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Edward T. Young Still Living the Good Life: Coeur d'Alene Tribe v. Idaho

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CASE COMMENT

EDWARD T. YOUNG STILL LIVING THE GOOD LIFE: *COEUR D'ALENE TRIBE v. IDAHO*

I. INTRODUCTION

The Eleventh Amendment, which bars some private party suits from being brought against states in federal court, has been one of the more enigmatic provisions of the United States Constitution.[1] The United States Supreme Court added to the amendment's jurisprudential legacy during its two most recently completed terms, handing down a pair of significant decisions concerning the ability of private parties to sue state officials in federal court. Garnering attention in the 1996 term was the Court's decision in *Seminole Tribe v. Florida*,[2] in which the Court expounded upon a limitation on the application of the *Ex parte Young*[3] doctrine, which, by its well-accepted fiction, removes the Eleventh Amendment's jurisdictional barrier to suits in which a plaintiff seeks prospective relief from a state official attempting to act in contravention of federal statutory or constitutional law.[4] In *Seminole Tribe*, the Court explained that *Young* suits cannot overcome this jurisdictional barrier if Congress has enacted a detailed remedial scheme that implicitly or explicitly evidences its intent to displace the availability of a *Young* claim.[5] *Seminole Tribe* was decided amid a long line of other notable pro-federalism decisions

1 *See, e.g.*, Eng v. Coughlin, 858 F.2d 889, 897 (2d Cir. 1988) ("Eleventh Amendment jurisprudence has not been a model of logical symmetry, but marked rather by a baffling complexity."); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) ("The eleventh amendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law.").

2 116 S. Ct. 1114 (1996).

3 209 U.S. 123 (1908).

4 *See id.* at 159–60.

5 *See Seminole Tribe*, 116 S. Ct. at 1132–33.

that manifest the philosophy of the Court's majority to devolve significant power from the federal to the state level.[6]

During its last term, the Court appeared poised to use *Idaho v. Coeur d'Alene Tribe*[7] as another step in its march toward rebalancing federal-state power in favor of the latter by sweeping a larger set of state-officer suits, namely those involving private party claims to real property in which a state also claims title, outside the scope of *Young*. But as in *Seminole Tribe*, the Court in *Coeur d'Alene* tempered its pro-federalist zeal by chipping away only at the fringes of the *Young* doctrine. In *Coeur d'Alene*, a badly fractured Court further qualified the application of the doctrine by prohibiting the Coeur d'Alene Tribe from pursuing its federal court action against individual Idaho state officials for possession of, and an end to, Idaho's regulatory authority over the beds, banks, and submerged lands surrounding Lake Coeur d'Alene.[8] Albeit, Justice Kennedy, in the principal opinion, advocated a fundamental shift in the doctrinal philosophy underpinning *Young*, as well as a reworking of its relatively formalistic application into a case-by-case balancing test. The majority of the Court, however, represented by Justice O'Connor's concurrence and Justice Souter's dissent, reaffirmed *Young's* importance as a counterbalance to the Eleventh Amendment by affording private parties access to federal

6 *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997) (finding unconstitutional the portion of the Brady Act that commanded local sheriffs to conduct background checks on prospective handgun purchasers); Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (upholding Kansas' Sexually Violent Predator Act, which provided for the civil commitment of persons who are likely to engage in predatory acts of sexual violence); Missouri v. Jenkins, 515 U.S. 70 (1995) (limiting a federal court's discretion to fashion remedies in desegregation cases even where there has been a finding of de jure discrimination); United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun-Free Zones Act, which prohibited the possession of firearms within 1000 feet of school grounds, stating that matters such as public education, crime, and domestic relations are generally within the ambit of the sovereign states); New York v. United States, 505 U.S. 144 (1992) (blocking federal legislation to force states to accept nuclear waste dumps within their borders, because the states are not mere political subdivisions of the United States and hence cannot be commandeered to carry out federal purposes). The holdings in these cases are consistent with the declared goal of the conservative majority presently on the Court "to reduce the role of the federal government in everyday life by reducing the authority of Congress to put it there." Hon. Sven Erik Holmes, *Introduction: The October 1995 Supreme Court Term*, 32 TULSA L.J. 355 (1997); *see also* Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. REV. 495, 499 (1997) (noting the "broader canvass of federalism on which the Court has been working since 1990").

7 117 S. Ct. 2028 (1997).

8 *See id.* at 2032.

courts in order to hold state officials, and thereby the states, accountable for violations of federal statutory and constitutional law. As the controlling opinion in the case, Justice O'Connor's concurrence does raise some troubling questions about the status of the Court's *Young* jurisprudence. Read broadly, her opinion appears to advocate a slight variation of the principal opinion's balancing test: prohibiting extension of a federal forum whenever the underlying subject matter of the *Young* suit implicates a historical aspect of state sovereignty. While this reading is plausible, a careful analysis of Justice O'Connor's opinion reveals that it stakes out a similar ideological position to that of Justice Souter's, the two opinions parting substantially only over whether the relief sought by the Coeur d'Alene Tribe rose to the level of a quiet title action and was thereby barred entry into a federal forum by the Eleventh Amendment. Thus, while *Coeur d'Alene* carves out another narrow exception to the *Young* doctrine, the case in no way signals a turning point in the Court's *Young* jurisprudence and leaves essentially unchanged the ability of a private plaintiff to seek prospective relief from a state official acting in contravention of federal statutory or constitutional law.

