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Sumner Canary Lecture Judging under the Aegis of the Third Article

Louis H. Pollak

SUMNER CANARY LECTURE

JUDGING UNDER THE AEGIS OF THE THIRD ARTICLE[1]

Louis H. Pollak[†]

I think that I made a mistake in framing the title of this lecture: *Judging Under the Aegis of the Third Article*. Article III is—as every school-child knows (and as their elders have forgotten)—the article of the Constitution that establishes the Supreme Court, authorizes Congress to establish so-called "inferior" courts, and describes the judicial power of the United States—i.e., the kinds of cases federal courts are empowered to hear, provided Congress elects to enact jurisdictional statutes compatible with Article III. However, I am afraid that *Judging Under the Aegis of the Third Article* is not a banner calculated to draw large crowds clamoring for admission to the lecture-hall. *Judging Under the Aegis of the Third Article* is a collection of words that suggests that the lecturer—particularly one who makes his home in the basement of Article III—may be expected to share with his audience such delectable jurisprudential morsels as the niceties of standing, or of jurisdictional amount—or, just possibly, the proper way to draft a complaint asserting a cause of action said to "arise under" federal law, or whether federal district court exercise of supplemental jurisdiction under section 1367 of the Judicial Code may turn out to be the camel's nose under the tent of state-court autonomy. The fact is, however, that what I want to talk about this afternoon is none of the above. Indeed, my topic may be regarded as undeserving of house room in a law school of venerable pedigree and of notable professional and scholarly distinction. My topic is not doctrinal. Worse yet, it is not meta-doctrinal—whatever that may mean. And it

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[†] Judge, United States District Court, Eastern District of Pennsylvania. I am most grateful to Dean Gerald Korngold and Nancy H. Canary, Esq., and the faculty of the Case Western Reserve University School of Law for the privilege of delivering the 2000 Sumner Canary Lecture.

isn't even interdisciplinary. One might argue that what I propose to talk about has to do with judicial manners—that is, the style of adjudication—rather than with the content of what is adjudged. But I will try to suggest that it has to do with both.

I.

I will get to my topic in a somewhat round-about way. It has to do with the Supreme Court—the current Court. It is an open secret that the current Court—more precisely, a five-Justice majority, captained by the Chief Justice, and including Justices O'Connor, Scalia, Kennedy, and Thomas—has, over the last several years, been engaged in rearranging some of the heretofore familiar features of our federal architecture. The legislative authority of Congress appears to be more circumscribed—and, correlatively, the several states appear to be more sovereign—than we have previously understood.

The possibility that Congress has less authority than we have long supposed was brought home sharply by the Court's 1995 decision in *United States v. Lopez.*[2] That surprising decision, in which the five Justices held unconstitutional a federal statute—the Gun-Free School Zones Act of 1990—that made it a crime to carry a gun within one thousand feet of a school, was the first instance of Supreme Court invalidation of a law enacted pursuant to the Commerce Clause—the principal grant of regulatory authority in the arsenal of Congress—in more than sixty years. What was unclear (in addition to the precise rationale of the decision) was whether *Lopez* was an isolated event or a harbinger of more to come. Because I tend to be optimistic (a word of Latin derivation which means "near-sighted") I managed to persuade myself that *Lopez*—wrongly decided as I believed it to be—did not have to be read as a case of broad implication. The statute at issue in *Lopez*—unlike most federal gun-control statutes—did not specify that the gun must be shown to have traveled in interstate commerce, the conventional ground of congressional regulatory authority over firearms. The provenance of this lacuna has not, so far as I am aware, been unearthed—very likely, it was simple negligence in the legislative drafting process. In mulling about *Lopez* at the time it was decided, I realized that the Court's opinion—written by the Chief Justice, and joined by Justices O'Connor, Scalia, and Kennedy, and joined in part by Justice Thomas—could be read as simply a "heads up" to Congress, warning the denizens of Article I that there are limits to the judiciary's tolerance of inattentive lawmaking.[3] But

[2] 514 U.S. 549 (1995).

[3] *See* Louis H. Pollak, *Perspectives on a Divided Court*, 25 CAP. U. L. REV. 285, 294-95 (1996): "Certainly the Gun-Free School Zones Act of 1990 presented itself as an inviting target for Justices who felt it appropriate to remind Congress that even the commerce power has limits

some of the language in the Chief Justice's opinion, and in the concurring opinions of Justice Kennedy (joined by Justice O'Connor) and Justice Thomas, could be read as an intimation that *Lopez* was a decision of broader implication. Which of these readings would, in the fullness of time, turn out to be correct was a matter of major constitutional moment. As my erstwhile teacher and colleague Boris Bittker sagely observed four years after *Lopez*, in his remarkable treatise on the Commerce Clause:

> Viewed in isolation as a check on the federal regulatory Goliath, the *Lopez* case itself is all but imperceptible; but it has already been cited in nearly 1,000 cases, and the Supreme Court has not yet signaled whether it is an initial step in changing the Court's direction, or only a short detour.
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> As explained in this work, if *United States v. Lopez* is to become a landmark of constitutional law rather than a curiosity, the Supreme Court will have to revise a host of long-entrenched seminal cases and doctrines. The result would be a wrenching shift of regulatory power from Congress to the states—a change that may well disturb the regulated entrepreneurs even more than it disappoints the federal regulatory agencies, and that will produce a cemetery full of memorials to the deceased doctrine of stare decisis.[4]

In short, whether *Lopez* was a discrete event or a staker-out of new ground remains a matter of major constitutional moment today. The Court has not yet had occasion—or, at least, has not yet taken occasion—to extend *Lopez*. Nor has the Court retreated from *Lopez*.[5]

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and that judicial scrutiny is not to be warded off by the simple process of passing a law and then relying on the Solicitor General to incant the word 'commerce.'"

