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Seminole v. Florida

THE WHITE HOUSE

WASHINGTON

March 31, 1996

MEMORANDUM FOR HAROLD ICKES

FROM: ELENA KAGAN *EL*
CC: JACK QUINN, KATHY WALLMAN
SUBJECT: SEMINOLE TRIBE V. FLORIDA

Kathy Wallman asked me to give you a brief summary and analysis of the recent Supreme Court decision in Seminole Tribe v. Florida. In that case, the Court invalidated, as an incursion on state sovereignty, a provision of the Indian Gaming Regulatory Act (IGRA) permitting tribes to sue States in federal court for failing to negotiate in good faith toward the formation of gaming compacts. The practical significance of the decision for Indian gaming is very uncertain. Also uncertain is the effect of the decision on other kinds of enforcement actions brought against the States.

Background and holding

IGRA provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. The Act imposes on the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty.

In accordance with the Act, the Seminole Tribe sued the State of Florida for refusing to engage in good-faith negotiations over a gaming compact. The State argued that the suit violated its Eleventh Amendment right to sovereign immunity from suit in federal court.

The Court accepted the State's argument, reversing a recent decision to hold that neither the Commerce Clause nor the Indian Commerce Clause grants Congress the authority to abrogate the sovereign immunity of the States. Thus, Congress cannot subject a State to private suit in federal court for violating a statute (like IGRA) enacted pursuant to the Commerce Clause or Indian Commerce Clause.

Implications for Indian Gaming

As a preliminary matter, it should be noted that Seminole Tribe has no effect at all on already existing gaming compacts. Nor does it prevent willing States from entering into compacts in the future. The decision makes a difference only when a State and tribe have reached impasse regarding a compact.

It is unclear, however, exactly what difference the decision makes. One possibility is that the tribe now has no recourse at all when a State refuses to negotiate in good faith; on this understanding, the State's obligation to engage in good-faith negotiations, which is at the very heart of IGRA, becomes wholly unenforceable. A second, very different possibility is that the tribe now has the ability to go straight to the Secretary of the Interior for a remedy; with the federal courts out of the picture, the Secretary himself determines whether a State has acted in bad faith and, if so, what remedy (up to and including the imposition of compact terms) is appropriate. Doubtless there are other possibilities in between these two.

The Department of Interior is currently considering what view to adopt on this issue. Interior believes that in the next few months, several tribes will allege bad faith on the part of States and petition the Secretary for relief. Interior intends to present an options paper to the White House this week on what to do in such cases: whether to set up a remedial mechanism within the Department to handle allegations of this kind, and, if so, how that mechanism would operate.

Broader Implications

The Court's holding potentially affects any private suit brought against a State in federal court that alleges a violation of a statute enacted under Congress's Commerce Clause power. For example, the decision may bar an individual from suing a State in federal court for violating environmental laws, antitrust laws, or copyright and patent laws. Some of these laws will remain enforceable by individuals in state court, subject to whatever sovereign immunity defenses the state court chooses to recognize. But some of these laws give exclusive jurisdiction to the federal courts, so that no alternative forum is available.

In many cases, however, there will be ways around the Court's ruling. First, Congress can condition the receipt of federal monies on a State's submission to suit in federal court. At least arguably, some current statutes authorizing citizen suits do so through exactly this mechanism; private suits brought in federal court under these statutes thus could go forward. Second, an individual usually can bring suit for injunctive relief against officials acting on the State's behalf, even if not against the State itself. The Court ruled that this option was not available in Seminole because by prescribing a detailed remedial scheme in IGRA, Congress implicitly had disallowed suits against state officials. But when a law does not create such a detailed remedial scheme -- and certainly when a law explicitly authorizes suits against state officials -- such suits provide a way to escape the Court's new understanding of the Eleventh Amendment.

Moreover, the Court's holding does not apply at all to actions against a State alleging a violation of the Fourteenth

Amendment or civil rights statutes enacted to enforce it. The Court reasoned that the Fourteenth Amendment, in any cases in which it applied, effectively overrode the Eleventh Amendment.

The Court's decision nonetheless has broad significance. The decision will doubtless stand in the way of at least some citizen suits brought to enforce federal law (as it barred the Seminoles' own lawsuit). And the decision, especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools, indicates a serious effort by a bare majority of the Court to reorient the balance of power between the federal government and the States. It is highly unlikely that this case will be the last one to pursue that states'-rights agenda.

JEFF POWELL

Wilder

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US sue on behalf of tribes.

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Lurching Toward States' Rights

A headstrong five-justice majority is driving the Supreme Court toward a revolutionary, indeed reactionary, interpretation of federalism, tilting the balance dangerously toward states' rights at the expense of Federal power.

By a 5-to-4 margin, Chief Justice Rehnquist and four of his colleagues upheld a lower court ruling that the 11th Amendment barred the Seminole Indian tribe from suing the state of Florida in a dispute over gambling on Seminole land — even though Congress, in 1988, explicitly permitted such suits. The Court has now raised high barriers against citizens' use of the Federal courts to force states to abide by national laws enacted under the Commerce Clause, which underlies much of modern Federal regulation on the environment, public safety and other areas.

The decision follows last year's surprising ruling that Congress lacked authority under the Commerce Clause to prohibit firearms near public schools. It also repudiates the Court's own 1989 ruling that allowed citizen suits under the Superfund law to force states to pay their share of pollution cleanup costs.

For generations, the Court has given Congress broad discretion to regulate interstate and foreign commerce, as provided in the Constitution. In so doing, it honored the Constitution's original design

for shared Federal-state governance while insuring a common national market unencumbered by tariff walls and other gatekeepers at each state boundary.

That honorable design may not survive this Court, whose right wing, which has sought to roll back established civil liberties and diminish women's rights, is now busily searching for cases that will challenge the Federal role.

One result may be that, with citizen suits removed from the equation, the Federal Government may find itself obliged to police every such law Congress enacts, straining national resources and damaging the rule of law by limiting enforcement. In legal terms, the decision represents an inflated reading of the 11th Amendment, on which the Chief Justice based his majority opinion. Read literally, the amendment bars lawsuits against states by outsiders and foreigners. As interpreted by the Chief Justice, it appears to close the courthouse to any private plaintiffs, including a state's own citizens.

Joining the Chief Justice were Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas. The dissenters were John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer. They have tried to preserve 50 years of settled concepts of Federal supremacy and, regrettably, they are failing.

will happen here?

How about
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Explicit link
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1st pt -

The Mayor's New Police Commissioner

For those steeped in the proud and insular traditions of New York City's uniformed services, Mayor Rudolph Giuliani's decision to appoint the Fire Commissioner as head of the Police Department must have seemed a little like naming an admiral to run West Point. But Fire Commissioner Howard Safir, who still has a business and family home in Maryland, is not actually aligned to either service. His career has mainly been in Federal law enforcement. He is above all else a trusted Giuliani loyalist whose friendship with the Mayor goes back more than 20 years.

The Mayor is gambling that crime will continue to fall under the low-profile Mr. Safir's watch, making it crystal clear that Rudolph Giuliani, not outgoing Police Commissioner William Bratton, was the city's top crime fighter. If murders, robberies, rapes and car thefts start to climb, the public may conclude that the Police Department's accomplishments were Mr. Bratton's doing, and that things went wrong because Mayor Giuliani could not bear to share credit with him.

Mr. Safir's appointment will not please many of the Police Department's top officers, some of whom had hoped to get the job themselves. The rank-and-file officers were unhappy already; they are working without a contract, and the Giuliani administration for the first time is making cuts in the number of uniformed personnel.

Mr. Safir's first challenges will be to form a new top management team that works as effectively as Mr. Bratton's did, and to resolve the contract dispute in a way that increases pay, particularly for the least experienced officers, without busting the city budget. The best way to do this would be through productivity gains such as one-man police cars in the city's safest neighborhoods and greater use of civilians for desk jobs.

But Mr. Safir's record on productivity in the Fire Department is not reassuring. He resolved the longstanding problem of excessive overtime by working out a deal in which the city agreed to restore five-man fire trucks in return for a reduction in sick time. The fact that Mr. Safir was willing to give up the four-man truck — one of the major productivity gains of the Koch administration — in order to get firefighters to refrain from calling in sick unnecessarily is in part a tribute to the special hold the firefighters have on the Mayor's affections. But Mr. Safir will need to be tougher in dealing with the larger, more expensive police unions.

The new Police Commissioner will also have to press forward with the department's new strategies for cutting drug sales, and beating back sudden increases in crime in neighborhoods like Park Slope and Riverdale. If he succeeds, he will undoubtedly insist that all the credit go to Mayor Giuliani — and the Mayor will probably deserve it.

Editorial Notebook

Are the Mad Cows Bad Cows?

Mad cow disease may destroy the British beef industry, topple the Government of John Major and slow the push toward European cooperation. But the most maddening thing about this waning animal epidemic is the great uncertainty about whether it poses a major or trivial threat to the health of those eating British beef.

For years the British Government insisted that there was no risk to human health. But last week, in a shocking reversal, an expert advisory committee said that mad cow disease may be "linked" to a handful of atypical cases of Creutzfeld-Jakob disease, a rare and fatal brain disease that strikes one in a million people. Since then, the authorities have been furiously backtracking and experts have been alternately reassuring and alarmist, reflecting the dearth of scientific knowledge about what is going on.

The disease in cattle, known technically as bovine spongiform encephalopathy, or B.S.E., was first identified in 1986. It turns the brain into a spongelike or Swiss-cheese consistency, causing loss of coordination, dementia and death. The disease has struck a small but significant slice of Britain's 11 million cattle. The great majority were dairy cows, whose milk is not deemed a transmission route, but perhaps 20 percent were beef cattle.

The best guess is that cattle got the disease by eating feed that was fortified with the ground-up remains of sheep that have long suffered from a similar brain disease known as scrapie. Such feed has been used for decades, but in the early 1980's the preparation process was changed, possibly allowing contamination. Whatever the cause, cases of B.S.E. in cows began to soar, reaching a peak of 37,000 in 1992.

Though British authorities have been charged, in hindsight, with moving too slowly, they did institute protective measures. They ordered the slaughter and incineration of any cattle with symptoms of B.S.E. and banned the use of sheep and cattle remains in animal feed. Perhaps most important, in 1989 they banned cattle brains, spinal cords and other organs that can harbor the infectious agent from entering the human food supply, lest they contaminate, for example, the ground beef in burgers or meat pies.

These measures seemed to work. The number of B.S.E. cases fell sharply, from a peak of about 1,000 a week in January 1993 to fewer than 300 a week currently, with most of the illness concentrated in older cows that may have contracted it before the protective measures took full effect.

But just when the cattle epidemic seemed to be under control, there came a worrisome hint of human

Or Will the Chickens Come Home to Roost?

health problems. The British had tightened surveillance of Creutzfeld-Jakob disease, and last week an expert committee concluded that the surveillance had picked up a disease pattern never seen before. Ten of the Britons who developed Creutzfeld-Jakob over the past two years had brain pathology that looked different from the typical case, and they were far younger than the typical elderly victim. The committee could find no adequate explanation for these strange cases. So, "in the absence of a credible alternative," it concluded that "the most likely" explanation was exposure to beef in the years before the 1989 ban on risky organs in the food supply. The disease has a long incubation period, so cases appearing now would have been contracted many years ago.

What made the pronouncement especially scary was an ominous sentence — "This is cause for great concern" — that seemed to abandon the usual scientific caution. But the truth is, nobody has the vaguest idea whether Britain is at the opening stage of a frightening epidemic or whether there will be few if any more cases.

Indeed, it is startling to realize what a frail scientific base has led toward such momentous consequences for Britain and its beef industry. The current crisis stems from concern about 10 cases of human disease whose pathology seems distinctive. That difference may be a clue that something new and frightening is happening — or the pattern may have been there all along and only found now because the British have been looking harder than anyone else.

There is still no scientific evidence that beef can transmit brain disease to humans, and some experts even speculate that chickens or pigs, which continued to be fed ground-up sheep brains until recently, might conceivably have transmitted the infection to humans. What a tragedy if Britain destroyed its cattle herd only to find later that the real culprit was a different animal.

There is no easy way out of this maze of uncertainties. To restore confidence, the British will need to get B.S.E. out of its cattle or at least out of the animals used for food. They will probably end up destroying segments of the herd deemed most likely to be infected in an effort to convince consumers there is no risk from the remainder. But the surest answer might be a diagnostic test — one is said to be nearly ready — that could identify which cattle are infected and which are not.

Meanwhile, consumers are registering their own opinion by shunning British beef. Some top scientists involved in the investigations consider this an overreaction. But this is an area where it is hard to act purely from reason.

PHILIP M. BOFFEY

Seminoles and State Sovereignty

FORGET, FOR A moment, that the important case decided by the Supreme Court on Wednesday was about gambling on Indian reservations. That is a subject of such great public interest that it is tempting to consider the case in terms of how many casinos will soon be set up in which states. But the ruling goes far beyond that subject and has implications for state-federal relations that are not yet clear. At the very least, it is a broad victory for those who believe the federal government has been encroaching on the prerogatives of the states in a manner never contemplated by the Founders.

Pursuant to a federal statute enacted in 1988, the Seminole Tribe entered into negotiations with the state of Florida on the terms and conditions under which the tribe would operate casinos in that state. When the negotiations proved unproductive, the Seminoles—again acting under the provisions of the federal statute—sued the state to force an agreement.

The 11th Amendment to the Constitution, which limits the jurisdiction of federal courts to hear suits by individuals against states, has traditionally been interpreted as reinforcing the sovereign immunity of each state, i.e., its right to be immune from suit without its consent. It was this amendment the court cited to strike that part of the federal statute authorizing tribes to sue states. The court held that Congress cannot

abrogate this right of states even to allow action to enforce federal rights. This holding required the justices to reverse a ruling made only eight years ago in which a badly divided court allowed such suits under certain circumstances.

Indian tribes are not without alternatives. They can bring their complaints about state intransigence to the secretary of the interior, who has ultimate responsibility for Indian affairs. Nor will the enforcement of civil rights laws be affected, since they are based on the 14th Amendment, which superseded the 11th Amendment on the matter of suing states. But other federal laws grant individuals the right to sue states for denial of federally guaranteed rights—environmental statutes, for example, and those relating to copyright. If the states are protected from suits in these areas, Congress will have to consider other methods of enforcing federal laws, such as withholding federal funds unless permission to sue is granted.

The details of how these questions of federalism will play out are uncertain. But the determination of five justices to protect the rights of states grounded in those amendments to the Constitution, largely ignored until recently, is clear. The slim margin and strong dissent in this case provide reason to believe that the sorting out will not be completed soon.

Under Congress' bill, doctors who performed the procedure could be fined up to \$250,000 and sentenced to prison for up to two years. The bill also would permit a father, if married to an under-age mother, to bring a lawsuit against a physician who performed the procedure. The maternal parents of an unwed mother under 18 would have the same right.

(EDITORS: STORY CAN TRIM HERE)

These civil actions, abortion rights lobbyists complain, are intended to deter physicians from providing such services and could lead to tragic consequences in cases that could readily be justified on medical grounds.

The wrenchingly emotional debate Wednesday sparked a chorus of rhetoric from anti-abortion members who portrayed the procedure in the grisliest terms.

Using a large chart that starkly diagrams the procedure, Canady showed how the fetus is withdrawn feet-first with forceps through the birth canal with the head stopped just short of clearing the vaginal opening. There the doctor pierces the base of the skull, usually with surgical scissors, enlarges the wound, then inserts a strong suction to draw the fetal brain from the cranium. Once the brain is sucked out, the head collapses and the lifeless fetus is pulled from the woman's body.

"The difference between a partial-birth abortion and homicide is a mere three inches," Canady said.

Rep. Christopher Smith, R-N.J., called the procedure a form of "infanticide the baby is partially born. It is a gruesome form of child abuse that should be banished from this land."

Senate votes to give president line-item veto in spending bills By David Hess Knight-Ridder Newspapers(KRT)

WASHINGTON The Senate voted on Wednesday to hand over to the president a piece of the most precious gift bestowed upon Congress by the Constitution: the power of the purse.

The bill, which gives the president the equivalent of a line-item veto, is expected to pass the House later this week and go to President Clinton for his signature.

Rarely does Congress agree to give the president more power, but this bill does just that marking a historic shift in the checks and balances created by the Founding Fathers more than two centuries ago.

In so doing, lawmakers are tacitly acknowledging that they cannot control their appetites for spending on their own.

The measure, which the Senate approved on a 69 to 31 vote, would go into effect next year.

With the new power, the president could strike from spending and revenue bills passed by Congress many individual items he didn't like.

The president would be able to delete spending items as well as targeted tax breaks that benefit 100 or fewer taxpayers, and he could remove provisions that entitle groups of people to certain benefits.

In his 1997 budget proposal to Congress, for instance, President Clinton suggested a number of items that he would strip from defense spending if he had the authority, including \$140 million for purchasing Kiowa helicopters and \$9 million for Navy Fast Patrol crafts. Last year, among scores of items, the president objected to \$1.4 million for a National Swine Research Center at Iowa State University.

"Congress created the nation's \$5 trillion debt and now it's Congress' responsibility to fix it," said Sen. John McCain, R-Ariz., a sponsor of the bill.

But opponents, led by traditionalist Sen. Robert Byrd, D-W. Va., call the bill "a colossal mistake (that) we will come to regret."

Technically, the bill provides for a process known as "enhanced rescission." Lawmakers had to call it that because a pure line-item veto under which the president could simply strike out specific programs or projects in spending bills with little congressional recourse poses

serious constitutional questions.

The Founding Fathers gave Congress the power to make spending and taxing decisions because they didn't want a powerful head of state to dictate those priorities. As Byrd declaimed: "The power of the purse is the central pillar upon which the constitutional temple of checks and balances rests, and if that pillar crumbles, the temple will fall."

Under the enhanced rescission bill, a rather complicated procedure is set up to give the president more power over such decisions. Here's how it would work:

1. Congress would pass a spending (or tax) bill and send it to the president for his signature.

2. He could make a list of items in the bill he wanted rescinded and send it back to Congress.

3. Congress would then be obliged to either accept all or part of the president's rescissions or reject them and send the rejections, in a bill of disapproval, back to the White House.

4. The president would veto that bill and send it back to Congress.

5. Congress would either acquiesce in the veto or try to overturn it.

The president would almost always win this legislative badminton game because it takes a two-thirds majority in each house to override a veto. And Congress rarely musters the votes to prevail on veto overrides.

Understandably, both Republican and Democratic presidents from Ronald Reagan to Bill Clinton love the idea. They have said it would give the president a potent check on Congress' free-spending tendencies and put lawmakers on a diet from the pork barrel.

The 1996 Republican presidential nominee, Sen. Bob Dole of Kansas, is a prime mover of the bill. "It'll strengthen the president's hand in moving to a balanced budget," he said, hoping it will become a major weapon in his own arsenal if he wins the election.

The motive behind the Republican-controlled Congress' eagerness to surrender this power seems rooted not only in its desire to balance the budget but also in its need to compensate this election year for the failure of its agenda last year.

"Since they blew the end game on the balanced budget in 1995," said Thomas Mann, political analyst at the Brookings Institution, "they have to have some achievement to show voters in 1996. And this is something that President Clinton will let pass."

Dole and Clinton agreed that the bill should not go into effect until next Jan. 1 to keep it out of the politically charged presidential election campaign. By then, voters will have decided whether Clinton or Dole should be president next year.

Despite the compromise bill's roundabout route around the Constitution, critics say enhanced rescission is indistinguishable from a straight line-item veto because the result is exactly the same: more power ceded to the president.

"It gives a president a club which he can wield to beat members of Congress into submission in support of administration policies," Byrd said.

No president, he contended, could resist using the threat of stripping out a prized highway project or special tax break for a hometown industry in a bid to gain a balky congressman's support for one of the president's pet programs.

(EDITORS: STORY CAN TRIM HERE)

"Can you imagine Ronald Reagan not using it to pry more money from Congress for defense or the FBI?" said Mann. "It strains belief to think any president would not wield this power to influence Congress." An organization representing federal judges has also raised objections, warning that a president could use the power to pressure the judiciary.

But sponsors of the bill believe presidents would use the power sparingly lest Congress, in anger, reverse itself and take it back.

"What we're really doing here," said Rep. Porter Goss, R-Fla., "is making it harder for low-priority,

wasteful programs to slip through in massive spending bills that presidents find hard to veto. The bill says to Congress that if a president wants to line out certain items, Congress has to step up and defend them openly. It can't duck and hide."

And House Appropriations Committee Chairman Bob Livingston, R-La., whose jurisdiction would be most affected by ceding such power, said the bill would shift more of the onus for reaching a balanced budget to the president.

"Also," he said, "Congress is not exactly helpless in responding if the president abuses this power. The president needs Congress to get a whole lot of things done."

Besides, Congress has built a couple of escape hatches into the bill. For one thing, it automatically expires in eight years unless Congress votes to renew it. Congress also could vote to specifically exempt certain items from being rescinded simply by saying so in the original tax and spending bills before they're sent to the White House.

Supreme Court curbs people's right to sue states By Aaron Epstein Knight-Ridder Newspapers(KRT)

WASHINGTON Strengthening states' rights at the expense of Congress, the Supreme Court on Wednesday dramatically curbed the ability of people to sue states for violating many federal laws.

The potential impact of the court's extraordinary 5-4 ruling provoked dissenters to denounce the decision with such words of alarm as "shocking," "amazing" and "simply irresponsible."

The court used a dispute over Indian gambling to breathe life into the Constitution's dormant 11th Amendment, which shields states from being sued in federal courts against their will.

Congress violated the amendment by giving Native American tribes a federal right to sue states that refused to negotiate agreements on gambling on Indian lands, the court said.

The ruling is expected to slow, but not stop, the expansion of gambling casinos on Indian reservations, which has grown into a \$6 billion-a-year industry in 23 states and turned some Native American entrepreneurs into millionaires.

Despite state objections, tribes are entitled to seek approval of their gambling plans directly from the U.S. Department of the Interior, lawyers said. "States win, Congress loses and the tribes are still holding the cards," said Bruce Rogow, a law professor who represented Florida's Seminole tribe in the case.

But the impact of the decision reached far beyond casinos on reservations.

While civil rights enforcement against states was untouched, dissenter John Paul Stevens said the ruling would prohibit federal suits to enforce environmental, antitrust, bankruptcy, copyright, patent and other federal laws against the states.

Chief Justice William H. Rehnquist, who wrote the majority opinion, called Stevens' conclusion "exaggerated," saying that other methods of ensuring state compliance with federal law remained.

William Van Alstyne, a Duke University law professor who specializes in constitutional law, said Congress could get around the ruling by revising affected laws to authorize suits against state officials rather than state governments.

"In a larger sense," he added, "this case certainly is significant because it indicates the court majority tends to take seriously the boundaries (of federal power)."

In fact, it was the second time in less than a year that the court's most conservative members Rehnquist, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas had curbed the power of Congress over interstate commerce.

Last April, in an identical 5-4 split, the justices

ruled that Congress had exceeded its authority by barring anyone from carrying a gun near a school.

Taken together, the decisions signal a sharp retreat from the court's longtime willingness to endorse the expanding power of Congress to regulate a vast array of commercial activities.

The decision issued Wednesday by Chief Justice Rehnquist resolved a conflict between the U.S. Indians Gaming Regulatory Act of 1988 and a little-known constitutional amendment that has been a rallying cry for states-rights advocates.

The act requires states to negotiate "in good faith" with the tribes over gambling on Indian lands and authorizes the tribes to sue states that refuse to do so. Many states reached agreements with tribes, but Florida, Alabama, Washington, Oklahoma, Kansas and Montana resisted.

"Congress could have done this without the states," said Howard Dickstein, a Sacramento lawyer representing California tribes. "By cutting the states in, Congress ran into trouble."

The Seminole Tribe of Florida, which started the Indian gambling boom by opening a high-stakes bingo hall in 1979 on their reservation near Hollywood, Fla., sued the state and its governor, Lawton Chiles.

A federal appeals court upheld Florida's contention that the suit was barred by the 11th Amendment, a ruling narrowly affirmed Wednesday by the Supreme Court.

The amendment provides that "the judicial power of the United States shall not be construed to extend to any suit ... against one of the United States" by citizens of another state or a foreign country.

The Supreme Court has interpreted the amendment to mean that each state is "a sovereign entity" and cannot be sued by an individual unless the state consents, usually by law.

But historically, the court made two exceptions. One exception, which stems from the 14th Amendment and remains intact, allows individuals to seek remedies in federal court against states that allegedly violated their rights to life, liberty, property and equal protection of the laws.

The second exception, announced by a more liberal court in the 1989 case of Pennsylvania vs. Union Gas Co., gave Congress the power to override state sovereignty in commerce-based laws, thus making the states susceptible to damages for disobeying such laws.

On Wednesday, Rehnquist obliterated the commerce exception, reasserted the underlying principle of state sovereignty and concluded "that Union Gas was wrongly decided and that it should be, and now is, overruled."

Even when Congress has complete law-making authority over a subject, such as Indian commerce, "the 11th Amendment prevents congressional authorization of suits by private parties against consenting states," Rehnquist said.

Responding to Justice Stevens, Rehnquist said the court had not impaired the federal government's authority to bring a suit in federal court against a state, nor the right of an individual to sue a state official instead of the state itself.

(However, in the Indian gambling case, Seminole Tribe vs. Florida, Rehnquist barred a suit against Gov. Chiles because the Indian gaming law has an unusual enforcement mechanism.)

"All pretty cold comfort," replied Justice David H. Souter, who read from the bench excerpts of a historically based dissent that ran 92 pages, three times the length of the chief justice's majority opinion.

"The majority's position ignores the importance of citizen-suits to enforcement of federal law," declared Souter, who was joined by Ruth Bader Ginsburg and Stephen Breyer.

Stevens attacked the majority's allegiance to sovereign immunity, an ancient English legal doctrine based on a belief that "the king can do no wrong." That belief "has always been absurd" and has no place in a democratic society, he said.

(STORY CAN END HERE)

to one of those believed to be at the ranch, Dale Jacobi, who formerly owned a business near the militia's headquarters in Noxon.

But he said militia members were concerned by rumors that military troops would be enlisted in the standoff.

"We've got rumors of military involvement, and that better not be, because that changes the whole character of things," he said.

FBI officials refused to discuss what agencies were involved or how many units had been dispatched.

The 930-acre wheat ranch owned by freemen leader Ralph Clark lies about 40 miles northwest of Jordan, itself the most remote town in a state known for its wide, open spaces.

Visitors to the freemen's self-declared "Justus Township" were warned away by armed patrolmen. One television crew had its camera seized by the militants, who have declared themselves exempt from local and federal law and answerable only to the Constitution.

(Optional add end)

The standoff brings to a head more than a year of tension and bafflement in nearby Jordan, where the militant freemen have placed \$1 million bounties on the local sheriff, county prosecutor and judge and filed harassment liens against the properties of various government officials and citizens after the government enforced the bank foreclosure on Clark's ranch several years ago.

"They threatened to take over my personal possessions, my personal property, my real property, including anything my husband owned," said Garfield County Clerk Joanne Stanton, who had to process hundreds of legal filings under the freemen's self-declared common law court system. "There were always these little digs 'proceed-at-your-own-peril.' Failure to do as they ordered would cause harm."

The freemen threatened to hang Garfield County Sheriff Charles Phipps from a bridge for "common law crimes" connected to the foreclosure of the farm where Clark was born.

In one phone call last year to county officials, an unidentified caller said: "Just be forewarned, because you've really bitten off more than you can chew." Freemen members arrested in a nearby county were found with a map of Jordan, including the location of the county attorney's office and home.

Agents Seize Litton Records for Billing Probe (Los Angeles) By Aaron Curtiss and Ralph Vartabedian= (c) 1996, Los Angeles Times=

LOS ANGELES Federal agents seized thousands of records from the headquarters of defense contractor Litton Industries Wednesday as part of a criminal investigation into allegations of fraudulent billing on government contracts, authorities said.

About 40 investigators from the Defense Criminal Investigative Service, or DCIS, the FBI and the Air Force descended on the Litton complex in suburban Woodland Hills Wednesday morning and hauled away a decade's worth of documents related to billing by the company's guidance and control division the unit that produces specialized navigation equipment used in military planes and ships.

"This is a real sensitive case we have right now," said DCIS spokesman Al White, who declined to comment on specifics of the raid. "I can say we are executing a warrant and conducting a criminal investigation."

A senior federal law enforcement official said the investigation is attempting to determine whether Litton engaged in a practice of improper billing, based on evidence that the company had inflated prices on certain contracts.

"We are trying to determine whether there is a broad practice that crosses lines of business," said the official, who asked not to be identified.

sealed lawsuit under the federal False Claims Act, which allows individuals to sue a contractor on behalf of the government and share in any damages that are won.

The suit, filed in federal court in Los Angeles, is believed to allege that Litton officials arbitrarily inflated contract bids for defense work, according to an official knowledgeable about the case. The practice of inflating bids is not allowed under federal acquisition regulations since all bids are supposed to be supported by actual cost data.

Litton spokesman Robert Knapp said he was unsure what agents wanted, but acknowledged that their efforts were focused on billing records. "You have to assume it has to do with pricing or contracts," Knapp said.

(Optional add end)

Litton's guidance and control division is one of the largest units in the company's electronics group, which accounted for more than half the company's \$3.32 billion in revenue in its fiscal year ended July 31. Its other major business segment is military shipbuilding.

The division makes navigation systems used in virtually every type of military aircraft, as well as in ships, land vehicles and missiles. Its newest guidance systems, for instance, combine laser gyros and star-tracking technologies to allow missiles to fly with extremely high accuracy for thousands of miles.

In one of the largest whistle-blower settlements in history, Litton agreed in July 1994 to pay \$82 million to resolve allegations that it overcharged the government for computer work on defense contracts. That case also was filed under the federal False Claims Act by a former Litton data systems analyst, who alleged that the company used illegal accounting techniques to charge the Pentagon for data-processing costs that should have been borne by commercial customers.

Presidential Race Now Turns Into a Referendum on Clinton By Ronald Brownstein= (c) 1996, Los Angeles Times=

For the last seven weeks the Republican primary campaign has been largely a referendum on the front-runner Sen. Bob Dole. Now, with the nomination in hand, Dole moves into a contest that will be principally a referendum on his opponent President Clinton.

For months, Dole has worked to sell himself an uncompleted task that remains central to his ultimate success. But over the next eight months, Dole's most critical task will be to convert voters who now seem inclined to give Clinton a second term.

Traditionally, presidential elections have turned more on assessments of the incumbent than on the challenger. And over the past year, the assessment of Clinton has grown increasingly positive.

In fact, since last November, Clinton has, for the first time in his presidency, consistently pushed his approval rating above 50 percent. In the past, something has always seemed to cause Clinton to sink just when he appears to be strong. But if Clinton this time can sustain his current level of support through the summer, the history of presidential elections over the past half century suggests he is a strong favorite for re-election no matter what voters come to think about Dole.

"We treat this like it is a race between two men, but that comes very secondarily," says Guy Molyneux, a Democratic pollster. "The first question voters ask is: do we want the guy we have to get the job again?"

Polls and interviews alike suggest that relatively few voters who believe Clinton is doing a good job are likely to vote for Dole on the theory that he would be even better. If anything, the pervasive skepticism about politicians may make many Americans even more reluctant to trade a devil they know for one they don't unless they consider the incumbent devil unacceptable.

with the court's opinion.

one of the most significant decisions ever on
" said California Assistant Attorney General
ede, who had filed a friend-of-the-court brief on
the state and 30 others. "It reasserts the
role for the sovereign states."

(end optional trim)

The justices took on the case, *Seminole Tribe vs. Florida*, 94-12, because of a recurring dispute over gambling on Indian reservations.

Wednesday's ruling does not resolve that legal muddle. While the court agreed the states cannot be hauled into federal court to negotiate with the tribes over gambling, it did not make clear who has legal authority to regulate tribal gaming.

(Optional add end)

In California, tribes are operating casinos in defiance of the state, and federal officials have refused so far to intervene.

Instead, the high court used the case to make a statement about a state's authority.

"This is a case about the basic structure of government," said Washington attorney Richard G. Taranto, who filed a brief on behalf of the National Governors Association. "There are five justices who care deeply about the states having a strong independent role."

A Justice Department attorney who read the opinion said it was unclear whether it would have a broad, practical impact. Only a few laws encourage citizen suits against the states. It is also possible Congress could rewrite these laws to direct the suits against state officials, rather against the state itself.

*a condition
spending*

Energy Secretary Agrees to Halt Foreign Trade Missions (Washn)By Alan C. Miller= (c) 1996, Los Angeles Times=

WASHINGTON Faced with continuing criticism of her expensive foreign travel as well as an ongoing investigation, Energy Secretary Hazel O'Leary has agreed not to undertake any new international trade missions until her department resolves well-documented problems in arranging overseas trips.

O'Leary also has ordered new procedures for approving and planning international travel throughout the department, pending the outcome of an inquiry by Energy's inspector general. These measures are meant to improve accountability and cost-efficiency.

"Unfortunately, I have now concluded that the department has not addressed all of the problems which have been identified over the course of both internal and external reviews," O'Leary said in a March 13 letter to Rep. Joe Barton, R-Texas, chairman of the Commerce subcommittee on oversight and investigations, which is holding a series of hearings on O'Leary's travel and management record.

In the panel's latest session on Wednesday, several Energy employees complained that employees were being furloughed and merit-pay bonuses suspended in the wake of O'Leary's globe-trotting. The department's chief financial officer, Joseph F. Vivona, contended there was no connection, however and blamed the salary and benefit reductions on congressional budget cuts.

O'Leary has come under fire for her 16 foreign trips and her penchant for large entourages, four-star hotels and luxury airline travel. Most controversial have been four high-profile trade ventures to India, Pakistan, China and South Africa intended to bolster U.S. business and security interests abroad that cost taxpayers about \$2.6 million.

O'Leary has defended her trips as justified by her international responsibilities and the Clinton administration's goal of expanding foreign opportunities for U.S. companies. But she has had her wings clipped following a public outcry over the scope and style of her

journeys.

(Optional add end)

Inspector General John C. Layton, who began a probe of O'Leary's foreign travels three months ago, has interviewed more than 200 individuals who arranged and participated in the trips and has identified another 300 potential subjects, a spokeswoman said. He has set a July 1 target date to complete his inquiry.

Layton told Barton's subcommittee earlier this month that his investigation which was initiated at O'Leary's request in response to a December story in the *Los Angeles Times* has been handicapped by departmental records that make it difficult to determine who went on the trips and how money was spent on them. He described Energy's travel books as "a mess."

Layton also criticized O'Leary for continuing to conduct trade missions even though the department failed to implement all the reforms that he had recommended in a 1994 report. These included establishing formal procedures for acquiring international air services and a systematic process for recouping flight costs from business executives and other nongovernmental trip participants.

Energy spokeswoman Carmen MacDougall said Wednesday that, with the adoption of new interim international travel procedures, Energy has incorporated each of Layton's 1994 recommendations, as well as concerns expressed by the General Accounting Office. A GAO review, conducted after two of the trade missions, documented lax accounting procedures.

Nevertheless, MacDougall said that a proposed Latin American trade mission sometime this year has been shelved in the wake of the travel controversy and budget constraints.

Militia Calls for Calm in Freeman Standoff With Government(Jordan)By Kim Murphy= (c) 1996, Los Angeles Times=

JORDAN, Mont. Militia leaders issued an appeal for calm Wednesday as anti-government activists began trickling into central Montana in support of a dozen armed "freemen" in their 3-day-old standoff with state and federal law enforcement agents.

As a soft, wet snow fell on the dreary Buttes around the freemen's remote ranch, the Militia of Montana said it had sent representatives to the bustling tent city of law enforcement agents several miles outside the ranch to try to help negotiate a peaceful surrender.

"We're working with the FBI, trying to get a peaceful solution," David Trochmann, spokesman for the Militia of Montana, said in an interview.

"I'm definitely concerned right now. We have to all keep cool heads. ... They're all concerned, they're afraid there's going to be another Waco up there. We're trying to shut them down. We're telling them we don't need any more (men) than we have right now."

Militia leaders and law enforcement officials said they hoped to avoid a repeat of the sieges at Waco, Texas, and Ruby Ridge, Idaho, when similar standoffs against heavily armed activists ended in violence.

Federal, state and local law enforcement officials so far have maintained a low-key presence, gathering resources several miles away from the freemen ranch while attempting to negotiate a surrender of 10 suspects named in federal indictments unsealed this week.

Two men, LeRoy Schweitzer and Daniel Petersen Jr., were arrested without incident Monday when FBI agents lured them out of the ranch house.

"We believe there are 10 other indicted parties possibly at the site, but we can't confirm those 10 people are there," said FBI spokesman Ron VanVranken.

"We are engaged in talks, trying to convince them to come out so they can answer to the court," he said. "We are trying to approach this in a positive way, with the goal of resolving it peacefully. There have been no shots fired, no injuries, which we are thankful for."

Justices Curb Federal Power To Subject States to Lawsuits

By LINDA GREENHOUSE

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WASHINGTON, March 27 — Escalating its profound and divisive debate over the relationship between the states and the Federal Government, the Supreme Court today bolstered state power by sharply curbing the authority of Congress to subject states to suits in Federal court.

The 5-to-4 ruling came in a case challenging the constitutionality of a 1988 law permitting Indian tribes to sue states in Federal court for failing to negotiate in good faith over the operation of gambling casinos on tribal land. In an opinion by Chief Justice William H. Rehnquist, the Court ruled today that this portion of the law, the Indian Gaming Regulatory Act, was an unconstitutional incursion on state sovereignty.

But the significance of today's decision extends far beyond the particular context of the case, raising questions about whether individuals can use the courts to force states to abide by a variety of Federal laws.

With respect to Indian gambling, the decision left unanswered many important questions, which the Justices may soon address in related cases awaiting Court action. But the paradoxical effect may be that even though an Indian tribe was nominally the loser in the case, it will now be easier for tribes to open casinos by getting authorization directly from the Interior Department rather than dealing with the states at all.

And at the broadest level, the decision made it stunningly clear that last term's ruling in *United States v. Lopez* that Congress lacked authority to ban possession of guns near schools was not an aberrant decision, as some thought then.

