**Balancing the Scales: The 1996 Telecommunications Act and Eleventh Amendment Immunity**

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> Judicial review of such statutory and constitutional issues is fully in accord with the institutional expertise of the judiciary and the role that courts are expected to play in our constitutional system. Ever since *Marbury v. Madison*, it is "emphatically the province and duty of the judicial department to say what the law is."[1]

## I. Introduction

The 1996 Telecommunications Act (Act or 1996 Act) creates a delicate balance between the roles of state regulatory commissions (state commission(s))[2] and federal courts in ensuring interconnectivity between incumbent local service providers and their new competitors. While state commissions have primary regulatory authority, federal judicial review safeguards the rights of parties who disagree with the state commission's interpretation of the Act.

Federal courts are appropriate venues for review of interconnection agreements. Federal review increases consistency among local service areas and provides minimum standards for the industry. In addition, federal court judges are less susceptible to local interest and influence—especially the powerful influence of an incumbent service provider who likely has a long-term relationship with a state commission or with state legislators.

Federal judicial review of state-approved interconnection agreements raises important issues of state sovereignty and immunity, concepts grounded in the Eleventh Amendment of the United States Constitution.[3] Eleventh Amendment immunity is an effective bar to federal court jurisdiction over suits against states as originally granted in Article Three of the Constitution.[4]

States' Eleventh Amendment immunity from suit is not absolute however. Three alternatives exist for avoiding state immunity and the resulting bar to federal court jurisdiction. First, as a sovereign entity, a state may always consent to suit, thereby waiving immunity. Second, in limited circumstances, Congress can abrogate state immunity when enacting legislation. The Supreme Court requires that Congress explicitly express its intent to abrogate immunity and that Congress act pursuant to an appropriate source of power when it does so. Finally, without a state's consent or an abrogation of immunity by Congress, a litigant may bring a suit against a state official for prospective relief under the doctrine of *Ex parte Young*.[5]

According to the generally settled[6] framework of Eleventh Amendment law described above, Congress abrogated state immunity when it enacted the 1996 Telecommunications Act.[7] By all known standards, the federal judicial review provisions of the Act were enforceable against states at the time of enactment.

However, in April of 1996, the Supreme Court issued its decision in *Seminole Tribe v. Florida*[8] and modified essentially the entire framework of Eleventh Amendment immunity jurisprudence. In one sweeping decision, the Court severely limited the application of the doctrine of *Ex parte Young* and removed an important source of congressional power to abrogate state immunity. Only state consent to suit, through a waiver of immunity, remains intact. The full effect of this decision has yet to been seen. It is clear, however, that the decision creates a vacuum of unenforceable rights granted to citizens by federal statutes.

The 1996 Act does not escape the fate of the other statutes enacted by Congress under the Commerce Clause[9] with an explicit abrogation of state immunity. In the case of the Act, the resulting inability of a federal court to secure jurisdiction will have unfortunate consequences for many citizens. Congress's attempt to place regulatory control in state commissions coupled with the Supreme Court's zealous effort to protect state immunity will increase costs of interconnection—costs eventually passed on to consumers—and delay the entry of competition in the local service market.

This Note argues that, despite the Supreme Court's affinity for state immunity, federal court review of interconnection agreements is essential to the balance of power between state and federal governments in the emerging local telephony market. In Part II, this Note examines the role of state commissions in creating interconnection agreements under the Act. Part III discusses implications of the *Seminole Tribe* decision on federal judicial review provisions of the Act. The inapplicability of the *Ex parte Young* exception to such suits is dis
cussed in Part IV. Part V suggests that while state consent to suit is still a viable option for securing jurisdiction, that consent cannot be inferred from state commission participation. In Part VI, this Note asserts that the pragmatic effects of litigation over an interconnection agreement can result in federal court jurisdiction over state action, though the effect of the *Seminole Tribe* decision will unduly hamper enforcement efforts. Finally, a more appropriate response to the immunity concerns raised by federal judicial review of state action is offered: federal courts' use of a deferential standard of review.