Part II of this Comment outlines the genesis of the Eleventh Amendment and the evolution of Eleventh Amendment jurisprudence. Part III traces the development and subsequent application of the *Ex parte Young* doctrine. Part IV introduces the facts and the procedural history of the dispute in *Coeur d'Alene*, and then discusses individually the three opinions in the case. Part V analyzes Justice O'Connor's controlling opinion, arguing that although its muddled and inconsistent reasoning could be interpreted as portending a dramatic retrenchment in the number of state-officer suits that fall within the ambit of *Young*, her concurrence has shifted only slightly the line demarcating permissible and impermissible extensions of *Young* jurisdiction.

II. THE ELEVENTH AMENDMENT

In order to understand the *Ex parte Young* exception to the Eleventh Amendment, as well as the arguments advanced in the three separate opinions in *Coeur d'Alene*, a brief overview of the history of the Eleventh Amendment and the concept of state sovereignty is required.[9] The American conception of sovereign immunity—that one

9 This overview is by no means meant to be an exhaustive treatment of state sovereignty and of the often muddled history of the Eleventh Amendment. For more in depth discourse on these areas, see CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); William A. Fletcher, *A Historical Interpretation of the*

sovereign, absent its consent, cannot be sued in the courts of another—traces its heritage to the English maxim "the king can do no wrong."[10] This maxim embodied two concepts: (1) that the king was not personally answerable to his subjects, as that would threaten his sovereign authority; and (2) that the crown could do no injury as it existed for the benefit of its subjects.[11] The Founding Fathers, impressed with notions of English legal traditions, were, during their construction of the framework of the Union, mindful of the need to strike a delicate balance between state and federal power.[12] The Founders, however, never inserted a provision explicitly conferring a right of sovereign immunity upon the states; instead, their answer was the less encompassing Article III, Section 2 of the United States Constitution.

By its terms, Article III, Section 2 confers upon federal courts jurisdiction over, among other things, controversies "between a State and Citizens of another State."[13] This state-citizen diversity clause in Article III, Section 2 engendered little debate at the ratification convention, and the debate that did take place confirms that there was little consensus on the meaning of this provision.[14] Alexander Hamilton, James Madison, and John Marshall believed that pursuant to the

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Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033 (1983); Gibbons, *supra* note 1; Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

10 The doctrine is also premised on the eighteenth century expression that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (K.B. 1788).

11 *See* Wambdi Awanwicake Wastewin, Comment, *Federal Courts—Indians: The Eleventh Amendment and* Seminole Tribe: *Reinvigorating the Doctrine of State Sovereign Immunity*, 73 N.D. L. REV. 517, 522 & n.41 (1997) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES * 255).

12 *See id.* By the eighteenth century, the King's immunity was less than absolute as petitions of right, the writ by which a suit could be brought directly against the King, were routinely granted. *See* Gibbons, *supra* note 1, at 1896.

13 U.S. CONST. art. III, § 2 more fully provides that "[t]he judicial Power shall extend . . . to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

14 *See* Donald L. Boren, *Suing a State in Federal Court Under a Private Cause of Action: An Eleventh Amendment Primer*, 37 CLEV. ST. L. REV. 417, 422 (1989); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527–36 (1978); Fletcher, *supra* note 9, at 1053–54.

clause, a state could not be haled into a federal forum absent its consent.[15] However, Patrick Henry, George Guthrie, and two of the most distinguished lawyers at the Constitutional Convention, James Wilson and Edmund Randolph, took the opposite view, understanding that the clause did confer federal jurisdiction over the states.[16] Despite this confusion, the Constitution was adopted with the understanding that additional amendments would be added.[17] However, none of the first twelve amendments proposed by the First Congress concerned the amenability of the states to suit in federal court.[18]

Shortly after the Constitution's ratification in 1788, the United States Supreme Court had an opportunity to test the Constitution's purported jurisdictional grant. In the 1793 case of *Chisholm v. Georgia*,[19] the Court allowed a citizen of South Carolina to pursue an action in federal court for the recovery of revolutionary war debts owed by the State of Georgia.[20] Georgia refused to appear, instead entering a written objection to the Court's assertion of jurisdiction over it.[21] The Court found against Georgia, concluding that an implicit waiver of the states' sovereign immunity had flowed from the Constitution's grant of jurisdiction; therefore, in a state-citizen diversity suit, a private party could recover money damages from a state without that state's express waiver of immunity.[22] *Chisholm*, in part, reflected the need to provide out-of-state creditors with a neutral forum in which to pursue their claims against those states that had incurred heavy debts during the war.[23] More importantly, however, was the Court's fundamental belief "that since the state was the creation of man, it should be no

15 *See* William D. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183, 184 (1908).

16 *See id.*

17 *See id.*

18 *See id.*

19 2 U.S. (2 Dall.) 419 (1793).

20 *Id.* at 420. Robert Farquar, a South Carolina citizen, had supplied war material to Georgia during the Revolution. Although Georgia had appropriated the necessary funds, the Georgia commissaries failed to pay for the purchases. With the debt unpaid at Farquar's death, the executor of his estate and also a South Carolina citizen, Alexander Chisholm, attempted to collect the money owed in an action in assumpsit. *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 12 (1987).

21 *See Chisholm*, 2 U.S. (2 Dall.) at 419.

22 *See id.* at 476–79.

