INDIAN GAMING INTRODUCTION

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American Indian Gaming Overview

By David Palermo

Tribal government gambling in 23 years has emerged as the most compelling, complex and misunderstood segment of North America's legal gambling industry.

In two decades tribal gambling has grown to become a dominant segment of the legal gambling industry. There are from 419 to 442 tribal gambling facilities in 28 of the United States, operated by 229 to 237 federally recognized American Indian tribes and Alaska Native villages. Differing figures are provided by the National Indian Gaming Commission (NIGC), which audits and regulates tribal casinos, and private financial and accounting firms that monitor their growth and productivity.

Tribal government gambling is a huge industry.

Tribal gross gambling revenues in 2009 were $26.5b, according to the NIGC, a significant increase from the $212m generated from tribal casinos and bingo halls prior to passage of the Indian Gaming Regulatory Act (IGRA) of 1988. Tribal gambling revenue is fast approaching the $30b generated in 2009 by the

commercial casino segment of the US gambling industry, according to the American Gaming Association, the commercial casino industry's lobby and trade association. There are commercial casinos in 13 states and tribal government casinos in 28 states. A person wagering in a casino outside Nevada and the Atlantic City Boardwalk is likely gambling in a tribal government facility.

We have in the last four decades witnessed the greatest expansion of legal gambling in North American history. In 1973 there were casinos in Nevada, lotteries in seven states and pari-mutuel racetracks in a handful of states. Today there are commercial and tribal government casinos, pari-mutuel racetracks, racetrack slot casinos, or "racinos," lotteries, card rooms and charitable gambling in every state but Hawaii and Utah. There are 13 states with commercial casinos, 28 states with tribal government casinos, 40 states with pari-mutuel wagering, 44 states with lotteries, 48 states with charitable gambling and 12 states with racinos. Gross gambling revenues nationwide have grown from $10.4b in 1982 to $92.3b in 2007, according to Christiansen Capital Advisors, LLC.

For the most part, the growth of gambling in the United States has been fueled by states in need of tax revenue. The proliferation of gambling has largely been an issue of dollars and cents: tax revenue for states and profits for the gambling companies. Tribal government gambling is the exception to the rule.

While other forms of gambling are framed in the context of taxes and profits, Indian gambling is regarded by tribal leaders as a means of asserting sovereignty and self-determination; a tool for strengthening tribal governments, rebuilding tribal economies and reviving Indian communities that for generations have been victims of poverty, neglect and failed federal government policies of tribal paternalism. Tribal government gambling is regarded by American Indians as a means of protecting and preserving Indian cultures and ensuring that future generations are able to live a native way of life.

Many non-Indian legal scholars and gambling industry observers trace the origins of tribal government gambling to federal court rulings in the1980s, notably the US Supreme Court decision in *California v. Cabazon Band of Mission Indians*, which held in 1987 that the state of California had no authority to apply its regulatory statues to gambling conducted on tribal reservations. At the time, according to gambling industry publications, there were about 70 Indian casinos in 16 states.

The *California v. Cabazon* ruling, along with a 1981 US Appeals Court decision in *Seminole Tribe of Florida v. Butterworth,* prompted passage of the Indian Gaming Regulatory Act. IGRA was enacted by Congress to provide a statutory basis for the conduct and regulation of Indian gambling, specifying mechanisms and procedures, including the requirement that gambling revenues be used to promote the economic development and welfare of tribes and tribal citizens.

It would, however, be a historic injustice to trace the origins of tribal gambling to the court rulings in the 1980s. From the perspective of American Indians, the evolution of tribal gambling began long before *California v. Cabazon* and *Seminole v. Butterworth*.

The discussion of tribal gambling must begin with the unique legal status of American Indian tribes and indigenous Americans. There also needs to be a review of tribal-federal government relations, notably the Dawes General Allotment Act of 1887, the Indian Reorganization Act of 1934 and a federal policy of tribal self-determination introduced in the late 1960s by President Lyndon Johnson and articulated in a landmark 1970 message to Congress by President Richard Nixon.

There are 565 federally recognized American Indian tribes and Alaska Native villages in the United States, according to the US Department of Interior, Bureau of Indian Affairs, approximately 365 of which are located in the lower 48 states. These tribes operate as separate, sovereign nations, a status conferred by the commerce clause of the US Constitution, confirmed in treaty agreements with the federal government and upheld in rulings by the US Supreme Court dating back nearly 180 years. The sovereignty of Indian tribes can only be limited by acts of Congress. The federal government serves as trustee for the tribes. Social services and management of some 55 million acres of tribal trust land is administered by the Department of Interior and BIA.

"The federal government's unique obligation toward Indian tribes, known as the trust responsibility, is derived from their unique circumstances, namely that Indian tribes are separate sovereigns, but are subject to federal law and lack the lands and other resources to achieve self-sufficiency," wrote the National Gambling Impact Study Commission (NGISC) in 1999. "Since…first recognized by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831), federal courts have held that Congress as well as the Executive Branch must carry out the federal government's fiduciary responsibilities to Indian tribes. The trust responsibility is the obligation of the federal government to protect tribes' status as self-governing entities and their property rights."

In *Cherokee Nation v. Georgia*, the court ruled that an Indian tribe was "a distinct political society…capable of managing its own affairs and governing itself." A year later in *Worcester v. Georgia*, Chief Justice Marshall, writing for the court, held that Indian tribes are distinct, independent political communities "having territorial boundaries, within which their authority [of self-government] is exclusive…By entering into treaties, the court held, Indian tribes did not 'surrender [their] independence – [their] right to self-government…'"

The trust relationship between the federal government and American Indian tribes largely stems from US/tribal treaties reached in exchange for the massive loss of indigenous lives and land as a result of European settlement of North America. These treaties, wrote the NGISC, "…have also come to mean that, among its other

obligations, the protection of tribal members and the promotion of their economic and social well-being is the responsibility of the federal government. All observers agree that, in this regard, the federal government's record has been poor, at best."

"Over the past two centuries," wrote the NGISC, "the policy of the US government toward the Indian tribes has oscillated between recognition of their separate status and attempts to culturally assimilate them into the broader society."

Following decades of war, genocide, massive disease outbreaks and subjugation of American Indians on federal reservations the Dawes General Allotment Act of 1887 dismantled American Indian governments. It provided for the division of tribally held lands into individual parcels. Surplus lands after the allotment was deeded to non-Indians and railroads. The act stripped American Indians of millions of acres of land and undermined tribal government and culture. The attempt was to assimilate indigenous Americans through the deterioration of their communal lifestyle of American Indian societies.

The Indian Reorganization Act of 1934, otherwise known as the Wheeler-Howard Act, reversed the process of eliminating common ownership of tribal lands and allotting Indian lands to individual indigenous Americans. IRA restored tribal governance and management of tribal assets in an effort to establish an economic foundation for impoverished Indian reservations. IRA generally imposed upon the reservation a tribal council form of government with the authority to negotiate

government-to-government agreements with federal, state and local governments. IRA governments were not culturally relevant. In the case of the Hopi Tribe of Arizona and other Indian nations, BIA-imposed tribal governments were formed as a tool by which the federal governments and private companies could negotiate leases for the mining of coal, oil, uranium and gas and the harvesting of timber and other valuable energy and natural resources on Indian land.

The new federal policy awakened in American Indians a spirit of self-determination. But it did little to promote economic progress on often remote reservations lacking employment and educational opportunity, health care, social services and an adequate infrastructure of roads, water and utilities. "Poverty in Indian country shocked anyone who saw it," Charles Wilkinson wrote in *Blood Struggle: the Rise of Modern Indian Nations*. "Reservation Indians simply had not joined America, they lacked an enterprising economic spirit and education levels and health conditions remained abysmal. The Bureau of Indian Affairs charged to oversee these 'wards,' epitomized bureaucracy run utterly amok – a nightmare of red tape, ineptitude manipulation and oppressiveness."

In a later effort to assimilate American Indians into non-native society – including the forced relocation of reservation Indians to cities and non-Indian communities – the Department of Interior in 1954 initiated a termination policy that resulted in the legal dismantling of 61 tribal reservations.

The response was a “red power” rebellion by a new breed of young, college-educated American Indians. Their message, which paralleled the Civil Rights movement of the 1960s, flowed from tribal culture and history. They demanded the federal government end termination, respect treaty agreements and adhere to its trust relationship with the first Americans and its pledge to uphold hunting, fishing and water rights. The 1973 siege at Wounded Knee on the remote and destitute Pine Ridge Indian Reservation, the 1969 takeover of Alcatraz Island and some 74 other Indian occupations of federal facilities are among the protest actions credited with helping end the termination era and changing federal government policy toward American Indians.

The National Congress of American Indians (NCAI) behind the leadership of President Joe Gerry of the Schitsu’umsh Tribe of Coeur d’Alene, Idaho, and Helen Peterson, NCAI executive director and a citizen of the Oglala Lakota (Sioux) Nation of South Dakota, united tribes and allied native nations with labor unions, the National Council of Churches and others in a campaign to end the nearly two decades of US policy aimed at terminating tribes.

“As a result of these developments,” wrote the NGISC, “the federal government’s policy toward Native Americans shifted toward enhancing tribal self-determination and placing a greater emphasis on promoting economic and social development on the reservation.”

The “blueprint” for tribal self-determination, wrote the NGISC, was drawn up by President Lyndon Johnson as part of his Great Society initiative to eliminate poverty and racial injustice in America. Tribal self-determination was later articulated in a landmark, July 8, 1970 speech to Congress by President Richard Nixon. “It is long past time that the Indian policies of the federal government began to recognize and build upon the capacities and insights of the Indian people,” Nixon said. “Both as a matter of justice and as a matter of enlightened social policy, we must egin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”

Subsequent administrations reinforced the concept of tribal self-determination. President Gerald Ford in 1975 signed into law the Indian Self-Determination and Education Assistance Act, which authorized tribes to administer Interior/BIA federal programs and gave them greater flexibility and decision-making authority. US Supreme Court and federal court rulings consistently upheld tribal sovereignty and supported indigenous America’s strive for self-governance. There were a slew of landmark court rulings, administrative decisions and legislation to assist tribal governments emerging from near extinction: the Indian Financing Act, Indian Self-Determination and Education Assistance Act, Indian Health Care Improvement Act, Indian Child Welfare Act, Indian Religious Freedom Act and Alaska Native Land Claims Act. Sacred and ancestral lands were returned to tribes by the Indian Claims Commission.

"We had a lot of liberal friends in Congress and organizations and individuals within the administration helping us back then," Forrest Gerald, a citizen of the Blackfeet Tribe of Montana and one-time assistant secretary for Indian affairs in the Interior Department, told *Indian Gaming Business* magazine.

President Ronald Reagan, in a 1983 Indian policy statement, said, "It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government." President Bill Clinton enacted executive orders calling for greater government-to-government consultations between tribes and federal agencies. President George W. Bush signed into law a tribal energy program giving indigenous governments more authority to control energy resource development on tribal land. President Barack Obama, in an effort to generate more domestic energy development, furthered the Bush initiatives. H also reaffirmed the tribal/federal government-to-government precepts in appointing an American Indian to a cabinet-level position in the White House Office of Intergovernmental Affairs.

"By the turn of this century Indian tribes had put in place much of the ambitious agenda that tribal leaders advanced in the 1950s and 1960s," Wilkinson wrote in *Blood Struggle*. "They stopped termination and replaced it with self-determination. They ousted the BIA as the reservation government and installed their own sovereign legislatures, courts and administrative agencies. They enforced the

treaties of old and, with them, the fishing, hunting and water rights. They earned the right to follow their own traditions and cultures and see them reflected in schools, health care and land management."

This was the political and legal climate that existed when tribes began to explore legal gambling as a means of generating revenue to fund their governments. Previous economic ventures – hunting and fishing lodges, mineral development, tax-free cigarette sales and other tribal business enterprises – proved marginal at best. Tribal reservations were largely remote, isolated from urban markets and lacking a skilled employment base, water, sewer, roads and other infrastructure.

When tribal leaders became aware that states as public policy endorsed pari-mutuel horse and dog racing, lotteries, charitable wagering and other forms of gambling – when they woke up to the spread of legal gambling throughout the United States – they began setting up poker clubs and bingo parlors, many with prizes that exceeded those offered by non-Indian and charitable and non-profit organizations.

The Seminole Tribe of Florida and its chairman, Howard Tommie, raised the stakes. The Seminole kept a tribal bingo hall operating six days a week, exceeded the state-imposed, two-day weekly limit for non-Indian bingo halls. The tribe paid jackpots in excess of the $100 state limit. Broward County Sheriff Robert Butterworth threatened to close down the tribal operation, but 5th District Court Judge Robert Roettger, citing Chief Justice Marshall's majority opinion in *Worcester v. Georgia*

(1832), upheld the tribe's position. "Indian nations have always been dealt with exclusively by the federal government," Roettger said. "The federal government has long permitted Indian nations largely to govern themselves, free from state interference." His decision was affirmed by the 5th Circuit court of Appeals. The US Supreme court declined to review the case.

Meanwhile, the small, impoverished Cabazon Band of Mission Indians in Indio, Calif., was pressing city and Riverside County officials in its effort to operate a small bingo hall. The hall was raided and shut down on two occasions. Cabazon and the neighboring Morongo Band of Mission Indians in Banning, which operated another bingo hall, had their lawsuits consolidated and the US Supreme Court in 1986 accepted the case. Twenty-one states weighed in with California against the tribes. The court in 1987 ruled 6-3 for Cabazon and Morongo, stating that if tribal gambling was to be regulated by a non-Indian government, it would have to be Congress, not California. "Tribal sovereignty," wrote Justice Byron White for the majority, "is dependent on, and subordinate to, only the federal government, not the states."

Fearful of a nationwide proliferation of tribal casinos, state governors and their attorneys general responded by going to Congress and getting enacted the Indian Gaming Regulatory Act of 1988, a tool for both regulating tribal casinos and providing some measure of federal and state oversight.

IRGA recognizes the right of tribes to engage in gambling on Indian land except when wagering is contrary to federal law or prohibited by a state government. The act allows tribes to engage in traditional Indian games, or Class I gambling, without interference by federal and state authorities. It permits tribes to engage in Class II gambling – bingo, pull-tabs and other player-banked games – with regulation by the tribes and the National Indian Gaming Commission (NIGC), a federal agency formed by the act and funded by the tribes.

Tribes seeking to operate the more lucrative Class III, Las Vegas-style house-banked games and slot machines are required by the act to enter into agreements, or compacts, with states allowing for primary regulation of casinos by the tribes with oversight by the NIGC and state gambling authorities.

Tribes view the compacts and state involvement in tribal government gambling as a major infringement of traditional tribal sovereignty and self-governance. But impoverished Indian nations – desperately seeking employment and revenue to fund their governments and provide services to their citizens – agreed to the concession in tribal sovereignty.

Some governors and state legislatures embraced efforts by tribes to establish Class III casinos, both as a means of helping tribes achieve self-sufficiency and economic progress and in an effort to generate economic growth and employment in nearby counties and municipalities. A majority of the jobs in tribal casinos – as much as 70

percent or more in most places – are held by non-Indian residents of surrounding communities., according to the National Indian Gaming Association, the tribal casino industry's lobby and trade association. Minnesota, Wisconsin and Mississippi were among the first states with compacted tribal government casinos.

Other states such as Florida and California resisted efforts by tribes to develop casinos. State governments are required by IGRA to enter into good faith negotiations with tribes for Class III compacts. But the US Supreme Court in *Seminole Tribe v. Florida* (1996), citing state government immunity against lawsuits in the 11th Amendment, ruled that tribes could not sue states to force them to negotiate Class III compacts.

Although IGRA prohibits the taxation of tribal gambling revenue by states, revenue sharing agreements became standard negotiating tools, in Connecticut reaching 25 percent of tribal casino revenues.

We will explore IGRA and its many complexities in depth in the weeks to come, including such controversial issues as taxation, land/trust regulations, off-reservation casinos and judicially enforceable casino mitigation agreements between tribal governments and surrounding counties and municipalities. We also will discuss the controversy over the regulation and definition of Class II and Class III games

The congressional intent of IGRA – to strengthen tribal governments and build tribal economies – has proven successful for many tribal communities.

"The poor economic conditions in Indian country have contributed to the same extensive social ills generated in other impoverished communities, including high crime rates, child abuse, illiteracy, poor nutrition and poor health care access," wrote the NGISC. "But with revenues from gambling operations, many tribes have begun to take unprecedented steps to begin to address the economic as well as social problems on their own. For example, through gambling tribes have been able to provide employment to their members and other residents where the federal policies failed to create work. This has resulted in dramatic drops in the extraordinarily high unemployment rates in many, though not all, communities in Indian country and a reduction in welfare rolls and other governmental services for the unemployed."

"Tribes also use gambling revenues to support tribal governmental services, including tribal courts, law enforcement, fire protection, water, sewer, solid waste, roads, environmental health, land-use planning and building inspection services, and natural resource management. They also use gambling revenues to establish and enhance social welfare programs in the areas of education, housing substance abuse, suicide prevention, child protection, burial expenses, youth recreation and more."

Tribal gambling is credited with providing increased educational opportunity for young American Indians. Operating and financing multimillion-dollar casino resorts and related hospitality and tourism projects has empowered native America with the legal and business skills and financial fluency to diversify tribal economies and ensure a sustainable flow of government revenues for future generations. Tribal investments include commercial and industrial real estate, retail developments and business parks. Tribes are branching into traditional and renewable energy projects.

Tribes are reacquiring ancestral and aboriginal lands and securing water rights. Tribes in Washington State, Arizona and elsewhere are working with federal, state and local governments on major environmental projects, including the restoration of fisheries and watersheds. The Hoopa Valley Tribe in Northern California is managing a federal program to preserve and protect the spotted owl. The Red Lake Band of Chippewa in Minnesota is restoring fish to their lake. The Jicarilla Apache Nation of New Mexico is managing elk and mule deer populations. The Zunis of New Mexico are treating wounded eagles. The Nez Perce is returning the gray wolf to Idaho. Some 57 tribes are bringing back bison herds to the Great Plains, Southwest and Midwest United States.

“Gambling revenues are being used to support tribal language, history and cultural programs,” wrote the NGISC. “All of these programs have historically suffered from significant neglect and underfunding by the federal government.”

The federal policy of tribal self-determination is credited with empowering tribes to rebuild their governments by enabling them to take over management of federal programs on the reservations. “As long as the Bureau of Indian Affairs or some toher outside organization carries primary responsibility for economic conditions on Indian reservations, development decisions will tend to reflect outsiders’ agendas,” Stephen Cornell, co-director of the Harvard Project on American Indian Economic development, told *Indian Gaming Business* magazine.

Native nation building accelerated dramatically with the introduction of tribal government gambling and passage of IGRA. Much of the $26.5b in 2009 tribal revenue is used to subsidize or fully fund programs providing health care, education, housing and government services to tribal citizens.

