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Michael Grant

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SEMINOLE TRIBE V. FLORIDA — EXTINCTION OF THE "NEW BUFFALO?"

Michael Grant*

I. Introduction — The Need for Indian Gaming

Many Native Americans refer to Indian gaming as the "New Buffalo."¹ This name is much deserved. Indian gaming is an industry which has provided tribal nations with the "first real means of maintaining an autonomous existence since the great buffalo roamed the plains centuries ago."² In fact, since the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*,³ Indian tribes have greatly improved their economic status through gaming. Historically, tribal reservations were stifled by "unemployment, welfare dependency and substandard housing and infrastructure."⁴ Because of the advantages provided by gaming, however, the Indian tribes have been able to provide a steady source of capital for the tribes while attracting tourism and increasing employment.⁵ Indeed, gaming

*B.A., Journalism (Professional Writing), 1992, University of Oklahoma; J.D., 1997, University of Oklahoma College of Law. This author cannot adequately express his gratitude to the faculty, staff, and to his classmates at The University of Oklahoma. Particularly, this author wishes to thank Richard J. Ansson, Jr. whose contribution was substantial and whose own student work in the field of American Indian Law inspired me to write and complete this Comment. This author wishes to thank the membership of the *American Indian Law Review* as well as the editorial advisor, Michael Waters, for their assistance. Finally, special thanks to OU Professors Michael Scaperlanda, Jerry Parkinson, and Adjunct Professor Avrom Greenberg whose classes in the areas of Constitutional Law, Civil Procedure, and Federal Courts respectively provided the essential background for this topic.

1. Jason D. Kolkema, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. DET. MERCY L. REV. 361, 361 (1996).

2. *Id.* It should be noted that Indian gaming is not unknown to Indian traditions. Indeed, "[w]agers on contests of skill, horse races, a variety of dice games, and a unique Indian game known as the stick game have been popular with many Indian tribes for thousands of years." William E. Horwitz, Note, *Scope of Gaming Under the Indian Gaming and Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS & ENT. L.J. 153, 158 (1996).

3. 480 U.S. 202 (1987). In *Cabazon*, the Supreme Court decided whether the state of California could enforce its gaming laws on the Cabazon Indian reservation. *Id.* at 205-06. The Court held that the state was without jurisdiction because states can not impose *regulations* on reservation gaming operations. The Court determined this by following a rule in which state law may be applicable when it is prohibitory and inapplicable when regulatory. *Id.* at 209. For a thorough discussion on *Cabazon*, see Connie K. Haslam, Note, *Indian Sovereignty: Confusion Prevails — California v. Cabazon Band of Mission Indians*, 63 WASH. L. REV. 169 (1988).

4. Kolkema, *supra* note 1, at 361.

5. *Id.* In discussing the benefits of casino gaming, Ray Halbritter, the Nation Representative

has become a very lucrative business.⁶

In fact, gaming is an essential means of attaining tribal self-sufficiency and self-government.⁷ This has now been confirmed by several studies. These studies indicate a series of impacts that stimulate economic growth.⁸ All the benefits which necessarily follow from increased employment multiply at a high rate. This is referred to as the "multiplier effect."⁹ Gaming additionally increases the number of visitors to tribal reservations. These visitors contribute to the economic growth because they frequently spend money on goods and services beyond mere gaming.¹⁰

It is important to note that all revenues from gaming operations are reinvested in the tribal community to advance tribal economic development as mandated by the Indian Gaming Regulatory Act (IGRA).¹¹ For example, in 1994 the Mashantucket Pequot Indians in southeastern Connecticut generated over \$800 million dollars from their Foxwoods Casino.¹² The Pequots have used this money to employ every member of the tribe and pay

of the Oneida Indian Nation of New York, stated that "[t]he casino is not a statement of who we are, but only a means to get us to where we want to be. We had tried poverty for 200 years, so we decided to try something else." Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 567-68 (1994); Kathryn R.L. Rand & Steven A. Light, *Article: Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 381 (1997).

6. Of the nation's 550 recognized tribes, more than 200 participate in high-stakes gaming. Kevin J. Worthen & Wayne R. Farnsworth, *Symposium: The Dilemma of American Federalism: Power to the People, the States, or the Federal Government? Who Will Control the Future of Indian Gaming? "A Few Pages of History are Worth a Volume of Logic"*, 1996 BYU L. REV. 407, 407-08 (1996). "Indian gaming produces about \$7 billion in gross revenues annually, of which the Tribes net between \$750 million and \$1 billion." *Id.* at 408.

7. For more on tribal self-sufficiency, see FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (Univ. of N.M. photo reprint 1971) (1942).

8. Kolkema, *supra* note 1, at 361.

9. *Id.* The multiplier effect refers to the process by which wages from employment are spent on goods and services, which in turn, provide employment and wages to producers of such goods and services. *Id.* (citing DELOITTE & TOUCHE, *ECONOMIC IMPACTS OF CASINO GAMING ON THE STATE OF MICHIGAN* (1995) (on file with the *University of Detroit Mercy Law Review*)).

10. *Id.*

11. 25 U.S.C. § 2710 (b)(2) (1994). The statute provides for the following:

(B) net revenues from any tribal gaming are not to be used for purposes other than —

- (i) to fund tribal government operations or programs;
- (ii) to provide for the general welfare of the Indian tribe and its members;
- (iii) to promote tribal economic development;
- (iv) to donate to charitable organizations; or
- (v) to help fund operations of local government agencies.

Id.

12. Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 724-25 (1996).

these members between \$50,000 and \$60,000 a year.¹³ Additionally, the Pequot Tribe has guaranteed that it will pay for all of its members' education from preschool through a doctorate.¹⁴ Finally, the Pequots have contributed \$10 million to the federal government for the building of an American Indian Museum.¹⁵

Moreover, the economic effects of Indian gaming are felt far beyond the reservations. For example, it is estimated that one gaming job generates, on average, 1.4 additional jobs in the host economy.¹⁶ Thus, as a result of gaming, Indian tribes have been better able to achieve self-sufficiency and their host economies are greatly benefitted as well.¹⁷

II. The Indian Gaming Regulatory Act — Its Intended Purpose

Several years before the passage of the IGRA, President Reagan reaffirmed President Nixon's Indian Policy¹⁸ which had initially cited the need for greater tribal self-governance and economic self-sufficiency.¹⁹ President Reagan's Policy noted that "[a] fundamental prerequisite to economic development is capital formation. The establishment of a financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation."²⁰ Hence, President Reagan concluded that this goal can be achieved only by "removing the federal impediments to tribal self-government."²¹

13. *Id.* at 725.

14. *Id.*

15. *Id.* The Pequot tribe has also employed an archaeologist to "uncover its history and to stock its new museum." *Id.*

16. Robert Robinson, *The Economic Impact of Indian-Reservation Based Gaming Activities*, in RESERVATION-BASED GAMING 9, 13 n.3 (Glen Feldman & O'Connor Cavanagh eds., 1993).

17. The Pequot Tribe, for example, has paid Connecticut over \$100 million to protect its current monopoly over slot machines. Mezey, *supra* note 12, at 725.

18. "[T]he Reagan Administration was altering policy towards Indians in the United States by reducing direct subsidies to Indian tribes and encouraging greater economic self-sufficiency and entrepreneurial activity to replace . . . the bankrupted paternalistic policies toward Indian tribes of the past one hundred years." William R. Eadington, *Preface*, in INDIAN GAMING AND THE LAW v, vii (William Eadington ed., 1990).

19. In 1968 President Nixon stated that he wanted to strengthen tribal sovereignty, transfer programs from the federal government to the tribal government, and secure Indian land bases. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 363, 91st Cong. 1 (1968). Moreover, President Nixon argued that federal legislation should not continue to be paternalist. *Id.* at 101. For more on the era of self-determination, see STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES — THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 8-9 (2nd ed. 1993).

20. Karen S. McFadden, Note, *The Stakes Are Too High To Gamble Away Tribal Self-Government, Self-Sufficiency and Economic Development When Amending the Indian Gaming Regulatory Act*, 21 J. CORP. L. 807, 823 (1996) (citing President's Policy on Indians, WEEKLY COMP. PRES. DOC., Jan 28, 1993, at 101).

21. *Id.* at 823 (citing President's Policy on Indians, *supra* note 20, at 99).

The IGRA promotes these same objectives, and these objectives are "clearly met by Indian gaming."²² The Policy stated that the "economies of American Indian reservations [were] extremely depressed, with unemployment rates among the highest in the country²³ before the proliferation of Indian gaming, and past attempts to stimulate their economies failed."²⁴ Currently, however, the advantages of Class III gaming are shared by Indians and non-Indians alike allowing Indians to take pride in their culture, independence, and gaming success while still allowing non-Indians to benefit as well.²⁵

It is important to note the IGRA's purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."²⁶ The IGRA, however, does more than protect the tribes. States' rights were also a powerful consideration when Congress enacted the legislation.

In fact, it was over strong opposition by the tribes that the states persuaded Congress to include an escape provision in the IGRA, i.e., the compacting requirement. This controversial provision prohibited an Indian tribe from engaging in casino gaming without a state-approved gaming compact. Congress' reasons for including the compacting requirement, were due partly in response to states' fears that tribes would not exercise self-restraint, and partly in response to political pressures.²⁷ The IGRA divided Indian gaming into three categories:

Class I: "[S]ocial games solely for prizes of minimal value."²⁸

Class II: "[G]ame[s] of chance commonly known as bingo . . . including . . . pull-tabs, lotto, punch boards, tip jars, instant bingo . . . and card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited. [C]lass II gaming does not include any banking card games, including baccarat . . . or blackjack (21), or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."²⁹

Class III: "[A]ll forms of gaming that are not class I gaming or class II gaming."³⁰

As a prerequisite to Class III gaming, the IGRA requires that a tribe and a state enter into a compact covering conditions of play.³¹

22. *Id.*

23. *Id.* (citing President's Policy on Indians, *supra* note 20, at 100).

24. *Id.*

25. *Id.* at 823-24. For a thorough discussion on the legislative history of the IGRA, see Horwitz, *supra* note 2, at 164-74.

26. 25 U.S.C. § 2702(1) (1994).

27. *Id.* §§ 2701-2721.

28. *Id.* § 2703(6).

29. *Id.* § 2703(7).

30. *Id.* § 2703(8).

31. *Id.* § 2710(d)(3)(A).

In an effort to even the odds between the tribes and the states, Congress mandated that the states negotiate for compacts in good faith. Indeed, if the state did not meet this provision, Congress expressly granted Indian tribes the power to sue the states in federal district court.

