10-25-1996

Section 8: Federalism

Institute of Bill of Rights Law, William & Mary Law School

SESSION ENDS WITH CONFLICTING VIEWS ON STATES' RIGHTS

The Hartford Courant
Tuesday, July 2, 1996
David Lightman, Washington Bureau Chief

Sometime in the future, when consumers try to sue tobacco manufacturers and makers of faulty medical devices, or stop Indian casinos from multiplying, they might look back and applaud Supreme Court decisions from the term that ended Monday.

But experts say the court set few important precedents this term that make it easier for states to protect the health and safety of constituents.

Justices wrote a lot of "plurality opinions," or those where no firm majority could be cobbled together. The results of the 1995-96 term were "muddled," said Kevin Tierney, professor of law at the University of California's Hastings College of the Law in San Francisco.

Connecticut Attorney General Richard Blumenthal called the court "more fractured and more factioned than at any point in its history. It is very deeply and frequently divided, unable to form consensus or give ground."

In the area of states' rights, said Kevin J. Worthen, professor of law at Brigham Young University's J. Reuben Clark Law School, what pattern did emerge was this: If a case involved what was largely a procedural question -- such as the Indian case -- or one involving prisoner rights, the court sided with states. But if states' rights clashed with other deeply held legal principles -- notably civil rights, free-market competition or long-established banking procedures -- the court rejected the attorney generals' arguments.

A TRIBE'S LAWSUIT

Four cases seemed to offer two conflicting views of how the court saw states' rights.

States won two -- notably a challenge by the Seminole Tribe of Florida to that state's effort to block casino gambling. The tribe had sued the state when state officials would not discuss its casino bid.

Florida claimed sovereign immunity. The Supreme Court ruled 5-4 that states need not be subject to federal lawsuits if negotiations between states and Indian tribes break down.

"The case is extraordinarily significant in very lasting, profound ways," Blumenthal said, because it revived the 11th Amendment, which protects states from being sued in federal courts without their consent.

"We have found that Congress does not have authority to make the state suable in federal court," wrote Chief Justice William H. Rehnquist.

The second win for states came last week. A federal court ruled that Arizona officials had to provide illiterate inmates and those who do not speak English access to legal help.

The Supreme Court disagreed, and Justice Antonin Scalia issued a tough warning to courts who want, in effect, to run prison systems. "This case is a model of what should not [be done]," he said, calling the district court ruling "inordinately -- indeed, wildly -- intrusive."

Still, any bold trend toward broader states' rights was harder to find than a governor's unlisted phone number. The same week it ruled against the prisoners, the court called Virginia Military Institute's all-male policy unconstitutional.

Earlier in the year, it struck down a Colorado law denying homosexuals protection against discrimination.

To Worthen the four rulings meant "this court is more interested in states' rights than previous courts." But states are only likely to win, he said, "when states' rights is the primary issue."

CREDIT CARD LATE FEES

The split decisions on states' rights mirrored the term's outcome for consumers.

One key ruling will allow banks to charge late payment fees to consumers, even if they live in a state that does not permit such fees. Connecticut banks called that good news, because it meant they could market credit cards with such fees all over the country.

But Blumenthal said it "greatly undermines the state's power to protect consumers in this area."

A second case should make it easier for banks to sell insurance. Here, the court was clear: "The federal statute pre-empts the state statute."

Mark A. Chavez, a San Francisco attorney specializing in consumer cases, said he fears that banks now will try to place credit card and insurance operations in states where regulation is most lax, and then sell products to people all over the country.

But John Pemberton, chief policy counsel in the legal studies division for the Washington Legal Foundation, a research group, said he thought consumers ultimately would benefit, because the court was promoting competition and disclosure.

"What these decisions say is we cannot keep consumers in the dark about products," he said. "We can allow people to make decisions for themselves."

A FAULTY PACEMAKER

Probably no single case summed up the states' year like *Lora and Michael Lohr vs. Medtronic, Inc.*

Lora Lohr's Medtronic pacemaker failed in 1990, three years after it was installed. She underwent emergency surgery to replace the pacemaker and since has had four more operations. The Lohrs sued Medtronic, which contended it could not be sued in state courts, because of a 1976 federal law regulating medical devices.

A divided court ruled for Lohr, and in one sense, seemed to give consumers an important victory.

Stevens wrote that the 1976 law did not intend "a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices."

Trial attorneys and consumer groups rejoiced.

"A huge victory for consumers," said Pamela A. Liapakis, president of the Association of Trial Lawyers of America. "The decision puts a roadblock in the path of makers of automobiles, aircraft and tobacco. . . ."

Attorneys said the ruling could affect lawsuits against silicone breast implant makers. Blumenthal said it could be helpful in the lawsuit he plans to file this summer against tobacco companies to recover money the state spends on smokers' medical care.

Yet the Supreme Court ruling was not an unqualified consumer triumph. Stevens was joined in his opinion by three other justices. Justice Stephen G. Breyer, while siding with the majority, said that because of ambiguities in the 1976 law, there could be instances where federal law prevailed over state law.

As the court term ended, perhaps fittingly, few were quite sure what this case -- or for that matter, what this year -- ultimately meant for states and their constituents. "It was generally positive," Blumenthal said of the year, "but mixed."

STATES ON A WINNING STREAK

11th Amendment Ruling Strikes Another Blow Against Federal Power

ABA Journal
June, 1996; 82 June ABA J. 46

David G. Savage

For the third time in five years, the U.S. Supreme Court has strengthened the sovereign powers of the states at the expense of the authority of Congress.

On one level, *Seminole Tribe of Florida v. Florida*, No. 94-12 (March 27, 1996), is an attempt to clarify how disputes between states and Native American tribes over gambling operations should be resolved. That issue is important enough, given the growth in tribal casino gambling.

But on a broader level, *Seminole Tribe* follows closely behind recent decisions by the Court affirming state powers in the face of congressional actions. In *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court struck down a federal law that banned handguns in local school zones, and in *New York v. United States*, 505 U.S. 144 (1992), the Court blocked legislation to force states to accept nuclear waste dumps within their borders.

It is enough to suggest a trend. Taken together, the three rulings upset the conventional wisdom of recent decades that said Congress had unquestioned power to legislate on matters of national interest.

The decisions also reflect a commitment by the Supreme Court to re-examine the contours of federalism. At stake may be the constitutionality of recent federal laws on carjacking, handgun registration, abortion clinics and drug possession--and that is just in the short term.

"The lower courts are percolating with challenges to the whole Clinton agenda," says Professor Akhil Reed Amar of Yale Law School in New Haven, Conn. Many experts, including Amar, are quick to note, however, that the Court's recent rulings simply restrict certain powers of Congress, but have not reached the more revolutionary stage of removing those powers. At least, not yet.