“Nation rebuilding largely began in the 30 years since self-determination, when the federal government began promoting tribal government systems and tribal judicial systems,” University of Oklahoma law professor Taiawagi Helton, a citizen of the Cherokee Nation, told *Indian Gaming Business*. “But we’re definitely seeing an increase in the last 10 or 15 years, now that tribes have more economic resources. And my guess is you would see the most rapid rise among tribes with gaming.”

Gambling tribes such as the San Carlos Apache Tribe of Arizona, the Crow Tribe of Montana, the Northern Cheyenne of South Dakota and the Osage Nation of Oklahoma are among the many Indian nations reforming outdated and culturally

inappropriate constitutions imposed on them with passage of the Indian Reorganization Act. Others are establishing and expanding tribal courts, providing assurances to non-Indian investors that, if necessary, they will be provided with competent, impartial judicial dispute resolution.

But the rebuilding and development of modern tribal governments has not reached much, if not most, of native America. Social and economic progress for many native communities remains out of reach. And the economic benefit of government gambling has not fallen evenly on Indian country.

Of the 419 tribal casinos audited by the NIGC in 2009, 71 of them, or 16.9 percent, generated $18.4b, or 69.5 percent of the $26.5b won by all the tribal casinos in the country. Sixty-one California casinos operated by 60 tribes with a combined enrollment of less than 40,000 citizens won $7.3b in 2008, more than a fourth of the tribal revenues nationwide. The most lucrative tribal casinos are owned by small Indian communities in urban areas. The great majority of tribal casinos are marginal operations run by large, remote Indian nations, generating desperately needed jobs but little significant economic growth.

Some 3.3m US citizens identify themselves as single ethnicity Native American, either American Indian or Alaska Native, according to the US Census. Of these, 1.2m resides on tribal trust reservations or in Alaska villages. The average income of

reservation households, according to the 2000 census, was $24,249, compared to $41,994 for the average US household.

Citizens of gambling and non-gambling tribes have seen their per capita incomes grow 30 to 36 percent from 1990 to 2000, according to a Harvard University study, three times the rate of non-Indians. But indigenous Americas remain last in most social and economic indicators, including employment, health care, education, depression and suicide, addiction and housing.

Ironically, the marginal economic and social progress of American Indian tribes, particularly those with gambling, is creating new and ominous challenges.

Tribal leaders fear the publicity generated by the skyrocketing growth of tribal government gambling is creating a false perception among the public, policymakers and Congress that all American Indians have become wealthy because of tribal casinos, that there is no longer a need for the federal government to honor treaty trust obligations and responsibility for the welfare of the first Americans. Indians fear a congressional backlash against the growing political power vested in a handful of wealthy gambling tribes.

“The public believes we’re all about gaming, that we are all very wealthy from gaming,” Tracy Stanhoff, former chair of the Prairie Band of Potawatomi of Kansas,

told *Indian Gaming Business*. "It's an extremely dangerous misperception. It's a threat to our status as sovereign nations and our treaty agreements."

"Tribes are making their presence felt, politically and economically," Ron Allen, chairman of the Washington Indian Gaming Association and Jamestown S'Klallam Tribe, told the magazine. "There is no longer the notion of tribes pulling themselves up by the bootstraps. Now the notion is, 'Why should the tribes be getting all the gold in them there hills?' A negative perception has emerged. It's OK for tribes to be poor. Now that some of us are well off, that is unacceptable."

"Our people are beginning to be identified as 'casino Indians' and not as the people of the land or of the salmon," said Nisqually elder Billy Frank Jr. "Casinos help economically but they are not who we are. We are our languages, our culture, our natural resources, our spirituality and our prayers."

"The future preservation and prosperity of American Indians will not be decided in the halls of Congress or state legislatures, nor will it be adjudicated within the solemn chambers of the US Supreme Court. It will be decided in the court of public opinion," Anthony Pico, chairman of the Viejas Band of Kumeyaay Indians near San Diego, Calif., said in a 2007 speech. "How we are viewed in the eyes of the nation – our ability to deliver our message to the public, the press, elected officials and federal and state policy makers – is of crucial importance to our grandchildren, their grandchildren and future generations of Native Americans.

"Perception is reality. Truth is our ally," Pico said. "If we don't take steps necessary to promote an accurate image of contemporary Native America, if we do not tell our story completely and accurately to all who will listen, the pillars of economic, social and governmental progress tribes have begun building over the last 30 years will come crashing down around us. Sadly, I fear cracks are already growing in the foundation."

Pico's words have proven prophetic.

The District of Columbia Circuit Court, in a landmark 2007 case, declared the tribal casino owned by the San Manuel Band of Mission Indians of San Bernardino County, Calif., subject to the jurisdiction of the National Labor Relations Board, ruling it was a commercial business and not an essential government enterprise. The ruling seriously undermined the historic exemption of tribal governments from NLRB jurisdiction.

The US Supreme Court in 2009 ruled in *Carcieri v. Salazar* that tribes not under federal jurisdiction as of 1934 (and passage of the Indian Reorganization Act) cannot follow a longstanding land-into-trust process administered by the US Department of the Interior. The ruling stemmed from an attempt by the Narragansett Indian Tribe of Rhode Island to place 31 acres of land in trust for a housing development, a project halted because Gov. Ronald Carcieri feared the land

would instead be used for a tribal government casino. *Carcieri* has forced Interior to severely slow some 1,300 land/trust applications, only 33 of which involved potential casinos.

Tribal efforts to get a legislative "fix" to the damaging *Carcieri* ruling are hindered by growing political and public opposition to attempts by a handful of tribes to establish casinos off existing reservations. John Tahsuda, vice president of Navigators Global LLC, a Washington, D.C., government consulting firm, told 2010 G2E attendees at the Las Vegas Convention Center "there is a perception (*Carcieri vs. Salazar*) is a gaming issue" when, in fact, the ruling potentially impacts all trust applications for newly acquired lands.

"The rising economic and political clout of Indian nations [is} often seen as threats at the local level to non-Indian governments," wrote Harvard professors Stephen Cornell and Joseph Kalt in *American Indian Self-Determination: the Political Economy of a Policy that Works.* The general trend of federal courts over the last two decades, they wrote, "has been a reining in, rather than an expansion, of tribal sovereignty." Cornell and Kalt predict a growing Republican presence in Congress may prove damaging to tribal self-determination policies.

We will discuss at a later date contemporary, gambling-related issues facing native America.

But in closing it may be best to conclude this overview by returning to Chairman Pico, who in a 2002 speech to the International Masters of Gaming Law, said, "Gaming is more to Indians than profits. It gives us the ability to exercise sovereignty, the right to govern our lands and meet our government responsibilities to our people and future generations. This was the dream that gave our ancestors the will to survive against all odds. For my generation, protecting sovereignty and exercising it is a sacred obligation."

Key Statutes and Court Opinions

Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360)

18 U.S.C. § 1162. State Jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of Indian country affected

Alaska All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the State.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

25 U.S.C. § 1321. Assumption by State of criminal jurisdiction

(a) Consent of United States; force and effect of criminal laws

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by

such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

25 U.S.C. § 1323. Retrocession of jurisdiction by State

(a) Acceptance by United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18, section 1360 of title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

25 U.S.C. § 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1325. Abatement of actions

(a) Pending actions or proceedings; effect of cession

No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) Criminal actions; effect of cession

No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

25 U.S.C. § 1326. Special election

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

658 F.2d 310

SEMINOLE TRIBE OF FLORIDA, an Organized Tribe of Indians, as recognized under and by the Laws of the United States, Plaintiff-Appellee,

v.

Robert BUTTERWORTH, the duly elected Sheriff of Broward County, Florida, Defendant-Appellant.

No. 80-5496.

United States Court of Appeals,

Fifth Circuit.

Unit B *

Oct. 5, 1981.

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Shailer & Purdy, Philip S. Shailer, Fort Lauderdale, Fla., for defendant-appellant.

Kent A. Zaiser, Asst. Atty. Gen., Dept. of Legal Affairs, Civ. Div., Tallahassee, Fla., for amicus State of Florida.

Stephen H. Whilden, Hollywood, Fla., Marion Sibley, Miami Beach, Fla., Jesse J. McCrary, Jr., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN, RONEY and KRAVITCH, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

This appeal involves a question arising under Public Law 280, the federal law permitting states to exercise civil and criminal jurisdiction over the Indian tribes. All parties agree that the case turns on the determination of whether Florida Statute Section 849.093 which permits bingo games to be played by certain qualified organizations subject to restrictions by the state is civil/regulatory or criminal/prohibitory in nature. If the statute is civil/regulatory within the meaning of Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the statute cannot be enforced against the Seminole Tribe of Florida.

This lawsuit commenced when the Seminole Indian tribe brought an action under 28 U.S.C. §§ 2201 and 2202, seeking a declaratory judgment and injunctive relief against Robert Butterworth, the sheriff of Broward County, Florida. The Seminole tribe had contracted with a private limited partnership that agreed to build and operate a bingo hall on the Indian reservation in exchange for a percentage of the profits as management fees. Anticipating violation of the Florida bingo statute, Sheriff Butterworth informed the tribe that he would make arrests for any violations of Fla.Stat. § 849.093. 1 The attorney general of the

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state of Florida filed a petition on behalf of the state seeking leave to participate in the case as amicus curiae, and leave was granted. Relying on stipulated facts,

the parties filed cross motions for summary judgment, presenting the question to the district court, 491 F.Supp. 1015, whether the statute could be enforced against the Indian nation. After finding that the case satisfied the "case or controversy" requirement of the Constitution, the district judge granted the plaintiff's motion for summary judgment on the ground that the statute in question was regulatory in nature and therefore could not be enforced against the Indian tribe. The lower court enjoined the sheriff from enforcing the statute against the plaintiff. The sheriff of Broward County and the State of Florida appealed the lower court's decision to this court, but agreeing with the lower court, we affirm its decision.

I. Can Indians Operate Bingo Halls?

The states lack jurisdiction over Indian reservation activity until granted that authority by the federal government; however, Sections 2 and 4 of Public Law 280 [2] granted certain states the right to exercise

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criminal jurisdiction and limited civil jurisdiction over the Indian tribes. Section 7 of the Act [3] granted to other states the right to assume criminal and civil jurisdiction by legislative enactment, and although this section was repealed in 1968 by Section 403(b) of Public Law 90-284, any cessions of jurisdiction made pursuant to the Act prior to its repeal were not affected. Pursuant to the former Public Law 280 the state of Florida assumed criminal jurisdiction over reservation Indians in Fla.Stat. § 285.16. By this enactment, Florida assumed jurisdiction over the Indians to the full extent allowed by the law.

In Bryan v. Itasca County, supra, 426 U.S. at 383, 96 S.Ct. at 2108, the Supreme Court of the United States interpreted Public Law 280 as granting civil jurisdiction to the states only to the extent necessary to resolve private disputes between Indians and Indians and private citizens. In Bryan the petitioner Indian sought relief from a personal property tax that the state had levied against his mobile home. The Court interpreted the language of Section 4(a) of Public Law 280 [4] providing for civil jurisdiction as follows:

(S)ubsection (a) seems to have been primarily intended to redress the lack of Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes .... (The statute) authorizes application by the state courts of their rules of decision to decide such disputes. Id. at 383-84, 96 S.Ct. at 2108.

After further discussion the Court concluded that "if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation over reservation Indians, it would have expressly said so." Id. at 390, 96 S.Ct. at 2111. Although the Supreme Court was interpreting the language of Public Law 280 as directed at the six mandatory states, it is clear that these same limitations on civil jurisdiction would apply to a state that assumed jurisdiction pursuant to Section 7 of the former Public Law 280. Thus, the mandate from the Supreme Court is that states do not have general regulatory power over the Indian tribes.

The difficult question remaining in a case such as the present one is whether the statute in question represents an exercise of the state's regulatory or prohibitory authority. The parties have presented the question for decision to this court in that form, and several cases out of the Ninth Circuit have addressed similar Indian problems with the same or a similar analysis. See United States v. Farris, 624 F.2d 890 (9th Cir. 1980); United States v. County of Humboldt, 615 F.2d 1280 (9th Cir. 1980); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). See also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975). Thus, under a civil/regulatory versus criminal/prohibitory analysis, we consider the Florida statute in question to determine whether the operation of bingo games is prohibited as against the public policy of the state or merely regulated by the state.

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Fla.Stat. Section 849.093 [5] provides that the general prohibition against lotteries does not apply to prevent "nonprofit or veterans' organizations engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities ... from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games shall be donated by such organizations to the endeavors mentioned above." Id. Section 2 of the statute sets out conditions of operation for organizations not engaged in the charitable activities listed above. The remaining sections of the statute state restrictions for the operation of bingo games and penal sanctions for violation of those provisions. [6] Although the inclusion of penal sanctions makes it tempting at first glance to classify the statute as prohibitory, the statute cannot be automatically classified as such. A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one. See United States v. Marcyes, supra, 557 F.2d at 1364. The classification of the statute is more complex, and requires a consideration of the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute.

The Florida Constitution provides: "lotteries, other than the types of pari-mutuel pools authorized by law ..., are hereby prohibited in this state." Art. X, § 7, Fla.Const. The legislature has the power to prohibit or regulate all other forms of gambling, and in Greater Loretta Improvement Ass'n. v. State ex rel. Boone, 234 So.2d 665 (Fla.1970), the Florida Supreme Court recognized that bingo was one of the forms of gambling, along with horse racing, dog racing, and jai alai, excepted from the lottery prohibition and permitted to be regulated by the state. Based on the definition of "pari-mutuel" and the fact that the bingo statute was enacted the same year that the Constitution was revised, the court held that the bingo statute did not violate the Constitution of Florida. In a later constitutional challenge, Carroll v. State, 361 So.2d 144 (Fla.1978), the Supreme Court of Florida stated that

while the legislature cannot legalize any gambling device that would in effect amount to a lottery, it has an inherit power to regulate or to prohibit any and all other forms of gambling. In exercising this power to regulate, the legislature, in its wisdom, has seen fit to permit bingo as a form of recreation, and at the same

time, has allowed worthy organizations to receive the benefits. (citations omitted) (emphasis added) Id. at 146-47.

Although this language suggesting that the legislature has chosen to regulate bingo is not binding on this court as to whether the statute is regulatory or prohibitory, the language indicates that the game of bingo is not against the public policy of the state of Florida. See also State v. Appelbaum, 366 So.2d 443 (Fla.1979) ("The statute... regulates the conduct of bingo...."). Bingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses. Where the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, [7]

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the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed.

In holding that the bingo statute in question is regulatory, we must address two Ninth Circuit cases in which similar issues were raised. In United States v. Marcyes, supra, 557 F.2d at 1364, the Ninth Circuit held that a fireworks statute of the state of Washington was a prohibitory statute of the state, and therefore was necessarily included within the ambits of the Assimilative Crimes Act, 18 U.S.C. § 13. The fireworks statute, like the bingo statute in question, permitted the activity to take place under certain circumstances. Despite these exceptions, to the statute, however, the Ninth Circuit found that the statute's "intent was to prohibit the general possession and/or sale of dangerous fireworks" and that it was "not primarily a licensing law." Id. The lower court in the present case relied on Marcyes for its discussion of the regulatory/prohibitory distinction, but distinguished the case based on the fact that fireworks are dangerous items that, if bought on an Indian reservation, can be carried off of it. The operation of bingo halls, on the other hand, must necessarily remain on the reservation. Although the distinction is a legitimate one, the determination underlying it is a legislative decision which we are not at liberty to make. Instead we find that the real distinction between the cases lies in the reference to each state's law as to whether the statutes in question were prohibitory or regulatory. Legislative intent determines whether the statute is regulatory or prohibitory, and although the state of Florida prohibits lotteries in general, exceptions are made for certain forms of gambling including bingo. All parties agree that forms of gambling such as horse racing are regulated in Florida, and indeed the petitioner admits that the Indians could engage in the operation of horse racing activities without interference by the state. Petitioner suggests that the distinction between bingo and horse racing lies within the licensing requirements; however, we find that argument without merit. Regulation may appear in forms other than licensing, and the fact that a form of gambling is self-regulated as opposed to state-regulated through licensing does not require a ruling that the activity is prohibited.

In a more recent and in some respects more similar case, United States v. Farris, supra, 624 F.2d 890, the Ninth Circuit found that members of the Puyallup Indian tribe could not be prohibited from operating a gambling casino on the reservation because the state of Washington had not assumed jurisdiction over

gambling offenses. However, in considering whether the provisions of 18 U.S.C. § 1955 of the Organized Crime Control Act of 1970 could apply to non-Indians gambling on the reservation, the Ninth Circuit analyzed the public policy of the state of Washington and determined that the state prohibited professional gambling. The court found that the "violation of a law of a state" requirement of section 1955 was intended to exempt from federal prosecution the operators of gambling business in states where gambling was not contrary to the public policy of the state, and the legislative declaration in Washington's gambling statute indicated a clear legislative intent to prohibit professional gambling. [8] Specifically noting the exception of Florida fronton operators to the gambling provisions, the court reiterated that the federal statute could apply only in states where gambling was illegal. Washington, unlike Florida, was such a state, and thus the statute could be enforced against non-Indians gambling

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on the reservation. Cf. Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (S.D.Calif.1971), rev'd on other grounds, 495 F.2d 1 (9th Cir. 1974) (court held local ordinance prohibiting gambling was within ambit of phrase "laws of such state" of Public Law 280 so that gambling provisions could apply to Indians on the reservation).

Although the Ninth Circuit found that the casino operation of the Puyallup Indians was a "violation of the law of a state" for which non-Indians could be prosecuted under the federal gambling law, the case supports the proposition that the state's public policy determines whether the activity is prohibited or regulated. Although the Florida Constitution, the Florida Supreme Court, and the Florida legislature have in various forms denounced the "evils of gambling," it is clear from the provisions of the bingo statute in question and the statutory scheme of the Florida gambling provisions considered as a whole that the playing of bingo and operation of bingo halls is not contrary to the public policy of the state. Other courts prohibiting other forms of gambling have found those forms of gambling contrary to the public policy of the state. As the district court noted, this case presents a close and difficult question. The Supreme Court in interpreting Public Law 280 has stated that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, supra, 426 U.S. at 392, 96 S.Ct. at 2112. Although the regulatory bingo statute may arguably be interpreted as prohibitory, the resolution must be in favor of the Indian tribe.

II. Can Non-Indians Play?

Although we have concluded that the Florida bingo statute cannot be enforced against the Seminole tribe, Sheriff Butterworth and the State of Florida petition this court for a ruling requiring the Seminole Indians to distinguish between Indians and non-Indians and abide by the restrictions of the statute as to non-Indians. It is not altogether clear how petitioner proposes that such distinctions practically could be made without prohibiting non-Indians from play or imposing the restrictions on all players, Indian and non-Indian alike. Furthermore, the relief sought continues to request the right to enforce regulation of the Indians

operation of bingo games. We reject petitioner's argument for these and the following reasons.