III. The Case

A. Procedural History

In *Seminole Tribe of Florida v. Florida*,³² the Seminole Tribe of Florida (the Tribe) brought suit against the State of Florida (the State) under rights provided by Congress through the Indian Gaming Regulatory Act (IGRA).³³ The IGRA expressly grants a tribe the power to sue a state in federal court to compel good faith negotiations toward the formation of a gaming compact.³⁴ The State asserted its sovereign immunity from suit and moved to dismiss the Tribe's complaint. The district court denied the State's motion.³⁵ The Court of Appeals for the Eleventh Circuit reversed, however, and found Congress did not have the authority to abrogate the State's Eleventh Amendment immunity under the power delegated to Congress through the Indian Commerce Clause.³⁶ The Court also found that the doctrine set forth in *Ex parte Young*³⁷ does not permit a tribe to sue a state's governor in order to compel good faith negotiations.³⁸

B. The Majority Opinion

In a controversial 5-4 decision, the Supreme Court affirmed the court of appeals' dismissal of the Tribe's suit. In doing so, the majority held that: (1) Congress lacks authority under the Indian Commerce Clause to abrogate a state's sovereign immunity under the Eleventh Amendment,³⁹ and (2) the doctrine of *Ex parte Young* may not be used to enforce the IGRA against a state official.⁴⁰

In regard to the issue of immunity, the Court found that the Eleventh Amendment's doctrine of sovereign immunity precludes individual lawsuits brought under federal question as well as diversity jurisdiction.⁴¹ In order to

32. 801 F. Supp. 655 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1026 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1119 (1996).

33. *Id.*

34. 25 U.S.C. § 2710(d)(7) (1994).

35. *Seminole Tribe*, 801 F. Supp. at 656.

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

37. 209 U.S. 123 (1908).

38. *Seminole Tribe*, 11 F.3d at 1028.

39. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1119 (1996).

40. *Id.*

41. *Id.*

justify this somewhat controversial Eleventh Amendment claim, the majority relied upon *Hans* as *stare decisis*, and Rehnquist relied upon Number 81 of the *Federalist* to support his view of the Eleventh Amendment.⁴² The Court also recognized that Congress may abrogate a state's immunity if it has "unequivocally expressed its intent" to do so, "pursuant to a valid exercise of power."⁴³ In the present case, Congress' *intent* to abrogate the states' immunity from suit was "unmistakably clear."⁴⁴ On the other hand, the issue of Congress' *power* to abrogate was explored more fully by the Court.

The Court explored the question of whether the IGRA was passed pursuant to a valid constitutional provision. The IGRA was enacted by Congress under authority granted by the Indian Commerce Clause. In the instant case, the Court reasoned that the Indian Commerce Clause is indistinguishable from the Interstate Commerce Clause. Therefore, the Court's reasoning implicated *Pennsylvania v. Union Gas Co.*,⁴⁵ which recognizes Congress' authority, under the Interstate Commerce Clause, to abrogate a state's sovereign immunity. Rather than attempt to distinguish the instant case from *Union Gas*, the Court overturned the earlier opinion, declaring it "wrongly decided."⁴⁶ *Union Gas*, the Court found, had been proven to be a "solitary departure from established law."⁴⁷ Ultimately, the Court rejected *Union Gas* because the divided opinion deviated from the Supreme Court's established federalism jurisprudence and caused confusion in the lower courts.⁴⁸ Furthermore, the Court concluded that the Eleventh Amendment's express limitation on diversity actions implied a general limitation on federal question actions.

Moreover, the Court determined that the doctrine of *Ex parte Young*⁴⁹ may not be used to enforce the IGRA against a state official.⁵⁰ The *Ex parte Young* doctrine allows a suit to proceed against a state official, notwithstanding any claims of state sovereign immunity.⁵¹ The Court found that the intricate remedial scheme created by the IGRA allows a suit to be brought against a state but not against a state's officials.⁵² The Court found that since Congress did not expressly provide for the availability of *Ex parte Young*, it would not rewrite the statutory enforcement scheme to "approximate

42. See *infra* Part IV.

43. *Seminole Tribe*, 116 S. Ct. at 1123.

44. *Id.* at 1123-24; see U.S.C. § 2710(d)(7)(B) (1994).

45. 491 U.S. 1 (1989).

46. *Seminole Tribe*, 116 S. Ct. at 1128.

47. *Id.*

48. *Id.*

49. 209 U.S. 123 (1908).

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

51. *Id.*

52. *Id.*

what it thinks Congress might have wanted had it known that [abrogation of state sovereign immunity] was beyond its authority."⁵³

C. Justice Stevens' Dissent

Justice Stevens' dissent began by tersely examining the fundamental question at issue: "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."⁵⁴ Stevens further stated: "There can be no serious debate . . . 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."⁵⁵

In his dissent, Justice Stevens examined the origins of the modern doctrine of state sovereign immunity. He derided the majority's assertion that "the Eleventh Amendment's express but partial limitation on [diversity actions found within] Article III reveals that an implicit but more general limitation was already in place."⁵⁶

Justice Stevens cited the opinion in *Hans v. Louisiana*⁵⁷ in support of the conclusion that the doctrine of state sovereign immunity was a common-law rule that Congress had directed the federal courts to respect, *not* a constitutional privilege that Congress could not displace by statute.⁵⁸ The ruling in *Hans*, Stevens argued, was based on the fact that Congress had not attempted to overcome the common-law presumption of sovereign immunity.⁵⁹

Justice Stevens insisted that the Court's "fundamental error" was "its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity 'has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.'"⁶⁰ Moreover, Stevens suggested that he would be willing to adhere to a judge-created common law doctrine of sovereign immunity.⁶¹ Stevens determined, however, that a common law doctrine could not bar Congress from abrogating state immunity when it clearly expressed its intention to do so.⁶² In the instant case, Stevens

53. *Seminole Tribe*, 116 S. Ct. at 1133 (Stevens, J., dissenting).

54. *Id.*

55. *Id.* at 1134.

56. *Id.* at 1137.

57. 134 U.S. 1 (1890).

58. *Seminole Tribe*, 116 S. Ct. at 1137 (Stevens, J., dissenting).

59. *Id.*

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

61. *Id.* at 1142-44.