It is evident now that the *Lopez* decision was a signal that the current majority is in the process of revisiting some long-settled assumptions about the structure of the Federal Government and the constitutional allocation of authority between Washington and the states.

The lineup in the two cases was the same: Chief Justice Rehnquist wrote for the majority, joined by Justices Sandra Day O'Connor, Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas, while dissenting votes were cast by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

The subject of the case today was the 11th Amendment, which bars jurisdiction in the Federal courts to hear suits against a state by citizens of another state. An 1890 Supreme Court decision, *Hans v. Louisiana*, gave the amendment the broader interpretation of generally barring Federal court suits against states without their consent, whether by their own residents or residents of other states.

The significance of *Hans v. Louisiana*

ana as a precedent had been watered down over the years, as the Court permitted suits against states in Federal court to enforce a variety of Federal laws, most recently, in a 1989 decision, the Federal Superfund environmental law. The Court today overruled that decision, *Pennsylvania v. Union Gas*, declaring that laws enacted by Congress in the exercise of its authority to regulate interstate commerce were not enforceable against states in Federal court.

Also overruled, by implication, was a series of recent decisions holding that the 11th Amendment required only that Congress make clear its intention to subject the states to suits in Federal court to enforce particular laws. If the Federal law was clear enough, these cases held, the states' 11th Amendment would be abrogated. Chief Justice Rehnquist said today that although Congress had made its intention to subject the states to suit by Indian tribes "absolutely clear," the 11th Amendment barred the suits anyway.

The practical significance of the decision is far from clear. In a dissenting opinion, Justice Stevens cited Federal copyright, bankruptcy and antitrust laws as among those that would "have no remedy" for state violations, an assertion that Chief Justice Rehnquist disputed in his majority opinion.

The full scope of the ruling will have to be filled out in future cases. Some limits on the decision are clear. Suits may still be brought against states to enforce the right to equal protection guaranteed by the 14th Amendment, which Chief Justice Rehnquist noted was adopted "well after" the adoption of the 11th Amendment and which "operated to alter the pre-existing balance between state and Federal power."

Suits may also be brought by the Federal Government against states, and by individuals against state officials for injunctions to prohibit future illegal actions. The principal effect of the decision will be to limit suits to enforce rights granted by Congress within its authority under

the Commerce Clause, which encompasses much of modern Federal regulation.

That was the area addressed in the *Union Gas* case in 1989, in which the Court held that a Federal court could order a state to pay environmental cleanup costs. In declaring today that the *Union Gas* precedent was overruled, Chief Justice Rehnquist said it was a "deeply fractured" ruling, unsupported by a majority opinion, that had "created confusion among the lower courts" and "deviated sharply from our established federalism jurisprudence."

Regardless of the immediate practical effects, the breadth of the debate was clear from the vigor of the language on both sides, which echoed the tone of the opinions last year in both the *Lopez* and the term-limits cases.

Justice Stevens and Justice Souter both filed dissenting opinions; Justice Souter's 92-page dissent (compared with 31 pages for the majority opinion) was also signed by Justices Ginsburg and Breyer.

Justice Stevens, disputing the Chief Justice's assertion that the Court was simply restoring a long-dominant view of federalism, called the decision a "sharp break with the past." He referred to "the shocking character of the majority's affront to a co-equal branch of our Government," meaning Congress, and said the decision was "profoundly misguided."

Justice Souter attacked the majority opinion on both broad theoretical grounds and specific legal analysis. He said the majority was endorsing and giving constitutional status to a notion of state sovereignty that was incompatible with the Federal Government that the Constitution had established.

He said the ratification of the Constitution "demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the state, but by the people through a specific delegation of their sovereign power to a national government that was paramount within its delegated sphere."

He added, "Given the framers' general concern with curbing abuses

by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the national government powerless to render the states judicially accountable for violations of Federal rights." Justice Souter said the Court was making the same mistake it made at "the nadir of its competence" early in this century, when it applied common-law concepts of property rights and contract to overrule Congressional economic regulation.

**Another signal that
the Justices are
reconsidering
questions of states'
rights.**

Chief Justice Rehnquist dismissed Justice Souter's opinion by saying it "disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events."

The decision, *Seminole Tribe v. Florida*, No. 94-12, upheld a ruling by the United States Court of Appeals for the 11th Circuit, in Atlanta. That court ruled in 1994 that the 11th Amendment barred a suit by the Seminole Tribe under the Indian Gaming Regulatory Act to force Florida to negotiate the terms of a tribal-state compact to open a casino on Seminole land.

The Indian gaming act set up a complex procedure under which a tribe's request for a compact, if frustrated by the state despite a court order, would be referred to a court-appointed mediator and eventually to the Secretary of the Interior. When it struck down the lawsuit mechanism, the appeals court interpreted the remaining portions of the law to authorize the tribe to go directly to the Interior Department.

Gambling in reservation casinos is now a \$4-billion a year business, with 200 tribes operating 126 casinos in 24 states. The decision today may enhance the prospects in Congress for an overall review of the situation.

Representative Robert G. Torricelli, Democrat of New Jersey, where the Atlantic City casinos are strongly opposed to gambling on Indian reservations, said today that Congress should hold hearings to assess the decision and "must enact comprehensive reform to redefine the playing field."

It is quite possible the Court has not yet said its final word on the Indian gaming act. The Justices will act soon on a challenge to the law brought by Oklahoma, which is attacking not only the lawsuit provision the Court struck down today but the ultimate authority of the Federal Government under the 10th Amendment to require unwilling states to accept tribal casinos. That further question was not before the Court today. The Court has not yet agreed to hear the Oklahoma case, *Oklahoma v. Ponca Tribe*, No. 94-1029, but today's majority may not be able to resist the opportunity.

THE NEW YORK TIMES
THURSDAY, MARCH 28, 1996

Rabin's Killer Is Given a Life Sentence in Israel

By JOEL GREENBERG

TEL AVIV, March 27 — Yigal Amir, the man who shattered Israel when he assassinated Prime Minister Yitzhak Rabin, was sentenced to life imprisonment today after having been found guilty of murder.

In a judgment laced with poetry and soaring prose, the presiding judge, Edmond Levy, brought two months of often technical proceedings to an emotional conclusion, grieving for the loss of a national leader and condemning Mr. Amir as someone who had "lost all semblance of humanity."

"There is no greater desecration of God's name," Judge Levy said, than the attempt "to justify the murder as a religious commandment or a moral mission." Mr. Amir has maintained that he acted in accord with religious law to save Jewish lives threatened by Mr. Rabin's agreements with the Palestinians.

After reading the guilty verdict this morning, the three-judge panel that heard the case listened to brief arguments from both sides about Mr. Amir's sentencing for the murder of Mr. Rabin and the wounding of a bodyguard. A few hours later, in the early afternoon, the judges reconvened to announce the life sentence, which is mandatory under the law. The death penalty here is reserved for Nazi war crimes and espionage.

Wearing a white shirt and the black skullcap of an Orthodox Jew, Mr. Amir, 25, stood in the dock at the Tel Aviv District Court and listened to the sentence with downcast eyes, gazing up occasionally to look at the judge.

Commenting on the sentence while he attended an army ceremony near Jerusalem, Prime Minister Shimon Peres said: "The punishment pales in my eyes in comparison with the crime, although I have no suggestion how to deepen this punishment. In my view, this murder is a violation of all the values of

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our people, from the Ten Commandments to the laws of the nation and the state."

Unrepentant to the end, Mr. Amir asserted that he had served his people and his country when he shot and killed Mr. Rabin after a peace rally in Tel Aviv on Nov. 4. Mr. Amir has repeatedly argued that his objective was to stop Mr. Rabin from endangering Israel by handing over land to Palestinian rule under an accord signed in 1993 with the Palestine Liberation Organization.

"Everything I did was for the God of Israel, the Torah of Israel, the people of Israel and the Land of Israel," he declared to the court.

Mr. Amir's mother wiped her eyes as she read from the book of Psalms throughout the proceedings, and his father, wearing the beard and black hat of the strictly Orthodox, sat hunched over, a hand covering his face. "The court didn't rule," he said after hearing the verdict. "It was God's judgment."

Mr. Amir was also found guilty of wounding one of Mr. Rabin's bodyguards, Yoram Rubin, and sentenced to an additional six years in jail.

His lawyers said they would appeal the verdict to Israel's Supreme Court. Under Israeli law, a life term may be commuted only by the President.

Flanked by police officers and listening impassively to the proceedings, Mr. Amir, a former university student, seemed resigned to the outcome. He smiled reassuringly at his relatives and occasionally smirked in response to statements coming from the bench.

Rejecting Mr. Amir's argument that he had only intended to paralyze Mr. Rabin and his policies, the judges cited remarks he had made under police questioning and in court showing that he had intended to kill.

The judges also rejected suggestions by a defense lawyer that a second gunman might have shot Mr. Rabin, noting that the two bullets taken from the Prime Minister's body were identified as having been fired from Mr. Amir's pistol.

Citing psychiatric findings that the assassin had acted rationally and suffered no mental illnesses or disorders, the judges asserted that he understood well the meaning of his

act. "With premeditation and astonishing composure, he decided that killing the late Prime Minister is the last way in which to stop the political process which was not to his liking, and he followed this path to the end," they wrote.

Judge Levy, an Orthodox Jew, took pains to rebut Mr. Amir's contention that he had killed Mr. Rabin in accordance with the "the judgment of the pursuer," a tenet of Jewish law that permits killing an assailant who poses a mortal threat.

Reading from the verdict, the judge asserted that the "pursuer" could only be killed as a last resort, and even if the term were somehow applied to Mr. Rabin, harming him was forbidden by Jewish law because there were democratic ways to replace him.

"The attempt to give the murder of Yitzhak Rabin the seal of approval of Jewish law is out of place, and constitutes cynical and blatant exploitation of religious law to serve ends that are foreign to Judaism," the judge concluded.

Pronouncing the sentence, the judge cited the Biblical injunction, "Thou shalt not kill," which he said should "certainly beat in the heart of a Jew who has taken upon himself to observe the commandments."

In his final remarks, Mr. Amir called the proceedings a "show trial from start to finish" that had "followed all the rules of protocol" but had ignored the motives for the killing.

"I was compelled to carry out this act even though it contradicts my character and my personal philosophy, because the damage that was going to be caused would have been irreversible," Mr. Amir said. "What was done in the last three years will cause rivers of blood in this country. A whole nation is sitting silently. I decided to take action, knowing that I would pay the price, but the people who are causing the deaths of thousands will not be brought to justice."

Mr. Amir continued: "This is not a regular murder trial, but a trial about the existential problem of the State of Israel, the contradiction between a Jewish state and a democratic state. This subject was not dealt with at all."

When Judge Levy cut him off, Mr. Amir blurted: "God help you all."

To Mr. Rabin's widow, Leah, the court proceedings and Mr. Amir's

punishment were of little interest. "I don't wish anything on him, because I don't relate to him," she told Israel Radio. "For me it's like he doesn't exist."

After the courtroom had emptied, Eitan Haber, who had been Mr. Rabin's closest aide, stayed behind. He was surrounded by a clutch of reporters, much like the group that gathered around him on the night he announced the Prime Minister's death outside a Tel Aviv hospital.

Mr. Haber had attended the trial from its outset, on a personal mission to haunt Mr. Amir. Today he had one final message for him.

"A life sentence won't bring Yitzhak Rabin back to life, a life sentence is neither revenge nor a comfort," Mr. Haber said. "I very much hope that before this scum of the earth rots away in jail, he will get to see that the murder has achieved precisely the opposite of what he had intended. For Yitzhak Rabin, peace will avenge his blood."

THE NEW YORK TIMES
THURSDAY, MARCH 28, 1996

An Accountability Issue

As States Gain Political Power, a Ruling Seems to Free Them of Some Legal Reins

By NINA BERNSTEIN

To some proponents of states' rights and the so-called devolution revolution, a major Supreme Court ruling last week is a welcome reinforcement of a long-term realignment in American politics — the states' reclaiming of authority from a Federal Government grown too big and too intrusive.

But the bitterly contested decision, in an esoteric gambling dispute in Florida, raises the specter of a system in which states can use enhanced sovereignty to avoid accountability.

Few cases could seem less relevant to the everyday life of most people than a Seminole Indian tribe's dispute with Florida officials over casinos. But the Supreme Court's decision has turned that obscure suit and the dusty 11th Amendment into the stuff of historical watersheds.

The decision, *Seminole Tribe v. Florida*, came in a case challenging a 1988 law that permits Indian tribes to sue states in Federal court for failing to negotiate in good faith over gambling operations on tribal land. In an opinion by Chief Justice William H. Rehnquist, the Court ruled that this portion of the law was an unconstitutional incursion on state sovereignty.

The decision means that even as political power shifts from the Federal Government to state governments through block grants, waivers and a political retreat from Federal regulation, states will be less accountable to people who believe they are the victims of government wrongdoing in matters as diverse as water pollution, health care and copyright infringement.

"This is a case about power," Associate Justice John Paul Stevens wrote in his dissent from the 5-to-4 majority decision. The importance of the Court's decision, he declared, "cannot be overstated."

The ruling raises much broader

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questions about whether individuals can use the courts to force states to abide by a variety of Federal laws.

"It's very similar to what happened in the 1880's and 1890's," said Eric Foner, the American historian whose book on Reconstruction is cited in the long and passionate dissent by Associate Justice David H. Souter. "You had a series of Supreme Court decisions which little by little retreated from the broad definition of Federal power which had been written into the laws and Constitution during Reconstruction."

Civil liberties lawyers are quick to point out that the decision's immediate, concrete effects are limited. It leaves intact the individual's right to sue states in Federal court for violations of a variety of civil rights statutes under the umbrella of the 14th Amendment, which made Congress an enforcer of due process, equal protection and voting rights in the states. And it leaves open other legal mechanisms for challenging state actions in areas not covered by the 14th Amendment. But many of those avenues, though legally open, are now in a kind of political meltdown.

Congress, for example, can still attach conditions to the receipt of Federal money, including a contractual requirement that states waive their immunity from private lawsuits in state courts if they accept it. But as governors clamor for block grant, President Clinton has granted waivers of Federal welfare rules to more than half the states.

Similarly, the Federal Government can still enforce environmental or occupational safety laws through its regulatory agents, and can sue states in Federal court for failing to enforce those laws. But the Republican Congress has made cutting back on regulations one of its major goals.

"What's happening in the Supreme Court dovetails nicely with what's happening in the 104th Congress," Timothy Lynch, a constitutional scholar at the conservative Cato Institute, said last week.

Many Federal laws on the environment, business and occupational health and safety contain provisions authorizing people who are injured to sue for relief in Federal court if those laws are violated. Laurence Tribe, a professor of law at Harvard University, said the purpose of such provisions was to put a right of enforcement action directly into the hands of the most affected parties.

But the new Supreme Court decision says that if the state itself is the wrongdoer, or is an accomplice in

wrongdoing by a private party, it is immune from such a suit — and that Congress lacks the constitutional authority to overcome that barrier.

An individual would now seem to be barred from suing a state university under Federal copyright laws if, for example, the university pirated his computer software, said David Strauss, a professor of law at the University of Chicago. A private business apparently could not collect damages from a state-run health maintenance organization that violated Federal truth-in-advertising laws, he said.

As states compete for industry, create public-private partnerships and privatize functions like prisons, the Supreme Court decision in the Florida case takes on wider significance. Its scope can be determined only through future litigation.

One lawyer who argued a case that was overturned in the new ruling sees major problems in the environmental arena.

"What this means specifically for

An obscure lawsuit spawns questions about power.

environmental sites is that the states can ignore their environmental obligations while other parties go bankrupt cleaning up," said Robert A. Swift, who successfully argued against state immunity before a different set of Supreme Court Justices in *Pennsylvania v. Union Gas* in 1989, representing Union Gas.

In that water pollution case, the state had relocated a stream near an old gas plant, releasing a dormant deposit of coal tar. Pennsylvania, sued for part of the cleanup cost under the law known as Superfund, claimed immunity under the 11th Amendment, which protects states against certain suits, but lost and paid \$400,000. An opposite result would have flowed from last week's decision, which pointedly overruled the Court's 5-to-4 holding in *Pennsylvania v. Union Gas*.

John Knorr, Chief Deputy Attorney General for Pennsylvania, praised last week's decision, saying it "frees the states to be accountable to their own people for deciding what is a fair scheme, rather than being accountable to the courts."

But Professor Foner, the Dewitt Clinton Professor of American History at Columbia University, said that

in the past, an open courthouse door had been crucial to keeping states accountable. After the Civil War, when the national Government was weak and small, the major mechanism for establishing the Federal supremacy won by the Union Army was to allow private citizens to bring suits in Federal courts, which went through a tremendous expansion.

But then, in 1877, a disputed Presidential election was resolved with a deal that traded Southern support for Rutherford B. Hayes for the promise not to intervene in the South anymore. The door was closed on Reconstruction, and opened, over the next generation, to Jim Crow laws, the reign of the Ku Klux Klan, and the disenfranchisement of black voters.

This was the political context in which the 11th Amendment was first interpreted as a general bar to citizens' suits against states in Federal court, in *Hans v. Louisiana*. That 1890 decision, given new life by the Court last week, was made "in the midst of one of the darkest periods of Supreme Court history in terms of its complete abdication of its role in protecting the rights of American citizens," Professor Foner said.

The 11th Amendment, on its face, bars Federal court jurisdiction when one state is sued by citizens of another state or a foreign country. It was written expressly to invalidate an early Supreme Court decision favoring a suit by South Carolinians representing British banking interests, who sued Georgia to collect on a Revolutionary War debt.

Mr. Tribe called Justice Rehnquist's majority opinion a "radical departure from the language of the 11th Amendment and the architectural frame of the Constitution as a whole." In light of an earlier ruling that Congress lacked authority to ban possession of guns near schools, he added, "the Court's current dedication to a states' rights doctrine seems to be a rather free-floating cloud that can rain on almost any source of Congressional power."

David Vladeck of the nonprofit consumer organization Public Citizen said that if the lower courts followed the decision strictly, it would be very difficult to enforce a wide range of statutes against the states. But he said he was confident alternatives would emerge.

"One of the reasons the doctrines of sovereign immunity have eroded over time," he said "is that it is very difficult for a political body to tell citizens repeatedly that they have no redress when the government commits, time and again, an egregious wrong."

THE NEW YORK TIMES

MONDAY, APRIL 1, 1996

The Speaker's Gruff No. 2 Takes Charge in the House

By JERRY GRAY

WASHINGTON, March 30 — Leadership has not dulled Mr. Armey when he arrived on Capitol Hill in mealy tongue or his style. Barely three weeks into the 104th Congress, he was engulfed in controversy when, in a radio interview, he and brooding Texan as someone referred to Representative Barney Frank of Massachusetts, a Democrat who is a homosexual, as "Barney Fag."

Representative Dick Armey is still politically crude, rough-edged and brooding. But 12 years after quitting a college classroom to run for Congress, he has become one of the most powerful politicians in Washington.

Several predecessors could be cited to rival Newt Gingrich for the title of most powerful Speaker of the House in the nation's history. But it is almost universally accepted in Washington these days that never has a majority leader, the No. 2 job in the House that Mr. Armey holds, commanded so much authority.

Unabashedly partisan, fiercely conservative and with a tongue as sharp as barbed wire, the 55-year-old Mr. Armey has emerged as the leading Republican voice in the House as well as the majority's biggest political stick.

"Nobody enjoys confrontation, I certainly don't," Mr. Armey said in an interview last Wednesday. "But it is a tool and sometimes you use it."

Since the start of the second session of the 104th Congress in January, Mr. Gingrich's low poll ratings have become a drag on the Republican majority and its agenda, which has been suffering. In the face of that and, more important, to free himself to travel around the country raising money for Republican candidates, the Speaker has ceded more and more of the day-to-day power to his deputy. As a result, Mr. Armey has a decisive voice in determining which bill will be brought to the floor, in what form and when.

It is rare for any leader to trust his No. 2 with such power. But Mr. Armey describes himself as "a man totally without guile," and Mr. Gingrich, and even some of Mr. Armey's most ardent critics, agree.

Continued on Page B8, Column 1

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"He hasn't tried to trim his sails as majority leader and he has not been one who looks for compromise," said Representative Martin Frost of Texas, whose district abuts Mr. Armey's and who heads the Democratic Congressional Campaign Committee. "He does not have a hidden agenda. What you see is what you get with Armey."

Mr. Armey, who is 6 feet 3 inches tall, gravelly voiced and usually scowling, has cultivated a reputation as a political brawler.

In the 103d Congress, which overlapped the first two years of the Clinton Administration, it was Mr. Armey who frequently led the jousts with the White House over the budget and taxes. In the debate over health care he once denounced Hillary Rodham Clinton, who led the Administration's fight on the issue, as a Marxist.

"I was just being my naturally charming self," Mr. Armey said later. Mrs. Clinton called him "the Dr. Kevorkian of health-care reform."

Despite his lack of political experience, Mr. Armey defeated a freshman Democrat, Representative Tom Vandergriff, in 1984, and arrived in Washington as a self-described "budget commando."

"Jack Kemp told me when I was a freshman, 'You're scary, you're a very scary guy,'" Mr. Armey said. "I think there's something about my physical appearance. I'm a big guy and I have this stormy look."

"But I'm funny," he added. "I'm really one of the funniest guys I know."

When he arrived on Capitol Hill, the off-beat college professor and father of five soon provided some amusement with his much-publicized decision to sleep in the House gymnasium, and later in his office, as a way to save money. Ten years later, as part of the Republican leadership, he declined to ride herd on several freshmen who took up residency in their offices.

Mr. Armey first came to national prominence in 1987, when he proposed an independent commission operating outside politics to shut down hundreds of obsolete military bases; Congress approved the legislation a year later. In 1990, he led a bipartisan coalition in a winning assault on agricultural subsidies.

And Mr. Armey was one of the earliest and most vocal proponents of the flat tax.

His rise as a political power in Washington began slightly less than three years ago, when he won the chairmanship of the Republican Conference Committee in the 103d Congress. That made him No. 3 in a party hierarchy that had Mr. Gingrich as second-in-command and the minority whip and Representative Robert H. Michel of Illinois as the minority leader.

Mr. Armey and Mr. Gingrich were the major architects of the Contract With America, the political manifesto that helped the Republicans take control of the House in the 1994 elections for the first time in 40 years.

And it was Mr. Armey who supervised the effort to turn the political promises into draft legislation and then held together the Republican majority, including the unruly freshmen, to force House passage of all but one of the 10 parts of the contract.

Behind the scenes, Mr. Armey has acted as a restraint to the sometimes impulsive Mr. Gingrich. "Newt is a history professor and has this very broad sweep of the world," Mr. Armey said. "I'm a micro-economist and I look at the details."

"I'm fascinated by policy," he continued. "I'll do politics when I have to, and I think I do it well, but it's not my favorite pastime."

More times than not, he has played the role of "bad cop," manipulating the rules of debate to shut out Democrats and his own party's moderates. Although Democrats did the same thing to their opponents when they

THE NEW YORK TIMES

MONDAY, APRIL 1, 1996

Justices Curb Federal Suits Against States

By PAUL M. BARRETT

Staff Reporter of THE WALL STREET JOURNAL
WASHINGTON — The Supreme Court, using a case on Indian-run casinos, took another dramatic step in curtailing congressional authority in favor of state power.

Led by Chief Justice William Rehnquist, the high court's conservative majority yesterday said Congress lacks authority under the Commerce Clause and other constitutional provisions to permit individuals or groups to sue states in federal court.



LEGAL BEAT

The bitterly fought 5-4 ruling could block a wide range of private suits against states or their agencies when they are accused of wrongdoing under federal laws regulating the environment, antitrust, copyright and patent, among other areas. Suits filed against state entities under some federal civil rights statutes could also be affected, constitutional experts said.

The ruling struck down part of a 1988 federal statute that let Indian tribes sue states in federal court when negotiations over establishing gambling on tribal lands hit an impasse. The \$4 billion-a-year Indian gambling industry operates in 24 states, including Florida, where state officials opposed plans for casino gambling by the Seminole Tribe. Although the Seminoles were the short-term losers at the Supreme Court, yesterday's ruling left open the possibility that tribes could skip litigation altogether and ask the Interior Department directly to approve their gambling plans.

Signaling the unusual nature of the ruling, Justice David Souter read from the bench a lengthy summary of his massive 92-page dissent. The decision "flies in the face of the Constitution's text and rests upon a fundamental misunderstanding of the federalism intended by the Constitution's framers," he told a hushed high court audience.

The majority forcefully extended the reach of the 11th Amendment, which protects states from most private suits in federal court. Chief Justice Rehnquist asserted in his 31-page majority opinion that "the states, although in a union, maintain certain attributes of sovereignty, including sovereign immunity" from being sued.

Under federal law, Indian gaming operators will continue to have the authority to run bingo and other games associated with traditional and charity events. And higher-stakes casinos will be permitted in states that allow them. In many areas, Indian gambling has become a major source of tourism revenue and employment.

Although Florida officials plan to continue to oppose casino gambling there, the Seminoles have been allowed to offer card games and betting on racing. Meanwhile, Congress is considering separate bills that would increase policing of Indian casinos and let states ban them outright.

The topic of Indian gambling could return to the high court soon. The conservative justices might continue their re-examination of the boundary between state and federal authority by taking up a case that poses the question of whether the Interior secretary has the constitutional power to order states to allow Indian gambling establishments.

The issue of state-federal relations erupted last year, when the Supreme Court curtailed congressional authority under the Commerce Clause to pass legislation addressing traditionally local issues like education and crime. The court struck down a federal law banning guns near schools — the first time in 60 years that it had taken such an action. The Commerce Clause, which gives Congress power to regulate interstate commerce, has been interpreted quite broadly since the late 1930s.

The lineup in yesterday's ruling was the same as in last year's case, marking the ideological fissure that splits the nation's top bench in its most closely watched rulings. Chief Justice Rehnquist along with Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas form the states-rights majority. Defending federal prerogatives in dissent are Justices Souter, John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer.

The symbolism of the Seminole decision was heightened by the conservative majority's overruling of a 1989 precedent written by retired Justice William Brennan, a leading liberal jurist. That case held that a federal court may order a state to pay cleanup costs under federal pollution law, and established Congress's power to authorize private suits against states, despite the 11th Amendment's protection.

Justice Stevens is the only member of the 1989 majority still on the high court. Chief Justice Rehnquist emphasized that the 1989 majority itself was fractured in its reasoning, and that the case "deviated sharply from our established federalism jurisprudence."

In addition to protecting states against pollution-cleanup suits in federal court, yesterday's ruling could shield a state university from a suit alleging it had infringed an author's copyright or an inventor's patent. In some instances, states could still be sued in state courts, but U.S. courts have exclusive jurisdiction over some federal economic regulatory laws, including copyright, bankruptcy and antitrust. Congress could try to lessen the impact of yesterday's ruling by conditioning distribution of federal funds on states agreeing to let themselves be sued in federal courts, according to Laurence Tribe, a constitutional law professor at Harvard University.

The ruling didn't limit congressional power under the 14th Amendment to authorize suits accusing states of discrimination or certain other violations of individual rights.

(Seminole Tribe of Florida vs. Florida)

Governors Promise Tougher Standards For Education

By ROCHELLE SHARPE

Staff Reporter of THE WALL STREET JOURNAL
PALISADES, N.Y. — Trying to reinvigorate the education-overhaul movement, the nation's governors pledged to develop rigorous academic standards and tests for their states within two years.

At a national education summit here, 48 top business leaders also agreed to start requiring job applicants to submit school transcripts or other evidence of academic achievement when they seek employment. The executives said they would consider the quality of a state's academic standards when locating new businesses.

President Clinton urged the governors to make the standards important by requiring students to pass state performance tests before they can be promoted from school to school. "I don't believe you can succeed unless you have an assessment system with consequences," he told the summit.

The president said the business community should help schools streamline their budgets, complaining they spend way too much on administration. New York City, he noted, spends \$8,000 per student a year on education, but only \$44 goes to books and classroom materials.

While the summit declared that state and local districts should set standards, the group agreed to establish a nongovernmental clearinghouse to help states develop such standards. Many governors seemed interested in working with one another to create achievement tests, which can be costly to develop.

But the notion of a clearinghouse generated shouting matches behind the scenes. Conservatives have argued that education is a local issue to be controlled by local districts. They have complained about "Goals 2000," the federal government's effort to encourage state and local changes in education, as being too intrusive. At one private meeting, where conservative governors tried to amend the summit's proposed policy statement, International Business Machines Corp. Chairman Louis Gerstner Jr., the co-chairman, denounced the process as "hogwash," according to an aide who attended.

Other executives seemed perplexed, too. At one session, Paul O'Neill, chairman of Aluminum Co. of America, questioned why "we have to do the basics 50 times."

But it became clear that developing standards from the bottom up may be the only politically palatable method. Attempts to develop model national standards have bogged down. Yet states' attempts to develop their own standards also have run into problems, with many trying to rewrite their new, vague standards.

The governors decided to take several months to design a clearinghouse politically acceptable to everyone.

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Clinton Set To Ease Curbs On Satellites

By ASRA Q. NOMANI

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — President Clinton is expected to sign a directive today phasing out restrictions that the Pentagon had placed on civilian use of the government's sophisticated satellite-navigation system.

The new policy, which would grant expanded use of the system to U.S. airlines, auto makers and other commercial enterprises, is expected to be unveiled formally by Vice President Al Gore tomorrow. The satellite technology can pinpoint the location of users anywhere in the world, from the skies to golf courses.

The Pentagon's restrictions, based on national-security concerns, have limited the accuracy of the satellite-navigation system, reducing its uses for civilian purposes and raising a concern among potential foreign buyers that the military's control on the technology was too tight. The new policy follows a recommendation from Rand Corp., which estimated the satellite-navigation industry is likely to grow to \$8.5 billion a year by the end of the century from the current \$1 billion.

The policy shift "will be a huge boost to business," said Frank O'Mahony, a spokesman at Trimble Navigation Ltd., a leading maker of the small, portable radio receivers that are used to pick up information from a 24-satellite network, enabling the users on land, sea or in the air to pinpoint their exact location. For example, drivers can figure out how to avoid traffic jams by using car-navigation systems based on this technology.

The announcement isn't likely to mean much to the makers of satellites, because the U.S. and commercial users will continue to use the 24 satellites that are already in orbit. Other potential commercial beneficiaries on the ground include Rockwell International Corp., Sony Corp. and General Motors Corp.

Another important feature of the new policy is that it apparently rejects proposals that the U.S. charge fees to users of the satellite technology, which started in the 1970s as a Defense Department project. Prepared by the White House Office of Science and Technology Policy, the policy means the U.S. will continue upkeep of the satellite system without curbing or charging for commercial use.

A White House official said, "This new policy will do a better job of balancing national-security needs with civil and commercial-sector uses" for the satellite-navigation system.

"It's long overdue," said Marvin White, general manager of the commercial division of Etak Inc., a Menlo Park, Calif., unit of News Corp., which sells the technology to users such as ambulance services in Albuquerque, N.M., Kansas City, Mo., and Baltimore. Other Etak customers include the makers of car navigation systems such as Motorola Inc. "We would be delighted" with a phase-out of military restrictions on the signals, Mr. White said. "That would make using maps and navigation equipment less expensive," because users would need one receiver instead of two receivers to unscramble satellite signals.

The Federal Aviation Administration and U.S. carriers are expected to increase use of the system for air-traffic-control needs, and are already experimenting with it in the Pacific. UAL Corp.'s United Airlines and others have been investing in the system for their flying operations over places such as Russia and China, where language difficulties often hinder air-navigation efforts.

Car rental companies such as Hertz, Avis and National have already been experimenting with navigation systems. Pro-Shot Golf Inc., Newport Beach, Calif., just signed a deal with Trimble to develop advanced satellite-navigation parts for golf products; already, it uses the technology on golf carts to tell golfers how far they are from the green.

President Clinton says educational standards should be determined at state, local levels By Michael Dorning Chicago Tribune(KRT)

PALISADES, N.Y. President Clinton on Wednesday backed away from his administration's politically much-criticized efforts to set national educational standards, saying they should be determined at the state and local levels.

In a speech to governors and corporate executives gathered for a session billed as an education summit, he reiterated arguments for strong and clear standards, and he urged that educators make them meaningful by failing students who fail to attain them.

"No more social promotions, no more free passes," he told the meeting hosted by the National Governors Association. "If you want people to learn, learning has to mean something."

The administration's Goals 2000 initiative called for national educational standards that were to be voluntarily adopted by local school districts. But the standards have been fought bitterly by Christian fundamentalists and other conservative groups, which see them as an attempt to impose a secular agenda on classrooms and as a threat to local control of schools.

Others have criticized the standards as so vague and weak as to be meaningless. The English standards, for example, contain no suggested reading list and no grade-by-grade definition of skills to be taught.

The U.S. Senate last year voted 99-to-1 to oppose history standards, which were criticized as overemphasizing racial strife and social problems while slighting the contributions of the nation's founders.

Until recently, Clinton has argued on behalf of the national standards and spoken favorably of Goals 2000. But even before Wednesday he was emphasizing local flexibility in applying standards and had migrated far from a 1992 campaign platform that called for European-style national educational examinations.

Clinton told the governors on Wednesday, "The effort to have national standards, I think it's fair to say, has been less than successful. I believe they should be set by the states and the testing mechanism should be approved by the states."

But, he added, "Being promoted (a grade) ought to mean more or less the same thing in Pasadena, Calif., that it does in Palisades, N.Y."

He emphasized the need for competency tests and noted that only five states require students to pass examinations for promotion either from grade to grade or school to school.

"You shouldn't be afraid to find out if they're learning it, and you shouldn't be deterred by people saying this is cruel, this is unfair, or whatever they say," Clinton said.

IBM Chairman Louis V. Gerstner Jr., co-chairman and host of the educational summit, said the president's position was a realistic way of achieving competitive educational standards that businesses consider critical to the nation's economy.

"One of the messages coming out of this conference has been that the effort to create national standards didn't work. Let the states do it," Gerstner said.

The governors unanimously adopted a resolution committing themselves to locally establishing "internationally competitive academic standards" and "accountability systems" based on those standards within two years.

The governors also voted to set up an independent, non-governmental clearinghouse so state governments and local school districts could share information on educational standards and assessment methods.

In his speech, Clinton called such a clearinghouse "a good way to begin this." But he said he hoped local authorities would draw on the work of the Goals 2000 initiative, particularly in less controversial areas such as math and science.

Supreme Court ruling limits rights of individuals to sue states in federal court By Jan Crawford Greenburg Chicago Tribune(KRT)

WASHINGTON Indicating its continued willingness to limit federal powers, a divided Supreme Court on Wednesday reined in Congress' ability to give individuals the right to sue states in federal court.

In a 5-4 decision, the court said Congress was wrong when it passed a law authorizing Indian tribes to sue states in federal court if their negotiations over proposed gaming activities broke down.

The decision directly affects the 23 states that allow gambling on Indian reservations because it prevents tribes from taking their complaints against states to federal courts.

Legal experts predicted it could strengthen the states' ability to resist gambling because tribes must now go to the often less-friendly state courts or appeal to the U.S. secretary of the interior if they reach an impasse.

But the decision's wider significance lies in what it says about the court's position on the balance of power between the state and federal governments.

In an opinion by Chief Justice William Rehnquist, the court overruled an unrelated 1989 case that would have allowed the lawsuit and said Congress had no authority to subject states to that kind of liability against their will.

"It's a decision of utmost importance in explaining how our federal scheme distributes powers between the federal government on the one hand and the states on the other," said Richard Ruda, chief counsel of the State and Local Legal Center, which filed a brief supporting the state of Florida's challenge to the law.

The lawsuit arose after the Seminole tribe sued Florida because state officials refused to allow casinos on a Seminole reservation. The tribe relied on a 1988 law that required states to negotiate in good faith and authorized a federal lawsuit.

In response, Florida argued that the law abrogated the Constitution's 11th Amendment, an obscure provision that prohibits a federal court from hearing a private person's lawsuit against a state or state official.

In the 1989 case, a fragmented court said Congress could authorize federal lawsuits against state governments despite what the 11th Amendment says. That case said Congress was entitled to do so under its constitutional authority to regulate interstate commerce.

Four justices on the current court had dissented in the 1989 opinion, which did not get a majority. Those four, Rehnquist and Justices Antonin Scalia, Sandra Day O'Connor and Anthony Kennedy, voted to overrule it Wednesday, along with Justice Clarence Thomas.

"It's a contradiction of what a couple of years ago was considered

a federal power," Ronald Rotunda, a University of Illinois law professor, said of Wednesday's ruling. "It's a significant case, and it reduces the federal power to authorize private parties to sue states to comply with federal requirements."

(EDITORS: STORY CAN END HERE)

Justice David Souter took the unusual step of summarizing his 92-page dissent from the bench, calling the court's decision "fundamentally mistaken." He said it marked the "first time since the founding of the Republic" that the court has held that Congress had no authority to subject a state to a federal lawsuit by a person asserting a federal right.

His dissent was joined by Justices Ruth Bader Ginsburg and Stephen Breyer.

In a separate dissent, Justice John Paul Stevens called the decision "shocking" and said it would prohibit people from suing states in federal court over such commercial matters as copyright violations, antitrust, bankruptcy and environmental issues.

The decision would not, however, affect lawsuits by individuals who say the state or a state official has violated their civil rights. The 14th Amendment gives Congress authority to pass laws to enforce its provisions.

Wednesday's ruling is part of a series of cases in

To buy a Russian election

In a highly dramatic election year, which counts Taiwan, Israel, and the United States, the presidential election in Russia may be the greatest cliffhanger of them all. Will Russian President Boris Yeltsin be toppled by one of his challengers—Communist leader Gennady Zyuganov, ultranationalist Vladimir Zhirinovskiy or reformer Grigory Yavlinsky? Not if the Clinton administration, the International Monetary Fund (IMF) and any number of European countries have a say in this. Whether they do, however, at this point in Russia's lurching evolution, is a highly debatable proposition. Chances are that their efforts may be wasted at best, or backfire at worst.

President Clinton, himself facing an election in November, is fairly desperate to keep his old friend Boris in the saddle in the Kremlin, however wobbly the Russian leader may be on occasion. According to a memo obtained by The Washington Times, Mr. Clinton even traded assurances of broad support for Mr. Yeltsin at the anti-terrorism summit in Cairo for a rescinded Russian ban on American chickens—more specifically, Arkansas chickens. Master politician that he is, Mr. Clinton no doubt thought he had killed two birds with one stone.