REDEFINING THE 11TH AMENDMENT

In 1988, Congress adopted the Indian Gaming Regulatory Act, which provided that tribes in states that allow casino gambling may request that the state "negotiate in good faith" to reach a compact permitting the tribe to operate a casino. If the state balked, the tribe could sue it in federal court for failing to negotiate in good faith.

In a 5-4 vote, the Supreme Court struck down this provision of the Indian Gaming Act on grounds that the states generally have "sovereign immunity" under the 11th Amendment to the Constitution from being sued by individuals in federal court.

"Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the 11th Amendment prevents congressional authorization by private parties against unconsenting states," wrote Chief Justice William H. Rehnquist for the majority in *Seminole Tribe*.

The clash over the balance of power between the states and the federal government is older than the Constitution itself, and *Seminole Tribe* touches on cases going back more than a century.

Ratified in 1795, the 11th Amendment states, "The judicial power of the United States shall not be construed to extend to any suit" brought against a state "by citizens of another state, or by citizens or subjects of any foreign state."

As written, the 11th Amendment does not prohibit a "citizen" from suing his or her own state in federal court, but the Supreme Court imposed that broader state immunity in *Hans v. Louisiana*, 134 U.S. 1 (1890).

For the past decade, however, the justices have divided over the scope of the 11th Amendment in decisions triggered by congressional actions authorizing private suits against states to compel their compliance with federal laws, especially in the environmental area.

And more recently, Congress has pushed the envelope by authorizing private suits against states on an increasing number of matters as varied as cleaning up hazardous wastes, protecting copyrights and recovering money in bankruptcies.

In 1989, a deeply split Court ruled in *Pennsylvania v. Union Gas*, 491 U.S. 1, that Congress is empowered to authorize such suits.

Since then, however, four of the five justices in the Union Gas majority have departed (William J. Brennan Jr., Thurgood Marshall, Byron R. White and Harry A. Blackmun), and one of the new justices, Clarence Thomas, has emerged as a stalwart advocate of state sovereignty. Backed by a new, but narrow, majority, Rehnquist declared in *Seminole Tribe* that *Union Gas* "was wrongly decided . . . and now is overruled."

The chief justice noted that *Seminole Tribe* does not bar federal civil rights suits against states,

since they are specifically authorized by the 14th Amendment.

But the decision leaves some doubt about whether individual state officials may be sued in federal courts to force them to comply with laws passed by Congress. That type of suit is the classic end-run around the 11th Amendment that was upheld in 1908 in *Ex Parte Young*, 209 U.S. 123. Whether this tactic remains viable will be one of the measures of the true impact of *Seminole Tribe*.

For now, Rehnquist's opinion does not resolve the issue. On the one hand, he stated in a footnote that Congress may authorize suits against state officials, but he also rejected the Seminoles' suit against Florida Gov. Lawton Chiles because the Indian Gaming Act was directed at the states, not individual officials.

On April 15, only two weeks after issuing the *Seminole Tribe* ruling, the Supreme Court agreed to hear another 11th Amendment case, this one to clarify the conditions under which state officials can be sued in federal court. *Idaho v. Coeur D'Alene Tribe*, No. 94-1474, will be argued during the 1996-97 term.

Seminole Tribe was issued a year after *Lopez*, which may eventually come to achieve landmark status after limiting congressional power under the commerce clause for the first time in some 60 years.

The decisions shared the same majority. Rehnquist wrote both opinions, in which he was joined by Justices Thomas, Sandra Day O'Connor, Antonin Scalia and Anthony M. Kennedy.

In striking down the federal Gun-Free School Zones Act prohibiting the possession of firearms within 1,000 feet of school grounds, *Lopez* reminded that the power of Congress to regulate is limited to "those activities that substantially affect interstate commerce." Matters such as public education, crime and domestic relations generally are within the ambit of the sovereign states, Rehnquist observed in a statement that flies in the face of 30 years of activist law-making by Congress.

Even earlier, in 1992, the Court had kicked off the current string of states' rights victories by striking down Congress' effort to force states to locate nuclear waste dumps within their borders. As in *Seminole Tribe*, the Court in *New York v. United States* did not resolve the merits of the dispute, but used the case to recognize the independent powers of the states.

"States are not mere political subdivisions of the United States," O'Connor wrote for the Court, and they cannot be "commandeered" to carry out federal purposes.

Unquestionably, *Seminole Tribe* and its predecessors have sent a message. "There are five justices who care deeply about the states having a strong independent role," according to Washington, D.C., lawyer Richard G. Tarunto, a former clerk to O'Connor. "And on several fronts, they are saying to Congress, 'Stop!'"

The message is being heard in the lower courts. In March, the 5th U.S. Circuit Court of Appeals at New Orleans struck down part of the Brady Handgun Registration Act, citing O'Connor's opinion in *New York*. A requirement that local sheriffs conduct background checks on handgun buyers until a national system is in place is unconstitutional because it "commandeers" a local official to carry out a federal task, the appellate court ruled in *Koog v. United States*, Nos. 94-50562 and 94-60518 (March 21, 1996).

Meanwhile, the 9th Circuit at San Francisco struck down part of a federal arson statute, in *United States v. Pappadopoulos*, 64 F.3d 522 (1995). The court reasoned that a fire at a private dwelling with no substantial link to interstate commerce should not be prosecuted under the federal statute.

Federal district judges have struck down a federal anti-carjacking statute, the Child Support Recovery Act, and the Freedom of Abortion Clinic Entrances Act on the basis of the Supreme Court's recent rulings limiting federal power.

Some criminal defense lawyers are challenging federal drug possession laws. After all, they argue if Congress lacks the power to make it a crime to possess a gun near a school, how can it declare possession of crack cocaine at home to be a federal crime?

Legal experts are divided on how far the Court will push the "new" federalism, but most agree that Justice Kennedy will be the key vote in upcoming decisions.

"I think if [the conservative justices] go too far, they are likely to lose Justice Kennedy," says Barry Friedman, a professor at Vanderbilt University School of Law in Nashville, Tenn.

Last term, Kennedy split from the states' rights faction in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995), by supporting the majority in striking down state laws that limited the terms of elected members of Congress. Though federalism is a crown jewel of the American constitutional system, Kennedy wrote, members of Congress are national officers whose service should be governed by a uniform national rule.

Friedman and others suggest it will take further rulings by the Supreme Court to clarify this area. "*Lopez* has a lot of gray areas, and we won't know until that becomes clearer," he says.

Certainly within the Court, the struggle promises to continue. Justice David H. Souter filed a 92-page dissent in *Seminole Tribe*, arguing that the majority's view of the 11th Amendment was wrong as a matter of history.

