justice Souter so argued in his dissent, treating *Ex parte Young* not as establishing a particular procedural regime but rather as standing for a "jurisdictional rule by which paramount federal law may be enforced in a federal court by substituting a nonimmune party . . . for an immune one." *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1182 (1996) (Souter, J., dissenting).

⁸⁸ See *id.* at 1182-84 (Souter, J., dissenting) (arguing that the majority is incorrect in assuming Congress cannot regulate the procedures of suits jurisdictionally dependent on *Ex parte Young*). Justice Souter does not address the second aspect of *Ex parte Young*, involving an implied cause of action under the Constitution, perhaps because he sees the statute itself as authorizing relief against state officers. See *id.* at 1183 ("*Young* does not ban the application of IGRA's procedures when effective relief is sought by suing a state officer."). Even if the plaintiffs had sought a "broader" remedy against the Governor than against the State, there is nothing in the *Ex parte Young* doctrine to suggest that a federal court is required to give an injunctive remedy that goes beyond the relief provided by the statute.

⁸⁹ See *id.* at 1133.

What is astonishing about the Court's analysis in this part of its opinion is its reversal of ground, within two paragraphs, as to the relevance of Congress's presumed intentions. Thus, the Court heavily relies on a presumed inference to exclude other actions from Congress's intention to have actions brought pursuant to the "intricate procedures" of IGRA.⁹⁰ When faced, however, with the fact that these carefully crafted procedures had just been invalidated by its decision, the Court then disclaimed any ability to craft remedies—designed to vindicate the substantive goals of the law—in order to "approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority."⁹¹

This conclusion is inconsistent with the Court's well established case law on severability. In severability analysis, the task is precisely to determine what "Congress might have wanted" had it known that a particular section of the law was beyond its authority.⁹² The severability question involves judicial lawmaking—should the act, without its invalid portion, be treated as effective, or not?⁹³ If courts are able to make this determination, why are they not able to determine whether,

⁹⁰ See *id.* at 1132 ("Congress intended § 2710(d)(3) to be enforced against the State in an action brought under § 2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also significantly to limit, the duty imposed by § 2710(d)(3).").

⁹¹ *Id.* at 1133.

⁹² See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2397 (1996) ("The question [of severability] is one of legislative intent: Would Congress still 'have passed' § 10(a) 'had it known' that the remaining 'provision[s] were] invalid?'" (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985))); *Alaska Airlines v. Brock*, 480 U.S. 678, 684-85 (1987) (in determining severability of unconstitutional provision invalid provisions may be dropped unless it is evident that Congress would not have enacted valid provisions independently of them; relevant to severability is whether statute, as severed, can operate independently and "will function in a *manner* consistent with the intent of Congress").

⁹³ In *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), Justice O'Connor and Chief Justice Rehnquist objected to the majority's refusal to craft a provision limiting the reach of an honoraria ban to constitutional limits—that is, to judicially narrow a ban that applied to speeches or writings by employees by construing the ban to apply only to speeches or writings that had some nexus to the employment. Justice O'Connor argued that it was only "common sense" to believe that Congress would prefer to ban some honoraria even if it could not ban all, and that other parts of the statute provided sufficient guidance for the Court to shape a particular nexus requirement. See *id.* at 1023-24 (O'Connor, J., concurring in judgment in part and dissenting in part); *id.* at 1030-31 (Rehnquist, C.J., dissenting) (to similar effect). The majority declined to "judicially rewrite" the statute, in part because Congress had provided varying definitions of nexus, and the majority asserted that it was for Congress to decide exactly what nexus requirement was appropriate. See *id.* at 1019 & n.26. For another invocation by Justice O'Connor of "common sense" in preserving Congress's intentions in severability analysis, see *New York v. United States*, 505 U.S. 144, 186-87 (1992) ("Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, [the Court's invalidation of one of several incentives provided by Congress] to achieve that purpose . . .

in light of the invalidity of a specific statutory remedy, an ordinary background remedy should be available to vindicate Congress's substantive intentions?⁹⁴ Indeed, IGRA clearly reflected Congress's intention to provide federal judicial enforcement of the duty to bargain, an intention wholly defeated by this decision.

C. *The Confusion of Substantive Law with Jurisdictional Immunity*

Based on its unsupported assumptions that an *Ex parte Young* injunction would be broader than the remedial scheme crafted by Congress and that Congress would not have wanted such a remedy to be available in addition to the suit against the State, and its further conclusion that it could not determine what remedy Congress would want in light of the unavailability of suit against the State, the Court concluded that the Eleventh Amendment barred the suit against the

should not ordinarily cause Congress' overall intent to be frustrated."); *id.* (holding invalid portion of Act severable).

In *Seminole Tribe*, "common sense" and considerations of not allowing Congress's overall intent to be frustrated would seem clearly to tilt in favor of permitting the so-called *Ex parte Young* action. See *Seminole Tribe*, 116 S. Ct. at 1183 (Souter, J., dissenting) (referring to "utter implausibility of the Court's reading of the congressional mind"). Indeed, Justice Souter noted that IGRA's jurisdictional provision contemplates suits against state officers since it applies to "any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." *Id.* (quoting § 2710(d)(7)(A)(i)). Souter argued that "[t]his language does not limit the possible defendants to States . . . [and was probably drafted] in anticipation that *Young* might well be the jurisdictional basis for enforcement action." *Id.*

⁹⁴ The severance issue, it might be argued, involves less judicial activism than recognition of an implied cause of action, because in resolving severability issues courts work with legislatively crafted text. But the assumption that courts do not engage in activist, creative lawmaking in deciding whether some portions of a statute are severable from unconstitutional portions is belied by such cases as *Brockett*, 472 U.S. at 502-07 (relying on severance principles to determine that obscenity statute was only partially invalid insofar as statutory definition of "lust" encompassed normal desires); cf. *Wyoming v. Oklahoma*, 502 U.S. 437, 459-61 (1992) (rejecting Special Master's recommendation that invalidation of State's restriction on utility purchase of out of state coal not extend to state owned business under "market participant" doctrine because restrictive statute, applied only to state owned entity and not to its privately owned competitors, "would become a fundamentally different piece of legislation;" decision whether to burden state utility with restriction no longer faced by its private competitors was for state legislature). These cases suggest that even where there is no legislative text that can be fully operative, the effect given to legislation by the Court, after invalidating some aspect of the legislation as unconstitutional, will depend on the degree of clarity that exists about what the legislative body would, in all likelihood, want to see happen. Under that criteria, it is hard to believe that the Congress which enacted IGRA would not have wanted an action against the Governor to be permitted (and indeed assumed that, under *Ex parte Young*, it was permitted); were the plaintiffs seeking more novel relief, judicial diffidence about what Congress would want might have seemed more apt. Cf. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 n.20 (1982) (plurality opinion) (noting that in *Alabama v. Pugh*, 438 U.S. 781 (1978), dismissal of State as defendant did not affect substance of relief granted against Alabama prison officials).

Governor himself. "We hold that *Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction."⁹⁵

The constitutional conclusion is thus driven by an analysis of Congress's intent in enacting other procedures for suit now declared unconstitutional. This is a novel and difficult form of constitutional analysis, if such it be.

Logically, the Court's reasoning is flawed because it conflates the implied cause of action aspect of *Ex parte Young*, arguably of no relevance in a case involving a statutory cause of action and clear congressional intent for federal courts to help enforce the states' duty to bargain, with the Eleventh Amendment avoidance aspect of *Ex parte Young*. Neither the plaintiffs nor the defendants in *Seminole Tribe* argued that *Ex parte Young* supplied a separate cause of action. Rather, plaintiffs argued that under *Ex parte Young*, suit against the Governor should not be regarded as one against the State, and that the Governor was a proper party who had a "federal statutory duty to negotiate in good faith with the [tribe]."⁹⁶ The defendants disagreed, noting that the action of the entire State, including the legislature, would be required to enact a compact.⁹⁷

The Court might have analyzed the statute to conclude that it authorized no cause of action against the Governor—but that determination does not go to whether the suit against the Governor is one against the State. Rather, it goes to whether there is a statutory duty on the part of, or a cause of action authorized against, the Governor. In a footnote, the Court seems to say that it concluded only that the statute did not authorize suit against the Governor,⁹⁸ a holding having

⁹⁵ *Seminole Tribe*, 116 S. Ct. at 1133.

⁹⁶ Brief for Petitioner at 23, *Seminole Tribe* (No. 94-12).

⁹⁷ See Brief of Respondents at 27-28, 31, *Seminole Tribe* (No. 94-12). If the statute were read to require the state legislature to enact a law, it would raise serious questions under the anti-commandeering rule of *New York v. United States*, 505 U.S. 144, 175-76 (1992). The statute does not, however, appear to impose a requirement that states so act. Rather, if states fail to reach an agreement with the tribes, the matter ultimately is resolved by the federal Secretary of the Interior, see 25 U.S.C. § 2710(d)(7)(B)(vii) (1994), in an area in which the Court had previously found states to lack regulatory authority in light of federal interests. See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211, 221-22 (1987).

⁹⁸ See *Seminole Tribe*, 116 S. Ct. at 1133 n.17 ("Contrary to . . . 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 [IGRA].").

There are at least two difficulties, not discussed in Justice Souter's trenchant dissent, with the Court's analysis of IGRA as not supplying a cause of action against the Governor. The first has to do with the Court's conclusion that IGRA, a statute addressed to a "state,"

no implications for whether the Eleventh Amendment barred jurisdiction over the claim. *Ex parte Young* would have been irrelevant.⁹⁹ Yet, in text, the Court concludes by saying that “*Ex parte Young* is inapplicable to petitioner’s suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction.”¹⁰⁰ Wrong! What footnote seventeen implies is that the suit must be dismissed for failure to state a cause of action, not for want of jurisdiction.¹⁰¹

does not authorize a cause of action for prospective relief against the Governor. See *Seminole Tribe*, 116 S. Ct. at 1132; *id.* at 1183-84 (Souter, J., dissenting). The Fourteenth Amendment is, after all, addressed explicitly only to states. Yet it has long been established that this constitutional language extends not only to the state but to executive officers and subunits of a state, who are the persons through whom laws and state policies are carried out. See *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287-88 (1913) (finding that Fourteenth Amendment is not limited to wrongs “authorized by a state,” but also applies to those who possess and abuse state’s powers). There may be good reason for applying different interpretive traditions in the construction of statutes enacted under Article I than in the constitutional text of the Fourteenth Amendment—but these need to be spelled out. Would a Congress legislating in the late twentieth century not tend to assume that statutes directed at “states” would be enforceable against those who possess and exercise “state powers”? But see Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 Harv. L. Rev. 102, 130-31 (1996) (arguing that IGRA did not create cause of action against Governor). Second, as discussed below in Part II.D., the Court failed to consider why 42 U.S.C. § 1983 did not authorize suit against the Governor as a “person” acting “under color of” state law and in violation of the tribe’s statutory rights under IGRA.