62. *Id.* at 1144.

argued, Congress *has* expressed its intent to overcome that presumption, and it has the clear authority to do so.⁶³

Justice Stevens ended with an unusually direct reproach of the majority opinion. "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."⁶⁴

D. Justice Souter's Dissent — Joined by Justice Ginsburg and Justice Breyer

In his dissent, Justice Souter boldly attacked *Hans* by employing a lengthy analysis of the historical origins of sovereign immunity. He determined that the Eleventh Amendment only limits federal jurisdiction in cases of citizen-state diversity, not in cases where federal questions are implicated.⁶⁵ Souter's assertion was that since the plaintiffs in the case at bar are citizens of the State that they are suing, the Eleventh Amendment does not apply to them.⁶⁶ Therefore, Souter argued that the Court must look elsewhere for the source of the immunity that the State cited.⁶⁷

Justice Souter maintained that the source the majority was relying upon was the *common-law* doctrine of state sovereign immunity, as it was wrongly promoted to the status of constitutional law.⁶⁸ Souter, like Stevens, contended that the Court in *Hans v. Louisiana* had not considered whether Congress could abrogate common-law sovereign immunity by statute. Indeed, he argued that this issue was not specifically addressed until the Supreme Court decided in *Union Gas* that such immunity had no constitutional status and was subject to abrogation.⁶⁹ The *Hans* Court wrongly decided, it was argued, that the common law principle of sovereign immunity barred a suit brought against a state by one of its own citizens under federal question jurisdiction.⁷⁰ The majority's determination that the simple common law doctrine is now constitutional law "takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law."⁷¹

Justice Souter concluded that the Eleventh Amendment bars litigation based on the status of the parties only — and only when they are suing on nonfederal claims. The amendment, he argued, has no applicability to Article

63. *Id.* at 1138.

64. *Id.* at 1145.

65. *Id.* (Souter, J., dissenting).

66. *Id.* at 1152.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

III federal question jurisdiction.⁷² Like Justice Stevens, Justice Souter concluded that *Hans* could be preserved as a matter of stare decisis⁷³ but that it had no applicability when Congress clearly intended to abrogate state immunity.⁷⁴

Justice Souter further argued that, even if the Eleventh Amendment shielded the state from suit, the doctrine of *Ex parte Young*⁷⁵ should provide relief for the tribe against the state Governor. Emphasizing the jurisdictional rather than remedial nature of the *Young* rule,⁷⁶ Justice Souter maintained that Congress' mentioning of the word "State" in the statutory scheme should "not limit the possible defendants to States and is quite literally consistent with the possibility that a tribe could sue an appropriate state official for a State's failure to negotiate."⁷⁷

Moreover, Justice Souter argued that the fact that a suit against a state official under the *Ex parte Young* doctrine may have had a significant impact on state government did not invalidate the doctrine's application.⁷⁸ Souter explored the history of the doctrine and defended it as more than mere judicial fiction.⁷⁹ Justice Souter determined that there was no clear statement of intent to displace the *Ex parte Young* doctrine in the IGRA. In fact, in no way did Souter find that the IGRA's "intricate remedial mechanisms" displaced the doctrine in the case at bar. Therefore, Justice Souter argued that the Supreme Court should have reversed the Appellate Court's judgment.⁸⁰

IV. Analysis

A. The Text of the 11th Amendment — Diversity Jurisdiction

The express language of the Eleventh Amendment reads: "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."⁸¹ Just from reading the text, the most plausible interpretation of the Eleventh Amendment is probably that the Amendment bars diversity actions brought by a citizen of one state against another state.⁸² However, other interpretations have been proffered.⁸³

72. *Id.* at 1150.

73. *Id.* at 1159.

74. *Id.* at 1159-60.

75. 209 U.S. 123 (1908).

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

77. *Id.* at 1183.

78. *Id.* at 1178.

79. *Id.* at 1180.

80. *Id.* at 1185.

81. U.S. CONST. amend XI.

82. Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme*

Nonetheless, it is difficult to dispute that the meaning of the Amendment — derived either textually or historically — is the one aforementioned.⁸⁴ A simple reading of the plain language of the text promptly reveals that the Amendment grants immunity to a state, but only from diversity actions brought by citizens of another state. Moreover, from a practical perspective, the Amendment nearly duplicates Article III's Diversity Jurisdiction Clause.⁸⁵ Therefore, its textual meaning is clear. The Amendment bars actions brought against the state by a citizen(s) of another state. Thus, one need look no further — the Framers' intent is readily apparent from the express language of the Eleventh Amendment.⁸⁶

The very words of the Amendment then should slam the door shut in the face of those wishing to bring suit against the state if they are, in fact, citizens of another state basing their claim on diversity jurisdiction. However, the door should be opened wide for those citizens of the same state wishing to bring their federal question claims arising under congressional authority. Although this seemingly disparate treatment may seem unfair, the Amendment was specifically designed to reach a much fairer compromise and thereby deny only those suits based on diversity jurisdiction. An inquiry into the historical origins of the Eleventh Amendment will provide the policy reasons behind the Amendment's bar on diversity actions and reveal the framers' intent.

The historical debate over the Eleventh Amendment was concerned mainly with private actions to collect war debts owed by the states.⁸⁷ There were two sides to this debate: (1) those from debt-ridden states proposing a liberal

Court's Lopez and Seminole Tribe Decisions, 96 COLUM. L. REV. 2213, 2239 (1996). This is an outstanding commentary on the Supreme Court's treatment of both decisions.