So far, Mr. Clinton has been as good as his word, helping to push through a \$10.2 billion loan from the IMF to Russia, which was approved this week. Another \$1 billion may be forthcoming from the Export-Import Bank. The ostensible purpose of this munificence is to help Russia restructure its economy. IMF Director Michael Camdessus has emphasized that funds will not be disbursed should Russia stray from its economic reform program or fail to lower recently raised protectionist tariffs on foreign goods.

Well, that's a fine theory. But the fact is that the people associated with economic reform are all long gone from the Russia government, fired to placate the communist forces in the Duma. And where privatization ought to have led to a functioning free-market, the result has been that Russia now sports a plutocracy that controls energy resources, previously state-owned enterprises, banks and practically everything else of value, acquired in part through Russia's much criticized privatization program.

Operation Chicken

For a while it looked as though Russia might declare American chicken pullus non gratus, but that was solved after some diplomatic intervention at the highest levels. President Clinton personally managed the Great Drumstick Crisis. His friend and long-time political sugar daddy, Don Tyson, the chicken wallah with the Russia concession, is a happy man today.

When Vice President Gore announced that the nation formerly known as the Soviet Union had decided to forgo its ban on broilers from the United States, the about-face sparked speculation in this space that some unknown deal must have been struck: "What exactly," an editorial here asked archly, "did Mr. Clinton's crack negotiating team promise the Russians as ransom for the hostage chicken legs?"

That was a joke, of course—except that the question has now been answered, thanks to The Washington Times' Bill Gertz, who uncovered the astonishing quid pro quo. Meeting with Russian President Yeltsin at the anti-terrorism summit in Sharm el-Sheikh, Egypt, Mr. Clinton promised to do "positive" things to support Mr. Yeltsin in his re-election bid. Mr. Clinton also said he wanted the Russian leader to make sure there would be no more foolishness regarding the hundreds of millions of dollars' worth of chicken shipped from Arkansas to Moscow each year. According to a classified State Department record, Mr. Clinton made no bones about his parochial interest in the putative poultry ban. "[T]his is a big issue," Mr. Clinton told Mr. Yeltsin, "especially since about 40 percent of U.S. poultry is produced in Arkansas."

No doubt Mr. Yeltsin already knew that. In fact, it could well be that's the very reason the Russians clucked about blocking the birds' entry to the Rus-

Furthermore, as Heritage Foundation scholar Ariel Cohen noted recently, the IMF loan is much more likely to help Mr. Yeltsin buy an election than anything else. The Yeltsin government has already promised \$4 billion to the defense industry; \$2.2 billion in back wages to public-sector workers; \$2 billion to Russia's miners; \$3.3 billion to the agricultural sector; half a billion dollars to pensioners; and more than \$1 billion to officers and soldiers in the armed forces. That's a grand total of \$13 billion, more than the IMF loan itself.

Consider also that Russia has been writing off its foreign debts: \$8 billion owed by Libya; \$3 billion owed by the Sandinista regime of Nicaragua; and \$250 million owed by Ethiopia. Is cash-flow really the problem here?

At the White House, the reasoning is that Mr. Yeltsin, being the devil we know, is preferable to the devil we don't know—so why shouldn't we help him buy an election? Granted, Mr. Zyuganov, currently the front-runner, is no one's idea of a good neighbor. His party platform includes the reconstitution of the Soviet Union, state subsidies for failing industries, and the confiscation by the state of unspecified amounts of now private property—a course that could lead to civil war and economic disaster. All of which makes everybody, but especially the former Soviet republics and the countries of Central and Eastern Europe, very nervous indeed. Given that the United States has thrown its support behind his competition, it could also be that Mr. Zyuganov's program includes none-too-friendly relations with the West. Remember that it took Mr. Clinton himself years to get over his dislike of British Prime Minister John Major, who had committed the unforgivable offense of supporting President Bush in 1992.

In fact, it may well be that not even the largess of the U.S. taxpayer can help Mr. Yeltsin overcome the monumental distrust of the Russian voter. In that case, clearly our dollars might be far better spent on things that this country really needs, like a national missile defense, and our political capital on securing the gains of the Cold War, like NATO expansion. At this time, placing American interests first is the only reasonable Russia policy we can have.

ian market in the first place. Imagine all the newspaper articles the Russian Embassy has clipped and sent home about the Clintons' cozy ties to the Arkansas aristocracy (as it were)—and about the all the mutual back-scratching there. The Russians could be forgiven for hitting on the notion that wringing Tyson by the neck was the perfect way to get Mr. Clinton's attention.

Mr. Yeltsin's success at bullying the White House, if that's what it was, could well inspire other countries to follow suit. Maybe Saddam Hussein will offer to make the charter airline owned by Hollywood producer and Clinton pal Harry Thomason the new official carrier of Iraq if Mr. Clinton manages to get the United Nations to drop sanctions.

Of course, there's an even more conspiratorial explanation available. There have been reports that Tyson has been spreading the money around a little more freely lately—including to Republicans. How best to bring the chickens home? Maybe place a little call to Boris, suggest that he talk up a poultry scare—one that a U.S. president could slip right in and solve, thus incurring the everlasting gratitude of the chicken king.

Come to think of it, how about that Mad Cow's disease panic over British beef, which may be leading to a world-wide ban on beef exports from Great Britain. Mr. Clinton's dislike for John Major is well known—and there's an election coming up both there and here. It might not be a bad idea for investigators to have a look-see. A huge windfall to Big Beef U.S.A. and a kick in the teeth to the Tories in time to help Labor? It's almost as good as Iran-Contra.

One thing for investigators to look for: any unusual activity lately in the cattle-futures market.

it could raise concerns if it means that poor, youths from substandard schools don't get hired. where good education policy ... is going to to civil rights policy," the union chief propose it results in disparate impacts?" noted that transcripts have little meaning they are based on grading systems that vary tremendously from school to school. He said the summit ought to provoke more discussion about how to turn transcripts into a "common currency" that employers can use no matter where in the country a job applicant is from, and said he supports the basic purpose of the requirement giving youths a strong incentive to work hard in school.

Senate Passes Line-Item Veto; Clinton Eager to Sign Bill (Washn) By Elizabeth Shogren= (c) 1996, Los Angeles Times=

WASHINGTON In a move that would shift power from the legislative branch to the White House, the Senate passed a landmark measure Wednesday granting presidents authority to veto individual spending items in bills without rejecting the entire measures.

By a vote of 69-31, the Senate approved legislation giving the executive branch a powerful tool that all modern presidents have requested but all previous Congresses had denied them.

The House also was expected to pass the line-item veto without difficulty Friday and send it to President Clinton, who says he is eager to sign it.

Sponsors of legislation hailed it as an extraordinary gesture by Congress to voluntarily surrender some of its power over the federal purse strings in effort to restrict the kind of excessive federal spending that has resulted in a \$3.7 trillion debt.

"In effect, we're taking action against our interest," said Senate Majority Whip Trent Lott, R-Miss. "We are showing that we can rise above politics and take an action because it will be the right thing to do for our country."

The law would allow the president to surgically remove individual programs in appropriations bills, cancel targeted tax benefits aimed at 100 or fewer beneficiaries or erase spending on new entitlement programs.

"The president can no longer say, 'I didn't like having to spend on that wasteful project, but it was part of a larger bill I just couldn't say no to,' said Sen. John McCain, R-Ariz., who has worked toward a line-item veto for 10 years. "Under a line-item veto, no one can hide."

Under current law, influential legislators regularly insert so-called pork-barrel legislation in popular bills to win special projects for their states or districts.

Opponents of the measure however, warned that Congress was disturbing the delicate balance of powers struck by the Founding Fathers.

"The control of the purse is the foundation of our constitutional system of checks and balances," Sen. Robert Byrd, D-W.Va., said. "The control over the purse is the ultimate power to be exercised by the legislative branch to check the executive."

Calling Congress' action "rank heresy," Byrd accused his colleagues of ushering in a new order where presidents could use the device to pressure Congress into rubber stamping their agendas by threatening to kill legislators' pet projects if they defy the White House.

"What senator is willing to surrender his independence of thought and action and speech to an already powerful executive?" Byrd added.

Congressional efforts to grant presidents line-item veto authority date back to 1876, but never before has Congress agreed to cede such control to the president.

(Begin optional trim)

The decision by Republicans to support the measure at a time a Democrat is sitting in the White House reflects

their understanding of the mounting frustration the public feels about the ballooning federal debt. Under the measure, any savings that result from line-item vetoes would be earmarked for deficit reduction.

McCain said the success reflected Congress' understanding of "the growing discontent with the way that Congress does business."

"It's one way for us to fulfill our pledge to American taxpayers for less Washington spending," said Senate Majority Leader Bob Dole, who is the Republican presidential nominee.

Before scheduling the vote in the Senate, Dole and Clinton agreed that the new power will not go into effect until Jan. 1, 1997 after they have squared off in the election. However, Dole and Clinton also agreed that the measure could go into effect later this year if the White House and Congress agree on a seven-year plan to balance the budget and enact it into law.

(End optional trim)

The president's new authority would not be completely unchecked. Under the measure, Congress would have the authority to restore line items canceled by the president. The president, however, could then veto that bill and a two-thirds majority of both chambers would be required to override.

(Optional add end)

Also, the measure would sunset after eight years, so the Congress can re-evaluate it at that time.

Across the country, 43 governors wield line-item veto authority and studies show that many use the device to supplant legislators' spending priorities with their own.

House OKs Bill Criminalizing Late-Term Abortion Method (Washn) By Edwin Chen= (c) 1996, Los Angeles Times=

WASHINGTON The House Wednesday night gave final congressional approval to a bill that criminalizes a late-term abortion procedure and asserts federal authority for the first time over a specific medical practice.

The controversial measure, identical to one approved by the Senate in December, passed on a vote of 286-129, with more than a third of the chamber's Democrats joining the Republican majority in voting yes.

It now goes to the White House for an expected veto by President Clinton, who believes doctors should be allowed greater latitude to perform the procedure to protect the health of a woman not just to save her life, as the bill provides.

Like last Friday's House repeal of the assault weapons ban, the so-called partial-birth abortion bill seems to have as much to do with drawing a sharp distinction between the two political parties in the coming elections as with making public policy.

"Make no mistake about it partial birth abortion is child abuse, and those who do it have an unfettered license to kill," said Rep. Chris Smith, R-N.J. "Veto this bill and there is no doubt that Bill Clinton will go down in history as the abortion president."

Rep. Lynn Woolsey, D-Calif., said the bill was "a very crude attempt to make a political point ... (and) a frontal attack" on abortion rights in this country.

The abortion measure prescribes up to two years in prison for physicians who perform the procedure for any reason other than to save a woman's life. The burden of proof would rest with prosecutors. The measure contains no sanctions against women who have such abortions.

The bill also would allow the father to sue for damages, but only if he was married to the pregnant woman at the time of the abortion.

That measure's "life of the woman" exception was contained in an amendment written by Senate Majority Leader Bob Dole, R-Kan., who has clinched the Republican presidential nomination.

Supreme Court Strengthens Power of States (Washn) By David G. Savage= (c) 1996, Los Angeles Times=

WASHINGTON In a potentially far reaching opinion, the Supreme Court declared Wednesday that states are separate and sovereign governments and generally cannot be sued for failing to comply with federal laws.

The 5-4 ruling marks the third time in five years the conservative high court has broadly strengthened the powers of states at the expense of the federal government.

Although the latest ruling arose in a case involving gambling on Indian reservations, its impact will be felt most directly in areas as diverse as the environment and copyright protection, legal experts said.

In a bold endorsement of states' rights, Chief Justice William H. Rehnquist said the Constitution gives states a "sovereign immunity" from lawsuits filed in federal court, except those involving civil rights.

In dissenting opinions that ran to 118 pages, the four liberal-leaning justices condemned Rehnquist's opinion as "shocking, ... fundamentally mistaken, ... (and) simply irresponsible."

Typically, Congress gets the states to follow its lead by offering them money. States that take federal funds for highway construction, public education or health care for the poor, for example, must comply with federal regulations.

But in the past two decades, Congress often has worked its will by authorizing citizen lawsuits in federal court, for example, against those who fail to clean up hazardous wastes or who copy a protected work. Sometimes, the states are hauled into court to answer these suits.

Under Wednesday's ruling, it appears that a state that fails to clean up a waste dump or a state university that illegally copies a protected work cannot be sued in federal court.

Rehnquist relied on the rather obscure 11th Amendment, which was added to the Constitution in 1795 to prevent citizens suing the states in federal court to collect unpaid debts from the Revolutionary War.

In the past decade, this previously ignored amendment has become a source of bitter division within the high court.

In 1989, Justice William J. Brennan, the court's aging liberal leader, wrote an opinion for a 5-4 majority that allowed Pennsylvania to be sued under federal law for damages by the Union Gas Company. The company, which can

go to court as a private citizen, wanted the state to pay its share of the clean-up cost for a hazardous waste site. The federal Superfund Act specifically allowed such suits.

However, Brennan retired a year later. And on Wednesday, the five-member majority overruled that 1989 decision and laid down a new rule.

"Even when the Constitution vests in Congress complete law-making authority over a particular area, the 11th Amendment prevents congressional authorization of suits by private parties against unconsenting states," Rehnquist wrote. He was joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas.

Rehnquist noted civil rights claims against states are not affected by this ruling. After the Civil War, the 14th Amendment was added to the Constitution, and it specially authorized lawsuits against states in federal court.

(Begin optional trim)

In a rare move, Justice David H. Souter read parts of his dissent from the bench. In written form, it ran to 92 pages.

"The Court today for the first time since the founding of the Republic holds that Congress has no authority to subject a state to the jurisdiction of a federal court at the behest of an individual asserting a federal right," said Souter.

He was joined in dissent by Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen G. Breyer.

Not surprisingly, state officials said they were

Abortion rights advocates had sought another exception to protect physicians from prosecution when the health of the pregnant woman is at stake. But anti-abortion forces successfully fought against such an exception, saying it would create a loophole large enough to accommodate virtually any circumstance, including emotional well-being.

The White House had no comment on the bill's passage Wednesday night, but press officials referred reporters to a Feb. 28 letter that Clinton sent to Rep. Henry J. Hyde, R-Ill., chairman of the House Judiciary Committee.

In it, Clinton told Hyde that he is "prepared to support" a bill that bans the procedure but only if it exempts from prosecution physicians who perform it to "preserve the life of the woman or avert serious adverse health consequences to the woman."

The president expressed anguish over the controversy, saying he had "studied and prayed about this issue" and, as Arkansas governor, had signed into law a bill that barred third trimester abortions. That law, however, exempted physicians in cases where they deemed the procedure necessary to protect the life or health of the woman.

The president also called the procedure "very disturbing" and said he "cannot support its use on an elective basis."

Despite the harsh rhetoric of the congressional debate, the vote did not break along partisan lines. Seventy-two Democrats voted for the bill, including Rep. Tim Roemer, D-Ind., who called the procedure "a brutal and inhumane procedure that should be banned."

Among the 15 Republicans who voted against the bill were Reps. Jan Meyers of Kansas and Nancy Johnson of Connecticut, both of whom inveighed against what they called government intrusion.

Charles T. Canady, R-Fla., the bill's chief sponsor, said after the vote: "I believe partial-birth abortion is not an acceptable practice in our society. It is detestable. If, as a society, we do not act to protect innocent children at the most vulnerable time of their lives, we do not deserve to call ourselves civilized."

Rep. Louise M. Slaughter, D-N.Y., an abortion rights supporter, raved afterward that "this is just the beginning" of congressional action to curtail abortion. Rep. Cynthia A. McKinney, D-Ga., called the vote "the first step toward ending a woman's right to choose."

(Optional add end)

The bill's champions said the procedure is inhumane, tantamount to infanticide and often used by women who change their minds late in pregnancy about giving birth.

But the bill's critics said women have few, if any, feasible alternatives in certain life-threatening situations, especially in late pregnancies involving a severely deformed fetus that is unlikely to survive after birth.

"The anti-choice forces of the 104th Congress can pat themselves on the back for being the first Congress ever to pass legislation outlawing a medically necessary procedure," said Jane Gallagher, director of the reproductive freedom project at the American Civil Liberties Union.

"It is unprecedented and inappropriate for Congress to step into the operating room and legislate against specific procedures. By doing so, they are putting politics ahead of the health and lives of women, and second-guessing the medical judgment of trained physicians."

senatorial "McCarthyism," angry legislators, and the legacy of a 4-year-old scandal the Navy would dearly like to forget.

But Stumpf, whose future is on the line, believes the issue is simple: He did nothing wrong. He was, and is, a family man and a good officer.

In court papers, he acknowledges that he was present at a lewd party thrown by two of his subordinates at the Las Vegas convention. But he contends that he stayed in the background and left before the party got as raunchy as it later did.

He argues that he was thoroughly probed by the Navy, which exonerated him and recommended him for promotion. He

was cleared, he says, "good to go."

But the powerful Senate Armed Services Committee, which by law has

a say in such promotions, conducted its own review after the Navy belatedly revealed that Stumpf was at Tailhook.

Its verdict was different: He should not be promoted. And last December Dalton, citing his desire to "maintain the integrity of the promotion process," removed Stumpf's name from the promotion list.

Though he has sued Dalton, Stumpf blames the committee for holding him to a separate standard from the Navy's. But last week, Georgia Sen. Sam Nunn said the Senate judged Stumpf on the Navy's own codes: "These are not post-Tailhook standards. ... (They) reflect bedrock principles of good order and discipline."

X X X

(EDITORS: NEXT 21 GRAFS OPTIONAL)

Stumpf's is a dilemma he might never have imagined.

Born in Leavenworth, Kan., the second of the three sons of a West Point graduate and the grandson of a World War II division commander, Stumpf was reared in the military and thrived on its challenges and order.

His father, an infantry colonel, had fought in North Africa, Sicily and Normandy. His mother's father had commanded a division under Patton, and one of his uncles had been shot down and killed while flying a P-47 fighter in Europe during World War II.

All of this Stumpf grew up with, although he said in a recent interview in his home here the family did not often tell war stories.

Still, his upbringing on Army posts in Virginia left its mark. He attended the old Hammond High School in Alexandria, Va., along with many other military brats and his future wife, Susan, an admiral's daughter.

His dream was a life in the service, although his choice of the Navy, stemming, he said, from a childhood near the seaboard, seemed surprising for the son of an Army family.

Stumpf said, though, that his family applauded his choice, and he was graduated from Annapolis in 1974. From there on, his career path climbed steadily upward. But not without setbacks.

He initially failed in primary training to qualify for fighter school, and, crushed, had been sent back to learn helicopters. But he had persisted, writing a letter asking for reinstatement and then bearing down once he was readmitted.

He had failed again in night carrier landings, but then spent hours in the simulator and at the elbow of a dedicated landing instructor.

Finally he succeeded and was assigned to a fleet squadron. But before he left, he was taken aside by his legendary commanding officer, former Vietnam POW, now U.S. senator, John McCain.

"That's going to be the most fun you're ever going to have in your life," Stumpf recalled McCain saying. "Get ready for it. Enjoy every day of it."

Stumpf went on to a rich career in Naval aviation, to a job flying the latest fighters, to a stint in the Pentagon and to a crucial assignment operating off the Saratoga during the Gulf War.

During the war he led nine strike missions into Iraq and Kuwait, several of them hair-raising, and participated in a total of 22 attacks during the war. He lost a good friend on one mission, and others were shot down and

captured.

The nights were filled with fear, missiles and anti-aircraft fire, he said. But he survived, and was later decorated for courage.

After the war, Stumpf sought the elite job of heading the Navy's famous aerobatic team, the Blue Angels. It was the only job he could find that would allow him to keep flying. On Nov. 18, 1992, he got the job.

At that point he had reached a pinnacle. "I had punched all the tickets," said Stumpf, wearing his brown leather flight jacket and tan uniform, as he sat recently in his book-lined living room. Next he'd make captain and command an air wing.

But there was a time bomb ticking.

A year earlier, in September 1991, he had attended the Tailhook convention to receive an award for his squadron. While there he attended a party thrown by two subordinates, where there was much drinking and explicit performances by two nude female dancers.

Stumpf kept in the background and left early. After he left, one of the dancers was paid by the party-goers to perform oral sex, a violation of military law, on a drunken naval aviator, according to a Navy investigation.

X X X

Three months into the Blue Angels job, Stumpf was approached by Pentagon inspectors and told he was under investigation about Tailhook. He proclaimed innocence of wrongdoing, and, after an arduous Navy probe, was cleared.

But he was not cleansed.

(END OPTIONAL TRIM)

In the wake of the Tailhook incident, the Senate had instructed the Navy to inform the Armed Services Committee when any candidate being sent to Congress for promotion review had been associated with Tailhook.

When the promotion of Stumpf, whose career seemed back on track, was sent on March 11, 1994, there was no mention of Tailhook. On May 24, 1994, the Senate confirmed his nomination. Stumpf was to be promoted July 1, 1995.

A few weeks after the confirmation, though, the Pentagon informed the committee that there had been an error. Stumpf had, indeed, attended Tailhook.

The Navy said the mistake had been a simple administrative error. But on June 30, 1994, the committee asked the Navy to hold Stumpf's promotion and provide a complete report on his role in Tailhook.

Nine months later, the Navy delivered the report. And seven months after that, on Nov. 13, 1995, the committee gave its verdict: Despite the Navy's exoneration, had the committee known the details of Stumpf's Tailhook actions, it "would not have recommended ... his nomination to the grade of captain."

"It is the view of the committee," the senators wrote, "that Commander Stumpf should not be appointed to the grade of captain."

X X X

Reflecting in his home recently, Stumpf was asked who was to blame for his predicament.

"I think we're all to blame," he said, "in that we were part of a culture that allowed Tailhook to occur. In that sense all of us who have been in the Navy for a long time can share some of that, because that should never have happened."

Still, he said, "my basic position is: I'm a good officer. I've served my country honorably. I haven't done anything wrong. I earned and was selected for promotion, properly approved. ... And now they've decided not to promote me.

"It's just wrong," he said.

"And I'm not going to stand by while it happens."

The next step for Indian tribes unable to reach agreement with states, Dickstein said, is "to go directly to the (interior) secretary (Bruce Babbitt). He could negotiate rules with the tribes, approve tribe rules, begin a federal rule-making process or do nothing."

The dispute over Indian gambling has focused largely on blackjack, slot machines, poker and other features of casino gambling, which Florida Governor Chiles called "a bad bet for our people."

A Senate committee is rewriting stricter rules for Indian gambling in response to complaints from states and competitors that the Indian casinos have unfair advantages and rob them of needed revenues.

The tribes, for their part, say the proposed revisions infringe on their sovereignty and break the promises of Indian gaming law. Tribes need not report their casino revenues and profits to the government and aren't subject to the same kind of security and employee background checks that non-Indian casinos must follow.

In recent years, though, the Indian gambling association has fought off further restrictions on Indian casinos, despite opposition from Donald Trump and other non-Indian casino owners.

Indian leaders criticize Supreme Court ruling on suing states By Tracey A. Reeves Knight-Ridder Newspapers(KRT)

WASHINGTON Indian leaders denounced a Supreme Court ruling on gambling Wednesday as "a blow to tribal sovereignty" and said they will keep pushing to expand their lucrative casino industry.

At most, Indians said, the high court's ruling may slow the growth of their industry and make it tougher for some tribes to build high-stakes casinos. The court, stressing states' rights, said tribes can no longer sue states that refuse to negotiate with them on reservation gambling.

"I'm disappointed and confused," said Michael Haney, a Seminole from Oklahoma. "First we get tricked by states, then we get tricked again by the Supreme Court. It's clear there are people out there who want to shut the door on our gaming."

The National Congress of American Indians, the nation's oldest native advocacy group, also objected.

"What the court and members of Congress fail to remember is that Indian affairs are a federal prerogative, and that unlike other initiatives in the Congress, Indian issues simply cannot be turned back to the states," said NCAI President W. Ron Allen.

Since Congress passed the Indian Gaming Regulatory Act in 1988, which required states to negotiate with tribes on gambling, reservation-based gambling has exploded from a \$121 million-a-year to a \$6 billion-a-year industry in 23 states.

Although the Supreme Court sided with the states in its 5-4 decision, it also affirmed a part of the gaming act that gives tribes the option of taking their gambling cases to the U.S. Interior Department, when states and courts fail to act in their favor.

"All hope is not lost for tribes," said Henry Buffalo, a prominent Minneapolis attorney who represents Indian tribes with gaming interests. "It appears that they'll still have an avenue to pursue their cases."

The case was brought by the Seminole tribe against the state of Florida in 1991. Jim Shore, attorney for the Seminoles of central Florida, reserved comment, saying he and other tribal officials had not had a chance to decipher the decision.

The decision is expected to severely hamper efforts of tribes in the process of negotiating agreements for gambling with their states, such as those in Florida, California and Oklahoma. Tribes contemplating casinos may also see their efforts thwarted. But the ruling should not affect tribes that have already negotiated gambling agreements with their states.

Charles Anderer, editor of International Gaming and Wagering Business magazine, said he views the Supreme

Court decision as the tool that critics of Indian gaming have been waiting for.

"This is not a good day for Indians," said Anderer, whose New York-based publication is considered the leader in tracking gambling. "I see it as a growth impediment for their whole gaming industry."

John McCarthy, executive director of the Minnesota Indian Gaming Association, saw the ruling as a statement on the court's attitude toward tribal sovereignty and the end to Congress' longtime control in making laws governing tribes.

"To me, it's a blow to tribal sovereignty," said McCarthy. "It reverses certain policies in federal government that Indians were promised and are entitled to."

Other tribal leaders expressed frustration at how "outsiders" continue to chip away at their pursuit of economic autonomy and a place in a society that too often forgets they exist.

Said Melanie Benjamin, an administrator with the Mille Lacs Band of Ojibwe Indians in central Minnesota, "The gaming has given us something that no one else could. It's for the future of our people and our children."

(EDITORS: STORY CAN TRIM HERE)

The Mille Lacs Indians are among a handful of tribes that have managed to turn their Grand Casino into a model for all Indian casinos.

Like tribes in Connecticut, Wisconsin, New York and Minnesota, the Mille Lacs have used their gambling profits to erase decades of high unemployment.

They've provided new jobs, built new schools, roads, sewer and water lines, health clinics and homes for their elderly. And they've socked money away for their youngsters' education.

"We've come so far only to be met with something like this," said Haney. "It seems for every step we take forward, we have to take two steps back."

Navy commander sues Navy for refusing him promotion because of attendance at Tailhook convention By Michael E. Ruane Knight-Ridder Newspapers(KRT)

VIRGINIA BEACH, Va. In a way, Bob Stumpf's career had often been like that night in the Gulf War when he wrestled his blinded jet back from the mission over Baghdad to the deck of the carrier Saratoga:

Descending too fast, with a cockpit of crippled instruments, he was waved off the first time he tried to land. But, out of the blackness, he came around again, and with guts, concentration and help, he put the bird safely back on deck.

Military life for this West Point colonel's son who had grown up to the rhythm of reveille and retreat had been like that: Tough it out. Be persistent. Come around again. Things will work out.

Until Tailhook.

Earlier this month, Navy Cmdr. Robert E. Stumpf, 43, Annapolis class of '74, former commander of the Blue Angels, decorated Gulf War aviator, sued the secretary of the Navy over the 1991 Tailhook sex scandal.

He charged that the secretary, John H. Dalton, illegally deprived him of promotion to the rank of captain because of a Senate committee's displeasure over Stumpf's attendance at the notorious 1991 Tailhook convention.

It was a desperate act. Many Navy careers have been quietly, and appropriately, ended by the Tailhook episode, in which scores of women were assaulted by drunken Navy aviators. But Stumpf, who proclaims his innocence, insists that his career and perhaps others' should not be among them.

"Me and lots of other folks who attended Tailhook but who didn't participate in any of the misconduct there and, yes, there was misconduct at Tailhook are being caught up in the political storm" in its wake, he says.

His fight has entangled him in a large public controversy involving newspaper editorials, charges of

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

29-Mar-1996 01:37pm

TO: Elena Kagan

FROM: Michael T. Schmidt
 Domestic Policy Council

SUBJECT: Seminole and Indian Gaming

I have been told that you are working on the Supreme Court's recent Seminole ruling and our response to that ruling. I wanted to pass on some information to you that I hope will be helpful.

This morning, I was over at John Duffy's Office (DOI -- Counselor to Babbit and Indian Gaming Guru) and took part in a very informal discussion of this issue with John, Jim Simon (DOJ), and some other agency folks. (I apologize for not letting you know about this meeting, but before today I didn't realize you were working on the issue!) Nothing much came from this meeting, just some brainstorming over possible options that the Admin can chose from in dealing with the Indian Gaming side of the Seminole Decision. It is my understanding that the Departments of Justice and Interior will be meeting more formally on Monday to discuss this issue and agency (and Administration) reaction to the issue. Both DOJ and DOI expressed great interest in having someone from WH Counsel attend. Included in this meeting may be some discussion about a possible press release -- I am not sure about this, but I asked John Duffy over at Interior to make sure he ran any public statement from DOI by the WH before releasing. You may be interested in attending this meeting -- if so, call Bob Anderson (Solicitor's Office DOI) at 208-7404, or Craig Alexander (DOJ Office of Tribal Justice) at 514-9080 for time and place. I think that a number of DOJ shops will be at the meeting, not just OTJ.

I will be out of town from this afternoon until Tuesday night. Due to my lack of a skypager, I have left a contact number with WH Operator if you need to reach me before I get back. Also, Pat Romani (Carol Rasco's assistant) has these numbers as well.

Hope this helps!

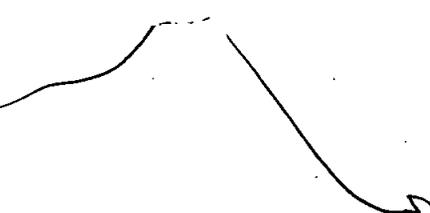
The Department of the Interior released the following statement concerning the Supreme Court's recent decision in *Seminole Tribe of Florida v Florida*:

We are disappointed that the Court has disrupted a process that has resulted in over one hundred and twenty-five voluntary compacts between States and Tribe in more than twenty states.

We want to emphasize that the Court's decision does not affect the continued validity of existing compacts or, in our view, prevent the voluntary creation of new compacts.

We note that the overwhelming majority of existing compacts were negotiated voluntarily, without using the dispute resolution procedure that the Court declared unconstitutional.

The Department intends to consult with all interested parties before taking further action in light of yesterday's decision.



notes 16 Feb
essentially
unchanged.

EXECUTIVE OFFICE OF THE PRESIDENT

27-Mar-1996 05:26pm

TO: Jennifer M. O'Connor
TO: Marcia L. Hale
TO: Ray Martinez

FROM: Michael T. Schmidt
Domestic Policy Council

SUBJECT: Heads up on Indian Gaming Issue

Just wanted to give you a heads up on an Indian Gaming Issue that we will probably be getting calls on soon. This morning, the Supreme Court handed down a decision in a huge Indian Gaming Case -- Seminole Tribe vs. Florida -- which [deals a severe blow to Tribes who are unable to negotiate a gaming compact with a Governor. The Court ruled 5-4 that Congress cannot expose states to federal lawsuits when negotiations break down between a Tribe and a Governor over placing gaming operations on reservations.]

Some background: The Indian Gaming Regulatory Act (IGRA) of 1988 requires Tribes to negotiate with Governors over the types of casino-type gaming that they can operate on Tribal land (Tribes have the power to run bingo operations without any state approval). If a compact cannot be reached, IGRA gives the Tribes the right to sue the state for not negotiating in "good faith." States have long claimed immunity from such suits under the 11th Amendment. In today's ruling, the Supreme Court agreed with the State's claim.

This ruling is extraordinary in that it one of the few to ever limit Congress' virtually exclusive power to make laws affecting American Indians (although it really doesn't limit Congress' power over the Tribes themselves, just their ability to expose states to a judicial remedy). Its practical affect is yet to be seen -- at the very least it will take away a powerful tool that Tribes had to force a reluctant Governor to sit down and negotiate a compact. (This ruling won't so much impact Tribes that already have gaming, but it will impact Tribes seeking gaming, especially in states with Governors who have historically been reluctant to negotiate.

In the short term, I would guess that we will be getting calls from Indian Country asking the POTUS to take some action on this issue. There is really nothing we can do, but Indian Country has long argued that the Secretary of Interior has the power to approve Tribally-run off-reservation gaming without a

Governor's sign-off, and they will probably do so once again. The states obviously disagree, and we have consistently agreed with the states on this issue, but we will likely hear about this issue from Tribes. This will also increase pressure on Congress to pass some version of the long-dormant IGRA Amendments.

Justice and Interior are working to analyze this decision. It literally came out this morning, so they are just today getting copies of the 200+ page decision. They will hopefully get us a better analysis of this decision sometime next week, but in the meantime I wanted to pass this on to you FYI.

3:30 Roosevelt Run

Sevinde

Start

Do the compacts already in place?
No effect.

Fed ch determ - no gd faith
triggers mediation process
culminating in Secy's decision.

Just who falls out?

Can these trikes go directly to Secy?
Ask for Secy to prescribe proc?

ICC said this

SCT said took no view.

Secy do whole thing - set both a compact.

What will Secy do?
Prescribe proc - or no?
under advisement.

options paper
mechanism to deal w/
bad faith negotiati-

Can't have
no remedy at all.
Then not have to
say whole stat is
unconst - don't everything
down.

2ND CASE of Level 1 printed in FULL format.

SEMINOLE TRIBE OF FLORIDA, PETITIONER v. FLORIDA ET AL.

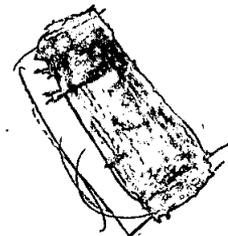
No. 94-12

SUPREME COURT OF THE UNITED STATES

1996 U.S. LEXIS 2165

October 11, 1995, Argued

March 27, 1996, Decided



NOTICE: [*1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

DISPOSITION: *11 F. 3d 1016*, affirmed.

SYLLABUS:

The Indian Gaming Regulatory Act, passed by Congress pursuant to the Indian Commerce Clause, allows an Indian tribe to conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. *25 U.S.C. § 2710(d)(1)(C)*. Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710(d)(3)(A), and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710(d)(7). In this § 2710(d)(7) suit, respondents, Florida and its Governor, moved to dismiss petitioner Seminole Tribe's complaint on the ground that the suit violated Florida's sovereign immunity from suit in federal court. [*2] The District Court denied the motion, but the Court of Appeals reversed, finding that the Indian Commerce Clause did not grant Congress the power to abrogate the States' Eleventh Amendment immunity and that *Ex parte Young*, *209 U.S. 123*, does not permit an Indian tribe to force good faith negotiations by suing a State's Governor.

Held:

1. The Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against States to enforce legislation enacted pursuant to the Indian Commerce Clause. Pp. 7-27.

(a) The Eleventh Amendment presupposes that each State is a sovereign entity in our federal system and that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State's] consent." *Hans v. Louisiana*, *134 U.S. 1, 13*. However, Congress may abrogate the States' sovereign immunity if it has "unequivocally expressed its intent to abrogate the immunity" and has acted "pursuant to a valid exercise of power." *Green v. Mansour*, *474 U.S. 64, 68*. Here, through the numerous references to the "State" in § 2710(d)(7)(B)'s text, Congress provided an "unmistakably clear" statement of its intent [*3] to abrogate. Pp. 8-11.

(b) The inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on a single question: Was the Act in question passed pursuant to a constitutional provision granting Congress such power? This Court has found authority to abrogate under only two constitutional provisions: the Fourteenth Amendment, see, e.g., *Fitzpatrick v. Bitzer*, *427 U.S. 445*, and, in a plurality opinion, the Interstate Commerce Clause, *Pennsylvania v. Union Gas Co.*, *491 U.S. 1*. The Union Gas plurality found that Congress' power to abrogate came from the States' session of their sovereignty when they gave Congress plenary power to regulate commerce. Under the rationale of *Union Gas*, the Indian Commerce Clause is indis-

tinguishable from the Interstate Commerce Clause. Pp. 11-17.

(c) However, in the five years since it was decided, Union Gas has proven to be a solitary departure from established law. Reconsidering that decision, none of the policies underlying stare decisis require this Court's continuing adherence to its holding. The decision has been of questionable precedential value, largely [*4] because a majority of the Court expressly disagreed with the plurality's rationale. Moreover, the deeply fractured decision has created confusion among the lower courts that have sought to understand and apply it. The plurality's rationale also deviated sharply from this Court's established federalism jurisprudence and essentially eviscerated the Court's decision in *Hans*, since the plurality's conclusion--that Congress could under Article I expand the scope of the federal courts' Article III jurisdiction--contradicted the fundamental notion that Article III sets forth the exclusive catalog of permissible federal-court jurisdiction. Thus, Union Gas was wrongly decided and is overruled. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Pp. 17-27.

2. The doctrine of *Ex parte Young* may not be used to enforce § 2710(d)(3) against a state official. That doctrine allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, where the suit seeks prospective injunctive relief in order to end a [*5] continuing federal-law violation. However, where, as 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 *Ex parte Young* action. The intricate procedures set forth in § 2710(d)(7) show that Congress intended not only to define, but also significantly to limit, the duty imposed by § 2710(d)(3). The Act mandates only a modest set of sanctions against a State, culminating in the Secretary of the Interior prescribing gaming regulations where an agreement is not reached through negotiation or mediation. In contrast, an *Ex parte Young* action would expose a state official to a federal court's full remedial powers, including, presumably, contempt sanctions. Enforcement through an *Ex parte Young* suit would also make § 2710(d)(7) superfluous, for it is difficult to see why a tribe would suffer through § 2710(d)(7)'s intricate enforcement scheme if *Ex parte Young*'s more complete and more immediate relief were available. The Court is not free to rewrite the statutory scheme in order to approximate what it thinks Congress might [*6] have wanted had it known that § 2710(d)(7) was beyond its

authority. Pp. 27-30.

11 F. 3d 1016, affirmed.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined.

OPINIONBY: REHNQUIST

OPINION: CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U.S.C. § 2710(d)(1)(C). The Act, passed by Congress under the Indian Commerce Clause, U.S. Const., Art. I, § 10, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress [*7] that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), may not be used to enforce § 2710(d)(3) against a state official.