[4] BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, at xxii (1999).

[5] On May 15, 2000, just over a month after this lecture was delivered, the Court, in *United States v. Morrison*, 529 U.S. 598 (2000), held that congressional inclusion in the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, & 42 U.S.C.), *as amended by* Pub. L. No. 104-294, 110 Stat. 3506 & 3507, of a federal civil remedy for gender-motivated assault, 42 U.S.C. § 13981, was not constitutionally supportable either by the Commerce Clause or by the Fourteenth Amendment. The commerce power aspect of the Court's holding seems, indeed, to have extended *Lopez*. The Court, speaking through Chief Justice Rehnquist, said:

> In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, *e.g.* H. R. Conf. Rep. No. 103-711, p. 385 (1994), U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853; S. Rep. No. 103-138, p. 40 (1993); S. Rep. No. 101-545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" 514 U.S., at 557, n. 2, 115 S.Ct. 1624 (quoting *Hodel* [*v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S.

However, the five-Justice majority has not been idle on other, related, constitutional frontiers. In 1997, in *Printz v. United States*,[6] the

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264, 311 (1981)] (Rehnquist, J., concurring in judgment)). Rather, "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" 514 U.S., at 557, n. 2 (quoting *Heart of Atlanta Motel, [Inc. v. United States*, 379 U.S. 241, 273 (1964)] (Black, J., concurring)).

....

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. *Lopez*, 514 U.S., at 568, 115 S.Ct. 1624 (citing *[NLRB v.] Jones & Laughlin Steel*, 301 U.S., at 30 [(1937)]). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, *e.g.*, *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the states, than the suppression of violent crime and vindication of its victims.

Morrison, 529 U.S. at 614-18 (footnotes omitted). The principal dissent was written by Justice Souter and was joined by Justices Stevens, Ginsburg and Breyer. According to the dissenting Justices:

The Act would have passed muster at any time between *Wickard [v. Filburn*, 317 U.S. 111 (1942)] in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. § 8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra*, at 258; *[Katzenbach v.] McClung*, [379 U.S. 294,] 301-305 [(1964)], but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta, supra*, at 257.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante*, at 1752. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

Id. at 637-38 (Souter, J., dissenting).

[6] 521 U.S. 898 (1997).

question before the Court was the validity of certain provisions of the Brady Gun-Control Statute of 1993—a statute designed to strengthen long-standing federal prohibitions on the possession of guns by convicted felons, drug addicts, persons committed to mental institutions, illegal aliens, and others regarded as unsuitable gun-possessors. The provisions in question required local law enforcement officers to "make a reasonable effort" to conduct a not-very-onerous inquiry into whether a would-be gun purchaser fell into one of the disfavored categories. These were interim provisions, designed to last for five years, until the Attorney General could put into operation adequate federal machinery. The Brady Gun-Control Statute was, like the Gun-Free School Zones Act, enacted pursuant to the Commerce Clause. But in *Printz* the question was not whether Congress lacked authority under the Commerce Clause to impose limits on gun possession. The question was whether Congress had authority to impose obligatory duties, of a minimal clerical/ministerial nature, on law enforcement officers who owed their authority to a state rather than to the United States. The five-Justice majority, speaking through Justice Scalia, held that what Congress had asked of local law enforcement officers was incompatible with the dignity and independence of the several states.

The debate between the *Printz* majority and the *Printz* dissenters is a constitutional theorist's dream, but the real-world consequences of the decision are unlikely to be of enduring and pervasive significance. For the vast bulk of its regulatory agenda, Congress has no pressing need to rely on the efforts of local officialdom. Even in *Printz*, what was at stake were transitional procedures; the longer-term Brady Gun-Control provisions do not appear likely to generate major constitutional issues. Having said as much, I should add that, in my view, the dissenters had the better of the argument in *Printz*. But I will not undertake to pursue those constitutional issues, because they would pull me away from the matters that I do want to discuss with you this afternoon.

Before the conclusion of this lecture, I will return to *Printz*, but less for the content of the constitutional debate than for the form of one aspect of that debate. But first I want to talk with you about *Seminole Tribe v. Florida*,[7] decided in 1996—after *Lopez* and prior to *Printz*.

The *Seminole Tribe* problem has its roots in Article III. It is familiar learning that Article III contemplates two categories of cases that can be brought in the federal courts. The first category encompasses cases arising under federal law—statutes, treaties, the Constitution, and the largely judge-wrought realm of admiralty.

[7] 517 U.S. 44 (1996).

The second category encompasses cases characterized by the identity of the parties rather than by the federalness of the legal issues. Thus, it extends the federal judicial power "to Controversies to which the United States shall be a party; to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different states;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[8] In this second category, the most numerous cases are, of course, those we know as "diversity" cases—suits between citizens of different states, in which the legal issues are generally matters of state law routinely addressed by state courts but for whose adjudication the Framers felt it appropriate to provide access to federal courts with a view to insuring that out-of-state litigants had a level judicial playing field. In noting that this was a reason why the Framers, in 1787, undertook to empower Congress to provide that federal courts could entertain diversity suits, I am not suggesting that hostility to out-of-state litigants has been a significant ingredient of state-court adjudication in any current time-frame. Today, the case for retaining diversity jurisdiction (and Congress will assuredly not jettison it, at least for the foreseeable future) must depend on arguments other than the perceived parochialism of state courts. Also, as is apparent, this second category of Article III cases includes cases in which a state is a party—a case, for example, in which one state sues another, or a case involving a controversy between a state and a citizen of another state.