## II. Interconnection Agreements Under the 1996 Act

### *A. Provisions for Interconnection*

The 1996 Act provides guidelines for introducing competition into local telephone markets. In particular, section 251

of the Act imposes a duty on incumbent local exchange carriers (ILECs) "to interconnect directly or indirectly with the facilities and equipment of other telecommunication carriers."[10] These ILECs are required to provide, at just and reasonable rates, interconnection with their networks for the transmission and routing of telephone exchange service and exchange access at any feasible point within the ILECs' networks.[11] The Act also prohibits technological barriers to interconnection,[12] encourages consumer-friendly accommodations, such as number portability,[13] and imposes a duty to negotiate in good faith with other carriers to reach interconnection agreements.[14]

While the Federal Communications Commission (FCC or Commission) is charged with developing regulations for the implementation of the Act,[15] state commission oversight and regulation is expressly warranted both in the ability to enforce the state commissions' own policies, orders, or regulations and the state commissions' final authority to approve interconnection agreements.[16] State commissions are to "determine whether the rates for interconnection are just and reasonable, a determination that must be `based on the cost (determined without reference to rate-of-return or other rate-based proceeding) of providing the interconnection,' but may include a reasonable profit."[17]

*B. The Role for State Commissions*

Upon receiving a request for interconnection, the incumbent ILEC may negotiate and enter into a binding agreement with a requesting carrier. All negotiated agreements must be submitted for approval to the state commission:

> The state commission may reject the negotiated agreement within 90 days, but only if it concludes, with written findings . . . that the agreement discriminates against a telecommunications carrier not a party to the agreement or that the implementation of the agreement is not consistent with the public interest, convenience, or necessity.[18]

The Act provides for arbitration, mediation, and negotiation procedures in cases where parties cannot reach negotiated agreements.[19] At any point in voluntary negotiations, a party can ask the state commission to mediate differences,[20] and from the 135th to the 160th day after a request for negotiation, any party can seek binding arbitration from the state commission.[21] The state commission is required to settle each unresolved issue no later than nine months after the date of the first request for negotiation.[22] The arbitrated agreement must then be approved by the state commission which may reject the agreement only if it does not meet the new access and interconnection obligations imposed by section 251 or the pricing standards of section 252(d).[23] If the state commission fails to approve or reject the agreement, or carry out any of its other duties under the Act, the FCC shall issue an order preempting the state commission's jurisdiction over that proceeding or matter within ninety days of being notified of such failure.[24]

If a party to an agreement disagrees with the state commission's determination in approving or rejecting the agreement, the Act provides a judicial remedy for parties. Any party aggrieved by an interconnection agreement approved by the state commission as described above, may bring a claim in the federal district court.[25] The Act bars state courts from hearing complaints under the Act and limits relief in federal court to a determination of whether the agreement or statement meets the requirements of the Act.[26]

While the language of the Act clearly articulates a role for judicial review in this process, the ability of a federal court to review state commission action is no longer as simple as the language of the Act implies. The Supreme Court's recent expansion of the Eleventh Amendment bar on suits against a state will prevent parties from suing state commissions directly.

III. State Immunity from Suit After *Seminole Tribe*

The doctrine of sovereign immunity found in the Eleventh Amendment limits a civil litigant's ability to sue a state.[27] "[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state."[28]

The Supreme Court has long held that Congress has the ability to abrogate a state's immunity through legislation if it explicitly indicates its intent in a statute and acts under proper authority.[29] Prior to the Supreme Court's decision in *Seminole Tribe*, "proper authority" included the Commerce Clause of the Constitution.[30] However in April of 1996, two months after the Telecommunications Act was passed, the United States Supreme Court handed down its decision in *Seminole Tribe* and severely limited Congressional power to abrogate state immunity.

*A. The Test for Abrogating State Immunity*

The test for determining whether a state's immunity has been effectively abrogated has two components: first, whether Congress explicitly intended to open states to suit when it enacted a law; and second, whether Congress acted under a valid exercise of power.[31] Within the Indian Gaming Regulatory Act (IGRA), Congress expressly provides for judicial intervention through the federal court system. The Act authorizes a tribe to compel a state's good faith negotiation in gaming agreements by bringing it before a federal district court. In *Seminole Tribe*, the Court found that this statutory language satisfies the explicitness requirement.[32]

The second part of the test focuses on whether Congress acted under a valid exercise of power when it abrogated state immunity. The IGRA was enacted pursuant to the Indian Commerce Clause.[33] This clause, according to the Court, does not grant Congress the power to abrogate states' immunity.[34] The Court's determination that Congress did not properly abrogate state immunity under the Indian Commerce Clause rendered the IGRA unenforceable in federal court.