⁹⁹ While *Ex parte Young* did proceed on the basis of an implied constitutional cause of action, here the plaintiffs relied on the other aspect of *Ex parte Young*—its explicit holding that an action to restrain a state officer from violating supreme federal law is not an action against “the state” barred by the Eleventh Amendment. See *Ex parte Young*, 209 U.S. at 159-60. That *Ex parte Young* itself involved both an implied cause of action question and an immunity question may contribute to the Court’s confusion of the cause of action and immunity question in *Seminole Tribe*. Plaintiffs in *Seminole Tribe* were relying on a statute, see Petitioner’s Brief at 6, *Seminole Tribe* (No. 94-12), not a constitutional provision, and thus did not need *Ex parte Young*’s implication of a constitutional cause of action to support their claim that the Governor had an enforceable duty to negotiate with them.

Perhaps, though, *Ex parte Young* has come to stand for a third proposition: that where a duty under federal law is shown and the plaintiff is the intended beneficiary, injunctive relief will generally be available to restrain violations of the duty. In some respects, the deepest concern *Seminole Tribe* raises is about the stability of the presumption in favor of the prospective enforceability of federal law. See *infra* text accompanying notes 163-66.

¹⁰⁰ *Seminole Tribe*, 116 S. Ct. at 1133.

¹⁰¹ Moreover, as the dissent also points out, the language of the jurisdictional provision of the statute would permit finding a governor to be a proper defendant. See *Seminole Tribe*, 116 S. Ct. at 1183 (Souter, J., dissenting); see also *supra* note 98. Justice Souter agrees that, in theory, Congress could bar availability of prospective injunctions against state officials to enforce federal statutory law, but argues that this is contrary to the usual federal-state balance represented by *Ex parte Young* and thus favors requiring a “clear statement” from Congress to displace the availability of *Ex parte Young* type relief. See *Seminole Tribe*, 116 S. Ct. at 1180-81 (Souter, J., dissenting).

This is a mistake similar to that which other scholars have found in earlier reinvigorations of jurisdictional immunity doctrines. Professors Engdahl and Currie, for example, have observed that in *Louisiana v. Jumel*¹⁰²—an action against the State Treasurer to require him to pay interest on certain bonds—the action could have been dismissed on the grounds that under established principles of contract law an agent did not have liability for the principal's contracts.¹⁰³ Instead Engdahl suggests the Court in *Jumel* treated the suit as one really against the State and thus barred by the Eleventh Amendment.¹⁰⁴

Thus, the Court's confusion of the substantive cause of action with a jurisdictional immunity has long historical roots. That the mistake is a familiar one does not, however, mean that it is harmless.¹⁰⁵ Characterizing the problem as one of jurisdictional immunity tends to divert attention away from the nature of the plaintiff's claim and to focus attention on the status of the defendant, even though the nature of the plaintiff's claim may bear on a court's understanding of the defendant's immunity.¹⁰⁶

¹⁰² 107 U.S. 711 (1883).

¹⁰³ See Engdahl, *supra* note 13, at 23; Currie, *supra* note 62, at 153. Engdahl argues, in other words, that the action to compel the state treasurer to levy taxes and use them to pay out interest on certain bonds could have been decided, under the Court's analysis in prior cases, on the ground that there was no cause of action on the state's contract with its bondholders against an individual state officer. The defendant would then win on the merits because he had no contractual duty—there was no cause of action personally against him. See Engdahl, *supra* note 13, at 23; see also *Jumel*, 107 U.S. at 723 (officer had no contractual relationship with bondholders). But, Engdahl argues, the *Jumel* Court instead reasoned that the State was in substance the defendant. For a similar critique of *In re Ayers*, 123 U.S. 443 (1887) (another bondholder action to restrain a state official from violating a state's contract by instituting proceedings to collect taxes from bondholders who had tendered tax payments in accordance with terms of disavowed bond contract), see Currie, *supra* note 62, at 154 (while *Ayers* correctly reasoned that state official had no personal liability, *Ayers* Court erred in "announcing that because the officer was not himself liable the suit was against the state and thus barred by the Eleventh Amendment").

¹⁰⁴ Engdahl, *supra* note 13, at 23 (discussing *Jumel*, 107 U.S. at 723-27).

¹⁰⁵ For one thing, Eleventh Amendment objections are difficult to waive and can arise very late in litigation. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-69 (1945) (rejecting waiver arguments and concluding that State of Indiana was immune from petitioner's suit despite fact that State had failed to raise Eleventh Amendment at district or appellate level); Currie, *supra* note 62, at 154, 168. In addition, denials of Eleventh Amendment immunity are immediately appealable as of right, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993), in contrast to denials of Rule 12(b)(6) motions for failure to state a claim on which relief can be granted, which would ordinarily be subject to the "final judgment" rule of 28 U.S.C. § 1291 (1993).

¹⁰⁶ For example, in *Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), cert. granted, 116 S. Ct. 1415 (1996) (No. 94-1474), the plaintiff tribe sought injunctive and other relief against the State and its officials in connection with competing claims of title to the submerged lands within the boundaries of its reservation. See *id.* at 1247. The merits turned on acts of reservation and state admission by the federal government. The State argued that the action against its officials was "really" against the State to quiet title and

D. *The Failure to Consider Whether Section 1983 Provides an Express Cause of Action Against the Governor*

Given its view of *Ex parte Young* as analogous to a “judicially implied” remedy, it is surprising that the Court (as well as the parties) ignored the explicit statutory cause of action found in 42 U.S.C. § 1983. This statute provides a cause of action in “law . . . equity, or other proper proceeding for redress,” against “[e]very person who, under color of” state law, deprives another of “any rights, privileges, or immunities secured by the Constitution and laws” of the United States.¹⁰⁷ By virtue of *Maine v. Thiboutot*,¹⁰⁸ the section 1983 cause of action is available to vindicate all federal laws (not just civil rights statutes) conferring rights, privileges, or immunities.¹⁰⁹

The *Thiboutot* ruling has engendered substantial debate and confusion. It is clear that, notwithstanding *Thiboutot*, the words “and laws” do not mean all federal laws.¹¹⁰ First, the law in question must

thus barred by sovereign immunity, regardless of who had good title. The Ninth Circuit, however, was persuaded by the plaintiff’s argument that, if the tribe’s claim of title was good, its claim against the state officials for prospective relief against their interference with tribal rights to possess and control use of property, should not be treated as one against the State. See *id.* at 1254-55.

On this theory, then, in title to property cases involving actions brought nominally against officers, the sovereign immunity jurisdictional objection can be resolved only after some evaluation of the merits of the claim of ownership. See *Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 673, 694-97 (1982) (plurality opinion) (holding that, where State of Florida had no colorable claim to ownership of lands or shipwreck 40 nautical miles west of Key West, action by salvage company against state officials to recover property found there was not barred by Eleventh Amendment). The waters of this jurisdictional issue are, however, muddy at best. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 101 n.11 (1984) (holding that Eleventh Amendment generally bars injunctive relief against state officers on state law grounds, and emphasizing absence of any colorable claim of ownership on part of State in *Treasure Salvors*); see also Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867 (1970) (emphasizing importance of varying historic treatments of different kinds of claims). Compare *United States v. Lee*, 106 U.S. 196, 221 (1882) (upholding jurisdiction and judgment in favor of plaintiff in ejectment action against two federal officers holding property to which United States claimed title), with *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962) (holding sovereign immunity barred action in ejectment against federal forest service officer; relying on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 (1962), to distinguish *Lee* as applying only when there is claim that holding of land is unconstitutional taking of property without compensation).

¹⁰⁷ 42 U.S.C. § 1983 (1994).

¹⁰⁸ 448 U.S. 1 (1980).

¹⁰⁹ See *id.* at 4.

¹¹⁰ See George D. Brown, *Whither Thiboutot? Section 1983, Private Enforcement and the Damages Dilemma*, 33 DePaul L. Rev. 31, 34 (1983); see also *Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984) (while Court will not lightly conclude that Congress intended to preclude reliance on section 1983 as remedy for substantial equal protection claim, crucial question is Congress’s intent; allowing plaintiffs to circumvent administrative remedy of

secure "rights, privileges or immunities."¹¹¹ Second, under *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,¹¹² an elaborate remedial scheme in the federal law under which plaintiff asserts rights can, under some circumstances, rebut the presumptive availability of the section 1983 claim.¹¹³ Thus, if the *Seminole Tribe* Court had addressed section 1983, it might well have reached the same conclusion that it did in analyzing IGRA itself—that the section 1983 remedy was precluded by the more specific and intricate statutory remedy.

But that is by no means a foregone conclusion. In at least two cases since *Sea Clammers*, the Court has rejected state officials' arguments that a federal statute could not be enforced through the section 1983 cause of action.¹¹⁴ In *Wright*, the Court found that tenants in federally assisted housing could sue the housing agency for injunctive relief under section 1983, alleging violations of the terms of the federal grant statute, notwithstanding that the grant statute also authorized the Secretary of Housing and Urban Development to terminate funding to noncomplying recipients.¹¹⁵ And in *Wilder*, the Court held that hospitals could use section 1983 to challenge state implementation of Medicaid rules, notwithstanding the availability of a fund cutoff administered by the federal Department of Health and Human Services.¹¹⁶ The availability of a section 1983 cause of action for statu-

Education of the Handicapped Act (EHA) by section 1983 action is inconsistent with that intent).

¹¹¹ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst I*), 451 U.S. 1, 18-19 (1981) (no privately enforceable rights were created by federal Developmentally Disabled Assistance and Bill of Rights Act); *Suter v. Artist M*, 503 U.S. 347, 363-64 (1992) (federal Adoption Assistance and Child Welfare Act contains no private right enforceable under section 1983).

¹¹² 453 U.S. 1 (1981).

¹¹³ See *id.* at 14-15, 19-21 (holding that an environmental statute's detailed provisions for "citizen suits," including administrative notice requirements and limitations to equitable relief, were sufficiently comprehensive to preclude availability of 42 U.S.C. § 1983 cause of action against state and local government officials accused of violating that environmental statute). Where another statute provides for individual remedies, plaintiffs may still want to pursue a section 1983 remedy, either to obtain some form of relief not provided by the statute (such as damages) or to have a chance to recover attorney's fees, which are available to prevailing parties in section 1983 litigation. See 42 U.S.C. § 1988 (1994).

¹¹⁴ See *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 512 (1990); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 429-30 (1987); see also *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108-13 (1989) (finding that section 1983 is available to vindicate a federal preemption claim relating to rights under the National Labor Relations Act).

¹¹⁵ See *Wright*, 479 U.S. at 424; see also *Blessing v. Freestone*, 117 S. Ct. 1353, 1362-63 (1997) (finding statutory fund cutoff remedy insufficient to demonstrate intent to preclude section 1983 remedy).