83. For example, the Amendment (plus any penumbra) bars (1) both diversity actions and federal question actions by any citizen against any state, including the citizen's own state, unless Congress makes clear that the federal statute at issue is designed to abrogate state sovereign immunity; (2) same as (1), except that citizens are not barred from suing their own state; and (3) same as (1), except that Congress is not allowed to abrogate the immunity. Hovenkamp, *supra* note 82, at 2239.

84. See William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1280-82 (1989).

85. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, . . . between a State and Citizens of another State").

86. See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). As Amar stated:

If the Eleventh Amendment's framers had intended a broad sovereign immunity principle applicable even in federal question cases, they knew the words: [T]hat no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.

Id. at 1481. However, the Framers did not choose these words. Instead, they chose the words that can be found in the express language of the Eleventh Amendment.

87. Hovenkamp, *supra* note 82, at 2240 (citing Justice Marshall's account in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821); Fletcher, *supra* note 84, at 1271-73).

doctrine of sovereign immunity from both diversity and federal question lawsuits (which would then force creditors into the state courts of the debtor state where sovereign immunity would no doubt be asserted), and (2) those who wanted to limit state sovereign immunity to diversity cases, thus permitting federal question jurisdiction.⁸⁸

In different sessions of Congress, alternative proposals reflecting these two sides were offered. The first was by a representative from Massachusetts named Theodore Sedgwick.⁸⁹ This proposal, made by the representative of a state with heavy war debts, "would have created a broad doctrine of state sovereign immunity that closed federal courts to all suits against states, whether by citizens or non-citizens."⁹⁰ As a result, this proposal would have barred not only diversity jurisdiction but federal question jurisdiction as well.⁹¹ What must be remembered, however, is that this proposal was rejected. The adopted version of the Eleventh Amendment concerned only diversity jurisdiction suits (suits brought against a state by a citizen of a different state).⁹²

As with any Amendment, the Eleventh was forged through compromise. There were strong competing interests — those of the fledgling states who needed a degree of protection to keep from becoming impoverished and those of foreign nationals who needed some degree of recourse to keep our country from suffering foreign relations problems.⁹³ Upon first glance, it would seem the states' diversity-jurisdiction immunity would prevent all suits by *foreign* nationals; however, this was not the case. The reason was because Congress had enacted the Treaty of Paris. Thus, suits under the Treaty by foreign nationals would effectively "arise under" Article III's federal question jurisdiction.⁹⁴ Simply put, the Treaty of Paris allowed our foreign creditors — those who helped us gain our Independence by providing the necessary funds to wage our

88. Hovenkamp, *supra* note 82, at 2240.

89. *Id.* at 2240-41.

90. *Id.* at 2240.

91. *Id.* Sedgwick's proposal stated:

[N]o 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.

Id. at 2240 n.127.

92. *Id.* at 2240-41 (quoting Rep. James Elliott of Vermont). Representative Elliot had offered a resolution supporting the proposed amendment to the Constitution of the United States, "for confining the judiciary power of the Courts of the United States to cases in law and equity, arising under the Constitution and laws of the United States, and treaties made, or which shall be made under their authority; . . . [and] cases of admiralty and maritime jurisdiction" 16 ANNALS OF CONG. 216 (1806) (statement of Rep. Elliott). Elliott's interpretation was that the amendment merely limited federal jurisdiction in suits against states to *federal question* cases, but did allow suit in such cases. Hovenkamp, *supra* note 82, at 2240-41 n.128.

93. See Hovenkamp, *supra* note 82, at 2240.

94. *Id.*

Revolutionary War — to collect the money we owed to them. Had the Amendment applied to federal question cases as well as diversity cases, it would have rendered those debts uncollectible, and then our nation would have been perceived as financially unsound in the realm of the nation states. Moreover, as Souter noted, "[i]f 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."⁹⁵

Ultimately, however, regardless of foreign relations problems and matters of war debts, it seems that giving the states absolute immunity from both federal question actions as well as diversity actions is simply too dangerous. Early on, those who dealt with this issue understood the Amendment's plain textual meaning and the policy reasons behind the limitation. Justice Marshall, for example, recognized a danger in giving the Amendment any broader of a meaning than was already apparent on its face. The danger was that states might shirk their federal obligations, such as those created by the Constitution's Contract Clause, thereby allowing the states to effectively deprive citizens of their federal rights. If the Amendment bars all claims, both those in federal question as well as diversity, then the federal rights that all citizens claim and seek to have protected would be rendered void for lack of federal jurisdiction.⁹⁶ What is the value of a federal claim without a federal court to enforce it? The answer is as obvious now as it was then. Therefore, the history of the Eleventh Amendment reveals that the Framers' intent was to limit state sovereign immunity to diversity. But this, of course, does not mean that the majority in *Seminole* paid the respect due to either the history or to the text of our Eleventh Amendment.

B. Hans — Federal Question Jurisdiction

In *Hans v. Louisiana*, the Supreme Court expanded the scope of the Amendment's "sovereignty grant" to include federal questions.⁹⁷ The Court, however, did not address the issue of congressional power to abrogate state sovereign immunity.

Hans v. Louisiana held that a citizen could not assert federal rights against his own state in the federal court without the state's consent.⁹⁸ In *Hans*, a state citizen sued under federal question jurisdiction based upon the state's alleged violation of the Contracts Clause.⁹⁹ The *Hans* court held that it would be

95. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1151 (Souter, J., dissenting) (citing Fletcher, *supra* note 84, at 1280-82).

96. See Hovenkamp, *supra* note 82, at 2240.

97. See *Hans v. Louisiana* 134 U.S. 1, 10 (1890) ("[A] State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States.").

98. *Id.* at 15.