First, as respondent strongly points out, the argument was never presented below. The issue presented to the district judge on stipulated facts involved only the question of whether the statute could be enforced to prevent the Indians from violating its restrictions. As a general rule the court of appeals need not address issues raised for the first time by a party on appeal. See Adams v. Askew, 511 F.2d 700 (5th Cir. 1975); D.H. Overmyer Co. v. Lofling, 440 F.2d 1213 (5th Cir. 1971). Furthermore, we note that the statute in question, Fla.Stat. § 849.093, makes no reference to violations of its restrictions by the players of bingo. Sheriff Butterworth suggests that several general lottery prohibition statutes, such as Fla.Stat. §§ 849.08, 849.09(1)(b), and 849.09(2), permit the arrest of bingo players as players of illegal lotteries; however, we refuse to recognize in one breath that bingo is excluded from the general lottery prohibition and in the next permit the arrest of bingo players as players of illegal lotteries. The statutes cited must be considered in pari materia with the bingo statute permitting the operation of bingo games. The bingo statute does not prohibit the playing of bingo games in violation of its restrictions, and if the legislature of the state of Florida desires to prohibit such, then it must act accordingly. The courts that have prohibited Indians or non-Indians from gambling on reservations have done so in light of a statute that specifically prohibits the act of gambling. In Florida, unlike in Washington, no distinction exists between Indians and non-Indians for the legality (or

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illegality) of certain gambling activities. Thus, petitioner's attempts to require the Seminoles to distinguish between Indian and non-Indian players are to no avail. [9] The decision of the lower court is

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent on the ground that the State of Florida has prohibited, not regulated, the precise kind of bingo operation which the plaintiff seeks to conduct. As a matter of fact, it is because such activity is prohibited in Florida that this business was started and is successful. The reasons that Florida laws prohibit such a bingo business, focusing on the indirect consequences of it, whether right or wrong, are as applicable to a bingo casino on the Indian reservation as they are to such a business off a reservation. If only Indians were involved, or if the effects of the bingo casino were shown to be confined to the reservation, the decisions relied upon by the Court might be applicable. Without such a showing, in my opinion, they are not. I would reverse.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980.

1 The Florida bingo statute provides as follows:

849.093 Charitable, nonprofit organizations; certain endeavors permitted

(1) As used in this section:

(a) "Bingo game" means and refers to the activity commonly known as "bingo" wherein participants pay a sum of money for the use of one or more cards. When

the game commences, numbers are drawn by chance, one by one, and announced. The players cover or mark those numbers on the cards which they have purchased until a player receives a given order of numbers in sequence that has been preannounced for that particular game. This player calls out "bingo" and is declared the winner of a predetermined prize. More than one game may be played upon a bingo card, and numbers called for one game may be used for a succeeding game or games.
(b) "Bingo card" means and refers to the flat piece of paper or thin pasteboard employed by players engaged in the game of bingo. More than one set of bingo numbers may be printed on any single piece of paper.
(2) None of the provisions of this chapter shall be construed to prohibit or prevent nonprofit or veterans' organizations engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar activities, which organizations have been in existence for a period of 3 years or more, from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games, less actual business expenses for articles designed for and essential to the operation, conduct, and playing of bingo, shall be donated by such organizations to the endeavors mentioned above. In no case shall the net proceeds from the conduct of such games be used for any other purpose whatsoever. The proceeds derived from the conduct of bingo games shall not be considered solicitation of public donations.
(3) If an organization is not engaged in efforts of the type set out above, its right to conduct bingo or guest games hereunder shall be conditioned upon the return of all the proceeds from such games to the players in the form of prizes. If at the conclusion of play on any day during which a bingo or guest game 1 is allowed to be played under this section there remain proceeds which have not been paid out as prizes, the nonprofit organization conducting the game shall at the next scheduled day of play conduct bingo or guest games without any charge to the players and shall continue to do so until the proceeds carried over from the previous days played have been exhausted. This provision in no way extends the limitation on the number of prize or jackpot games allowed in one night as provided for in subsection (5).
(4) The number of days during which such organizations as are authorized hereunder may conduct bingo or guest games per week shall not exceed two.
(5) No jackpot shall exceed the value of $100 in actual money or its equivalent, and there shall be no more than one jackpot in any one night.
(6) There shall be only one prize or jackpot on any one day of play of $100. All other game prizes shall not exceed $25.
(7) Each person involved in the conduct of any bingo or guest game must be a resident of the community where the organization is located and a bona fide member of the organization sponsoring such game and shall not be compensated in any way for operation of said bingo or guest game.
(8) No one under 18 years of age shall be allowed to play.
(9) Bingo or guest games shall be held only on the following premises:
(a) Property owned by the nonprofit organization;

(b) Property owned by the charity or organization that will benefit by the proceeds;
(c) Property leased full time for a period of not less than 1 year by the nonprofit organization or by the charity or organization that will benefit by the proceeds;
(d) Property owned by and leased from another nonprofit organization qualified under this section; or
(e) Property owned by a municipality or a county when the governing authority has, by appropriate ordinance or resolution, specifically authorized the use of such property for the conduct of such games.
(10) Any organization or other person who willfully and knowingly violates any provision in this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For a second or subsequent offense, the organization or other person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
2 The two sections were codified at 18 U.S.C.A. § 1162 and 28 U.S.C.A. § 1360, respectively. The first section concerned state assumption of criminal jurisdiction and the second involved assumption of civil jurisdiction. These sections were directed at the willing states of California, Minnesota, Nebraska, Oregon and Wisconsin (later adding Alaska), which are sometimes referred to as the mandatory states because the assumption of jurisdiction was dictated by the statute.
3 67 Stat. 590 (1953) (repealed by Pub.L. 90-284, Title IV, § 403, 82 Stat. 79 (1968). The former section provided:
The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action obligate and bind the state to assumption thereof.
The repeal changed the law to require the consent of the Indians to any further assumption of jurisdiction.
4 See note 2 supra. Section 4(a) provides:
(a) Each of the States or Territories listed ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory ....
5 For the text of the statute, see note 1 supra.
6 The statute as originally enacted contained no penal sanctions for its violation. The penalties were added by amendment in 1973, Laws 1973, c. 73-229, § 1. Arguably, the original enactment of the statute without penal sanctions indicates a legislative intent that the statute be construed as regulatory.
7 Arguably, the Florida bingo statute could be viewed as a narrow exception to the general prohibition against lotteries, permitting bingo operations only when the activity was recreational or charitable, and not for profit. Under this view

urged by petitioner, professional, money-making bingo operations continue to be prohibited. Even if we were to accept this view of the statute as prohibiting professional bingo, the Seminole Indian tribe could arguably qualify as a nonprofit organization "engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities" as prescribed in the statute. The Seminole's complaint alleges that the profits received by the tribe from the bingo activities are to be invested for the betterment of the Indian community. Although the Indian nation may not qualify as a charitable organization within the letter of the statute, the Seminole tribe could be said to fall within the spirit of its permissive intent.

8 The Wash.Rev.Code § 9.46.010 provides:

It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; (and) to restrain all persons from patronizing such professional gambling activities....

9 The petitioner has cited a line of cases culminating in Washington v. Confederated Tribes, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), for the proposition that states can require Indians to apply state regulations to non-Indians who engage in activity on Indian reservations. Washington v. Confederated Tribes, supra, involved the imposition of a state sales tax on the purchase of cigarettes. The Court required an Indian smoke shop owner to precollect the tax imposed on the buyer. Although we recognize the validity of the line of cases cited, we note that an important distinction exists between the present case and those cases where regulations are imposed on non-Indians. In the present case the only regulation involved is directed at the Indian operators of the bingo hall, not its non-Indian bingo player. Thus, even if we were to fully address petitioner's argument, the line of cases cited would not require a contrary holding.

California v. Cabazon Tribe

480 U.S. 202

107 S.Ct. 1083

94 L.Ed.2d 244

CALIFORNIA, et al., Appellants,

v.

CABAZON BAND OF MISSION INDIANS et al.

No. 85-1708.

Argued Dec. 9, 1986.
Decided Feb. 25, 1987.
Syllabus

Appellee Indian Tribes (the Cabazon and Morongo Bands of Mission Indians) occupy reservations in Riverside County, Cal. Each Band, pursuant to its federally approved ordinance, conducts on its reservation bingo games that are open to the public. The Cabazon Band also operates a card club for playing draw poker and other card games. The gambling games are open to the public and are played predominantly by non-Indians coming onto the reservations. California sought to apply to the Tribes its statute governing the operation of bingo games. Riverside County also sought to apply its ordinance regulating bingo, as well as its ordinance prohibiting the playing of draw poker and other card games. The Tribes instituted an action for declaratory relief in Federal District Court, which entered summary judgment for the Tribes, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed.

Held:

1. Although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by Pub.L. 280 or by the Organized Crime Control Act of 1970 (OCCA). Pp. 207-214.

(a) In Pub.L. 280, the primary concern of which was combating lawlessness on reservations, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State but more limited, nonregulatory civil jurisdiction. When a State seeks to

enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court. There is a fair basis for the Court of Appeals' conclusion that California's statute, which permits bingo games to be conducted only by certain types of organizations under certain restrictions, is not a "criminal/prohibitory" statute falling within Pub.L. 280's grant of criminal jurisdiction, but instead is a "civil/regulatory" statute not authorized by Pub.L. 280 to be enforced on Indian reservations. That an otherwise regulatory law is enforceable (as here) by

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criminal as well as civil means does not necessarily convert it into a criminal law within Pub.L. 280's meaning. Pp. 207-212.

(b) Enforcement of OCCA, which makes certain violations of state and local gambling laws violations of federal criminal law, is an exercise of federal rather than state authority. There is nothing in OCCA indicating that the States are to have any part in enforcing the federal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. California may not make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes. Pp. 212-214.

2. Even though not expressly authorized by Congress, state and local laws may be applied to on-reservation activities of tribes and tribal members under certain circumstances. The decision in this case turns on whether state authority is pre-empted by the operation of federal law. State jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. The federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, are important, and federal agencies, acting under federal laws, have sought to implement them by promoting and overseeing tribal bingo and gambling enterprises. Such policies and actions are of particular relevance in this case since the tribal games provide the sole source of revenues for the operation of the tribal governments and are the major sources of employment for tribal members. To the extent that the State seeks to prevent all bingo games on tribal lands while permitting regulated off-reservation games, the asserted state interest in preventing the infiltration of the tribal games by organized crime is irrelevant, and the state and county laws are pre-empted. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted since the asserted state interest is not sufficient to escape the pre-emptive force of the federal and tribal interests apparent in this case. Pp. 214-222.

783 F.2d 900 (CA 9 1986), affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which O'CONNOR and SCALIA, JJ., joined, post, p. ---.

Roderick E. Walston, San Francisco, Cal., for petitioner.

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Glenn M. Feldman, Phoenix, Ariz., for respondents.

Justice WHITE delivered the opinion of the Court.

The Cabazon and Morongo Bands of Mission Indians, federally recognized Indian Tribes, occupy reservations in Riverside County, California.1 Each Band, pursuant to an

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ordinance approved by the Secretary of the Interior, conducts bingo games on its reservation.2 The Cabazon Band has also opened a card club at which draw poker and other card games are played. The games are open to the public and are played predominantly by non-Indians coming onto the reservations. The games are a major source of employment for tribal members, and the profits are the Tribes' sole source of income. The State of California seeks to apply to the two Tribes Cal.Penal Code Ann. § 326.5 (West Supp.1987). That statute does not entirely prohibit the playing of bingo but permits it when the games are operated and staffed by members of designated charitable organizations who may not be paid for their services. Profits must be kept in special accounts and used only for charitable purposes; prizes may not exceed $250 per game. Asserting that the bingo games on the two reservations violated each of these restrictions, California insisted that the Tribes comply with state law.3 Riverside

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County also sought to apply its local Ordinance No. 558, regulating bingo, as well as its Ordinance No. 331, prohibiting the playing of draw poker and the other card games.

The Tribes sued the county in Federal District Court seeking a declaratory judgment that the county had no authority to apply its ordinances inside the reservations and an injunction against their enforcement. The State intervened, the facts were stipulated, and the District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Court of

Appeals for the Ninth Circuit affirmed, 783 F.2d 900 (1986), the State and the county appealed, and we postponed jurisdiction to the hearing on the merits. 476 U.S. 1168, 106 S.Ct. 2888, 90 L.Ed.2d 975.4

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I

The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory," United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided. Here, the State insists that Congress has twice given its express consent: first in Pub.L. 280 in 1953, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 ed. and Supp. III), and second in the Organized Crime Control Act in 1970, 84 Stat. 937, 18 U.S.C. § 1955. We disagree in both respects.

In Pub.L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country 5 within the States and provided for the assumption of jurisdiction by other States. In § 2, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State.6 Section 4's grant of civil jurisdiction was more lim-

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ited.7 In Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. Id., at 385, 388-390, 96 S.Ct., at 2109, 2110-2112. We held, therefore, that Minnesota could not apply its personal property tax within the reservation. Congress' primary concern in enacting Pub.L. 280 was combating lawlessness on reservations. Id., at 379-380, 96 S.Ct., at 2106-2107. The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society. Id., at 387, 96 S.Ct., at 2110. We recognized that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

The Minnesota personal property tax at issue in Bryan was unquestionably civil in nature. The California bingo statute is not so easily categorized. California law permits bingo

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games to be conducted only by charitable and other specified organizations, and then only by their members who may not receive any wage or profit for doing so; prizes are limited and receipts are to be segregated and used only for charitable purposes. Violation of any of these provisions is a misdemeanor. California insists that these are criminal laws which Pub.L. 280 permits it to enforce on the reservations.

Following its earlier decision in Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy, 694 F.2d 1185 (CA 9 1982), cert. denied, 461 U.S. 929, 103 S.Ct. 2091, 77 L.Ed.2d 301 (1983), which also involved the applicability of § 326.5 of the California Penal Code to Indian reservations, the Court of Appeals rejected this submission. 783 F.2d, at 901-903. In Barona, applying what it thought to be the civil/criminal dichotomy drawn in Bryan v. Itasca County, the Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. Inquiring into the nature of § 326.5, the Court of Appeals held that it was regulatory rather than prohibitory.8 This was the analysis employed, with similar results,

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by the Court of Appeals for the Fifth Circuit in Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (1981), cert. denied, 455 U.S. 1020, 102 S.Ct. 1717, 72 L.Ed.2d 138 (1982), which the Ninth Circuit found persuasive.9

We are persuaded that the prohibitory/regulatory distinction is consistent with Bryan's construction of Pub.L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in the present case, the court reexamined the state law and reaffirmed its holding in Barona, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here.

There is surely a fair basis for its conclusion. California does not prohibit all forms of gambling. California itself operates a state lottery, Cal.Govt. Code Ann. § 8880 et seq. (West Supp.1987), and daily encourages its citizens to participate

in this state-run gambling. California also permits parimutuel horse-race betting. Cal.Bus. & Prof.Code Ann. §§ 19400-19667 (West 1964 and Supp.1987). Although certain enumerated gambling games are prohibited under Cal.Penal Code Ann. § 330 (West Supp.1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Brief for

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Appellees 47-48. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games must be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.10

California argues, however, that high stakes, unregulated bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

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This view, adopted here and by the Fifth Circuit in the Butterworth case, we find persuasive. Accordingly, we conclude that Pub.L. 280 does not authorize California to enforce Cal.Penal Code Ann. § 326.5 (West Supp.1987) within the Cabazon and Morongo Reservations.11

California and Riverside County also argue that the Organized Crime Control Act (OCCA) authorizes the application of their gambling laws to the tribal bingo enterprises. The OCCA makes certain violations of state and local gambling laws violations of federal law.12 The Court of Appeals re-

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jected appellants' argument, relying on its earlier decisions in United States v. Farris, 624 F.2d 890 (CA9 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 920, 66

L.Ed.2d 839 (1981), and Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy, 694 F.2d 1185 (CA 9 1982). 783 F.2d, at 903. The court explained that whether a tribal activity is "a violation of the law of a state" within the meaning of OCCA depends on whether it violates the "public policy" of the State, the same test for application of state law under Pub.L. 280, and similarly concluded that bingo is not contrary to the public policy of California.13

The Court of Appeals for the Sixth Circuit has rejected this view. United States v. Dakota, 796 F.2d 186 (1986).14 Since the OCCA standard is simply whether the gambling business is being operated in "violation of the law of a State," there is no basis for the regulatory/prohibitory distinction that it agreed is suitable in construing and applying Pub.L. 280. 796 F.2d, at 188. And because enforcement of OCCA is an exercise of federal rather than state authority, there is no danger of state encroachment on Indian tribal sovereignty. Ibid. This latter observation exposes the flaw in appellants' reliance on OCCA. That enactment is indeed a federal law that, among other things, defines certain federal crimes over which the district courts have exclusive jurisdiction.15 There is nothing in OCCA indicating that the States

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are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government.16 Whether or not, then, the Sixth Circuit is right and the Ninth Circuit wrong about the coverage of OCCA, a matter that we do not decide, there is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes.

II

Because the state and county laws at issue here are imposed directly on the Tribes that operate the games, and are not expressly permitted by Congress, the Tribes argue that the judgment below should be affirmed without more. They rely on the statement in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-171, 93 S.Ct. 1257, 1261-1262, 36 L.Ed.2d 129 (1973), that " '[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply' " (quoting United States Dept. of the Interior, Federal Indian Law 845 (1958)). Our cases, however, have not established an inflexible per se rule pre-

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cluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.17 "[U]nder 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." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 611 (1983) (footnotes omitted). Both Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), are illustrative. In those decisions we held that, in the absence of express congressional permission, a State could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian

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customers. Both cases involved nonmembers entering and purchasing tobacco products on the reservations involved. The State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators.18

This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." Mescalero, 462 U.S., at 333, 334, 103 S.Ct., at 2385, 2386. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. Id., at 334-335, 103 S.Ct., at 2386-2387.19 See also,

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Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980).

These are important federal interests. They were reaffirmed by the President's 1983 Statement on Indian Policy.20 More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to

implement these policies by promoting tribal bingo enterprises.21 Under the Indian Financing Act of 1974, 25

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U.S.C. § 1451 et seq. (1982 ed. and Supp.III), the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities. See S.Rep. No. 99-493, p. 5 (1986); Mashantucket Pequot Tribe v. McGuigan, 626 F.Supp. 245, 246 (Conn.1986). The Department of Housing and Urban Development and the Department of Health and Human Services have also provided financial assistance to develop tribal gaming enterprises. See S.Rep. No. 99-493, supra, at 5. Here, the Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. See H.R.Rep. No. 99-488, p. 10 (1986). The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. § 81, and has issued detailed guidelines governing that review.22 App. to Motion to Dismiss Appeal or Affirm Judgment 63a-70a.