23 *See* Peter N. Swan, *The Eleventh Amendment Revisited: Suits Against State Government Entities and Their Employees in Federal Courts*, 14 J.C. & U.L. 1, 3 (1987).

more entitled to assert the defense of sovereign immunity than a man."[24]

Negative reaction to *Chisholm* was immediate.[25] Fueling this reaction was the political climate at that time, which included talk of the possibility of war with Great Britain.[26] With *Chisholm* essentially holding that state sovereignty did not exist under the constitutional framework, the erection of some jurisdictional barrier was believed to be necessary in order to prevent Tories and British creditors from initiating collection actions against the states in federal courts.[27] Consequently, on February 19, 1793, the day after *Chisholm* was reported, a resolution for a Constitutional Amendment that would overturn the

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24 Fletcher, *supra* note 9, at 1056. In one of the majority opinions, Chief Justice Jay wrote that the feudal notion of complete sovereignty is inconsistent with democracy. Consequently, private party suits against states were not inconsistent with the states' limited sovereignty. *See Chisholm*, 2 U.S. (2 Dall.) at 471–73. Jay continued that the unequal treatment by individual states of citizens of other states and countries was "among the evils against which it was proper for the nation, that is, the people of all the *United States*, to provide by a national judiciary." *Id.* at 474. Justice Wilson, in another of the majority opinions, wrote:

> A State like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a* SOVEREIGN *State*?

Id. at 456.

25 The Court's decision in *Chisholm*, as well as the subsequent commencement of *Vassal v. Massachusetts*, an unreported federal court action for the return of loyalist property allegedly confiscated in violation of the 1783 peace treaty that formally ended the revolutionary war, *see* Rodolphe J.A. de Seife, *The King Is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 HOFSTRA L. REV. 981, 1012–13 & n.143 (1996); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 114 n.279 (1989), caused great alarm among the states, especially those burdened by war debts. *See* Guthrie, *supra* note 15, at 184. So upset was the State of Georgia that its legislature was purported to have enacted a law "subjecting to death without benefit of clergy any officer who should attempt to serve a process in any suit against the State." *Id.* at 185. No such law has been found to exist, but if any such law did, it was most probably passed only by Georgia's lower house. *See id.*; *see also* Fletcher, *supra* note 9, at 1058 ("Other states were alarmed by [*Chisholm*], not only because of the symbolic affront to their sovereignty, but also because of their considerable indebtedness in the postwar period.").

26 *See* Boren, *supra* note 14, at 429.

27 *See id.*; *see also* Gibbons, *supra* note 1, at 1894, 1926–34 (attributing the development of the Eleventh Amendment more to foreign policy concerns than to a strong notion of state sovereign immunity).

case was introduced in the House of Representatives.[28] A second resolution was introduced the following day, but both resolutions were tabled and Congress adjourned without acting on them.[29] The following session, the resolution that is now the Eleventh Amendment was introduced in the Senate and was passed quickly by both houses of Congress.[30]

On its face, the Eleventh Amendment is not troubling. The amendment provides that "[t]he 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."[31] A literal interpretation of the amendment, therefore, indicates that it prohibits only those actions initiated in a federal forum against a state by citizens or subjects of any foreign state.[32] The Supreme Court, however, has found much deeper complexities hidden by this apparently straightforward language.

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28 That first resolution, introduced by representative Theodore Sedgewick, stated:

> [N]o state shall be liable to one made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.

Nowak, *supra* note 9, at 1436 (quoting 3 ANNALS OF CONG. 651–52 (1793)).

29 The second resolution read as follows: "The Judicial power of the United States shall not extend to any suits 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." *Id.* (quoting 4 ANNALS OF CONG. 25 (1794)).

30 *See* John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255, 256 (1994). The resolution was introduced on January 2, 1794, and was passed by the Senate on January 14, 1794, and by the House on March 4, 1794. *See* Nowak, *supra* note 9, at 1436. On January 8, 1798, President John Adams declared the Amendment in force after it had been ratified by three-quarters of the states. *See* Swan, *supra* note 23, at 3. Some scholarship, however, supports the proposition that the requisite twelve states had ratified the amendment by February of 1795. *See* JACOBS, *supra* note 9, at 67.

31 U.S. CONST. amend. XI.

32 According to this reading of the amendment, also called the "diversity view," the amendment simply precludes party-based jurisdiction under Article III, but does not preclude jurisdiction when based on subject matter. Others, as does the Supreme Court, read the amendment much more broadly, interpreting it to foreclose all Article III jurisdiction over private party suits against the states. *See* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 10–13; Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 104 (1996).

The Supreme Court's first major expansion of the Eleventh Amendment's jurisdictional bar occurred in *Hans v. Louisiana*.[33] Hans, a Louisiana citizen, brought suit in federal court against the State of Louisiana in order to recover interest due on a bond issue that the State had attempted to repudiate.[34] Hans argued that the Eleventh Amendment presented no barrier to the conferral of federal jurisdiction over his claim because the amendment restricts jurisdiction in diversity alone, whereas he was a citizen of the state against which he had filed suit and implicit in the amendment was a ratification of a citizen's right to sue his home state.[35] While the Court was careful to agree that a literal reading of the amendment did not prohibit Hans's suit,[36] the Court stated that Hans's interpretation of the amendment "strain[ed] the Constitution and the law to a construction never imagined or dreamed of."[37] The foundation of the Court's reasoning was that Hans's suggested interpretation of the amendment would create the anomalous situation in which a state could be sued by its own citizens in federal-question cases, but would be immune from suits by citizens of a sister state on the same cause of action.[38]

Although the *Hans* Court's rationale prominently rested on this impermissible jurisdictional anomaly, the Court has subsequently read *Hans* broadly, interpreting it to represent the proposition that the Eleventh Amendment stands "not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact [and] that the judicial authority in Article III is limited by this sovereignty . . . ."[39] The principle thus carried forward from *Hans* was the

33 134 U.S. 1 (1890).

34 *See id.* at 1–3.

35 *See id.* at 10.

36 *See id.*

37 *Id.* at 15.

38 *See id.* The majority believed that the Founding Fathers had never intended to give Article III courts jurisdiction over suits against a state by whomever brought them, *id.* at 14–15, and that *Chisholm* had sent "a shock of surprise throughout the country" that the Eleventh Amendment had been promptly adopted to correct the decision, *see id.* at 11.