Prior to the *Seminole Tribe* decision, both the Commerce Clause[35] and the Fourteenth Amendment provided Congress with valid sources of power to abrogate state immunity.[36] Relying on the Supreme Court's prior decision in *Pennsylvania v. Union Gas, Co.*,[37] Congress abrogated state immunity through the Commerce Clause power in several federal statutes including the Fair Labor Standards Act,[38] the Comprehensive Environmental Responsibility Cleanup Liability Act,[39] and the 1996 Telecommunications Act.[40] However, the Court noted in *Seminole Tribe* that the Commerce Clause was indistinguishable from the Indian Commerce Clause, implying that it, too, is not a valid source of abrogation power.[41] By removing an important source of congressional power to abrogate state immunity, the Court effectively limited citizens' ability to sue states under many federally declared causes of action.

In overturning *Union Gas*, the Court noted several reasons for deviating from the usually binding precedent of previous decisions.[42] First, the Court suggested that the *Union Gas* decision was of questionable precedential value because the majority of the Court disagreed with the rationale of the plurality decision.[43] Next, the Court asserted that review of the decision was appropriate because the case involved an interpretation of the Constitution which is only subject to review by the Court or Constitutional Amendment. Until either event, Congress was bound to act within the Court's previous interpretation.[44] Finally, review was important because the result in *Union Gas* and the plurality's reasoning departed from the Court's established understanding of the Eleventh Amendment.[45] The Court declined to follow the doctrine of *stare decisis* in this case and overruled *Union Gas* and along with it, limited Congress's authority to abrogate state immunity.

Federal district courts applying the *Seminole Tribe* holding have found states immune from suit in federal court without their consent.[46] The Court's decision already has severely limited the ability of citizens to seek redress from a state under many federal laws, and seems likely to prevent suits under the 1996 Telecommunications Act.

*B. The 1996 Act After Seminole Tribe*

The Court's holding in *Seminole Tribe* extends state immunity and deprives federal courts of jurisdiction over state commissions. Using the *Green v. Masour*[47] two-part test for determining whether a state's immunity has been properly abrogated by Congress under a federal law, the Act can overcome only the first requirement of an explicit declaration by Congress of its intent to abrogate immunity. Congress explicitly provided parties to

interconnection agreements an avenue for judicial review in the federal courts satisfying the first part of the test. The statute clearly indicates Congress's intent for federal judicial review of state commission action in the language of section 252(e)(6), "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination *may bring an action in an appropriate Federal district court . . . .*"[49]

However, the Act was passed pursuant to Congress's power under the Commerce Clause of the Constitution. After *Seminole Tribe*, the Commerce Clause is no longer a valid source of abrogation power. Despite the fact that at the time the Act was passed, the Commerce Clause was considered a valid source of power, the Court's decision a few months later nullified Congress's explicit intent to abrogate state immunity.

IV. The *Ex parte Young* Exception to Eleventh Amendment Immunity

*Ex parte Young* has long been an exception to state immunity's bar on claims against a state. Where the relief sought is prospective in nature, such as an injunction, a federal court may order a state official in his or her individual capacity to act or cease an action without offending the state's immunity. In suits under the 1996 Telecommunications Act, the exception is no longer available to preserve suits against state actors. The Supreme Court's *Seminole Tribe* analysis of a congressionally provided remedial scheme can be applied to the Act and will prevent a court from finding jurisdiction over a state actor.

*A. The Ex parte Young Exception*

The *Ex parte Young* doctrine permits a lawsuit against a state where the Eleventh Amendment would otherwise prevent it, provided that the named party is the state official in his or her individual capacity rather than the state itself.[50] In addition, the relief sought must be injunctive, instead of relief which would require payment from the state treasury.[51]

In *Ex parte Young*, the Supreme Court held that a federal court's injunction preventing a state officer from enforcing a state statute that allegedly violated the Fourteenth Amendment was not prohibited by the Eleventh Amendment.[52] If an officer acts in a manner in conflict with the superior authority of the Constitution, he or she is "stripped of his [or her] official position"[53] or representative character and is thus not entitled to the grant of immunity found in the Eleventh Amendment. This distinction is largely an acceptance of the fiction that the suit in that case is against a private party rather than the state.[54]