These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal gov-

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ernments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

California seeks to diminish the weight of these seemingly important tribal interests by asserting that the Tribes are merely marketing an exemption from state gambling laws. In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S., at 155, 100 S.Ct., at 2082, we held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere." We stated that "[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." Ibid. Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and

depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games.23 The tribal bingo enterprises are

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similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the "concerted and sustained" management of reservation land and wildlife resources. New Mexico v. Mescalero Apache Tribe, 462 U.S., at 341, 103 S.Ct., at 2390. The Mescalero project generates funds for essential tribal services and provides employment for tribal members. We there rejected the notion that the Tribe is merely marketing an exemption from state hunting and fishing regulations and concluded that New Mexico could not regulate on-reservation fishing and hunting by non-Indians. Ibid. Similarly, the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.

The State also relies on Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), in which we held that California could require a tribal member and a federally licensed Indian trader operating a general store on a reservation to obtain a state license in order to sell liquor for off-premises consumption. But our decision there rested on the grounds that Congress had never recognized any sovereign tribal interest in regulating liquor traffic and that Congress, historically, had plainly anticipated that the States would exercise concurrent authority to regulate the use and distribution of liquor on Indian reservations. There is no such traditional federal view governing the outcome of this case, since, as we have explained, the current federal policy is to promote precisely what California seeks to prevent.

The sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime. To the extent that the State seeks to prevent any and all bingo

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games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant and the state and county laws are pre-empted. See n. 3, supra. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted. The State insists that the high stakes offered at tribal games are attractive to organized crime, whereas the controlled games authorized under California law are not. This is surely a legitimate concern, but we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case. California does not allege any present criminal involvement in the Cabazon and Morongo enterprises, and the Ninth Circuit discerned none. 783 F.2d, at 904. An

official of the Department of Justice has expressed some concern about tribal bingo operations,24 but far from any action being taken evidencing this concern—and surely the Federal Government has the authority to forbid Indian gambling enterprises—the prevailing federal policy continues to support these tribal enterprises, including those of the Tribes involved in this case.25

We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enter-

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prises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club. We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice O'CONNOR and Justice SCALIA join, dissenting.

Unless and until Congress exempts Indian-managed gambling from state law and subjects it to federal supervision, I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. Congress has not pre-empted California's prohibition against high-stakes bingo games and the Secretary of the Interior plainly has no authority to do so. While gambling provides needed employment and income for Indian tribes, these benefits do not, in my opinion, justify tribal operation of currently unlawful commercial activities. Accepting the majority's reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises. As the law now stands, I believe tribal entrepreneurs, like others who might derive profits from catering to non-Indian customers, must obey applicable state laws.

In my opinion the plain language of Pub.L. 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 ed. and Supp.III), authorizes California to enforce its prohibition against commercial gambling on Indian reservations. The State prohibits bingo games that are not operated by members of designated charitable organizations or which offer prizes in excess of $250 per game. Cal.Penal Code Ann. § 326.5 (West Supp.1987). In § 2 of Pub.L. 280, Con-

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gress expressly provided that the criminal laws of the State of California "shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U.S.C. § 1162(a). Moreover, it provided in § 4(a) that the civil laws of California "that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360(a) (1982 ed., Supp.III).

It is true that in Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), we held that Pub.L. 280 did not confer civil jurisdiction on a State to impose a personal property tax on a mobile home that was owned by a reservation Indian and located within the reservation. Moreover, the reasoning of that decision recognizes the importance of preserving the traditional aspects of tribal sovereignty over the relationships among reservation Indians. Our more recent cases have made it clear, however, that commercial transactions between Indians and non-Indians—even when conducted on a reservation—do not enjoy any blanket immunity from state regulation. In Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), respondent, a federally licensed Indian trader, was a tribal member operating a general store on an Indian reservation. We held that the State could require Rehner to obtain a state license to sell liquor for off-premises consumption. The Court attempts to distinguish Rice v. Rehner as resting on the absence of a sovereign tribal interest in the regulation of liquor traffic to the exclusion of the States. But as a necessary step on our way to deciding that the State could regulate all tribal liquor sales in Indian country, we recognized the State's authority over transactions, whether they be liquor sales or gambling, between Indians and non-Indians: "If there is any interest in tribal sovereignty implicated by imposition

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of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other members of the Pala Tribe on the Pala Reservation." Id., at 721, 103 S.Ct., at 3297. Similarly, in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), we held that a State could impose its sales and cigarette taxes on non-Indian customers of smokeshops on Indian reservations.

Today the Court seems prepared to acknowledge that an Indian tribe's commercial transactions with non-Indians may violate "the State's public policy." Ante, at 209. The Court reasons, however, that the operation of high-stakes bingo games does not run afoul of California's public policy because the State permits some forms of gambling and, specifically, some forms of bingo. I find this approach to "public policy" curious, to say the least. The State's policy concerning gambling is to authorize certain specific gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated

commercial lotteries that are operated for private profit.1 To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is con-

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sistent with public policy because the State allows driving at speeds of up to 55 miles an hour.

In my view, Congress has permitted the State to apply its prohibitions against commercial gambling to Indian tribes. Even if Congress had not done so, however, the State has the authority to assert jurisdiction over appellees' gambling activities. We recognized this authority in Washington v. Confederated Tribes, supra; the Court's attempt to distinguish the reasoning of our decision in that case is unpersuasive. In Washington v. Confederated Tribes, the Tribes contended that the State had no power to tax on-reservation sales of cigarettes to non-Indians. The argument that we rejected there has a familiar ring:

"The Tribes contend that their involvement in the operation and taxation of cigarette marketing on the reservation ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. The primary argument is economic. It is asserted that smokeshop cigarette sales generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations. Most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices the smokeshops charge by virtue of their claimed exemption from state taxation. If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-a-vis businesses in surrounding areas." Id., 447 U.S., at 154, 100 S.Ct., at 2081-2082.

"What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." Id., at 155, 100 S.Ct., at 2082.

In Confederated Tribes, the tribal smokeshops offered their customers the same products, services, and facilities that other tobacconists offered to their customers. Al-

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though the smokeshops were more modest than the bingo palaces involved in this case, presumably they were equally the product of tribal labor and tribal capital. What made them successful, however, was the value of the exemption

that was offered to non-Indians "who would normally do their business elsewhere." Id., at 155, 100 S.Ct., at 2082.

Similarly, it is painfully obvious that the value of the Tribe's asserted exemption from California's gambling laws is the primary attraction to customers who would normally do their gambling elsewhere. The Cabazon Band of Mission Indians has no tradition or special expertise in the operation of large bingo parlors. See Declaration of William J. Wallace, ¶ 2, App. 153, 171. Indeed, the entire membership of the Cabazon Tribe—it has only 25 enrolled members—is barely adequate to operate a bingo game that is patronized by hundreds of non-Indians nightly. How this small and formerly impoverished Band of Indians could have attracted the investment capital for its enterprise without benefit of the claimed exemption is certainly a mystery to me.

I am entirely unpersuaded by the Court's view that the State of California has no legitimate interest in requiring appellees' gambling business to comply with the same standards that the operators of other bingo games must observe. The State's interest is both economic and protective. Presumably the State has determined that its interest in generating revenues for the public fisc and for certain charities outweighs the benefits from a total prohibition against publicly sponsored games of chance. Whatever revenues the Tribes receive from their unregulated bingo games drain funds from the state-approved recipients of lottery revenues just as the tax-free cigarette sales in the Confederated Tribes case diminished the receipts that the tax collector would otherwise have received.

Moreover, I am unwilling to dismiss as readily as the Court does the State's concern that these unregulated high-stakes bingo games may attract organized criminal infiltration.

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Brief for Appellants 25-26, 29; Reply Brief for Appellants 12. Comprehensive regulation of the commercial gambling ventures that a State elects to license is obviously justified as a prophylactic measure even if there is presently no criminal activity associated with casino gambling in the State. Indeed, California regulates charitable bingo, horseracing, and its own lottery. The State of California requires that charitable bingo games may only be operated and staffed by members of designated charitable organizations, and that proceeds from the games may only be used for charitable purposes. Cal.Penal Code Ann. § 326.5 (West Supp.1987). These requirements for staffing and for dispersal of profits provide bulwarks against criminal activity; neither safeguard exists for bingo games on Indian reservations.2 In my judgment, unless Congress authorizes and regulates these commercial gambling ventures catering to non-Indians, the State has a legitimate law enforcement interest in proscribing them.

Appellants and the Secretary of the Interior may well be correct, in the abstract, that gambling facilities are a sensible way to generate revenues that are badly needed by reservation Indians. But the decision to adopt, to reject, or to define the precise contours of such a course of action, and thereby to set aside the substantial public policy concerns of a sovereign State, should be made by the Congress of the United States. It should not be made by this Court, by the temporary occupant of the Office of the Secretary of the Interior, or by non-Indian entrepreneurs who are experts in gambling management but not necessarily dedicated to serving the future well-being of Indian tribes.

I respectfully dissent.

1. The Cabazon Reservation was originally set apart for the "permanent use and occupancy" of the Cabazon Indians by Executive Order of May 15, 1876. The Morongo Reservation also was first established by Executive Order. In 1891, in the Mission Indian Relief Act, 26 Stat. 712, Congress declared reservations "for the sole use and benefit" of the Cabazon and Morongo Bands. The United States holds the land in trust for the Tribes. The governing bodies of both Tribes have been recognized by the Secretary of the Interior. The Cabazon Band has 25 enrolled members and the Morongo Band has approximately 730 enrolled members.

2. The Cabazon ordinance authorizes the Band to sponsor bingo games within the reservation "[i]n order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues" and provides that net revenues from the games shall be kept in a separate fund to be used "for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes." App. to Brief for Appellees 1b-3b. The ordinance further provides that no one other than the Band is authorized to sponsor a bingo game within the reservation, and that the games shall be open to the public, except that no one under 18 years old may play. The Morongo ordinance similarly authorizes the establishment of a tribal bingo enterprise and dedicates revenues to programs to promote the health, education, and general welfare of tribal members. Id., at 1a-6a. It additionally provides that the games may be conducted at any time but must be conducted at least three days per week, that there shall be no prize limit for any single game or session, that no person under 18 years old shall be allowed to play, and that all employees shall wear identification.

3. The Tribes admit that their games violate the provision governing staffing and the provision setting a limit on jackpots. They dispute the State's assertion that they do not maintain separate funds for the bingo operations. At oral argument, counsel for the State asserted, contrary to the position taken in the merits brief and contrary to the stipulated facts in this case, App. 65, ¶ 24, 82-83, ¶ 15, that the Tribes are among the charitable organizations authorized to sponsor bingo games under the statute. It is therefore unclear whether the State intends to put

the tribal bingo enterprises out of business or only to impose on them the staffing, jackpot limit, and separate fund requirements. The tribal bingo enterprises are apparently consistent with other provisions of the statute: minors are not allowed to participate, the games are conducted in buildings owned by the Tribes on tribal property, the games are open to the public, and persons must be physically present to participate.

4. The Court of Appeals "affirm[ed] the summary judgment and the permanent injunction restraining the County and the State from applying their gambling laws on the reservations." 783 F.2d, at 906. The judgment of the District Court declared that the state statute and county ordinance were of no force and effect within the two reservations, that the State and the county were without jurisdiction to enforce them, and that they were therefore enjoined from doing so. Since it is now sufficiently clear that the state and county laws at issue were held, as applied to the gambling activities on the two reservations, to be "invalid as repugnant to the Constitution, treaties or laws of the United States" within the meaning of 28 U.S.C. § 1254(2), the case is within our appellate jurisdiction.

5. "Indian country," as defined at 18 U.S.C. § 1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." This definition applies to questions of both criminal and civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427, n. 2, 95 S.Ct. 1082, 1084, n. 2, 43 L.Ed.2d 300 (1975). The Cabazon and Morongo Reservations are thus Indian country.

6. Section 2(a), codified at 18 U.S.C. § 1162(a), provides:

"Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . ., and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . .:

* * * * *

"California ..... All Indian country within the State."

7. Section 4(a), codified at 28 U.S.C. § 1360(a) (1982 ed. and Supp.III) provides:

"Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have

the same force and effect within such Indian country as they have elsewhere within the State:

* * * * *

"California ..... All Indian country within the State."

8. The Court of Appeals questioned whether we indicated disapproval of the prohibitory/regulatory distinction in Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). We did not. We rejected in that case an asserted distinction between state "substantive" law and state "regulatory" law in the context of 18 U.S.C. § 1161, which provides that certain federal statutory provisions prohibiting the sale and possession of liquor within Indian country do not apply "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country. . . ." We noted that nothing in the text or legislative history of § 1161 supported the asserted distinction, and then contrasted that statute with Pub.L. 280. "In the absence of a context that might possibly require it, we are reluctant to make such a distinction. Cf. Bryan v. Itasca County, 426 U.S. 373, 390 [96 S.Ct. 2102, 2111, 48 L.Ed.2d 710] (1976) (grant of civil jurisdiction in 28 U.S.C. § 1360 does not include regulatory jurisdiction to tax in light of tradition of immunity from taxation)." 463 U.S., at 734, n. 18, 103 S.Ct., at 3303, n. 18.

9. Seminole Tribe v. Butterworth was an action by the Seminole Tribe for a declaratory judgment that the Florida bingo statute did not apply to its operation of a bingo hall on its reservation. See also Mashantucket Pequot Tribe v. McGuigan, 626 F.Supp. 245 (Conn.1986); Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712 (WD Wis.1981).

10. Nothing in this opinion suggests that cock-fighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California. See post, at 222. The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory. The lower courts have not demonstrated an inability to identify prohibitory laws. For example, in United States v. Marcyes, 557 F.2d 1361, 1363-1365 (CA9 1977), the Court of Appeals adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Statute, 62 Stat. 686, 18 U.S.C. § 13. The court concluded that, despite limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature. See also United States v. Farris, 624 F.2d 890 (CA9 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 920, 66 L.Ed.2d 839 (1981), discussed in n. 13, infra.

11. Nor does Pub.L. 280 authorize the county to apply its gambling ordinances to the reservations. We note initially that it is doubtful that Pub.L. 280 authorizes the

application of any local laws to Indian reservations. Section 2 of Pub.L. 280 provides that the criminal laws of the "State" shall have the same force and effect within Indian country as they have elsewhere. This language seems clearly to exclude local laws. We need not decide this issue, however, because even if Pub.L. 280 does make local criminal/prohibitory laws applicable on Indian reservations, the ordinances in question here do not apply. Consistent with our analysis of Cal.Penal Code Ann. § 326.5 (West Supp.1987) above, we conclude that Ordinance No. 558, the bingo ordinance, is regulatory in nature. Although Ordinance No. 331 prohibits gambling on all card games, including the games played in the Cabazon card club, the county does not prohibit municipalities within the county from enacting municipal ordinances permitting these card games, and two municipalities have in fact done so. It is clear, therefore, that Ordinance No. 331 does not prohibit these card games for purposes of Pub.L. 280.

12. OCCA, 18 U.S.C. § 1955, provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more that $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." (Emphasis added.)

13. In Farris, in contrast, the court had concluded that a gambling business, featuring blackjack, poker, and dice, operated by tribal members on the Puyallup Reservation violated the public policy of Washington; the United States, therefore, could enforce OCCA against the Indians.

14. In Dakota, the United States sought a declaratory judgment that a gambling business, also featuring the playing of blackjack, poker, and dice, operated by two members of the Keweenaw Bay Indian Community on land controlled by the community, and under a license issued by the community, violated OCCA. The Court of Appeals held that the gambling business violated Michigan law and OCCA.

15. Title 18 U.S.C. § 3231 provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

16. See S.Rep. No. 99-493, p. 2 (1986). Federal law enforcement officers have the capability to respond to violations of OCCA on Indian reservations, as is apparent from Farris and Dakota. This is not a situation where the unavailability of a federal officer at a particular moment would likely result in nonenforcement. OCCA is directed at large-scale gambling enterprises. If state officers discover a gambling business unknown to federal authorities while performing their duties authorized by Pub.L. 280, there should be ample time for them to inform federal authorities, who would then determine whether investigation or other enforcement action was appropriate. A federal police officer is assigned by the Department of the Interior to patrol the Indian reservations in southern California. App. to Brief for Appellees D1-D7.

17. In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule. In Montana v. Blackfeet Tribe, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." Id., at 765, 105 S.Ct., at 2403. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 1114 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements "to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . . Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." Ibid. (emphasis added).

18. Justice STEVENS appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151, 100 S.Ct. 2578, 2587, 65 L.Ed.2d 665 (1980), in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law." It is even less correct when applied to the activities of tribes and tribal members within reservations.

19. In New Mexico v. Mescalero Apache Tribe, 462 U.S., at 335, n. 17, 103 S.Ct., at 2387, n. 17, we discussed a number of the statutes Congress enacted to promote tribal self-government. The congressional declarations of policy in the Indian Financing Act of 1974, as amended, 25 U.S.C. § 1451 et seq. (1982 ed. and Supp.III), and in the Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. § 450 et seq. (1982 ed. and Supp.III), are particularly significant in this case: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. § 1451. Similarly, "[t]he Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b).

20. "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. of Pres.Doc. 99 (1983).

21. The Court of Appeals relied on the following official declarations. 783 F.2d, at 904-905. A policy directive issued by the Assistant Secretary of the Interior on March 2, 1983, stated that the Department would "strongly oppose" any proposed legislation that would subject tribes or tribal members to state gambling regulation. "Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983. . . . A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced." The court also relied on an affidavit submitted by the Director of Indian Services, Bureau of Indian Affairs, on behalf of the Tribes' position:

"It is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination. All of these are federal goals for the tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983."

22. Among other things, the guidelines require that the contract state that no payments have been made or will be made to any elected member of the tribal government or relative of such member for the purpose of obtaining or maintaining the contract. The contractor is required to disclose information on all parties in interest to the contract and all employees who will have day-to-day management responsibility for the gambling operation, including names, home and business addresses, occupations, dates of birth, and Social Security numbers. The Federal Bureau of Investigation must conduct a name-and-record check on these persons before a contract may be approved. The guidelines also specify accounting procedures and cash management procedures which the contractor must follow.

23. An agent of the California Bureau of Investigation visited the Cabazon bingo parlor as part of an investigation of tribal bingo enterprises. The agent described the clientele as follows:

"In attendance for the Monday evening bingo session were about 300 players. . . . On row 5, on the front left side were a middle-aged latin couple, who were later joined by two young latin males. These men had to have the game explained to them. The middle table was shared with a senior citizen couple. The aisle table had 2 elderly women, 1 in a wheelchair, and a middle-aged woman. . . . A goodly portion of the crowd were retired age to senior citizens." App. 176. We are unwilling to assume that these patrons would be indifferent to the services offered by the Tribes.

24. Hearings on H.R. 4566 before the House Committee on Interior and Insular Affairs, 98th Cong., 2d Sess., 15-39, 66-75 (1984); App. 197-205.