I

Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes. See 25 U.S.C. § 2702. The Act divides gaming on Indian lands into three classes--I, II, and III--and provides a different regulatory scheme for each class. Class III gaming--the type with which we are here concerned--is defined as "all forms of gaming that are not class I gaming or class II gaming," § 2703(8), and includes such things as slot machines, casino games, banking card games, dog racing, and lotteries. n1 It is the most heavily regulated of the three classes. The Act provides that class III gaming is lawful only where it is: (1) authorized by an ordinance or resolution that (a) is adopted by the governing body of the Indian tribe, (b) satisfies certain statutorily prescribed requirements, and (c) is approved by the National Indian Gaming Commission; (2) located [*8]

in a State that permits such gaming for any purpose by any person, organization, or entity; and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." § 2710(d)(1).

n1 Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations," 25 U.S.C. § 2703(6), and is left by the Act to "the exclusive jurisdiction of the Indian tribes." § 2710(a)(1).

Class II gaming is more extensively defined to include bingo, games similar to bingo, nonbanking card games not illegal under the laws of the State, and card games actually operated in particular States prior to the passage of the Act. See § 2703(7). Banking card games, electronic games of chance, and slot machines are expressly excluded from the scope of class II gaming. § 2703(B). The Act allows class II gaming where the State "permits such gaming for any purpose by any person, organization or entity," and the "governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman" of the National Indian Gaming Commission. § 2710(b)(1). Regulation of class II gaming contemplates a federal role, but places primary emphasis on tribal self-regulation. See § 2710(c)(3)-(6).

[*9]

The "paragraph (3)" to which the last prerequisite of § 2710(d)(1) refers is § 2710(d)(3), which describes the permissible scope of a Tribal-State compact, see § 2710(d)(3)(C), and provides that the compact is effective "only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register," § 2710(d)(3)(B). More significant for our purposes, however, is that § 2710(d)(3) describes the process by which a State and an Indian tribe begin negotiations toward a Tribal-State compact:

"(A) 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 activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact."

The State's obligation to "negotiate with the Indian tribe in good faith," is made judicially enforceable by §§ 2710(d)(7)(A)(i) and (B)(i):

"(A) The United States district [*10] 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 under paragraph (3) or to conduct such negotiations in good faith

"(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A)."

Sections 2710(d)(7)(B)(ii)-(vii) describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact. A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian [*11] tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of [the Act] and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State consents to the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary [of the Interior]" and that the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." § 2710(d)(7)(B)(vii). n2

n2 Sections 2710(d)(7)(B)(ii)-(vii) provide in full:

"(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

"(I) a Tribal-State compact has not been entered into under paragraph (3), and

"(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

"(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

"(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

"(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

"(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact . . . within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

"(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

"(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

"(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

"(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

"(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction."

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In September 1991, the Seminole Tribe of Indians, petitioner, sued the State of Florida and its Governor, Lawton Chiles, respondents. Invoking jurisdiction under 25 U.S.C. § 2710(d)(7)(A), as well as 28 U.S.C. §§ 1331 and 1362, petitioner alleged that respondents had "refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the "requirement of good faith negotiation" contained in § 2710(d)(3). Petitioner's Complaint P24, see App. 18. Respondents moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court. The District Court denied respondents' motion, 801 F. Supp. 655 (SD Fla. 1992), and the respondents took an interlocutory appeal of that decision. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (collateral order doctrine allows immediate appellate review of order denying claim of Eleventh Amendment immunity).

The Court of Appeals for the Eleventh Circuit reversed the decision of the District Court, holding that the Eleventh Amendment barred petitioner's suit against respondents. n3 11 F. 3d [*13] 1016 (1994). The court agreed with the District Court that Congress in § 2710(d)(7) intended to abrogate the States' sovereign immunity, and also agreed that the Act had been passed pursuant to Congress' power under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. The court disagreed with the District Court, however, that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and concluded therefore that it had no jurisdiction over petitioner's suit against Florida. The court further held that *Ex parte Young*, 209 U.S. 123 (1908), does not permit an Indian tribe to force good faith negotiations by suing the Governor of a State. Finding that it lacked subject-matter jurisdiction, the Eleventh Circuit remanded to

the District Court with directions to dismiss petitioner's suit. n4

n3 The Eleventh Circuit consolidated petitioner's appeal with an appeal from another suit brought under § 2710(d)(7)(A)(i) by a different Indian tribe. Although the district court in that case had granted the defendants' motions to dismiss, the legal issues presented by the two appeals were virtually identical. See *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (SD Ala. 1991) (Eleventh Amendment bars suit against State), and 784 F. Supp. 1549 (SD Ala. 1992) (Eleventh Amendment bars suit against Governor).

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n4. Following its conclusion that petitioner's suit should be dismissed, the Court of Appeals went on to consider how § 2710(d)(7) would operate in the wake of its decision. The court decided that those provisions of § 2710(d)(7) that were problematic could be severed from the rest of the section, and read the surviving provisions of § 2710(d)(7) to provide an Indian tribe with immediate recourse to the Secretary of the Interior from the dismissal of a suit against a State. 11 F. 3d, at 1029.

Petitioner sought our review of the Eleventh Circuit's decision, n5 and we granted certiorari, 513 U.S. (1995), in order to consider two questions: (1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and (2) Does the doctrine of Ex parte Young permit suits against a State's governor for prospective injunctive relief to enforce the good faith bargaining requirement of the Act? We answer the first question in the affirmative, the second [*15] in the negative, and we therefore affirm the Eleventh Circuit's dismissal of petitioner's suit. n6

n5 Respondents filed a cross-petition, No. 94-219, challenging only the Eleventh Circuit's modification of § 2710(d)(7), see n. 4, supra. That petition is still pending.

n6 While the appeal was pending before the Eleventh Circuit, the District Court granted respondents' earlier-filed summary judgment motion, finding that Florida had fulfilled its obligation under the Act to negotiate in good faith. The Eleventh Circuit has stayed its review of that decision pending the disposition of this case.

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."

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, [*16] "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Id.*, at 13 (emphasis deleted), quoting *The Federalist* No. 81, p.487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority*, supra, at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans*, supra, at 15. n7

n7 E.g., *North Carolina v. Temple*, 134 U.S. 22, 30 (1890); *Fitts v. McGhee*, 172 U.S. 516, 524 (1899); *Bell v. Mississippi*, 177 U.S. 693 (1900); *Smith v. Reeves*, 178 U.S. 436, 446 (1900); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Duhne v. New Jersey*, 251 U.S. 311, 313 (1920); *Ex parte New York*, 256 U.S. 490, 497 (1921); *Missouri v. Fiske*, 290 U.S. 18, 26 (1933); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944); *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304, n. 13 (1952); *Parden v. Terminal Railway of Ala. Docks Dept.*, 377 U.S. 184, 186 (1964); *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *Employees v. Department of Public Health and Welfare of Mo.*, 411 U.S. 279, 280 (1973); *Edelman v. Jordan*, 415 U.S. 651, 662-663 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Cory v. White*, 457 U.S. 85 (1982); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-100 (1984); *Atascadero State Hospital v. Scanlon*,

473 U.S. 234, 237-238 (1985); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472-474 (1987) (plurality opinion); *Dellmuth v. Muth*, 491 U.S. 223, 227-229, and n. 2 (1989); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, (1993).

[*17]

Here, petitioner has sued the State of Florida and it is undisputed that Florida has not consented to the suit. See *Blatchford*, *supra*, at 782 (States by entering into the Constitution did not consent to suit by Indian tribes). Petitioner nevertheless contends that its suit is not barred by state sovereign immunity. First, it argues that Congress through the Act abrogated the States' sovereign immunity. Alternatively, petitioner maintains that its suit against the Governor may go forward under *Ex parte Young*, *supra*. We consider each of those arguments in turn.

II

Petitioner argues that Congress through the Act abrogated the States' immunity from suit. In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expressed its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power." *Ibid*.

A

Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement." *Blatchford*, 501 U.S., at 786. This rule arises from a recognition [*18] of the important role played by the Eleventh Amendment and the broader principles that it reflects. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-239 (1985); *Quern v. Jordan*, 440 U.S. 332, 345 (1979). In *Atascadero*, we held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S., at 246; see also *Blatchford*, *supra*, at 786, n. 4 ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim") (emphases deleted). Rather, as we said in *Dellmuth v. Muth*, 491 U.S. 223 (1989),

"To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's

role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Id.*, at 227-228.

See also *Welch v. Texas Dept. of Highways and Public Transp.* [*19], 483 U.S. 468, 474 (1987) (plurality opinion).

Here, we agree with the parties, with the Eleventh Circuit in the decision below, 11 F.3d, at 1024, and with virtually every other court that has confronted the question n8 that Congress has in § 2710(d)(7) provided an "unmistakably clear" statement of its intent to abrogate. Section 2710(d)(7)(A)(i) vests jurisdiction in "the United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . ."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . .", the court shall order the State . . .; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit [*20] to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit. n9

n8 See *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1427-1428 (CA10 1994), cert. pending, No. 94-1029; *Spokane Tribe v. Washington*, 28 F.3d 991, 994-995 (CA9 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 280-281 (CA8 1993); *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F.Supp. 1341, 1345 (WD Okla. 1993); *Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F.Supp. 277 (D. Minn. 1993); *Kickapoo Tribe of Indians v. Kansas*, 818 F.Supp. 1423, 1427 (D. Kan. 1993); 801 F.Supp. 655, 658 (SD Fla. 1992)

(case below); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484, 1488-1489 (WD Mich. 1992); *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp., at 557-558.

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n9 The dissent argues that in order to avoid a constitutional question, we should interpret the Act to provide only a suit against state officials rather than a suit against the State itself. Post, at 88-89. But in light of the plain text of § 2710(d)(7)(B), we disagree with the dissent's assertion that the Act can reasonably be read in that way. "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." See *United States v. Locke*, 471 U.S. 84, 96 (1985), quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.). We already have found the clear statement rule satisfied, and that finding renders the preference for avoiding a constitutional question inapplicable.

B

Having concluded that Congress clearly intended to abrogate the States' sovereign immunity through § 2710(d)(7), we turn now to consider whether the Act was passed "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S., at 68. Before we address that question here, however, we think it necessary first to [*22] define the scope of our inquiry.

Petitioner suggests that one consideration weighing in favor of finding the power to abrogate here is that the Act authorizes only prospective injunctive relief rather than retroactive monetary relief. But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. See, e.g., *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"). We think it follows a fortiori from this proposition that the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "prevent federal court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S.

(1994) (slip op., at 17); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and [*23] Sewer Authority*, 506 U.S., at 146 (internal quotation marks omitted).

Similarly, petitioner argues that the abrogation power is validly exercised here because the Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands. It is true enough that the Act extends to the States a power withheld from them by the Constitution. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Nevertheless, we do not see how that consideration is relevant to the question whether Congress may abrogate state sovereign immunity. The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority. Cf. *Atascadero*, 473 U.S., at 246-247 ("The mere receipt of federal funds cannot establish that a State has consented to suit in federal court").

Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? See, e.g., *Fitzpatrick v. Bitzer* [*24], 427 U.S. 445, 452-456 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.*, at 455. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." See *id.*, at 453 (internal quotation marks omitted). We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

In only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court found that the Interstate Commerce [*25] Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." *Union Gas*, 491 U.S., at 19-20. Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he "[did] not agree with much of [the plurality's] reasoning." *Id.*, at 57 (White, J., concurring in judgment in

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part and dissenting in part).

In arguing that Congress through the Act abrogated the States' sovereign immunity, petitioner does not challenge the Eleventh Circuit's conclusion that the Act was passed pursuant to neither the Fourteenth Amendment nor the Interstate Commerce Clause. Instead, accepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that clause grants Congress the power to abrogate the States' sovereign immunity.

Petitioner begins with the plurality decision in *Union Gas* and contends that "there is no principled basis for finding that congressional power under [*26] the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause." Brief for Petitioner 17. Noting that the *Union Gas* plurality found the power to abrogate from the "plenary" character of the grant of authority over interstate commerce, petitioner emphasizes that the Interstate Commerce Clause leaves the States with some power to regulate, see, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. (1994), whereas the Indian Commerce Clause makes "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 234 (1985). Contending that the Indian Commerce Clause vests the Federal Government with "the duty of protecting" the tribes from "local ill feeling" and "the people of the States," *United States v. Kagama*, 118 U.S. 375, 383-384 (1886), petitioner argues that the abrogation power is necessary "to protect the tribes from state action denying federally guaranteed rights." Brief for Petitioner 20.

Respondents dispute the petitioner's analogy between the Indian Commerce Clause and the Interstate Commerce Clause. They note that we have recognized that [*27] "the Interstate Commerce and Indian Commerce Clauses have very different applications," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), and from that they argue that the two provisions are "wholly dissimilar." Brief for Respondents 21. Respondents contend that the Interstate Commerce Clause grants the power of abrogation only because Congress' authority to regulate interstate commerce would be "incomplete" without that "necessary" power. *Id.*, at 23, citing *Union Gas*, supra, at 19-20. The Indian Commerce Clause is distinguishable, respondents contend, because it gives Congress complete authority over the Indian tribes. Therefore, the abrogation power is not "necessary" to the Congress' exercise of its power under the Indian Commerce Clause. n10

n10 Respondents also contend that the Act mandates state regulation of Indian gaming and therefore violates the Tenth Amendment by allowing federal officials to avoid political accountability for those actions for which they are in fact responsible. See *New York v. United States*, 505 U.S. 144 (1992). This argument was not considered below by either the Eleventh Circuit or the District Court, and is not fairly within the question presented. Therefore we do not consider it here. See this Court's Rule 14.1; *Yee v. Escondido*, 503 U.S. 519 (1992).

[*28]

Both parties make their arguments from the plurality decision in *Union Gas*, and we, too, begin there. We think it clear that Justice Brennan's opinion finds Congress' power to abrogate under the Interstate Commerce Clause from the States' cession of their sovereignty when they gave Congress plenary power to regulate interstate commerce. See *Union Gas*, 491 U.S., at 17 ("The important point . . . is that the provision both expands federal power and contracts state power"). Respondents' focus elsewhere is misplaced. While the plurality decision states that Congress' power under the Interstate Commerce Clause would be incomplete without the power to abrogate, that statement is made solely in order to emphasize the broad scope of Congress' authority over interstate commerce. *Id.*, at 19-20. Moreover, respondents' rationale would mean that where Congress has less authority, and the States have more, Congress' means for exercising that power must be greater. We read the plurality opinion to provide just the opposite. Indeed, it was in those circumstances where Congress exercised complete authority that Justice Brennan thought the power to abrogate most necessary. *Id.*, at [*29] 20 ("Since the States may not legislate at all in [the aforementioned] situations, a conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause").

Following the rationale of the *Union Gas* plurality, our inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over

Indian commerce and Indian tribes. Under the rationale of *Union Gas*, if the States' partial cession of authority over a particular area includes cession of the immunity from suit, then their virtually total cession of authority over a different [*30] area must also include cession of the immunity from suit. See *Union Gas*, supra, at 42 (SCALIA, J., joined by REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., dissenting) ("If the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers"); see *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F. 3d 1422, 1428 (CA10 1994) (Indian Commerce Clause grants power to abrogate), cert. pending, No. 94-1029; *Cheyenne River Sioux Tribe v. South Dakota*, 3 F. 3d 273, 281 (CA8 1993) (same); cf. *Chavez v. Arte Publico Press*, 59 F. 3d 539, 546-547 (CA5 1995) (After *Union Gas*, Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, must grant Congress power to abrogate). We agree with the petitioner that the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause.

Respondents argue, however, that we need not conclude that the Indian Commerce Clause grants the power to abrogate the States' sovereign immunity. Instead, they contend that if we find the rationale of the *Union Gas* plurality to extend to the Indian [*31] Commerce Clause, then "*Union Gas* should be reconsidered and overruled." Brief for Respondents 25. Generally, the principle of stare decisis, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), counsel strongly against reconsideration of our precedent. Nevertheless, we always have treated stare decisis as a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and not as an "inexorable command," *Payne*, 501 U.S., at 828. "When governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Id.*, at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Our willingness to reconsider our earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne*, supra, at 828, (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) [*32] (Brandeis, J., dissenting)).

The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. We have already seen that Justice Brennan's opinion received the support of only three other Justices. See *Union Gas*, 491 U.S., at 5 (Marshall, Blackmun,

and STEVENS, JJ., joined Justice Brennan) Of the other five, Justice White, who provided the fifth vote for the result, wrote separately in order to indicate his disagreement with the majority's rationale, *id.*, at 57 (White, J., concurring in judgment and dissenting in part), and four Justices joined together in a dissent that rejected the plurality's rationale. *Id.*, at 35-45 (SCALIA, J., dissenting, joined by REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ.). Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision. See, e.g., *Chavez v. Arte Publico Press*, supra, at 543-545 ("Justice White's concurrence must be taken on its face to disavow" the plurality's theory); 11 F. 3d, at 1027 (Justice White's "vague concurrence renders the continuing validity of *Union Gas* in [*33] doubt").

The plurality's rationale also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*. See *Union Gas*, supra, at 36 ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all") (SCALIA, J., dissenting). It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit" And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III," *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984); see *Union Gas*, supra, at 38, ("The entire judicial power granted by the Constitution does not embrace authority to [*34] entertain a suit brought by private parties against a State without consent given . . . ") (SCALIA, J., dissenting) (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)); see also cases cited at n. 7, supra. As the dissent in *Union Gas* recognized, the plurality's conclusion—that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III—"contradicted our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction." *Union Gas*, 491 U.S., at 39.

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond

the bounds of Article III. *Marbury v. Madison*, 1 Cranch 137 (1803). The plurality's citation of prior decisions for support was based upon what we believe to be a misreading of precedent. See *Union Gas*, 491 U. S., at 40-41 (SCALIA, J., dissenting). The plurality claimed support for its decision [*35] from a case holding the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity, see *id.*, at 14-15 (citing *Parden v. Terminal Railway of Ala. Docks Dept.*, 377 U.S. 184 (1964)), and cited as precedent propositions that had been merely assumed for the sake of argument in earlier cases, see 491 U. S., at 15 (citing *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U. S., at 475-476, and *n. 5*, and *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U. S., at 252).

The plurality's extended reliance upon our decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress could under the Fourteenth Amendment abrogate the States' sovereign immunity was also, we believe, misplaced. *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment. *Id.*, at 454. As the dissent in *Union Gas* made [*36] clear, *Fitzpatrick* cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution." *Union Gas*, 491 U. S., at 42 (SCALIA, J., dissenting).

In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Reconsidering the decision in *Union Gas*, we conclude that none of the policies underlying *stare decisis* require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality. See *Nichols v. United States*, 511 U.S. (1994) (slip op., at 8) (the "degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision"). The case involved the interpretation of the Constitution and therefore may be altered only by constitutional amendment or revision by this Court. Finally, both the result in *Union Gas* and the plurality's [*37] rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that *Union Gas* was wrongly decided and that it should be,

and now is, overruled.

The dissent makes no effort to defend the decision in *Union Gas*, see post at 2, but nonetheless would find congressional power to abrogate in this case. n11 Contending that our decision is a novel extension of the Eleventh Amendment, the dissent chides us for "attending" to dicta. We adhere in this case, however, not to mere obiter dicta, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound. Cf. *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 613 (1990) (exclusive basis of a judgment is not dicta) (plurality); *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only [*38] to the holdings of our prior cases, but also to their explications of the governing rules of law.") (KENNEDY, J., concurring and dissenting); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reaches . . . is entitled to greater weight . . .") (O'CONNOR, J., concurring). For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment. In *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), the Court held that the Eleventh Amendment barred a suit brought against a State by a foreign state. Chief Justice Hughes wrote for a unanimous Court:

"Neither the literal sweep of the words of Clause one of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent. Thus Clause one specifically provides that the judicial power shall extend 'to all Cases, [*39] in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.' But, although a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens. . . ."

"Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates

which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'"

Id., at 321-323 (citations and footnote omitted); see *id.* at 329-330; see also *Pennhurst*, 465 U. S., at 98 ("In short, the principle [*40] of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III"); *Ex parte New York*, 256 U. S., at 497 ("The entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . ."). It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity (save in *Union Gas*). But consideration of that question must proceed with fidelity to this century-old doctrine.

n11 Unless otherwise indicated, all references to the dissent are to the dissenting opinion authored by JUSTICE SOUTER.

The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. The dissent cites not a single decision since *Hans* (other than *Union Gas*) that supports its view of state [*41] sovereign immunity, instead relying upon the now-discredited decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793). See, e.g., post, at 57 n. 47. Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication. See post, at 23-26.

The dissent mischaracterizes the *Hans* opinion. That decision found its roots not solely in the common law of England, but in the much more fundamental "jurisprudence in all civilized nations." *Hans*, 134 U. S., at 17, quoting *Beers v. Arkansas*, 20 How. 527, 529 (1858); see also *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (sovereign immunity "is the general sense and the general practice of mankind"). The dissent's proposition that the common law of England, where adopted by the States, was open to change by the legislature, is wholly unexceptionable and largely beside the point: that common law provided the substantive rules of law rather than jurisdiction. Cf. *Monaco*, supra, at 323 (state sovereign immunity, like the re-

quirement that there be a "justiciable" controversy, is a constitutionally grounded [*42] limit on federal jurisdiction). It also is noteworthy that the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment.

Hans--with a much closer vantage point than the dissent--recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution. The dissent's conclusion that the decision in *Chisholm* was "reasonable," post, at 8, certainly would have struck the Framers of the Eleventh Amendment as quite odd: that decision created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco*, supra, at 325. The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man--we long have recognized that blind reliance upon the text of the Eleventh Amendment is "to strain the Constitution and the law to a construction never imagined or dreamed of." *Monaco*, 292 U. S., at 326, quoting *Hans*, 134 U. S., at 15. The text dealt in terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the federal courts did not have [*43] federal question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal question jurisdiction over the States.

That same consideration causes the dissent's criticism of the views of Marshall, Madison, and Hamilton to ring hollow. The dissent cites statements made by those three influential Framers, the most natural reading of which would preclude all federal jurisdiction over an unconsenting State. n12 Struggling against this reading, however, the dissent finds significant the absence of any contention that sovereign immunity would affect the new federal-question jurisdiction. Post, at 46-54. But the lack of any statute vesting general federal question jurisdiction in the federal courts until much later makes the dissent's demand for greater specificity about a then-dormant jurisdiction overly exacting. n13

n12 We note here also that the dissent quotes selectively from the Framers' statements that it references. The dissent cites the following, for instance, as a statement made by Madison: "the Constitution 'gives a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.'" See post, at 47. But that statement, perhaps ambiguous when read in isolation, was preceded by the following: "Jurisdiction in controversies between a state and

citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal courts. It appears to me that this can have no operation but this:" See 3 J. Elliot, Debates on the Federal Constitution 67 (1866).

[*44]

n13 Although the absence of any discussion dealing with federal question jurisdiction is therefore unremarkable, what is notably lacking in the Framers' statements is any mention of Congress' power to abrogate the States' immunity. The absence of any discussion of that power is particularly striking in light of the fact that the Framers virtually always were very specific about the exception to state sovereign immunity arising from a State's consent to suit. See, e.g., The Federalist No. 81, pp. 487-488 (C. Rossiter ed. 1961) (A. Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.") (emphasis in the original); Madison in 3 Elliot, supra n. 11 ("It is not in the power of individuals to call any state into court. . . . [The Constitution] can have no operation but this: . . . if a state should condescend to be a party, this court may take cognizance of it").

[*45]

In putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers, concluding with the statement that "the Framers' principal objectives in rejecting English theories of unitary sovereignty . . . would have been impeded if a new concept of sovereign immunity had taken its place in federal question cases, and would have been substantially thwarted if that new immunity had been held untouchable by any congressional effort to abrogate it." n14 Post, at 62. This sweeping statement ignores the fact that the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court. And Congress itself waited nearly a century before even conferring federal question jurisdiction on the lower federal courts. n15

n14 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, see, e.g., *United States v. Texas*, 143 U.S. 621, 644-645 (1892) (finding such power necessary to the "permanence of the Union"); 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 (1908); 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, see, e.g., *Cohens v. Virginia*, 6 Wheat. 264 (1821).

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n15 JUSTICE STEVENS, in his dissenting opinion, makes two points that merit separate response. First, he contends that no distinction may be drawn between state sovereign immunity and the immunity enjoyed by state and federal officials. But even assuming that the latter has no constitutional foundation, the distinction is clear: the Constitution specifically recognizes the States as sovereign entities, while government officials enjoy no such constitutional recognition. Second, JUSTICE STEVENS' criticizes our prior decisions applying the "clear statement rule," suggesting that they were based upon an understanding that Article I allowed Congress to abrogate state sovereign immunity. His criticism, however, ignores the fact that many of those cases arose in the context of a statute passed under the Fourteenth Amendment, where Congress' authority to abrogate is undisputed. See, e.g., *Quern v. Jordan*, 440 U.S. 332 (1979). And a more fundamental flaw of the criticism is its failure to recognize that both the doctrine requiring avoidance of constitutional questions, and principles of federalism, require us always to apply the clear statement rule before we consider the constitutional question whether Congress has the power to abrogate.

[*47]

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. n16 The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used

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to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

n16 JUSTICE STEVENS understands our opinion to prohibit federal jurisdiction over suits to enforce the bankruptcy, copyright, and antitrust laws against the States. He notes that federal jurisdiction over those statutory schemes is exclusive, and therefore concludes that there is "no remedy" for state violations of those federal statutes. Post, at 2 n. 1.

That conclusion is exaggerated both in its substance and in its significance. First, JUSTICE STEVENS' statement is misleadingly overbroad. We have already seen that several avenues remain open for ensuring state compliance with federal law. See supra, at n. 13. 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. See supra, at n. 14. Second, contrary to the implication of JUSTICE STEVENS' conclusion, it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes; in the decision of this Court that JUSTICE STEVENS cites (and somehow labels "incompatible" with our decision here), we specifically reserved the question whether the Eleventh Amendment would allow a suit to enforce the antitrust laws against a State. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 n. 22 (1975). Although the copyright and bankruptcy laws have existed practically since our nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States. Notably, both Court of Appeals decisions cited by JUSTICE STEVENS were issued last year and were based upon *Union Gas*. See *Chavez v. Arte Publico Press*, 59 F.3d 539 (CA5 1995); *Matter of Merchants Grain, Inc. v. Mahern*, 59 F.3d 630 (CA7 1995). Indeed, while the Court of Appeals in *Chavez* allowed the suit against the State to go forward, it expressly recognized that its holding was unprecedented. See *Chavez*, 59 F.3d at 546 ("we are aware of no case that specifically holds that laws passed pursuant to the Copyright Clause can abrogate state immunity").

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III

Petitioner argues that we may exercise jurisdiction over its suit to enforce § 2710(d)(3) against the Governor notwithstanding the jurisdictional bar of the Eleventh Amendment. Petitioner notes that since our decision in *Ex parte Young*, 209 U.S. 123 (1908), we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to "end a continuing violation of federal law." *Green v. Mansour*, 474 U.S., at 68. The situation presented here, however, is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.

Here, the "continuing violation of federal law" alleged by petitioner is the Governor's failure to bring the State into compliance with § 2710(d)(3). But the duty to negotiate imposed upon the State by that statutory provision does not stand alone. Rather, as we have seen, supra, at , Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7).

Where Congress has created a remedial scheme for the enforcement of a particular [*49] federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Here, 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 [*50] therein not only to define, but also significantly to limit, the duty imposed by § 2710(d)(3). For example, where the court finds that the State has failed to negotiate in good faith, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only

sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing Class III gaming on the tribal lands at issue. By contrast with this quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions. If § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous; it is difficult to see why an [*51] Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*. n17

n17 Contrary to the claims of the dissent, we do not hold that Congress cannot authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act. Although one might argue that the text of § 2710(d)(7)(A)(i), taken alone, is broad enough to encompass both a suit against a State (under an abrogation theory) and a suit against a state official (under an *Ex parte Young* theory), subsection (A)(i) of § 2710(d)(7) cannot be read in isolation from subsections (B)(ii)-(vii), which repeatedly refers exclusively to "the State." See *supra*, at 10-11. In this regard, § 2710(d)(7) stands in contrast to the statutes cited by the dissent as examples where lower courts have found that Congress implicitly authorized suit under *Ex parte Young*. Compare 28 U.S.C. § 2254(e) (Federal court authorized to issue an "order directed to an appropriate State official"); 42 U.S.C. § 11001 (1988 ed.) (requiring "the Governor" of a State to perform certain actions and holding "the Governor" responsible for nonperformance); 33 U.S.C. § 1365(a) (authorizing a suit against "any person" who is alleged to be in violation of relevant water pollution laws). Similarly the duty imposed by the Act—to "negotiate . . . in good faith to enter into" a compact with another sovereign—stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers. Cf. *State ex rel Stephan v. Finney*, 836 P. 2d 1169, 251 Kan. 559 (1992) (Governor of Kansas may negotiate but may not enter into compact without grant of power from legislature).

[*52]

Here, of course, we have found that Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3). Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts. 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.

IV

The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court. The narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine cannot be used to enforce § 2710(d)(3) because Congress enacted a remedial [*53] scheme, § 2710(d)(7), specifically designed for the enforcement of that right. The Eleventh Circuit's dismissal of petitioner's suit is hereby affirmed. n18

n18 We do not here consider, and express no opinion upon, that portion of the decision below that provides a substitute remedy for a tribe bringing suit. See 11 F. 3d 1016, 1029 (CA11 1994) (case below).

It is so ordered.

DISSENTBY: STEVENS; SOUTER

DISSENT: JUSTICE STEVENS, dissenting.

This case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right. In *Chisholm v. Georgia*, 2 Dall. 419 (1793), the entire Court—including Justice Iredell whose dissent provided the blueprint for the Eleventh Amendment—assumed that Congress had such power. In *Hans v. Louisiana*, 134 U.S. 1 (1890)—a case the Court purports to follow today—the Court again assumed that Congress had such power. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 [*54] (1976), and *Pennsylvania v. Union Gas*

Co., 491 U.S. 1, 24 (1989) (STEVENS, J., concurring), the Court squarely held that Congress has such power. In a series of cases beginning with *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-239 (1985), the Court formulated a special "clear statement rule" to determine whether specific Acts of Congress contained an effective exercise of that power. Nevertheless, in a sharp break with the past, today the Court holds that with the narrow and illogical exception of statutes enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, Congress has no such power.

The importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, [*55] environmental law, and the regulation of our vast national economy. n1

n1 See, e.g., *Pennsylvania v. Union Gas Co.*, 496 U.S. 1 (1989) (holding that a federal court may order a State to pay clean-up costs pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *In re Merchants Grain, Inc.*, 59 F.3d 630 (CA7 1995) (holding that the Eleventh Amendment does not bar a bankruptcy court from issuing a money judgment against a State under the Bankruptcy Code); *Chavez v. Arte Publico Press*, 59 F.3d 539 (CA5 1995) (holding that a state university could be sued in federal court for infringing an author's copyright). The conclusion that suits against States may not be brought in federal court is also incompatible with our cases concluding that state entities may be sued for antitrust violations. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-792 (1975).

As federal courts have exclusive jurisdiction over cases arising under these federal laws, the majority's conclusion that the Eleventh Amendment shields States from being sued under them in federal court suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy. See Harris & Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash With Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction*, 37 *Emory L. J.* 645

(1988).

[*56]

There may be room for debate over whether, in light of the Eleventh Amendment, Congress has the power to ensure that such a cause of action may be enforced in federal court by a citizen of another State or a foreign citizen. There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear.

As JUSTICE SOUTER has convincingly demonstrated, the Court's contrary conclusion is profoundly misguided. Despite the thoroughness of his analysis, supported by sound reason, history, precedent, and strikingly uniform scholarly commentary, the shocking character of the majority's affront to a coequal branch of our Government merits additional comment.

I

For the purpose of deciding this case, I can readily assume that Justice Iredell's dissent in *Chisholm v. Georgia*, 2 *Dall.*, at 429-450, and the Court's opinion in *Hans v. Louisiana*, 134 U.S. 1 (1890), correctly stated the law that should govern our decision today. As I shall explain, both of those opinions relied on an interpretation of an Act of Congress rather than a want of congressional [*57] power to authorize a suit against the State.

In concluding that the federal courts could not entertain *Chisholm's* action against the State of Georgia, Justice Iredell relied on the text of the Judiciary Act of 1789, not the State's assertion that Article III did not extend the judicial power to suits against unconsenting States. Justice Iredell argued that, under Article III, federal courts possessed only such jurisdiction as Congress had provided, and that the Judiciary Act expressly limited federal-court jurisdiction to that which could be exercised in accordance with "the principles and usages of law." *Chisholm v. Georgia*, 2 *Dall.*, at 434 (quoting § 14 of the Judiciary Act of 1789.) He reasoned that the inclusion of this phrase constituted a command to the federal courts to construe their jurisdiction in light of the prevailing common law, a background legal regime which he believed incorporated the doctrine of sovereign immunity. *Chisholm v. Georgia*, 2 *Dall.*, at 434-436 (Iredell, J., dissenting). n2

n2 Because Justice Iredell read the Judiciary Act of 1789 to have incorporated the common law, he did not even conclude that Congress would have to make a clear-statement in order to override the com-

mon law's recognition of sovereign immunity.

[*58]

Because Justice Iredell believed that the expansive text of Article III did not prevent Congress from imposing this common-law limitation on federal-court jurisdiction, he concluded that judges had no authority to entertain a suit against an unconsenting State. n3 At the same time, although he acknowledged that the Constitution might allow Congress to extend federal-court jurisdiction to such an action, he concluded that the terms of the Judiciary Act of 1789 plainly had not done so.

"[Congress'] direction, I apprehend, we cannot supersede because it may appear to us not sufficiently extensive. If it be not, we must wait till other remedies are provided by the same authority. From this it is plain that the Legislature did not chuse to leave to our own discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law already well known, and by their precision calculated to guard against the innovating spirit of Courts of Justice, which the Attorney-General in another case reprobed with so much warmth, and with whose sentiments in that particular, I most cordially join." *Id.*, at 434 [*59] (emphasis added).

n3 Actually, he limited his conclusion to the narrower question whether an action of assumpsit would lie against a State, which he distinguished from the more general question whether a State can ever be sued. *Chisholm v. Georgia*, 2 *Dall.*, at 430. He did so because he recognized "that in England, certain judicial proceedings not inconsistent with the sovereignty, may take place against the Crown, but that an action of assumpsit will not lie", and because he had "often found a great deal of confusion to arise from taking too large a view at once." *Ibid.*

For Justice Iredell then, it was enough to assume that Article III permitted Congress to impose sovereign immunity as a jurisdictional limitation; he did not proceed to resolve the further question whether the Constitution went so far as to prevent Congress from withdrawing a State's immunity. n4 Thus, it would be ironic to construe the *Chisholm* dissent as precedent for the conclusion that Article III limits [*60] Congress' power to determine the scope of a State's sovereign immunity in federal court.

n4 In two sentences at the end of his lengthy opinion, Justice Iredell stated that his then-present view was that the Constitution would not permit a

"compulsive suit against a State for the recovery of money." *Id.*, at 449. In light of Justice Iredell's express statement that the only question before the Court was the propriety of an individual's action for assumpsit against a State, an action which, of course, results in a money judgment, see n. 2, *supra*, this dicta should not be understood to state the general view that the Constitution bars all suits against unconsenting States. Moreover, even as to the limited question whether the Constitution permits actions for money judgments, Justice Iredell took pains to reserve ultimate judgment. *Chisholm v. Georgia*, 2 *Dall.*, at 449. Thus, nothing in Justice Iredell's two sentences of dicta provides a basis for concluding that Congress lacks the power to authorize the suit for the nonmonetary relief at issue here.

[*61]

The precise holding in *Chisholm* is difficult to state because each of the Justices in the majority wrote his own opinion. They seem to have held, however, not that the Judiciary Act of 1789 precluded the defense of sovereign immunity, but that Article III of the Constitution itself required the Supreme Court to entertain original actions against unconsenting States. n5 I agree with Justice Iredell that such a construction of Article III is incorrect; that Article should not then have been construed, and should not now be construed, to prevent Congress from granting States a sovereign immunity defense in such cases. n6 That reading of Article III, however, explains why the majority's holding in *Chisholm* could not have been reversed by a simple statutory amendment adopting Justice Iredell's interpretation of the Judiciary Act of 1789. There is a special irony in the fact that the error committed by the *Chisholm* majority was its decision that this Court, rather than Congress, should define the scope of the sovereign immunity defense. That, of course, is precisely the same error the Court commits today.

n5 In this respect, *Chisholm v. Georgia*, should be understood to be of a piece with the debate over judicial power famously joined in *Martin v. Hunter's Lessee*, 1 *Wheat.* 304, 337 (1816). There, too, the argument centered on whether Congress had the power to limit the seemingly expansive jurisdictional grant that Article III had conferred, not on whether Article III itself provided the relevant limitation.

[*62]

n6 The contention that Article III withdrew Georgia's sovereign immunity had special force precisely because *Chisholm* involved an action premised

on the Supreme Court's original jurisdiction. While Article III leaves it to Congress to establish the lower federal courts, and to make exceptions to the Supreme Court's appellate jurisdiction, it specifically mandates that there be a Supreme Court and that it shall be vested with original jurisdiction over those actions in which "a State shall be a party." Article III, § 2. In light of that language, the Chisholm majority's conclusion that the Supreme Court had a constitutional obligation to take jurisdiction of all suits against States was not implausible.

In light of the nature of the disagreement between Justice Iredell and his colleagues, Chisholm's holding could have been overturned by simply amending the Constitution to restore to Congress the authority to recognize the doctrine. As it was, the plain text of the Eleventh Amendment would seem to go further and to limit the judicial power itself in a certain class of cases. In doing [*63] so, however, the Amendment's quite explicit text establishes only a partial bar to a federal court's power to entertain a suit against a State. n7

n7 It should be remembered that at the time of Chisholm, there was a general fear of what Justice Iredell termed the "innovating spirit" of the Federal Judiciary. See, e.g., 3 A. Beveridge, *The Life of John Marshall* 19-30 (1919) (discussing the consternation that the federal courts' creation of common-law felonies engendered). Thus, there is good reason to believe that the reaction to Chisholm reflected the popular hostility to the Federal Judiciary more than any desire to restrain the National Legislature.