And in a separate 26-page dissent, Justice John Paul Stevens denounced Rehnquist's opinion as "shocking . . . misguided . . . [and] simply irresponsible. The better reasoning in Justice Souter's far wiser and far more scholarly opinion will surely be the law one day."

Only time, and more decisions, will tell.

THE NATION--TAKING STATES SERIOUSLY

The New York Times
Sunday, April 14, 1996
Linda Greenhouse

For much of his nearly quarter century on the Supreme Court, William H. Rehnquist was the outrider. Often in dissent, he traveled far from the pack, tracing a singular path across a constitutional landscape that in his view was strewn with monuments to the modern Court's errors. Prominent among these were the Court's precedents elevating the power of the Federal Government at the expense of the individual states.

Now approaching his 10th anniversary as Chief Justice, Mr. Rehnquist began to put his years as a lone dissenter behind as Presidents Reagan and Bush reshaped the Court around him. These days, he is the general in charge of a constitutional war along the Federal-state frontier. Aided by timing, patience and, to no small extent, the good luck of having colleagues who agree with him that the states' interests have been submerged for too long, he is conducting this high-stakes war along several fronts of distinct but interrelated constitutional doctrine.

And he is winning. When the Rehnquist Court passes into history--the 71-year-old Chief Justice is widely expected to retire within the next few years -- a reshaping of the Federal-state balance may prove his most enduring legacy. He has been frustrated in other areas where he lacks a working majority -- the right to abortion is still the law of the land, and organized prayer is not back in public schools. But for Federal-state relations, his tenure could mark a historic shift.

STATES' RIGHTS

Last month, Chief Justice Rehnquist wrote an opinion for a 5-to-4 majority in a case that gave new teeth to one of the Constitution's more obscure and ambiguous provisions, the 11th Amendment. The amendment, adopted in 1795 in response to the states' fears of being sued for Revolutionary War debts, shields a state from being sued in Federal court by a citizen of another state. The Court subsequently interpreted the 11th Amendment to bar suits by a state's own citizens as well in an 1890 decision that Chief Justice Rehnquist's opinion last week in *Seminole Tribe v. Florida* essentially revised and placed on firmer constitutional footing than ever before.

The *Seminole Tribe* decision struck down a portion of the Indian Gaming Regulatory Act, a Federal law governing the terms by which Indian tribes can conduct gambling on their reservations. The Court held that, despite Congress's virtually complete constitutional authority to legislate in the area of Indian affairs and the states' lack of any such authority, the law's provision permitting tribes to sue a state to bring it to the bargaining table violated the 11th Amendment.

The decision contained several loopholes; people can still sue states on equal protection grounds and seek injunctions to keep individual state officials from violating Federal law. But it calls into question the authority of Congress to insure that people can vindicate their Federally guaranteed rights in Federal court.

The 11th Amendment case followed by less than a year an important victory by the Chief Justice on another front: Congress's authority to regulate interstate commerce. In *United States v. Lopez*, the Court found for the first time in 60 years that Congress had exceeded its authority by making it a Federal crime to carry a gun within 1,000 feet of a school. Such an act, the Chief Justice said, was simply not commerce.

As with the *Seminole Tribe* case, the significance of *United States v. Lopez* lay in its implications, in its turning away from the prevailing notion that Congress knew best and that the authentic vision of American history was "the steady and inevitable triumph of nationalism," as Wilfred M. McClay, a historian at Tulane University, wrote recently in *Commentary*.

A Rehnquist opinion rings no such rhetorical bells. The *Lopez* opinion was typically dry and to the point. To agree with the Government that Congress had the power it claimed would require the Court to conclude "that there never will be a distinction between what is truly national and what is truly local," the Chief Justice said. "This," he added, "we are unwilling to do."

Federal courts have since struck down a Federal arson law as applied to a private home -- seen as insufficiently connected to interstate commerce -- and the Child Support Recovery Act, which brings some "deadbeat dad" cases within Federal jurisdiction.

The mightiest constitutional engine of all for returning power to the states may be the 10th Amendment, which has been absent from the Court's docket for the last few years but may soon return in force.

The 10th Amendment provides that powers not delegated by the Constitution to the Federal

Government are reserved to the states. Its history as a charter of state sovereignty has been fitful, with the Chief Justice its most ardent modern champion on the Court.

Four years ago, he joined an opinion by Justice Sandra Day O'Connor that invoked the 10th Amendment to strike down a Federal law that required the states to take responsibility for disposing of the low-level radioactive waste generated within their borders. Referring to the Constitution as dividing power "among sovereigns," Justice O'Connor said the Federal Government could not "commandeer" the states "into the service of Federal regulatory purposes."

TICKING DECISIONS

For several years, the decision, *New York v. United States*, sat quietly ticking. But last month, the United States Court of Appeals for the Fifth Circuit relied heavily on it to strike down a section of the 1994 Brady Handgun Violence Protection Act that requires local sheriffs to make background checks of handgun purchasers. The Brady law makes states the "victims of impermissible Federal coercion," the appeals court said. Two other appeals courts had upheld the law, so Supreme Court review is all but inevitable.

In addition to Justice O'Connor, a former state legislator and judge in Arizona who came to the Court as a passionate advocate for state interests, the Chief Justice's allies are Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. (It is an interesting twist that the only other Justice with state government experience, David H. Souter, a former New Hampshire attorney general and state court judge, has brought equal passion to dissenting opinions that have made the argument for Federal authority.)

While solid for now, the Chief Justice's margin is thin enough to make it likely that hearings for his successor -- or for any Justice -- will spend substantial time on the nominee's views on federalism. After years of controversy over race, sex, religion and abortion, who could have predicted that the 10th Amendment, the 11th Amendment and the Commerce Clause would hold center stage? But if the confirmation process is a window into what people hope for and fear from the Court at any given moment, they just might.

DECISION SETS LIMIT ON SUITS VS. STATES

Tribes Can't Sue States Opposed to Casinos, Supreme Court Says

The Herald-Sun (Durham, N.C.)
Thursday, March 28, 1996
Aaron Epstein, Knight-Ridder

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

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

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

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

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

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

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

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

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

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

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

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

Last April, in an identical 5-4 split, the justices ruled that Congress had exceeded its authority by barring anyone from carrying a gun near a school.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Last April, in an identical 5-4 split, the justices ruled that Congress had exceeded its authority by barring anyone from carrying a gun near a school.

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

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

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

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

AN ACCOUNTABILITY ISSUE

The New York Times
Monday, April 1, 1996
Nina Bernstein

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

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

Many Federal laws on the environment, business, health and safety now have provisions that allow people hurt by violations of those laws to sue in Federal court. But the new decision, in *Seminole Tribe v. Florida*, says states are immune from such suits and holds that Congress is powerless to authorize them.