In 1793, in the great case of *Chisholm v. Georgia*,[9] the Supreme Court had before it a suit in assumpsit—essentially, a contract suit—which did not arise under federal law, brought by a citizen of South Carolina against the state of Georgia. *Chisholm* was not brought in an "inferior" federal court. It was brought in the Supreme Court, in compliance with Article III's directive that "[i]n all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction."[10] Georgia filed what was in essence a motion to dismiss, contending that as a sovereign state it could not be sued without its consent. The Supreme Court—four Justices to one—declined to dismiss Mr. Chisholm's suit. Authority to entertain the suit was found to lie in Article III's express language—suits "between a State and Citizens of another State"[11]—and the corresponding language of the First Judiciary Act. The Court's ruling sustaining jurisdiction in

[8] U.S. CONST. art. III, § 2, cl. 1.
[9] 2 U.S. (2 Dall.) 419 (1793).
[10] U.S. CONST. art. III, § 2, cl. 2.
[11] *Id.* cl. 1.

Chisholm was distressing to many who had a firm belief in states' rights, and Congress soon submitted to the states a proposed constitutional amendment to overturn the decision. The proposed amendment was promptly ratified and became part of the Constitution in 1798. That amendment—the Eleventh—provided that "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."[12] On its face the language of the amendment appeared to be directed only to the second category of Article III cases—i.e., cases brought before the federal courts by virtue of the character of the parties—with the result that thenceforth a state could not be sued in a federal court by a citizen of another state (or by a citizen of another country) on a non-federal cause of action.

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[12] *Id.* amend. XI. *Seminole Tribe*—the Eleventh Amendment case decided in 1996 to which this lecture devotes principal attention—builds on the entire span of our constitutional history. However it is only in the 20 years leading up to *Seminole Tribe* that questions of state sovereign immunity—the amenability *vel non* of states to be sued in federal courts—have regained a substantial measure of the intense constitutional significance that they briefly and dramatically assumed two centuries ago, when *Chisholm* was decided and was at once followed by adoption of the Eleventh Amendment. In the 20 years leading up to *Seminole Tribe*, the major case law landmarks were *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The Court's progress from *Fitzpatrick* to *Union Gas* was paralleled by a spate of revived scholarly interest in the Eleventh Amendment. *See, e.g.*, Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. PA. L. REV. 1203 (1978) (addressing congressional power to abrogate state sovereign immunity); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (arguing that the Eleventh Amendment was simply intended to overturn *Chisholm*'s holding that the Article III language extending the judicial power to suits "between a State and Citizens of another States" not only contemplated suits in which a state was a plaintiff but also contemplated suits in which a state was a defendant); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983) (arguing that the Supreme Court's understanding of the Eleventh Amendment was thrown off track by *Hans v. Louisiana*, 134 U.S. 1 (1809), and that the Court has for the last century continued to give the Eleventh Amendment far too sweeping an interpretation); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (arguing that the Supreme Court has extended the Eleventh Amendment beyond its text and beyond what a coherent vision of federalism requires); JOHN V. ORTH, JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987); Vickie C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988) (arguing that the Eleventh Amendment was "a limited repeal of a party-based [i.e., citizen of one state versus another state] head of jurisdiction, implying no constitutional immunity over claims arising under the federal question or admiralty heads of jurisdiction," *id.* at 5 n.13); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (arguing that construing the Eleventh Amendment as only an elimination of party-based jurisdiction cannot be squared with the breadth of the amendment's text); William P. Marshall, *The Diversity of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989) (rejecting the views of Fletcher, Gibbons, Amar, and others); Calvin R. Massey, *State Sovereign Immunity and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989) ("The amendment sought to create a party based denial of jurisdiction to the federal courts that sweeps across all the jurisdictional heads of Article III," *id.* at 65); *Correspondence*, 57 U. CHI. L. REV. 117 (1990) (Massey, William Marshall, Lawrence Marshall, and Fletcher restate their positions).

Almost a century later, in 1890, the Court, in *Hans v. Louisiana*[13]—a "landmark case," as Justice Scalia has properly characterized it[14]—had further occasion to give close scrutiny to a state's claim of sovereign immunity. Hans, a citizen of Louisiana, brought suit against the state of Louisiana in a Louisiana federal court. Hans claimed entitlement to interest payments on Louisiana bonds, and contended that Louisiana's refusal to pay the interest was based on an amendment to Louisiana's constitution that precluded the state from making the interest payments as they came due; the effect of the amendment, Hans asserted, was to prevent performance by Louisiana of the bond contract that Hans and Louisiana had entered into—a state impairment of the obligation of contract forbidden by the Contract Clause of the Constitution, one of the nine express interdictions of state authority contained in the first paragraph of Section 10 of Article I of the Constitution. The *Hans* Court recognized that Hans's suit was brought under the portion of Article III which extends the judicial power "to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties"—the portion of Article III implemented, in 1875, by a statute generally authorizing the federal courts to entertain cases arising under federal law. The Court also recognized that Hans, as a citizen of Louisiana suing his own state, did not come within the letter of the Eleventh Amendment's prohibition of suits brought against states by citizens of other states or countries. However, the Court concluded, in effect, that the Eleventh Amendment was to be read more broadly than its text required—that it was to be read as a pronouncement by the American people that the *Chisholm* Court erred in holding that the Constitution as originally written permitted an individual to sue a state in a federal court.[15] "The suability of a State without its consent

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[13] 134 U.S. 1 (1890).