Justice Brennan has persuasively explained that the Eleventh Amendment's jurisdictional restriction is best understood to apply only to suits premised on diversity jurisdiction, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (dissenting opinion), and JUSTICE SCALIA has agreed that the plain text of the Amendment cannot be [*64] read to apply to federal-question cases. See *Pennsylvania v. Union Gas*, 491 U.S., at 31 (dissenting opinion). n8 Whatever the precise dimensions of the Amendment, its express terms plainly do not apply to all suits brought against unconsenting States. n9 The question thus becomes whether the relatively modest jurisdictional bar that the Eleventh Amendment imposes should be understood to reveal that a more general jurisdictional bar implicitly inheres in Article III.

n8 Of course, even if the Eleventh Amendment

applies to federal-question cases brought by a citizen of another State, its express terms pose no bar to a federal court assuming jurisdiction in a federal-question case brought by an in-state plaintiff pursuant to Congress' express authorization. As that is precisely the posture of the suit before us, and as it was also precisely the posture of the suit at issue in *Pennsylvania v. Union Gas*, there is no need to decide here whether Congress would be barred from authorizing out-of-state plaintiffs to enforce federal rights against States in federal court. In fact, Justice Brennan left open that question in his dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 288, n. 41 (1985) (Brennan, J., dissenting). "When the Court is prepared to embark on a defensible interpretation of the Eleventh Amendment consistent with its history and purposes, the question whether the Amendment bars federal-question or admiralty suits by a noncitizen or alien against a State would be open." *Ibid.*

[*65]

n9 Under the "plain text" of the Eleventh Amendment, I note that there would appear to be no more basis for the conclusion that States may consent to federal-court jurisdiction in actions brought by out-of-state or foreign citizens, than there would be for the view that States should be permitted to consent to the jurisdiction of a federal court in a case that poses no federal question. See, e.g., *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377, n. 21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112-113, n. 3 (1972); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, and n. 17 (1951); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Jackson v. Ashton*, 8 Pet. 148, 149 (1834). We have, however, construed the Amendment, despite its text, to apply only to unconsenting States. See, e.g., *Clark v. Barnard*, 108 U.S. 436, 447 (1883). In so doing, we of course left it for Congress to determine whether federal courts should entertain any claim against a State in federal court. A departure from the text to expand the class of plaintiffs to whom the Eleventh Amendment's bar applies would, however, limit Congress' authority to exercise its considered judgment as to the propriety of federal-court jurisdiction. The absence of a textual warrant for imposing such a broad limitation on the legislative branch counsels against this Court extratextually imposing one.

[*66]

The language of Article III certainly gives no indica-

tion that such an implicit bar exists. That provision's text specifically provides for federal-court jurisdiction over all cases arising under federal law. Moreover, as I have explained, Justice Iredell's dissent argued that it was the Judiciary Act of 1789, not Article III, that prevented the federal courts from entertaining Chisholm's diversity action against Georgia. Therefore, Justice Iredell's analysis at least suggests that it was by no means a fixed view at the time of the founding that Article III prevented Congress from rendering States suable in federal court by their own citizens. In sum, little more than speculation justifies the conclusion that the Eleventh Amendment's express but partial limitation on the scope of Article III reveals that an implicit but more general one was already in place.

II

The majority appears to acknowledge that one cannot deduce from either the text of Article III or the plain terms of the Eleventh Amendment that the judicial power does not extend to a congressionally created cause of action against a State brought by one of that State's citizens. Nevertheless, the majority asserts that [*67] precedent compels that same conclusion. I disagree. The majority relies first on our decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), which involved a suit by a citizen of Louisiana against that State for a claimed violation of the Contracts Clause. The majority suggests that by dismissing the suit, Hans effectively held that federal courts have no power to hear federal question suits brought by same-state plaintiffs.

Hans does not hold, however, that the Eleventh Amendment, or any other constitutional provision, precludes federal courts from entertaining actions brought by citizens against their own States in the face of contrary congressional direction. As I have explained before, see *Pennsylvania v. Union Gas Co.*, 491 U.S., at 25-26 (STEVENS, J., concurring), and as JUSTICE SOUTER effectively demonstrates, Hans instead reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting States. Because Hans did not announce a constitutionally mandated jurisdictional bar, one need not overrule Hans, or even question its reasoning, in order to conclude that [*68] Congress may direct the federal courts to reject sovereign immunity in those suits not mentioned by the Eleventh Amendment. Instead, one need only follow it.

Justice Bradley's somewhat cryptic opinion for the Court in Hans relied expressly on the reasoning of Justice Iredell's dissent in Chisholm, which, of course, was premised on the view that the doctrine of state sovereign immunity was a common-law rule that Congress had

directed federal courts to respect, not a constitutional immunity that Congress was powerless to displace. For that reason, Justice Bradley explained that the State's immunity from suit by one of its own citizens was based not on a constitutional rule but rather on the fact that Congress had not, by legislation, attempted to overcome the common-law presumption of sovereign immunity. His analysis so clearly supports the position rejected by the majority today that it is worth quoting at length.

"But besides the presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the Circuit [*69] Court does not exist, is the language of an act of Congress by which its jurisdiction is conferred. The words are these: 'The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties,' etc.—'Concurrent with the Courts of the several States.' Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the judiciary act of 1789, which was before the court in *Chisholm v. Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh [*70] Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's view in this regard. *Hans v. Louisiana*, 134 U.S., at 18-19.

As this passage demonstrates, Hans itself looked to see whether Congress had displaced the presumption that sovereign immunity obtains. Although the opinion did go to great lengths to establish the quite uncontroversial historical proposition that unconsenting States generally were not subject to suit, that entire discussion preceded the opinion's statutory analysis. See *Hans v. Louisiana*, 134 U.S. at 10-18. Thus, the opinion's thorough historical investigation served only to establish a presumption against jurisdiction that Congress must overcome, not an inviolable jurisdictional restriction that inheres in the Constitution itself.

Indeed, the very fact that the Court characterized the

doctrine of sovereign immunity as a "presumption" confirms its assumption that it could be displaced. The Hans Court's inquiry into congressional intent would have been wholly inappropriate if it had believed that the doctrine of sovereign immunity was a constitutionally inviolable jurisdictional [*71] limitation. Thus, Hans provides no basis for the majority's conclusion that Congress is powerless to make States suable in cases not mentioned by the text of the Eleventh Amendment. Instead, Hans provides affirmative support for the view that Congress may create federal-court jurisdiction over private causes of action against unconsenting States brought by their own citizens.

It is true that the underlying jurisdictional statute involved in this case, 28 U.S.C. § 1331, does not itself purport to direct federal courts to ignore a State's sovereign immunity any more than did the underlying jurisdictional statute discussed in Hans, the Judiciary Act of 1875. However, unlike in Hans, in this case Congress has, by virtue of the Indian Gaming Regulation Act, affirmatively manifested its intention to "invest its courts with" jurisdiction beyond the limits set forth in the general jurisdictional statute. 134 U.S., at 18. By contrast, because Hans involved only an implied cause of action based directly on the Constitution, the Judiciary Act of 1875 constituted the sole indication as to whether Congress intended federal-court jurisdiction to extend to a suit against [*72] an unconsenting State. n10

n10 In his dissent in *Pennsylvania v. Union Gas Co.*, 491 U.S., at 36-37, JUSTICE SCALIA contended that the existence of the Judiciary Act of 1875 at the time of Hans requires one to accept the "gossamer distinction between cases in which Congress has assertedly sought to eliminate state sovereign immunity pursuant to its powers to create and organize courts, and cases in which it has assertedly sought to do so pursuant to some of its other powers," in order to conclude that, in spite of Hans, Congress may authorize federal courts to hear a suit against an unconsenting State. I rely on no such "gossamer distinction" here.

Congress has the authority to withdraw sovereign immunity in cases not covered by the Eleventh Amendment under all of its various powers. Nothing in Hans is to the contrary. As the passage quoted above demonstrates, Hans merely concluded that Congress, in enacting the Judiciary Act of 1875, did not manifest a desire to withdraw state sovereign immunity with sufficient clarity to overcome the countervailing presumption. Therefore, I rely only on the distinction between a statute that clearly directs

federal courts to entertain suits against States, such as the one before us here, and a statute that does not, such as the Judiciary Act of 1875. In light of our repeated application of a clear-statement rule in Eleventh Amendment cases, from Hans onward, I would be surprised to learn that such a distinction is too thin to be acceptable.

[*73]

Given the nature of the cause of action involved in Hans, as well as the terms of the underlying jurisdictional statute, the Court's decision to apply the common-law doctrine of sovereign immunity in that case clearly should not control the outcome here. The reasons that may support a federal court's hesitancy to construe a judicially crafted constitutional remedy narrowly out of respect for a State's sovereignty do not bear on whether Congress may preclude a State's invocation of such a defense when it expressly establishes a federal remedy for the violation of a federal right.

No one has ever suggested that Congress would be powerless to displace the other common-law immunity doctrines that this Court has recognized as appropriate defenses to certain federal claims such as the judicially fashioned Bivens remedy. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Similarly, our cases recognizing qualified officer immunity in § 1983 actions rest on the conclusion that, in passing that statute, Congress did not intend to displace the common-law immunity that officers would have retained under suits premised solely on [*74] the general jurisdictional statute. See *Tower v. Glover*, 467 U.S. 914, 920 (1984). For that reason, the federal common law of officer immunity that Congress meant to incorporate, not a contrary state immunity, applies in § 1983 cases. See *Martinez v. California*, 444 U.S. 277, 284 (1980). There is no reason why Congress' undoubted power to displace those common-law immunities should be either greater or lesser than its power to displace the common-law sovereign immunity defense.

Some of our precedents do state that the sovereign immunity doctrine rests on fundamental constitutional "postulates" and partakes of jurisdictional aspects rooted in Article III. See ante, at 22-25. Most notably, that reasoning underlies this Court's holding in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

Monaco is a most inapt precedent for the majority's holding today. That case barred a foreign sovereign from suing a State in an equitable state law action to recover payments due on State bonds. It did not, however, involve a claim based on federal law. Instead, the case concerned a purely state law question to which the

State had interposed a federal defense. [*75] *Principality of Monaco v. Mississippi*, 292 U.S. 313, 317 (1934). Thus, Monaco reveals little about the power of Congress to create a private federal cause of action to remedy a State's violation of federal law.

Moreover, although Monaco attributes a quasi-constitutional status to sovereign immunity, even in cases not covered by the Eleventh Amendment's plain text, that characterization does not constitute precedent for the proposition that Congress is powerless to displace a State's immunity. Our abstention doctrines have roots in both the Tenth Amendment and Article III, and thus may be said to rest on constitutional "postulates" or to partake of jurisdictional aspects. Yet it has not been thought that the Constitution would prohibit Congress from barring federal courts from abstaining. The majority offers no reason for making the federal common-law rule of sovereign immunity less susceptible to congressional displacement than any other quasi-judicial common-law rule.

In this regard, I note that Monaco itself analogized sovereign immunity to the prudential doctrine that "controversies" identified in Article III must be "justiciable" in order to be heard [*76] by federal courts. *Id.*, at 329. The justiciability doctrine is a prudential rather than a jurisdictional one, and thus Congress' clearly expressed intention to create federal jurisdiction over a particular Article III controversy necessarily strips federal courts of the authority to decline jurisdiction on justiciability grounds. See *Allen v. Wright*, 468 U.S. 737, 791 (1984) (STEVENS, J., dissenting); *Flast v. Cohen*, 392 U.S. 83, 100-101 (1968). For that reason, Monaco, by its own terms, fails to resolve the question before us. n11

n11 Indeed, to the extent the reasoning of Monaco was premised on the ground that a contrary ruling might permit foreign governments and States indirectly to frustrate Congress' treaty power, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331 (1934), the opinion suggests that its outcome would have been quite different had Congress expressly authorized suits by foreign governments against individual States as part of its administration of foreign policy.

[*77]

More generally, it is quite startling to learn that the reasoning of Hans and Monaco (even assuming that it did not undermine the majority's view) should have a stare decisis effect on the question whether Congress possesses the authority to provide a federal forum for the vindication of a federal right by a citizen against

its own State. In light of the Court's development of a "clear-statement" line of jurisprudence, see, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-239 (1985); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), I would have thought that Hans and Monaco had at least left open the question whether Congress could permit the suit we consider here. Our clear-statement cases would have been all but unintelligible if Hans and Monaco had already established that Congress lacked the constitutional power to make States suable in federal court by individuals no matter how clear its intention to do so. n12

n12 Moreover, they would have most unnecessarily burdened Congress. For example, after deciding that Congress had not made sufficiently explicit its intention to withdraw the state sovereign immunity defense in certain bankruptcy actions, see *Hoffman v. Connecticut Dept. of Income Maintenance*, 392 U.S. 96 (1989), Congress understandably concluded that it could correct the confusion by amending the relevant statute to make its intentions to override such a defense unmistakably clear. See *In re Merchants Grain, Inc.*, 59 F.3d 630 (CA7 1995). Congress will no doubt be surprised to learn that its exercise in legislative clarification, which it undertook for our benefit, was for naught because the Constitution makes it so.

[*78]

Finally, the particular nature of the federal question involved in Hans renders the majority's reliance upon its rule even less defensible. Hans deduced its rebuttable presumption in favor of sovereign immunity largely on the basis of its extensive analysis of cases holding that the sovereign could not be forced to make good on its debts via a private suit. See *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *In re Ayers*, 123 U.S. 443 (1887). Because Hans, like these other cases, involved a suit that attempted to make a State honor its debt, its holding need not be read to stand even for the relatively limited proposition that there is a presumption in favor of sovereign immunity in all federal-question cases. n13

n13 Significantly, Chief Justice Marshall understood the Eleventh Amendment's bar to have been designed primarily to protect States from being sued for their debts. See *Cohens v. Virginia*, 6 Wheat. 264, 406 (1821).

In [*79] Hans, the plaintiff asserted a Contracts Clause

claim against his State and thus asserted a federal right. To show that Louisiana had impaired its federal obligation, however, Hans first had to demonstrate that the State had entered into an enforceable contract as a matter of state law. That Hans chose to bring his claim in federal court as a Contract Clause action could not change the fact that he was, at bottom, seeking to enforce a contract with the State. See Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 *Case W. Res. L. Rev.* 931 (1990).

Because Hans' claimed federal right did not arise independently of state law, sovereign immunity was relevant to the threshold state-law question of whether a valid contract existed. n14 Hans expressly pointed out, however, that an individual who could show that he had an enforceable contract under state law would not be barred from bringing suit in federal court to prevent the State from impairing it.

"To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subject of judicial [*80] cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to effect their enjoyment." *Hans v. Louisiana*, 134 *U. S.*, at 20-21.

n14 Significantly, many of the cases decided after Hans in which this Court has recognized State sovereign immunity involved claims premised on the breach of rights that were rooted in state law. See *Ford Motor Co. v. Department of Treasury of Ind.*, 323 *U.S.* 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 *U.S.* 47 (1944); *Smith v. Reeves*, 178 *U.S.* 436 (1900). In such cases, the Court's application of the state-law immunity appears simply to foreshadow (or follow) the rule of *Erie Railroad Co. v. Tompkins*, 304 *U.S.* 64 (1938), not to demark the limits of Article III.

[*81]

That conclusion casts doubt on the absolutist view that Hans definitively establishes that Article III prohibits federal courts from entertaining federal-question suits brought against States by their own citizens. At the very least, Hans suggests that such suits may be brought

to enjoin States from impairing existing contractual obligations.

The view that the rule of Hans is more substantive than jurisdictional comports with Hamilton's famous discussion of sovereign immunity in *The Federalist Papers*. Hamilton offered his view that the federal judicial power would not extend to suits against unconsenting States only in the context of his contention that no contract with a State could be enforceable against the State's desire. He did not argue that a State's immunity from suit in federal court would be absolute.

"There is no color to pretend that the State governments would, by the adoption of [the plan of convention], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the [*82] sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. *The Federalist* No. 81, p. 488 (C. Rossiter ed. 1961).

Here, of course, no question of a State's contractual obligations is presented. The Seminole Tribe's only claim is that the State of Florida has failed to fulfill a duty to negotiate that federal statutory law alone imposes. Neither the *Federalist Papers*, nor Hans, provides support for the view that such a claim may not be heard in federal court.

III

In reaching my conclusion that the Constitution does not prevent Congress from making the State of Florida suable in federal court for violating one of its statutes, I emphasize that I agree with the majority that in all cases to which the judicial power does not extend—either because they are not within any category defined in Article III or because they are within the category withdrawn from Article III by the Eleventh Amendment—Congress lacks the power to confer jurisdiction on the federal courts. As I have previously insisted: "A statute cannot amend the Constitution." *Pennsylvania v. Union Gas Co.*, 491 *U. S.*, at 24.

It was, therefore, [*83] misleading for the Court in *Fitzpatrick v. Bitzer*, 427 *U.S.* 445 (1976), to imply that § 5 of the Fourteenth Amendment authorized Congress to confer jurisdiction over cases that had been withdrawn from Article III by the Eleventh Amendment. Because that action had been brought by Connecticut citizens against officials of the State of Connecticut, jurisdiction was not precluded by the Eleventh Amendment. As Justice Brennan pointed out in his concurrence, the con-

gressional authority to enact the provisions at issue in the case was found in the Commerce Clause and provided a sufficient basis for refusing to allow the State to "avail itself of the nonconstitutional but ancient doctrine of sovereign immunity." *Id.*, at 457 (opinion concurring in judgment).

In confronting the question whether a federal grant of jurisdiction is within the scope of Article III, as limited by the Eleventh Amendment, I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate Commerce among the several States, and with the Indian Tribes, Art. I, § 8, cl. 3, the power to establish uniform laws on the subject of bankruptcy, Art. I, § 8, cl. 4, the [*84] power to promote the progress of science and the arts by granting exclusive rights to authors and inventors, Art. I, § 8, cl. 8, the power to enforce the provisions of the Fourteenth Amendment, § 5, or indeed any other provision of the Constitution. There is no language anywhere in the constitutional text that authorizes Congress to expand the borders of Article III jurisdiction or to limit the coverage of the Eleventh Amendment.

The Court's holdings in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), do unquestionably establish, however, that Congress has the power to deny the States and their officials the right to rely on the nonconstitutional defense of sovereign immunity in an action brought by one of their own citizens. As the opinions in the latter case demonstrate, there can be legitimate disagreement about whether Congress intended a particular statute to authorize litigation against a State. Nevertheless, the Court there squarely held that the Commerce Clause was an adequate source of authority for such a private remedy. In a rather novel rejection of the doctrine of stare decisis, the Court today demeans [*85] that holding by repeatedly describing it as a "plurality decision" because Justice White did not deem it necessary to set forth the reasons for his vote. As JUSTICE SOUTER's opinion today demonstrates, the arguments in support of Justice White's position are so patent and so powerful that his actual vote should be accorded full respect. Indeed, far more significant than the "plurality" character of the three opinions supporting the holding in *Union Gas* is the fact that the issue confronted today has been squarely addressed by a total of 13 Justices, 8 of whom cast their votes with the so-called "plurality". n15

n15 It is significant that JUSTICE SOUTER's opinion makes it perfectly clear that JUSTICE GINSBURG, JUSTICE BREYER, and he did not consider it necessary to rely on the holding in *Union*

Gas to support their conclusion. I find today's decision particularly unfortunate because of its failure to advance an acceptable reason for refusing to adhere to a precedent upon which the Congress, a well as the courts, should be entitled to rely.

[*86]

The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity "has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment." *Id.*, at 25 (STEVENS, J., concurring). It rests rather on concerns of federalism and comity that merit respect but are nevertheless, in cases such as the one before us, subordinate to the plenary power of Congress.

IV

As I noted above, for the purpose of deciding this case, it is not necessary to question the wisdom of the Court's decision in *Hans v. Louisiana*. Given the absence of precedent for the Court's dramatic application of the sovereign immunity doctrine today, it is nevertheless appropriate to identify the questionable heritage of the doctrine and to suggest that there are valid reasons for limiting, or even rejecting that doctrine altogether, rather than expanding it.

Except insofar as it has been incorporated into the text of the Eleventh Amendment, the doctrine is entirely the product of judge-made law. Three features of its English ancestry make it particularly unsuitable for incorporation into [*87] the law of this democratic Nation.

First, the assumption that it could be supported by a belief that "the King can do no wrong" has always been absurd; the bloody path trod by English monarchs both before and after they reached the throne demonstrated the fictional character of any such assumption. Even if the fiction had been acceptable in Britain, the recitation in the Declaration of Independence of the wrongs committed by George III made that proposition unacceptable on this side of the Atlantic.

Second, centuries ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority. n16 While such a justification for a rule that immunized the sovereign from suit in a secular tribunal might have been acceptable in a jurisdiction where a particular faith is endorsed by the government, it should give rise to skepticism concerning the legitimacy of comparable rules in a society where a constitutional wall separates the State from the Church.

n16 See Stevens, *Is Justice Irrelevant?*, 87 NW Law Rev. 1121, 1124-1125 (1993).

[*88]

Third, in a society where noble birth can justify preferential treatment, it might have been unseemly to allow a commoner to hale the monarch into court. Justice Wilson explained how foreign such a justification is to this Nation's principles. See *Chisholm v. Georgia*, 2 Dall., at 455. Moreover, Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State's dignity. *Cohens v. Virginia*, 6 Wheat. 264, 406-407 (1821). Its purpose, he explained, was far more practical.

"That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the Amendment. . . . We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable [*89] amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the preservation of peace." *Ibid.* n17

n17 Interestingly, this passage demonstrates that the Court's application of a common law sovereign immunity defense in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), was quite probably justified. There a foreign State sued a State as a substantial creditor, and thus implicated the very purpose of the Eleventh Amendment.

Nevertheless, this Court later put forth the interest in preventing "indignity" as the "very object and purpose of the [Eleventh] Amendment." *In re Ayers*, 123 U.S., at 505. That, of course, is an "embarrassingly insufficient" rationale for the rule. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, (1993) (STEVENS, J., dissenting.)

Moreover, I find unsatisfying Justice Holmes' explanation that "[a] sovereign is exempt from suit, not because of any [*90] formal conception or obsolete the-

ory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). As I have explained before, Justice Holmes' justification fails in at least two respects.

"First, it is nothing more than a restatement of the obvious proposition that a citizen may not sue the sovereign unless the sovereign has violated the citizen's legal rights. It cannot explain application of the immunity defense in cases like *Chisholm*, in which it is assumed that the plaintiff's rights have in fact been violated—and those cases are, of course, the only ones in which the immunity defense is needed. Second, Holmes's statement does not purport to explain why a general grant of jurisdiction to federal courts should not be treated as an adequate expression of the sovereign's consent to suits against itself as well as to suits against ordinary litigants." Stevens, *Is Justice Irrelevant?*, 87 NW U.L. Rev. 1121, 1126 (1993).

In sum, as far as its common-law ancestry is concerned, there is no better reason for the rule of sovereign [*91] immunity "than that so it was laid down in the time of Henry IV." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). That "reason" for the perpetuation of this ancient doctrine certainly cannot justify the majority's expansion of it.

In this country the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign. For that reason, Justice Holmes' explanation for a rule that allows a State to avoid suit in its own courts does not even speak to the question whether Congress should be able to authorize a federal court to provide a private remedy for a State's violation of federal law. In my view, neither the majority's opinion today, nor any earlier opinion by any Member of the Court, has identified any acceptable reason for concluding that the absence of a State's consent to be sued in federal court should affect the power of Congress to authorize federal courts to remedy violations of federal law by States or their officials in actions not covered by the Eleventh Amendment's explicit text. n18

n18 Because *Hans v. Louisiana*, 134 U.S. 1 (1890), was the first case in which the Court held that a State could not be sued in federal court by one of its citizens, this comment is of interest:

"It is not necessary that we should enter upon an examination of the reason or the expediency of the

rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence." *Id.*, at 21.

So it is today.

[*92]

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

V

Fortunately, and somewhat fortuitously, a jurisdictional problem that is unmentioned by the Court may deprive its opinion of precedential significance. The Indian Gaming Regulatory Act establishes a unique set of procedures for resolving the dispute between the Tribe and the State. If each adversary adamantly adheres to its understanding of the law, if the District Court determines that the State's inflexibility constitutes a failure to negotiate in good faith, and if the State thereafter continues to insist that it is acting [*93] within its rights, 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. 25 U.S.C. § 2710(d)(7)(B). As the Court of Appeals interpreted the Act, this final disposition is available even though the action against the State and its Governor may not be maintained. 11 F.3d 1016, 1029 (CA11 1994) (The Court does not tell us whether it agrees or disagrees with that disposition.) In my judgment, it is extremely doubtful that the obviously dispensable involvement of the judiciary in the intermediate stages of a procedure that begins and ends in the Executive Branch is a proper exercise of judicial power. See *Gordon v. United States*, 117 U.S. Appx. 697, 702-703 (1864) (opinion of Taney, C. J.); *United States v. Ferreira*, 13 (How.) 40, 48 (1851). It may well follow that the misguided opinion of today's majority has nothing more than an advisory character. Whether or not that be so, the better reasoning in JUSTICE SOUTER's far wiser and far more scholarly opinion will surely be the law one day.

For these reasons, as well as those set forth in JUSTICE SOUTER's opinion, I [*94] respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. Although the Court invokes the Eleventh Amendment as authority for this proposition, the only sense in which that amendment might be claimed as pertinent here was tolerantly phrased by JUSTICE STEVENS in his concurring opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1, 23 (1989) (STEVENS, J., concurring). There, he explained how it has come about that we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134 U.S. 1 (1890). JUSTICE STEVENS saw in that second Eleventh Amendment no bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by individuals against a State, and I can only say that after my own canvass [*95] of the matter I believe he was entirely correct in that view, for reasons given below. His position, of course, was also the holding in *Union Gas*, which the Court now overrules and repudiates.

The fault I find with the majority today is not in its decision to reexamine *Union Gas*, for the Court in that case produced no majority for a single rationale supporting congressional authority. Instead, I part company from the Court because I am convinced that its decision is fundamentally mistaken, and for that reason I respectfully dissent.

I

It is useful to separate three questions: (1) whether the States enjoyed sovereign immunity if sued in their own courts in the period prior to ratification of the National Constitution; (2) if so, whether after ratification the States were entitled to claim some such immunity when sued in a federal court exercising jurisdiction either because the suit was between a State and a non-state litigant who was not its citizen, or because the issue in the case raised a federal question; and (3) whether any state sovereign immunity recognized in federal court may be abrogated by Congress.

The answer to the first question is not clear, although some [*96] of the Framers assumed that States did enjoy immunity in their own courts. The second question

was not debated at the time of ratification, except as to citizen-state diversity jurisdiction; n1 there was no unanimity, but in due course the Court in *Chisholm v. Georgia*, 2 Dall. 419 (1793), answered that a state defendant enjoyed no such immunity. As to federal question jurisdiction, state sovereign immunity seems not to have been debated prior to ratification, the silence probably showing a general understanding at the time that the States would have no immunity in such cases.

n1 The two Citizen-State Diversity Clauses provide as follows: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., Art. III, § 2. In his opinion in *Union Gas*, JUSTICE STEVENS referred to these clauses as the "citizen-state" and "alien-state" clauses, respectively, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24 (1989) (STEVENS, J., concurring). I have grouped the two as "Citizen-State Diversity Clauses" for ease in frequent repetition here.

[*97]

The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants. I will explain why the Eleventh Amendment did not affect federal question jurisdiction, a notion that needs to be understood for the light it casts on the soundness of Hans's holding that States did enjoy sovereign immunity in federal question suits. The Hans Court erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens. The error of Hans's reasoning is underscored by its clear inconsistency with the Founders' hostility to the implicit reception of common-law doctrine as federal law, and with the Founders' conception of sovereign power as divided between the States and the National Government for the sake of very practical objectives.

The Court's answer today to the third question is likewise at odds with the Founders' view that common law, when it was received into the new American legal systems, [*98] was always subject to legislative amendment. In ignoring the reasons for this pervasive understanding at the time of the ratification, and in holding that a nontextual common-law rule limits a clear grant of congressional power under Article I, the Court follows

a course that has brought it to grief before in our history, and promises to do so again.

Beyond this third question that elicits today's holding, there is one further issue. To reach the Court's result, it must not only hold the Hans doctrine to be outside the reach of Congress, but must also displace the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that an officer of the government may be ordered prospectively to follow federal law, in cases in which the government may not itself be sued directly. None of its reasons for displacing Young's jurisdictional doctrine withstand scrutiny.

A

The doctrine of sovereign immunity comprises two distinct rules, which are not always separately recognized. The one rule holds that the King or the Crown, as the font of law, is not bound by the law's provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts. [*99] See, e.g., Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *Harv. L. Rev.* 1, 3-4 (1963). n2 The one rule limits the reach of substantive law; the other, the jurisdiction of the courts. We are concerned here only with the latter rule, which took its common-law form in the high middle ages. "At least as early as the thirteenth century, during the reign of Henry III (1216-1272), it was recognized that the king could not be sued in his own courts." C. Jacobs, *Eleventh Amendment and Sovereign Immunity* 5 (1972). See also 3 W. Blackstone, *Commentaries*, * 244- * 245; Jaffe, *supra*, at 2 ("By the time of Bracton (1268) it was settled doctrine that the King could not be sued *eo nomine* in his own courts").

n2 The first of these notions rests on the ancient maxim that "the King can do no wrong." See, e.g., 1 W. Blackstone, *Commentaries* * 244. Professor Jaffe has argued this expression "originally meant precisely the contrary to what it later came to mean," that is, "it meant that the king must not, was not allowed, not entitled, to do wrong." Jaffe, 77 *Harv. L. Rev.*, at 4 (quoting Ehrlich, *Proceedings Against the Crown* (1216-1377) p. 42, in 6 *Oxford Studies in Social and Legal History* (P. Vinogradoff ed. 1921), at 42); see also 1 Blackstone, *supra*, at * 246 (interpreting the maxim to mean that "the prerogative of the crown extends not to do any injury"). In any event, it is clear that the idea of the sovereign, or any part of it, being above the law in this sense has not survived in American law. See, e.g., *Långford v. United States*, 101 U.S. 341, 342-343 (1880); *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

[*100]

The significance of this doctrine in the nascent American law is less clear, however, than its early development and steady endurance in England might suggest. While some colonial governments may have enjoyed some such immunity, Jacobs, *supra*, at 6-7, the scope (and even the existence) of this governmental immunity in pre-Revolutionary America remains disputed. See Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 1895-1899 (1983).

Whatever the scope of sovereign immunity might have been in the Colonies, however, or during the period of Confederation, the proposal to establish a National Government under the Constitution drafted in 1787 presented a prospect unknown to the common law prior to the American experience: the States would become parts of a system in which sovereignty over even domestic matters would be divided or parcelled out between the States and the Nation, the latter to be invested with its own judicial power and the right to prevail against the States whenever their respective substantive laws might be in conflict. With this prospect in mind, the 1787 Constitution might have addressed state sovereign immunity [*101] by eliminating whatever sovereign immunity the States previously had, as to any matter subject to federal law or jurisdiction; by recognizing an analogue to the old immunity in the new context of federal jurisdiction, but subject to abrogation as to any matter within that jurisdiction; or by enshrining a doctrine of inviolable state sovereign immunity in the text, thereby giving it constitutional protection in the new federal jurisdiction. See Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 *U. Pa. L. Rev.* 515, 536-538 (1977).

The 1787 draft in fact said nothing on the subject, and it was this very silence that occasioned some, though apparently not widespread, dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity as it could have done on any matter of nonfederal law litigated in its own courts. As it has come down to us, the discussion gave no attention to congressional power under the proposed Article I but focused entirely on the limits of the judicial power provided in Article III. And although the jurisdictional bases together constituting [*102] the judicial power of the national courts under section 2 of Article III included questions arising under federal law and cases between States and individuals who are not citizens, n3 it was only upon the latter citizen-state diversity provisions that preratification questions about state immunity from suit

or liability centered. n4

n3 The text reads that "the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

n4 The one statement I have found on the subject of States' immunity in federal question cases was an opinion that immunity would not be applicable in these cases: James Wilson, in the Pennsylvania ratification debate, stated that the federal question clause would require States to make good on pre-Revolutionary debt owed to English merchants (the enforcement of which was promised in the Treaty of 1783) and thereby "show the world that we make the faith of the treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." 2 J. Elliot, *Debates on the Federal Constitution*, 490 (2d ed. 1836) (Elliot's Debates).

[*103]

Later in my discussion I will canvass the details of the debate among the Framers and other leaders of the time, see *infra*, at 47-54; for now it is enough to say that there was no consensus on the issue. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 263-280 (1985) (Brennan, J., dissenting); *Nevada v. Hall*, 440 U.S. 410, 419 (1979); Jacobs, *supra*, at 40 ("The legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity"). There was, on the contrary, a clear disagreement, which was left to fester during the ratification period, to be resolved only thereafter. One other point, however, was also clear: the debate addressed only the question whether ratification of the Constitution would, in diversity cases and

without more, abrogate the state sovereign immunity or allow it to have some application. We have no record that anyone argued for the third option mentioned above, that the Constitution would affirmatively guarantee state sovereign immunity against any congressional action to the contrary. Nor would [*104] there have been any apparent justification for any such argument, since no clause in the proposed (and ratified) Constitution even so much as suggested such a position. It may have been reasonable to contend (as we will see that Madison, Marshall, and Hamilton did) that Article III would not alter States' pre-existing common-law immunity despite its unqualified grant of jurisdiction over diversity suits against States. But then, as now, there was no textual support for contending that Article III or any other provision would "constitutionalize" state sovereign immunity, and no one uttered any such contention.

B

The argument among the Framers and their friends about sovereign immunity in federal citizen-state diversity cases, in any event, was short lived and ended when this Court, in *Chisholm v. Georgia*, 2 Dall. 419 (1793), chose between the constitutional alternatives of abrogation and recognition of the immunity enjoyed at common law. The 4-to-1 majority adopted the reasonable (although not compelled) interpretation that the first of the two Citizen-State Diversity Clauses abrogated for purposes of federal jurisdiction any immunity the States might have enjoyed in their [*105] own courts, and Georgia was accordingly held subject to the judicial power in a common-law assumpsit action by a South Carolina citizen suing to collect a debt. n5 The case also settled, by implication, any question there could possibly have been about recognizing state sovereign immunity in actions depending on the federal question (or "arising under") head of jurisdiction as well. The constitutional text on federal question jurisdiction, after all, was just as devoid of immunity language as it was on citizen-state diversity, and at the time of *Chisholm* any influence that general common-law immunity might have had as an interpretive force in construing constitutional language would presumably have been no greater when addressing the federal question language of Article III than its Diversity Clauses. See Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v Louisiana*, 57 U. Chi. L. Rev. 1260, 1270 (1990).

n5 This lengthy discussion of the history of the Constitution's ratification, the Court's opinion in *Chisholm v. Georgia*, 2 Dall. 419 (1793) and the adoption of the Eleventh Amendment is neces-

sary to explain why, in my view, the contentions in some of our earlier opinions that *Chisholm* created a great "shock of surprise" misread the history. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). The Court's response to this historical analysis is simply to recite yet again Monaco's erroneous assertion that *Chisholm* created a "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted," 292 U.S., at 325. See ante, at 24. This response is, with respect, no response at all.

Monaco's ipse dixit that *Chisholm* created a "shock of surprise" does not make it so. This Court's opinions frequently make assertions of historical fact, but those assertions are not authoritative as to history in the same way that our interpretations of laws are authoritative as to them. In *Tucker v. Alexandroff*, 183 U.S. 424, 434 (1902), which was, like Monaco, decided a century after the event it purported to recount, the Court baldly stated that "in September 1790, General Washington, on the advice of Mr. Adams, did refuse to permit British troops to march through the territory of the United States from Detroit to the Mississippi, apparently for the reason that the object of such movement was an attack on New Orleans and the Spanish possessions on the Mississippi." Modern historians agree, however, that there was no such request, see J. Daly, *The Use of History in the Decisions of the Supreme Court: 1900-1930* 65-66 (1954); W. Manning, *The Nootka Sound Controversy*, in *Annual Report of the American Historical Association*, H. R. Doc. 429 (1905), at 415-423, and it would of course be absurd for this Court to treat the fact that Tucker asserted the existence of the request as proof that it actually occurred. Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72-73 (1938) ("But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to [the Judiciary Act of 1789] by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written").

Moreover, in this case, there is ample evidence contradicting the "shock of surprise" thesis. Contrary to Monaco's suggestion, the Eleventh Amendment was not "at once proposed and adopted." Congress was in session when *Chisholm* was decided, and a constitutional amendment in response was proposed two days later, but Congress

never acted on it, and in fact it was not until two years after *Chisholm* was handed down that an amendment was ratified. See *Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 1926-1927 (1983).

[*106]

Although Justice Iredell's dissent in *Chisholm* seems at times to reserve judgment on what I have called the third question, whether Congress could authorize suits against the States, *Chisholm, supra*, at 434-435 (Iredell, J., dissenting), his argument is largely devoted to stating the position taken by several federalists that state sovereign immunity was cognizable under the Citizen-State Diversity Clauses, not that state immunity was somehow invisibly codified as an independent constitutional defense. As JUSTICE STEVENS persuasively explains in greater detail, ante, at 3-6, Justice Iredell's dissent focused on the construction of the Judiciary Act of 1789, not Article III. See also Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia* (1793), 73 *N. C. L. Rev.* 255 (1994). This would have been an odd focus, had he believed that Congress lacked the constitutional authority to impose liability. Instead, on Justice Iredell's view, States sued in diversity retained the common-law sovereignty "where no special act of Legislation controls it, to be in force in each state, as it existed in England (unaltered by any statute), at the time of the first settlement [*107] of the country." 2 *Dall.*, at 435. While in at least some circumstances States might be held liable to "the authority of the United States," *id.*, at 436, any such liability would depend upon "laws passed under the Constitution and in conformity to it." *Ibid.* n6 Finding no congressional action abrogating Georgia's common-law immunity, Justice Iredell concluded that the State should not be liable to suit. n7

n6 See also 2 *Dall.*, at 435 ("It is certain, that in regard to any common-law principle which can influence the question before us, no alteration has been made by any statute,"); *id.*, at 437 (if "no new remedy be provided. . . we have no other rule to govern us, but the principles of the pre-existent laws, which must remain in force till superseded by others"); *Atascadero State Hospital v. Scanlon*, 473 *U.S.* 234, 283 (1985) (Brennan, J., dissenting). But see Justice Iredell's dicta suggesting that the Constitution would not permit suits against a State. *Chisholm, supra*, at 449 (Iredell, J., dissenting); *Atascadero, supra*, at 283, n. 34 (Brennan, J., dissenting).