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

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

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

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

The ruling raises much broader questions about whether individuals can use the courts to force states to abide by a variety of Federal laws.

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

Civil liberties lawyers are quick to point out that the decision's immediate effects are limited. It leaves intact the individual's right to sue states in Federal court for violations of civil rights statutes under the umbrella of the 14th Amendment, which includes the decree that states cannot "deprive any person of life, liberty, or property without due process of law." And it leaves open other legal mechanisms for challenging state actions in areas not covered by the 14th Amendment. But many of those mechanisms are now in a kind of political meltdown.

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

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

"What's happening in the Supreme Court dovetails nicely with what's happening in the 104th Congress," Timothy Lynch, a constitutional scholar at the conservative Cato Institute, said. "If Robert Dole wins the White House," he added, "this trend is going to accelerate."

Laurence H. Tribe, a professor of law at Harvard University, said the reason a wide range of Federal laws included an individual right to sue in Federal court was that Congress wanted to put a right of enforcement action directly into the hands of the most affected parties. The new ruling, though, puts the states off limits for such Federal litigation.

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

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

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

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

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

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

But Professor Foner, the Dewitt Clinton Professor of American History at Columbia University, said that in the past, an open courthouse door has been crucial to keeping states accountable. After the Civil War, when the national Government was relatively weak and small -- it lacked even a Justice Department until 1870 -- the major mechanism for establishing the Federal supremacy won by the Union Army was to let private citizens bring suits in Federal courts. Those courts went through a tremendous expansion.

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

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

The 11th Amendment bars Federal courts from hearing cases in which one state is sued by citizens of another state or country. It was written to invalidate an early Supreme Court decision favoring a suit by South Carolinians representing British banking interests. The plaintiffs were trying to collect a Revolutionary War debt from Georgia.

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

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

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

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

FLORIDA ET AL.

SUPREME COURT OF THE UNITED STATES

116 S. Ct. 1114

March 27, 1996, Decided

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

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. The Act divides gaming on Indian lands into three classes. . . and provides a different regulatory scheme for each class. Class III gaming--the type with which we are here concerned . . . includes such things as slot machines, casino games, banking card games, dog racing, and lotteries. 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."

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 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. 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." 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." 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," and submits it to the State and the Indian tribe. 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)."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."

In September 1991, the Seminole Tribe of Indians, petitioner, sued the State of Florida and its Governor, Lawton Chiles, respondents. . . .[P]etitioner 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". . . 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, and the respondents took an interlocutory appeal of that decision.

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. 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. 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* 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.

Petitioner sought our review of the Eleventh Circuit's decision, and we granted certiorari 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.

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." That presupposition. . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"

Here, petitioner has sued the State of Florida and it is undisputed that Florida has not consented to the suit. 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*. We consider each of those arguments in turn.

II

Petitioner argues that Congress through the Act abrogated the States' immunity from suit. In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expressed its intent to abrogate the immunity"; and second, whether Congress has acted "pursuant to a valid exercise of power."

A

Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement". . . .

Here, we agree with the parties, with the Eleventh Circuit in the decision below, and with virtually every other court that has confronted the question that Congress has in § 2710(d)(7) provided an "unmistakably clear" statement of its intent to abrogate. Section 2710(d)(7)(A)(i) vests jurisdiction in "the United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . . ."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . . . the court shall order the State . . ."; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit [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.

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." 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. The Eleventh Amendment does not exist solely in order to "prevent federal court judgments that must be paid out of a State's treasury"; it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

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 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. 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.

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? Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. . . .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 *Pennsylvania v. Union Gas Co.*, a plurality of the Court found that the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity. . .

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.

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. . . . 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.

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. . . . 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. 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." . . . 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'" . . . .

In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law. 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.

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.

. . .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. . . . 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. . . .

. . .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. . . .

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

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 specifically designed for the enforcement of that right. The Eleventh Circuit's dismissal of petitioner's suit is hereby affirmed.

It is so ordered.

. . . 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. . . . [I]n 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.

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.

. . .[T]he 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* and the Court's opinion in *Hans v. Louisiana* 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.'" 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.

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. 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. . . .

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. 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. 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. 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. . . .

. . . Whatever the precise dimensions of the [11th] Amendment, its express terms plainly do not apply to all suits brought against unconsenting States. 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. . . .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 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. . . 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. For that reason, the federal common law of officer immunity that Congress meant to incorporate, not a contrary state immunity, applies in § 1983 cases. 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. . . .

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. . . .

Here . . . 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.

It was, therefore, misleading for the Court in *Fitzpatrick v. Bitzer* 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. . . .

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, the power to establish uniform laws on the subject of bankruptcy, the power to promote the progress of science and the arts by granting exclusive rights to authors and inventors, 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*, and *Pennsylvania v. Union Gas Co.* 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. . . .[T]he 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".

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." 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.

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

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

In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. Although the Court invokes the Eleventh Amendment as authority for this proposition, the only sense in which that amendment might be claimed as pertinent here was tolerantly phrased by JUSTICE STEVENS in his concurring opinion in *Pennsylvania v. Union Gas*.

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*. 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. . . .

. . . 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; there was no unanimity, but in due course the Court in *Chisholm v. Georgia* 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. . . .

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.

. . .[T]here 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*, 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. . . The one rule holds that the King or the Crown. . . 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. 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. . . .

The Eleventh Amendment . . . 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. . . .

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."

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. 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. . . .

Three critical errors in *Hans* weigh against constitutionalizing its holding as the majority does today. The first . . . : the *Hans* Court misread the Eleventh Amendment. 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. . . .

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. . . .

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." 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. . . .

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. . .

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. . . .

The fact, without more, that such suits may have a significant impact on state governments does not count under *Young*. . . . 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*, *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 "remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *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. . . .

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". . . .

The decision in *Ex parte Young*, and the historic doctrine it embodies, thus plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a "fiction," the long history of its felt necessity shows it to be something much more estimable, as we may see by considering the facts of the case" . . . .

A rule of such lineage, engendered by such necessity, should not be easily displaced, if indeed it is displaceable at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies. We have in fact never before inferred a congressional intent to eliminate this time-honored practice of enforcing federal law. That of course does not mean that the intent may never be inferred, and where, as here, the underlying right is one of statutory rather than constitutional dimension, I do not in theory reject the Court's assumption that Congress may bar enforcement by suit even against a state official. But because in practice, in the real world of congressional legislation, such an intent would be exceedingly odd, it would be equally odd for this Court to recognize an intent to block the customary application of *Ex parte Young* without applying the rule recognized in our previous cases, which have insisted on a clear statement before assuming a congressional purpose to "affect the federal balance". . . .