39 Blatchford v. Native Village, 501 U.S. 775, 779 (1991), *accord* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (stating that the Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III"). The *Hans* Court did assert that the *Chisholm* majority had erred in its interpretation of the Eleventh Amendment, and that "[t]his 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 [in *Chisholm*]." *Hans*, 134 U.S. at 11.

Court's having effectively read both the Eleventh Amendment and the Constitution to impart a broad, non-textual right of sovereign immunity upon the states.[40]

III. *EX PARTE YOUNG*

An immediate and likely inadvertent quandary presented itself to the Court after its decision in *Hans*. Read broadly, *Hans* appeared to forbid all suits against an unconsenting state in federal court. Such a jurisdictional limitation would mean that under our judicial system, which is based on the supremacy of federal law, the lower federal courts were powerless to compel the states' compliance with that law.[41] Therefore, in *Ex parte Young*, the Court crystallized the fiction that a suit to enjoin a state official from violating federal constitutional law does not implicate the sovereignty of a state as does a suit directly against the state itself, thus vitiating any conflict with the Eleventh Amendment.[42]

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40 *See Hans*, 134 U.S. at 13–16; *see also* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1131–32 (1996) (reaffirming that the fundamental principle of state sovereign immunity is a limit on Article III jurisdiction).

The Court has used this "Hansian philosophy" to guide its subsequent reinforcements of the Eleventh Amendment's jurisdictional bar. In *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934), the Court held that the states' sovereign immunity precluded a foreign sovereign from suing an unconsenting state in federal court. Monaco had asserted that Article III, Section 2 conferred federal jurisdiction over its suit to recover on bonds issued by Mississippi. *See id.* at 320. The Court concluded that the Eleventh Amendment barred the suit despite the fact that Article III, Section 2, which provides that "[t]he judicial Power shall extend . . . between a State . . . and foreign States," appears to permit such a suit. Additionally, the Court has held that because the amendment "sufficiently partakes of the nature of a jurisdictional bar," a state may raise the Eleventh Amendment as a defense at any time during litigation. Edelman v. Jordan, 415 U.S. 651, 678 (1974). The amendment, however, has not been held to extend to suits brought by a state against another state, *see* Kansas v. Colorado, 206 U.S. 46 (1907), although a state may not sue another state in federal court on behalf of a group of its citizens who hold bonds of the defendant state, *see* New Hampshire v. Louisiana, 108 U.S. 76, 89–91 (1883). The Eleventh Amendment has also been held not to prohibit suits initiated by the United States against a state. *See* United States v. Texas, 143 U.S. 621, 646 (1892).

41 *See* William Burnham, *"Beam Me Up, There's No Intelligent Life Here": A Dialogue on the Eleventh Amendment with Lawyers From Mars*, 75 NEB. L. REV. 551, 558 (1996).

42 Ex parte Young, 209 U.S. 123, 155–56 (1908). *Ex parte Young* is credited with establishing this fiction, but *Young* merely reconciled already established Supreme Court precedents holding that a state official who attempts to enforce a state law that is allegedly inconsistent with federal constitutional law could be sued in federal court without the state's consent. *See, e.g.*, Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906) (enjoining a state attorney general from collecting an unconstitutional tax levy); Prout v. Starr, 188 U.S. 537 (1903) (finding that a federal court could enjoin a

In *Ex parte Young*, a group of shareholders from nine different railroads sued Minnesota's Attorney General, Edward T. Young, in federal court, seeking to enjoin his continued enforcement of two allegedly unconstitutional Minnesota acts regulating railway rates.[43] The Attorney General argued that the shareholders' suit was essentially a suit against the State of Minnesota and thus violated the Eleventh Amendment because neither he nor the state had consented to the action.[44] The Court rejected this argument, holding that state officials who attempt to enforce unconstitutional laws may be enjoined from doing so by federal courts.[45] In justifying its holding, the Court explained that if the act sought to be enjoined is alleged by the plaintiff to be, and is in fact, unconstitutional, a state official's "use of the

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state attorney general from enforcing an unconstitutional state railroad rate regulation statute); Smyth v. Ames, 169 U.S. 466 (1898) (denying Eleventh Amendment immunity to state officials who sought to be enjoined from enforcing an unconstitutional railroad rate regulation statute); Tindal v. Wesley, 167 U.S. 204 (1897) (denying Eleventh Amendment immunity to South Carolina state officials who had deprived plaintiffs of due process and just compensation in seizing their property); Pennoyer v. McConnaughy, 140 U.S. 1 (1891) (denying immunity to state officials who attempted to sell real property pursuant to unconstitutional state legislation); Board of Liquidation v. McComb, 92 U.S. 531 (1875) (holding that a federal court could enjoin state officials from issuing additional state bonds that would impair the security of the plaintiff's bonds); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872) (denying state officials immunity from a suit to enjoin their attempted seizure of the plaintiff's real property). *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), is considered to be the American genesis of the *Ex parte Young* fiction. *Osborn*, like its immediate progeny, however, relied on the "party of record rule" in order to enjoin state officials from collecting an unconstitutional tax because the named defendants were the state officials and not the state itself. *Id.* at 856–59.

The *Young* fiction traces its lineage to a similar fiction used by England's common law courts. In England, the King was generally immune from suit. Common law courts, however, would distinguish between the King and his agents on the theory that the King could not authorize unlawful conduct, and thus the unlawful acts of his officers could not be imputed as the acts of the sovereign. The fiction served two purposes: First, it allowed the common law courts to avoid confronting directly the issue of the King's sovereign immunity. Second, it allowed the courts to curb the abuses of the monarch. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 142–43 & n.21 (1984) (Stevens, J., dissenting) (citations omitted).