[14] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31-32 (Scalia, J., concurring in part and dissenting in part).

[15] The *Hans* Court put the matter this way:

> This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "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." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney General Lee, in the case of *Hollingsworth v. Virginia*, 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" *Tilghman* and *Rawle* argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the

was a thing unknown to the law," the Court said in *Hans.*[16] The *Hans* Court acknowledged that, by joining the United States, a state was understood to have acquiesced in being subject to suit in the federal courts by other states and by the United States, but the Court appeared to have found in the Eleventh Amendment a prohibition on federal court adjudication of any suit brought against a state by a private person or enterprise, wherever domiciled, even if the plaintiff's claim may have arisen under federal law.[17]

In the last quarter century, the Court has confronted more than once the question whether Congress, in order to enforce a valid federal legislative program, has the power to enact a limited abrogation of a state's sovereign immunity to the extent necessary to authorize federal court suits against a state by persons (whether animate or artificial) alleging injury flowing from a state's failure to comply with a legislative directive of Congress. In 1976, in *Fitzpatrick v. Bitzer*,[18] the Court held that Congress can effectuate such an abrogation of a state's sovereign immunity when the program Congress seeks to implement is one adopted pursuant to the Fourteenth Amendment—an amendment which (a) was adopted subsequent to the Eleventh Amendment and (b) by its express terms (the Equal Protection, Due Process, and Privileges and Immunities Clauses) imposes constraints on states. But thirteen years later, in 1989, in *Pennsylvania v. Union Gas Co.*,[19] the Court was sharply divided over the question whether

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> amendment. But, on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state."
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> This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*....

Hans, 134 U.S. at 11-12.

16 *Id.* at 16. Justice Harlan concurred in the judgment in *Hans* but declined to give his assent to many things said in the opinion. The comments made upon the decision in

> *Chisholm v. Georgia* do not meet my approval. They are not necessary to a determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.

Id. at 21 (Harlan, J., concurring).

17 Building on *Hans*, the Court in 1934, in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), held that a foreign country could not sue an unconsenting state in a federal court (in that instance, the Supreme Court) to recover principal and interest allegedly due on bonds issued by the state. In litigation not brought to recover money damages, as in *Hans* and *Principality of Monaco v. Mississippi*, but seeking to restrain an allegedly unconstitutional course of action pursued by a state official, the rigor of *Hans* was alleviated by cases such as *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891), and, most notably, *Ex parte Young*, 209 U.S. 123 (1908). Conceptually, a suit to stop a state official from violating the Constitution is not regarded as a suit against the state.

18 427 U.S. 445 (1976).

19 491 U.S. 1 (1989).

Congress could abrogate state sovereign immunity in order to authorize suits against states by persons asserting non-compliance with federal legislative programs adopted under the Commerce Clause. Four Justices—Justice Brennan, joined by Justices Marshall, Blackmun and Stevens—concluded that Congress had power to authorize such suits. Four Justices—Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy—disagreed. The ninth Justice—Justice White—voted with Justices Brennan, Marshall and Blackmun but stated: "I agree with the conclusion reached by Justice Brennan . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning."[20]

The question, in *Union Gas*, was whether the Union Gas Company could file a third-party claim against the Commonwealth of Pennsylvania for a portion of the costs which the United States had incurred in cleaning up a Superfund site near Brodhead Creek, in Stroudsburg, Pennsylvania, and which the United States was seeking to recover from Union Gas. For the purposes of the particular case before the Court, the ruling in *Union Gas* answered that question in the affirmative. But, manifestly, the efforts to clean up Brodhead Creek had left the law of state sovereign immunity quite muddy. In particular, it was notable that the four-Justice *Union Gas* plurality led by Justice Brennan had managed to endorse the abrogation of Pennsylvania's sovereign immunity without disturbing *Hans*. Plainly, the Justices had more work ahead of them. The opportunity to mitigate—or, perchance, aggravate—the puzzlements surrounding the Eleventh Amendment presented itself seven years later in *Seminole Tribe*.

In *Seminole Tribe* the Court had before it a federal statute designed to facilitate the efforts of Indian tribes to gain the cooperation of states in establishing casinos on Indian reservations located within states. Specifically, the statute authorized federal district courts to entertain suits brought by Indian tribes against recalcitrant states to compel the states to negotiate with the tribes. Invoking the statute, the Seminole Tribe of Florida sued the state of Florida. The five-Justice majority, speaking through the Chief Justice, held the statute unconstitutional as an infringement of Florida's sovereign immunity.

The Chief Justice's opinion relied heavily on *Hans*. Justice Stevens filed a dissenting opinion which, in part, sought to distinguish *Hans*. Justice Souter also filed a dissenting opinion in which Justices Ginsburg and Breyer joined. The Souter dissent was eighty pages long. The Souter dissent met *Hans* frontally and challenged its correctness. In particular, Justice Souter argued that the *Hans* Court was mistaken in projecting onto the words of the Eleventh Amendment a

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[20] *Id.* at 57 (White, J., concurring in part and dissenting in part).

meaning beyond the text—i.e., a pronouncement by the Congress proposing and the states ratifying the Eleventh Amendment that the Court in *Chisholm* had wrongly construed the Constitution as originally drafted and that the sovereign immunity of each state to all suits other than suits brought by the United States or another state had been embedded in Article III from the beginning. In support of his argument that *Hans* had gotten its constitutional history wrong, Justice Souter cited a good deal of recent scholarship,[21] including a comprehensive study of the Eleventh Amendment and its *sequelae* published in 1983 in the *Columbia Law Review*.[22] That major study was written by John Gibbons, who was then a judge—and a judge of great distinction—of the Third Circuit. (To the great regret of those of us who reside in Article III, Judge Gibbons retired from the bench in 1990, to return to practice.) According to the Gibbons analysis—an analysis concurred in, in some degree, by other commentators—the result in *Hans* was driven in part by a felt need on the part of the Court to avoid having federal courts take cognizance of suits against southern states that in the post-Reconstruction period were defaulting on Reconstruction-era bonds; as Gibbons saw the matter, suits of this sort, if permitted to be maintained, were likely to result in money judgments against states which the federal courts would find themselves powerless to enforce, to the detriment of the federal judicial image.