There is, finally, a response to the Court's rejection of *Young* that ought to go without saying. Our long-standing practice is to read ambiguous statutes to avoid constitutional infirmity. 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*). 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. . . .

95-1503 MACK v. U.S.

Firearms—Brady Act—Tenth Amendment—Commerce Clause—Requirement that state and local law enforcement personnel conduct federally mandated background checks of prospective handgun purchasers.

Ruling below (CA 9, 66 F.3d 1025, 64 LW 2169, 57 CrL 1553):

Interim provisions of 1993 Brady Handgun Control Act that require state and local law enforcement officers to carry out, in addition to records maintenance responsibilities, "reasonable efforts" to ascertain whether prospective handgun buyers are disqualified by law from purchasing handgun, 18 USC 922(s), do not commandeer state legislative, regulatory, or policymaking processes and do not present risk that state officials will bear brunt of public disapproval of federal policy, in violation of Tenth Amendment as interpreted in *New York v. U.S.*, 505 U.S. 144, 60 LW 4603 (1992); unlike firearms statute at issue in *U.S. v. Lopez*, 63 LW 4343 (US SupCt 1995), Brady law regulates sales of handguns and thus lies within Congress' constitutional authority to regulate interstate commerce; moreover, legislative history of act contains finding that handgun violence affects interstate commerce; judgments upholding local sheriffs' challenges to records-check provisions are reversed.

Questions presented: (1) Does Congress exceed its Commerce Clause powers when it orders state officials, themselves neither engaged in nor interfering with interstate commerce, to exercise their police powers with regard to commerce? (2) Can federal statute requiring state officials to investigate and pass upon background of each handgun purchaser be reconciled with Tenth Amendment as construed in *New York v. U.S.* on claimed distinction that it commandeers state's labor rather than its policymaking?

Petition for certiorari filed 3/18/96, by David T. Hardy, of Tucson, Ariz.

95-1478 PRINTZ v. U.S.

Firearms—Brady Act—Tenth Amendment—Requirement that state and local law enforcement personnel conduct background checks of prospective handgun purchasers.

Ruling below (*Mack v. U.S.*, CA 9, 66 F.3d 1025, 64 LW 2169, 57 CrL 1553):

Interim provisions of 1993 Brady Handgun Control Act that require state and local law enforcement officers to carry out, in addition to records maintenance responsibilities, "reasonable efforts" to ascertain whether prospective handgun buyers are disqualified by law from purchasing handgun, 18 USC 922(s), do not commandeer state legislative, regulatory, or policymaking processes and do not present risk that state officials will bear brunt of public disapproval of federal policy, in violation of Tenth Amendment as interpreted in *New York v. U.S.*, 505 U.S. 144, 60 LW 4603 (1992).

Question presented: Does Congress have power under Article I, Section 8 of Constitution, consistent with Tenth Amendment as interpreted in *New York v. U.S.*, to command state-created chief law enforcement officers to search records to ascertain whether persons may lawfully purchase handguns, to destroy records concerning handgun purchasers, and to provide reasons for adverse determinations, as mandated by Brady Act, 18 USC 922(s)(2), (6)(B) and (C)?

Petition for certiorari filed 3/15/96, by Stephen P. Halbrook and Richard E. Gardiner, both of Fairfax, Va.

SUPREME COURT DECIDES TO REVIEW BRADY LAW CASES

Some Officials Object to Unfunded Background Checks

The Dallas Morning News
Tuesday, June 18, 1996
David Jackson, Washington Bureau

WASHINGTON - The U.S. Supreme Court agreed Monday to review the Brady law, the landmark gun-control measure that requires five-day waiting periods so that local police can check the backgrounds of prospective handgun buyers.

In accepting cases from Arizona and Montana, the high court agreed to decide whether Congress can force local law-enforcement officials to do the background checks.

Several local sheriffs, including one in South Texas, have sued over that requirement, calling it an unconstitutional, unfunded mandate.

"The Brady bill essentially orders local law enforcement to carry out background checks for a federal program," said David T. Hardy, the attorney in the Arizona case involving Graham County Sheriff Richard Mack. "The federal government cannot issue an unequivocal demand to the states, under the commerce clause of the Constitution."

Brady law supporters argued that Congress needs only temporary help while developing a computerized "instant check" program expected to be in place by late 1998. In a legal brief to the Supreme Court, Solicitor General Drew Days also asserted a strong, legitimate federal interest in regulating gun traffic. "The Brady Act is an important federal statute directed at one of the most serious issues of public safety currently facing the nation, the epidemic of gun violence," Mr. Days wrote.

The high court will hear the case in its next term. A decision is expected by July 1997, more than a year before the instant-check system is to take effect. Attorneys on both sides urged the justices to consider the Brady law, citing a series of conflicting opinions in lower courts. Federal judges in Arizona and Montana struck down the law, but appeals courts for those states upheld it.

The reverse happened in a case out of Val Verde County, near the Texas-Mexico border. A San Antonio federal judge upheld the Brady law, but the 5th U.S. Circuit Court of Appeals in New Orleans struck down the portion calling for background checks.

The Brady Act is named for former White House press secretary James Brady, who was critically injured in the 1981 assassination attempt on President Ronald Reagan. Mr. Brady's wife, Sarah, is chairwoman of Handgun Control Inc., a major proponent of waiting periods and background checks designed to prevent the kind of attack that crippled her husband. "We are not surprised that the Supreme Court agreed to examine the case given the split in the circuits," Ms. Brady said, adding she was confident the high court would uphold the law.

The law, which took effect in 1994, requires a gun buyer to fill out a form that is reviewed by "the chief law enforcement officer" in the area. Those officials then have five business days to check an applicant's record. According to the U.S. Justice Department, applicants can be denied gun ownership if they are: convicted felons, drug users, undocumented immigrants, minors under 18 years of age, fugitives or under restraining orders for allegations of domestic abuse. Applicants also can be denied if they have been indicted, committed to a mental institution, renounced their American citizenship or been dishonorably discharged from the military.

The Dallas Police Department's records section reported that, from March 1994 to this May, there were 33,574 gun applications. There have been 2,361 rejections based on criminal histories. However, officials said some of those decisions have been reversed because of erroneous searches or because people who were on deferred adjudication have had their records cleared.

Former Val Verde County Sheriff J.R. Koog, who filed the Texas suit, said the background checks put too much of a crimp in his $2 million budget. Mr. Koog, who retired Dec. 31, also argued that his department would be liable for millions in damages if one of his researchers made a mistake.

"I don't have the people to analyze these things," he said. "It's a badly written law. It has good intentions, but it's led to nothing."