43 *See Young*, 209 U.S. at 129–31. The Minnesota Legislature had passed an act reducing railroad passenger rates from three cents per mile to two cents per mile and a second act establishing a fixed rate schedule for the transportation of certain commodities. The shareholders claimed that the acts violated their rights to equal protection and to due process. *See id.* at 127–28. Quite ironically, in the Court's final disposition of the *Young* matter, the Court adjudged the rates to be constitutional. *See* Minnesota Rate Cases, 230 U.S. 352 (1913).

44 *See Young*, 209 U.S. at 132.

45 *See id.* at 156.

name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."[46] In such a case, the official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity."[47] In other words, the *Ex parte Young* doctrine rests on the fiction that because a state cannot authorize a violation of federal statutory or constitutional law, an officer enforcing such a violative state law is not exercising state authority.[48] The practical effect of enjoining or requiring action on behalf of a state official is, nonetheless, felt directly by the state.

The Court has taken several subsequent opportunities to clarify the situations in which *Young* jurisdiction may exist.[49] In *Edelman v. Jordan*,[50] the Court held that although ordering the payment of future public aid benefits from a state's treasury was permissible prospective relief, compelling the payment of retroactive monetary awards from a state's treasury more closely resembled an award against the state itself rather than the prospective injunctive relief awarded in *Young*.[51] Therefore, awards of retrospective monetary relief are barred from *Young* suits.[52] In *Pennhurst State School & Hospital v. Halderman*,[53] the

46 *Id.* at 159.

47 *Id.* at 160.

48 This fiction creates the irony that for the purposes of *Ex parte Young* an unconstitutional action is not attributable to the state, while for purposes of the Fourteenth Amendment, such illegal conduct is considered to be state action. *See* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) (noting the irony of the fiction, but reaffirming the *Ex parte Young* doctrine as one of the bedrock principles of Eleventh Amendment jurisprudence).

49 The Court's first attempt to limit the application of *Ex parte Young* occurred several months after *Young* was decided. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), the Court held that federal courts should not enjoin state officers until the prospective plaintiff had exhausted all his or her available administrative appeals before seeking a federal remedy. The Court, however, was careful to note that its holding was merely an exercise of discretion, not a reflection on any deficiency in federal court jurisdiction. *See id.* at 229–32.

50 415 U.S. 651 (1974). Both the district court and the Seventh Circuit had ordered officers of Illinois' public aid department "to release and remit" benefits wrongfully withheld from the plaintiffs. *Id.* at 655–56.

51 *See id.* at 665 ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."); *id.* at 663 (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945)).

52 *See id.* at 665, 668. Writing for the majority, Justice Rehnquist explained that awarding retroactive benefits would be much more disruptive of the state's budgetary process than would ordering compliance that required the release of future pay-

Court further expounded upon the application of the doctrine, holding that federal courts could not enjoin a state official whose actions violated only state law.[54] One of the principal justifications the *Young* Court used to advance its fiction was the necessity of having federal courts ensure the supremacy of federal law.[55] That necessity, the Court explained, disappears when a federal court attempts to grant relief against state officials on the basis of state law because such relief has no impact on the vindication of the supreme authority of federal law.[56]

More recently, in *Seminole Tribe v. Florida*,[57] the Court for the first time refused to extend *Young* jurisdiction to a plaintiff seeking prospective relief for a state official's alleged violation of federal statutory law. Pursuant to the requirements of the Indian Gaming Regulatory Act (IGRA),[58] the Seminole Tribe had been negotiating a tribal-state

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ments. *Id.* at 664–67. In a *Young* suit three years later, the Court in *Milliken v. Bradley*, 433 U.S. 267, 290 (1977), ordered Michigan to pay a retroactive monetary award for compensatory educational programs to children who had been forced to attend inferior segregated schools, believing that such compensatory relief did not violate the Eleventh Amendment. An attempt to reconcile *Edelman* and *Milliken* is beyond the scope of this Comment. Sufficient for this discussion is that retrospective monetary awards are generally prohibited in *Young* suits.

53 465 U.S. 89 (1984).

54 *See id.* at 106.

55 *See id.* at 105 ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States. . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.") (citations omitted); *see also* Green v. Mansour, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

56 *See id.* at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

Pennhurst, however, leads to three unpalatable forum options for a plaintiff with both state and federal law claims. The plaintiff could forego the federal forum, bringing all her claims in state court. She could split the case, filing in both state and federal court, but she then runs the risk of res judicata if the state forum adjudicates the matter first. And third, the plaintiff may file first in federal court, and, if unsuccessful, later seek redress in state court. This last alternative, however, is costly in terms of time and money, and may eventually generate statute of limitations concerns. *See* Courtney E. Flora, Chapter, *An Inapt Fiction: The Use of the* Ex parte Young *Doctrine for Environmental Citizen Suits Against States After* Seminole Tribe, 27 ENVTL. L. 935, 948 n.95 (1997).

57 116 S. Ct. 1114 (1996).