The opinion of the *Seminole Tribe* Court responded to Justice Souter's dissection of *Hans* by taking umbrage. Quoth the Court:

> The dissent [of Justice Souter] . . . disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. . . . Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional mode of adjudication.[23]

Umbrage is not enough. If the explanation of *Hans* proffered by Gibbons and other commentators, and referred to by Justice Souter, was overdrawn, would it not have been better practice for the Justices of the majority, in lieu of chastising their colleague, to identify the flaws in the commentators' analysis? Perhaps the majority's allergic reaction to the Souter dissent stemmed from a sense that the historical assessments Justice Souter invoked were revisionist in tone, less reverential to Justices of an earlier time—the *Hans* Court—than is customary in an institution supremely (indeed, almost uniquely) con-

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[21] The academic writings listed in note 12, *supra*, include the various materials cited by Justice Souter in his dissenting opinion.

[22] *See* Gibbons, *supra* note 12.

[23] Seminole Tribe v. Florida, 517 U.S. 44, 68-69 (1996).

scious of its direct links to its past.[24] But—and here I take my stand on a dictum of another erstwhile colleague, Stephen Burbank:

> Revisionist history (if that is not redundant) may be better than no history at all when a court is called upon to decide an issue of procedure, particularly one that implicates separation of powers or federalism. . . . [W]hen a court acknowledges the relevance of history to the decision of an issue, scholars and others who follow that court's work can better assess its performance . . . .[25]

Further, in assessing *Seminole Tribe*, it is important to recognize that the correctness of Justice Souter's dissent does not stand or fall on the correctness of the Gibbons explanation of why the Court decided *Hans* as it did. Justice Souter's reason for presenting, and giving weight to, the Gibbons thesis was, as Justice Souter put it, "not that historical circumstance may undermine an otherwise defensible position; on the contrary, it is just because *Hans* is so utterly indefensible on the merits of its legal analysis that one is forced to look elsewhere to understand how the Court could have gone so far wrong."[26] The correctness of Justice Souter's dissent turns, then, not on whether Judge Gibbons and other commentators accurately parsed the dynamics of *Hans*. The correctness of Justice Souter's dissent turns on (1) whether the Court, in *Chisholm*, in 1793, articulated a reasonable interpretation of Article III as drafted only six years before, and (2) whether the Congress that proposed and the state legislatures that ratified the Eleventh Amendment demonstrably had in mind a reordering of our constitutional arrangements that swept far more broadly than is apparent from the words of the single sentence of text actually added to the Constitution. In his *Seminole Tribe* dissent, Justice Souter put forward the submission that "[t]he history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diver-

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[24] It should be noted that Justice Souter did not insist that the revisionist commentary was demonstrably and definitively the whole truth:

> I am reluctant, to be sure, to ascribe these legal developments to a single, extralegal cause, and at least one commentator has suggested that the Southern debt crisis may not have been the only factor driving the Court's Eleventh Amendment jurisprudence during this period. See generally Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212 (1988) (reviewing [ORTH, *supra* note 11]). But neither would I ignore the pattern of the cases, which tends to show that the presence or absence of enforcement difficulties significantly influenced the path of the law in this area.

Id. at 122 n.16 (Souter, J., dissenting).

[25] Stephen Burbank, *The Bitter with the Sweet: Tradition, History and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1294 (2000).

[26] *Seminole Tribe*, 517 U.S. at 122-23 n.17 (Souter, J., dissenting).

sity Clauses."[27] Justice Souter undertook to document that submission by referring to the bumper crop of Eleventh Amendment scholarship in the 1970s and 1980s—most of which (but not all, as Justice Souter scrupulously acknowledged) supported his submission.[28]

It is hardly a sufficient answer to say, as the *Seminole Tribe* majority did, that "*Hans*—with a much closer vantage point than the dissent—recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution."[29] After all, the members of the *Chisholm* Court had a "much closer vantage point" than the members of the *Hans* Court. It is, of course, possible that the *Chisholm* majority did not understand Article III. *Chisholm* was, after all, not unanimous—Justice Iredell dissented. And, Justice Iredell was certainly knowledgeable about the Constitution: he had played an important role in securing ratification in North Carolina. But Justice Iredell's four colleagues—the *Chisholm* majority—were no less personally involved in the Constitution-making process: Justice Cushing was Vice-Chairman of the Massachusetts ratifying convention, presiding over most of its sessions. Justice Blair and Justice Wilson were both delegates to the Constitutional Convention—and, indeed, Wilson was one of the Convention's most articulate and influential members. And Chief Justice Jay was, of course, one of the authors of *The Federalist Papers*.

You may infer, from what I have said, that I think the Court chose to follow a wrong path in *Seminole Tribe*. Such an inference would be correct. And, unhappily, the Court has continued along that path in a series of cases decided last term and this.[30]

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27 *Id.* at 110.

28 *See id.* at n.8. *See also supra* note 21.

29 *Seminole Tribe*, 517 U.S. at 69.