The high court cases concern Sheriff Mack of Arizona and Jay Printz, sheriff of Ravalli County, Mont. Mr. Koog's attorney, Stephen P. Halbrook, said he wouldn't be surprised if the justices agree later to add the Texas case. "It is the precedent that led to the [appeals court] circuits coming into conflict," said Mr. Halbrook, a Fairfax, Va., attorney who specializes in constitutional issues. "The principles are the same in all three cases."

In recent years, the Supreme Court has criticized what some justices have called congressional

overreaching into state and local affairs. The high court has struck down laws ranging from gun bans around schools to the Indian Gaming Regulatory Act of 1988.

"They've been real solid behind the 10th Amendment and states' rights," said Sheriff Mack. "Here we have Big Brother from Washington coming in and commandeering the local sheriff's offices." Mark Polston, an attorney for the Center To Prevent Handgun Violence, said the Brady law "does not cross the line the court has drawn" because it requires local background checks for only a short period of time.

Even though instant checks are set to be in place by late 1998, Mr. Polston said a court decision striking down the law could be devastating. "Even in one year in which there are no background checks, that could mean 40,000 felons getting access to handguns," Mr. Polston said.

In a February report issued in connection with the Brady Act's second anniversary, Treasury Secretary Robert Rubin and Attorney General Janet Reno said the law had blocked 60,000 unqualified gun purchasers.

"Each month the Brady Act is preventing nearly 2,500 criminals from buying guns, while permitting law-abiding citizens to do so," said Mr. Rubin, whose department includes the Bureau of Alcohol, Tobacco and Firearms.

Chip Walker, a spokesman for the National Rifle Association, disputed the law's effectiveness, saying, "I'm sure some of those felons went back out and found firearms through other means."

BRADY BILL BOOMERANG

The Washington Post
Wednesday, June 1, 1994
David S. Broder

Congress amends or repeals scores of laws each year, but there is one law that never goes away: the law of unintended consequences. The latest boomerang involves the Brady bill, the controversial measure to impose a five-day waiting period for purchases of handguns.

It was signed with great publicity last December as a breakthrough victory for gun-control advocates and a tribute to the tenacity of Sarah and Jim Brady -- he the popular press secretary who was badly wounded in the 1981 assassination attempt against President Reagan.

Far less attention has been given to the May 16 federal court decision that the key section of the Brady bill -- requiring a check of criminal records, drug or mental problems of gun applicants -- is a violation of the Constitution and unenforceable anywhere in the country.

The law was not thrown out because it violated the Second Amendment -- the right to bear arms. That issue, the battle cry of the National Rifle Association, was not even raised in this lawsuit. Rather, it was found to violate one of the most neglected provisions of the Constitution, the 10th Amendment, reserving to the states and the people all powers not assigned to the federal government.

Specifically, District Judge Charles C. Lovell of Missoula, Mont., said that the feds had overreached themselves when they told Ravalli County Sheriff Jay Printz he had to divert deputies from their other duties to do background checks on Montana gun buyers.

The last thing Congress had in mind when it passed the Brady bill was providing another opening for Washington's critics to raise the issue of unfunded federal mandates on the states and localities. Organizations representing cities and states have been on the warpath all year against the feds' habit of dreaming up new assignments they want the lower levels of government to pay for and carry out. Those unfunded mandates cost billions.

The mandates issue and the 10th Amendment were raised in congressional debate but brushed aside in the rush to enact the waiting-period law. The court, however, in a decision that is certain to be appealed, said these questions could not be so easily discarded.

Prior Supreme Court rulings on 10th Amendment cases are anything but simple to reconcile or understand. But Judge Lovell found his footing in a 1992 case in which New York successfully challenged a federal law requiring states to dispose of radioactive wastes according to Congress's directive.

Lovell said his reading of the 6-3 decision in *New York v. United States* led him to conclude that the background check part of the Brady bill is unconstitutional "because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program."

The five-day waiting period remains in effect, under the decision, but without background checks, it obviously doesn't accomplish much. That's a setback to the hopes of gun-control advocates, of whom I am one. But the principle raised by Judge Lovell is a vital one.

Sheriff Printz told the court that he has 16 officers and 13 support people at his disposal to provide law and order for 30,000 residents scattered through 2,400 square miles of rugged country near the Idaho border. Chasing down records, some kept hundreds of miles away, would divert them from their other duties, he said. He convinced Judge Lovell that as a local elected official, he was being asked by Washington not only to "bear the brunt of its [the law's] unpopularity" among his gun-owner constituents but to cut back other activities of his department or seek a higher budget.

As the judge dryly observed, "The corollary to state and local governments being held financially accountable for the act is that the federal government will not be.... The federal officials will receive some of the accolades or criticism for their program, but they will not suffer any of the consequences for the cost."

The Justice Department argued, unavailingly, that the imposition on Sheriff Printz and his crew was minimal and should not raise any constitutional objections in the judge's mind. It even argued that in the circumstances facing Sheriff Printz, "a 'reasonable' effort [to do background checks] may be no effort at all." But the judge wasn't buying that sophistry.

The underlying issue is very important. Washington spends all its money and borrows, each year, hundreds of billions more. Still, that does not satisfy its appetite for action, so it increasingly has

fallen into the habit of mandating other people to carry out and pay for its wishes.

Sometimes, as with the Brady bill, the costs fall mostly on other governments; sometimes, as with the Americans With Disabilities Act, on both private business and the public sector. The causes are generally good ones, but as this decision reminds us, there is a reason why the Constitution tried to limit the reach of federal officials.

It's a matter of accountability. Washington, like everyone else, has to learn to pay for its good deeds.

Richard MACK, Sheriff of Graham County, Arizona,
Plaintiff-Appellee-Cross-Appellant

v.

UNITED STATES OF AMERICA, Defendant-Appellant-Cross-Appellee

Jay PRINTZ, Sheriff/Coroner, Ravalli County, Montana,
Plaintiff-Appellant-Cross-Appellee

v.

UNITED STATES OF AMERICA, Defendant-Appellee-Cross-Appellant

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

66 F.3d 1025

September 8, 1995

. . .CANBY, Circuit Judge:

Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the constitutionality of the Brady Handgun Control Act. The main issue on appeal concerns the district courts' respective holdings that section 922(s)(2) of the Brady Act, requiring local law enforcement officials to perform background checks of handgun purchasers, violates the Tenth Amendment. We conclude that the Act is constitutional, and we accordingly reverse the judgments of the district courts.

FACTS

The Brady Act, passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up to five days for the purchase of a handgun, and subjects purchasers to a background check during that period. Within five years from the effective date of the Act, such checks will be performed instantaneously through a national criminal background check system maintained by the Department of Justice, but in the meantime the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's place of residence. The Act requires CLEOs to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law . . . ." The CLEO performs the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. If the CLEO approves the transfer, he or she must destroy the buyer's statement within twenty business days after the statement was made. If the CLEO disapproves the transfer, the CLEO must provide the reasons for the determination within twenty business days if so requested by the disappointed purchaser.