The balance between supremacy and sovereignty concerns is at the heart of the *Ex parte Young* doctrine. "As Justice Brennan has observed, `*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.'"[55] "The doctrine of *Ex parte Young* is based on the idea that the power of federal courts to enjoin continuing violations of federal law is necessary to vindicate the federal interest in assuring the supremacy of that law."[56]

In *Edelman v. Jordan*,[57] the Court held that when a plaintiff sued a state alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct.[58] The *Jordan* Court's emphasis on the distinction between prospective and retroactive relief has become an integral part of the *Ex parte Young* doctrine by fulfilling "the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States."[59]

*B. Seminole Tribe's Remedial Scheme Analysis*

The Court in *Seminole Tribe* declined to find the *Ex parte Young* exception available in the suit against Florida.[60] Despite petitioners' argument that the *Ex parte Young* doctrine could be applied to their case where the governor had been named individually and the relief sought was prospective—an order to negotiate with the tribe in good faith—the Court upheld the governor's immunity as a state officer. The Court's reasoning focused on Congress's insertion of a remedial process in the statute itself. The Court held that Congress could not have intended to subject states to the full range of relief available in federal court where it provided for limited remedies in the text.[61] "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."[62] The Court cautioned lower courts to hesitate before casting aside statutory limitations by permitting an action against a state officer based on *Ex parte Young* for the enforcement of a statutorily created right.[63]

The Indian Gaming Regulation Act provided that where a court finds that the state has failed to negotiate in good faith, the remedy available was an order directing the state and the Indian tribe to conclude a compact within sixty days.[64] If the parties disregarded the court's order, each party would then have to submit a proposed compact to a mediator. If the state failed to accept the compact, the mediator would be required to notify the Secretary of the Interior, who would then provide regulation.[65]

The total result of the remedial scheme in the IGRA would subject the state only to an order to negotiate, which if ignored, would result in regulation of Indian gaming by the Secretary of the Interior. The Court found the limited remedy available to tribes compelling, and based its limitation of the *Ex parte Young* doctrine on its existence in the statute.

Despite the broad definition of remedial scheme employed by the Court, lower courts have declined to limit *Ex parte Young*'s application by distinguishing the language found to constitute a "remedial scheme" in the IGRA from language found in other federal statutes.[66] The "gloss on *Ex parte Young* does not affect the statutes in the present action whose remedial schemes are not similar to the one provided for in the IGRA."[67]

The above distinction is not well founded and certainly susceptible to contrary interpretation. The Court in *Seminole Tribe* described the limitation on federal court review as a "remedial scheme."[68] The Court's characterization of a remedial scheme can be applied to any statute where Congress has described or indicated the types of remedies available from courts. Any insertion by Congress of a limitation on the scope of federal court review, or the types of remedies available, fits the remedial scheme definition of *Seminole Tribe*.

*C. The Remedial Scheme Analysis Prevents an Ex parte Young Exception Under the 1996 Act*

Prior to *Seminole Tribe*, the *Ex parte Young* doctrine would have been a useful tool in preserving federal court jurisdiction over states. Suits by aggrieved parties to interconnection agreements could have named state officers such as regulatory commissioners or directors instead of the state itself. In accordance with the Act, the suits could have sought prospective relief in the form of an injunction preventing the state from enforcing an agreement found to be contrary to the provisions of the statute.

However, after *Seminole Tribe*, the *Ex parte Young* exception is not available in suits under statutes where Congress has provided a "remedial scheme."[69] The Court's description of what constitutes a remedial scheme and its application of this definition to the IGRA effectively eliminate the possibility of getting around state immunity in any statute where Congress has limited the type of judicial remedy available to litigants, as it has in the 1996 Act.

A remedial scheme, similar to the one found persuasive in the IGRA, exists in the 1996 Act. The Act specifically limits the relief available in a federal district court to a determination by the federal court that "the agreement or statement meets the requirements of section 251 of this title and this section."[70] A court in this instance is likely to decline to apply the *Ex parte Young* exception on the same grounds as the Supreme Court did in *Seminole Tribe*. Because the full authority of the federal court in an *Ex parte Young* suit could expose the state regulators to more severe action than anticipated by section 252(e)(6), a district court, in light of *Seminole Tribe*, will determine whether *Ex parte Young* is unavailable.