25. Justice STEVENS' assertion, post, at 226, that the State's interest in restricting the proceeds of gambling to itself, and the charities it favors, justifies the prohibition or regulation of tribal bingo games is indeed strange. The State asserted no such discriminatory economic interest; and it is pure speculation that, in the absence of tribal bingo games, would-be patrons would purchase lottery tickets or would attend state-approved bingo games instead. In any event, certainly California has no legitimate interest in allowing potential lottery dollars to be diverted to non-Indian owners of card clubs and horse tracks while denying Indian tribes the opportunity to profit from gambling activities. Nor is California necessarily entitled to prefer the funding needs of state-approved charities over

the funding needs of the Tribes, who dedicate bingo revenues to promoting the health, education, and general welfare of tribal members.

1. The Court holds that Pub.L. 280 does not authorize California to enforce its prohibition against commercial gambling within the Cabazon and Morongo Reservations. Ante, at 212. The Court reaches this conclusion by determining that § 4(a) of Pub.L. 280, 28 U.S.C. § 1360(a), withholds from the States general civil regulatory authority over Indian tribes, and that the State's rules concerning gambling are regulatory rather than prohibitory. In its opinion, the Court dismisses the State's argument that high-stakes, unregulated bingo is prohibited with the contention that an otherwise regulatory law does not become a prohibition simply because it "is enforceable by criminal as well as civil means." Ante, at 211. Aside from the questionable merit of this proposition, it does not even address the meaning of § 2(a) of Pub.L. 280, 18 U.S.C. § 1162(a) (1982 ed., Supp. III), a provision which is sufficient to control the disposition of this case. See supra, at ----.

2. The Cabazon Band's bingo room was operated under a management agreement with an outside firm until 1986; the Morongo Band operates its bingo room under a similar management agreement. App. to Brief for Appellees, C-1 to C-3; Morongo Band of Mission Indians Tribal Bingo Enterprise Management Agreement, ¶ 4B, App. 97-98.

Post Cabazon

With tribes' rights of gaming thus affirmed in Seminole and Cabazon, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA). This Act circumscribes the rights recognized by the Supreme Court in Cabazon. Under IGRA, all gambling activities on the reservations are subject to each tribe's own gaming laws, ordinances, and commissions. Class II gambling (e.g., bingo style games, though such games may be played with electronic assistance) and Class III gambling (casino games and slot machines) are both subject to the oversight of the federal National Indian Gaming Commission. And Class III gambling may be subject to state regulation and oversight depending on how these are specified and negotiated in intergovernmental tribal-state agreements or compacts.

The following is the text of IGRA

Indian Gaming Regulatory Act

Sec. 2701 Findings

The Congress finds that -

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Sec. 2702. Declaration of policy

The purpose of this chapter is -

(1) 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;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Sec. 2703. Definitions

For purposes of this chapter -

(1) The term **"Attorney General"** means the Attorney General of the United States.

(2) The term **"Chairman"** means the Chairman of the National Indian Gaming Commission.

(3) The term **"Commission"** means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term **"Indian lands"** means -

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term **"Indian tribe"** means any Indian tribe, band, nation, or other organized group or community of Indians which -

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term **"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.

(7) (A) The term **"class II gaming"** means -

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term **"class II gaming"** does not include

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term **"class II gaming"** includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term **"class II gaming"** includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term **"class II gaming"** includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term **"class III gaming"** means all forms of gaming that are not class I gaming or class II gaming.

(9) The term **"net revenues"** means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses,

excluding management fees.

(10) The term **"Secretary"** means the Secretary of the Interior.

Sec. 2704. National Indian Gaming Commission

Establishment (a) There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

Composition; investigation; term of office; removal (b) (1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2) (A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4) (A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

> (B) Of the initial members of the Commission (i) two members, including the Chairman, shall have a term of office of three years; and (ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who -

> (A) has been convicted of a felony or gaming offense;
>
> (B) has any financial interest in, or management responsibility for, any gaming activity; or
>
> (C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

Vacancies (c) Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6) of this section.

Quorum (d) Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

Vice Chairman (e) The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

Meetings (f) The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

Compensation (g) (1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5.

(3) All members of the Commission shall be reimbursed in accordance with title 5 for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

Sec. 2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to -

(1) issue orders of temporary closure of gaming activities as provided in section 2713 (b) of this title;

(2) levy and collect civil fines as provided in section 2713 (a) of this title;

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710 (d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

Sec. 2706. Powers of Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders The Commission shall have the power, not subject to delegation -

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713 (a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations The Commission -

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in

accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) [Omitted]

(d) Application of Government Performance and Results Act.

in accordance with that Act.

Sec. 2707. Commission Staffing

(a) General Counsel. The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5, United States Code.

(b) Staff. The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title 5 USCS §§ 5101 et seq. and 5331 et seq.] relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) Temporary services. The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Federal agency personnel. Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this

Act, unless otherwise prohibited by law.

(e) Administrative support services. The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

http://www.nigc.gov/LawsRegulations/IndianGamingRegulatoryAct/tabid/605/Default.aspx

Sec. 2708. Commission; access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

Sec. 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act [enacted Oct. 17, 1988] relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

Sec. 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands

by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman. A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(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;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $ 25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health,

education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)

(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)

(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act [25 USCS § 2712],

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) [25

USCS § 2717(a)(1)] for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act [enacted Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation.

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act [enacted Oct. 17, 1988]; and

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b) [25 USCS § 2706(b)(1)-(4)];

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) [25 USCS § 2710(b)(2)(C)] and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 [25 USCS § 2717] in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe

having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)

(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)]. Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)

(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) (II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)

(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.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the

Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into

by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) [15 USCS § 1175] shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) Jurisdiction

(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(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).

(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) (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 [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 governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe 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 Act 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 Act, and the relevant provisions of the laws of the State, and

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

(8)

(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [25 USCS § 2711(b)-(d), (f)-(h)]. (e) Approval of ordinances. For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

Sec. 2711. Management contracts

(a) Class II gaming activity; information on operators.

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1) [25 USCS § 2710(b)(1)], but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;
(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval. The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least--

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and

income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues.

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension. By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection. (e) Disapproval. The Chairman shall not approve any contract if the Chairman determines that--

(1) any person listed pursuant to subsection (a)(1)(A) of this section--

(A) is an elected member of the governing body of the Indian tribe

which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land. No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority. The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission. (i) Investigation fee. The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

Sec. 2712. Review of existing ordinances and contracts

(a) Notification to submit. As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act [enacted Oct. 17, 1988], adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section.

(b) Approval or modification of ordinance or resolution.

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 11(b) of this Act [25 USCS § 2710(b)]. (

2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) conforms to the requirements of section 11(b) [25 USCS § 2710(b)], the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) does not conform to the requirements of section 11(b) [25 USCS § 2710(b)], the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance. (c) Approval or modification of management contract. (1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12 [25 USCS § 2711]. (2) If the Chairman determines that a management contract submitted under subsection (a), and the management contractor under such contract, meet the requirements of section 12 [25 USCS § 2711], the Chairman shall approve the management contract. (3) If the Chairman determines that a contract submitted under subsection (a), or the management contractor under a contract submitted under subsection (a), does not meet the requirements of section 12 [25 USCS § 2711], the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act

[enacted Oct. 17, 1988], the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

Sec. 2713. Civil penalties

(a) Authority; amount; appeal; written complaint.

(1) Subject to such regulations as may be prescribe Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $ 25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13 [25 USCS § 2710 or 2712].

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13 [25 USCS § 2710 or 2712], that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing.

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act [25 USCS § 2710 or 2712].

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor

involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision. A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

(d) Regulatory authority under tribal law. Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

Sec. 2714. Judicial review

Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

Sec. 2715. Subpoena and deposition authority

(a) Attendance, testimony, production of papers, etc. By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Geographical location. The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Refusal of subpoena; court order; contempt. Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or

documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Depositions; notice. A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Oath or affirmation required. Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witness fees. Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Sec. 2716. Investigative powers

(a) Confidential information. Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) Provision to law enforcement officials. The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) Attorney General. The Attorney General shall investigate activities associated with gaming authorized by this Act which may be a violation of Federal law.

Sec. 2717. Commission funding

(a)

(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each gaming operation that conducts a class II or class III gaming activity that is regulated by this Act.

(2)

(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be--

(i) no more than 2.5 percent of the first $ 1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $ 1,500,000, of the gross revenues from each activity regulated by this Act.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed 0.080 percent of the gross gaming revenues of all gaming operations subject to regulation under this Act.

(C) Inapplicability of Nov. 14, 1997 amendments to the Mississippi Band of Choctaw. Act Nov. 14, 1997, **P.L. 105-83**, Title I, § 123(a)(2)(C), **111 Stat. 1566**; Oct. 21, 1998, **P.L. 105-277**, Div A, § 101(e) [Title III, § 338], **112 Stat. 2681**-295, provides: "Nothing in subsection (a) of this section [amending this section] shall apply to the Mississippi Band of Choctaw."

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)

(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 2718 of this title, in an amount equal the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.http://www.nigc.gov/LawsRegulations/IndianGamingRegulatoryAct/tabid/605/Default.aspx

Sec. 2717a. Availability of class II gaming activity fees to carry out duties of Commission

In fiscal year 1990 and thereafter, fees collected pursuant to and as limited by section 18 of the Act shall be available to carry out the duties of the Commission, to remain available until expended.

Sec. 2718. Authorization of appropriations

(a) Subject to section 18, there are authorized to be appropriated, for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 18(a).

(b) Notwithstanding section 18, there are authorized to be appropriated to fund the operation of the Commission, $ 2,000,000 for fiscal year 1998, and $ 2,000,000 for each fiscal year thereafter. The amounts authorized to be appropriated in the preceding sentence shall be in addition to the amounts authorized to be appropriated under subsection (a).

Sec. 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act [enacted Oct. 17, 1988]; or

(2) the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct. 17, 1988] and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions.

(1) Subsection (a) will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of--

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by

the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to--

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected. Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Internal Revenue Code. (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code [26 USCS §§ 1441, 3402(q), 6041, and 6050I, and 4401 et seq.]) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) [25 USCS § 2710(d)(3)] that is in effect, in the same manner as such provisions apply to State gaming and wagering operations. (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of

this Act [enacted Oct. 17, 1988] unless such other provision of law specifically cites this subsection.

Sec. 2720. Dissemination of Information

Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

Sec. 2721. Severability

In the event that any section or provision of this Act, or amendment made by this Act, is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act, and amendments made by this Act, shall continue in full force and effect.

Seminole Tribe of Florida v. Florida (No. 94-12)

Syllabus

SUPREME COURT OF THE UNITED STATES

517 U.S. 44

Seminole Tribe of Florida v. Florida

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-12 Argued: October 11, 1995 --- Decided: March 27, 1996

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. 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. ___.

(a) The Eleventh Amendment presupposes that each State is a sovereign entity in our federal system, and that "'[i]t 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 expresse[d] its intent to abrogate the immunity" and has acted "pursuant to a valid exercise of power." 134 U.S. 1, 13. However, Congress may abrogate the States' sovereign immunity if it has "unequivocally expresse[d] 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 to abrogate. Pp. ___.

(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 indistinguishable from the Interstate Commerce Clause. Pp. ___.

(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 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. ___.

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 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 have wanted had it known that § 2710(d)(7) was beyond its authority. Pp. ___.

11 F.3d 1016, affirmed.

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.

REHNQUIST, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

517 U.S. 44

Seminole Tribe of Florida v. Florida

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-12 Argued: October 11, 1995 --- Decided: March 27, 1996

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 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 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).

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 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 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]

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, ¶ 24, *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 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]

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 in the negative, and we therefore affirm the Eleventh Circuit's dismissal of petitioner's suit. [n6]

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, "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 "'[i]t 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]

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 expresse[d] 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 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.,* 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

[t]he 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 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]

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 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 "preven[t] federal court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation,* 513 U.S. ___ (1994); 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 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 ("[T]he 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,* 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 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 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

[t]here is no principled basis for finding that congressional power under 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 protect[ing]" 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 "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]

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 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 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) ("[I]f 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 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. "[W]hen 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) (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 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, ("'[T]he 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. . . .'") (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 -- "contradict[ed] 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 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 preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment. *Id.* at 454. As the dissent in *Union Gas* made 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) (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 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 ___, 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 "attend[ing]" 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 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 reache[s] . . . 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:

[N]either 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, 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 nonconsenting 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 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 ("[T]he 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.

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 sovereign immunity, instead relying upon the now-discrSyllabus & Opinions Only in *Chisholm v. Georgia,* 2 Dall. 419 (1793). *See, e.g., post* at ___ 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 ___.

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 requirement that there be a "justiciable" controversy, is a constitutionally grounded 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 ___, 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 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 ___. 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]

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

[t]he Framer's 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 ___. 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]

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 lawmaking 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 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.

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 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 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 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]

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 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]

It is so ordered.

1. 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).

2. 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.

3. 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).

4. 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.

5. 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.

6. 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.

7. 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).

8. 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.

9. 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 ___. 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.

10. 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).

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

12. 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 "give[s] 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 ___. But that statement, perhaps ambiguous when read in isolation, was preceded by the following:

[J]urisdiction 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).

13. 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").

14. 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).

15. 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.

16. 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 ___ 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").

17. 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 ___. 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).

18. 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).

STEVENS, J., Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

517 U.S. 44

Seminole Tribe of Florida v. Florida

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-12 Argued: October 11, 1995 --- Decided: March 27, 1996

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 (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, environmental law, and the regulation of our vast national economy. [n1]

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 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]

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 reprobated with so much warmth, and with whose sentiments in that particular I most cordially join.

Id. at 434 (emphasis added).

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 Congress' power to determine the scope of a State's sovereign immunity in federal court.

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.

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 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]

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 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.

The language of Article III certainly gives no indication 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 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 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 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 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 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 an unconsenting State. [n10]

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 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 ___. 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. *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*-jurisdictional 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 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]

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]

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]

In *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 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.

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.

[T]here 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 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, 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 congressional 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 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 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]

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 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.

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 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]

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 formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). 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 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]

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 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 respectfully dissent.

1. See, e.g., Pennsylvania v. Union Gas Co., 496 U.S. 1 (1989) (holding that a federal court may order a State to pay cleanup 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).

2. 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 common law's recognition of sovereign immunity.

3. 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.*

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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, 492 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.

13. 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).

14. 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.

15. 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.

16. See STEVENS, Is Justice Irrelevant?, 87 NW Law Rev. 1121, 1124-1125 (1993).

17. 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.

18. 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.

SOUTER, J., Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

517 U.S. 44

Seminole Tribe of Florida v. Florida

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-12 Argued: October 11, 1995 --- Decided: March 27, 1996

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 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 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.

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'* 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'* 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, 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. *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").

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 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 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 pre-ratification questions about state immunity from suit or liability centered. [n4]

Later in my discussion I will canvass the details of the debate among the Framers and other leaders of the time, *see infra* at ___; 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 ("[T]he 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 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' preexisting 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 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).

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 ___, 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 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]

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, 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, 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 intentions 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:

[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.

Gazette of the United States 303 (Feb. 20, 1793).

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]

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 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 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).

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]

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]

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 overrules *Union Gas* and holds just the opposite. In deciding how to choose between these two positions, the place to begin is with *Hans'* 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'* 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.

A

The Louisiana plaintiff in *Hans* held bonds issued by that State, 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. Indeed, Bradley explicitly admitted that

[i]t is true, the amendment does so read [as to permit Hans' 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 pre-ratification 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 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]

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 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 and may enforce those opinions by penalties. It would be hazarding 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' 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 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]

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.

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 ___. 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,

[f]or 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 ___. 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 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 ___.

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 nonconsenting States.

Id. at 322. [n19] This statement certainly is true to *Hans,* which clearly recognized a preexisting 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.

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 "limit[s] and control[s]" 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) ("[T]he 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, 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 ___. [n22] More generally, the proponents of the Court's theory have repeatedly referred to state sovereign immunity as a "background principle," *ante* at ___, "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,* 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.

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, 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 ___. 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 ___.

If these examples were not enough to distinguish *Hans'* rationale of a preexisting 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 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.

Hans itself recognized that an "observation [in a prior case that] was unnecessary to the decision, and in that sense *extrajudicial* . . . 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. ___, ___ (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend"); *Bennis v. Michigan,* 516 U.S. ___, ___ (1996). But because the Court disregards this norm today,

I must consider the soundness of *Hans'* 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'* 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 ___. 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, *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).

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,

[w]e 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 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'* resort to a common law principle to limit the Constitution's contrary text.

1
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
[t]he 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]
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 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.
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 that,

[f]or 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, "[s]ocial and geographical conditions contributed also to make the work of receiving and reshaping the common law exceptionally difficult." Pound, *supra* at 7.

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,

[t]he 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, "[l]egislatures 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 "suitab[ility] to local institutions and conditions" was "incomparably the most important" principle of reception in the new states).

2

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 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").

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 fundamental common law protections associated with due process, *see, e.g.,* 3 Elliot's Debates 451 (George Nicholas, Virginia 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 ___.

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) (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 to have existed.

Finally, the Framers' aversion to a general federal 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.

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 "[i]t would have been untenable to maintain that the body of British common law had been adopted by the Constitution . . . "). Madison concluded that

[i]t 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 ___. The evidence is even more specific, however, that there was no pervasive understanding that sovereign immunity had limited federal question jurisdiction.

1

As I have already noted briefly, *see supra* at ___, 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 "give[s] 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"); [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,

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 ___. But there is no such mandate to be found.

As I have already said, the immediate context 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 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. . . . [u]nless . . . 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 "[t]he circumstances which are necessary to produce an alienation of state 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:

[A]s 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 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 alienate and extinguish a preexisting 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 "[s]tate 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, 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.

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 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 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.

2

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 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) (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 "shatter[ed] . . . 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' 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

[t]hey 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] Under such a scheme, Alexander Hamilton explained,

[i]t 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

[t]he 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).

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 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:

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 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 "[w]here 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 government. 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 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.

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

[n]o 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 overrule 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 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 pre-ratification 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 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]

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 ___. [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 capable of enforcing their federal rights directly against an intransigent state?

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 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.

1

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 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,

[s]hared 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. . . . [T]he 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]

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]

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 "[t]he 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 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]

2

History confirms the wisdom of Madison's abhorrence 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). [n60]

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 ostensible effort to give content to some 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 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:

[S]ome 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. . . .

. . . [I]t 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 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 and Distrust 52 (1980). It should take more than references to "background principle[s]," *ante* at ___, and "implicit limitation[s]," *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 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 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 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

[r]emedies 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. 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 attaint 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 attaint was ultimately overtaken by the more moderate common law writs of certiorari and mandamus, "operat[ing] 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 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 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 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 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 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 play 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. 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 "affec[t] the federal balance," *United States v. Bass,* 404 U.S. 336, 349 (1971). *See also Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'") (quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. at 242); *Gregory v. Ashcroft,* 501 U.S. 452, 460-461 (1991). Our habitual caution makes sense for just the reason we mentioned in *Dellmuth v. Muth,* 491 U.S. 223, 230-231 (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 stop short of making its intention manifest.