30 *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that Congress is powerless to authorize a federal court suit for patent infringement brought by a private entity against a state instrumentality under the Patent and Plant Variety Protection Remedy Clarification Act); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that Congress is powerless to authorize a federal court suit for misleading advertising brought by a private entity against a state instrumentality under the Lanham Act); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that Congress is powerless to authorize federal court suits for age discrimination brought by private individuals against state instrumentalities under the Age Discrimination in Employment Act ("ADEA")); *cf.* Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress is powerless to authorize a Fair Labor Standards Act ("FLSA") suit for overtime brought in a Maine *state court* by private individuals against their employer, the state of Maine). In each of these cases, the Court was divided on the now-familiar five-to-four lines. In *Kimel*, Justice O'Connor, joined by the Chief Justice and Justice Scalia, wrote for the Court. Justice Thomas, joined by Justice Kennedy, filed an opinion concurring in part and dissenting in part. The two Justices' point of difference with Justice O'Connor's opinion was that they were not persuaded that the language and legislative history of the ADEA evidenced a clear congressional intention to authorize suits against a state or its instrumentalities. However, in stating their concurrence in the balance of Justice O'Connor's opinion, Justices Thomas and Kennedy expressly noted their "agree[ment] that the purposed abrogation of the States' Eleventh Amendment immunity in the ADEA falls

outside Congress' § 5 [of the Fourteenth Amendment] enforcement power." *Kimel*, 528 U.S. at 99 n.1 (Thomas, J., concurring in part and dissenting in part).

A further chapter in the *Seminole Tribe* saga was added ten months after this lecture was given. In *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001), the Court, speaking through the Chief Justice, held that the Eleventh Amendment bars Congress from authorizing private individuals to bring damage actions against state agencies for violation of Title I (employment discrimination) of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1994).

After reiterating that, under *Seminole Tribe* and its *sequelae*, Commerce Clause-based legislation cannot abrogate the Eleventh Amendment, the Court rejected the plaintiff's alternative contention that the ADA, in addition to its Commerce Clause base, was a valid congressional implementation of the equal protection of the laws guaranteed by § 1 of the Fourteenth Amendment, § 5 of which empowers Congress to enforce the amendment by "appropriate legislation," and that, under *Bitzer*, legislative enactments in aid of the Fourteenth Amendment trump the Eleventh Amendment. The Court concluded that the ADA was not "appropriate [enforcing] legislation." The Court, citing *Kimel* and *City of Boerne v. Flores*, 521 U.S. 507 (1997), acknowledged that Congress's § 5 authority "is not limited to mere legislative repetition of this Court's constitutional jurisprudence" but "'includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Garrett*, 121 S. Ct. at 963 (quoting *Kimel*, 528 U.S. at 81). But the Court then noted that "*City of Boerne* also confirmed . . . the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees," and "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented and the means adapted to that end.'" *Id.* On examining the evidence relied on by Congress as a predicate to the enactment of the ADA, the Court came to the conclusion that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." *Id.* at 965. "Congress," said the Court,

> is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation, Those requirements are not met here.

Id. at 967-68. Justice Kennedy, joined by Justice O'Connor, filed a concurring opinion. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. Taking strong issue with the Court's conclusion that "Congress assembled only minimal evidence of unconstitutional state discrimination in employment," the dissent stated: "In fact Congress compiled a vast legislative record documenting "'massive, society-wide discrimination'" against persons with disabilities," *id.* at 969 (Breyer, J., dissenting) (quoting S. Rep. No. 101-116, at 8-9), and appended to the dissent extended references to numerous congressional hearings and a congressionally appointed task force. The dissent concluded:

> The Court, through its evidentiary demands, its nondeferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress. [*Katzenbach*] *v. Morgan*, 384 U.S., at 648, n.7 (The "sponsors and supporters of the [Fourteenth] Amendment were primarily interested in augmenting the power of Congress"). Its decision saps § 5 of independent force, effectively "confin[ing] the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch [is] prepared to adjudge unconstitutional." *Id.*, at 648-49. Whether the Commerce Clause does or does not enable Congress to enact this provision, see, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 100-185 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); [*Florida Prepaid Postsecondary Education Expense Board v.*] *College Savings Bank*, [527 U.S.] at 699-700 (Breyer, J. dissenting), in my view, § 5 gives Congress the necessary authority.

Id. at 975-96.

Some of you may be wondering why I think *Seminole Tribe* is a big deal. You may be muttering to yourself that the Court put a roadblock in the way of a process calculated to produce more casinos on Indian reservations; and haven't we more than enough casinos—tribal and otherwise—already? In response to such muttering, let me tell you about the most recent case in the *Seminole Tribe* line—*Kimel v. Florida Board of Regents*,[31] decided in January of 2000. In *Kimel* the Court reviewed three cases consolidated in the Eleventh Circuit in which state employees—two professors at the University of Montevallo, a state university in Alabama; a group of professors and librarians at two state universities in Florida; and an employee of the Florida Department of Corrections—had brought suit against their employers under the Age Discrimination in Employment Act ("ADEA"). The Supreme Court granted certiorari "to resolve a conflict among the Federal Courts of Appeals on the question whether the ADEA validly abrogates the States' Eleventh Amendment immunity."[32] The Court's answer was in the negative. Justice Thomas, joined by Justice Kennedy, did not find in ADEA a clear congressional statement of intention to make states suable by their employees for age discrimination. Justice O'Connor, joined by the Chief Justice and Justice Scalia, found that Congress did intend to abrogate state immunity. But the three Justices ruled that, insofar as ADEA was enacted pursuant to the Commerce Clause, *Seminole Tribe* barred Congress from authorizing suits by individuals against a state or a state agency. Further, the three Justices, while acknowledging that Congress can authorize individuals to sue states and state agencies to enforce the Fourteenth Amendment, concluded that the ADEA provisions protecting employees against discrimination on grounds of age swept so broadly as to travel beyond the scope of the Fourteenth Amendment's Equal Protection Clause, particularly given that Congress had not made any real findings that states in general, or any particular state, discriminated among state employees on grounds of age. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented: the dissenters agreed with Justice O'Connor, Chief Justice Rehnquist and Justice Scalia that Congress had, by enacting certain amendments to ADEA, intended to abrogate state immunity to suit by state employees alleging age discrimination. But they persisted in being "unwilling to accept *Seminole Tribe* as controlling precedent."[33] To which Justice O'Connor replied that "the present dissenters' refusal to accept the validity and natural import of decisions like *Hans*, rendered over a full century ago by this Court, makes it difficult to