¹¹⁶ See *Wilder*, 496 U.S. at 520-22.

tory violations, particularly for rights asserted under federal spending statutes, continues to evoke divided commentary and decisions from the Court.¹¹⁷

Had *Seminole Tribe* discussed section 1983, the Court would presumably first have determined whether or not IGRA secures rights, privileges, or immunities on behalf of the tribes, or is instead merely hortatory, expressive of nonbinding congressional "preferences," in addressing itself to state conduct.¹¹⁸ This is a complex question. On the one hand, it is clear that Congress intended the State's statutory duty to negotiate with the tribe to have some judicially enforceable content.¹¹⁹ IGRA thus is arguably more "rights conferring" than the statutes at issue in *Pennhurst State School v. Halderman* (*Pennhurst I*)¹²⁰ or *Suter v. Artist M.*¹²¹

¹¹⁷ One scholar in 1991 commented that "[i]mplied preemption of a section 1983 remedy on the basis of the assertedly comprehensive nature of the remedial scheme created by the federal legislation is not favored." Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233, 247 (1991) (generally arguing that *Golden State and Wilder* suggest that the *Sea Clammers* rule—that Congress can specifically foreclose section 1983 remedy by enacting comprehensive remedial scheme for particular statute—is "exceedingly narrow"). But cf. Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies and Realism*, 90 Mich. L. Rev. 1062, 1100-01 (1992) (damages under section 1983 should not be available if statute itself supplies no express or implied right of action; two inquiries—implied cause of action and availability of section 1983—should be governed by same criteria and yield identical results in statutory cases). For suggestions that the Court should not recognize section 1983 actions as applicable to the vindication of noncivil rights statutes, especially those enacted under the spending clause, see David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 93-105 (1994) (arguing, inter alia, that *Thiboutot* was flawed and likely to be overruled). Recent cases cast doubt on the Court's general presumption in favor of the availability of the section 1983 remedy. See, e.g., *Blessing v. Freestone*, 117 S. Ct. 1353 (1997) (finding that Title IV-D of Social Security Act did not create individually enforceable federal rights under section 1983); *Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that Adoption Assistance and Child Welfare Act does not contain implied right of action enforceable under section 1983).

¹¹⁸ See *Blessing*, 117 S. Ct. at 1359 (three factors determine whether federal statute creates right for purposes of section 1983: 1) whether plaintiff is intended beneficiary, 2) whether plaintiff's interests are concrete enough to be judicially enforceable, and 3) whether statute imposes binding obligations on state governments). Another preliminary question would be whether an Indian tribe is a person who may sue under section 1983. See, e.g., *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1046 n.2 (9th Cir. 1996) (finding that, in light of other grounds for dismissal, court need not decide whether Crow Tribe is person who may sue under section 1983).

¹¹⁹ See 25 U.S.C. § 2710(d)(3), (7) (1994).

¹²⁰ 451 U.S. 1 (1981) ("bill of rights" provision in federal grant statute to states was not intended to create enforceable cause of action).

¹²¹ 503 U.S. 347 (1992) (holding that Adoption Assistance and Child Welfare Act, while requiring state recipients of federal funds to have approved plan providing for reasonable efforts to prevent removal of child from home and facilitate reunification, is not intended to create privately enforceable cause of action). In rejecting the plaintiffs' efforts to obtain injunctive relief in *Suter* (either as an implied cause of action under the statute, or through

On the other hand, as Justice Stevens noted in his separate dissent in *Seminole Tribe*, ultimately a court under IGRA cannot award coercive relief.¹²² If the judicial process fails to result in an agreement on regulation acceptable to the State, then the Secretary of the Interior is required to propose regulations.¹²³ It thus might be thought that the statute confers no substantive right, privilege, or immunity on the tribe, but only a procedural right to good faith bargaining and a circumscribed (because not compulsively enforceable) right at that. Without necessarily agreeing with Justice Stevens's implication that the IGRA is unconstitutional because the courts' judgments are merely advisory and preliminary to an executive decision,¹²⁴ determining whether IGRA creates the "rights, privileges or immunities" encompassed by section 1983 is not easy.

Assuming one found that IGRA conferred such rights, privileges, or immunities, then the availability of the section 1983 remedy would seem to follow from present law. *Sea Clammers* seems clearly distinguishable. It is one thing to hold, as the Court did there, that in enforcing a federal statute involving complex regulations, with a specialized administrative agency and with its own enforcement scheme including privately initiated remedies, the section 1983 statute, designed generally to redress misuse of state power, should not be available.¹²⁵ It is another thing to say that, with respect to a claimed

the application of section 1983), the Court indicated that Congress must unambiguously confer private enforceable rights where it intends to authorize such causes of action to enforce the terms of a federal grant. See *id.* at 363-64. *Suter* is, at a minimum, in tension with *Thiboutot's* plain language presumption in favor of the availability of section 1983 actions to vindicate federal statutory rights. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). *Suter* distinguished *Wilder* on the grounds that the Boren Amendment there at issue "actually requires the states to adopt reasonable rates," a requirement enforceable by providers in light of the detailed federal rules for rate calculation, while the statute in *Suter* did not impose any concrete obligation on the part of the state to individual citizens, but only required adoption of a state plan meeting federal standards. See *Suter*, 503 U.S. at 359-60. What standards to apply in determining when federal funding statutes like those in *Wilder* and *Suter* will be deemed enforceable under section 1983 was most recently at issue in *Blessing v. Freestone*, 117 S. Ct. 1353 (1997), discussed *supra* notes 115, 118, and *infra* notes 142, 156.

¹²² See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1144 (1996) (Stevens, J., dissenting) ("If each adversary adamantly adheres to its understanding of the law . . . the maximum sanction that the Court can impose is an order that refers the controversy to a member of the Executive Branch of the Government for resolution.").

¹²³ See 25 U.S.C. § 2710(d)(7)(B)(vii) (1994).

¹²⁴ See *Seminole Tribe*, 116 S. Ct. at 1144-45 (Stevens, J., dissenting) (expressing doubt that "obviously dispensable involvement" of judiciary in a procedure "that begins and ends in the Executive Branch is a proper exercise of judicial power").

¹²⁵ See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (noting that environmental acts "contain unusually elaborate enforcement provisions, conferring authority to sue . . . both on government officials and private citizens").

violation of a federal statute designed solely to regulate state relations with Indian tribes and providing express remedial provisions that (as the Court understands them) cannot be given effect, the general remedy provided by section 1983 for state violations of federal law is not available. Thus, assuming "rights" were created for section 1983 purposes, Congress's intent would clearly be served by a section 1983 action to enforce whatever that IGRA right is.¹²⁶

That the Court did not even address this question may be accounted for by the Court's reliance primarily on the parties to identify issues.¹²⁷ Or it may be part of a larger picture, discussed in the next section, of a Court moving towards dissipating differences in analysis of the availability of relief to vindicate federal law and limiting the availability of even prospective judicial relief against the government except where that precise form of relief is clearly and specifically provided for by Congress.

E. Chilicky and the Conflation of Constitutional and Statutory Implied Right of Action Analysis

In pursuing its analysis of statutory intent, the Court cited *Schweiker v. Chilicky*¹²⁸ and reasoned from it that the presence of a detailed remedial scheme in IGRA suggested that courts should not

¹²⁶ In this sense, *Seminole Tribe* differs from cases such as *Suter*, 503 U.S. at 363, where the federal statute whose obligations plaintiffs sought to enforce (a federal funding statute designed to encourage states to work for family reunification while also providing for foster care and adoption services) did not explicitly provide for any individual judicial remedy. See also *Blessing*, 117 S. Ct. at 1360-61 (finding requirement that states substantially comply with Title IV-D of Social Security Act does not create enforceable right under section 1983). Moreover, the statute at issue in *Suter* was enacted under the spending power, see *Suter*, 503 U.S. at 356, and some scholars have argued for more limited federal judicial enforcement of the conditions in spending statutes which typically provide for fund cutoff as the remedy for noncompliance, see Engdahl, *supra* note 117, at 93-97 (suggesting that whether "third party beneficiaries" of federal spending statutes' conditions may sue to enforce those conditions should depend, *inter alia*, on (a) whether those conditions are within federal regulatory powers and (b) if not, whether under state law third parties can sue); *id.* at 104 (arguing that third party rights in spending statutes are "secured" not by reference to any "law" but rather by a contract).

¹²⁷ The section 1983 question was not referred to in the parties' briefs before the Court nor alleged in the plaintiffs' complaint. See Meltzer, *supra* note 29, at 40 n.185. Larry Kramer has suggested to me that the Court's failure to address section 1983 might have been sensible in light of the difficulty of resolving an issue which was neither raised nor briefed. But see Meltzer, *supra* note 29, at 40 n.185 (arguing that tribe's failure to plead section 1983 does not excuse Court's failure to consider it).

¹²⁸ 487 U.S. 412 (1988) (refusing to permit action for damages under Due Process Clause related to procedural defects in treatment of plaintiffs' entitlement to Social Security payments, in light of comprehensive administrative scheme established by Congress for correction of errors in Social Security Administration).

imply further remedies.¹²⁹ The Court's reliance on *Chilicky*, one of the so-called *Bivens*¹³⁰ line of cases involving implied causes of action for damages against federal officials who violate the Constitution, seems a far reach from the question before the Court in *Seminole Tribe*. It thus raises questions about the broader direction of the Court's remedial jurisprudence.

First, the Court in *Chilicky* was faced with a valid and functioning remedial scheme designed by Congress¹³¹—not a remedial scheme that had just been declared unconstitutional. It is one thing to say that where Congress has designed a detailed, operative remedial scheme, courts should not imply additional remedies. It is quite another matter to say that where Congress has designed a detailed, but unconstitutional and hence inoperative, remedial scheme, courts should likewise stay their hand. As Justice Souter said in dissent in *Seminole Tribe*, “*Young* would not function here to provide a merely supplementary regime of compensation to deter illegal action, but [as] the sole jurisdictional basis for an Article III court's enforcement of a clear federal statutory obligation, without which a congressional act would be rendered a nullity in a federal court.”¹³²

Second, the *Bivens/Chilicky* line of cases has generally involved claims not for injunctive relief, but for damages. In actions against state and local officials for violations of federal law, the traditions of U.S. judicial federalism have been for federal courts to exercise far greater caution with respect to monetary awards than with respect to injunctions to prevent ongoing violations of federal law.¹³³ Plaintiffs

¹²⁹ See *Seminole Tribe*, 116 S. Ct. at 1132.

¹³⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing cause of action for damages against federal officials for violating plaintiff's Fourth Amendment rights).

¹³¹ See *Chilicky*, 487 U.S. at 414-17, 424.