99. See U.S. CONST. art. I, § 10, cl. 1. The *Hans* Court seemed to assume that (in modern

inconsistent to deny a state's sovereign immunity in an action by a citizen of the same state, yet allow an action by a citizen of a different state. Thus, the Court in *Hans* decided to allow the state its sovereign immunity in both instances. The Court turned a blind eye to the fact that its holding runs contrary to both the plain language of the Eleventh Amendment and the Amendment's history.

The Court relied on Hamilton's remarks in Number 81 of the *Federalist*:

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.¹⁰⁰

Thus, the *Hans* Court's analysis was based on a highly controversial interpretation of the Eleventh Amendment. An interpretation which seems logically inconsistent.

The best conception for those attempting to reconcile the Court's reasoning in *Hans* with the text of the Eleventh Amendment was that the federal question sovereign immunity provided by *Hans* exists only as a matter of federal "constitutional" common law. This "judge-recognized" common law is enforceable by the courts, but only until Congress expressly provides otherwise.¹⁰¹ Therefore, under this rationale, *Hans* merely supplied us with a federal common law doctrine in effect only until Congress clearly abrogates it, (and Congress has clearly done so with its enactment of the IGRA!).¹⁰²

C. The Majority's Reasoning Is Flawed!

The overly broad interpretations of the Eleventh Amendment, such as those adopted by *Hans* and *Seminole Tribe*, are unjustified both textually and historically. What is remarkable, however, is that even those justices who are widely known as strict "textualists" have welcomed an interpretation of our Constitution that is completely separate from any words that can be found within the text. For example, Justice Scalia, who helped form the majority in *Seminole*, and who is a respected constitutional law scholar, noted in his dissent in *Pennsylvania v. Union Gas Co.* that the "plain text of the Amendment makes

times) the clause created an implied right of action.

100. *Hans*, 134 U.S. at 13 (quoting THE FEDERALIST No. 81 (Alexander Hamilton)).

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

102. Justices Stevens and Souter argued that *Hans* never addressed the question of Congress' power to abrogate immunity. As a result, they maintained that any congressional abrogation of common law sovereign immunity would not be constitutionally prohibited. See *Seminole Tribe*, 116 S. Ct. at 1137-39 (Stevens, J., dissenting); *id.* at 1153 (Souter, J., dissenting).

clear that the Framers were talking about diversity actions and not federal question actions."¹⁰³ However, Scalia continued by stating:

What we said in *Hans* was, essentially, that the Eleventh Amendment was important not merely for what is 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.¹⁰⁴

This argument did not get very far — even with Scalia. He must have realized that this argument contradicts his own repeated theory that the "Constitution can mean no more than the plain, contemporary understanding of its words."¹⁰⁵ Therefore, Justice Scalia ultimately "rested on *stare decisis* and *Hans*."¹⁰⁶

Justice Souter responded to this argument in *Seminole* by stating that "the Court [majority] is not struggling to fulfill a responsibility to reconcile two arguably conflicting . . . constitutional provisions, nor is it struggling with any . . . text at all."¹⁰⁷ Souter continued by stating he could remember only one other occasion where the Court had extended its own reach so far as to declare that the plain text of our Constitution is actually subordinate to the Court's own judicially discoverable principles, unconnected to any written provision in the Constitution.¹⁰⁸ Souter told of a Justice who had taken this position almost 200 years ago. Souter concluded that this position was: "no less in conflict with American constitutionalism in 1798, than it is today. Such a position is clearly inconsistent with the Framers' view of the Constitution as fundamental law."¹⁰⁹

Furthermore, Chief Justice Rehnquist's "constitutional analysis" in *Seminole* was just nothing short of the opposite. Instead of analyzing and applying the text or considering the history of our Constitution, Rehnquist chose instead to rely upon Alexander Hamilton's words in Number 81 of the *Federalist*. In this

103. Hovenkamp, *supra* note 82, at 2242.

104. *Id.* (quoting *Pennsylvania v. Union Gas*, 491 U.S. 1, 31-32 (1989) and citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

105. *Id.* at 2243.

106. *Id.* (citing Justice Scalia who stated the "mere venerability of an answer consistently adhered to for almost a century [referring to *Hans*] and the difficulty of changing, or even clearly identifying, the intervening law that has been based on that answer, strongly argue against a change." *Union Gas*, 491 U.S. at 34 (Scalia, J., dissenting)). This cite demonstrates that Scalia the "textualist" makes a strong appeal to tradition while ignoring the text of our Eleventh Amendment.

107. *Seminole Tribe*, 116 S. Ct. at 1177 (Souter, J., dissenting).

108. *Id.*

109. *Id.*

document, Hamilton asserts his belief that "the Constitution preserved the traditional doctrine of state sovereign immunity."¹¹⁰

Yet, as denoted by Justice Souter's dissent in *Seminole*, the context of Hamilton's discussion in Number 81 of the *Federalist* was common law suits against the states for nonpayment of war debts. Hamilton stated "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."¹¹¹ Hamilton's statement clearly disallows the use of Number 81 of the *Federalist* in support of federal question jurisdiction. This is true because in Hamilton's suggestion, the "assignment" was what created the jurisdiction in the first place.¹¹² Hamilton was speaking of cases that could have only been in federal court under diversity jurisdiction. Chief Justice Rehnquist's numerous citations from Hamilton in Number 81 of the *Federalist* states no more than that the states were presumed to preserve their common law sovereign immunity in diversity lawsuits. "Hamilton was not even discussing federal question lawsuits."¹¹³

This is truly nothing short of remarkable. Number 81 of the *Federalist*, cited by Rehnquist in support of his position, actually does not support his position yet likely supports the contrary position taken by both Stevens and Souter.