58 25 U.S.C. §§ 2701–2721 (1994). The IGRA was enacted in order to restore to the states a role in regulating casino-type gaming on the reservations and to insulate

gaming compact with the State of Florida, the agreement on a compact being a necessary precondition to a tribe's operation of gambling casinos on its reservation.[59] After Florida's officials proved unwilling to negotiate about forms of gambling prohibited by the State, the Seminole Tribe brought suit in federal district court against the State of Florida and its Governor, Lawton Chiles, contending that the breakdown in negotiations violated the IGRA's good faith negotiation provision.[60]

Although the Seminole Tribe's action against the State was barred by the Eleventh Amendment,[61] the Seminole Tribe attempted to pursue its claim against Governor Chiles, asserting that it was entitled to proceed under *Ex parte Young* because it was seeking only prospective relief to compel Florida's officials to abide by the IGRA's mandate to negotiate in good faith.[62]

The Court conceded that suits, such as the Seminole Tribe's, to compel state officials to conform their future actions to the dictates of federal statutory law are generally allowed by *Ex parte Young*.[63] The Court, nevertheless, disallowed the Seminole Tribe's use of the doctrine, reasoning that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."[64] The Court explained that the cause of action author-

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Indian gaming from corrupt influences. *See* Meltzer, *supra* note 32, at 4; C. Shannon Bacon, Note, *The Indian Gaming Regulatory Act: What Congress Giveth, The Court Taketh Away*—Seminole Tribe of Florida v. Florida, 30 CREIGHTON L. REV. 569 (1997).

59 *See Seminole Tribe*, 116 S. Ct. at 1119–20 (citing 25 U.S.C. § 2710(d)(1) (1994)).

60 *See id.* at 1121. By the IGRA's terms, "the State shall negotiate with the Indian tribe in good faith to enter into such a [tribal-state] compact." 25 U.S.C. § 2710(d)(3)(A) (1994). For a state's failure to enter into negotiations or to negotiate in good faith, the IGRA conferred upon federal district courts jurisdiction over any action initiated by a tribe arising from such a failure. 25 U.S.C. § 2710(d)(7)(A)(i) (1994).

61 *See Seminole Tribe*, 116 S. Ct. at 1126–32.

62 *See id.* at 1132.

63 *See id.*

64 *Id.* The Court rested its holding on *Schweiker v. Chilicky*, 487 U.S. 412 (1988), in which the plaintiff, who had been erroneously denied social security disability benefits in violation of the Due Process Clause, sought the creation of a *Bivens* remedy in order to compensate for the violation. *Id.* at 417–21. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that the victim of a Fourth Amendment violation by federal officers, who had acted under color of their authority, could sue for damages. The *Schweiker* Court explained that it had traditionally been hesitant to create additional *Bivens* remedies when Congress, in its design of a statutory program, has indicated that the remedies provided by that pro-

ized by the IGRA was strictly limited in its remedial scope,[65] while an action brought under *Ex Parte Young* would expose Governor Chiles "to the full remedial powers of a federal court, including, presumably, contempt sanctions."[66] By declining to extend *Young* jurisdiction, the Court believed that it had fully effectuated Congress' intent, as evidenced by its development of a limited remedial scheme for the IGRA, to avoid exposing an IGRA defendant to the broad range of federal remedial powers.[67]

Young jurisdiction can, therefore, be abrogated when it is found to conflict with congressional intent. However, the Court clarified that its holding did not disallow Congress from authorizing *Young* jurisdiction over a cause of action with a limited remedial scheme.[68] Rather, the Court's holding was limited, given the narrow focus of the remedial scheme imposed by the IGRA, which would have been rendered no more than surplusage with which no Indian tribe would have bothered were "the more complete and more immediate relief" via pursuit of a *Young* claim available.[69]

After deciding *Seminole Tribe*, the Court granted Idaho's petition for writ of certiorari, seemingly poised to continue against its back-

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gram are adequate to cure any constitutional violations that may occur from the program's administration, regardless of whether the available remedies would provide "complete relief" for the violation. Because Congress had created an adequate remedial scheme for those persons improperly denied social security disability benefits, nothing compelled the creation of a *Bivens* remedy. *Schweiker*, 412 U.S. at 422–29. The Court in *Seminole Tribe* recognized that although *Schweiker* concerned the creation of a new *Bivens* remedy, its rationale applied by analogy to the lifting of the Eleventh Amendment's jurisdictional bar. *Seminole Tribe*, 116 S. Ct. at 1132.

65 Under the IGRA's remedial scheme, if a court finds that a state has failed to negotiate in good faith, "the court shall order the State and the Indian Tribe [sic] to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii) (1994) (footnote omitted). Failing the agreement on a compact within that 60-day period, both the Tribe and the State shall submit "their last best offer for a compact" to a court appointed mediator who shall select a compact from between the two submitted offers. 25 U.S.C. § 2710(d)(7)(B)(iv) (1994).

66 *Seminole Tribe*, 116 S. Ct. at 1133. *But see* Jackson, *supra* note 6, at 514–17 (arguing that the *Ex parte Young* injunction did not necessarily provide a broader remedy than did the IGRA's remedial scheme).

Justice Souter argued in his dissent that the Court has "never before inferred a congressional intent to eliminate [*Young's*] time-honored practice of enforcing federal law," adding that although such an intent may be inferred, it should be inferred only from a clear statement of federal intent to block the *Young* claim. Souter added that "in practice, in the real world of congressional legislation, such an intent would be exceedingly odd." *Seminole Tribe*, 116 S. Ct. at 1180 (Souter, J., dissenting).

67 *See id.* at 1133.

68 *See id.* at 1133 n.17.

69 *Id.* at 1133.

drop of pro-federalist decisions by using its recent encroachment into *Ex parte Young* as a springboard toward removing an even greater number of potential cases from the ambit of that doctrine. However, save for the great ideological transmutation in *Young* jurisprudence made by Justice Kennedy and Chief Justice Rehnquist from *Seminole Tribe* to *Coeur d'Alene,* the Court's majority has tempered its attempts to reposition the states' authority in the Union when resolving questions about *Ex parte Young.* Granted that *Coeur d'Alene,* like *Seminole Tribe,* carved out a narrow exception at the edges of *Ex parte Young,* the Court's majority declined to chart a new direction in *Young* jurisprudence despite the opportunity to create a real property exception to the doctrine.