¹³² *Seminole Tribe*, 116 S. Ct. at 1182 (Souter, J., dissenting). While Souter is correct that injunctive relief against the Governor would seem necessary and appropriate to fulfill Congress's legislative goals, he, like the majority, seems at times to conflate the “implied right of action” aspect of *Ex parte Young* with the “avoidance of sovereign immunity” aspect. See *id.* I understand plaintiffs to have argued that the statute itself supported a cause of action against the Governor which, under *Ex parte Young*, was not one “against the state.” This claim might have made relevant such cases as *Cannon v. University of Chicago*, 441 U.S. 677 (1979), on implied causes of action, to which the Court did not refer. See also *supra* note 99; *infra* note 160.

¹³³ See Jackson, *supra* note 29, at 7, 72-75, 88-104 (discussing remedial hierarchy and policy considerations supporting distinction, articulated in *Edelman v. Jordan*, 415 U.S. 651 (1974), between permissible prospective relief and impermissible retroactive relief); see also Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 *Hast. L.J.* 1123, 1144 (1989) (arguing that prospective injunctive relief against state officers is appropriately treated as more important than compensatory retrospective relief); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 *S. Cal. L. Rev.* 289, 293 (1995) (stating that “federal question statute, without more, has al-

in *Seminole Tribe* sought to invoke, not a newly created monetary remedy for violation of constitutional rights, but what Justice Souter described as a "general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began."¹³⁴

Third, the Court in *Chilicky* was faced with a question whether to infer a cause of action against a *federal* official in the face of an existing federal remedial scheme.¹³⁵ But *Seminole Tribe* involved not an action against *federal* officials, but against *state* officials.¹³⁶ Assuming, for the moment, that the IGRA itself did not authorize a cause of action against the Governor, as noted above, an obvious question to ask would have been whether section 1983 provides an explicit cause of action for equitable relief against the Governor.¹³⁷

Fourth, *Chilicky* involved a claim for relief requiring a judicially implied remedy of damages for violating *constitutional* rights to procedural due process.¹³⁸ *Seminole Tribe*, by contrast, involved purely statutory rights.¹³⁹ While it can be persuasively argued that courts have a greater role to play in assuring available remedies for vindication of constitutional rights than with respect to statutory rights,¹⁴⁰ this argument is usually made against a backdrop in which Congress has provided some remedy for a statutory right and a private litigant seeks something beyond what Congress has provided. Professors

ways been considered sufficient authority for traditional equitable relief against government officials"). In numerous cases, the Court has seemed more prepared to accept injunctive relief than damages, even without specifying the jurisdictional or remedial basis for that remedy. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 602, 606-07 (1983) (White, J.) (arguing that, with respect either to implied remedies under spending statute or section 1983 remedy for violation of spending clause statute, only injunctive relief should be available); see also *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (accepting availability of injunctive relief on preemption claim but objecting to damages liability). For other decisions upholding claims for prospective relief, see *Cannon*, 441 U.S. 677 (regarding Title IX); *Rosado v. Wyman*, 397 U.S. 397 (1970) (regarding Social Security/Aid to Families with Dependent Children laws).

¹³⁴ *Seminole Tribe*, 116 S. Ct. at 1182 (Souter, J., dissenting); see also *Bivens*, 403 U.S. at 405 (Harlan, J., concurring).

¹³⁵ See *Chilicky*, 487 U.S. at 418.

¹³⁶ See *Seminole Tribe*, 116 S. Ct. at 1121.

¹³⁷ Neither of the parties raised this question, but neither did they discuss *Chilicky*, the *Bivens* line, or argue that there was a difference in the scope of remedial powers in an *Ex parte Young* action as compared with a statutory IGRA action.

¹³⁸ See *Chilicky*, 487 U.S. at 414, 420-21.

¹³⁹ See *Seminole Tribe*, 116 S. Ct. at 1121.

¹⁴⁰ See *Cannon v. University of Chicago*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting) ("[T]his Court's traditional responsibility to safeguard constitutionally protected rights . . . permits greater judicial creativity with respect to implied constitutional causes of action."); cf. *Webster v. Doe*, 486 U.S. 592, 603-05 (1988) (interpreting statute not to bar review of constitutional claims involving federal intelligence agency).

Stewart and Sunstein and others have argued that in some statutory settings, judicial implication of remedies may upset an enforcement balance reflecting legislative decisionmaking entitled to deference.¹⁴¹ Whatever weight such arguments ordinarily have, they would seem to bear no weight in the unusual circumstance of a court invalidating the only judicial remedy provided by Congress.

F. Warning Signs: Retrenchment of Federal Equitable Power To Enforce Federal Law?

The Court's unconvincing analysis of legislative intent in resolving the *Ex parte Young* question suggests a need to look beyond the Court's stated reasons to obtain a better understanding of what motivates the decision. While some would argue that there is nothing troubling about limiting remedies for statutory violations to those specified by Congress, *Seminole Tribe* may go beyond this, making it more difficult for Congress to provide private remedies through increasing judicial burdens of clear statement. And the *sua sponte* invocation of *Chilicky*—a case involving a constitutional claim against federal officials—might suggest that the Court will bring the same skepticism about the value of individually initiated federal remedies for government wrongdoing to several bodies of law, involving constitutional and statutory claims, moving towards a more general stance of judicial inaction.

Seminole Tribe's treatment of *Ex parte Young* can be understood as part of a broader effort by the Court to limit the availability of federal judicial relief on a range of statutory and constitutional claims, absent explicit congressional authorization. In the face of requests for the exercise of traditional equitable powers of the courts to provide appropriate remedies for violations of law, *Seminole Tribe* may imply that the Court will require judicial *inaction* absent an explicit legislative command to provide equitable relief. Does the Court's *Seminole Tribe* analysis foreshadow retrenchment in the availability of section 1983 relief (at least on noncivil rights statutory claims),¹⁴² the availa-

¹⁴¹ See Richard Stewart & Cass Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1208-12 (1982); see also *Cannon*, 441 U.S. at 742-49 (Powell, J., dissenting) (stressing that separation of powers concerns caution against implication of private causes of action for statutory violations).

¹⁴² Several types of constitutional and statutory claims could be affected, including pre-emption claims, see *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989), dormant commerce clause claims, see *Dennis v. Higgins*, 498 U.S. 439, 450 (1991), and claims of violations of federal spending clause or regulatory statutes, see *Wright v. City of Roanoke Redevel. & Hous. Auth.*, 479 U.S. 418 (1987). For one Justice's argument that section 1983 does not provide a vehicle for the assertion of constitutional claims arising under the power-allocating provisions of Article I of the Constitution, see *Dennis*, 498 U.S.

bility of implied, judicially enforceable rights under federal statutes more generally, or possibly even the availability of injunctive relief to restrain constitutional violations?

Seminole Tribe seems to be the first Supreme Court decision since *Ex parte Young* to hold that the Eleventh Amendment bars an action against a state official for purely prospective relief not directed at accrued state financial liabilities or property, to prevent threatened or ongoing violations of federal law.¹⁴³ Because the Court has held

at 452-58 (Kennedy, J., dissenting). In *Blessing v. Freestone*, 117 S. Ct. 1353 (1997), the Supreme Court held that the Ninth Circuit had erred in recognizing a right to sue under section 1983 for the State's failure to achieve "substantial compliance" with Title IV-D of the Social Security Act (which provides funding for state child support enforcement services). But in reversing, the Court spoke narrowly and within the bounds of existing precedent. It held that the plaintiffs had not established that the statute afforded them individually enforceable federal rights and that the statutory "substantial compliance" standard was not intended to give rise to individual rights but to guide the Secretary's assessments of state compliance. See *id.* at 1360-62.

While the Court's reversal of the Ninth Circuit is consistent with a desire to restrict availability of judicial actions to enforce spending clause programs, other aspects of the Court's decision show no inclination to move in the more radical directions suggested. First, the Court left open on remand the possibility that in particular other provisions of Title IV-D an individual right secured by federal law could be found. See *id.* at 1362. More important, the Court rejected the State's argument that the remedial scheme was sufficiently comprehensive to demonstrate Congress's intent to preclude section 1983 suits, ruling quite clearly that the Secretary's limited powers to audit and cut federal funding are not sufficiently comprehensive to warrant the inference of intent to foreclose section 1983 liability. See *id.* at 1363.

¹⁴³ Prior to *Seminole Tribe*, the Court frequently noted the availability of prospective injunctive relief against state officials to enjoin violations of federal law. See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985) (Under *Ex parte Young*, federal courts may grant "prospective injunctive relief to prevent a continuing violation of federal law"); *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) (in injunctive relief action based on federal law, state's immunity is overcome by naming state officials as defendants); see also *Hafer v. Melo*, 502 U.S. 21, 30 (1991) (referring to *Ex parte Young* as settling that Eleventh Amendment provides no shelter for state officials from claims for deprivation of federal rights under color of state law). Based on a LEXIS search of Supreme Court decisions since *Ex parte Young* referring to the Eleventh Amendment, cases can be found in which the Eleventh Amendment was relied on to bar prospective relief based on state law. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984); see also *Cory v. White*, 457 U.S. 85 (1982) (finding no jurisdiction over federal interpleader action for declaratory judgment against state taxing officials where only state law question of decedent's domicile involved); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) (Eleventh Amendment bars interpleader action seeking injunctive relief against state taxing officials; rejecting plaintiffs' claim that conflicting determinations of domicile for tax purposes violates federal law). *Cory* describes *Worcester County Trust* as finding "no credible claim of a violation of federal law." *Cory*, 457 U.S. at 89; see also *id.* at 91 (treating *Worcester County Trust* as case that involved no allegation that state officers acted "contrary to federal law or against the authority of state law").

Likewise, cases preclude jurisdiction based on the Eleventh Amendment where the relief sought, even if styled as an injunction against officers, is essentially "retroactive," for example, an order to restore wrongly withheld welfare benefits. See *Edelman v. Jordan*, 415 U.S. 651, 664-68 (1974); see also *Papasian v. Allain*, 478 U.S. 265, 279-82 (1986)

that section 1983 does not abrogate states' Eleventh Amendment immunity from suit,¹⁴⁴ the availability of injunctions against state officers under section 1983 is premised on the *Ex parte Young* doctrine.¹⁴⁵ If the existence of an unavailable statutory remedy in IGRA is sufficient to warrant invocation of an Eleventh Amendment bar to prospective relief against a state official, what obstacles may lie in the path of future section 1983 suits for injunctions against state officials?