In fact, Souter's own statement on this issue is telling:

In sum, either the majority reads Hamilton as I do, to say nothing about sovereignty or immunity in such a [federal question] 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* 81. . . . Either way, he [Hamilton] is no authority for the Court's position.¹¹⁴

D. Congress' Power to Abrogate the Common Law

Even assuming *Hans* is worthy as precedent, the *Seminole Tribe* holding remains unjustified. *Hans* involved the Constitution's Contract Clause, not a federal statute. Thus, it did not speak to the issue of congressional power to abrogate state sovereign immunity through an act of Congress.

110. See *Seminole Tribe*, 116 S. Ct. at 1122 (1996) (quoting THE FEDERALIST No. 81, at 487 (Clinton Rossiter ed. 1961) (Alexander Hamilton)); *Id.* at 1130. This position was rejected by the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 419 (1793).

111. See *Seminole Tribe*, 116 S. Ct. at 1166 (Souter, J., dissenting) (quoting THE FEDERALIST No. 81 (Alexander Hamilton)).

112. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 80 (1923).

113. Hovenkamp, *supra* note 82, at 2243; see also *Seminole Tribe*, 116 S. Ct. at 1166 (Souter, J., dissenting).

114. *Seminole Tribe*, 116 S. Ct. at 1168 (Souter, J., dissenting).

The decision in *Seminole Tribe*, however, goes beyond *Hans* and holds that Congress now lacks the power to abrogate state sovereign immunity. *Hans* clearly does not support this newfound contention by the Court. Moreover, since the text of the Eleventh Amendment does not once mention state sovereign immunity from federal question claims, congressional power to abrogate is not included there either. In fact, until *Seminole Tribe*, sovereign immunity was still regarded as a common law doctrine, and the simple truth of the matter is that Congress, acting within its delegated powers, has the authority to abrogate the common law.¹¹⁵ Simply put, "Congress preempts common law rules all the time."¹¹⁶ Most attorneys, law students, and judges (including Supreme Court Justices) are already aware of this. For this reason, Justice Scalia in his *Union Gas* dissent and Chief Justice Rehnquist in *Seminole Tribe* were forced to raise sovereign immunity to a constitutional law status. They did so by relying on the position that the Constitution, although expressly silent, mysteriously contains the constitutional principle of state sovereign immunity. Sovereign immunity is no longer a simple common law doctrine. Now it's constitutional law.¹¹⁷

V. *Ex Parte Young*

In *Ex parte Young*, the Supreme Court held that even though the state itself might be immune, a federal court may assert its jurisdiction against a state officer whose action violates the applicable federal law.¹¹⁸ In *Seminole*, however, the majority attempted to argue that the doctrine of *Young* should not apply. The majority argued that the IGRA's remedial scheme actually displaced the use of *Young*.

Justice Souter pointed out, however, that *Young* does not create one kind of remedy and Congress another. *Young*, instead stands for a jurisdictional rule, i.e., if one is barred from suing an immune party (the State) then one may proceed against a non-immune party (the officer). Therefore, a case may depend upon *Young* for its federal jurisdiction and on Congress for its remedy. Thus, *Young* in no way displaces the procedural rules devised by Congress such as the IGRA.

Moreover, Souter, in his dissent, articulated a very simple truth, i.e., the doctrine of *Young* came about as a consequence of *Hans*. Since *Hans* granted

115. Hovenkamp, *supra* note 82, at 2245.

116. *Id.*

117. The irony is that the word "sovereignty" never appears in the Constitution. It does not appear in the Eleventh Amendment, nor in any other Amendment, including the Tenth Amendment where one might expect it to be. The language of the Eleventh Amendment obviously suggests some narrow degree of immunity for the states in diversity cases. Federal question sovereign immunity, however, is no where to be found until the Court in *Hans* recognized it as a common law doctrine — one that Congress would obviously be capable of abrogating (that is, until the *Seminole* decision improperly raised this common law doctrine to the status of constitutional law). See Amar, *supra* note 86, at 1456.

118. See *Seminole Tribe*, 116 S. Ct. at 1178 (Souter, J., dissenting).

state immunity in federal question cases, *Young* was necessary to "vindicate the federal interest in assuring the supremacy of that law."¹¹⁹ In fact, since the Court understood the negative implications of its *Hans* decision, it was therefore forced to create the doctrine espoused in *Young*. As Souter stated: "[*Young* was created to provide] a sensible view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III."¹²⁰ In other words, the doctrine of *Young* was created to serve those plaintiffs whose actions were barred as a result of the Court's "judicially discovered" federal question immunity. Therefore, it seems logical to assume that if one is barred under a *Hans* analysis (such as in the instant case) then the doctrine of *Young* should be used to remedy that loss. After all, *Young* was created by the Supreme Court to be used in exactly that situation.

The majority's denial of *Young*, however, should come as no surprise. The majority is merely being consistent with the rest of its opinion in *Seminole Tribe*.

VI. IGRA and States' Rights

As previously stated, in *Seminole Tribe* the majority struck down certain provisions of the Indian Gaming Regulatory Act,¹²¹ passed by Congress under its power to regulate commerce with the Indian tribes. That Act permitted Indian tribes to conduct certain types of gaming only if the state permits the same type of gaming "for any purpose by any person, organization, or entity,"¹²² and the tribe has a compact with the state in which the tribal lands are located. Under the Act, a state was obligated to negotiate in good faith to create such a compact. If the state failed to do so, then the tribe could sue the state in federal court.