IV. *IDAHO V. COEUR D'ALENE TRIBE OF IDAHO*

A. *The United States District Court Decision*

On October 15, 1991, the Coeur d'Alene Tribe of Idaho filed suit in Federal District Court for the District of Idaho, claiming the beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters within the original boundaries of its reservation,[70] as defined by President Ulysses S. Grant's Executive Order of November 8, 1873,[71] and ratified by Congress in 1891.[72] Coeur d'Alene tribal leaders had grown dissatisfied with the State's failure to enforce health and pollution laws affecting the lake, its failure to monitor mining and timber operations near the lake, and its hindrance of the lakeshore owners' access "to a great national treasure."[73]

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70 *See* Coeur d'Alene Tribe v. Idaho, 798 F. Supp. 1443, 1445 (D. Idaho 1992).

71 For a reprint of the Executive Order that Established the Coeur d'Alene Indian Reservation, see David W. Gross, Note, *Examining Aboriginal Rights in Submerged Lands:* Coeur d'Alene Tribe v. Idaho, 30 IDAHO L. REV. 139, 149 n.2 (1993).

72 Exec. Order of November 8, 1873, ch. 543, § 26 Stat. 989, 1026–29 (1891).

73 *Coeur d'Alene Tribe Is Laying Claim to Lake,* SEATTLE TIMES, May 5, 1991, at B9, *available in* 1991 WL 4458110 (quoting tribal elder Henry Si John). Tribal chairman Ernie Stensgar said that the Tribe filed the lawsuit to quiet title to the lake because of its concern that mining and timber operations sanctioned by the State were contributing to a degradation of the lake. "Idaho's stewardship [of Lake Coeur d'Alene] has been a clear failure," Stensgar said, adding that "[i]t is painful to sit back and watch the waters of our lake being subject to such brutality through the pollution and privatization of all done in the name of profit." He concluded that "[s]ince the tribe has never relinquished title to the lake, we feel obligated to do something to improve the lake." *Id.* In 1991, the United States Geological Survey reported that after a century of mining in the area, Lake Coeur d'Alene registered the highest heavy-metal contam-

The Tribe named as defendants the State of Idaho, various state agencies, and certain state officials in their individual capacities. In its complaint, the Tribe sought from the court an order quieting title to the disputed lands in the Tribe;[74] "a declaratory judgment that the bed, banks, and waters at issue are for the exclusive use, occupancy, and enjoyment of the Tribe";[75] a declaration that all Idaho statutes and ordinances that regulate or affect in any way the disputed lands and waters are invalid;[76] and, lastly, an injunction preventing the State, its agencies, and its officials from taking any action to regulate or to interfere with in any way the Tribe's exclusive right to the disputed lands and waters.[77]

Idaho responded to the Tribe's charges by filing a Rule 12(b)(6) motion to dismiss, claiming that the Tribe's suit was "barred by the jurisdictional limitations imposed on the federal judiciary by the Eleventh Amendment to the United States Constitution."[78] In the alternative, the State grounded its motion on a failure by the Tribe to state a claim upon which relief could be granted.[79]

Relying on the Supreme Court's decision in *Blatchford v. Native Village*,[80] which held that suits initiated by Indian tribes against unconsenting states are prohibited by the Eleventh Amendment,[81] the dis-

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ination in the world. *See* Peggy Anderson, *Tribe Challenges Ruling on Idaho Lake*, PORTLAND OREGONIAN, Feb. 3, 1994, at CO2, *available in* 1994 WL 4828299.

74 *See Coeur d'Alene*, 798 F. Supp. at 1445.

75 *Id.*

76 *See id.* In particular, the Tribe sought to declare invalid the water right set forth in section 67-4304 of Idaho's statutory code. That section states in pertinent part:

> The governor is hereby authorized and directed to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend d'Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition. The preservation of said water in said lakes for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water.

IDAHO CODE § 67-4304 (1995). Idaho's Legislature had also passed a number of other regulations affecting Lake Coeur d'Alene. *See* IDAHO CODE § 39-3613 (Supp. 1997); § 58-104(9) (1994 & Supp. 1997); §§ 67-4304 to -4306 (1995 & Supp. 1997); and §§ 70-201 to -208 (1989 & Supp. 1997).

77 *See Coeur d'Alene*, 798 F. Supp. at 1445.

78 *Id.*

79 *See id.*

80 501 U.S. 775 (1991).

81 In reaching its holding in *Blatchford*, the Supreme Court rejected the Noatak Tribe's argument that, as a sovereign tribe, it could sue a sovereign state without triggering the Eleventh Amendment's jurisdictional bar. *See Coeur d'Alene*, 798 F. Supp. at 1446–47 (citing *Blatchford*, 501 U.S. at 780–81). The Court also rejected the argument

trict court granted the State's motion, dismissing the Tribe's claims against the State and its agencies.[82] Next, the district court concluded that the Tribe's action for declaratory judgment and to quiet title against Idaho's individual state officials was also barred by the Eleventh Amendment because these claims "do not fall within the narrow exception set forth in *Ex parte Young* and its progeny."[83] The court believed that the declaratory relief sought by the Tribe would be, in essence, equivalent to an award of damages or of restitution by the court, thereby executing an "end run" around *Edelman's* prohibition of federal suits against state officials for money damages or its equivalent.[84]