As noted earlier, the Court's reliance on *Chilicky* (involving a claimed constitutional cause of action) and its reasoning (that prospective injunctive relief against state officers to vindicate federal law can be silently displaced where Congress does not explicitly authorize it) suggest that analyses of implied constitutional causes of action, implied causes of action under federal statutes, and the availability of section 1983 relief (at least for federal statutes not related to civil rights) may be merging.¹⁴⁶ While the modern Congress may be somewhat more sophisticated about the articulation of (or studied use of silence with respect to) judicial remedies than were earlier Con-

(although plaintiffs characterized their first claim as one to enjoin ongoing violation of federal law, that claim was barred by Eleventh Amendment because it involved not-yet-extinguished liability for past breach of trust and was thus "essentially equivalent in economic terms to a one-time restoration of the lost corpus itself . . . [and would be] in substance the award, as continuing income rather than as a lump sum, of 'an accrued monetary liability,'" (quoting *Milliken v. Bradley*, 433 U.S. 267, 289 (1977)), comparable to restitution claim rejected in *Edelman*; by contrast, plaintiffs' second claim, for injunctive relief based on allegedly ongoing violations of federal equal protection clause, was permitted under *Ex parte Young*). And cases can be found in which actions for prospective relief, based on federal law, against the State as such have been jurisdictionally barred. See, e.g., *Alabama v. Pugh*, 438 U.S. 781 (1978). Since *Ex parte Young*, however, I have identified no case in which the Eleventh Amendment was found to bar a request for purely prospective injunctive relief, not directed at state funds or property, against a state official to remedy ongoing violations of federal statutory or constitutional law.

¹⁴⁴ See *Quern v. Jordan*, 440 U.S. 332, 338-45 (1979); see also *Will v. Michigan*, 491 U.S. 58 (1989) ("state" not a person for purposes of § 1983 cause of action).

¹⁴⁵ See *Quern*, 440 U.S. at 337-39; see also *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991).

¹⁴⁶ At least with respect to statutory, noncivil rights claims, this coalescence has some scholarly support. See Mazzuchi, *supra* note 117, at 1064, 1100 (arguing for parallelism in definition of rights in section 1983 with test for implied rights of action); Brown, *supra* note 110, at 62-66 (sympathetically describing this approach and arguing that section 1983's phrase "and laws" should be read, as Justice Powell did in his dissent in *Thiboutot*, as limited to civil rights laws). For a more nuanced approach, see Cass Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394 (1982). And for a view that treats section 1983 as irrelevant to determining the proper remedy for violations of conditions of federal spending statutes, see *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596-97, 602 n.23 (1983) (White, J.) (in fashioning remedies for violations of spending clause statute by recipients of federal funds, courts must recognize and respect recipient's option of withdrawing from federal funds, courts must recognize and respect recipient's option of withdrawing from federal program entirely; analogizing to Eleventh Amendment, Justice White argued that only injunctive relief was proper to enforce Title VI and that "make whole" remedies were usually not proper to vindicate spending clause statutory claims).

gresses, thus arguably justifying a more deferential judicial stance with respect to implied remedies for statutory claims, many would argue that courts have a more active role to play with respect to constitutional, as compared to statutory, claims.¹⁴⁷ Yet the Court's reliance on *Chilicky* may suggest otherwise.¹⁴⁸ More important, the Court's analysis in *Seminole Tribe* might be read to suggest that in many remedial areas, involving prospective relief to enjoin active violations of federal law as well as in the question of remedies for past wrongs, courts may require some further signal—beyond the presence of a substantive statutory or constitutional provision—that Congress wants judicial enforcement at the behest of private parties.

In fairness, there are indications in *Seminole Tribe* that these fears may be overdrawn.¹⁴⁹ Thus, for example, in responding to the dissent's argument that state immunity will thwart "[t]he Framers' . . .

¹⁴⁷ See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (while for statutory rights and obligations established by Congress, it is "entirely appropriate" for Congress to determine who may enforce them and in what manner, Constitution is not prolix code, and in its great outlines "the judiciary is clearly discernible as the primary means through which these rights may be enforced"). But see *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1983) (when Congress provides remedial mechanisms for constitutional violations that may occur in administration of government program, courts do not create additional remedies).

¹⁴⁸ It does take some steps to move from the Court's refusal to permit prospective relief to vindicate the federal statutory claim at issue in IGRA to a more general refusal to permit prospective relief against constitutional violations (or against private persons under other federal statutes). It may be that the Court will not take those steps. It is not my claim that *Seminole Tribe* makes this inevitable, but rather that it seems to point in this direction. Not only is its reliance on *Chilicky* odd (a more apt case might have been *Sea Clammers*), but its emphasis on the narrowness of *Ex parte Young* also points in the direction of more restricted remedies. Finally, its almost willful defiance of Congress's actual intent to have a judicial remedy suggests a more general hostility to the use of courts to provide even mild remedies against state governments, whether through their officials or through direct actions against the states.

¹⁴⁹ For more sanguine views of *Seminole Tribe's* effect on *Ex parte Young*, see David P. Currie, *Ex Parte Young after Seminole Tribe*, 72 N.Y.U. L. Rev. 547 (1997); Meltzer, *supra* note 29, at 44-46; Monaghan, *supra* note 98, at 128-32 (arguing that *Seminole Tribe* does not disturb doctrine of *Ex parte Young*). As noted in the introduction, the Court's analysis of *Ex parte Young* might be simply the result of confusion. The unusual nature of the remedial scheme caused Justices at oral argument to ask, in effect, whether each party would not be better off if its position lost. See Record at *2, *7-*8, *23, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (No. 94-12), reprinted in 1995 U.S. Trans. LEXIS 112. If the stakes for the parties seemed low or incomprehensible to the Court, or if, as others have suggested, the Court was eager to use the case as a vehicle to overrule *Union Gas*, see Meltzer, *supra* note 29, at 44-45, it simply may not have devoted much time or attention to the short discussion of *Ex parte Young*. If these speculations are correct, then the *Ex parte Young* discussion may have little significance for the Supreme Court's future approaches and the opinion will hopefully not mislead the lower federal courts as to the continued availability of *Ex parte Young*.

objectives in rejecting English theories of unitary sovereignty,"¹⁵⁰ the Court says:

This argument wholly disregards other methods of ensuring the States' compliance with federal law: the Federal Government can bring suit in federal court against a State; *an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law, see, e.g., Ex parte Young, 209 U.S. 123*; and this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit.¹⁵¹

Further, in response to Justice Stevens's argument that the opinion would effectively prohibit private enforcement of bankruptcy, copyright, and antitrust laws against states (since these are areas of exclusive federal jurisdiction),¹⁵² the Court describes Stevens's conclusion as "exaggerated" because "several avenues remain open for ensuring state compliance with federal law. . . . *Most notably, an individual may obtain injunctive relief under Ex parte Young in order to remedy a state officer's ongoing violation of federal law.*"¹⁵³

While these references to the availability of *Ex parte Young* to permit individuals to obtain enforcement of federal laws, both statutory and constitutional, are reassuring, the latter part of the opinion in which the Court finds that *Ex parte Young* does not permit a prospective remedy under this statute is less so. Indeed, in a footnote the Court can be read almost to impose a form of "clear statement" requirement upon Congress, above and beyond that supplied already by section 1983, to authorize very specifically injunctions to vindicate federal statutory rights.¹⁵⁴ While paying lip service to the existence of

¹⁵⁰ *Seminole Tribe*, 116 S. Ct. at 1172 (Souter, J., dissenting).

¹⁵¹ *Id.* at 1131 n.14 (citations omitted) (emphasis added).

¹⁵² See *id.* at 1134 & n.1 (Stevens, J., dissenting) (the majority's conclusion "suggests that persons harmed by state violations of federal copyright, bankruptcy and antitrust laws have no remedy").

¹⁵³ *Id.* at 1131 n.16 (emphasis added).

¹⁵⁴ See *id.* at 1133 n.17 (suggesting that imposition of duties on "State" is insufficient to warrant prospective relief against officers without further indicia that officials are required to perform certain actions). Notwithstanding the apparent direction of the Court's reasoning, it is possible that *Seminole Tribe's* treatment of *Ex parte Young* will be confined to situations in which Congress proscribes an explicit, intricate, and comprehensive remedy for a statutory right, without specifically authorizing prospective relief against state officials. Cf. *Blessing v. Freestone*, 117 S. Ct. 1353 (1997) (section IV-D of Social Security Act did not necessarily foreclose availability of section 1983 action, where only statutory remedies expressly provided were federal audit and fund cutoff and where statute provided no private remedy at all, judicial or administrative, through which aggrieved persons could seek redress).

Lower federal courts have, since *Seminole Tribe*, continued to entertain actions for prospective relief against state officials. See, e.g., *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000 (2d Cir. 1997) (ERISA does not preclude *Ex parte*

the prospective remedy under *Ex parte Young*, the Court applies a standard for when Congress will be deemed to have precluded such relief that is inhospitable to its actual availability.

Thus, the most troubling implication of *Seminole Tribe* is its recasting of *Ex parte Young* as an almost doubtful act of judicial usurpation, justified only in "narrow" circumstances (possibly those involving constitutional violations not the subject of statutory remedies).¹⁵⁵ The Court's purported deference to Congress's remedial scheme suggests that statutory remedies for constitutional (as well as

Young injunction); *National Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 423-24 (9th Cir. 1996) (citizen enforcement action under Clean Water Act); *Thiel v. State Bar*, 94 F.3d 399, 403 (7th Cir. 1996) (First Amendment suit concerning compulsory bar dues); *Death Row Prisoners v. Ridge*, 948 F. Supp. 1258, 1264-66 (E.D. Pa. 1996) (suit against state officers' threatened invocation of "opt-in" habeas corpus provisions of Anti-terrorism and Effective Death Penalty Act), appeal resolved and terminated, 106 F.3d 35 (3d Cir. 1997). But see *Booth v. Maryland*, 112 F.3d 139 (4th Cir. 1997) (holding, in conflict with *Death Row Prisoners*, that Eleventh Amendment bars actions for injunctive relief against state officials invoking "opt-in" provisions of new federal habeas statute). Under the 1996 amendments to the federal habeas statute, states that meet federal requirements for providing counsel on state post-conviction review of capital-sentenced cases are entitled to shorter statutes of limitations (i.e., six months rather than a year) in federal habeas actions challenging state criminal judgments. See 28 U.S.C.A. § 2261, 2263 (West Supp. 1997). Maryland announced its intention to take the position in litigation that its system for providing counsel met federal standards and thus the six month limitation period applied. The plaintiffs, death row inmates who had or were planning to file federal habeas petitions, challenged whether Maryland in fact met federal standards of competence and compensation. See *Booth*, 112 F.3d at 141.

¹⁵⁵ See *Seminole Tribe*, 116 S. Ct. at 1133 (describing *Ex parte Young* as "narrow exception to the Eleventh Amendment"). Compare that description of *Ex parte Young*, written by Chief Justice Rehnquist for the Court in *Seminole Tribe*, with that written by then-Justice Rehnquist for the Court in *Edelman v. Jordan*, 415 U.S. 651, 664 (1974):

Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

Id. (emphasis added).