On its face, one might view the Gaming Act as an attempt to force states to negotiate with Indian tribes to permit unwanted casino gambling on Indian lands located in the state. But under the Indian Commerce Clause, Congress has plenary power, i.e., the absolute power to apply its own law to the Indian lands and preempt all state law.¹²³ Simply put, Congress could have plainly passed a statute authorizing casino gambling on Indian lands, giving no protection to the states and completely siding in favor of Indian tribes. Had Congress enacted

119. *Id.*

120. *Id.*

121. 25 U.S.C. § 2710(d)(1)(C) (1994).

122. *Id.* § 2710(d)(1)(B).

123. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (holding that the state has no authority to regulate gambling on Indian lands); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (regulation of activities on Indian lands is the exclusive province of federal law); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) (holding state law not generally applicable on Indian lands except where Congress so permits). This doctrine of exclusive federal sovereignty dates back to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

legislation of this sort, there would be no controversy. Congress, however, chose an evenhanded approach in enacting the IGRA and therefore considered the states' interests involved. In fact, the states themselves were a principal protagonist and beneficiary of the IGRA, which gave them a measure of control over Indian gaming that the Indian Commerce Clause would clearly deny them.¹²⁴ The provision requiring a "compact" between the state and the tribe was an attempt by Congress to avoid either: (1) complete preemption of state law (which would be the case absent a federal statute recognizing a state right); or (2) a federal statute giving states the authority to regulate gaming on Indian lands.¹²⁵

Thus, the IGRA was a compromise. The act was clearly not an attempt by the federal government to diminish state authority. Instead, the IGRA was a good faith effort to accommodate state interests and concerns.

VII. *Union Gas* — *Lifts the Mystery from This Decision*

Aside from the debate over Indian's gaming rights, however, it seems apparent that the Supreme Court had its own reasons for granting certiorari in *Seminole*. In *Pennsylvania v. Union Gas Co.*,¹²⁶ a plurality of the Court held that the Interstate Commerce Clause granted Congress authority to abrogate state sovereign immunity. Because of subsequent appointments to the Court, the Justices who formed the minority in *Union Gas* perceived an opportunity to reverse that decision. In sum, the newly formed majority has been longing for a case involving Congress' attempted abrogation of state sovereign immunity through the Interstate Commerce Clause in order to implicate *Union Gas* and reverse it. What they got was legislation passed pursuant to the Indian Commerce Clause. This was close enough for the Court. Moreover, the majority wanted to restrain Congress from enacting legislation that supposedly interferes with states' sovereign rights. Thus, the Supreme Court seized this newfound opportunity, reversed *Union Gas*, and held that neither the Indian Commerce Clause nor the Interstate Commerce Clause grant Congress the authority to abrogate state sovereign immunity.¹²⁷ This goes a long way to lifting the mystery of a constitutional law decision which abandons the Constitution in favor of Number 81 of the *Federalist* and a squinted view beyond the text.¹²⁸

124. See S. REP. NO. 100-446, at 2-3, 5 (1988). Another protagonist of the legislation was gaming interests from Nevada, which sought to limit the extent of Indian gaming.

125. See Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387, 395-403 (1993).

126. 491 U.S. 1 (1989).

127. See Pat Smith, *Point: Seminole Tribe of Florida Victory For States' Rights; Indian Gaming Act Caught in the Crossfire*, MONT. LAW., July-Aug. 1996, at 21.

128. As opposed to the plain language and the legislative history of the Eleventh Amendment itself.

Assuming that this is a justifiable explanation for the Court's decision, the practical problem with the Court's reasoning is twofold. First, if the majority is attempting to make a ruling in favor of state's rights, it need only uphold the IGRA. As previously noted, Congress enacted the compacting requirement to benefit the states, not the Indians. In fact, the provision was included over the objection of the Indians. Congress chose a reasonable requirement, taking into account the states' and the Indians' rights. It seems illogical for the majority to strike down this provision under the guise of benefitting the states.

Second, even if the majority's desire was to benefit the states, there is really no reason why the doctrine of *Ex parte Young* also should be held inapplicable. This doctrine should have been used to provide a reasonable compromise, i.e., the Court could overturn *Union Gas* but leave room for the Indians' claim under *Ex parte Young*. The majority's insistence on closing both doors is not just mysterious, it seems downright ludicrous.

VIII. Conclusion

The majority in *Seminole Tribe* is blind — both to the obvious meaning of the text of our Constitution and to the Framers who established it. The *Seminole Tribe* decision improperly raises a simple and undeniable common law doctrine — *federal question sovereign immunity* — to the unjustifiable status of constitutional law. Indeed, the Supreme Court's use of *stare decisis* through *Hans* utterly fails, going far beyond any fair reading required by precedent. The Supreme Court's interpretation in *Seminole* should provoke outrage among those who are sincerely committed to upholding the integrity of the United States Constitution. Simply put, it is the Court's responsibility to uphold the Constitution, not ignore it, and the Court's analysis in *Seminole Tribe* ignores both the text and the history of the Eleventh Amendment.

Moreover, the IGRA was intended to provide a means of tribal self-sufficiency while protecting states' rights. So, now a Court, which appears to favor states' rights, has put Congress in the position of rewriting the legislation to accommodate only Indian concerns. Furthermore, the doctrine of *Ex parte Young* could have formed a reasonable compromise, but the Court's unwillingness to apply this doctrine merely reveals its callous approach to such issues.

Overall, the Court's reasons for granting certiorari and deciding *Seminole* in such an entirely unjustified manner defy common sense, yet the Supreme Court did so. Whether the Indians are victims of some real battle being waged by the majority against the decision in *Union Gas*, or whether the Court truly believes in its own unprecedented legal analysis, the case remains a testament to the casualties the Court inflicts when it engages in outcome determinative decision making. The great buffalo which roamed the plains centuries ago are almost entirely extinct. If Congress does not correct what the Court has done, the extinction of the "New Buffalo" might soon follow.