*Ex parte Young*, as refined by the *Seminole Tribe* remedial scheme analysis, fails to provide an exception to the Eleventh Amendment for cases arising under section 252(e)(6) of the Act.[71] According to *Seminole Tribe*, where Congress has expressly indicated the type of relief available, the full jurisdictional power of the federal judiciary cannot be unleashed on state actors.[72] It is likely that courts will refrain from applying the *Ex parte Young* exception to

cases under the Act, and state immunity will be preserved.

V. State Consent to Suit

The only alternative to the Eleventh Amendment's bar to federal jurisdiction remaining untouched by the *Seminole Tribe* decision is the ability of a state to waive immunity and consent to suit. However, where parties are challenging state commission regulatory action, this result depends upon the discretion of the state to provide an explicit agreement to the suit in federal court. Just as Congress is required to provide explicit indication of its intent to abrogate state immunity, so must a state provide an unequivocal expression of its consent to the suit when it waives immunity.

State consent to suit cannot be inferred from state action or participation in a federal program.[73] Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.[74] As with all constitutionally protected rights, Eleventh Amendment immunity is not to be taken lightly. Thus, a clear statement waiving immunity must precede federal court jurisdiction.

Despite instruction from the Supreme Court on this issue, the United States District Court for the Western District of Washington held that the State of Washington and its regulatory commission consented to suit when it undertook the arbitration of the interconnection agreement between the incumbent carrier and the entering carrier.[75] The court found that the "overwhelming implication" of the statutory structure of the Act is that Congress conditioned state participation in the interconnection agreement negotiation, arbitration, and approval process on consent to federal judicial review of the state's participatory actions.[76]

The United States District Court for the Western District of Washington focused on the "overwhelming implication" language found originally in the Supreme Court's decision in *Murray v. Wilson Distilling Co.*[77] and repeated in numerous cases involving immunity issues. The case before the Supreme Court in *Wilson Distilling* involved the interpretation of a state statute. Wilson Distilling argued that the State of South Carolina intended to divest itself of its property rights when it created a state commission to regulate liquor. It was further argued that the state intended to consent to court jurisdiction over the state property and the commission. The Supreme Court disagreed, noting that an interpretation of the statute avoiding state immunity "could only be warranted if exacted by the most express language or by such overwhelming implication from the text . . . ."[78]

The District Court for the Western District of Washington failed to note the crucial difference between the *Wilson Distilling* case and the case before it, *US West Communications*. The Supreme Court was interpreting a statute passed by the South Carolina legislature—an expression of the state. The district court was interpreting the Act—an expression of Congress. Congressional explicitness in its intent to abrogate immunity is not the same as the required expression on the part of the state indicating its intent to waive immunity. The "overwhelming implication" of the language of the Act suggests Congress intended to abrogate state immunity at a time when such abrogation was sanctioned by the Supreme Court. To extend the "overwhelming implication" of language drafted by Congress to any of the fifty states who regulate local telephone markets, is to take the Supreme Court's enunciated standard out of context. While it is true that the Supreme Court itself has used the phrase inexactly, the Court has never supported a finding that a state consented to suit through participation in a federal program with the phrase "overwhelming implication." The decision by the District Court for the Western District of Washington is unsupported by any previous Supreme Court decision. Further, federalism and state sovereignty require that states be held to their own expressions, not those of Congress.

Finally, it is illogical to read the Act as a manifestation of Congress's intent to condition state commission participation on state consent to suit. At the time the Act was passed, Congress had good reason to believe it could abrogate state immunity by an explicit statement of its intent to do so and by acting pursuant to proper authority, which, at that time, included the Commerce Clause. Even if Congress could condition participation on a consent to suit—a condition never previously recognized by the Supreme Court—it is an illogical interpretation of the Act given the legal context. Without an expression of a state commission's consent to suit under the Act, federal courts are incapable of securing jurisdiction over state commissions.

## VI. The End Run Around State Immunity: Limited and Costly Federal Review After *Seminole Tribe*

Federal judicial review of interconnection agreements is an essential step in achieving the fair and competitive state of telephony the Act envisions. Without it, the Act's careful balance between regulation and competition, as well as between federal and state power, is lost. Judicial review is also essential to the larger scheme of checks and balances on each of the three branches of government, and to the more precarious balance between federal and state authority.