A possible effect of *Seminole Tribe*'s narrow treatment of *Ex parte Young* may be seen in *Booth*, 112 F.3d at 142 (referring to *Ex parte Young* as a basis for "abrogating" a state's immunity). See *supra* note 154. The court's close linking of the state and its officials is reminiscent of the "evil" with which *Poindexter v. Greenhow*, 114 U.S. 270 (1885), in the opening quotation of this section, was concerned. *Booth* concludes that *Ex parte Young* is not available as an exception because it is available only where there is a "continuing violation of law," and no violation had yet occurred or could arise from the State's mere assertion of a defense (of limitations) in subsequent habeas corpus proceedings. See *Booth*, 112 F.3d at 142-43. But cf. *Ex parte Young*, 209 U.S. 123, 129-33 (1908) (Attorney General's conduct sought to be enjoined was threatened but had not yet occurred at time suit was filed and consisted, in part, of filing actions in state court). It may be that the *Booth* court's real concern was with the ripeness of the complaint (though under *Steffel v. Thompson*, 415 U.S. 452 (1974), the argument for the claims being ripe, by virtue of the

statutory) violations might easily displace the "necessity" for the *Ex parte Young* injunction, a conclusion that might fit with the Court's deference to congressional remedies in rejecting the constitutional damages claim in *Chilicky*.

Litigants have been alert to the possible breadth of the Court's treatment of the *Ex parte Young* issue in *Seminole Tribe*, and thus are sure to present the Court with opportunities to clarify how far it intends to move in this direction.¹⁵⁶ We have seen or may in the future see such claims as that section 1983 should never be available to vindicate preemption claims, or that *Ex parte Young*'s distinction between suits against officers and suits against the state should be unavailable for preemption claims, or for the enforcement of federal statutory claims under Article I.¹⁵⁷ Indeed, one wonders whether given the increased emphasis on *Ex parte Young* as a doctrine of necessity, and a "narrow" one at that,¹⁵⁸ the elevation in importance of state sovereign immunity will result in a reconfiguration of the concept of necessity to apply only when state courts are not open to the plaintiff's claim.¹⁵⁹

State's announcement, would seem substantial) or with whether habeas corpus should be understood as the exclusive mode intended by Congress for raising such challenges.

¹⁵⁶ See, e.g., *Cigna Health Plan v. Louisiana ex rel. Ieyoub*, 82 F.3d 642, 644 n.1 (5th Cir.) (noting State Attorney General's argument that *Ex parte Young* injunction should not be available to avoid Eleventh Amendment bar in action to invalidate state law and prevent its enforcement based on preemption by federal ERISA law), cert. denied, 117 S. Ct. 387 (1996); *Blessing v. Freestone*, 117 S. Ct. 1353, 1359 n.3 (1997) (noting State's arguments that "the Eleventh Amendment strips federal courts of jurisdiction over a § 1983 cause of action against state officials to enforce Title IV-D" and that *Thiboutot* should be overruled, but declining to address either of these questions because they "were neither raised nor decided below, and were not presented in the petition for certiorari"). Such claims are likely to be repeated since, as Professor Currie notes, the *Seminole Tribe* opinion might be "pushed" to overrule *Thiboutot*. See Currie, *supra* note 149, at 551.

¹⁵⁷ For one lower court judge who has recently invited the Court to move in this direction, see *National Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996) (O'Scannlain, J., concurring) (questioning availability of *Ex parte Young* in federal statutory claims). See also *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1256-57 & n.12 (9th Cir. 1996) (Reinhardt, J., dissenting) (urging that state officials may be sued for prospective relief on Supremacy Clause preemption claim, even if not on claim to enforce federal statute directly).

¹⁵⁸ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105 (1984) (emphasizing that necessity of vindicating supreme federal law justifies prospective relief); *Seminole Tribe*, 116 S. Ct. at 1133 (*Ex parte Young* described as "narrow" exception to Eleventh Amendment).

¹⁵⁹ In *Idaho v. Coeur d'Alene Tribe*, 1997 U.S. LEXIS 4030 (June 23, 1997), the petitioner argued that the Supreme Court should

also consider the fact that a potential remedy exists for the Tribe's claims in Idaho's state court system. Idaho law allows the state to be named as a party defendant in actions "affecting the title to real or personal property in which the State has, or claims to have, an interest, lien or claim." As this Court has noted, the issue in Eleventh Amendment cases is not the "general immunity of the States from private suit . . . but merely the susceptibility of the States to

Seminole Tribe's holding as to congressional power appears limited so far to Article I claims and thus leaves unimpaired congressional authority over Fourteenth Amendment claims. But the treatment of *Ex parte Young* raises questions of a different type about judicial authority and the relationship of the federal courts to Congress in the design of remedies for vindication of federal law. The Court's reasoning in this part of its opinion does not seem to draw on any distinctive features of Article I powers as compared with those conferred by post-Civil War Amendments. It also appears to give little weight to what might be considered a third aspect of the *Ex parte Young* action—that equitable relief to enforce federal law is ordinarily available from courts having jurisdiction over the subject.¹⁶⁰

suit before federal tribunals.” Adjudication in a federal tribunal is not necessarily required in order to fulfill the interest of the national government in ensuring the supremacy of federal law.

Petition for a Writ of Certiorari for Petitioner at 26 n.6, *Coeur d'Alene Tribe* (No. 94-1474) (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 294 (1973)); see also Brief of the Council of State Governments et al. as Amici Curiae in Support of Petitioners at 6, 16-19, *Coeur d'Alene Tribe* (No. 94-1474) (devoting entire section of argument to claim that use of fictional suits, like *Ex parte Young*, against government officials was necessitated by absence of remedy against sovereign itself and that if state provides forum, that “renders unnecessary the sanctioning of a suit against the State's officials”); Brief of State of California et al. as Amici Curiae in Support of Petitioners at 3, 12-14, *Coeur d'Alene Tribe* (No. 94-1474) (on behalf of 23 states) (arguing that where adequate statutory remedy exists, such as state quiet title action, officers' suit may not be substituted for that remedy).

At present, deference to existing, adequate state court remedies is a relatively minor theme (other than where a state court enforcement proceeding is pending) in the affirmative litigation of federal claims asserted against states, limited to specialized areas. See, e.g., Tax Injunction Act, 28 U.S.C. § 1341 (1994) (tax collection); Johnson Act, 28 U.S.C. § 1342 (1994) (utility regulation). While a holding that prospective relief, absent explicit congressional authorization, is available only when there is no state court forum adequate to hear the plaintiff's federal claim would be a marked change in the law, well beyond what *Seminole Tribe* holds, it would not be altogether inconsistent with developments in habeas corpus law requiring increased reliance on state courts. See, e.g., 28 U.S.C.A. § 2254(d) (West Supp. 1997) (federal habeas courts can grant relief on claims adjudicated on merits in state courts only under limited circumstances); *Stone v. Powell*, 428 U.S. 465, 489-95 (1976) (no federal habeas relief for Fourth Amendment violations where state courts provided opportunity for full and fair litigation of claim).

¹⁶⁰ See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1542-43 n.62 (1972) (discussing courts' established powers to issue injunctions); see also Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1138 (1969) (suggesting that pleading differences between equity and law practices may have facilitated assertion of affirmative claims for injunctive relief); cf. Michael G. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1510, 1517-18 (1989) (noting absence of controversy about implied actions under Constitution and federal question statute for equitable relief against state or federal officers, as well as courts' frequent acknowledgement of this tradition, but contesting adequacy of Hill's explanation for predominance of injunctive relief). See generally Bandes, *supra* note 133, at 301-02 (noting pervasive acceptance of injunctive relief and arguing that

Seminole Tribe's insistence on the narrowness of *Ex parte Young* thus raises the question whether the Court is prepared to reconsider the availability of injunctive relief to vindicate federal law more generally. Will the Court extend *Chilicky* to bar injunctive relief, as well as damages, for alleged constitutional due process violations if there is some other remedy? Or for those constitutional claims based on pre-Civil War parts of the Constitution?¹⁶¹ If a federal statutory scheme bears on the problem, will Congress's silence be treated as implicitly precluding the availability of a section 1983 remedy for the constitutional claim itself? Will the Court move to a jurisprudence requiring Congress clearly to provide authorization even for prospective injunctive relief to vindicate constitutional claims, authorization clearer than that provided in section 1983? These are the worrisome questions raised, but not answered, by the Court's treatment of *Ex parte Young*.¹⁶²

same source of law that provides cause of action supporting injunctive remedy can support implied damages remedy).

¹⁶¹ See *Dennis v. Higgins*, 498 U.S. 439, 460 (1991) (Kennedy, J., dissenting) (suggesting possibility that section 1983 be available to vindicate rights arising under Article I of Constitution only where states fail to provide remedy and thereby create separate violation of Fourteenth Amendment's Due Process Clause); see also Collins, *supra* note 160, at 1543.

¹⁶² These are worrisome because there is much to support the judgments that have been made, by Congress and the Supreme Court, over the last 120 years as to the benefits of extending original federal jurisdiction to claims against state and local governments for vindication of federal law. Repeatedly, in settings where state systems are not able to meet minimal federal standards of justice, federal courts have been a source of assistance. Life tenure does seem effective in rendering judges relatively independent from popular passions and thus more likely to be able to give measured attention to claims made by outcast individuals or small minority groups than other institutions holding power in a basically democratic government. Federal courts' relative independence not only may produce judges better able to do "equal justice," even to the unpopular, but also fairly to resolve intergovernmental conflicts.

Attention to the particular facts of *Seminole Tribe* may illuminate these points. *Seminole Tribe* was a suit brought by a collective entity, an Indian tribe, but in important respects, Indian tribes are "outside" the majoritarian processes that constitute the state and federal governments. As "dependent sovereigns," Indian tribes' abilities to continue to function as quasi-sovereign entities are in some measure at the mercy of federal legislation. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. Chi. L. Rev. 671, 693-96 (1989) (observing that Supreme Court treats Congress as having unusual plenary power with regard to Indian tribes, largely unprotected by Bill of Rights). But federal courts have played some role in providing tribes with a relatively impartial forum in which to present and resolve their claims to justice. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (upholding tribe's federal common law right to sue on possessory interests in land conveyed in violation of federal law in 1795); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 23-24 (1920) (requiring county officials to provide refund remedy for taxes coerced from Indians); *Choate v. Trapp*, 224 U.S. 665 (1912) (holding unconstitutional federal law destroying Indians' rights in property). Given the at times oppressive history of relations between the federal government and the Indian tribes, and of state governments and tribes and their members, one might

The dangers of eviscerating the so-called *Ex parte Young* action—the availability of prospective relief based on federal law against state officials—are twofold. First, limiting injunctive relief from courts to restrain active violations of federal law—whether constitutional or statutory—is inconsistent with the supremacy of federal law. The Supremacy Clause is linked not only to nationhood but to rule of law.¹⁶³ It is perhaps the single most important feature of U.S. constitutionalism—that laws govern government action and that courts enforce laws in accordance with a hierarchy in which constitutional federal law prevails. And for decades Justices on both “liberal” and “conservative” wings of the Court have shared a sense that the prospective equitable injunction is an appropriate and, absent other effective remedy, generally available judicial tool to enforce federal law.

think that tribal claims under federal law are paradigmatic examples of cases that ought to be decided by the most independent decisionmaker available.