[*108]

n7 Of course, even if Justice Iredell had concluded that state sovereign immunity was not subject to abrogation, it would be inappropriate to assume (as it appears the Court does today, and Hans did as well) that the Eleventh Amendment (regardless of what it says) "constitutionalized" Justice Iredell's dissent, or that it simply adopted the opposite of the holding in *Chisholm*. It is as odd to read the Eleventh Amendment's rejection of *Chisholm* (which held that States may be sued in diversity) to say that States may not be sued on a federal question as it would be to read the Twenty-Sixth Amendment's rejection of *Oregon v. Mitchell*, 400 *U.S.* 112 (1970) (which held that Congress could not require States to extend the suffrage to 18-year-olds) to permit Congress to require States to extend the suffrage to 12-year-olds.

C

The Eleventh Amendment, of course, repudiated *Chisholm* and clearly divested federal courts of some jurisdiction as to cases against state parties:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, [*109] commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

There are two plausible readings of this provision's text. Under the first, it simply repeals the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant. Under the second, it strips the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit. Neither reading of the Amendment, of course, furnishes authority for the Court's view in today's case, but we need to choose between the competing readings for the light that will be shed on the Hans doctrine and the legitimacy of inflating that doctrine to the point of constitutional immutability as the Court has chosen to do.

The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses. n8 In precisely tracking the language in Article III providing for citizen-state diversity jurisdiction, [*110] the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed. If the Framers had meant the Amendment to bar federal question suits as well, they could not only have made their inten-

tions clearer very easily, but could simply have adopted the first post-Chisholm proposal, introduced in the House of Representatives by Theodore Sedgwick of Massachusetts on instructions from the Legislature of that Commonwealth. Its provisions would have had exactly that expansive effect:

"No state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States." *Gazette of the United States* 303 (Feb. 20, 1793).

n8 The great weight of scholarly commentary agrees. See, e.g., Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *Yale L. J.* 1 (1988); Amar, *Of Sovereignty and Federalism*, 96 *Yale L. J.* 1425 (1987); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 *U. Pa. L. Rev.* 1203 (1978). While a minority has adopted the second view set out above, see, e.g., Marshall, *Fighting the Words of the Eleventh Amendment*, 102 *Harv. L. Rev.* 1342 (1989); Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 *U. Chi. L. Rev.* 61 (1989), and others have criticized the diversity theory, see, e.g., Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 *Harv. L. Rev.* 1372 (1989), I have discovered no commentator affirmatively advocating the position taken by the Court today. As one scholar has observed, the literature is "remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states." Jackson, *supra*, at 44, n. 179.

[*111]

With its references to suits by citizens as well as non-citizens, the Sedgwick amendment would necessarily have been applied beyond the Diversity Clauses, and for a reason that would have been wholly obvious to

the people of the time. Sedgwick sought such a broad amendment because many of the States, including his own, owed debts subject to collection under the Treaty of Paris. Suits to collect such debts would "arise under" that Treaty and thus be subject to federal question jurisdiction under Article III. Such a suit, indeed, was then already pending against Massachusetts, having been brought in this Court by Christopher Vassal, an erstwhile Bostonian whose move to England on the eve of revolutionary hostilities had presented his former neighbors with the irresistible temptation to confiscate his vacant mansion. 5 *Documentary History of the Supreme Court of the United States, 1789-1800*, pp. 352-449 (Marcus ed. 1994). n9

n9 Vassall initiated a suit against Massachusetts, invoking the original jurisdiction of the Supreme Court. Although the marshal for the district of Massachusetts served a subpoena on Governor John Hancock and Attorney General James Sullivan, the Commonwealth of Massachusetts did not appear by the original return date of August 1793, and the case was continued to the February 1794 Term. Massachusetts never did appear, and the case was "simply continued from term to term through 1796." 5 *Documentary History of the Supreme Court of the United States*, at 369. In February 1797 the suit was "dismissed with Costs, for reasons unknown," *ibid.* (internal quotation marks omitted), perhaps because "Vassall failed to prosecute it properly." *Ibid.*

[*112]

Congress took no action on Sedgwick's proposal, however, and the Amendment as ultimately adopted two years later could hardly have been meant to limit federal question jurisdiction, or it would never have left the states open to federal question suits by their own citizens. To be sure, the majority of state creditors were not citizens, but nothing in the Treaty would have prevented foreign creditors from selling their debt instruments (thereby assigning their claims) to citizens of the debtor State. If the Framers of the Eleventh Amendment had meant it to immunize States from federal question suits like those that might be brought to enforce the Treaty of Paris, they would surely have drafted the Amendment differently. See Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 *U. Chi. L. Rev.* 1261, 1280-1282 (1989).

It should accordingly come as no surprise that the weightiest commentary following the amendment's adoption described it simply as constricting the scope of the Citizen-State Diversity Clauses. In *Cohens v.*

Virginia, 6 *Wheat*. 264 (1821), for instance, Chief Justice Marshall, writing for the Court, emphasized that the amendment had [*113] no effect on federal courts' jurisdiction grounded on the "arising under" provision of Article III and concluded that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case." *Id.*, at 383. The point of the Eleventh Amendment, according to *Cohens*, was to bar jurisdiction in suits at common law by Revolutionary War debt creditors, not "to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation." *Id.*, at 407.

The treatment of the amendment in *Osborn v. Bank of United States*, 9 *Wheat*. 738 (1824), was to the same effect. The Amendment was held there to be no bar to an action against the State seeking the return of an unconstitutional tax. "The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens," Marshall stated, omitting any reference to cases that arise under the Constitution or federal law. *Id.*, at 847.

The good sense of this early construction of the Amendment as affecting the diversity jurisdiction and no more has the further [*114] virtue of making sense of this Court's repeated exercise of appellate jurisdiction in federal question suits brought against states in their own courts by out-of-staters. Exercising appellate jurisdiction in these cases would have been patent error if the Eleventh Amendment limited federal question jurisdiction, for the Amendment's unconditional language ("shall not be construed") makes no distinction between trial and appellate jurisdiction. n10 And yet, again and again we have entertained such appellate cases, even when brought against the State in its own name by a private plaintiff for money damages. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The best explanation for our practice belongs to Chief Justice Marshall: the Eleventh Amendment bars only those suits in which the sole basis for federal jurisdiction is diversity of citizenship. See *Atascadero State Hospital v. Scanlon*, 473 U.S., at 294 (Brennan, J., dissenting); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *Yale L. J.* 1, 44 (1988).

n10 We have generally rejected Eleventh Amendment challenges to our appellate jurisdiction on the specious ground that an appeal is not a "suit" for purposes of the Amendment. See,

e.g., *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 27 (1990). Although *Cohens v. Virginia*, 6 *Wheat*. 264, 412 (1821), is cited for this proposition, that case involved a State as plaintiff. See generally Jackson, "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity," 98 *Yale L. J.* 1, 32-35 (1988) (rejecting the appeal/suit distinction). The appeal/suit distinction, in any case, makes no sense. Whether or not an appeal is a "suit" in its own right, it is certainly a means by which an appellate court exercises jurisdiction over a "suit" that began in the courts below. Cf. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal").

[*115]

In sum, reading the Eleventh Amendment solely as a limit on citizen-state diversity jurisdiction has the virtue of coherence with this Court's practice, with the views of John Marshall, with the history of the Amendment's drafting, and with its allusive language. Today's majority does not appear to disagree, at least insofar as the constitutional text is concerned; the Court concedes, after all, that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts." *Ante*, at 8. n11

n11 See also *Pennsylvania v. Union Gas Co.*, supra, at 31 (SCALIA, J., concurring in part and dissenting in part) ("If this text [of the Eleventh Amendment] were intended as a comprehensive description of state sovereign immunity in federal courts . . . then it would unquestionably be most reasonable to interpret it as providing immunity only when the sole basis of federal jurisdiction is the diversity of citizenship that it describes (which of course tracks some of the diversity jurisdictional grants in U.S. Const., Art. III, § 2). For there is no plausible reason why one would wish to protect a State from being sued in federal court for violation of federal law . . . when the plaintiff is a citizen of another State or country, but to permit a State to be sued there when the plaintiff is citizen of the State itself").

[*116]

Thus, regardless of which of the two plausible readings one adopts, the further point to note here is that there is no possible argument that the Eleventh Amendment, by its terms, deprives federal courts of jurisdiction over all citizen lawsuits against the States. Not even the Court advances that proposition, and there would be no textual basis for doing so. n12 Because the plaintiffs in today's case are citizens of the State that they are suing, the Eleventh Amendment simply does not apply to them. We must therefore look elsewhere for the source of that immunity by which the Court says their suit is barred from a federal court. n13

n12 The Court does suggest that the drafters of the Eleventh Amendment may not have had federal question jurisdiction in mind, in the apparent belief that this somehow supports its reading. Ante, at 24-25. The possibility, however, that those who drafted the Eleventh Amendment intended to deal "only with the problem presented by the decision in *Chisholm*" would demonstrate, if any demonstration beyond the clear language of the Eleventh Amendment were necessary, that the Eleventh Amendment was not intended to address the broader issue of federal question suits brought by citizens.

Moreover, the Court's point is built on a faulty foundation. The Court is simply incorrect in asserting that "the federal courts did not have federal question jurisdiction at the time the Amendment was passed." Ante, at 25. Article III, of course, provided for such jurisdiction, and early Congresses exercised their authority pursuant to Article III to confer jurisdiction on the federal courts to resolve various matters of federal law. E.g., Act of Apr. 10, 1790, § 5, 1 Stat. 111; Act of Feb. 21, 1793, § 6, 1 Stat. 322; Act of Mar. 23, 1792, §§ 2,3, 1 Stat. 244; see also *Osborn v. Bank of United States*, 9 *Wheat*. 738 (1824) (holding that federal statute conferred federal question jurisdiction in cases involving the Bank of the United States); see generally P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 960-982 (3d ed. 1988). In fact, only six years after the passage of the Eleventh Amendment, Congress enacted a statute providing for general federal question jurisdiction. Act of Feb. 13, 1801, § 11, 2 Stat. 92 ("The said circuit courts respectively shall have cognizance of . . . all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority"). It is, of course, true that this statute proved short-lived (it was repealed by the Act of Mar. 8, 1802, 2 Stat. 132), and that

Congress did not pass another statute conferring general federal jurisdiction until 1875, but the drafters of the Eleventh Amendment obviously could not have predicted such things. The real significance of the 1801 act is that it demonstrates the awareness among the Members of the early Congresses of the potential scope of Article III. This, in combination with the pre-Eleventh Amendment statutes that conferred federal question jurisdiction on the federal courts, cast considerable doubt on the Court's suggestion that the issue of federal question jurisdiction never occurred to the drafters of the Eleventh Amendment; on the contrary, just because these early statutes underscore the early Congresses' recognition of the availability of federal question jurisdiction, the silence of the Eleventh Amendment is all the more deafening.

[*117]

n13 The majority chides me that the "lengthy analysis of the text of the Eleventh Amendment is directed at a straw man," ante, at 24. But plain text is the Man of Steel in a confrontation with "background principles" and "'postulates which limit and control,'" ante, at 23, 27. An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing. See, e.g., Monaghan, *Our Perfect Constitution*, 56 *N. Y. U. L. Rev.* 353, 383-384 (1981) ("For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration"); cf. *Bourjaily v. United States*, 483 *U.S.* 171, 178 (1987) (REHNQUIST, C. J.) ("It would be extraordinary to require legislative history to confirm the plain meaning of [Fed. R. Evid.] 104"); *Garcia v. United States*, 469 *U.S.* 70, 75 (1984) (REHNQUIST, J.) ("Only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language"). This is particularly true in construing the jurisdictional provisions of Art. III, which speak with a clarity not to be found in some of the more open-textured provisions of the Constitution. See *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 *U.S.* 582, 646-647 (1949) (Frankfurter, J., dissenting); Schauer, *Easy Cases*, 58 *S. Cal. L. Rev.* 399, 424 (1985) (noting the "seemingly plain linguistic mandate" of the Eleventh Amendment). That the Court thinks otherwise is an indication of just how far it has strayed beyond the boundaries of traditional constitutional analysis.

[*118]

II

The obvious place to look elsewhere, of course, is *Hans v. Louisiana*, 134 U.S. 1 (1890), and Hans was indeed a leap in the direction of today's holding, even though it does not take the Court all the way. The parties in Hans raised, and the Court in that case answered, only what I have called the second question, that is, whether the Constitution, without more, permits a State to plead sovereign immunity to bar the exercise of federal question jurisdiction. See *id.*, at 9. Although the Court invoked a principle of sovereign immunity to cure what it took to be the Eleventh Amendment's anomaly of barring only those state suits brought by noncitizen plaintiffs, the Hans Court had no occasion to consider whether Congress could abrogate that background immunity by statute. Indeed (except in the special circumstance of Congress's power to enforce the Civil War Amendments), this question never came before our Court until *Union Gas*, and any intimations of an answer in prior cases were mere dicta. In *Union Gas* the Court held that the immunity recognized in Hans had no constitutional status and was subject to congressional abrogation. Today the Court [*119] overrules *Union Gas* and holds just the opposite. In deciding how to choose between these two positions, the place to begin is with Hans's holding that a principle of sovereign immunity derived from the common law insulates a state from federal question jurisdiction at the suit of its own citizen. A critical examination of that case will show that it was wrongly decided, as virtually every recent commentator has concluded. n14 It follows that the Court's further step today of constitutionalizing Hans's rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of Hans itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law.

n14 Professor Jackson has noted the "remarkable consistency" of the scholarship on this point, Jackson, 98 *Yale L. J.*, at 44, n. 179. See also n. 8, *supra*.

A

The Louisiana plaintiff in Hans held bonds issued by that State, [*120] which, like virtually all of the Southern States, had issued them in substantial amounts during the Reconstruction era to finance public improvements aimed at stimulating industrial development. E. Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* pp. 383-384 (1988); Gibbons, 83 *Colum. L. Rev.*, at 1976-1977. As Reconstruction governments collapsed, however, the

post-Reconstruction regimes sought to repudiate these debts, and the Hans litigation arose out of Louisiana's attempt to renege on its bond obligations.

Hans sued the State in federal court, asserting that the State's default amounted to an impairment of the obligation of its contracts in violation of the Contract Clause. This Court affirmed the dismissal of the suit, despite the fact that the case fell within the federal court's "arising under," or federal question, jurisdiction. Justice Bradley's opinion did not purport to hold that the terms either of Article III or of the Eleventh Amendment barred the suit, but that the ancient doctrine of sovereign immunity that had inspired adoption of the Eleventh Amendment applied to cases beyond the Amendment's scope and otherwise within the federal question jurisdiction. [*121] Indeed, Bradley explicitly admitted that "it is true, the amendment does so read [as to permit Hans's suit], and if there were no other reason or ground for abating his suit, it might be maintainable." *Hans*, 134 U.S., at 10. The Court elected, nonetheless, to recognize a broader immunity doctrine, despite the want of any textual manifestation, because of what the Court described as the anomaly that would have resulted otherwise: the Eleventh Amendment (according to the Court) would have barred a federal question suit by a noncitizen, but the State would have been subject to federal jurisdiction at its own citizen's behest. *Id.*, at 10-11. The State was accordingly held to be free to resist suit without its consent, which it might grant or withhold as it pleased.

Hans thus addressed the issue implicated (though not directly raised) in the preratification debate about the Citizen-State Diversity Clauses and implicitly settled by *Chisholm*: whether state sovereign immunity was cognizable by federal courts on the exercise of federal question jurisdiction. According to Hans, and contrary to *Chisholm*, it was. But that is all that Hans held. Because no federal [*122] legislation purporting to pierce state immunity was at issue, it cannot fairly be said that Hans held state sovereign immunity to have attained some constitutional status immunizing it from abrogation. n15

n15 Indeed, as JUSTICE STEVENS suggests, there is language in Hans suggesting that the Court was really construing the Judiciary Act of 1875 rather than the Constitution. See *ante*, at 9-11.

Taking Hans only as far as its holding, its vulnerability is apparent. The Court rested its opinion on avoiding the supposed anomaly of recognizing jurisdiction to entertain a citizen's federal question suit, but not one brought by a noncitizen. See *Hans*, *supra*, at 10-11. There was,

however, no such anomaly at all. As already explained, federal question cases are not touched by the Eleventh Amendment, which leaves a State open to federal question suits by citizens and noncitizens alike. If Hans had been from Massachusetts the Eleventh Amendment would not have barred his action against Louisiana.

Although [*123] there was thus no anomaly to be cured by Hans, the case certainly created its own anomaly in leaving federal courts entirely without jurisdiction to enforce paramount federal law at the behest of a citizen against a State that broke it. It destroyed the congruence of the judicial power under Article III with the substantive guarantees of the Constitution, and with the provisions of statutes passed by Congress in the exercise of its power under Article I: when a State injured an individual in violation of federal law no federal forum could provide direct relief. Absent an alternative process to vindicate federal law (see Part IV, *infra*) John Marshall saw just what the consequences of this anomaly would be in the early Republic, and he took that consequence as good evidence that the Framers could never have intended such a scheme.

"Different States may entertain different opinions on the true construction of the constitutional powers of Congress. We know, that at one time, the assumption of the debts contracted by the several States, during the war of our revolution, was deemed unconstitutional by some of them. . . . States may legislate in conformity to their opinions [*124] and may enforce those opinions by penalties. It would be hazardous too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist." *Cohens v. Virginia*, 6 *Wheat.*, at 386-387.

And yet that is just what Hans threatened to do.

How such a result could have been threatened on the basis of a principle not so much as mentioned in the Constitution is difficult to understand. But history provides the explanation. As I have already said, Hans was one episode in a long story of debt repudiation by the States of the former Confederacy after the end of Reconstruction. The turning point in the States' [*125] favor came with the Compromise

of 1877, when the Republican party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes. See J. Orth, *Judicial Power of the United States: The Eleventh Amendment in American History* 53-57 (1987); Gibbons, 83 *Colum. L. Rev.*, at 1978-1982; see generally Foner, *Reconstruction*, at 575-587 (describing the events of 1877 and their aftermath). The troop withdrawal, of course, left the federal judiciary "effectively without power to resist the rapidly coalescing repudiation movement." Gibbons, 83 *Colum. L. Rev.*, at 1981. Contract Clause suits like the one brought by Hans thus presented this Court with "a draconian choice between repudiation of some of its most inviolable constitutional doctrines and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments." *Id.*, at 1974. Indeed, Louisiana's brief in Hans unmistakably bore witness to this Court's inability to enforce a judgment against a recalcitrant [*126] State: "The solemn obligation of a government arising on its own acknowledged bond would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment." Brief for Respondent in No. 4, O. T. 1889, p. 25. Given the likelihood that a judgment against the State could not be enforced, it is not wholly surprising that the Hans Court found a way to avoid the certainty of the State's contempt. n16

n16 See Gibbons, 83 *Colum. L. Rev.*, at 2000 ("Without weakening the contract clause, which over the next two decades the Fuller Court might need both in its fight against government regulation of business and as a weapon against defaulting local governments, the justices needed a way to let the South win the repudiation war. The means Bradley chose was to rewrite the eleventh amendment and the history of its adoption"). The commentators' contention that this Court's inability to enforce the obligation of Southern States to pay their debts influenced the result in *Hans v. Louisiana*, 134 *U.S.* 1 (1890), is substantiated by three anomalies of this Court's sovereign immunity jurisprudence during that period. First, this Court held in 1885 that Virginia's sovereign immunity did not allow it to abrogate its bonds. *Virginia Coupon Cases*, 114 *U.S.* 269 (1885). The difference from the situation in other states, however, was that Virginia had made its bond coupons receivable in payment of state

taxes; "under these circumstances federal courts did not need to rely on the political branches of government to enforce their orders but could protect creditors by a judgment that their taxes had in fact been paid. In these cases the Eleventh Amendment faded into the background." Orth, *Judicial Power of the United States*, at 9; see generally *id.*, at 90-109. Second, at the same time that this Court was articulating broad principles of immunity for States, we refused to recognize similar immunity for municipalities and similar state political subdivisions. See, e.g., *Lincoln County v. Luning*, 133 U.S. 529 (1890). Professor Orth suggests that this seeming inconsistency is traceable to the enforcement difficulties arising from the withdrawal of federal troops from the South. "It just so happened," he points out, "that counties had tended to issue bonds in the West, while in the South, states had usually done the job. Property in the form of bonds could be defended in the mid-West and West, but similar property in the South had to be sacrificed to the higher politics of the Compromise of 1877." Orth, *supra*, at 111. Finally, Professor Orth attributes this Court's recognition (or revival) of the *Ex parte Young* action as a way around state sovereign immunity to the fact that, by 1908, "the problem of repudiated Southern bonds was clearly a specter from an increasingly distant past." Orth, *supra*, at 128. See also *Gibbons*, *supra*, at 2002 (arguing that the Court's unanimous revival of its power to grant equitable relief against state officers in *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891), was made possible by the fact that the case "did not involve Southern State bonds"). I am reluctant, to be sure, to ascribe these legal developments to a single, extra-legal cause, and at least one commentator has suggested that the Southern debt crisis may not have been the only factor driving the Court's Eleventh Amendment jurisprudence during this period. See generally Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 *Colum. L. Rev.* 212 (1988) (reviewing Orth). But neither would I ignore the pattern of the cases, which tends to show that the presence or absence of enforcement difficulties significantly influenced the path of the law in this area. See *id.*, at 243 (acknowledging that "it is perfectly conceivable that Compromise-related politics exerted their influence at the margin—in doubtful cases in which the Court might have gone either way").

[*127]

So it is that history explains, but does not honor, *Hans*. The ultimate demerit of the case centers, however, not

on its politics but on the legal errors on which it rested. n17 Before considering those errors, it is necessary to address the Court's contention that subsequent cases have read into *Hans* what was not there to begin with, that is, a background principle of sovereign immunity that is constitutional in stature and therefore unalterable by Congress.

n17 Today's majority condemns my attention to *Hans*'s historical circumstances as "a disservice to the Court's traditional method of adjudication." Ante, at 23-24. The point, however, is not that historical circumstance may undermine an otherwise defensible decision; on the contrary, it is just because *Hans* is so utterly indefensible on the merits of its legal analysis that one is forced to look elsewhere in order to understand how the Court could have gone so far wrong. Nor is there anything new or remarkable in taking such a look, for we have sought similar explanations in other cases. In *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), for example, we suggested that the Court's holding in *Kentucky v. Dennison*, 24 How. 66 (1861), that "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," *id.*, at 107, was influenced by "the looming shadow of a Civil War," *Branstad*, 483 U.S., at 227, and we ultimately determined that *Dennison* should be overruled. *Id.*, at 230. The author of the Court's opinion today joined that analysis, as did the other Members of today's majority who were then on the Court. See *id.*, at 230 (O'CONNOR, J., concurring in part and concurring in judgment) (joining the relevant portion of the majority opinion); *id.*, at 231 (SCALIA, J., concurring in part and concurring in judgment) (same).

[*128]

B

The majority does not dispute the point that *Hans v. Louisiana*, 134 U.S. 1 (1890), had no occasion to decide whether Congress could abrogate a State's immunity from federal question suits. The Court insists, however, that the negative answer to that question that it finds in *Hans* and subsequent opinions is not "mere obiter dicta, but rather . . . the well-established rationale upon which the Court based the results of its earlier decisions." Ante, at 21. The exact rationale to which the majority refers, unfortunately, is not easy to discern. The Court's opinion says, immediately after its

discussion of stare decisis, that "for over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." Ante, at 22. This cannot be the "rationale," though, because this Court has repeatedly acknowledged that the Eleventh Amendment standing alone cannot bar a federal question suit against a State brought by a state citizen. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 662 (1974) (acknowledging that "the Amendment by its terms does not bar suits against a State by its [*129] own citizens"). n18 Indeed, as I have noted, Justice Bradley's opinion in *Hans* conceded that *Hans* might successfully have pursued his claim "if there were no other reason or ground [other than the Amendment itself] for abating his suit." 134 U.S., at 10. The *Hans* Court, rather, held the suit barred by a nonconstitutional common-law immunity. See *supra*, at 21.

n18 See also *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952) (same); *Fitts v. McGhee*, 172 U.S. 516, 524 (1899) (same). Even JUSTICE SCALIA's dissent in *Union Gas*, the reasoning of which the majority adopts today, acknowledged that its view of sovereign immunity depended upon "some other constitutional principle beyond the immediate text of the Eleventh Amendment." 491 U.S., at 31 (opinion concurring in part and dissenting in part). To the extent that our prior cases do refer to *Hans* immunity as part of the Eleventh Amendment, they can only be referring to JUSTICE STEVENS's "other" Eleventh Amendment. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. , (1994) (slip op., at 2) (STEVENS, J., concurring); see also *Pennsylvania v. Union Gas Co.*, *supra*, at 23-29 (STEVENS, J., concurring) (same).

[*130]

The "rationale" which the majority seeks to invoke is, I think, more nearly stated in its quotation from *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-323 (1934). There, the Court said that "we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States." *Id.*, at 322. n19 This statement certainly is true to *Hans*, which clearly recognized a pre-existing principle of sovereign immunity, broader than the Eleventh Amendment itself, that will ordinarily bar federal question suits against a nonconsenting State. That was the "rationale" which was sufficient to decide *Hans* and all of its progeny prior to *Union Gas*. But leaving aside the indefensibility of that rationale, which

I will address further below, that was as far as it went.

n19 See also *Union Gas*, 491 U.S., at 31-32 (SCALIA, J., concurring in part and dissenting in part) ("What we said in *Hans* was, essentially, that the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away"); *Nevada v. Hall*, 440 U.S., at 440 (REHNQUIST, J., dissenting) (interpreting *Monaco* as "relying on precepts underlying but not explicit in Art. III and the Eleventh Amendment").

[*131]

The majority, however, would read the "rationale" of *Hans* and its line of subsequent cases as answering the further question whether the "postulate" of sovereign immunity that "limits and controls" the exercise of Article III jurisdiction, *Monaco, supra*, at 322, is constitutional in stature and therefore unalterable by Congress. It is true that there are statements in the cases that point toward just this conclusion. See, e.g., *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III"); *Ex parte New York*, 256 U.S. 490, 497 (1921) ("The entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . ."). These statements, however, are dicta in the classic sense, that is, sheer speculation about what would happen in cases not before the court. n20 But this is not the only weakness of these statements, which are counterbalanced by many other opinions that have either stated the immunity principle without more, see, [*132] e.g., *Dellmuth v. Muth*, 491 U.S. 223, 229, n. 2 (1989) (noting that "an unconsenting State is immune from liability for damages in a suit brought in federal court by one of its own citizens," without suggesting that the immunity was unalterable by Congress), n21 or have suggested that the *Hans* immunity is not of constitutional stature. The very language quoted by the majority from *Monaco*, for example, likens state sovereign immunity to other "essential postulates" such as the rules of justiciability. 292 U.S., at 322. Many of those rules, as JUSTICE STEVENS points out, are prudential in nature and therefore not unalterable by Congress. See ante, at 14-15. n22 More generally, the proponents of the Court's theory have repeatedly referred to state

sovereign immunity as a "background principle," ante, at 27, "postulate," *Nevada v. Hall*, 440 U.S., at 437 (REHNQUIST, J., dissenting), or "implicit limitation," *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 496 (1987) (SCALIA, J., concurring in part and concurring in judgment), and as resting on the "inherent nature of sovereignty," *Great Northern Life Ins. Co. v. Read*, [*133] 322 U.S. 47, 51 (1944), rather than any explicit constitutional provision. n23 But whatever set of quotations one may prefer, taking heed of such jurisprudential creations in assessing the contents of federal common law is a very different thing from reading them into the Founding Document itself.

n20 There are good reasons not to take many of these statements too seriously. Some are plainly exaggerated; for example, the suggestion in *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 51 (1944), that "[a] state's freedom from litigation was established as a constitutional right through the Eleventh Amendment" obviously ignores a State's liability to suit by other States, see, e.g., *South Dakota v. North Carolina*, 192 U.S. 286 (1904), and by the National Government, see, e.g., *United States v. Texas*, 143 U.S. 621 (1892). See also *Nevada v. Hall*, supra, at 420, n. 19 (noting that "the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal-court actions"). Similarly, statements such as in *Ex parte New York*, 256 U.S., at 497, that "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given" should not necessarily be taken as affirming that Article III itself incorporated a constitutional immunity doctrine. How else to explain Justice Harlan's concurring opinion in *Hans*, which stated, practically in the same breath, that "a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends," and that Chisholm "was based upon a sound interpretation of the Constitution as that instrument then was"? 134 U.S., at 21.

[*134]

n21 See also *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952); *Fitts v. McGhee*, 172 U.S. 516, 524-525 (1899).

n22 See also *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules"); E. Chemerinsky, *Federal Jurisdiction* § 2.1, at 42-43 (2d ed. 1994).

n23 Indeed, THE CHIEF JUSTICE could hardly

have been clearer in *Fry v. United States*, 421 U.S. 542 (1975), where he explained that "the Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment. . . .

"As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation." *Id.*, at 556-557 (REHNQUIST, J., dissenting).

[*135]

The most damning evidence for the Court's theory that *Hans* rests on a broad rationale of immunity unalterable by Congress, however, is the Court's proven tendency to disregard the post-*Hans* dicta in cases where that dicta would have mattered. n24 If it is indeed true that "private suits against States [are] not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment)," *Union Gas*, 491 U.S., at 40 (SCALIA, J., concurring in part and dissenting in part), then it is hard to see how a State's sovereign immunity may be waived any more than it may be abrogated by Congress. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S., at 238 (recognizing that immunity may be waived). After all, consent of a party is in all other instances wholly insufficient to create subject-matter jurisdiction where it would not otherwise exist. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); see also E. Chemerinsky, *Federal Jurisdiction* § 7.6, at 405 (2d ed. 1994) (noting that "allowing such waivers seems inconsistent with viewing the Eleventh Amendment as a restriction on the federal courts' subject matter jurisdiction"). Likewise, [*136] the Court's broad theory of immunity runs doubly afoul of the appellate jurisdiction problem that I noted earlier in rejecting an interpretation of the Eleventh Amendment's text that would bar federal question suits. See supra, at 11-18. If "the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without

its consent," *Duhne v. New Jersey*, 251 U.S. 311, 313 (1920), and if consent to suit in state court is not sufficient to show consent in federal court, see *Atascadero*, supra, at 241, then Article III would hardly permit this Court to exercise appellate jurisdiction over issues of federal law arising in lawsuits brought against the States in their own courts. We have, however, quite rightly ignored any post-Hans dicta in that sort of case and exercised the jurisdiction that the plain text of Article III provides. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. (1996); see also supra, at 15-16.

n24 Indeed, in *Nevada v. Hall*, 440 U.S., at 439, THE CHIEF JUSTICE complained in dissent that the same statements upon which he relies today had been "dismissed . . . as dicta."

[*137]

If these examples were not enough to distinguish Hans's rationale of a pre-existing doctrine of sovereign immunity from the post-Hans dicta indicating that this immunity is constitutional, one would need only to consider a final set of cases: those in which we have assumed, without deciding, that congressional power to abrogate state sovereign immunity exists even when § 5 of the Fourteenth Amendment has an application. A majority of this Court was willing to make that assumption in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 101 (1989) (plurality opinion), in *Welch v. Texas Dept. of Highways and Public Transp.*, supra, at 475 (plurality opinion), and in *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 252 (1985). n25 Although the Court in each of these cases failed to find abrogation for lack of a clear statement of congressional intent, the assumption that such power was available would hardly have been permissible if, at that time, today's majority's view of the law had been firmly established. It is one thing, after all, to avoid an open constitutional question by assuming an answer and rejecting the claim on [*138] another ground; it is quite another to avoid a settled rationale (an emphatically settled one if the majority is to be taken seriously) only to reach an issue of statutory construction that the Court would otherwise not have to decide. Even worse, the Court could not have been unaware that its decision of cases like *Hoffman* and *Welch*, on the ground that the statutes at issue lacked a plain statement of intent to abrogate, would invite Congress to attempt abrogation in statutes like the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (IGRA). Such a course would have been wholly irresponsible if, as the majority now claims, the constitutionally unalterable nature of Hans immunity had been well established for a hundred years.

n25 In *Hoffman*, one member of the four-Justice plurality expressly disavowed the plurality's assumption that Congress could abrogate the States' immunity by making its intent to do so clear. See 492 U.S., at 105 (O'CONNOR, J., concurring). The four dissenters, however, not only assumed that Congress had the power to abrogate but found that it had done so. See *id.*, at 106 (Marshall, J., dissenting). Likewise, in *Welch*, the four-justice plurality was joined by four dissenters who insisted upon a congressional power of abrogation. See 483 U.S., at 519 (Brennan, J., dissenting).

[*139]

Hans itself recognized that an "observation [in a prior case that] was unnecessary to the decision, and in that sense extra judicial . . . ought not to outweigh" present reasoning which points to a different conclusion. 134 U.S., at 20. That is good advice, which Members of today's majority have been willing to heed on other occasions. See, e.g., *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. (slip op., at 4) (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend"); *Bennis v. Michigan*, 516 U.S. (slip op., at 6) (1996). But because the Court disregards this norm today, I must consider the soundness of Hans's original recognition of a background principle of sovereign immunity that applies even in federal question suits, and the reasons that counsel against the Court's extension of Hans's holding to the point of rendering its immunity unalterable by Congress.

III

Three critical errors in Hans weigh against constitutionalizing its holding as the majority does today. The first we have already seen: the Hans Court misread the Eleventh Amendment, see supra, at [*140] 20-26. It also misunderstood the conditions under which common-law doctrines were received or rejected at the time of the Founding, and it fundamentally mistook the very nature of sovereignty in the young Republic that was supposed to entail a State's immunity to federal question jurisdiction in a federal court. While I would not, as a matter of stare decisis, overrule Hans today, an understanding of its failings on these points will show how the Court today simply compounds already serious error in taking Hans the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it.

A

There is and could be no dispute that the doctrine of

sovereign immunity that Hans purported to apply had its origins in the "familiar doctrine of the common law," *The Siren*, 74 U.S. 152, 153 (1869); "derived from the laws and practices of our English ancestors," *United States v. Lee*, 106 U.S. 196, 205 (1882). n26 Although statutes came to affect its importance in the succeeding centuries, the doctrine was never reduced to codification, and Americans took their understanding of immunity doctrine from Blackstone, [*141] see 3 W. Blackstone, *Commentaries on the Laws of England* ch. 17 (1768). Here, as in the mother country, it remained a common-law rule. See generally, Jaffe, 77 *Harv. L. Rev.*, at 2-19; Borchard, *Governmental Responsibility in Tort*, VI, 36 *Yale L. J.* 1, 17-41 (1926).

n26 The Court seeks to disparage the common law roots of the doctrine, and the consequences of those roots which I outline infra, at 36-46 & 64-70, by asserting that Hans "found its roots not solely in the common law of England, but in the much more fundamental "jurisprudence in all civilized nations." Ante, at 24 (quoting *Hans*, 134 U.S., at 17). The Hans Court, however, relied explicitly on the ground that a suit against the State by its own citizen was "not known . . . at the common law" and was not among the departures from the common law recognized by the Constitution. *Hans*, 134 U.S., at 15. Moreover, Hans explicitly adopted the reasoning of Justice Iredell's dissent in *Chisholm*, see 134 U.S., at 18-19, and that opinion could hardly have been clearer in relying exclusively on the common law. "The only principles of law . . . which can affect this case," Justice Iredell wrote, "[are] those that are derived from what is properly termed 'the common law,' a law which I presume is the groundwork of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controuls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country." 2 *Dall.*, at 435 (emphasis omitted). See also *Employees of Dept. of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring in result) ("Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence"); R. Watkins, *The State as a Party Litigant* 51-52 (1927) ("It thus seems probable that the doctrine of state immunity was accepted rather as an existing fact by the people of the states, than

adopted as a theory. It was a matter of universal practice, and was accepted from the mother country along with the rest of the common law of England applicable to our changed state and condition").

[*142]

This fact of the doctrine's common-law status in the period covering the Founding and the later adoption of the Eleventh Amendment should have raised a warning flag to the Hans Court and it should do the same for the Court today. For although the Court has persistently assumed that the common law's presence in the minds of the early Framers must have functioned as a limitation on their understanding of the new Nation's constitutional powers, this turns out not to be so at all. One of the characteristics of the Founding generation, on the contrary, was its joinder of an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic. It is not that the Framers failed to see themselves to be children of the common law; as one of their contemporaries put it, "we live in the midst of the common law, we inhale it at every breath, imbibe it at every pore . . . [and] cannot learn another system of laws without learning at the same time another language." P. Du Ponceau, *A Dissertation on the Nature and Extent of Jurisdiction of Courts of the United States* 91 (1824). But still it is clear that the adoption [*143] of English common law in America was not taken for granted, and that the exact manner and extent of the common law's reception were subject to careful consideration by courts and legislatures in each of the new States. n27 An examination of the States' experience with common-law reception will shed light on subsequent theory and practice at the national level, and demonstrate that our history is entirely at odds with Hans's resort to a common-law principle to limit the Constitution's contrary text.

n27 See, e.g., Hall, *The Common Law: An Account of Its Reception in the United States*, 4 *Vand. L. Rev.* 791, 796 (1951) ("Whether we emphasize the imitation by the colonists of the practices of English local courts or whether we say the early colonial judges were really applying their own common-sense ideas of justice, the fact remains that there was an incomplete acceptance in America of English legal principles, and this indigenous law which developed in America remained as a significant source of law after the Revolution").