C

There is no question that, by its own terms, *Young's* indispensable rule authorizes the exercise of federal jurisdiction over respondent Chiles. Since this case does not, of course, involve retrospective relief, *Edelman's* limit is irrelevant, and there is no other jurisdictional limitation. Obviously, for jurisdictional purposes, it makes no difference in principle whether the injunction orders an official not to act, as in *Young,* or requires the official to take some positive step, as in *Milliken* or *Quern.* Nothing, then, in this case renders *Young* unsuitable as a jurisdictional basis for determining on the merits whether the petitioners are entitled to an order against a state official under general equitable doctrine. The Court does not say otherwise, and yet it refuses to apply *Young.* There is no adequate reason for its refusal.

No clear statement of intent to displace the doctrine of *Ex parte Young* occurs in IGRA, and the Court is instead constrained to rest its effort to skirt *Young* on a series of suggestions thought to be apparent in Congress's provision of "intricate procedures" for enforcing a State's obligation under the Act. The procedures are said to implicate a rule against judicial creativity in devising supplementary procedures; it is said that applying *Young* would nullify the statutory procedures; and finally, the statutory provisions are said simply to reveal a congressional intent to preclude the application of *Young.*

1
The Court cites *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988), in support of refraining from what it seems to think would be judicial creativity in recognizing the applicability of *Young.* The Court quotes from *Chilicky* for the general proposition that when Congress has provided what it considers adequate remedial mechanisms for violations of federal law, this Court should not "creat[e]" additional remedies. *Ante* at ___. The Court reasons 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 ___.
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 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. ___, ___ (1994).

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 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 preempts procedural rules devised by Congress for particular kinds of cases that may depend on *Young* for federal jurisdiction. [n61]

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 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 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]

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 with the specific intent to apply to officer liability under *Young.* It provides that

[t]he 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.

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 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 ___, 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 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 longstanding 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 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'* 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 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 "[t]he 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 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.

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.

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.

1. 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.

2. 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., Langford v. United States, 101 U.S. 341, 342-343 (1880); Nevada v. Hall, 440 U.S. 410, 415 (1979).

3. The text reads that

[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, 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.

4. 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).

5. 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 necessary 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 ___. 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).

6. See also 2 Dall. at 435 ("[I]t 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 preexistent 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).

7. 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.

8. 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.

9. 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.

10. 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").

11. 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").

12. 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 ___. 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 ___. 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 ("[T]he 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.

13. The majority chides me that the "lengthy analysis of the text of the Eleventh Amendment is directed at a straw man," ante at ___. But plain text is the Man of Steel in a confrontation with "background principle[s]" and "'postulates which limit and control,'" ante at ___. 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.) ("[O]nly 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.

14. Professor Jackson has noted the "remarkabl[e] consisten[cy]" of the scholarship on this point, Jackson, 98 Yale L.J. at 44, n. 179. See also n. 8, supra.

15. 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 ___.

16. 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;

[u]nder 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 "[i]t 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").

17. Today's majority condemns my attention to Hans' historical circumstances as "a disservice to the Court's traditional method of adjudication." Ante at ___. 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).

18. 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' "other" Eleventh Amendment. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. ___, ___ (1994) (STEVENS, J., concurring); see also Pennsylvania v. Union Gas Co., supra at 23-29 (STEVENS, J., concurring) (same).

19. 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 "rel[ying] on precepts underlying but not explicit in Art. III and the Eleventh Amendment").

20. 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.

21. See also Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952); Fitts v. McGhee, 172 U.S. 516, 524-525 (1899).

22. 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).

23. Indeed, The Chief Justice could hardly have been clearer in Fry v. United States, 421 U.S. 542 (1975), where he explained that

[t]he 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).

24. 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 "dismiss[ed] . . . as dicta."

25. 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).

26. The Court seeks to disparage the common law roots of the doctrine, and the consequences of those roots which I outline infra at ___ & ___, 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 ___ (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").

27. 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").

28. 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).

29. 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 adhesion 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).

30. 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).

31. 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'").

32. 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.

33. 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 & Edgarton 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 "[i]t 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").

34. 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 ___ (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.

35. See, e.g., 2 Elliot's Debates 400 (Thomas Tredwell, New York Convention) ("[W]e are ignorant whether [federal proceedings] shall be according to the common, civil, the Jewish, or Turkish law. . . . ").

36. 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, "[o]ur 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 "[t]he 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 "[t]he 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").

37. 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.

38. 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.

39. The Court accuses me of quoting this statement out of context, ante at ___, 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' preexisting 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.

40. 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).

41. 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) ("[U]nder 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").

42. 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. McKitrick, The Age of Federalism 64 (1993) (suggesting that "[t]he 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).

43. 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

[t]he 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).

44. 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).

45. See Wood 530 (noting that James Wilson "[m]ore 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").

46. See also U.S. Term Limits, Inc. v. Thornton, 514 U.S. ___, ___ (1995) (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").

47. 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").

48. See, e.g., Amar, supra at 1436 ("By thus relocating 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] assum[e] a supercilious preeminence above the people who have formed it." 2 Dall. at 461.

49. 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").

50. See also Wood 466 ("[O]nce 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").

51. 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).

52. See, e.g., Prout v. Starr, 188 U.S. 537, 543 (1903) (acknowledging the immunity recognized in Hans and other cases, but observing that "[i]t 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 ___, 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 ___; 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 "[a]ll 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).

53. 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 ___, 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.

54. 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.

55. 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) ("[A]ll . . . 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. 500V (1777), in 7 Swindler, supra at 177-178 ("[S]uch parts of the common law of England . . . as together did form the law of the said colony [of New York] on [April 19, 1775], 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 ¶ 62, p. 212 (1995) ("[I]n 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,* ¶ 52 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).

56. 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 statues). 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. "[b]y 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 ___.

57. 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 & anti-republican doctrines." Letter from Madison to Washington (Oct. 18, 1787), reprinted in 3 Farrand 130, App. A. "[I]t 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. . . . [L]iterally every article of the Federalist Constitution and every amendment in the Bill of Rights rests on the repudiation of the British view").

58. 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) ("[A]n assumption of the constitutional design was that if Congress exercised [its enumerated] powers through legislation, its laws would supersede any competing ones").

59. The Court attempts to sidestep this history by distinguishing sovereign immunity as somehow different from other common law principles. Ante at ___. 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 ___, 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 ___. 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 ___, 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).

60. Cf. United States v. Lopez, 514 U.S. ___, ___ (1995) (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").

61. The Court accuses me of misrepresenting its argument. Ante at ___, 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.

62. See also Brennan v. Stewart, 834 F.2d 1248, 1252, n.6 (CA5 1988) ("[A]lthough 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).

63. 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).

64. 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.

65. 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) (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.

66. 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).

CARCIERI v. SALAZAR (No. 07-526)
497 F. 3d 15, reversed.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued.The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.See United States v. Detroit Timber & Lumber Co., 200 U. S. 321 .

SUPREME COURT OF THE UNITED STATES
CARCIERI, GOVERNOR OF RHODE ISLAND, et al. *v.* SALAZAR, SECRETARY OF THE INTERIOR, et al.

certiorari to the united states court of appeals for the first circuit

No. 07–526. Argued November 3, 2008—Decided February 24, 2009

The Indian Reorganization Act (IRA), enacted in 1934, authorizes the Secretary of Interior, a respondent here, to acquire land and hold it in trust "for the purpose of providing land for Indians," 25 U. S. C. §465, and defines "Indian" to "include all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction," §479. The Narragansett Tribe was placed under the Colony of Rhode Island's formal guardianship in 1709. It agreed to relinquish its tribal authority and sell all but two acres of its remaining reservation land in 1880, but then began trying to regain its land and tribal status. From 1927 to 1937, federal authorities declined to give it assistance because they considered the Tribe to be under state, not federal jurisdiction. In a 1978 agreement settling a dispute between the Tribe and Rhode Island, the Tribe received title to 1,800 acres of land in petitioner Charlestown in exchange for relinquishing claims to state land based on aboriginal title; and it agreed that the land would be subject to state law. The Tribe gained formal recognition from the Federal Government in 1983, and the Secretary of Interior accepted a deed of trust to the 1,800 acres in 1988. Subsequently, a dispute arose over whether the Tribe's plans to build housing on an additional 31 acres of land it had purchased complied with local regulations. While litigation was pending, the Secretary accepted the 31-acre parcel into trust. The Interior Board of Indian Appeals upheld that decision, and petitioners sought review. The District Court granted summary judgment to the Secretary and other officials, determining that §479's plain language defines "Indian" to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date; and concluding that, since the Tribe is currently federally recognized and

was in existence in 1934, it is a tribe under §479. In affirming, the First Circuit found §479 ambiguous as to the meaning of "now under Federal jurisdiction," applied the principles of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 , and deferred to the Secretary's construction of the provision to allow the land to be taken into trust.

Held: Because the term "now under federal jurisdiction" in §479 unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934, and because the Narragansett Tribe was not under federal jurisdiction in 1934, the Secretary does not have the authority to take the 31-acre parcel into trust. Pp. 7–16.

(a) When a statute's text is plain and unambiguous, *United States* v. *Gonzales*, 520 U. S. 1 , the statute must be applied according to its terms, see, *e.g.*, *Dodd* v. *United States*, 545 U. S. 353 . Here, whether the Secretary has authority to take the parcel into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction," which, in turn, depends on whether "now" refers to 1998, when the Secretary accepted the parcel into trust, or 1934, when Congress enacted the IRA. The ordinary meaning of "now," as understood at the time of enactment, was at "the present time; at this moment; at the time of speaking." That definition is consistent with interpretations given "now" by this Court both before and after the IRA's passage. See *e.g., Franklin* v. *United States*, 216 U. S. 559 ; *Montana* v. *Kennedy*, 366 U. S. 308 . It also aligns with the word's natural reading in the context of the IRA. Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of §479 at the time of enactment. The Secretary's additional arguments in support of his contention that "now" is ambiguous are unpersuasive. There is also no need to consider the parties' competing views on whether Congress had a policy justification for limiting the Secretary's trust authority to tribes under federal jurisdiction in 1934, since Congress' use of "now" in §479 speaks for itself and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249 . Pp. 7–13.

(b) The Court rejects alternative arguments by the Secretary and his *amici* that rely on statutory provisions other than §479 to support the Secretary's decision to take the parcel into trust for the Narragansetts. Pp. 13–15.

497 F. 3d 15, reversed.

Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Breyer, and Alito, JJ., joined. Breyer, J., filed a concurring opinion. Souter, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined. Stevens, J., filed a dissenting opinion.

Justice Thomas delivered the opinion of the Court.

The Indian Reorganization Act (IRA or Act) authorizes the Secretary of the Interior, a respondent in this case, to acquire land and hold it in trust "for the purpose of providing land for Indians." Ch. 576, §5, 48 Stat. 985, 25 U. S. C. §465. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." §479. The Secretary notified petitioners—the State of Rhode Island, its Governor, and the town of Charlestown, Rhode Island—that he intended to accept in trust a parcel of land for use by the Narragansett Indian Tribe in accordance with his claimed authority under the statute. In proceedings before the Interior Board of Indian Appeals (IBIA), the District Court, and the Court of Appeals for the First Circuit, petitioners unsuccessfully challenged the Secretary's authority to take the parcel into trust.

In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase "now under Federal jurisdiction" in §479. Petitioners contend that the term "now" refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were "under Federal jurisdiction" in 1934. The respondents argue that the word "now" is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are "under Federal jurisdiction" at the time that the land is accepted into trust.

We agree with petitioners and hold that, for purposes of §479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, §479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust. We reverse the judgment of the Court of Appeals.

I

At the time of colonial settlement, the Narragansett Indian Tribe was the indigenous occupant of much of what is now the State of Rhode Island. See Final Determination of Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48Fed. Reg. 6177 (1983) (hereinafter Final Determination). Initial relations between colonial settlers, the Narragansett Tribe, and the other Indian tribes in the region were peaceful, but relations deteriorated in the late 17th century. The hostilities peaked in 1675 and 1676 during the 2-year armed conflict known as King Philip's War. Hundreds of colonists and thousands of Indians died. See E. Schultz & M. Tougias, King Philip's War 5 (1999). The Narragansett Tribe, having been decimated, was placed under formal guardianship by the Colony of Rhode Island in 1709. 48 Fed. Reg. 6177.1

Not quite two centuries later, in 1880, the State of Rhode Island convinced the Narragansett Tribe to relinquish its tribal authority as part of an effort to assimilate

tribal members into the local population. See *Narragansett Indian Tribe* v. *National Indian Gaming Comm'n*, 158 F. 3d 1335, 1336 (CADC 1998). The Tribe also agreed to sell all but two acres of its remaining reservation land for $5,000. *Ibid.* Almost immediately, the Tribe regretted its decisions and embarked on a campaign to regain its land and tribal status. *Ibid.* In the early 20th century, members of the Tribe sought economic support and other assistance from the Federal Government. But, in correspondence spanning a 10-year period from 1927 to 1937, federal officials declined their request, noting that the Tribe was, and always had been, under the jurisdictionof the New England States, rather than the FederalGovernment.

Having failed to gain recognition or assistance from the United States or from the State of Rhode Island, the Tribe filed suit in the 1970's to recover its ancestral land, claiming that the State had misappropriated its territory in violation of the Indian Non-Intercourse Act, 25 U. S. C. §177.2 The claims were resolved in 1978 by enactment of the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U. S. C. §1701 *et seq*. Under the agreement codified by the Settlement Act, the Tribe received title to 1,800 acres of land in Charlestown, Rhode Island, in exchange for relinquishing its past and future claims to land based on aboriginal title. The Tribe also agreed that the 1,800 acres of land received under the Settlement Act "shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." §1708(a); see also §1712(a).

The Narragansett Tribe's ongoing efforts to gain recognition from the United States Government finally succeeded in 1983. 48 Fed. Reg. 6177. In granting formal recognition, the Bureau of Indian Affairs (BIA) determined that "the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." *Id*., at 6178. The BIA referred to the Tribe's "documented history dating from 1614" and noted that "all of the current membership are believed to be able to trace to at least one ancestor on the membership lists of the Narragansett community prepared after the 1880 Rhode Island 'detribalization' act." *Ibid.* After obtaining federal recognition, the Tribe began urging the Secretary to accept a deed of trust to the 1,800 acres conveyed to it under the Rhode Island Indian Claims Settlement Act. 25 CFR §83.2 (2008) (providing that federal recognition is needed before an Indian tribe may seek "the protection, services, and benefits of the Federal government"). The Secretary acceded to the Tribe's request in 1988. See *Town of Charlestown, Rhode Island* v. *Eastern Area Director, Bur. of Indian Affairs*, 18IBIA 67, 69 (1989).3

In 1991, the Tribe's housing authority purchased an additional 31 acres of land in the town of Charlestown adjacent to the Tribe's 1,800 acres of settlement lands. Soon thereafter, a dispute arose about whether the Tribe's planned construction of housing on that parcel had to comply with local regulations. *Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F. 3d 908, 911–912 (CA1 1996). The Tribe's primary argument for noncompliance—that its ownership of the parcel made it a "dependent Indian community" and thus "Indian country" under 18 U. S. C. §1151—ultimately failed. 89 F. 3d, at 913–922. But, while the litigation was pending, the

Tribe sought an alternative solution to free itself from compliance with local regulations: It asked the Secretary to accept the 31-acre parcel into trust for the Tribe pursuant to 25 U. S. C. §465. By letter dated March 6, 1998, the Secretary notified petitioners of his acceptance of the Tribe's land into trust. Petitioners appealed the Secretary's decision to the IBIA, which upheld the Secretary's decision. See *Town of Charlestown, Rhode Island* v. *Eastern Area Director, Bureau of Indian Affairs*, 35IBIA 93 (2000).

Petitioners sought review of the IBIA decision pursuant to the Administrative Procedure Act, 5 U. S. C. §702. The District Court granted summary judgment in favor of the Secretary and other Department of Interior officials. As relevant here, the District Court determined that the plain language of 25 U. S. C. §479 defines "Indian" to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date. *Carcieri* v. *Norton*, 290 F. Supp. 2d 167, 179–181 (RI 2003). According to the District Court, because it is currently "federally-recognized" and "existed at the time of the enactment of the IRA," the Narragansett Tribe "qualifies as an 'Indian tribe' within the meaning of §479." *Id.*,at 181. As a result, "the secretary possesses authority under §465 to accept lands into trust for the benefit of the Narragansetts." Ibid.

The Court of Appeals for the First Circuit affirmed, first in a panel decision, Carcieri v. *Norton*, 423 F. 3d 45 (2005), and then sitting en banc, 497 F. 3d 15 (CA1 2008). Although the Court of Appeals acknowledged that "[o]ne might have an initial instinct to read the word 'now' [in §479] . . . to mean the date of [the] enactment of the statute, June 18, 1934," the court concluded that there was "ambiguity as to whether to view the term … as operating at the moment Congress enacted it or at the moment the Secretary invokes it." *Id.*,at 26. The Court of Appeals noted that Congress has used the word "now" in other statutes to refer to the time of the statute's application, not its enactment. *Id.*,at 26–27. The Court of Appeals also found that the particular statutory context of §479 did not clarify the meaning of "now." On one hand, the Court of Appeals noted that another provision within the IRA, 25 U. S. C. §472, uses the term "now or hereafter," which supports petitioners' argument that "now," by itself, does not refer to future events. But on the other hand, §479 contains the particular application date of "June 1, 1934," suggesting that if Congress had wanted to refer to the date of enactment, it could have done so more specifically. 497 F. 3d, at 27. The Court of Appeals further reasoned that both interpretations of "now" are supported by reasonable policy explanations, *id.*,at 27–28, and it found that the legislative history failed to "clearly resolve the issue," *id.*, at 28.

Having found the statute ambiguous, the Court of Appeals applied the principles set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984) , and deferred to the Secretary's construction of the provision. 497 F. 3d, at 30. The court rejected petitioners' arguments that the Secretary's interpretation was an impermissible construction of the statute. *Id.*,at 30–34. It also held that petitioners had failed to demonstrate that the Secretary's interpretation

was inconsistent with earlier practices of the Department of Interior. Furthermore, the court determined that even if the interpretation were a departure from the Department's prior practices, the decision should be affirmed based on the Secretary's "reasoned explanation for his interpretation." *Id.*,at 34.

We granted certiorari, 552 U. S. ___ (2008), and now reverse.

II

This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States* v. *Gonzales*, 520 U. S. 1, 4 (1997) . If it is, we must apply the statute according to its terms. See, *e.g.*, *Dodd* v. *United States*, 545 U. S. 353, 359 (2005) ; *Lamie* v. *United States Trustee*, 540 U. S. 526, 534 (2004) ; *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000) ; *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917) .