Moreover, that the dispute in this case is between tribes and a state would seem to be—in the overall scheme of Article III—a pressing reason to sustain the jurisdiction of the federal courts. One of the principal purposes why the jurisdiction was extended, for example, to disputes between two or more states, was to provide as neutral a forum as possible for the resolution of claims that might otherwise be settled by more hostile measures. See *United States v. Texas*, 143 U.S. 621, 641 (1892) (upholding federal jurisdiction in boundary dispute between United States and Texas and noting that this was superior to alternatives of suit in state court or “trial of physical strength”). The effect of the *Seminole Tribe* decision may be that instead of a federal judge, a federal executive branch member will decide what she or he thinks state law permits, and thus what scope of gaming is to be allowed on an Indian reservation located within that state. It is not clear why either states or the tribes (of the three sovereignties involved here) should prefer that decisionmaker to a more independent one. *Seminole Tribe* thus presented two important general reasons for the exercise of federal jurisdiction: it involved the claim of a highly “discrete and insular” minority group, and it involved conflicting interests of three different sovereign or quasi-sovereign entities. The Court’s willingness to find reason to dismiss on jurisdictional grounds ought, therefore, to raise concerns about the Court’s attitude towards access to and use of federal courts to secure federal rights more generally.

¹⁶³ Under *Seminole Tribe*’s approach to statutory interpretation and the availability of injunctive relief, could jurisdiction have been denied in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 737 (1824), to restrain officers of the State of Ohio from pursuing active resistance to federal law as declared in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)? Recall *McCulloch*’s conclusion that the State was prohibited from taxing the federal bank: this part of the decision was in part based on the Court’s understanding of the effect of the state law on the effectiveness of the federal statute creating the national bank, an implementation of the “Supremacy Clause” principle of preemption. See *McCulloch*, 17 U.S. (4 Wheat.) at 425-26, 436 (states cannot interfere with operation of the “constitutional laws of the Union . . . enacted by Congress”). Could the bank charter law be regarded as a statute that, if it failed to authorize an injunction against state officers, foreclosed its availability? For a thoughtful argument that the Supremacy Clause’s conception of law contemplates that the Constitution and laws of the United States be judicially enforceable, see Carlos Manuel Vázquez, *The Constitution As Law of the Land: The Supremacy Clause and Constitutional Remedies* (unpublished manuscript, on file with author).

A second danger of eviscerating *Ex parte Young* is perhaps less obvious. The availability of judicial review acts as a separation of powers check upon legislative and executive power. Absent the privately initiated *Ex parte Young* action, the availability of federal court litigation as a check on *federal* legislative and executive power is diminished.¹⁶⁴ While the federal government remains free to sue states

¹⁶⁴ While the need for judicial remedies to vindicate *constitutional* claims of right has been frequently argued, see, e.g., Bandes, *supra* note 133, there may also be value in independent judicial involvement in the interpretation and application of statutes that may in turn support a presumption in favor of the availability of judicial review of statutory issues. Compare Federalist 78, in which Hamilton argued:

[I]t is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

The Federalist No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

While it may be reasonable to suppose that Congress should have greater control over remedies for violations of statutes than over remedies for constitutional provisions, more general "rule of law" notions would favor a presumption in favor of the availability of background remedies, such as the equitable injunction, even with respect to statutory violations, absent stronger evidence than was adduced in *Seminole Tribe* that Congress intended to displace the (usually available) prospective injunction. Two aspects of the rule of law may be particularly apt. First, where law exists, both governments and private citizens are bound by it. See generally Richard H. Fallon, Jr., *The "Rule of Law" As a Concept in Constitutional Discourse*, 97 *Colum. L. Rev.* 1, 8 (1997) ("The law should rule officials, including judges, as well as ordinary citizens."). Second, law should be "efficacious"—that is to say, law should actually guide people (private and government) and they should obey it. See *id.* For a related argument that the Constitution's understanding of "law" in the Supremacy Clause generally requires the availability of a judicial sanction, see Vázquez, *supra* note 163.

Congress's power to control remedies for statutory violations is related to Congress's power to enact legislation that is less, rather than more, "law like," cf. *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst I*), 451 U.S. 1, 18-22 (1981) (finding Bill of Rights provision in federal spending statute to be hortatory and designed to encourage rather than require certain state conduct), and not subject at all to judicial enforcement at the behest of affected private parties, see Stewart & Sunstein, *supra* note 141, at 1258-59 (doubting Court's authority to tell Congress it cannot enact legislation that is to some degree hortatory). But cf. *INS v. Chadha*, 462 U.S. 919, 952 (1983) (suggesting that "law," for purposes of triggering requirements for bicameral enactment and presentment, has characteristic of "altering the legal rights, duties, and relations" of those outside Congress). However, courts should perhaps hesitate (rather than rush) before concluding that a statute cannot be judicially enforced by its intended beneficiaries. But cf. Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 *S. Cal. L. Rev.* 735, 779 (1992) (applauding doctrines that recognize congressional power to control judicially available, remedies even for constitutional violations).

in federal courts to vindicate federal law, history teaches that the government itself cannot always be relied on to protect the federal rights of all its people.¹⁶⁵ The federal injunction sought by private parties has played a historically important role in giving meaning to federal law, particularly federal constitutional law. For a court to hold that only the federal executive branch (untrammelled by the Eleventh Amendment) may initiate suits in federal courts against states and their officials to vindicate federal law may help limit litigation, but may also concentrate power excessively in governmental hands.¹⁶⁶

CONCLUSION

Aside from its implications for the world of federal courts and federal remedies, *Seminole Tribe* must be regarded as part of a

¹⁶⁵ See Stewart & Sunstein, *supra* note 141, at 1202 n.22 (discussing judicial response to administrative failure to enforce Title VI of Civil Rights Act of 1964); see also *Rosado v. Wyman*, 397 U.S. 397, 420 (1970) (permitting private action for injunction to enforce rights set forth in spending statutes despite fund cutoff remedy). Might the possibility of private enforcement encourage both more careful lawmaking (particularly during periods in which the same political party controls both the presidency and the Congress) and more effective law enforcement (particularly when the President disagrees with laws enacted by Congress)? If so, would that support a presumption in favor of the judicial enforceability of statutes? See *supra* note 164.

¹⁶⁶ I recognize that there is a tension between the suggestion that eliminating privately initiated suits against states and their officers raises separation of powers concerns and the view that *recognition* of private rights of action not specifically authorized by the legislature (at least with respect to federal statutory claims) raises separation of powers concerns about undermining legislative primacy. See, e.g., Sunstein, *supra* note 146, at 415 (arguing that there is a separation of powers problem in courts recognizing private rights of action not provided by Congress). But cf. Bandes, *supra* note 133, at 311 (arguing that judicial implication of causes of action for constitutional violations serves a separation of powers function in providing positive checks on other branches of government). Indeed, in the setting of actions against states as such, the traditions of sovereign immunity (which, I have elsewhere argued, should be regarded as a form of federal common law) might support some form of clear statement requirement to sustain finding causes of action directly against the states. See Jackson, *supra* note 29, at 75-104, 109-110 & n.438.

In the setting of actions against state officers, however, judicial enforcement of rights against the government through equitable relief against the officers is so well established that it might reasonably be thought to form a background assumption for both the legislature and the courts. See Stewart & Sunstein, *supra* note 141, at 1230-31 (court's failure to use background assumptions on which legislature may have relied can usurp legislative power; the more powerful a background assumption the more likely it is not to be referred to). Moreover, one might wonder whether the argument that judicial recognition of remedies usurps legislative prerogatives is not itself in tension with the more court-centered conception of legal remedies animating such decisions as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164, 171 (1803) (referring to questions which are "in [their] nature, judicial" and on which the "courts of the country" have a "duty of giving judgment").

Finally, and apart from the question of remedies for statutory violations, given *Seminole Tribe's* invocation of *Chilicky*, will the Court's willingness to discard or restrict the availability of the prospective injunction to enforce federal law be limited to the statutory setting, or extend to constitutional claims as well?

broader canvass on which the Court is redrawing lines of federalism. Since 1990, the Court has found three different federal statutes to be unconstitutional exercises of federal power—not because they invade or trench upon individual rights, but because they exceed federal powers and/or invade powers reserved to the states. In *New York v. United States*,¹⁶⁷ the Court struck down the “take title” provisions of a federal statute, otherwise concededly within Congress’s power over interstate commerce, because the take title provisions “commandeered” the governmental capacity of the state governments.¹⁶⁸ In *United States v. Lopez*,¹⁶⁹ the Court for the first time since the New Deal struck down a federal statute regulating private conduct (gun possession near schools) as exceeding Congress’s power to regulate interstate commerce. And now, in *Seminole Tribe*, the Court strikes down provisions in a federal law regulating gambling on Indian reservations that authorized federal courts to resolve disputes between the tribes and the states.

These recent federalism decisions are united by the diminished (in some cases invisible) role of *Garcia v. San Antonio Metropolitan Transit Authority*¹⁷⁰ and its view that the interests of the states can largely be safeguarded through the structures of federalism themselves.¹⁷¹ In *New York* and in *Seminole Tribe*, the record of state participation in resolving an ongoing problem at a national level through legislation to which states as such significantly contributed is clear.¹⁷² There can be little doubt that the “safeguards of the federal structure” were in play there, if they ever can be said to be in play. That the Court largely ignored the relevance of these safeguards suggests that the influence of *Garcia* is, at best, waning.

But beyond that, is there a substantive core which can be seen to unite the Court’s decisions? For now, the best answer is probably no. The Court’s federalism jurisprudence seems at present to be moti-

¹⁶⁷ 505 U.S. 144 (1992).

¹⁶⁸ See *id.* at 175-77.

¹⁶⁹ 115 S. Ct. 1624 (1995).

¹⁷⁰ 469 U.S. 528 (1985).

¹⁷¹ See *id.* at 556 (principal check on federal commerce power is “the built-in restraints that our system provides through State participation in Federal governmental action”).