In an effort to decentralize telecommunication regulation, Congress looked to state involvement in the process of integrating competition in local markets. However, Congress explicitly reserved a federal role in the process through FCC oversight and federal court review of agreements. The Supreme Court's *Seminole Tribe* decision erodes Congressional abrogation and limits the application of *Ex parte Young*, thereby eliminating two important means of obtaining federal jurisdiction over states. However, even after the Supreme Court's decision in *Seminole Tribe*, interconnecting parties may still be able to seek a limited form of federal judicial review of state commission action in approving interconnection agreements. Unfortunately, this review will come at a higher cost to providers and consumers than would otherwise be necessary.

### *A. Preserving Federal Judicial Review in the Context of Litigation*

The pragmatic result of litigation under the Act provides federal courts with jurisdiction to review the agreement despite their inability to secure jurisdiction over state commissions.[79] Parties who disagree with a state commission's approval or rejection of an agreement have the option of suing the other party to the interconnection agreement in federal district court.

While these suits will likely name the state regulatory commission as a defendant initially, the commission will quickly be dismissed if it raises immunity as a bar to jurisdiction. Parties to the agreement will then be left to present their case before a federal judge. The resulting judicial review is effectively what Congress intended to take place, even though the parties are not those it intended.

Congress explicitly outlined the scope of federal court review: to determine "whether the agreement or statement meets the requirements of section 251 of this title and this section."[80] This determination can be made with the carriers as litigants. However, it is clear that the review by a federal court will be limited by several factors. First, the court will not benefit from hearing from the state commission the rationale behind its decision. Carriers will likely attempt to explain the state commission's action to the court; however, because of their interest in the result, it will be skewed to reflect the outcome each desires. Neither party could better explain the state commission's rationale than the state commission itself.

In addition, state commissions on some level represent the interests of the citizen consumers of the state. Presumably, a state commission's decision is based on what is best for the local service market and its consumers. State citizen interests should be presented to the federal court for consideration in its review of the agreement.

State commissions are important parties in interconnection litigation. They represent state-wide interests, and consumer interests—interests not represented by interconnecting parties. Congress intended for these important interests to be presented to and considered by reviewing federal courts.

### *B. Lack of Jurisdiction Creates Enforcement Problems*

Despite federal court ability to review interconnection agreements without state commissions as parties, enforcement issues arise once review is completed. If a court determines that an agreement does not meet the requirements of the Act, it is not clear what remedy is available to litigants. Prior to *Seminole Tribe*, a court could have issued an injunction against the state commission or a declaration of an agreement's noncompliance ordering the state commission to arbitrate a new agreement. After *Seminole Tribe*, the above remedies are not available because a federal court lacks jurisdiction and therefore, the power to issue an effective order against a state commission.

Carriers, both incumbent and entering, are bound by the interconnection requirements of the Act. While a court could

direct the parties to reach a new interconnection agreement consistent with the Act, the new agreement would still be subject to state commission approval if the state commission chooses to act. Because a court may not compel a state commission to approve an agreement, the commission could reject the new agreement reached by the carriers. Even after long and expensive litigation, carriers are not assured of a satisfactory result. The tug-of-war between state commission and federal court authority could continue indefinitely.

*C. A Better Solution: Federal Court Deference to State Commission Decisions*

A more appropriate resolution for state sovereignty concerns rests in the maintenance of federal court jurisdiction and federal court use of a deferential standard of review. Use of a deferential standard of review in evaluating interconnection agreements comports with congressional intent, respects the discretion and expertise of the state commission, and avoids insulting state sovereignty concerns. This solution requires a return to the pre-*Seminole Tribe* understanding of the Eleventh Amendment.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*, the Supreme Court identified the appropriate restraint a court should demonstrate in cases of agency interpretation: an agency's decision should not be disregarded unless it is impermissible under the statute.[81] A court may not substitute its own construction of a statute if the agency's interpretation is reasonable.[82] While this decision applied to federal review of a federal agency action, it is equally applicable and possibly more appropriate in cases of federal court review of state commission action.

Deference to state commission action is especially appropriate where a conscious, legislative decision has been made to vest state commissions, rather than the FCC, with primary authority to implement the Act. Where Congress has delegated policy-making authority to a state commission, the extent of judicial review of the state commission's determinations is limited.[83] Federalism concerns and legislative intent caution federal courts away from re-deciding these cases on their merits rather than deferring to state commissions' expertise.

Judicial restraint and deference to agency determinations under the Act preserve state authority over competitors in local telephone markets. The delicate balance between state authority and interconnecting parties' ability to preserve their rights through judicial intervention is best achieved with deferential judicial review.