Richard Mack and Jay Printz, as sheriffs, are the CLEOs in their respective jurisdictions of Graham County, Arizona, and Ravalli County, Montana. They brought these actions in their local federal district courts to challenge the Brady Act's provisions imposing duties upon them. Mack and Printz both invoked the Tenth and Fifth Amendments. Mack also challenged the Act as violating the Thirteenth Amendment.

Both district courts held that section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by the Supreme Court in *United States v. New York*. Neither court enjoined the provisions of the Act requiring CLEOs to explain the reasons for rejecting a purchase application, § 922(s)(6)(C), and requiring destruction of records, § 922(s)(6)(B). The *Printz* decision noted that the requirement of a statement of reasons became optional once the mandatory background check was invalidated, and that the provision for destruction of records was "de minimis."

In *Mack*, the district court also held that the criminal provisions of the Act applied to CLEOs, and were void for vagueness under the Fifth Amendment because they made it a crime for CLEOs to fail to make a "reasonable effort" to ascertain the lawfulness of a prospective handgun purchase. The *Printz* court held that the criminal provisions did not apply to CLEOs. Finally, the *Mack* court rejected Mack's Thirteenth Amendment challenge. Both district courts held that the invalid portions of the Act were severable, and accordingly refused to hold the entire Act unconstitutional.

In both actions, both sides appealed. The sheriffs primarily dispute the holdings of severability, while the United States contends that the entire Act is constitutional.

ANALYSIS

I. THE TENTH AMENDMENT CHALLENGE

No one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress. The issue for decision is whether the manner in which Congress has chosen to regulate in the Brady Act violates the Tenth Amendment.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." As a textual matter, therefore, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." By its terms, the Amendment does not purport to limit the commerce power or any other enumerated power of Congress.

In recent years, however, the Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." Thus, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." The question before us is whether the Brady Act, by requiring CLEOs to perform background checks on handgun purchasers, transgressed such an implied limitation on federal power. We conclude that it did not.

There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal laws of general applicability. Second, Congress may condition the grant of federal funds on the States' taking governmental action desired by Congress.

These broad categories do not exhaust, however, the means by which the federal government can enlist state employees in implementing federal programs. State judicial and administrative bodies may be required to apply federal law. The federal government may offer to preempt regulation in a given area, and permit the states to avoid preemption if they regulate in a manner acceptable to Congress.

The federal government has been permitted effectively to compel the states to issue registered rather than bearer bonds. Finally, the federal government has been permitted to require state utility regulators to consider prescribed federal standards in determining regulatory policies. In the course of the latter ruling, the Supreme Court referred to and rejected the "19th century view" that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." That view, said the Court, "is not representative of the law today." "The federal government has some power to enlist a branch of state government . . . to further federal ends."

Against this background, there would appear to be nothing unusually jarring to our system of federalism in the Brady Act's requirement that CLEOs, during a five-year interim period, "make a reasonable effort to ascertain" the lawfulness of handgun purchases. The obligation imposed on state officers by the Brady Act is no more remarkable than, say, the federally-imposed duties of state officers to report missing children, or traffic fatalities.

Mack and Printz, however, contend that the precedential background set forth above was changed by *United States v. New York*, and that the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program. We do not read *New York* that broadly.

Although we concede that there is language in *New York* that lends support to the view of Mack and Printz, that language must be interpreted in the context in which it was offered. *New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act. The constitutional evil that *New York* addressed was one recognized by several of the cases already cited: the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula.

New York involved the constitutional validity of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The part of the Act that the Court found to violate the Tenth Amendment was the so-called "take title" provision. Under that provision, a State that failed to regulate radioactive waste according to congressional standards was simply given title to the waste within its borders (which previously would have

been in private hands). The waste then became the total responsibility of the State as owner. The alternative to this unacceptable prospect was for the State to legislate or regulate in a manner that Congress dictated, and "a direct order to regulate, standing alone, would . . . be beyond the power of Congress." Thus, in response to the government's argument that a strong federal interest supported the "take title" provision, the Court in *New York* stated: "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation." In the same vein was the Court's conclusion after reviewing the debates at the time of the founding of the Constitution:

We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Other decisions of the Supreme Court have recognized this proposition that the federal government cannot coerce States into performing the ultimately sovereign acts of legislating or regulating in a manner specified by the federal government. In *Virginia Surface Mining*, the Court noted that the provision of an alternative of federal regulation rendered federal standards for state regulation permissible; because the State had a constitutional option, "there can be no suggestion that the Act commandeers the legislative processes by directly compelling them to enact and enforce a federal regulatory program." Similarly, in *FERC v. Mississippi*, the Court noted that the federal command that the State "consider" federal alternatives was constitutional because "there is nothing in PURPA 'directly compelling' the States to enact a legislative program."

New York, then, is best read as a case that draws a line already partly delineated in Virginia Surface Mining and FERC v. Mississippi: the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government. Certainly *New York* did not purport to overrule *Virginia Surface Mining* or *FERC v. Mississippi*, or even to disavow the latter decision's rejection of the nineteenth century view that the federal government cannot command state employees. *New York* can be read consistently with these cases as an instance where "the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy.

There are good reasons for focusing Tenth Amemdment concern on federal coercion of a State's enactment of legislation or regulations or creation of an administrative program. These activities are inherently central acts of a sovereign; if an area of state activity is to be protected from direct coercion by an implication drawn from the Tenth Amendment, legislating and regulating are prime candidates. "The power to make decisions and to set policy is what gives the State its sovereign nature." There is a second reason, also, emphasized in *New York* itself. Democratic governments must be politically accountable. When the federal government requires the States to enact legislation, the enacted legislation is state legislation. Thus, it will likely "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." When the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability.

The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. The Brady Act does not embody a mandate to the "States" in the sovereign sense discussed in *New York*, *FERC v. Mississippi*, or *Virginia Surface Mining*. The Brady Act is a regulatory program aimed at individuals and not the States. It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. They are not even being asked to produce a state policy, for which the state must bear political accountability. Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program. Their activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials.

Mack and Printz do not agree that the Brady Act's interference with their state duties is minimal. They point out that there are many factors that may make a prospective handgun purchase illegal under the Act. A purchase is unlawful, for example, if the purchaser is a fugitive, is an unlawful user of a controlled

substance, has been adjudicated a mental defective, has been dishonorably discharged from the armed forces, has renounced his citizenship, or is under certain restraining orders involving an intimate partner. They also contend that it will be unduly burdensome to give reasons for rejecting a proposed purchase, within 20 days of being requested by the disappointed purchaser. Mack and Printz point out that they are sheriffs in rural counties with limited staffs and resources. To research for all of these disabilities and to give reasons for rejection, Mack and Printz argue, will either take all of their time or so much of it that they will be unable to perform their regular county duties.