[31] 528 U.S. 62 (2000). *Kimel*, however, is no longer the most recent case. *See supra* note 30.

[32] *Id.* at 72.

[33] *Id.* at 97 (Stevens, J., dissenting).

engage in additional meaningful debate on the place of sovereign immunity in the Constitution."[34]

The result of *Kimel* is that (1) Congress has enacted legislation, recognized by the entire Court to be valid, prohibiting states (as well as the private sector) from discriminating in employment on grounds of age, but (2) the only way Congress can arrange for federal judicial enforcement of these valid statutory requirements *against states* (as distinct from private employers) is to substantially expand the regulatory and litigation capacity of the federal government so that the United States (rather than an aggrieved state employee, represented by her own retained counsel) can sue on behalf of a state employee *who manages to persuade the executive branch of the government of the United States* that she has been discriminated against in the workplace on grounds of age and, that therefore, the executive branch should take up the litigation cudgels on her behalf.

Permit me to personalize the issue: Suppose, on the basis of what I perceive to be my sterling performance in today's lecture, I add to Dean Korngold's burdens by asking him for a part-time teaching appointment (I mean very part-time: As I see it, I could fly to Cleveland for a two hour seminar one day each week—and fly back to Philadelphia the same day, so I'd still have four full days in the courtroom each week). So I'd put this proposition to the Dean, but I'd hedge my bets—and also undertake to create a competitive market—by advising Dean Gregory Williams at Ohio State of my availability. If Dean Korngold, after *pro forma* consultation with his faculty, were to turn me down on the transparently pretextual ground of incompetence, and Dean Williams were to do the same, I could seek to retain my eminent Yale Law School classmate Seth Taft—who has graciously come to listen to this lecture—to sue Case Western, a private university, in the United States district court, and I would expect to prevail. But a complaint filed against Ohio State would be dismissed for lack of jurisdiction in order to preserve the dignity of the State of Ohio, now in its 197th year as a member of the Union. With matters in that posture, coming as I do from one of the thirteen original states, I would think we thirteen ought to rescind Ohio's statehood and make it a territory once again.

Having said all this about *Seminole Tribe* and its *sequelae*, I now must tell you that my principal concern this afternoon is not so much with the merits of *Seminole Tribe* and the decisions following in its wake. My principal concern is with a judicial approach to constitutional problems of great consequence that seems curiously inhospitable to new insights.

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[34] *Kimel*, 528 U.S. at 79-80.

If *Seminole Tribe*'s censure of Justice Souter were an isolated instance of reluctance to exhume and reexamine events long past, I would not press the point. But there are signs of a comparable, and more comprehensive, judicial myopia about the world of today which, so it seems to me, has the potential for radically shrinking the Court's constitutional horizons. I offer in evidence a paragraph from the fifty-first Cardozo Memorial Lecture delivered by Justice Ginsburg in 1999:

> [R]eadiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision. The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall. Nor does the U. S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision from which I also dissented [Justice Ginsburg was here referring to *Printz*], the majority responded: "We think such comparative analysis inappropriate to the task of interpreting a constitution."[35]

Bearing in mind that *Printz* involved the validity of enforcement mechanisms designed by Congress to implement regulations enacted pursuant to Congress's Article I authority to regulate commerce, one wonders how the *Printz* majority would undertake to square their dismissal of "comparative analysis" as "inappropriate" with Justice Frankfurter's observation almost half a century ago:

> While the distribution of powers between each national government and its parts varies, leading at times to different legal results, the problems faced by the United States Supreme Court under the Commerce Clause are not different in kind . . . from those which come before the Supreme Court of Canada and the High Court of Australia.[36]

The cases I have discussed have to do with the structure of our federal system and the allocation of governmental authority within that system. I have expressed concern that in *Seminole Tribe* the Justices of the majority took too confined a view of what lessons might be learned from our own history, and that in *Printz* the Justices of the

[35] Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 262 (1999).

[36] FELIX FRANKFURTER, OF LAW AND MEN 39 (1956).

majority were inappropriately reluctant to consider whether lessons might be learned from federal systems other than our own.

At bottom, my concern about the Court's *Seminole Tribe* reproof to Justice Souter—five Supreme Court Justices characterizing a colleague's historical analysis as a "disservice to the Court's traditional mode of adjudication"—is that it was a breach of courtesy. But, of course, lawyers—including judges—have been discourteous to each other before, and will be again, and so it may reasonably be wondered why I should bother to complain. The difficulty that I have in mind is not, however, simply an aesthetic one—manners for manners' sake. What makes discourtesy of the *Seminole Tribe* variety problematic is that it threatens to devitalize the process of full-bore inquiry in which members of an appellate court are duty-bound to engage. To fault a judicial colleague for that colleague's style of analysis—as distinct from undertaking to demonstrate that the analysis is methodologically flawed or has generated a result which is substantively insufficient—gives promise of ushering in an opinion-writing regime of stultifying, aridity (an aridity that would, however, be able to claim the virtue of being "judicially correct").