VII. Conclusion

In an attempt to vest regulatory control in states, Congress provided state commissions with the opportunity to give final approval of interconnection agreements. To balance state authority, Congress provided for federal judicial review for parties who disagree with state commission decisions. In a pre-*Seminole Tribe* world, this explicit indication of congressional intent would have preserved federal judicial review for parties in disagreement with the agency.

Congress's intent to preserve federal judicial review of state commission action within the new regulatory scheme of the Act is not thwarted by recent Supreme Court federalism concerns and its expansion of the sovereign immunity doctrine.[84] Congress's intent and the process of judicial review are, however, severely limited by the state commission's absence from litigation.

The balance of power that Congress imposed on the process of introducing competition preserves both state regulatory authority and the parties' ability to seek review and possible redress from the federal judiciary. This result would properly serve congressional intent for implementation of the 1996 Telecommunications Act.

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1. Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 435 (1993) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

2. The term "state regulatory commission" refers to agencies or other entities of state executive governments responsible for regulating telecommunications carriers.

3. "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." U.S. Const. amend. XI.

4. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2.

5. *Ex parte Young*, 209 U.S. 123 (1908).

6. The Author acknowledges the continuing debate over the meaning of the Eleventh Amendment and the resulting implications for federal court jurisdiction. However, as this important discussion is outside the scope of this Note, the argument presumes the state of Eleventh Amendment immunity is as the Supreme Court described in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

8. *Seminole Tribe*, 116 S. Ct. 1114.

9. U.S. Const. art. I, § 8, cl. 3.

10. 47 U.S.C.A. § 251(a)(1).

11. Thomas J. Krattenmaker, *Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1, 17; 47 U.S.C.A. § 251(c)(2).

12. 47 U.S.C.A. § 251(a)(2).

13. *Id*. § 251(b)(2).

14. *Id.* § 251(c)(1).

15. *Id*. § 251(d)(1). Note that the FCC is currently under a stay issued by the Eighth Circuit preventing it from imposing its regulations on ILECs or state regulatory agencies. Iowa Utils. Bd. v. FCC, 109 F.3d 418 (8th Cir.), *motion to vacate stay denied*, 117 S. Ct. 429 (1996).

16. Commission oversight is executed through the requirement that parties requesting interconnection notify the commission; commission monitoring of the negotiating process; and the commission's ultimate authority to approve or reject agreements. 47 U.S.C.A. § 252(e)(1). In addition, 47 U.S.C.A. § 251(d)(3) preserves state access regulations, and 47 U.S.C.A. § 252(e)(3) preserves state authority to establish and enforce other requirements of state law in review of the agreements.

17. Peter W. Huber et al., The Telecommunications Act of 1996 Special Report 26 (1996) (quoting 47 U.S.C.A. § 252(d)(1) (1996)).

18. *Id.* at 27 (explaining 47 U.S.C.A. § 252(e)(2)).

19. 47 U.S.C.A. § 252.

20. *Id.* § 252(a)(2).

21. *Id*. § 252(b)(1).

22. *Id*. § 252(b)(4)(C).

23. *Id*. § 252(e)(2)(B).

24. *Id*. § 251(e)(5).

25. *Id.* § 252(e)(6).

26. *Id*.

27. U.S. Const. amend. XI.

28. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (citation omitted).

29. The Court used a two part test: "first whether Congress has `unequivocally expresse[d] its intent to abrogate immunity' and second, whether Congress has acted `pursuant to a valid exercise of power.'" Seminole Tribe v. Florida, 116 S. Ct. 1114, 1123 (1996) (alteration in original) (quoting Green v. Masour, 474 U.S. 64, 68 (1985)).

30. Pennsylvania v. Union Gas, Co., 491 U.S. 1 (1988).

31. Green v. Masour, 474 U.S. 64 (1985).

32. *Seminole Tribe*, 116 S. Ct. at 1123-24.

33. *Id.* at 1119.

34. *Id.* at 1126-27.

35. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. 1, § 8, cl. 3.

36. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

37. *Union Gas*, 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

38. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994)).

39. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

40. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

41. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1126 (1996).

42. *Id.* at 1128.