The government, on the other hand, argues that there is no requirement that CLEOs pursue all of these avenues of potential disqualification. They are enjoined only to "make a reasonable effort," and the statute's only fixed requirement is a search in whatever recordkeeping systems are available and in a national system. Id. A reasonable effort, the government contends, might in the circumstances of Mack and Printz simply be a check of the existing computer records.

We agree, and the government concedes, that there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. Mack and Printz have not demonstrated that the Act will interfere unduly with their duties. Indeed, to a considerable degree, the dispute over the magnitude of the burden imposed upon them is not ripe for resolution. Mack and Printz have not been subjected to any interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records. On this record, we cannot conclude that "a reasonable effort" inevitably requires more than this minimum for Mack and Printz. To perform such computer checks, and to explain reasons for rejection when and if disappointed purchasers so request, has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns. It follows even more strongly that the minimal requirement of destruction of records presents no constitutional problem.

We also find no support for the Tenth Amendment claims of *Mack* and *Printz* in the cases from our circuit that they cite. In *Board of Natural Resources* we held that the Forest Resources Conservation and Shortage Relief Act violated the Tenth Amendment. That Act however - akin to the statute in *New York* - required the States to issue regulations and was far more demanding of state officials than the Brady Act. And *Brown*, like *Board of Natural Resources*, involved regulations that clearly intruded upon a state's sovereignty, unlike the contested provisions of the Brady Act. Additionally, *Brown* relied upon the Tenth Amendment view espoused in *Kentucky v. Dennison*, overruled by *Puerto Rico v. Branstad*, that "the Federal Government . . . has no power to impose on a State officer, as such, any duty whatsoever . . . ." As the Supreme Court has made clear, the view espoused in *Kentucky v. Dennison* is no longer representative of the law. We therefore reject Mack's and Printz's Tenth Amendment challenges to the Brady Act.

II. THE FIFTH AMENDMENT VAGUENESS CHALLENGE

Section 924(a)(5) of the Act provides that "whoever knowingly violates subsection (s)" of the Act is subject to fine or imprisonment or both. Mack and Printz contend that this provision subjects them to criminal liability for failing to "make a reasonable effort" to ascertain whether a particular purchase would violate the law, as required by section 922(s)(2). So construed, the criminal provision is unconstitutionally vague, according to Mack and Printz, because a person of reasonable intelligence has no way of knowing what may constitute a "reasonable effort."

It is not at all clear, however, that section 924(a)(5) is intended to apply to the Act's requirements imposed upon CLEOs. Indeed, the Montana district court viewed the criminal prohibition as ambiguous in that regard, and concluded that it did not apply to CLEOs.

We decline to reach this issue, however, because it is not ripe. Mack and Printz have not been charged under the Act with any criminal violations, nor are they likely to be. The United States represented during oral argument that the Justice Department's official position is that the criminal sanctions of the Brady Act do not apply to CLEOs. Because Mack and Printz do not face a "credible threat of prosecution," there is no "case or controversy." In the extremely unlikely event that a criminal prosecution is one day brought against a CLEO, the constitutional objection may be raised in defense at that time.

We therefore vacate the ruling of the District Court of Arizona that the criminal provisions apply to CLEOs and are void for vagueness, as well as the ruling of the District Court of Montana that the criminal provisions do not apply to CLEOs. These claims are to be dismissed as unripe.

III. THE THIRTEENTH AMENDMENT CHALLENGE

Mack also challenges the Brady Act as violating the Thirteenth Amendment. The Thirteenth Amendment provides that "neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction." According to Mack, section 922(s) requires him to perform labor for the United States or face legal sanctions, even though he is not a federal employee.

Unlike a slave, however, Mack can quit work at any time. By doing so, he escapes all compulsion. The requirements of the Brady Act are not placed on Mack personally; the duties that are imposed attend the office. Thus the Brady Act does not coerce Mack "by improper or wrongful conduct" into service by causing and intending to cause him "to believe that he . . . has no alternative but to perform the labor." The fact that Mack, if he continues to be sheriff, must perform certain duties as a condition of his employment, does not violate the Thirteenth Amendment.

CONCLUSION

The Brady Act violates neither the Tenth nor Thirteenth Amendment. Mack and Printz's Fifth Amendment vagueness challenge is not ripe. Accordingly, the district courts' injunctions prohibiting the United States from enforcing the disputed provisions of the Brady Act are vacated, and the district courts' judgments are reversed insofar as they invalidate portions of the Act. The portions of the cross-appeal in Mack and the appeal in Printz that challenge the district courts' rulings of severability are dismissed as moot; in all other respects the rulings challenged by Mack and Printz, are affirmed. The cases are remanded with instructions to dismiss the vagueness challenges as unripe. The United States is entitled to its costs on appeal.

. . . FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts II and III of the majority opinion, but I respectfully dissent from part I.

This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded. Congress has previously attempted to order the states to legislate or regulate in particular ways, and it has failed at that. That is to say, Congress has failed when it has not given the states the option to avoid the intended yoke. Even those determinations are not without their problems because they could lead to a "dismemberment of state government."

Now Congress has avoided those issues, but it has done so by eliminating the niceties of the federal-state relationship entirely. Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. Those officials must make a "reasonable effort" to decide whether receipt of a weapon by a proposed transferee "would be in violation of the law" of the United States. Those efforts must include "research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." And the work must be done within five business days. The officials must also dispose of the materials and may not make any use of them other than that directed by Congress. They must provide written explanations for negative determinations upon request. Presumably those officials must also adopt appropriate procedures for the carrying out of those functions. Perhaps that is not forced administration of the federal gun regulation program, but I fail to see why it is not.

Of course, the states are to bear the full cost of these tasks, and, unless the states adopt a local permit system, they cannot opt out of the federal program. If a state does not choose to engage in the regulation of this part of commerce - commerce in weapons - that makes no difference at all. In other words, state officials are conscripted by the federal government to fulfill its purposes and they can do nothing about that.

The government argues that this is much more respectful of state sovereignty than the legislation struck down in *New York*. I do not agree. If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

Moreover, we are not dealing with a situation where a state seeks to stay in the business of regulating commerce in weapons. Quite the contrary. This legislation impacts states that do not wish to do so. I assume that the Supreme Court meant what it said when it said:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.

Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees. It makes every CLEO's office an office of the federal bureaucracy, funded by the states, but directed from Washington. The time to stop this journey of a thousand miles is at the first step.

Therefore, I respectfully dissent from the majority's determination that the statute does not violate the Tenth Amendment.