[*144]

This American reluctance to import English common law wholesale into the New World is traceable to the early colonial period. One scholar of that time has written that "the process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles." P. Reinsch, *English Common Law in the Early American Colonies* 58 (1899). n28 For a variety of reasons, including the absence of trained lawyers and judges, the dearth of law books, the religious and ideological commitments of the early settlers, and the novel conditions of the New World, the colonists turned to a variety of other sources in addition to principles of common law. n29

n28 See also Jones, *The Common Law in the United States: English Themes and American Variations*, in *Political Separation and Legal Continuity* 95-98 (H. Jones, ed. 1976) (Jones) (acknowledging that a true common-law system had not yet developed in the early colonial period); Stoebuck, *Reception of English Common Law in the American Colonies*, *10 Wm. & Mary L. Rev.* 393, 406-407 (1968) (same).

[*145]

n29 See, e.g., Reinsch, *English Common Law in the Early American Colonies*, at 7 (finding that the colonists developed their own "rude, popular, summary" system of justice despite professed adherence to the common law); C. Hilkey, *Legal Development in Colonial Massachusetts, 1630-1686*, p. 69 (1967) (emphasizing Biblical and indigenous sources); Radin, *The Rivalry of Common-Law and Civil-Law Ideas in the American Colonies*, in *2 Law: A Century of Progress* 404, 407-411 (1937) (emphasizing natural law and Roman law); Goebel, *King's Law and Local Custom in Seventeenth Century New England*, *31 Colum. L. Rev.* 416 (1931) (finding that the early settlers imported the law and procedure of the borough and manor courts with which they had been familiar in England).

It is true that, with the development of colonial society and the increasing sophistication of the colonial bar, English common law gained increasing acceptance

in colonial practice. See Reinsch, *supra*, at 7-8; Hall, *The Common Law: An Account of Its Reception in the United States*, *4 Vand. L. Rev.* 791, 797 (1951). n30 But even in the late [*146] colonial period, Americans insisted that

"the whole body of the common law . . . was not transplanted; but only so much as was applicable to the colonists in their new relations and conditions. Much of the common law related to matters which were purely local, which existed under the English political organization, or was based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World. Such portions of the common law, not being applicable to the new conditions of the colonists, were never recognised as part of their jurisprudence." Dale, *The Adoption of the Common Law by the American Colonies*, *30 Am. L. Reg.* 553, 554 (1882). n31

The result was that "the increasing influx of common-law principles by no means obliterated the indigenous systems which had developed during the colonial era and that there existed important differences in law in action on the two sides of the Atlantic." Hall, *supra*, at 797.

n30 See also Stoebuck, *supra*, at 411-412 (indicating that the Colonies became significantly more receptive to the common law after 1700, in part because of a British desire to regularize colonial legal systems).

[*147]

n31 See also Jones 98 ("The selective nature of the reception is evident in any examination of the state of law in the colonies in the years immediately preceding the Revolution"). An example is Trott's law, adopted by South Carolina in 1712, which declared which English statutes were in force in the colony. Many laws of England, Trott conceded, were "altogether useless" in South Carolina "by reason of the different way of agriculture and the differing productions of the earth of this Province from that of England"; others were "impracticable" because of differences in institutions. L. Friedman, *A History of American Law* 90-93 (2d ed. 1985); see also C. Warren, *History of the American Bar* 122-123 (1911) (quoting North Carolina statute, passed in 1715, providing that the common law would be in force "so far as shall be compatible with our way of living and trade").

Understandably, even the trend toward acceptance of the common law that had developed in the late colonial period was imperiled by the Revolution and the ultimate break between the colonies and the old country. Dean Pound has observed [*148] that, "for a generation after the Revolution, . . . political conditions gave rise to a general distrust of English law. . . . The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century." R. Pound, *The Formative Era of American Law* 7 (1938); see also C. Warren, *A History of the American Bar* 224-225 (1911) (noting a "prejudice against the system of English Common Law" in the years following the Revolution). James Monroe went so far as to write in 1802 that "the application of the principles of the English common law to our constitution" should be considered "good cause for impeachment." Letter from James Monroe to John Breckenridge (Jan. 15, 1802) (quoted in 3 A. Beveridge, *The Life of John Marshall: Conflict and Construction 1800-1815*, p. 59 (1919)).ⁿ³² Nor was anti-English sentiment the only difficulty; according to Dean Pound, "social and geographical conditions contributed also to make the work of receiving and reshaping the common law exceptionally difficult." Pound, *supra*, at 7.

ⁿ³² American hostility to things English was so pronounced for a time that Pennsylvania, New Jersey, and Kentucky proscribed by statute the citation of English decisions in their courts, and the New Hampshire courts promulgated a rule of court to the same effect. See Hall, *4 Vand. L. Rev.*, at 806; Warren, *supra*, at 227. This hostility may appear somewhat paradoxical in view of the colonists' frequent insistence during the revolutionary crisis that they were entitled to common-law rights. See, e.g., First Continental Congress Declaration and Resolves (1774), in *Documents Illustrative of the Formation of the Union of the American States*, H. R. Doc. No. 398, 69th Cong., 1st Sess., 1, 3 (C. Tansill, ed. 1927) ("That the respective colonies are entitled to the common law of England"). In this context, however, the colonists were referring "not to the corpus of English case-law doctrine but to such profoundly valued common law procedures as trial by jury and the subjection of governmental power to what John Locke had called the 'standing laws,'" such as Magna Carta, the Petition of Right, the Bill of Rights of 1689, and the Act of Settlement of 1701. Jones 110; see also Jay, *Origins of Federal Common Law: Part Two*, *133 U. Pa. L. Rev.* 1231, 1256 (1985) (Jay II) (noting that "Antifederalists used the

term common law to mean the great rights associated with due process"). The cardinal principles of this common-law vision were parliamentary supremacy and the rule of law, conceived as the axiom that "all members of society, government officials as well as private persons, are equally responsible to the law and . . . 'equally amenable to the jurisdiction of ordinary tribunals.'" Jones 128-129 (quoting A. Dicey, *Introduction to Study of the Law of Constitution* 192 (9th ed. 1939)). It is hard to imagine that the doctrine of sovereign immunity, so profoundly at odds with both these cardinal principles, could have been imported to America as part of this more generalized common-law vision.

[*149]

The consequence of this anti-English hostility and awareness of changed circumstances was that the independent States continued the colonists' practice of adopting only so much of the common law as they thought applicable to their local conditions.ⁿ³³ As Justice Story explained, "the common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 2 *Pet.* 137, 144 (1829). In 1800, John Marshall had expressed the similar view that "our ancestors brought with them the laws of England, both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation." Letter from John Marshall to St. George Tucker, Nov. 27, 1800, reprinted in Jay II, App. A, at 1326, 1327. Accordingly, in the period following independence, "legislatures and courts and doctrinal writers had to test the common law at every point with respect to its applicability to America." Pound, *supra*, at 20; see also Jones 103 (observing that "suitability [*150] to local institutions and conditions" was "incomparably the most important" principle of reception in the new states).

ⁿ³³ See, e.g., *Conner v. Shepherd*, 15 *Mass.* 164 (1818) (rejecting English common-law rule regarding assignment of dower rights as inapplicable to the state and condition of land in Massachusetts); *Parker & Edgerton v. Foote*, 19 *Wend.* 309, 318 (N.Y. 1838) (rejecting English rule entitling a landowner to damages for the stopping of his lights; the court noted that "it cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing

state of things in this country, form no part of our law"); *Fitch v. Brainerd*, 2 Conn. 163, 189 (1805) (accepting English common-law rule barring married woman from disposing of her real estate by will, and observing that "it long since became necessary . . . to make [the English common law] our own, by practical adoption—with such exceptions as a diversity of circumstances, and the incipient customs of our own country, required") (emphasis in original); *Martin v. Bigelow*, 2 Aiken 184 (Vt. 1827) (declaring English common law as to stream rights inappropriate for conditions of Vermont waterways); *Hall v. Smith*, 1 Bay 330, 331 (S.C. Sup. Ct. 1793) (refusing to apply strict English rules regarding promissory notes as unsuited to the "local situation of Carolina"). See also Hall, *supra*, at 805 ("[A] review of the cases shows that no matter what the wording of the reception statute or constitutional provision of the particular state, the rule developed, which was sooner or later to be repeated in practically every American jurisdiction, that only those principles of the common law were received which were applicable to the local situation").

[*151]

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While the States had limited their reception of English common law to principles appropriate to American conditions, the 1787 draft Constitution contained no provision for adopting the common law at all. This omission stood in sharp contrast to the state constitutions then extant, virtually all of which contained explicit provisions dealing with common-law reception. See n. 55, *infra*. Since the experience in the States set the stage for thinking at the national level, see generally G. Wood, *Creation of the American Republic, 1776-1787*, p. 467 (1969) (Wood), this failure to address the notion of common-law reception could not have been inadvertent. Instead, the Framers chose to recognize only particular common-law concepts, such as the writ of habeas corpus, U.S. Const., Art. I, § 9, cl. 2, and the distinction between law and equity, U.S. Const., Amdt. VII, by specific reference in the constitutional text. See 1 J. Goebel, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Antecedents and Beginnings to 1801*, pp. 229-230 (1971). n34 This approach reflected widespread agreement that ratification would not itself entail a general reception of [*152] the common law of England. See Letter from John Marshall to St. George Tucker, Nov. 27, 1800, reprinted in Jay II, App. A, at 1326 ("I do not believe one man can be found who maintains "that the common law of England has .

. . . been adopted as the common law of America by the Constitution of the United States."); Jay II, at 1255 (noting that the use of the term "laws" in Article III "could not have been meant to accomplish a general reception of British common law").

n34 See also Jones 123-124 (noting that the common-law institutions of habeas corpus and jury trial were "not merely received as ordinary law," but rather "received by [specific textual provisions] of the Constitution itself, as part of the supreme law of the land"). Sovereign immunity, of course, was not elevated to constitutional status in this way; such immunity thus stands on the same footing as any other common-law principle which the Framers refused to place beyond the reach of legislative change. That such principles were and are subject to legislative alteration is confirmed by our treatment of other forms of common-law immunities, such as the immunity enjoyed under certain circumstances by public officials. *Butz v. Economou*, 438 U.S. 478, 508 (1978) (officer immunity is derived from the common law); *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976) (same). In this context, "our immunity decisions have been informed by the common law" only "in the absence of explicit . . . congressional guidance." *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982). See generally *ante*, at 13 (STEVENS, J., dissenting); Jackson, *supra*, at 75-104. Surely no one would deny Congress the power to abrogate those immunities if it should so choose.

[*153]

Records of the ratification debates support Marshall's understanding that everyone had to know that the new constitution would not draw the common law in its train. Antifederalists like George Mason went so far as to object that under the proposed Constitution the people would not be "secured even in the enjoyment of the benefit of the common law." Mason, *Objections to This Constitution of Government*, in 2 *Records of the Federal Convention of 1787*, p. 637 (M. Farrand ed. 1911) (Farrand); see also 3 *Elliot's Debates* 446-449 (Patrick Henry, Virginia Convention). In particular, the Antifederalists worried about the failure of the proposed Constitution to provide for a reception of "the great rights associated with due process" such as the right to a jury trial, Jay II, at 1256, and they argued that "Congress's powers to regulate the proceedings of federal courts made the fate of these common-law procedural protections uncertain." *Id.*, at 1257. n35 While Federalists met this objection by arguing that nothing in the Constitution necessarily excluded the fundamen-

tal common-law protections associated with due process, see, e.g., 3 Elliot's Debates 451 (George Nicholas, Virginia [*154] Convention), they defended the decision against any general constitutional reception of the common law on the ground that constitutionalizing it would render it "immutable," see *id.*, at 469-470 (Edmund Randolph, Virginia Convention), and not subject to revision by Congress, *id.*, at 550 (Edmund Pendleton, Virginia Convention); see also *infra*, at 68-70.

n35 See, e.g., 2 Elliot's Debates 400 (Thomas Tredwell, New York Convention) ("We are ignorant whether [federal proceedings] shall be according to the common, civil, the Jewish, or Turkish law . . .").

The Framers also recognized that the diverse development of the common law in the several states made a general federal reception impossible. "The common law was not the same in any two of the Colonies," Madison observed; "in some the modifications were materially and extensively different." Report on Resolutions, House of Delegates, Session of 1799-1800, Concerning Alien and Sedition Laws, in 6 Writings of James Madison 373 (G. Hunt ed. 1906) [*155] (Alien and Sedition Laws). n36 In particular, although there is little evidence regarding the immunity enjoyed by the various colonial governments prior to the Revolution, the profound differences as to the source of colonial authority between chartered colonies, royal colonies, and so on seems unlikely, wholly apart from other differences in circumstance, to have given rise to a uniform body of immunity law. There was not, then, any unified "Common Law" in America that the Federal Constitution could adopt, Jay, "Origins of Federal Common Law: Part I," 133 *U. Pa. L. Rev.* 1003, 1056 (1985) (Jay I); Stoebuck, 10 *Wm. & Mary L. Rev.*, at 401 ("The assumption that colonial law was essentially the same in all colonies is wholly without foundation"), and, in particular, probably no common principle of sovereign immunity, cf. Madison, *supra*, at 376. The Framers may, as Madison, Hamilton, and Marshall argued, have contemplated that federal courts would respect state immunity law in diversity cases, but the generalized principle of immunity that today's majority would graft onto the Constitution itself may well never have developed with any common clarity and, in any event, has not been shown [*156] to have existed.

n36 See also Justice Jay's Charge to the Grand Jury for the District of New York (April 4, 1790) (observing that at the time the Nation was formed, "our

jurisprudence varied in almost every State, and was accommodated to local, not general convenience—to partial, not national policy") (quoted in Jay, *Origins of Federal Common Law: Part I*, 133 *U. Pa. L. Rev.* 1003, 1056 n. 261 (1985)); *United States v. Worrall*, 28 *F. Cas.* 774, 779 (No. 16,766) (Chase, J.) (C.C. Pa. 1798) (noting that "the common law . . . of one state, is not the common law of another"); 8 *Annals of Cong.* 2137 (1798) (statement of Rep. Albert Gallatin) (asserting that there could be no national common law because "the common law of Great Britain received in each colony, had in every one received modifications arising from their situation . . . and now each State had a common law, in its general principles the same, but in many particulars differing from each other").

Finally, the Framers' aversion to a general federal [*157] reception of the common law is evident from the Federalists' response to the Antifederalist claim that Article III granted an unduly broad jurisdiction to the federal courts. That response was to emphasize the limited powers of the National Government. See, e.g., 3 Elliot's Debates 553 (John Marshall, Virginia Convention) ("Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers?"); Jay II, at 1260. n37 That answer assumes, of course, no generalized reception of English common law as federal law; otherwise, "arising under" jurisdiction would have extended to any subject comprehended by the general common law.

n37 See also Jay II, at 1241-1250 (arguing that Jeffersonian Republicans resisted the idea of a general federal reception of the common law as an incursion on States' rights); Jay I, at 1111 (same). Given the roots of the Framers' resistance, the Court's reception of the English common law into the Constitution itself in the very name of state sovereignty goes beyond the limits of irony.

[*158]

Madison made this assumption absolutely clear during the subsequent debates over the Alien and Sedition Acts, which raised the issue of whether the Framers intended to recognize a general federal jurisdiction to try common-law crimes. Rejecting the idea of any federal reception, Madison insisted that

"the consequence of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the Constitutions and laws of the States, the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation new model the whole political fabric of the country." Alien and Sedition Laws 381.

See also Goebel, Oliver Wendell Holmes Devise History of the Supreme Court of the United States, at 651-655 (discussing the lack of evidence to support the proposition that the Framers intended a general reception of the English common law through the Constitution); Jay II, at 1254 (arguing that "it would have been untenable to maintain that the body of British common law had been adopted by the Constitution . . . [*159] . "). Madison concluded that

"it is . . . distressing to reflect that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of Federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law--a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers." Alien and Sedition Laws 382.

B

Given the refusal to entertain any wholesale reception of common law, given the failure of the new Constitution to make any provision for adoption of common law as such, and given the protests already quoted that no general reception had occurred, the Hans Court and the Court today cannot reasonably argue that something like the old immunity doctrine somehow slipped in as a tacit but enforceable background principle. But see ante, at 27. The evidence is even more specific, however, that there was no pervasive understanding that [*160] sovereign immunity had limited federal question jurisdiction.

1

As I have already noted briefly, see supra, at 6-8, the Framers and their contemporaries did not agree about the place of common-law state sovereign immunity even as to federal jurisdiction resting on the Citizen-State Diversity Clauses. Edmund Randolph argued in favor of ratification on the ground that the immunity would

not be recognized, leaving the States subject to jurisdiction. n38 Patrick Henry opposed ratification on the basis of exactly the same reading. See 3 Elliot's Debates 543. On the other hand, James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification of Article III, so as to be at a State's disposal when jurisdiction would depend on diversity. This would have left the States free to enjoy a traditional immunity as defendants without barring the exercise of judicial power over them if they chose to enter the federal courts as diversity plaintiffs or to waive their immunity as diversity defendants. See id., at 533 (Madison: the Constitution "gives a citizen a right to be heard in the federal courts; [*161] and if a state should condescend to be a party, this court may take cognizance of it"); n39 id., at 556 (Marshall: "I see a difficulty in making a state defendant, which does not prevent its being plaintiff"). As Hamilton stated in Federalist 81,

n38 See 3 Elliot's Debates 573 (the Constitution would "render valid and effective existing claims" against the States). See also 2 id., at 491 (James Wilson, in the Pennsylvania ratification debate: "When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing"). Wilson, as I noted above, took a similar position in addressing the federal question, or arising under, clause, remarking that the effect of the clause would be to require States to honor pre-Revolutionary debt owed to English merchants, as had been promised in the Treaty of 1783. See supra, at n. 4.

n39 The Court accuses me of quoting this statement out of context, ante, at 25, n. 12, but the additional material included by the Court makes no difference. I am conceding that Madison, Hamilton, and Marshall all agreed that Article III did not of its own force abrogate the states' pre-existing common-law immunity, at least with respect to diversity suits. None of the statements offered by the Court, however, purports to deal with federal question jurisdiction or with the question whether Congress, acting pursuant to its Article I powers, could create a cause of action against a State. As I explain further below, the views of Madison and his allies on this more difficult question can be divined, if at all, only by reference to the more extended discussions by Hamilton in Federalist No. 32, and by Iredell in his Chisholm dissent. Both those discussions, I submit, tend to support a congressional power of abrogation.

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"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal." The Federalist No. 81, pp. 548-549 (J. Cooke ed. 1961).

See generally 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, 1045-1054 (1983) (discussing the adoption of the state-citizen diversity clause); Gibbons, 83 *Colum. L. Rev.*, at 1902-1914. The majority sees in these statements, and chiefly in Hamilton's discussion of sovereign immunity in Federalist No. 81, an unequivocal mandate "which would preclude all federal jurisdiction over an unconsenting State." Ante, at 25. But there is no such mandate to be found.

As I have already said, the immediate context [*163] of Hamilton's discussion in Federalist No. 81 has nothing to do with federal question cases. It addresses a suggestion "that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities." Federalist No. 81, at 548. Hamilton is plainly talking about a suit subject to a federal court's jurisdiction under the Citizen-State Diversity Clauses of Article III.

The general statement on sovereign immunity emphasized by the majority then follows, along with a reference back to Federalist No. 32. Ibid. What Hamilton draws from that prior paper, however, is not a general conclusion about state sovereignty but a particular point about state contracts:

"A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and [*164] have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81, at 549.

The most that can be inferred from this is, as noted above, that in diversity cases applying state contract law the immunity that a State would have enjoyed in its own courts is carried into the federal court. When, therefore, the Hans Court relied in part upon Hamilton's statement, see 134 *U. S.*, at 20, its reliance was misplaced; Hamilton was addressing diversity jurisdiction, whereas Hans involved federal question jurisdiction under the Contracts Clause. No general theory of federal question immunity can be inferred from Hamilton's discussion of immunity in contract suits. But that is only the beginning of the difficulties that accrue to the majority from reliance on Federalist No. 81.

Hamilton says that a State is "not . . . amenable to the suit of an individual without its consent . . . unless . . . there is a surrender of this immunity in the plan of the convention." The Federalist No. 81, at 548-549 (emphasis omitted). He immediately adds, however, that "the circumstances which are necessary to produce an alienation of state [*165] sovereignty, were discussed in considering the article of taxation, and need not be repeated here." Id., at 549. The reference is to Federalist No. 32, also by Hamilton, which has this to say about the alienation of state sovereignty:

"As the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it; but which would in fact be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive [*166] of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority." The Federalist No. 32, at 200 (emphasis in original).

As an instance of the last case, in which exercising concurrent jurisdiction may produce interferences in "policy," Hamilton gives the example of concurrent power to tax the same subjects:

"It is indeed possible that a tax might be laid on a particular article by a State which might render it inexpedient that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication [*167] alienate and extinguish a pre-existing right of sovereignty." *Id.*, at 202 (emphasis in original).

The first embarrassment Hamilton's discussion creates for the majority turns on the fact that the power to regulate commerce with Indian Tribes has been interpreted as making "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 234 (1985). n40 We have accordingly recognized that "state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-171 (1973) (internal quotation marks omitted); see also *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"). n41 We have specifically held, moreover, that the states have no power to regulate gambling on Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987). In sum, since the States have no sovereignty in the regulation of commerce with the tribes, [*168] on Hamilton's view there is no source of sovereign immunity to assert in a suit based on congressional regulation of that commerce. If Hamilton is good authority, the majority of the Court today is wrong.

n40 See also *Worcester v. Georgia*, 6 Pet. 515, 561 (1832) ("The Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force. . . . The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States"). This Court has repeatedly rejected state attempts to assert sovereignty over Indian lands. See, e.g., *The New York Indians*, 5 Wall. 761, 769 (1867) (rejecting state attempt to tax reservation lands); *Worcester*, supra, at 561-563 (nullifying an attempted prosecution by the state of Georgia of a

person who resided on Indian lands in violation of state law).

n41 Although we have rejected a per se bar to state jurisdiction, it is clear that such jurisdiction remains the exception and not the rule. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983) (footnotes omitted) ("Under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members").

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Quite apart, however, from its application to this particular act of Congress exercising the Indian Commerce power, Hamilton's sovereignty discussion quoted above places the Court in an embarrassing dilemma. Hamilton posited four categories: (a) congressional legislation on subjects committed expressly and exclusively to Congress, (b) on subjects over which state authority is expressly negated, (c) on subjects over which concurrent authority would be impossible (as "contradictory and repugnant"), and (d) on subjects over which concurrent authority is not only possible, but its exercise by both is limited only by considerations of policy (as when one taxing authority is politically deterred from adding too much to the exaction the other authority is already making). But what of those situations involving concurrent powers, like the power over interstate commerce, see e.g., *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1851) (recognizing power of states to engage in some regulation of interstate commerce), when a congressional statute not only binds the States but even creates an affirmative obligation on the State [*170] as such, as in this case? Hamilton's discussion does not seem to cover this (quite possibly because, as a good political polemicist, he did not wish to raise it). If in fact it is fair to say that Hamilton does not cover this situation, then the Court cannot claim him as authority for the preservation of state sovereignty and consequent immunity. If, however, on what I think is an implausible reading, one were to try to shoehorn this situation into Hamilton's category (c) (on the theory that concurrent authority is impossible after passage of the congressional legislation), then any claim of sovereignty and consequent immunity is gone entirely.

In sum, either the majority reads Hamilton as I do, to say nothing about sovereignty or immunity in such a case, or it will have to read him to say something about it that bars any state immunity claim. That is the dilemma

of the majority's reliance on Hamilton's Federalist No. 81, with its reference to No. 32. Either way, he is no authority for the Court's position.

Thus, the Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided. n42 The Court's difficulty is far [*171] more fundamental however, than inconsistency with a particular quotation, for the Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.

n42 See The Federalist No. 82, at 553 (A. Hamilton) (disclaiming any intent to answer all the "questions of intricacy and nicety" arising in a judicial system that must accommodate "the total or partial incorporation of a number of distinct sovereignties"); S. Elkins and E. McKittrick, *The Age of Federalism* 64 (1993) (suggesting that "the amount of attention and discussion given to the judiciary in the Constitutional Convention was only a fraction of that devoted to the executive and legislative branches," and that the Framers deliberately left many questions open for later resolution).

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We said in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) that "the States entered the federal system with their sovereignty intact," but we surely did not mean that they entered that system with the sovereignty they would have claimed if each State had assumed independent existence in the community of nations, for even the Articles of Confederation allowed for less than that. See Articles of Confederation, Art. VI, § 1 ("No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince or state . . ."). While there is no need here to calculate exactly how close the American States came to sovereignty in the classic sense prior to ratification of the Constitution, it is clear that the act of ratification affected their sovereignty in a way different from any previous political event in America or anywhere else. For the adoption of the Constitution made them members of a novel federal system that sought to balance

the States' exercise of some sovereign prerogatives delegated from their own people with [*173] the principle of a limited but centralizing federal supremacy.

As a matter of political theory, this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war had been. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. , (1995) (slip op., at 1) (KENNEDY, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty"). n43 Before the new federal scheme appeared, 18th-century political theorists had assumed that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself." B. Bailyn, *The Ideological Origins of the American Revolution* 198 (1967); see also Wood 345. n44 The American development of divided sovereign powers, which "shattered . . . the categories of government that had dominated Western thinking for centuries," id., at 385, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves. See id., at 530 (noting that because "none of these arguments about 'joint jurisdictions' and 'coequal sovereignties' [*174] convincingly refuted the Antifederalist doctrine of a supreme and indivisible sovereignty," the Federalists could succeed only by emphasizing that the supreme power "resides in the PEOPLE, as the fountain of government" (citing 1 *Pennsylvania and the Federal Constitution, 1787-1788*, p. 302 (J. McMaster & F. Stone, eds. 1888) (quoting James Wilson)). n45 The people possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit. See McDonald, *Novus Ordo Seclorum*, at 278. As James Wilson emphasized, the location of ultimate sovereignty in the People meant that "they can distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States." 1 *Pennsylvania and the Federal Constitution, 1787-1788*, supra, at 302. n46

n43 Regardless of its other faults, Chief Justice Taney's opinion in *Dred Scott v. Sandford*, 19 How. 393 (1857), recognized as a structural matter that "the new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one." Id., at 441. See also F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 276 (1985) ("The constitutional reallocation of powers created a new form

of government, unprecedented under the sun"); S. Beer, *To Make a Nation: The Rediscovery of American Federalism* 150-151 (1993) (American view of sovereignty was "radically different" from that of British tradition).

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n44 Cf., e.g., 1 W. Blackstone, *Commentaries* 49, 160-162 (Cooper, ed., 1803). This modern notion of sovereignty is traceable to the writings of Jean Bodin in the late 16th century. See J. Bodin, *Six Books of the Commonwealth*, bk. 2, ch. I, at 52-53 (M. Tooley, abr. & trans. 1967) (1576); see also T. Hobbes, *Leviathan*, Part II, ch. 29, at 150-151 (N. Fuller, ed. 1952) (1651).

n45 See Wood 530 (noting that James Wilson "more boldly and fully than anyone else . . . developed the argument that would eventually become the basis of all Federalist thinking" about sovereignty); see also *The Federalist* No. 22, at 146 (A. Hamilton) (acknowledging the People as "that pure original fountain of all legitimate authority"); id., No. 49, at 339 (J. Madison) ("the people are the only legitimate fountain of power").

n46 See also *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. , (1995) (slip op., at 2) (KENNEDY, J., concurring) (the Constitution "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it").

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Under such a scheme, Alexander Hamilton explained, "it does not follow . . . that each of the portions of powers delegated to [the national or state government] is not sovereign with regard to its proper objects." Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 *Papers of Alexander Hamilton* 98 (Syrett ed. 1965) (emphasis in original). n47 A necessary consequence of this view was that "the Government of the United States has sovereign power as to its declared purposes & trusts." *Ibid.* Justice Iredell was to make the same observation in his *Chisholm* dissent, commenting that "the United States are sovereign as to all the powers of government actually surrendered: each State in the Union is sovereign, as to all the powers reserved." 2 *Dall.*, at 434. And to the same point was Chief Justice Marshall's description of the National and State Governments as "each sovereign, with respect to the objects committed to it, and neither sovereign with respect

to the objects committed to the other." *McCulloch v. Maryland*, 4 *Wheat.* 316, 410 (1819).

n47 See Amar, 96 *Yale L. J.*, at 1434-1435 ("The ultimate American answer [to the British notion that the sovereign was by definition above the law], in part, lay in a radical redefinition of governmental 'sovereignty.' Just as a corporation could be delegated limited sovereign privileges by the King-in-Parliament, so governments could be delegated limited powers to govern. Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of the delegation itself").

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Given this metamorphosis of the idea of sovereignty in the years leading up to 1789, the question whether the old immunity doctrine might have been received as something suitable for the new world of federal question jurisdiction is a crucial one. n48 The answer is that sovereign immunity as it would have been known to the Framers before ratification thereafter became inapplicable as a matter of logic in a federal suit raising a federal question. The old doctrine, after all, barred the involuntary subjection of a sovereign to the system of justice and law of which it was itself the font, since to do otherwise would have struck the common-law mind from the Middle Ages onward as both impractical and absurd. See, e.g., *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.) ("A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends"). n49 But the ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign [*178] power to a National Government that was paramount within its delegated sphere. When individuals sued States to enforce federal rights, the Government that corresponded to the "sovereign" in the traditional common-law sense was not the State but the National Government, and any state immunity from the jurisdiction of the Nation's courts would have required a grant from the true sovereign, the people, in their Constitution, or from the Congress that the Constitution had empowered. We made a similar point in *Nevada v. Hall*, 440 U.S., at 416, where we considered a suit against a State in another State's courts:

n48 See, e.g., Amar, *supra*, at 1436 ("By thus re-

locating true sovereignty in the People themselves . . . Americans domesticated government power and decisively repudiated British notions of 'sovereign governmental omnipotence'). That this repudiation extended to traditional principles of sovereign immunity is clear from Justice Wilson's opinion in *Chisholm*, in which he blasted "the haughty notions of state independence, state sovereignty and state supremacy" as allowing "the state [to] assume a supercilious pre-eminence above the people who have formed it." 2 *Dall.*, at 461.

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n49 See also Hobbes, *supra*, at 130 ("The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. . . . For he is free that can be free when he will: nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound."); Bodin, *supra*, at 28-29 ("One may be subject to laws made by another, but it is impossible to bind oneself in any matter which is the subject of one's own free exercise of will. . . . It follows of necessity that the king cannot be subject to his own laws").

"This [traditional] explanation [of sovereign immunity] adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of [*180] the first as a matter of comity."

Cf. United States v. Texas, 143 U.S. 621, 646 (1892) (recognizing that a suit by the National Government against a State "does no violence to the inherent nature of sovereignty"). Subjecting States to federal jurisdiction in federal question cases brought by individuals thus reflected nothing more than Professor Amar's apt summary that "where governments are acting within the bounds of their delegated 'sovereign' power, they may partake of sovereign immunity; where not, not." Amar, 96 *Yale L. J.*, at 1490-1491 n. 261.

State immunity to federal question jurisdiction would, moreover, have run up against the common understanding of the practical necessity for the new federal relationship. According to Madison, the "multiplicity," "mutability," and "injustice" of then-extant state laws were prime factors requiring the formation of a new govern-

ment. 1 *Farrand* 318-319 (remarks of J. Madison). n50 These factors, Madison wrote to Jefferson, "contributed more to that uneasiness which produced the Convention, and prepared the Public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of [*181] the Confederation to its immediate objects." 5 *Writings of James Madison* 27 (G. Hunt ed. 1904). These concerns ultimately found concrete expression in a number of specific limitations on state power, including provisions barring the States from enacting bills of attainder or ex post facto laws, coining money or emitting bills of credit, denying the privileges and immunities of out-of-staters, or impairing the obligation of contracts. But the proposed Constitution also dealt with the old problems affirmatively by granting the powers to Congress enumerated in Article I, § 8, and by providing through the Supremacy Clause that Congress could preempt State action in areas of concurrent state and federal authority.

n50 See also Wood 466 ("Once men grasped, as they increasingly did in the middle [1780's], that reform of the national government was the best means of remedying the evils caused by the state governments, then the revision of the Articles of Confederation assumed an impetus and an importance that it had not had a few years earlier").

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Given the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights. And of course the Framers did not understand the scheme to leave the government powerless. In *The Federalist* No. 80, at 535, Hamilton observed that "no man of sense will believe that such prohibitions [running against the states] would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them," and that "an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union" was the Convention's preferred remedy. By speaking in the plural of an authority in the federal "courts," Hamilton made it clear that he envisioned more than this Court's exercise of appellate jurisdiction to review federal questions decided by state courts. Nor is it plausible that he was thinking merely of suits brought against States by the National Government itself, which *The Federalist's* authors did not describe in the paternalistic [*183] terms that would pass without an eyebrow raised today. Hamilton's power of the Government to

restrain violations of citizens' rights was a power to be exercised by the federal courts at the citizens' behest. See also Marshall, *102 Harv. L. Rev.*, at 1367-1371 (discussing the Framers' concern with preserving as much state accountability as possible even in the course of enacting the Eleventh Amendment).

This sketch of the logic and objectives of the new federal order is confirmed by what we have previously seen of the preratification debate on state sovereign immunity, which in turn becomes entirely intelligible both in what it addressed and what it ignored. It is understandable that reasonable minds differed on the applicability of the immunity doctrine in suits that made it to federal court only under the original Diversity Clauses, for their features were not wholly novel. While they were, of course, in the courts of the new and, for some purposes, paramount National Government, the law that they implicated was largely the old common law (and in any case was not federal law). It was not foolish, therefore, to ask whether the old law brought the old defenses with it. But it is equally [*184] understandable that questions seem not to have been raised about state sovereign immunity in federal question cases. The very idea of a federal question depended on the rejection of the simple concept of sovereignty from which the immunity doctrine had developed; under the English common law, the question of immunity in a system of layered sovereignty simply could not have arisen. Cf., e.g., Jay II, at 1282-1284; Du Ponceau, *A Dissertation on the Nature and Extent of Jurisdiction of Courts of the United States*, at 6-7. n51 The Framers' principal objectives in rejecting English theories of unitary sovereignty, moreover, would have been impeded if a new concept of sovereign immunity had taken its place in federal question cases, and would have been substantially thwarted if that new immunity had been held to be untouchable by any congressional effort to abrogate it. n52

n51 Cf. Jay I, at 1033-1034 ("English common law might afford clues to the meaning of some terms in the Constitution, but the absence of any close federal model was recognized even at the Convention"); F. Coker, *Commentary*, in R. Pound, C. McIlwain, & R. Nichols, *Federalism as a Democratic Process* 81-82 (1942).

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n52 See, e.g., *Prout v. Starr*, 188 U.S. 537, 543 (1903) (acknowledging the immunity recognized in *Hans* and other cases, but observing that "it would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the 11th Amendment,

were to be interpreted as nullifying those other provisions which confer power on Congress . . . all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. . ."). The majority contends that state compliance with federal law may be enforced by other means, ante, at 26, n. 14 but its suggestions are all pretty cold comfort: the enforcement resources of the Federal Government itself are limited; appellate review of state court decisions is contingent upon state consent to suit in state court, and is also called into question by the majority's rationale, see supra, at 15-16; and the Court's decision today illustrates the uncertainty that the Court will always permit enforcement of federal law by suits for prospective relief against state officers. Moreover, the majority's position ignores the importance of citizen-suits to enforcement of federal law. See, e.g., *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975) (acknowledging that, in many instances, "Congress has opted to rely heavily on private enforcement to implement public policy"); see also S. Rep. No. 94-1011, p. 2 (Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988) (recognizing that "all of these civil rights laws depend heavily upon private enforcement"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting) (noting importance of citizens' suits under federal environmental laws).

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Today's majority discounts this concern. Without citing a single source to the contrary, the Court dismisses the historical evidence regarding the Framers' vision of the relationship between national and state sovereignty, and reassures us that "the Nation survived for nearly two centuries without the question of the existence of [the abrogation] power ever being presented to this Court." Ante, at 26. n53 But we are concerned here not with the survival of the Nation but the opportunity of its citizens to enforce federal rights in a way that Congress provides. The absence of any general federal question statute for nearly a century following ratification of Article III (with a brief exception in 1800) hardly counts against the importance of that jurisdiction either in the Framers' conception or in current reality; likewise, the fact that Congress has not often seen fit to use its power of abrogation (outside the Fourteenth Amendment context, at

least) does not compel a conclusion that the power is not important to the federal scheme. In the end, is it plausible to contend that the plan of the convention was meant to leave the National Government without any way to render individuals [*187] capable of enforcing their federal rights directly against an intransigent state?

n53 The Court's further assertion, that "Congress itself waited nearly a century before even conferring federal question jurisdiction on the lower federal courts," ante, at 26, is simply incorrect. As I have noted, numerous early statutes conferred federal question jurisdiction on the federal courts operating under the original Judiciary Act in particular kinds of cases, and the Judiciary Act of 1800 provided for general federal question jurisdiction in the brief period before its repeal in 1801. See supra, n. 12.

C

The considerations expressed so far, based on text, Chisholm, caution in common-law reception, and sovereignty theory, have pointed both to the mistakes inherent in Hans and, even more strongly, to the error of today's holding. Although for reasons of stare decisis I would not today disturb the century-old precedent, I surely would not extend its error by placing the common-law immunity it mistakenly [*188] recognized beyond the power of Congress to abrogate. In doing just that, however, today's decision declaring state sovereign immunity itself immune from abrogation in federal question cases is open to a further set of objections peculiar to itself. For today's decision stands condemned alike by the Framers' abhorrence of any notion that such common-law rules as might be received into the new legal systems would be beyond the legislative power to alter or repeal, and by its resonance with this Court's previous essays in constitutionalizing common-law rules at the expense of legislative authority.

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I have already pointed out how the views of the Framers reflected the caution of state constitutionalists and legislators over reception of common-law rules, a caution that the Framers exalted to the point of vigorous resistance to any idea that English common-law rules might be imported wholesale through the new Constitution. The state politicians also took pains to guarantee that once a common-law rule had been received, it would always be subject to legislative alteration, and again the state experience was reflected in the Framers' thought. Indeed, the Framers' very insistence

that [*189] no common-law doctrine would be received by virtue of ratification was focused in their fear that elements of the common law might thereby have been placed beyond the power of Congress to alter by legislation.

The imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty. According to one historian, "shared ideas about the sovereignty of the people and the accountability of government to the people resulted at an early date in a new understanding of the role of legislation in the legal system. . . . Whereas a constitution had been seen in the colonial period as a body of vague and unidentifiable precedents and principles of common law origin that imposed ambiguous restrictions on the power of men to make or change law, after independence it came to be seen as a written charter by which the people delegated powers to various institutions of government and imposed limitations on the exercise of those powers. . . . The power to modify or even entirely to repeal the common law . . . now fell explicitly within the jurisdiction of the legislature." W. Nelson, *Americanization of the Common Law* 90 (1975). n54

n54 Considering the example of Massachusetts, Professor Nelson observes that "the clearest illustration that legislation was coming to rest on the arbitrary power of a majoritarian legislature rather than on its conformity with past law and principle was the ease with which statutes altering common law rights were enacted and repealed in the 1780s in response to changing election results." Nelson, *Americanization of the Common Law*, at 91-92.

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Virtually every state reception provision, be it constitutional or statutory, explicitly provided that the common law was subject to alteration by statute. See Wood 299-300; Jones 99. The New Jersey Constitution of 1776, for instance, provided that "the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law. . . ." N.J. Const., Art. XXII (1776), in 6 W. Swindler, *Sources and Documents of United States Constitutions* 452 (1976). n55 Just as the early state governments did not leave reception of the common law to implication, then, neither did they receive it as law immune to legislative alteration. n56

n55 See also Del. Const. Art. 25 (1776), in 2 Swindler, *Sources and Documents of United States*

Constitutions, at 203 ("The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution . . ."); Act of Feb. 25, 1784, in 1 First Laws of the State of Georgia 290 (1981) (declaring "the common laws of England" to be "in full force" "so far as they are not contrary to the constitution, laws and form of government now established in this State"); Mass. Const., Ch. VI, Art. VI (1780), in 5 Swindler, *supra*, at 108 ("All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay . . . shall still remain and be in full force, until altered or repealed by the legislature . . ."); *Commonwealth v. Churchill*, 2 Met. 118, 123-124 (Mass. 1840) (Shaw, C.J.) (construing "laws" in this provision to include common law); N. H. Const., Part II (1784), in 6 Swindler, *supra*, at 356 ("All the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New-Hampshire . . . shall remain and be in full force, until altered and repealed by the legislature . . ."); N. C. Laws 1778, Ch. V, in 1 First Laws of the State of North Carolina 353 (1984) ("All . . . such Parts of the Common Law, as were heretofore in Force and Use within this Territory . . . as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and the Form of Government therein established, and which have not been otherwise provided for, . . . not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full Force within this State"); N. Y. Const., Art. XXXV (1777), in 7 Swindler, *supra*, at 177-178 ("Such parts of the common law of England . . . as together did form the law of the said colony [of New York] on shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same"); R.I. Digest of 1766, quoted in 1 R. Powell & P. Rohan, *Powell On Real Property* P62, p. 212 (1995) ("In all actions, causes, matters and things whatsoever, where there is no particular law of this colony, or act of parliament . . . then and in such cases the laws of England shall be in force for the decision and determination of the same"); 2 T. Cooper, *Statutes at Large of South Carolina* 413 (1837) (Act of Dec. 12, 1712, § V) (receiving "the Common Law of England, where the same is not . . . inconsistent with the particular constitutions, customs and laws of this Province"); S. C. Const., Art.

VII (1790), in 8 Swindler, *supra*, at 480 ("All laws of force in this State at the passing of this constitution shall so continue, until altered or repealed by the legislature . . ."); W. Slade, *Vermont State Papers* 450 (1823) (Act of June 1782) (adopting "so much of the common law of England, as is not repugnant to the constitution or to any act of the legislature of this State"); Act of May 6, 1776, Ch. V, § VI, in *First Laws of the State of Virginia* 37 (1982) ("the common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the Legislative power of this colony").

Connecticut, which did not enact any reception statute or constitutional provision, adopted the common law by judicial decision insofar as it was appropriate for local conditions. See 1 Powell & Rohan, *supra*, P52, at 140-141, and n.77; Hall, 4 *Vand. L. Rev.*, at 800; *Fitch v. Brainerd*, 2 *Day* 163 (*Conn.* 1805). Maryland's position appears to have been articulated in an oath prescribed by the Assembly in 1728 for justices of the Provincial Court. The oath required that the justices act "according to the Laws, Customs, and Directions of the Acts of Assembly of this Province; and where they are silent, according to the Laws, Statutes, and reasonable Customs of England, as have been used and practiced in this Province . . ." M. Andrews, *History of Maryland* 227 (1929). Finally, although Pennsylvania's reception statute did not state that the common law could be altered by legislative enactment in so many words, it may be read as assuming the primacy of legislative enactments, see 9 *Statutes at Large of Pennsylvania* 29-30 (Mitchell & Flanders eds. 1903) (Act of Jan. 28, 1777) (declaring prior acts of the general assembly to still be in force, as well as "the common law and such of the statute laws of England as have heretofore been in force in the said province . . ."), and the state Assembly seems to have believed it had the power to depart from common law even prior to independence. See Warren, *History of the American Bar*, at 103; cf. *Kirk v. Dean*, 2 *Binn.* 341, 345 (*Pa.* 1810) (interpreting the state constitution as permitting departures from common-law rules where local circumstances required it).

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n56 It bears emphasis that, in providing for statutory alteration of the common law, the new States were in no way departing from traditional understandings. It is true that the colonial charters had generally rendered colonial legislation void to the extent that it conflicted with English common law, but this principle was simply indicative of the colonies'

legal subjugation to the mother country and, in any event, seldom enforced in practice. See Stoebuck, *10 Wm. & Mary L. Rev.*, at 396-398, 419-420. The traditional conception of the common law as it developed in England had always been that it was freely alterable by statute. T. Plucknett, *A Concise History of the Common Law* 336-337 (5th ed. 1956); see also T. Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* 26-31 (1922) (finding no historical support for the claim that common law was "fundamental" or otherwise superior to statutes). Coke appears to have attempted at one time to establish a paramount common law, see, e.g., *Dr. Bonham's Case*, 8 *Co. Rep.* 107a, 118a, 77 *Eng. Rep.* 638, 652 (C. P. 1610), but that attempt never took root in England. See Plucknett, *Concise History of the Common Law*, supra, at 337; Jones 130; J. Gough, *Fundamental Law in English Constitutional History* 202 (1955) (observing that "by the nineteenth century the overriding authority of statute-law had become the accepted principle in the courts"). And although Coke's dictum was to have a somewhat greater influence in America, that influence took the form of providing an early foundation for the idea that courts might invalidate legislation that they found inconsistent with a written constitution. See Jones 130-132; Gough, supra, at 206-207 (noting that Coke's view of fundamental law came to be transformed and subsumed in American practice by treatment of the written constitution as fundamental law in the exercise of judicial review). As I demonstrate infra, the idea that legislation may be struck down based on principles of common law or natural justice not located within the constitutional text has been squarely rejected in this country. See infra, at 71-74.

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I have already indicated that the Framers did not forget the state law examples. When Antifederalists objected that the 1787 draft failed to make an explicit adoption of certain common-law protections of the individual, part of the Federalists' answer was that a general constitutional reception of the common law would bar congressional revision. Madison was particularly concerned with the necessity for legislative control, noting in a letter to George Washington that "every State has made great inroads & with great propriety on this monarchical code." Letter from James Madison to George Washington (Oct. 18, 1787), reprinted in 3 *Farrand* 130, App. A (emphasis in original). n57 Madison went on to insist that "the Common law is nothing more than the unwritten law, and is left by all the

Constitutions equally liable to legislative alterations." Ibid. n58 Indeed, Madison anticipated, and rejected, the Court's approach today when he wrote that if "the common law be admitted as . . . of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power . . . [which] would be permanent and irremediable by the Legislature." Report [*193] on the Virginia Resolutions Concerning the Alien and Sedition Acts, in 6 *Writings of James Madison* 380. "A discretion of this sort," he insisted, "has always been lamented as incongruous and dangerous" *Id.*, at 381. n59

n57 See also 3 *Elliot's Debates* 469-470 (Edmund Randolph, Virginia Convention) (arguing that constitutional incorporation of the common law would be "destructive to republican principles"). Indeed, one reason for Madison's suspicion of the common law was that it included "a thousand heterogeneous & antirepublican doctrines." Letter from Madison to Washington (Oct. 18, 1787), reprinted in 3 *Farrand* 130, App. A. "It will merit the most profound consideration," Madison was later to warn in his Report on the Virginia Resolutions Concerning the Alien and Sedition Laws, "how far an indefinite admission of the common law . . . might draw after it the various prerogatives making part of the unwritten law of England." *Alien and Sedition Laws* 380. Such an admission, Madison feared, would mean that "the whole code, with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States." *Ibid.* See also *Amar*, 96 *Yale L. J.* 1490 ("[The] sole basis [of absolute government immunity from all suits] is the British idea that the sovereign government, as the source of all law, cannot itself be bound by any law absent its consent. . . . Literally every article of the Federalist Constitution and every amendment in the Bill of Rights rests on the repudiation of the British view").

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n58 See *Wood* 304, n. 75 ("To Jefferson in 1785 judicial discretion in the administration of justice was still the great evil and codification the great remedy"); G. White, *The Marshall Court and Cultural Change, 1815-1835*, p. 130 (1991) ("An assumption of the constitutional design was that if Congress exercised [its enumerated] powers through legislation, its laws would supersede any competing ones").

n59 The Court attempts to sidestep this history by distinguishing sovereign immunity as somehow different from other common law principles. Ante,

at 24. But see *Chisholm v. Georgia*, 2 Dall., at 435 (Iredell, J., dissenting) (arguing that the common law of England should control the case "so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controls it"). The Court cannot find solace in any distinction between "substantive rules of law" and "jurisdiction," ante, at 24, however; it is abundantly clear that we have drawn both sorts of principles from the common law. See, e.g., *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 609 (1990) (plurality opinion of SCALIA, J.) (noting that American notion of personal jurisdiction is a "common-law principle" that predates the Fourteenth Amendment). Nothing in the history, moreover, suggests that common law rules were more immutable when they were jurisdictional rather than substantive in nature. Nor is it true that "the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment." Ante, at 24. The Seventh Amendment, after all, was adopted to respond to Antifederalist concerns regarding the right to jury trial. See supra, at n. 34. Indeed, that amendment vividly illustrates the distinction between provisions intended to adopt the common law (the amendment specifically mentions the "common law" and states that the common law right "shall be preserved") and those provisions, like the Eleventh Amendment, that may have been inspired by a common law right but include no language of adoption or specific reference. Finally, the Court's recourse to a vague "jurisprudence in all civilized nations," ante, at 24, rather than the common law of England is unavailing. When the Constitution has received such general principles into our law, for example, in the Admiralty Clause's adoption of the general "law of nations" or "law of the sea," those principles have always been subject to change by congressional enactment. See, e.g., *Panama R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) (noting that although "the principles of the general maritime law, sometimes called the law of the sea" were "embodied" in Art. III, § 2 of the Constitution, they remained "subject to power in Congress to alter, qualify or supplement"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.) (stating that the Court would be "bound by the law of nations" until Congress passed a contrary enactment).

of constitutionalizing common-law rules to place them beyond the reach of congressional amendment. The Framers feared judicial power over substantive policy and the ossification of law that would result from transforming common law into constitutional law, and their fears have been borne out every time the Court has ignored Madison's counsel on subjects that we generally group under economic and social policy. It is, in fact, remarkable that as we near the end of this century the Court should choose to open a new constitutional chapter in confining legislative judgments on these matters by resort to textually unwarranted common-law rules, for it was just this practice in the century's early decades that brought this Court to the nadir of competence that we identify with *Lochner v. New York*, 198 U.S. 45 (1905).
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n60 Cf. *United States v. Lopez*, 514 U.S. (1995) (slip op., at 4) (SOUTER, J., dissenting) ("The fulcrums of judicial review in [the *Lochner* cases] were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them").

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It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect. See, e.g., *Adkins v. Childrens Hospital of D.C.*, 261 U.S. 525, 557 (1923) (finding abrogation of common-law freedom to contract for any wage an unconstitutional "compulsory exaction"); see generally Sunstein, *Lochner's Legacy*, 87 *Colum. L. Rev.* 873 (1987). And yet the superseding lesson that seemed clear after *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that action within the legislative power is not subject to greater scrutiny merely because it trenches upon the case law's ordering of economic and social relationships, seems to have been lost on the Court.

The majority today, indeed, seems to be going *Lochner* one better. When the Court has previously constrained the express Article I powers by resort to common-law or background principles, it has done so at least in an os-

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History confirms the wisdom of Madison's abhorrence

tensible effort to give content to some [*197] other written provision of the Constitution, like the Due Process Clause, the very object of which is to limit the exercise of governmental power. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908). Some textual argument, at least, could be made that the Court was doing no more than defining one provision that happened to be at odds with another. Today, however, the Court is not struggling to fulfill a responsibility to reconcile two arguably conflicting and Delphic constitutional provisions, nor is it struggling with any Delphic text at all. For even the Court concedes that the Constitution's grant to Congress of plenary power over relations with Indian tribes at the expense of any state claim to the contrary is unmistakably clear, and this case does not even arguably implicate a textual trump to the grant of federal question jurisdiction.

I know of only one other occasion on which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision. Justice Chase once took such a position almost 200 years ago:

"There are certain vital [*198] principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Calder v. Bull*, 3 Dall. 386, 388 (1798) (emphasis deleted).

This position was no less in conflict with American constitutionalism in 1798 than it is today, being inconsistent with the Framers' view of the Constitution as fundamental law. Justice Iredell understood this, and dissented (again) in an opinion that still answers the position that "vital" or "background" principles, without more, may be used to confine a clear constitutional provision:

"Some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . .

". . . It has been the policy of the American states, . . . and of the people of the United States . . . to define with precision the objects of the legislative power, and to restrain [*199] its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void. . . . If, on the other hand,

the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Id.*, at 398-399 (emphasis deleted) (opinion dissenting in part).

Later jurisprudence vindicated Justice Iredell's view, and the idea that "first principles" or concepts of "natural justice" might take precedence over the Constitution or other positive law "all but disappeared in American discourse." J. Ely, *Democracy* [*200] and *Distrust* 52 (1980). It should take more than references to "background principles," ante, at 27, and "implicit limitations," *Welch*, 483 U.S., at 496 (SCALIA, J., concurring in part and concurring in judgment), to revive the judicial power to overcome clear text unopposed to any other provision, when that clear text is in harmony with an almost-equally clear intent on the part of the Framers and the constitutionalists of their generation.

IV

The Court's holding that the States' Hans immunity may not be abrogated by Congress leads to the final question in this case, whether federal question jurisdiction exists to order prospective relief enforcing IGRA against a state officer, respondent Chiles, who is said to be authorized to take the action required by the federal law. Just as with the issue about authority to order the State as such, this question is entirely jurisdictional, and we need not consider here whether petitioner Seminole Tribe would have a meritorious argument for relief, or how much practical relief the requested order (to bargain in good faith) would actually provide to the Tribe. Nor, of course, does the issue turn in any way on one's views about the [*201] scope of the Eleventh Amendment or Hans and its doctrine, for we ask whether the state officer is subject to jurisdiction only on the assumption that action directly against the State is barred. The answer to this question is an easy yes, the officer is subject to suit under the rule in *Ex parte Young*, 209 U.S. 123 (1908), and the case could, and should, readily be decided on this point alone.

A

In *Ex parte Young*, this Court held that a federal court has jurisdiction in a suit against a state officer to enjoin

official actions violating federal law, even though the State itself may be immune. Under *Young*, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979); see also *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

The fact, without more, that such suits may have a significant impact on state governments does not count under *Young*. *Milliken*, for example, was a suit, under the authority of *Young*, brought against Michigan's Governor, Attorney General, Board of Education, Superintendent of Public [*202] Instruction, and Treasurer, which resulted in an order obligating the State of Michigan to pay money from its treasury to fund an education plan. The relief requested (and obtained) by the plaintiffs effectively ran against the State: state moneys were to be removed from the state treasury, and they were to be spent to fund a remedial education program that it would be the State's obligation to implement. To take another example, *Quern v. Jordan* involved a court order requiring state officials to notify welfare beneficiaries of the availability of past benefits. Once again, the defendants were state officials, but it was the obligation of the State that was really at issue: the notices would be sent from the state welfare agency, to be returned to the state agency, and the state agency would pay for the notices and any ensuing awards of benefits. Indeed, in the years since *Young* was decided, the Court has recognized only one limitation on the scope of its doctrine: under *Edelman v. Jordan*, 415 U.S. 651 (1974), *Young* permits prospective relief only and may not be applied to authorize suits for retrospective monetary relief.

It should be no cause for surprise [*203] that *Young* itself appeared when it did in the national law. It followed as a matter of course after the *Hans* Court's broad recognition of immunity in federal question cases, simply because "remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). *Young* provided, as it does today, a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III.

If *Young* may be seen as merely the natural consequence of *Hans*, it is equally unsurprising as an event in the longer history of sovereign immunity doctrine, for the rule we speak of under the name of *Young* is so far inherent in the jurisdictional limitation imposed by sovereign immunity as to have been recognized since the

Middle Ages. For that long it has been settled doctrine that suit against an officer of the Crown permitted relief against the government despite the Crown's immunity from suit in its own courts and the maxim that the king could do no wrong. See Jaffe, 77 *Harv. L. Rev.* [*204] *at 3, 18-19*; Ehrlich, No. XII: Proceedings Against the Crown (1216-1377) pp. 28-29, in 6 *Oxford Studies in Social and Legal History* (P. Vinogradoff ed. 1921). An early example, from "time immemorial" of a claim "affecting the Crown [that] could be pursued in the regular courts [without consent since it] did not take the form of a suit against the Crown," Jaffe, *supra*, at 1, was recognized by the Statute of Westminster I, 1275, which established a writ of disseisin against a King's officers. When a King's officer disseised any person in the King's name, the wrongfully deprived party could seek the draconian writ of attain against the officer, by which he would recover his land. 77 *Harv. L. Rev.*, at 9. Following this example forward, we may see how the writ of attain was ultimately overtaken by the more moderate common-law writs of certiorari and mandamus, "operating directly on the government; [and commanding] an officer not as an individual but as a functionary." *Id.*, at 16. Thus the Court of King's Bench made it clear in 1701 that "wherever any new jurisdiction is erected, be it by private or public act of parliament, they are subject to the inspections of this [*205] Court by writ of error, or by certiorari and mandamus." *The Case of Cardiffe Bridge*, 1 Salk. 146, 91 *Eng. Rep.* 135 (K. B.).

B

This history teaches that it was only a matter of course that once the National Constitution had provided the opportunity for some recognition of state sovereign immunity, the necessity revealed through six centuries or more of history would show up in suits against state officers, just as *Hans* would later open the door to *Ex parte Young* itself. Once, then, the Eleventh Amendment was understood to forbid suit against a State *eo nomine*, the question arose "which suits against officers will be allowed and which will not be." Jaffe, 77 *Harv. L. Rev.*, at 20.

"It early became clear that a suit against an officer was not forbidden simply because it raised a question as to the legality of his action as an agent of the government or because it required him, as in mandamus, to perform an official duty. These as we know had been well established before the eleventh amendment as not necessarily requiring consent. To be sure the renewed emphasis on immunity given by the eleventh amendment might conceivably have been taken so to extend the doctrine [*206] as to exclude suits against state officers even in cases where the English tradition would have allowed

them. There was a running battle as to where the line would be drawn. The amendment was appealed to as an argument for generous immunity. But there was the vastly powerful counterpressure for the enforcement of constitutional limits on the states. The upshot . . . was to confine the amendment's prohibition more or less to the occasion which gave it birth, to wit, the enforcement of contracts and to most (though not all) suits involving the title and disposition of a state's real and personal property." *Id.*, at 20-21.

The earliest cases, *United States v. Peters*, 5 Cranch 115 (1809), and *Osborn v. Bank of United States*, 9 Wheat. 738 (1824), embrace the English practice of permitting suits against officers, see Orth, *Judicial Power of the United States*, at 34-35, 40-41, 122, by focusing almost exclusively on whether the State had been named as a defendant. *Governor of Georgia v. Madrazo*, 1 Pet. 110, 123-124 (1828), shifted this analysis somewhat, finding that a governor could not be sued because he was sued "not by his name, but by his title," which [*207] was thought the functional equivalent of suing the State itself. *Madrazo* did not, however, erase the fundamental principle of *Osborn* that sovereign immunity would not bar a suit against a state officer. See, e.g., *Davis v. Gray*, 16 Wall. 203 (1873) (applying *Osborn* by enjoining the Governor of Texas to interfere with the possession of land granted by the State); *United States v. Lee*, 106 U.S. 196 (1882) (applying *Osborn* in context of federal sovereign immunity).

This simple rule for recognizing sovereign immunity without gutting substantial rights was temporarily muddled in *Louisiana v. Jumel*, 107 U.S. 711 (1883), where the Court, although it "did not clearly say why," refused to hear a suit that would have required a state treasurer to levy taxes to pay interest on a bond. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 S. Ct. Rev. 149, 152. (One recalls the circumstances of *Hans* itself, see *supra*, at 20-26.) The Court, however, again applied *Osborn* in the *Virginia Coupon Cases*, 114 U.S. 269 (1885) (permitting injunctions, restitution, and damages against state officers who seized property to collect [*208] taxes already paid with interest coupons the State had agreed to accept). *In re Ayers*, 123 U.S. 443, 502 (1887), sought to rationalize the competing strands of doctrine on the ground that an action may be "sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."

Ex parte Young restored the old simplicity by complementing *In re Ayers* with the principle that state officers never have authority to violate the Constitution or federal law, so that any illegal action is stripped of state character and rendered an illegal individual act. Suits against these officials are consequently barred by neither the Eleventh Amendment nor *Hans* immunity. The officer's action "is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. . . . The State has no power to impart to him [*209] any immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U. S., at 159-160.

The decision in *Ex parte Young*, and the historic doctrine it embodies, thus plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a "fiction," the long history of its felt necessity shows it to be something much more estimable, as we may see by considering the facts of the case. "Young was really and truly about to damage the interest of plaintiffs. Whether what he was about to do amounted to a legal injury depended on the authority of his employer, the state. If the state could constitutionally authorize the act then the loss suffered by plaintiffs was not a wrong for which the law provided a remedy. . . . If the state could not constitutionally authorize the act then Young was not acting by its authority." Orth, *Judicial Power of the United States*, at 133. The doctrine we call *Ex parte Young* is nothing short of "indispensable to the establishment of constitutional government and the rule of law." C. Wright, *Law of Federal Courts* 292 (4th ed. 1983). See also E. Chemerinsky, *Federal Jurisdiction* 393 (2d ed. [*210] 1994).

A rule of such lineage, engendered by such necessity, should not be easily displaced, if indeed it is displaceable at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies. We have in fact never before inferred a congressional intent to eliminate this time-honored practice of enforcing federal law. That of course does not mean that the intent may never be inferred, and where, as here, the underlying right is one of statutory rather than constitutional dimension, I do not in theory reject the Court's assumption that Congress may bar enforcement by suit even against a state official. But because in practice, in the real world of congressional legislation, such an intent would be exceedingly odd, it would be equally odd for this Court to recognize an intent to block the customary application of *Ex parte Young* without applying the rule recognized in our previous cases, which have insisted on a clear statement before assuming a congressional purpose to "affect the federal balance,"

States v. Bass, 404 U.S. 336, 349 (1971). See *Id. v. Michigan Dept. of State Police*, 491 U.S. 1989 [*211] ("If Congress intends to alter the constitutional balance between the States and the Government, it must make its intention to do so unmistakably clear in the language of the statute.") *Atascadero State Hospital v. Scanlon*, 473 U.S. 42; *Gregory v. Ashcroft*, 501 U.S. 452, 460-21). Our habitual caution makes sense for just as we mentioned in *Dellmuth v. Muth*, 491 U.S. 723 (1989): it is "difficult to believe that . . . Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but not of making its intention manifest."

It is no question that by its own terms Young's rule authorizes the exercise of federal jurisdiction over respondent Chiles. Since this case does not, therefore, involve retrospective relief, Edelman's limit is inapplicable, and there is no other jurisdictional limitation. Obviously, for jurisdictional purposes it makes no difference in principle whether the injunction orders the defendant not to act, as in Young, or requires the defendant to take some positive step, as in Milliken or Quern. The Court, then, [*212] in this case renders Young unusable as a jurisdictional basis for determining on the merits whether the petitioners are entitled to an order against the state official under general equitable doctrine. The Court does not say otherwise, and yet it refuses to overrule Young. There is no adequate reason for its refusal.

The Court's statement of intent to displace the doctrine of Young occurs in IGRA, and the Court is instead directed to rest its effort to skirt Young on a series of reasons thought to be apparent in Congress's provisions for "intricate procedures" for enforcing a State's law under the Act. The procedures are said to be a rule against judicial creativity in devising alternative procedures; it is said that applying Young would nullify the statutory procedures; and finally the provisions are said simply to reveal a congressional intent to preclude the application of Young.

The Court cites *Schweiker v. Chilicky*, 487 U.S. 412, 428, in support of refraining from what it seems would be judicial creativity in recognizing the vitality of Young. The Court quotes from Chilicky [*213] the general proposition that when Congress has prescribed what it considers adequate remedial mechanisms for violations of federal law, this Court should not fashion additional remedies. Ante, at 29. The Court states that Congress's provision in IGRA of "intricate

procedures" shows that it considers its remedial provisions to be adequate, with the implication that courts as a matter of prudence should provide no "additional" remedy under *Ex parte Young*. Ante, at 29-31.

Chilicky's remoteness from the point of this case is, however, apparent from its facts. In Chilicky, Congress had addressed the problem of erroneous denials of certain government benefits by creating a scheme of appeals and awards that would make a successful claimant whole for all benefits wrongly denied. The question was whether this Court should create a further remedy on the model of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for such harms as emotional distress, when the erroneous denial of benefits had involved a violation of procedural due process. The issue, then, was whether to create a supplemental remedy, backward-looking on the *Bivens* model, running [*214] against a federal official in his personal capacity, and requiring an affirmative justification (as *Bivens* does). See *Bivens, supra*; *FDIC v. Meyer*, 510 U.S. 476 (1994) (slip op., at 13-14).

The *Bivens* issue in Chilicky (and in Meyer) is different from the Young issue here in every significant respect. Young is not an example of a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized; it is a general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began. Young does not provide retrospective monetary relief but allows prospective enforcement of federal law that is entitled to prevail under the Supremacy Clause. It requires, not money payments from a government employee's personal pocket, but lawful conduct by a public employee acting in his official capacity. Young would not function here to provide a merely supplementary regime of compensation to deter illegal action, but the sole jurisdictional basis for an Article III court's enforcement of a clear federal [*215] statutory obligation, without which a congressional act would be rendered a nullity in a federal court. One cannot intelligibly generalize from Chilicky's standards for imposing the burden to justify a supplementary scheme of tort law, to the displacement of Young's traditional and indispensable jurisdictional basis for ensuring official compliance with federal law when a State itself is immune from suit.

2

Next, the Court suggests that it may be justified in displacing Young because Young would allow litigants to ignore the "intricate procedures" of IGRA in favor of a menu of streamlined equity rules from which any litigant could order as he saw fit. But there is no basis

in law for this suggestion, and the strongest authority to reject it. Young did not establish a new cause of action and it does not impose any particular procedural regime in the suits it permits. It stands, instead, for a jurisdictional rule by which paramount federal law may be enforced in a federal court by substituting a non-immune party (the state officer) for an immune one (the State itself). Young does no more and furnishes no authority for the Court's assumption that it somehow pre-empts [*216] procedural rules devised by Congress for particular kinds of cases that may depend on Young for federal jurisdiction. n61

n61 The Court accuses me of misrepresenting its argument. Ante, at 30, n. 17. The Court's claim, as I read it, is not that Congress cannot authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme, but rather that remedial limitations on the underlying cause of action do not apply to a claim based on Ex parte Young. Otherwise, the existence of those remedial limitations would provide no reason for the Court to assume that Congress did not intend to permit an action under Young; rather, the limitations would apply regardless of whether the suit was brought against the State or a state officer.

If, indeed, the Court were correct in assuming that Congress may not regulate the procedure of a suit jurisdictionally dependent on Young, the consequences would be revolutionary, for example, in habeas law. It is well established [*217] that when a habeas corpus petitioner sues a state official alleging detention in violation of federal law and seeking the prospective remedy of release from custody, it is the doctrine identified in Ex parte Young that allows the petitioner to evade the jurisdictional bar of the Eleventh Amendment (or, more properly, the Hans doctrine). See *Young*, 209 U.S., at 167-168; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949). n62 And yet Congress has imposed a number of restrictions upon the habeas remedy, see, e.g., 28 U.S.C. § 2254(b) (requiring exhaustion of state remedies prior to bringing a federal habeas petition), and this Court has articulated several more, see, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991) (abuse of the writ); *Teague v. Lane*, 489 U.S. 288 (1989) (limiting applicability of "new rules" on habeas); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (applying a more deferential harmless error standard on habeas review). By suggesting that Ex parte Young provides a free-standing remedy not subject to the restrictions otherwise imposed on federal remedial schemes (such as habeas corpus), the Court [*218] suggests that a state

prisoner may circumvent these restrictions by ostensibly bringing his suit under Young rather than 28 U.S.C. § 2254. The Court's view implies similar consequences under any number of similarly structured federal statutory schemes. n63

n62 See also *Brennan v. Stewart*, 834 F. 2d 1248, 1252, n.6 (CA5 1988) ("Although not usually conceptualized as Ex parte Young cases, most of the huge number of habeas claims in the federal courts under 28 U.S.C. § 2254 are effectively suits against the states. These suits pass muster under the Eleventh Amendment because the habeas theory of a civil suit against the bad jailer fits perfectly with the Ex parte Young fiction"); *United States ex. rel. Elliott v. Hendricks*, 213 F. 2d 922, 926-928 (CA3) (exercising jurisdiction over a habeas suit despite an Eleventh Amendment challenge on the theory that the suit was against a state officer), cert. denied, 348 U.S. 851 (1954).

n63 Many other federal statutes impose obligations on state officials, the enforcement of which is subject to "intricate provisions" also statutorily provided. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (citizen suit provision to enforce states' obligations under federal environmental law); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 (privately enforceable requirement that states form commissions, appointed by the Governor, to generate plans for addressing hazardous material emergencies).

[*219]

This, of course, cannot be the law, and the plausible rationale for rejecting the Court's contrary assumption is that Congress has just as much authority to regulate suits when jurisdiction depends on Young as it has to regulate when Young is out of the jurisdictional picture. If Young does not preclude Congress from requiring state exhaustion in habeas cases (and it clearly does not), then Young does not bar the application of IGRA's procedures when effective relief is sought by suing a state officer.

3

The Court's third strand of reasoning for displacing Ex parte Young is a supposed inference that Congress so intended. Since the Court rests this inference in large part on its erroneous assumption that the statute's procedural limitations would not be applied in a suit against an officer for which Young provided the jurisdictional basis, the error of that assumption is enough to show the unsoundness of any inference that Congress meant to

exclude Young's application. But there are further reasons pointing to the utter implausibility of the Court's reading of the congressional mind.

IGRA's jurisdictional provision reads as though it had been drafted [*220] with the specific intent to apply to officer liability under Young. It provides that "the United States district courts shall have jurisdiction over . . . any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." (Emphasis added.) This language does not limit the possible defendants to States and is quite literally consistent with the possibility that a tribe could sue an appropriate state official for a State's failure to negotiate. n64 The door is so obviously just as open to jurisdiction over an officer under Young as to jurisdiction over a State directly that it is difficult to see why the statute would have been drafted as it was unless it was done in anticipation that Young might well be the jurisdictional basis for enforcement action.

n64 In order for any person (whether individual or entity) to be a proper defendant under § 2710(d)(7) (and in order for standing to exist, since one of its requirements is redressability), that person, of course, would need to have some connection to the State's negotiations. See *Young*, 209 U.S., at 157; *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). The obvious candidates are the responsible state officials.

[*221]

But even if the jurisdictional provision had spoken narrowly of an action against the State itself (as it subsequently speaks in terms of the State's obligation), that would be no indication that Congress had rejected the application of Young. An order requiring a "State" to comply with federal law can, of course, take the form of an order directed to the State in its sovereign capacity. But as *Ex parte Young* and innumerable other cases show, there is nothing incongruous about a duty imposed on a "State" that Congress intended to be effectuated by an order directed to an appropriate state official. The habeas corpus statute, again, comes to mind. It has long required "the State," by "order directed to an appropriate State official," to produce the state court record where an indigent habeas petitioner argues that a state court's factual findings are not fairly supported in the record. See 28 U.S.C. § 2254(e) ("the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official"). If, then, IGRA's references to "a State's" duty were not enforceable by order to a state official, it would [*222] have to be for some other reason than the

placement of the statutory duty on "the State."

It may be that even the Court agrees, for it falls back to the position, see ante, at 30-31, n. 17, that only a State, not a state officer, can enter into a compact. This is true but wholly beside the point. The issue is whether negotiation should take place as required by IGRA and an officer (indeed, only an officer) can negotiate. In fact, the only case cited by the Court, *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992), makes that distinction abundantly clear.

Finally, one must judge the Court's purported inference by stepping back to ask why Congress could possibly have intended to jeopardize the enforcement of the statute by excluding application of Young's traditional jurisdictional rule, when that rule would make the difference between success or failure in the federal court if state sovereign immunity was recognized. Why would Congress have wanted to go for broke on the issue of state immunity in the event the State pleaded immunity as a jurisdictional bar? Why would Congress not have wanted IGRA to be enforced by means of a traditional doctrine [*223] giving federal courts jurisdiction over state officers, in an effort to harmonize state sovereign immunity with federal law that is paramount under the Supremacy Clause? There are no plausible answers to these questions.

D

There is, finally, a response to the Court's rejection of Young that ought to go without saying. Our long-standing practice is to read ambiguous statutes to avoid constitutional infirmity, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) ("every reasonable construction must be resorted to, in order to save a statute from unconstitutionality") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). This practice alone (without any need for a clear statement to displace Young) would be enough to require Young's application. So, too, would the application of another rule, requiring courts to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue (in this case, the place of state sovereign immunity in federal question cases and the status of Union Gas). *NLRB v. Catholic Bishop of Chicago*, 440 [*224] U.S. 490, 500-501 (1979). Construing the statute to harmonize with Young, as it readily does, would have saved an act of Congress and rendered a discussion on constitutional grounds wholly unnecessary. This case should be decided on this basis alone.

V

Absent the application of *Ex parte Young*, I would, of course, follow *Union Gas* in recognizing congressional power under Article I to abrogate Hans immunity. Since the reasons for this position, as explained in Parts II-III, *supra*, tend to unsettle Hans as well as support *Union Gas*, I should add a word about my reasons for continuing to accept Hans's holding as a matter of *stare decisis*.

The Hans doctrine was erroneous, but it has not previously proven to be unworkable or to conflict with later doctrine or to suffer from the effects of facts developed since its decision (apart from those indicating its original errors). I would therefore treat Hans as it has always been treated in fact until today, as a doctrine of federal common law. For, as so understood, it has formed one of the strands of the federal relationship for over a century now, and the stability of that relationship is itself [*225] a value that *stare decisis* aims to respect.

In being ready to hold that the relationship may still be altered, not by the Court but by Congress, I would tread the course laid out elsewhere in our cases. The Court has repeatedly stated its assumption that insofar as the relative positions of States and Nation may be affected consistently with the Tenth Amendment, n65 they would not be modified without deliberately expressed intent. See *Gregory v. Ashcroft*, 501 U. S., at 460-461. The plain statement rule, which "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision," *United States v. Bass*, 404 U. S., at 349, is particularly appropriate in light of our primary reliance on "the effectiveness of the federal political process in preserving the States' interests." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). n66 Hence, we have required such a plain statement when Congress preempts the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), imposes a condition on the grant of federal moneys, *South Dakota [*226] v. Dole*, 483 U.S. 203, 207 (1987), or seeks to regulate a State's ability to determine the qualifications of its own officials. *Gregory, supra*, at 464.

n65 The scope of the Tenth Amendment's limitations of congressional power remains a subject of debate. *New York v. United States*, 505 U.S. 144 (1992), holds that principles of federalism are "violated by a formal command from the National Government directing the State to enact a certain policy." *United States v. Lopez*, 514 U.S. , (1995) (slip op., at 17) (KENNEDY, J., concurring). Some suggest that the prohibition extends further than barring the federal government from directing the creation of state law. The views I express today should not be understood to take a position on that disputed

question.

n66 See also *The Federalist No. 46, supra*, at 319 (J. Madison) (explaining that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments"); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

[*227]

When judging legislation passed under unmistakable Article I powers, no further restriction could be required. Nor does the Court explain why more could be demanded. In the past, we have assumed that a plain statement requirement is sufficient to protect the States from undue federal encroachments upon their traditional immunity from suit. See, e.g., *Welch v. Texas Dept. of Highways & Public Transp.*, 483 U. S., at 475; *Atascadero State Hospital v. Scanlon*, 473 U. S., at 239-240. It is hard to contend that this rule has set the bar too low, for (except in *Union Gas*) we have never found the requirement to be met outside the context of laws passed under § 5 of the Fourteenth Amendment. The exception I would recognize today proves the rule, moreover, because the federal abrogation of state immunity comes as part of a regulatory scheme which is itself designed to invest the States with regulatory powers that Congress need not extend to them. This fact suggests to me that the political safeguards of federalism are working, that a plain statement rule is an adequate check on congressional overreaching, and that today's abandonment of that approach is wholly unwarranted. [*228]

There is an even more fundamental "clear statement" principle, however, that the Court abandons today. John Marshall recognized it over a century and a half ago in the very context of state sovereign immunity in federal question cases:

"The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." *Cohens v. Virginia*, 6 *Wheat.*, at 379-380.

Because neither text, precedent, nor history supports the majority's abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III, I would reverse the judgment of the Court of Appeals.

John Duffy - Interior

↳ Justice/Interior
Monday mtg.

↳ Bob Anderson 208-7407
↳ Craig Alexander

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