By contrast, my concern about the Court's *Printz* caveat that invoking foreign constitutional authority is "inappropriate" cuts far deeper. This, I suggest, reflects a parochialism that our legal system—and our nation—cannot afford as we commence a new century, and new millennium, of great risk and great opportunity. And I do not suggest that the parochialism is confined to the Supreme Court—or, indeed, that the area of greatest concern is the law of federalism. To the contrary, I suggest that the problem is one which we lawyers should recognize as permeating our profession as a whole—and, further, that it is most marked in the realm of law we Americans most devoutly prize—human rights.

A dozen years ago, Anthony Lester QC, the leading civil liberties lawyer in the United Kingdom and, indeed, throughout the nations of the Commonwealth, presented a lecture at Columbia Law School entitled *The Overseas Trade in the American Bill of Rights*. He celebrated the extent to which American principles of liberty and equality had strengthened those values in other lands. But he noted, with concern, that in the closing decades of the twentieth century the American legal community seemed content to distance itself from the proliferation of human rights values in the legal systems of other democracies:

> The overseas trade in the American Bill of Rights is an important means of strengthening international human rights. It is a misfortune that the precious commodity continues to be regarded as only for export. The failure of the United States

> to ratify the United Nations Covenants is oft noted; but equally troubling is the apparent reluctance of the [United States] Supreme Court to consider overseas interpretations of its own cases, especially when the Justices' opinions so clearly could have profited from such attention. Indeed, with honorable exceptions the United States judiciary, legal profession and law schools are as isolated from international human rights law as are the legislative and executive branches of the United States. That isolation is a matter of regret for those of us who trade overseas in the American Bill of Rights. I respectfully submit that it is also a misfortune for the United States itself, not only in diminishing American influence overseas, but also in separating American constitutional law from the ideas and values of other advanced democratic nations and their courts.[37]

POSTSCRIPT

The foregoing lecture was delivered in April of 2000, during the Supreme Court's 1999 term. The lecture is being published in Spring of 2001, during the Supreme Court's current term—the 2000 Term. In the course of the current term, the Court has again had occasion to address the *Seminole Tribe* question; this time the Court held that, by virtue of the Eleventh Amendment, Congress, in enacting the Americans with Disabilities Act ("ADA"), lacked power to authorize persons discriminated against by state agencies on the basis of disability to sue in federal court.[38]

The Court's current term commenced on October 2, 2000. On the same day, in Great Britain, there came into force the Human Rights Act—legislation effecting the most significant change in British constitutional structure in several centuries. It is, of course, a hornbook platitude that, lacking a written constitution, Britain does not have an American-style system of judicial review. This means that, as a general matter, a judge in the United Kingdom has no authority to review the validity of an act of Parliament, and a judge considering a challenged action of a Minister of the Crown, or of a subordinate executive official, has authority only to determine whether the challenged action was within the scope of the authority conferred by the governing statute or regulation. But the Human Rights Act has now imposed on the High Court, the Court of Appeal, and the House of Lords, the responsibility of determining whether

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37 Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988).

38 *See* Board of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001). *See also supra* note 30.

challenged governmental action—executive or legislative—is compatible with the constraints imposed by the European Convention on Human Rights on actions taken by the European nations, including Great Britain, that are signatories to the Convention. Hitherto, contentions that British governmental action contravened the Convention have been assertable only at Strasbourg, before the European Commission and Court established by the Convention to enforce its mandates. British courts, unlike the courts of the other nations signatory to the Convention, had no authority to consider Convention-based claims, because, for the first four decades of the Convention's history, Parliament had not made the Convention part of Britain's domestic law. The Human Rights Act has changed all that. British judges may now address such claims. And if a court of the United Kingdom determines that such a claim is well founded—that a challenged legislative or executive act cannot be squared with the Convention—the court is obligated to enter a judgment of incompatibility. That judgment imposes on Parliament with respect to legislation, or the government with respect to executive action, the duty of deciding whether or not to bring Britain into compliance with the Convention.[39] It would be a good thing if, profiting from the British example, American judges and American lawyers would undertake a far more modest course of action: The proposed modest course of action would be that, in American litigation focusing on issues of civil liberties and civil rights, consideration be given to the ways in which international tribunals and the highest courts of other nations have dealt with analogous constitutional (and even statutory) claims.

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[39] It is noteworthy that the chief architect of the Human Rights Act was Anthony Lester, whose observations about the parochialism of American constitutional jurisprudence were quoted at the conclusion of my lecture. Of course the Act would not have been enacted by Parliament had not the British government made it part of the government's legislative program. But it was Lester's efforts in the House of Lords (Lester is Lord Lester of Herne Hill, and a Liberal Democrat, not a member of the Labor Party) that constituted the principal engine propelling the Act to Parliamentary approval.

It may be noted that when the American Bar Association met in London in July of 2000, in the course of a panel discussion of "Common Law, Common Values, Common Rights: Common Law Principles for the 21st Century," in which Justice Kennedy and Lord Lester were both participants, Lester pointed to the readiness of British courts to look to American precedents, as contrasted with the "insularity of the American legal system." *See* Tony Mauro, *Visiting Justices Get an Earful in London*, LEGAL TIMES, July 31, 2000, at 10.