¹⁷² See *New York*, 505 U.S. at 189-94 (White, J., concurring in part and dissenting in part) (describing states’ efforts to secure passage of legislation); S. Rep. No. 100-446, at 1-2, 5-6, 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075, 3083 (describing participation and concerns of states in drafting IGRA); see also Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 Colum. L. Rev. 2213, 2223 (1996) (IGRA reflected political process that effectively balanced and enhanced, rather than limited, state power).

vated by ill defined intuitions that the Court must fix some sort of balance of power between the states and national government.¹⁷³

Given the nature of U.S. federalism—a political division of power designed to make effective a national union¹⁷⁴—some fluidity in doctrine may be more or less of a given. Federalism is quintessentially a political idea. As an allocation of power, it must—to be successful—have the flexibility to maintain a balance of power that is workable in the face of changed economic, political, or international circumstances. Some play in the joints of principled decisionmaking with respect to those allocations of power is neither unexpected nor necessarily inconsistent with reasonable constitutional expectations.¹⁷⁵

With respect to the role of courts in the vindication of federal law and individual claims of right, the absence of clearly correct and consistent decisionmaking is less easy to justify and more dangerous. *Seminole Tribe* not only limits the powers of federal courts to provide relief against states to persons injured by state action in violation of

¹⁷³ *New York* turned on a particular means used by the federal government deemed unduly coercive of states in their government capacity. See *New York*, 505 U.S. at 174-77, 188. *Lopez* turned instead on the indirectness of the claimed connection between education and commerce; no coercion of states was at issue. See *Lopez*, 115 S. Ct. at 1630-34. And *Seminole Tribe* purports to turn on the existence of an unwritten bar to the use of federal courts to vindicate federal laws against the state if those laws were enacted under Article I. See *Seminole Tribe*, 116 S. Ct. at 1131-32.

¹⁷⁴ See Daniel J. Elazar, *Exploring Federalism* 104-06 (1987) (arguing that United States' federalism was designed primarily to institute workable political arrangements and create tenable polity); see also Herbert Wechsler, *The Political Safeguards of Federalism*, 54 *Colum. L. Rev.* 543, 543 (1954) ("Federalism was the means and price of the formation of the Union."). For recent invocation of Wechsler's thesis, see Hovenkamp, *supra* note 172, at 2247.

¹⁷⁵ That is, flexible, not rigid, principles are required. Cf. *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J.) (in constitutional interpretation, machinery of government needs "a little play in its joints"). In a forthcoming article tentatively titled *Federalism: The Limits and Uses of Law*, I explore uses of *Lopez* and *New York* to develop principles for deferential judicial review of federalism challenges to federal action. For discussions of the need for practical political judgment in allocating decisionmaking between levels of government in the face of changing circumstances, see, e.g., Jesse Choper, *Judicial Review and the National Political Process* 202-03, 258 (1980) (contending Congress is at least as competent as courts on federalism issues, and Court should save its judicial capital for protecting individual rights); Kramer, *supra* note 25, at 1500-03 (courts lack institutional capacity to gather or evaluate data relevant to making judgments about where power should be situated; *stare decisis* deprives courts of flexibility to change course easily). For countervailing arguments favoring judicial enforcement of federalism limits on congressional power, albeit in different forms, see, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1 (1988) (courts should protect state government autonomy under Guarantee Clause); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 *Mich. L. Rev.* 554, 570 (1995) (courts should enforce limits on Congress's commerce powers where there is inadequate justification for federal, rather than state, regulation based on "general interests of the union" or on state incompetence).

federal law, but it also casts doubt on the federal courts' authority to vindicate federal law through equitable relief against state officers. It is thus fundamentally inconsistent with the tradition behind *Marbury v. Madison*'s assertion that the existence of a right implies a remedy and with the important roles of courts in providing access to justice for individuals not organized into the group coalitions needed for effective legislative advocacy. It is, further, inconsistent with the federal courts' role in enforcing federal law against occasionally recalcitrant states, a function helpful to maintaining a unified nation. Because the text, history, and purpose of the Eleventh Amendment can reasonably be read to confine its operation to claims asserted under diversity heads of jurisdiction, state sovereign immunity should be given a narrow, and not an expansive, reading.¹⁷⁶ *Seminole Tribe*, in short, should be abandoned—as quickly as possible.¹⁷⁷

¹⁷⁶ Professor Vázquez has recently argued that the Court may be moving towards understanding Eleventh Amendment immunity as an immunity from liability, in addition to an immunity from federal jurisdiction. See Vázquez, *supra* note 29, at 1714-44. While I agree that some language in *Seminole Tribe* and other opinions suggest that states may have some sovereign immunity in their own courts, and that these in turn could be read as consistent with an "immunity from liability" understanding, I disagree that the Court does, or should be encouraged to, understand the Eleventh Amendment in these terms.

In several cases in the last century, where the possibility of states having a constitutional immunity from being sued in state courts, either on state or federal claims, has mattered, the Court has explicitly rejected the claim of immunity, see *Nevada v. Hall*, 440 U.S. 410 (1979) (no immunity for state sued in the courts of another state), or decided the case in a way strongly inconsistent with the existence of such an immunity, see *General Oil v. Crain*, 209 U.S. 211 (1908); see also *Reich v. Collins*, 115 S. Ct. 547 (1994); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (FELA claims may be brought in state court even though statute did not abrogate Eleventh Amendment immunity in federal court); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); cf. *Will v. Michigan*, 491 U.S. 58 (1989) (treating states' claimed immunity from federal liability as one that Congress could overcome). While these cases may not squarely establish that a state may not withhold consent to being sued in its own courts on a federal claim (in the face of either congressional directive or constitutional exigency), they come much closer to the position that the Eleventh Amendment immunity is one to the jurisdiction of the (lower) federal courts than they do to Professor Vázquez's position. Moreover, because I see Professor Vázquez's proposed alternatives, while intriguingly thoughtful, as unlikely and somewhat impracticable, see Vázquez *supra* note 29, at 1766-67, 1770-85, 1795 (suggesting reinterpreting *McKesson* to require relief against state officials and enactment of legislation limiting official immunities from damages currently enjoyed by such officers), I view positive arguments that the Eleventh Amendment should be regarded as conferring an immunity from liability (in addition to a jurisdictional immunity in the federal courts) as a step in the wrong direction in terms of the accountability of government to laws and the effective exercise of national power.

¹⁷⁷ The Court has been sufficiently inconsistent, and divided, on the question of what the Eleventh Amendment means, that it is unlikely that the battle is finally concluded. Under the *stare decisis* theory of the Chief Justice (who wrote *Seminole Tribe*) the decision should, as yet, be accorded little, if any, *stare decisis* effect. See *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991) (degree of controversy within Court, closeness of decision, and decision relating to procedural issues all weigh against according *stare decisis* protection to

Seminole Tribe is just one of several expressions by the Court of a set of intuitions—judicial feelings—that the balance of power between state and federal governments needs adjustment. The Eleventh Amendment has the attraction of being an apparently easy hook on which to hang these intuitions. But the amenability of states and their officers to judicial remedies for violations of federal law is the wrong place to express constitutional angst, not only because the specificity of the text is inconsistent with the Court's broader claims, but also because the Court's current interpretation is inconsistent with basic principles of the Union, including the coextensiveness of judicial with legislative power, and undermines the capacity of the federal courts to support the Rule of Law.

constitutional decision). All three of these factors are present in the *Seminole Tribe* Court's resolution of Congress's power to abrogate states' immunity from suit.

Seminole Tribe itself was a closely divided decision, on a jurisdictional issue, in an area of great controversy. The Court has struggled with the problem of state sovereign immunity since the early nineteenth century. The party of record rule articulated in *Osborn* and relied upon in its strongest form as recently as *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872), was limited in *In re Ayers*, 123 U.S. 443, 487-92 (1887), which was in turn limited by *Ex parte Young*, 209 U.S. 123 (1908). Some 80-odd years of Eleventh Amendment law, as well as pendent jurisdiction and prudential preferences for adjudication of cases on state law grounds as in *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 193 (1909) (resolving case on state law grounds and thus avoiding unnecessary federal constitutional decision), were swept aside in *Pennhurst State School & Hospital v. Halderman (Pennhurst II)*, 465 U.S. 89, 124-25 (1984), when the Court introduced the novel holding that the Eleventh Amendment precluded even prospective injunctive relief on state law claims.

With respect to Congress's express power to subject states to suit, in *Parden v. Terminal Railway*, 377 U.S. 184, 190 (1964), the Court held that a state was covered by the Federal Employers Liability Act (FELA) and that the Act could constitutionally be applied to the states in litigation in federal court. In *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973), the Court held that while the Fair Labor Standards Act (FLSA) applied to states substantively, the states could not be sued by employees in federal court because there had not been a sufficiently clear statement by Congress of its intent to permit such suits. *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 476-78 (1987) (Powell, J., announcing judgment of Court), overruled *Parden's* statutory holding, finding that FELA did not speak with sufficient clarity to abrogate state's immunity from suit in federal court, and neither did the Jones Act (which was modeled on FELA). In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), the Court affirmed Congress's power under the Commerce Clause to subject states to liability in federal courts. Scholars argued that *stare decisis* should not prevent the overruling of *Hans v. Louisiana*, 134 U.S. 1 (1890), or the rejection of the constitutional theory for which it stood. See Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. Chi. L. Rev. 1260 (1990) (while *Hans* may have made sense under regime of *Swift v. Tyson*, 41 U.S. 1 (1842), under modern post-*Erle* regime, *Hans's* application to bar federal question suits against states should be disavowed); see also Jackson, *supra* note 29, at 119-26 (overruling view that Constitution requires state sovereign immunity need not drastically change district court jurisdiction but would make existing law more coherent). Instead, by reversing *Union Gas*, the Court has now extended *Hans's* effect.

POSTSCRIPT

As this was going to press, the Court decided *Idaho v. Coeur d'Alene Tribe*.¹⁷⁸ By the same vote as in *Seminole Tribe*, the Court held that the Eleventh Amendment precluded prospective relief against state officers interfering with alleged tribal property rights in submerged lands. Notwithstanding claims under federal law and the prospective aspect of the relief sought, five Justices agreed that this was the functional equivalent of a quiet title action against the state, particularly since the relief sought would preclude exercise of state regulatory authority over submerged lands.¹⁷⁹

Justices Kennedy and Rehnquist would have substantially modified *Ex parte Young* by applying a case by case balancing test under which, inter alia, availability of a state forum would weigh against federal jurisdiction and "special factors counselling hesitation," in implying constitutional damage claims would also be considered.¹⁸⁰ Justices O'Connor, Scalia, and Thomas disagreed, as did the four dissenters.¹⁸¹

The majority opinions suggest that while *Seminole Tribe's* hints of change in the *Ex parte Young* doctrine may have been intended by some members of that Court, a majority is not prepared to endorse a major shift in articulated doctrine. Although *Coeur d'Alene's* reasoning may be limited to its particular context, the majority has shown a willingness in applying *Ex parte Young* to narrow its availability, having twice in two Terms denied apparently prospective relief against state officers to vindicate federal law.

¹⁷⁸ 1997 U.S. LEXIS 4030 (June 23, 1997).

¹⁷⁹ See *id.* at *36-*39, *47; *id.* at *49-*50 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁸⁰ *Id.* at *17-*35 (discussing *Seminole Tribe's* citation of *Schweiker v. Chilicky*, 487 U.S. 412 (1988) and quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)); see *supra* text accompanying notes 128-42, 146-48, 158-59.

¹⁸¹ See *id.* at *53-*63 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at *86-*99 (Souter, J., dissenting).