The Secretary may accept land into trust only for "the purpose of providing land for Indians." 25 U. S. C. §465. "Indian" is defined by statute as follows:

"The term 'Indian' as used in this Act shall include all persons of Indian descent who are *members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation… ." §479 (emphasis added).

The parties are in agreement, as are we, that the Secretary's authority to take the parcel in question into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction." *Ibid.* That question, in turn, requires us to decide whether the word "now under Federal jurisdiction" refers to 1998, when the Secretary accepted the 31-acre parcel into trust, or 1934, when Congress enacted the IRA.

We begin with the ordinary meaning of the word "now," as understood when the IRA was enacted. *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 272 (1994) ; *Moskal* v. *United States*, 498 U. S. 103, 108–109 (1990) . At that time, the primary definition of "now" was "[a]t the present time; at this moment; at the time of speaking." Webster's New International Dictionary 1671 (2d ed. 1934); see also Black's Law Dictionary 1262 (3d ed. 1933) (defining "now" to mean "[a]t this time, or at the present moment" and noting that " '[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect …" (emphasis added)). This definition is consistent with interpretations given to the word "now" by this Court, both before and after passage of the IRA, with respect to its use in other statutes. See, *e.g.*, *Franklin* v. *United States*, 216 U. S. 559, 568–569 (1910)

(interpreting a federal criminal statute to have "adopted such punishment as the laws of the State in which such place is situated *now* provide for the like offense" (citing *United States* v. *Paul*, 6Pet. 141 (1832) (internal quotation marks omitted))); *Montana* v. *Kennedy*, 366 U. S. 308, 310–311 (1961) (interpreting a statute granting citizenship status to foreign-born "children of persons who *now* are, or have been citizens of the United States" (internal quotation marks omitted; emphasis deleted)).

It also aligns with the natural reading of the word within the context of the IRA. For example, in the original version of 25 U. S. C. §465, which provided the same authority to the Secretary to accept land into trust for "the purpose of providing land for Indians," Congress explicitly referred to current events, stating "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of [the] Navajo Indian Reservation . . . in the event that the proposed Navajo boundary extension measures *now* pending in Congress … become law." IRA, §5, 48 Stat. 985 (emphasis added).4 In addition, elsewhere in the IRA, Congress expressly drew into the statute contemporaneous *and* future events by using the phrase "now or hereafter." See 25 U. S. C. §468 (referring to "the geographic boundaries of any Indian reservation now existing or established hereafter"); §472 (referring to "Indians who may be appointed . . . to the various positions maintained, now or hereafter, by the Indian Office"). Congress' use of the word "now" in this provision, without the accompanying phrase "or hereafter," thus provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment. See *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumedthat Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of this provision at the time of enactment. In correspondence with those who would assist him in implementing the IRA, the Commissioner of Indian Affairs, John Collier, explained that:

"Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988), provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act* … ." Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (emphasis added).5

Thus, although we do not defer to Commissioner Collier's interpretation of this unambiguous statute, see *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 476 (1992) , we agree with his conclusion that the word "now" in §479 limits the definition of "Indian," and therefore limits the exercise of the Secretary's trust authority under §465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted.

The Secretary makes two other arguments in support of his contention that the term "now" as used in §479 is ambiguous. We reject them both. First, the Secretary argues that although the "use of 'now' can refer to the time of enactment" in the abstract, "it can also refer to the time of the statute's application." Brief for Respondents 18. But the susceptibility of the word "now" to alternative meanings "does not render the word . . . whenever it is used, ambiguous," particularly where "all but one of the meanings is ordinarily eliminated by context." *Deal* v. *United States*, 508 U. S. 129, 131–132 (1993) . Here, the statutory context makes clear that "now" does not mean "now or hereafter" or "at the time of application." Had Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§468 and 472, or it could have omitted the word "now" altogether. Instead, Congress limited the statute by the word "now" and "we are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp*., 442 U. S. 330, 339 (1979) .

Second, the Secretary argues that §479 left a gap for the agency to fill by using the phrase "shallinclude" in its introductory clause. Brief for Respondents 26–27. The Secretary, in turn, claims to have permissibly filled that gap by defining " 'Tribe' " and " 'Individual Indian' " without reference to the date of the statute's enactment. *Id.,* at 28 (citing 25 CFR §§151.2(b), (c)(1) (2008)). But, as explained above, Congress left no gap in 25 U. S. C. §479 for the agency to fill. Rather, it explicitly and comprehensively defined the term by including only three discrete definitions: "[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . [3] all other persons of one-half or more Indian blood." *Ibid.* In other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of "Indian" set forth in §479.6 Had it understood the word "include" in §479 to encompass tribes other than those satisfying one of the three §479 definitions, Congress would have not needed to enact these additional statutory references to specific Tribes.

The Secretary and his *amici* also go beyond the statutory text to argue that Congress had no policy justification for limiting the Secretary's trust authority to those tribes under federal jurisdiction in 1934, because the IRA was intended to strengthen Indian communities as a whole, regardless of their status in 1934. Petitioners counter that the main purpose of §465 was to reverse the loss of lands that Indians sustained under the General Allotment Act, see *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645 , n. 1 (2001), so the statute was limited to tribes under federal jurisdiction at that time because they were the tribes who lost their lands. We need not consider these competing policy views, because Congress' use of the word "now" in §479 speaks for itself and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992) .7

III

The Secretary and his supporting *amici* also offer two alternative arguments that rely on statutory provisions other than the definition of "Indian" in §479 to support the Secretary's decision to take this parcel into trust for the Narragansett Tribe. We reject both arguments.

First, the Secretary and several *amici* argue that the definition of "Indian" in §479 is rendered irrelevant by the broader definition of "tribe" in §479 and by the fact that the statute authorizes the Secretary to take title to lands "in the name of the United States in trust for the *Indian tribe* or individual Indian for which the land is acquired. " §465 (emphasis added); Brief for Respondents 12–14. But the definition of "tribe" in §479 itself refers to "any *Indian* tribe" (emphasis added), and therefore is limited by the temporal restrictions that apply to §479's definition of "Indian." See §479("The term 'tribe' wherever used in this Act shall be construed to refer to any *Indian* tribe, organized band, pueblo, or the Indians residing on one reservation" (emphasis added)). And, although §465 authorizes the United States to takeland in trust for an Indian tribe, §465 limits the Secretary's exercise of that authority "for the purpose of providing land for Indians." There simply is no legitimate way to circumvent the definition of "Indian" in delineating the Secretary's authority under §§ 465 and 479. 8

Second, amicus National Congress of American Indians (NCAI) argues that 25 U. S. C. §2202, which was enacted as part of the Indian Land Consolidation Act (ILCA), Title II, 96 Stat. 2517, overcomes the limitations set forth in §479 and, in turn, authorizes the Secretary's action. Section 2202 provides:

"The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)." (Alteration in original.)

NCAI argues that the "ILCA independently grants authority under Section 465 for the Secretary to execute the challenged trust acquisition." NCAI Brief 8. We do not agree.

The plain language of §2202 does not expand the power set forth in §465, which requires that the Secretary take land into trust only "for the purpose of providing land for Indians." Nor does §2202 alter the definition of "Indian" in §479, which is limited to members of tribes that were under federal jurisdiction in 1934.9 See *supra*, at 7–12. Rather, §2202 by its terms simply ensures that tribes may benefit from §465 even if they opted out of the IRA pursuant to §478, which allowed tribal members to reject the application of the IRA to their tribe. §478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application"). As a result, there is no conflict between §2202 and the limitation on the Secretary's authority to take lands contained in §465. Rather, §2202 provides additional protections to those who satisfied the definition of

"Indian" in §479 at the time of the statute's enactment, but opted out of the IRA shortly thereafter.

NCAI's reading of §2202 also would nullify the plain meaning of the definition of "Indian" set forth in §479 and incorporated into §465. Consistent with our obligation to give effect to every provision of the statute, *Reiter*, 442 U. S., at 339, we will not assume that Congress repealed the plain and unambiguous restrictions on the Secretary's exercise of trust authority in §§465 and 479 when it enacted §2202. "We have repeatedly stated . . . that absent 'a clearly expressed congressional intention,' . . . [a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.' " *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion) (quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974) , and *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936)).

IV

We hold that the term "now under Federal jurisdiction" in §479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed. Reg. 6177. Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government.'' Pet. for Cert. 6. The respondents' brief in opposition declined to contest this assertion. See Brief in Opposition 2–7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court's Rule 15.2. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

NOTES

[1] The Narragansett Tribe recognized today is the successor to two tribes, the Narragansett and the Niantic Tribes. The two predecessor Tribes shared territory and cultural traditions at the time of European settlement and effectively merged in the aftermath of King Philip's War. See Final Determination, 48 Fed. Reg. 6177.

[2] Title 25 U. S. C. §177 provides, in pertinent part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[3] The Tribe, the town, and the Secretary previously litigated issues relating to the

Secretary's acceptance of these 1,800 acres, and that matter is not presently before this Court. See generally Town of Charlestown, Rhode Island, 18 IBIA 67; Rhode Island v. Narragansett Indian Tribe, 19 F. 3d 685 (CA1 1994); Narragansett Indian Tribe v. Rhode Island, 449 F. 3d 16 (CA1 2006).

[4] The current version of §465 provides "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation . . . in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law."

[5] In addition to serving as Commissioner of Indian Affairs, John Collier was "a principal author of the [IRA]." United States v. Mitchell, 463 U. S. 206 , n. 21 (1983). And, as both parties note, he appears to have been responsible for the insertion of the words "now under Federal jurisdiction" into what is now 25 U. S. C. §479. See Hearings on S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 266 (1934). Also, the record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. App. 23a–24a. Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it. See Christensen v. Harris County, 529 U. S. 576, 587 (2000) (explaining that an Executive Branch statutory interpretation that lacks the force of law is "entitled to respect . . . to the extent that those interpretations have the 'power to persuade' " (internal quotation marks omitted)).

[6] See, e.g., 25 U. S. C. §473a ("Sections . . . 465 . . . and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska"); §1041e(a) ("The [Shawnee] Tribe shall be eligible to have land acquired in trust for its benefit pursuant to section 465 of this title . . ."); §1300b–14(a) ("[Sections 465 and 479 of this title are] hereby made applicable to the [Texas] Band [of Kickapoo Indians] . . ."); §1300g–2(a) ("[Sections 465 and 479] shall apply to the members of the [Ysleta Del Ser Pueblo] tribe, the tribe, and the reservation").

[7] Because we conclude that the language of §465 unambiguously precludes the Secretary's action with respect to the parcel of land at issue in this case, we do not address petitioners' alternative argument that the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U. S. C. §1701 et seq., precludes the Secretary from exercising his authority under §465.

[8] For this reason, we disagree with the argument made by Justice Stevens that the term "Indians" in §465 has a different meaning than the definition of "Indian" provided in §479, and that the term's meaning in §465 is controlled by later-enacted regulations governing the Secretary's recognition of tribes like the Narragansetts.

See post, at 4–6, 9–11 (dissenting opinion). When Congress has enacted a definition with "detailed and unyielding provisions," as it has in §479, this Court must give effect to that definition even when " 'it could be argued that the line should have been drawn at a different point.' " INS v. Hector, 479 U. S. 85, 88–89 (1986) (per curium) (quoting Fiallo v. Bell, 430 U. S. 787, 798 (1977)).

[9] NCAI notes that the ILCA's definition of "tribe" "means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." §2201. But §2201 is, by its express terms, applicable only to Chapter 24 of Title 25 of the United States Code. Ibid. The IRA is codified in Chapter 14 of Title 25. See §465. Section 2201, therefore, does not itself alter the authority granted to the Secretary by §465.

Justice Breyer, concurring.

I join the Court's opinion with three qualifications. *First*, I cannot say that the statute's language by itself is determinative. Linguistically speaking, the word "now" in the phrase "now under Federal jurisdiction," 25 U. S. C. §479, may refer to a tribe's jurisdictional status as of 1934. But one could also read it to refer to the time the Secretary of the Interior exercises his authority to take land "for Indians." §465. Compare *Montana* v. *Kennedy*, 366 U. S. 308, 311–312 (1961) ("now" refers to time of statutory enactment), with *Difford* v. *Secretary of HHS*, 910 F. 2d 1316, 1320 (CA6 1990) ("now" refers to time of exercise of delegated authority); *In re Lusk's Estate*, 336 Pa. 465, 467–468, 9 A. 2d 363, 365 (1939) (property "now" owned refers to property owned when a will becomes operative). I also concede that the Court owes the Interior Department the kind of interpretive respect that reflects an agency's greater knowledge of the circumstances in which a statute was enacted, cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944) . Yet because the Department then favored the Court's present interpretation, see *infra*, at 2, that respect cannot help the Department here.

Neither can *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984) , help the Department. The scope of the word "now" raises an interpretive question of considerable importance; the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty; and nothing in that history indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word "now." These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity. See *United States* v. *Mead Corp.*, 533 U. S. 218, 227, 229–230 (2001) .

Second, I am persuaded that "now" means "in 1934" not only for the reasons the Court gives but also because an examination of the provision's legislative history convinces me that Congress so intended. As I read that history, it shows that

Congress expected the phrase would make clear that the Secretary could employ §465's power to take land into trust in favor only of those tribes in respect to which the Federal Government already had the kinds of obligations that the words "under Federal jurisdiction" imply. See Hearings on S. 2755 et al.: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, pp. 263–266 (1934). Indeed, the very Department official who suggested the phrase to Congress during the relevant legislative hearings subsequently explained its meaning in terms that the Court now adopts. See Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (explaining that §479 included "persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act").

Third, an interpretation that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it at first appears. That is because a tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. See Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22–24; Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356–359 (1990). The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934—even though the Department did not know it at the time.

The statute, after all, imposes no time limit upon recognition. See §479 ("The term 'Indian' . . . shall include all persons of Indian descent who are members of *any recognized* Indian tribe now under Federal jurisdiction …" (emphasis added)). And administrative practice suggests that the Department has accepted this possibility. The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855. Consequently, the Department concluded that land could be taken into trust for the Tribe. See Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 6–7. Similarly, in 1934 the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. *Grand Traverse Band of Ottawa & Chippewa Indians* v. *Office of U. S. Attorney for Western Dist. of Mich.*, 369 F. 3d 960, 961, and n. 2 (CA6 2004). But later the Department recognized the Tribe, considering it to have existed continuously since 1675. 45Fed. Reg. 19321 (1980). Further, the Department in the 1930's thought that an anthropological study showed that the

Mole Lake Tribe no longer existed. But the Department later decided that the study was wrong, and it then recognized the Tribe. See Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758, 2762–2763 (Feb. 8, 1937) (recognizing the Mole Lake Indians as a separate tribe).

In my view, this possibility—that later recognition reflects earlier "Federal jurisdiction"—explains some of the instances of early Department administrative practice to which Justice Stevens refers. I would explain the other instances to which Justice Stevens refers as involving the taking of land "for" a tribe with members who fall under that portion of the statute that defines "Indians" to include "persons of one-half or more Indian blood," §479. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, pp. 706–707 (Shoshone Indians), 724–725 (St. Croix Chippewas), 747–748 (Nahma and Beaver Indians) (1979).

Neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934. Nor have they claimed that any member of the Narragansett Tribe satisfies the "one-half or more Indian blood" requirement. And I have found nothing in the briefs that suggests the Narragansett Tribe could prevail on either theory. Each of the administrative decisions just discussed involved post-1934 recognition on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office. I can find no similar indication of 1934 federal jurisdiction here. Instead, both the State and Federal Government considered the Narragansett Tribe as under *state,* but not under *federal,* jurisdiction in 1934. And until the 1970's there was "little Federal contact with the Narragansetts as a group." Memorandum from Deputy Assistant Secretary—Indian Affairs (Operations) to Assistant Scretary—Indian Affairs, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island Pursuant to 25 CFR 83, p. 8 (July 29, 1982). Because I see no realistic possibility that the Narragansett Tribe could prevail on the basis of a theory alternative to the theories argued here, I would not remand this case.

With the qualifications here expressed, I join the Court's opinion and its judgment.

Justice Stevens, dissenting.

Congress has used the term "Indian" in the Indian Reorganization Act of 1934 to describe those individuals who are entitled to special protections and benefits under federal Indian law. The Act specifies that benefits shall be available to individuals who qualify as Indian either as a result of blood quantum or as descendants of members of "any recognized Indian tribe now under Federal jurisdiction." 25 U. S. C. §479. In contesting the Secretary of the Interior's acquisition of trust land for the Narragansett Tribe of Rhode Island, the parties have focused on the meaning of "now" in the Act's definition of "Indian." Yet to my mind, whether

"now" means 1934 (as the Court holds) or the present time (as respondents would have it) sheds no light on the question whether the Secretary's actions on behalf of the Narragansett were permitted under the statute. The plain text of the Act clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of "Indian tribe."1 Because the Narragansett Tribe is an Indian tribe within the meaning of the Act, I would affirm the judgment of the Court of Appeals.

I

This case involves a challenge to the Secretary of the Interior's acquisition of a 31-acre parcel of land in Charlestown, Rhode Island, to be held in trust for the Narragansett Tribe.2 That Tribe has existed as a continuous political entity since the early 17th century. Although it was once one of the most powerful tribes in New England, a series of wars, epidemics, and difficult relations with the State of Rhode Island sharply reduced the Tribe's ancestral landholdings.

Two blows, delivered centuries apart, exacted a particularly high toll on the Tribe. First, in 1675, King Philip's War essentially destroyed the Tribe, forcing it to accept the Crown as sovereign and to submit to the guardianship of the Colony of Rhode Island. Then, in 1880, the State of Rhode Island passed a "detribalization" law that abolished tribal authority, ended the State's guardianship of the Tribe, and attempted to sell all tribal lands. The Narragansett originally assented to detribalization and ceded all but two acres of its ancestral land. In return, the Tribe received $5,000. See Memorandum from the Deputy Assistant Secretary-Indian Affairs (Operations) to Assistant Secretary-Indian Affairs (Operations) 4 (July 19, 1982) (Recommendation for Acknowledgment).

Recognizing that its consent to detribalization was a mistake, the Tribe embarked on a century-long campaign to recoup its losses.3 Obtaining federal recognition was critical to this effort. The Secretary officially recognized the Narragansett as an Indian tribe in 1983, Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, and with that recognition the Tribe qualified for the bundle of federal benefits established in the Indian Reorganization Act of 1934 (IRA or Act),4 25 U. S. C. §461 *et seq*. The Tribe's attempt to exercise one of those rights, the ability to petition the Secretary to take land into trust for the Tribe's benefit, is now vigorously contested in this litigation.

II

The Secretary's trust authority is located in 25 U. S. C. §465. That provision grants the Secretary power to take "in trust for [an] Indian tribe or individual Indian" "any interest in lands … for the purpose of providing land for Indians."5 The Act's language could not be clearer: To effectuate the Act's broad mandate to revitalize tribal development and cultural self-determination, the Secretary can take land into trust for a tribe or he can take land into trust for an individual Indian.