43. Four Justices joined Justice Brennan's opinion in *Union Gas*, with Justice White concurring in the judgment, but writing separately to indicate his disagreement with the majority's rationale. *Union Gas*, 491 U.S. at 45. Justice Stevens, the only remaining member of the *Union Gas* plurality, filed a dissenting opinion in *Seminole Tribe*. *Seminole Tribe*, 116 S. Ct. at 1133 ( Stevens J., dissenting).

44. "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."'" *Seminole Tribe*, 116 S. Ct. at 1127

(quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting))).

45. The Court argued throughout *Seminole Tribe* that the *Union Gas* decision was the exception rather than the rule in Eleventh Amendment analysis. "Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by
Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment." *Seminole Tribe*, 116 S. Ct. at 1128.

46. *See, e.g*., Blow v. Kansas, 929 F. Supp. 1400 (D. Kan. 1996) (suit brought under the Fair Labor Standards Act); Chauvin v. Louisiana, 937 F. Supp. 567 (E.D. La. 1996) (suit brought under the Fair Labor Standards Act); Natural Resources Defense Council v. Cal. Dept. of Transp., 96 F.3d 420 (9th Cir. 1996) (suit brought under the Clean Water Act); Prisco v. New York, 1996 WL 596546 (S.D.N.Y. 1996) (suit brought under CERCLA); Gen-Probe Inc. v. Amoco Corp. 1996 WL 264707 (N.D. Ill. 1996) (suit brought under Federal Patent Laws).

47. *Green*, 474 U.S. 64, 68 (1985).

48. Telecommunications Act of 1996, sec. 101(a), § 252(e)(6), 47 U.S.C.A. § 252(e)(6) (West Supp. 1997). In fact, Congress left open review only in federal court when it specifically banned suits in state court under the Act.

49. *Id.* (emphasis added).

50. *Ex parte Young*, 209 U.S. 123 (1908).

51. Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 Colum. L. Rev. 2213, 2246 (1996).

52. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984).

53. *Ex parte Young*, 209 U.S. at 159-60.

54. Hovenkamp, *supra* note 51, at 2246.

55. *Halderman*, 465 U.S. at 105 (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)).

56. SDDS, Inc., 97 F.3d 1030, 1035 (8th Cir. 1996).

57. *Jordan*, 415 U.S. 651 (1974).

58. *Halderman*, 465 U.S. at 102-103 (noting the *Jordan* clarification of availability of only prospective relief; *see also*, Wisconsin Cent. Ltd. v. Public Serv. Comm'n, 95 F. 3d 1359, 1365 (1996)).

59. *Halderman*, 465 U.S. at 106.

60. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1122 (1996).

61. *Id.* at 1132 (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)).

62. *Id.*

63. *Id.*

64. The Court fails to explain from whom a tribe is to secure this order if a federal court is not available. Presumably a state court would not be available either, as the Constitutional defense of Eleventh Amendment immunity as depicted by the Court would likely apply in state court as well.

65. *Seminole Tribe*, 116 S. Ct. at 1132-33.

66. Strahan v. Coxe, 939 F. Supp 963 (D. Mass. 1996).

67. *Id.* at 982.

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

69. *Id.* at 1132-33.

70. Telecommunications Act of 1996, sec. 101(a), § 252(e)(6), 47 U.S.C.A. § 252(e)(6) (West Supp. 1997).

71. *Strahan*, 939 F. Supp. at 982; *see also* Henry Paul Monoghan, *The Sovereign Immunity `Exception'*, 110 Harv. L. Rev. 102, 129-30 (1996).

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

73. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

74. Edelman v. Jordan, 415 U.S. 651 (1974).

75. US West Comm., Inc. v. TCG Seattle, 971 F. Supp. 1365 (W.D. Wash. 1997).

76. *Id.* at 1368.

77. *Wilson Distilling*, 213 U.S. 151 (1909).

78. *Id.* at 171.

79. The result of integrating competition into local telephone markets is that two private companies who disagree, can seek review in court. They are not bound to the administrative appeal process as was the case when the FCC or a state commission regulated a single service provider.

80. Telecommunications Act of 1996, sec. 101(a), § 252(e)(6), 47 U.S.C.A. § 252(e)(6) (West Supp. 1997).

81. *Chevron*, 467 U.S. 837, 843 (1984).

82. *Id.* at 843-44.

83. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991).

84. The proper judicial review can be obtained in the 1996 Telecommunications Act because the agreement subject to review is between two private parties. However, many other federal laws enacted under the Commerce Clause will be unenforceable against a state party.