Though Congress outlined the Secretary's trust authority in §465, it specified which entities would be considered "tribes" and which individuals would qualify as "Indian" in §479. An individual Indian, §479 tells us, "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" as well as "all other persons of one-half or more Indian blood." A tribe, §479 goes on to state, "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Because federal recognition is generally required before a tribe can receive federal benefits, the Secretary has interpreted this definition of "tribe" to refer only to recognized tribes. See 25 CFR §83.2 (2008) (stating that recognition "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes"); §151.2 (defining "tribe" for the purposes of land acquisition to mean "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, … which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs").6

Having separate definitions for "Indian" and "tribe" is essential for the administration of IRA benefits. The statute reflects Congress' intent to extend certain benefits to individual Indians, *e.g.*, 25 U. S. C. §471 (offering loans to Indian students for tuition at vocational and trade schools); §472 (granting hiring preferences to Indians seeking federal employment related to Indian affairs), while directing other benefits to tribes, *e.g.*, §476 (allowing tribes to adopt constitutions and bylaws); §470 (giving loans to Indian-chartered corporations).

Section 465, by giving the Secretary discretion to steer benefits to tribes and individuals alike, is therefore unique. But establishing this broad benefit scheme was undoubtedly intentional: The original draft of the IRA presented to Congress directed the Secretary to take land into trust only for entities such as tribes. Compare H. R. 7902, 73d Cong., 2d Sess., 30 (1934) ("Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust *for the Indian tribe or community for whom the land is acquired*" (emphasis added)), with 25 U. S. C. §465 ("Title to any lands or rights acquired pursuant to this Act … shall be taken in the name of the United States in trust *for the Indian tribe or individual Indian for which the land is acquired*" (emphasis added)).

The Secretary has long exercised his §465 trust authority in accordance with this design. In the years immediately following the adoption of the IRA, the Solicitor of the Department of the Interior repeatedly advised that the Secretary could take land into trust for federally recognized tribes and for individual Indians who qualified for federal benefits by lineage or blood quantum.

For example, in 1937, when evaluating whether the Secretary could purchase approximately 2,100 acres of land for the Mole Lake Chippewa Indians of Wisconsin, the Solicitor instructed that the purchase could not be "completed until it is determined whether the beneficiary of the trust title should be designated as a band

or whether the title should be taken for the individual Indians in the vicinity of Mole Lake who are of one half or more Indian blood." Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758 (Feb. 8, 1937). Because the Mole Lake Chippewa was not yet recognized by the Federal Government as an Indian tribe, the Solicitor determined that the Secretary had two options: "Either the Department should provide recognition of this group, or title to the purchased land should be taken on behalf of the individuals who are of one half or more Indian blood." *Id*., at 2763.

The tribal trust and individual trust options were similarly outlined in other post-1934 opinion letters, including those dealing with the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Island Indians of Michigan. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, pp. 706–707, 724–725, 747–748 (1979). Unless and until a tribe was formally recognized by the Federal Government and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold.

Modern administrative practice has followed this well-trodden path. Absent a specific statute recognizing a tribe and authorizing a trust land acquisition,7 the Secretary has exercised his trust authority—now governed by regulations promulgated in 1980 after notice-and-comment rulemaking, 25 CFR §151 *et seq.;* 45 Fed. Reg. 62034—to acquire land for federally recognized Indian tribes like the Narragansett. The Grand Traverse Band of Ottowa and Chippewa Indians, although denied federal recognition in 1934 and 1943, see Dept. of Interior, Office of Federal Acknowledgement, Memorandum from Acting Deputy Commissioner to Assistant Secretary 4 (Oct. 3, 1979) (GTB–V001–D002), was the first tribe the Secretary recognized under the 1980 regulations, see 45 Fed. Reg. 19322. Since then, the Secretary has used his trust authority to expand the Tribe's land base. See, *e.g.*, 49 Fed. Reg. 2025–2026 (1984) (setting aside a 12.5-acre parcel as reservation land for the Tribe's exclusive use). The Tunica-Biloxi Tribe of Louisiana has similarly benefited from administrative recognition, 46Fed. Reg. 38411 (1981), followed by tribal trust acquisition. And in 2006, the Secretary took land into trust for the Snoqualmie Tribe which, although unrecognized as an Indian tribe in the 1950's, regained federal recognition in 1999. See 71 Fed. Reg. 5067 (taking land into trust for the Tribe); 62Fed. Reg. 45864 (1997) (recognizing the Snoqualmie as an Indian tribe).

This brief history of §465 places the case before us into proper context. Federal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land. No party has disputed that the Narragansett Tribe was properly recognized as an Indian tribe in 1983. See 48 Fed. Reg. 6177. Indeed, given that the Tribe has a documented history that stretches back to 1614 and has met the rigorous criteria for administrative recognition, Recommendation for Acknowledgment 1, 7–18, it would be difficult to sustain an objection to the Tribe's status. With this in mind, and in light of the Secretary's

longstanding authority under the plain text of the IRA to acquire tribal trust land, it is perfectly clear that the Secretary's land acquisition for the Narragansett was entirely proper.

III

Despite the clear text of the IRA and historical pedigree of the Secretary's actions on behalf of the Narragansett, the majority holds that one word ("now") nestled in one clause in one of §479's several definitions demonstrates that the Secretary acted outside his statutory authority in this case. The consequences of the majority's reading are both curious and harsh: curious because it turns "now" into the most important word in the IRA, limiting not only some individuals' eligibility for federal benefits but also a tribe's; harsh because it would result in the unsupportable conclusion that, despite its 1983 administrative recognition, the Narragansett Tribe is not an Indian tribe under the IRA.

In the Court's telling, when Congress granted the Secretary power to acquire trust land "for the purpose of providing land for *Indians*," 25 U. S. C. §465 (emphasis added), it meant to permit land acquisitions for those persons whose tribal membership qualify them as "Indian" as defined by §479. In other words, the argument runs, the Secretary can acquire trust land for "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." §479. This strained construction, advanced by petitioners, explains the majority's laser-like focus on the meaning of "now": If the Narragansett Tribe was not recognized or under federal jurisdiction in 1934, the Tribe's members do not belong to an Indian tribe "now under Federal jurisdiction" and would therefore not be "Indians" under §465 by virtue of their tribal membership.

Petitioners' argument works only if one reads "Indians" (in the phrase in §465 "providing land for Indians") to refer to individuals, not an Indian tribe. To petitioners, this reading is obvious; the alternative, they insist, would be "nonsensical." Reply Brief for Petitioner State of Rhode Island 3. This they argue despite the clear evidence of Congress' intent to provide the Secretary with the option of acquiring either tribal trusts or individual trusts in service of "providing land for Indians." And they ignore unambiguous evidence that Congress used "Indian tribe" and "Indians" interchangeably in other parts of the IRA. See §475 (discussing "any claim or suit of any *Indian tribe* against the United States" in the first sentence and "any claim of such *Indians* against the United States" in the last sentence (emphasis added)).

In any event, this much must be admitted: Without the benefit of context, a reasonable person could conclude that "Indians" refers to multiple individuals who each qualify as "Indian" under the IRA. An equally reasonable person could also conclude that "Indians" is meant to refer to a collective, namely, an Indian tribe. Because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," *FDA* v. *Brown & Williamson Tobacco Corp.*,

529 U. S. 120, 132 (2000) , the proper course of action is to widen the interpretive lens and look to the rest of the statute for clarity. Doing so would lead to §465's last sentence, which specifies that the Secretary is to hold land in trust "for the Indian tribe or individual Indian for which the land is acquired." Put simply, in §465 Congress used the term "Indians" to refer both to tribes andindividuals.8

The majority nevertheless dismisses this reading of the statute. The Court notes that even if the Secretary has authority to take land into trust for a tribe, it must be an "*Indian* tribe," with §479's definition of "Indian" determining a tribe's eligibility. The statute's definition of "tribe," the majority goes on to state, itself makes reference to "Indian tribe." Thus, the Court concludes, "[t]here simply is no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §479." *Ante*, at13.

The majority bypasses a straightforward explanation on its way to a circular one. Requiring that a tribe be an "Indian tribe" does not demand immediate reference to the definition of "Indian"; instead, it simply reflects the requirement that the tribe in question be formally recognized as an Indian tribe. As explained above, the Secretary has limited benefits under federal Indian law—including the acquisition of trust land—to recognized tribes. Recognition, then, is the central requirement for being considered an "Indian tribe" for purposes of the Act. If a tribe satisfies the stringent criteria established by the Secretary to qualify for federal recognition, including the requirement that the tribe prove that it "has existed as a community from historical times until the present," 25 CFR §83.7(b) (2008), it is *a fortiori* an "Indian tribe" as a matter of law.

The Narragansett Tribe is no different. In 1983, upon meeting the criteria for recognition, the Secretary gave notice that "the Narragansett Indian Tribe … exists as an *Indian tribe*." 48 Fed. Reg. 6177 (emphasis added). How the Narragansett could be an Indian tribe in 1983 and yet not be an Indian tribe today is a proposition the majority cannot explain.

The majority's retort, that because "tribe" refers to "Indian," the definition of "Indian" must control which groups can be considered a "tribe," is entirely circular. Yes, the word "tribe" is defined in part by reference to "Indian tribe." But the word "Indian" is also defined in part by reference to "Indian tribe." Relying on one definition to provide content to the other is thus "completely circular and explains nothing." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 323 (1992) .

The Governor of Rhode Island, for his part, adopts this circular logic and offers two examples of why reading the statute any other way would be implausible. He first argues that if §479's definition of "Indian" does not determine a tribe's eligibility, the Secretary would have authority to take land into trust "for the benefit of any group that he deems, at his whim and fancy, to be an 'Indian tribe.' " Reply Brief for Petitioner Carcieri 7. The Governor caricatures the Secretary's discretion. This Court has long made clear that Congress—and therefore the Secretary—lacks

constitutional authority to "bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe." *United States* v. *Sandoval*, 231 U. S. 28, 46 (1913) . The Governor's next objection, that condoning the acquisition of trust land for the Narragansett Tribe would allow the Secretary to acquire land for an Indian tribe that lacks Indians, is equally unpersuasive. As a general matter, to obtain federal recognition, a tribe must demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." 25 CFR §83.7(e) (2008). If the Governor suspects that the Narragansett is not an Indian tribe because it may lack members who are blood quantum Indians, he should have challenged the Secretary's decision to recognize the Tribe in 1983 when such an objection could have been properly received.9

In sum, petitioners' arguments—and the Court's conclusion—are based on a misreading of the statute. "[N]ow," the temporal limitation in the definition of "Indian," only affects an individual's ability to qualify for federal benefits under the IRA. If this case were about the Secretary's decision to take land into trust for an individual who was incapable of proving her eligibility by lineage or blood quantum, I would have no trouble concluding that such an action was contrary to the IRA. But that is not the case before us. By taking land into trust for a validly recognized Indian tribe, the Secretary acted well within his statutory authority.10

IV

The Court today adopts a cramped reading of a statute Congress intended to be "sweeping" in scope. *Morton* v. *Mancari*, 417 U. S. 535, 542 (1974) . In so doing, the Court ignores the "principle deeply rooted in [our] Indian jurisprudence" that " 'statutes are to be construed liberally in favor of the Indians.' " *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992) (quoting *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 767–768 (1985)); see also Cohen §2.02[1], p. 119 ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians").

Given that the IRA plainly authorizes the Secretary to take land into trust for an Indian tribe, and in light of the Narragansett's status as such, the Court's decision can be best understood as protecting one sovereign (the State) from encroachment from another (the Tribe). Yet in matters of Indian law, the political branches have been entrusted to mark the proper boundaries between tribal and state jurisdiction. See U. S. Const., Art. I, §8, cl. 3; *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 192 (1989) ; *Worcester* v. *Georgia*, 6Pet. 515, 559 (1832). With the IRA, Congress drew the boundary in a manner that favors the Narragansett. I respectfully dissent.

NOTES

[1] In 25 U. S. C. §479, Congress defined both "Indian" and "tribe." Section 479 states, in relevant part: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further includeall other persons of one-half or more Indian blood… . The term'tribe' wherever used in this Act shall be construed to refer toany Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Notably the word "now," which is used to define one of the categories of Indians, does not appear in the definition of "tribe."

[2] In 1991, the Narragansett Tribe purchased the 31-acre parcel in fee simple from a private developer. In 1998, the Bureau of Indian Affairs notified the State of the Secretary's decision to take the land into unreserved trust for the Tribe. The Tribe "acquired [the land] for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the Department of Housing and Urban Development (HUD)." App. 46a.

[3] Indeed, this litigation stems in part from the Tribe's suit against (and subsequent settlement with) Rhode Island and private landowners on the ground that the 1880 sale violated the Indian Non-Intercourse Act of June 30, 1834, ch. 161, §12, 4 Stat. 730 (25 U. S. C. §177), which prohibited sales of tribal land without "treaty or convention entered into pursuant to the Constitution."

[4] The IRA was the cornerstone of the Indian New Deal. "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " Mescalero Apache Tribe v. Jones, 411 U. S. 145, 152 (1973) (quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). See generally F. Cohen, Handbook of Federal Indian Law §1.05 (2005) (hereinafter Cohen); G. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–45 (1980).

[5] Section 465 reads more fully: "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians. . . . . "Title to any lands or rights acquired pursuant to this Act … shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

[6] The regulations that govern the tribal recognition process, 25 CFR §83 et seq. (2008), were promulgated pursuant to the President's general mandate established

in the early 1830's to manage "all Indian affairs and … all matters arising out of Indian relations," 25 U. S. C. §2, and to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," §9. Thus, contrary to the argument pressed by the Governor of Rhode Island before this Court, see Reply Brief for Petitioner Carcieri 9, the requirement that a tribe be federally recognized before it is eligible for trust land does not stem from the IRA.

[7] Although Congress has passed specific statutes granting the Secretary authority to take land into trust for certain tribes, it would be a mistake to conclude that the Secretary lacks residual authority to take land into trust under 25 U. S. C. §465 of the IRA. Some of these statutes place explicit limits on the Secretary's trust authority and can be properly read as establishing the outer limit of the Secretary's trust authority with respect to the specified tribes. See, e.g., §1724(d) (authorizing trust land for the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe of Maine, and the Penobscot Tribe of Maine). Other statutes, while identifying certain parcels the Secretary will take into trust for a tribe, do not purport to diminish the Secretary's residual authority under §465. See, e.g., §1775c(a) (Mohegan Tribe); §1771d (Wampanoag Tribe); §1747(a) (Miccosukee Tribe). Indeed, the Secretary has invoked his §465 authority to take additional land into trust for the Miccosukee Tribe despite the existence of a statute authorizing and directing him to acquire certain land for the Tribe. See Post-Argument En Banc Brief for National Congress of American Indians et al. as Amici Curiae 7 and App. 9 in No. 03–2647 (CA1).

[8] The majority continues to insist, quite incorrectly, that Congress meant the term "Indians" in §465 to have the same meaning as the term "Indian" in §479. That the text of the statute tells a different story appears to be an inconvenience the Court would rather ignore.

[9] The Department of the Interior found "a high degree of retention of [Narragansett] family lines" between 1880 and 1980, and remarked that "[t]he close intermarriage and stability of composition, plus the geographic stability of the group, reflect the maintenance of a socially distinct community." Recommendation for Acknowledgment 10. It also noted that the Narragansett "require applicants for full voting membership to trace their Narragansett Indian bloodlines back to the 'Detribalization Rolls of 1880–84.' " Id., at 16. The record in this case does not tell us how many members of the Narragansett currently qualify as "Indian" by meeting the individual blood quantum requirement. Indeed, it is possible that a significant number of the Narragansett are blood quantum Indians. Accordingly, nothing the Court decides today prevents the Secretary from taking land into trust for those members of the Tribe who independently qualify as "Indian" under 25 U. S. C. §479. Although the record does not demonstrate how many members of the Narragansett qualify as blood quantum Indians, Justice Breyer nevertheless assumes that no member of the Tribe is a blood quantum Indian. Ante, at 4 (concurring opinion). This assumption is misguided for two reasons. To start, the record's silence on this matter is to be expected; the parties have consistently focused on the Secretary's authority to take land into trust for the Tribe, not for individual members of the

Tribe. There is thus no legitimate basis for interpreting the lack of record evidence as affirmative proof that none of the Tribe's members are "Indian." Second, neither the statute nor the relevant regulations mandate that a tribe have a threshold amount of blood quantum Indians as members in order to receive trust land. Justice Breyer's unwarranted assumption about the Narragansett's membership, even if true, would therefore also be irrelevant to whether the Secretary's actions were proper.

[10] Petitioners advance the additional argument that the Secretary lacks authority to take land into trust for the Narragansett because the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U. S. C. §1701 et seq., implicitly repealed the Secretary's §465 trust authority as applied to lands in Rhode Island. This claim plainly fails. While the Tribe agreed to subject the 1,800 acres it obtained in the Settlement Act to the State's civil and criminal laws, §1708(a), the 31-acre parcel of land at issue here was not part of the settlement lands. And, critically, nothing in the text of the Settlement Act suggests that Con-gress intended to prevent the Secretary from acquiring additional parcels of land in Rhode Island that would be exempt from the State's jurisdiction.

ustice Souter, with whom Justice Ginsburg joins, concurring in part and dissenting in part.

Save as to one point, I agree with Justice Breyer's concurring opinion, which in turn concurs with the opinion of the Court, subject to the three qualifications Justice Breyer explains. I have, however, a further reservation that puts me in the dissenting column.

The disposition of the case turns on the construction of the language from 25 U. S. C. §479, "any recognized Indian tribe now under Federal jurisdiction." Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time. See Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.

During oral argument, however, respondents explained that the Secretary's more recent interpretation of this statutory language had "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same." Tr. of Oral Arg. 42. Given the Secretary's position, it is not surprising that neither he nor the Tribe raised a claim that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present. The error

was shared equally all around, and there is no equitable demand that one side be penalized when both sides nodded.

I can agree with Justice Breyer that the current record raises no particular reason to expect that the Tribe might be shown to have been under federal jurisdiction in 1934, but I would not stop there. The very notion of jurisdiction as a distinct statutory condition was ignored in this litigation, and I know of no body of precedent or history of practice giving content to the condition sufficient for gauging the Tribe's chances of satisfying it. So I see no reason to deny the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the "jurisdiction" phrase that might favor their position here.

I would therefore reverse and remand with opportunity for respondents to pursue a "jurisdiction" claim and respectfully dissent from the Court's straight reversal.**

NOTES

** Depending on the outcome of proceedings on remand, it might be necessary to address the second potential issue in this case, going to the significance of the Rhode Island Indian Claims Settlement Act, 25 U. S. C. §1701 et seq. There is no utility in confronting it now.