As to the Tribe's prayer for injunctive relief, the court explained that if Idaho were not the rightful owner of the disputed lands, the court could enjoin the individual state officials from interfering with the Tribe's ownership rights in the land.[85] Without hearing arguments, however, the court concluded that this relief was unavailable because, pursuant to the Equal Footing Doctrine,[86] "Idaho is and always has been in rightful possession of the beds, banks, and waters of all of the navigable watercourses at issue in this case."[87] The court explained that according to the Equal Footing Doctrine, it is well established that the federal government held land under navigable waters in trust, to be granted to new states as they entered the Union, thereby assuring that these new members of the Union assumed sovereignty on an "equal footing" with the then already established states.[88] The doctrine, therefore, necessarily gives rise to a strong presumption against pre-statehood conveyances of these lands.[89] This presumption

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that the states, by adopting the Constitution, had waived their immunity from suits by Indian tribes, reasoning that "there is no compelling evidence that the Founders thought such a surrender inherent in the constitutional compact." *Id.* (quoting *Blatchford*, 501 U.S. at 781).

82 *See Coeur d'Alene*, 798 F. Supp. at 1446–48.

83 *Id.* at 1449.

84 *See id.* at 1448.

85 *See id.* at 1449.

86 *See id.* The American version of the Equal Footing Doctrine had its genesis in the English common law, under which the English Crown held in trust for the public's benefit all the lands underlying navigable waters because their importance to navigation, domestic and foreign commerce, fishing, and other commercial activities was considered to be essential to the sovereign. When the colonies gained their independence from Great Britain, they claimed, as the sovereign successors to the English Crown, title to the lands under navigable waters within their boundaries. *See id.* at 1449 (citing Utah Div. of State Lands v. United States, 482 U.S. 193, 195–96 (1987)).

87 *Id.* at 1452.

88 *See id.* at 1449 (citing *Utah Div. of State Lands*, 482 U.S. at 195–96).

89 *See id.* at 1449–50 (citing Montana v. United States, 450 U.S. 544, 552 (1981)).

arises from the recognition that although Congress may at times have conveyed lands under its navigable waters for certain purposes, the fact that "control over the property underlying navigable waters is so strongly identified with the sovereign power of government . . . it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.'"[90] Such a strong presumption can be overcome only by demonstrating that the intention to convey was "'definitely declared or otherwise made plain' . . . or was rendered 'in clear and especial words' . . . or 'unless the claim confirmed in terms embraces the land under the waters of the stream.'"[91]

The Tribe maintained that the 1873 Executive Order, which particularly described part of the boundary of its reservation as extending to the middle of the Spokane River, evinced the requisite intent to overcome the strong presumption against conveyance.[92] The district court, however, likened this Executive Order to the 1868 treaty with the United States upon which the Crow Indians, in *Montana v. United States*,[93] rested their claim to quiet title to and to end the State of Montana's regulatory authority over hunting and fishing on its reservation.[94] In *Montana*, the Supreme Court determined that the treaty's detailed description of the Crow's boundary as extending to the middle of a section of the Yellowstone River was a mere reservation of the land in a "general way," which could not overcome the presumption against pre-statehood conveyances.[95] The district court, relying on this reasoning, concluded that the 1873 Executive Order, which used similar descriptive language, likewise could not overcome the presumption against pre-statehood conveyances, thus meaning that Idaho has been in lawful possession of the disputed lands since it entered the Union.[96]

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90 *Id.* (quoting *Montana*, 450 U.S. at 552).

91 *Id.* at 1450 (quoting *Montana*, 450 U.S. at 552).

92 *See id.* at 1451.

93 450 U.S. 544 (1981).

94 *See Coeur d'Alene*, 798 F. Supp. at 1450–51 (citing *Montana*, 450 U.S. at 549, 554).

95 *See id.* at 1451 (citing *Montana*, 450 U.S. at 554).

96 *See id.* at 1451–52. *But see* Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886) (stating that an agreement with a tribe concerning the boundaries of its land is effective when entered and that Congress' ratification serves merely as an acceptance of cession); Brief for the United States as Amicus Curiae Supporting Respondents at 11–22, Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997) (No. 94-1474) (arguing that the United States intended to and did effect a pre-statehood conveyance of a portion of the lands at issue); Gross, *supra* note 71, at 149 (arguing that the Equal Footing Doctrine's presumption against pre-statehood conveyances is inapplicable to this dispute

B. *The Ninth Circuit Court of Appeals Decision*

On appeal, the Ninth Circuit affirmed the district court's holding that the Eleventh Amendment barred all the Tribe's claims against Idaho and its agencies.[97] As to the Tribe's quiet title action against Idaho's individual officials, the Ninth Circuit relied on *Florida Department of State v. Treasure Salvors, Inc.*,[98] which the appellate court interpreted to hold that "federal courts may not hear actions to quiet title to property in which the state claims an interest, without the state's consent," and thus dismissed that portion of Tribe's claim.[99]

The appellate court, however, also interpreted *Treasure Salvors* to allow federal suits for "declaratory and injunctive relief against state officials . . . even if that relief works to put the plaintiff in possession of property also claimed by the state."[100] The court explained that the fiction that cases adjudicating title to property claimed by a state in violation of federal law do not involve that state does not hold; a state so claiming title is a real party in interest in the litigation.[101] And although a suit brought directly against a state by a private party also

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because President Grant's 1873 Executive Order did not purport to give the Tribe any land, but merely recognized the Tribe's title to the land, and that the 1891 agreements limiting and defining the reservation were not ratified until eight months after Idaho had achieved statehood on July 3, 1890).

97 *See* Coeur d'Alene Tribe v. Idaho, 42 F.3d 1244, 1250 (9th Cir. 1994).

98 458 U.S. 670 (1981). In *Treasure Salvors*, pursuant to a Florida statute covering treasure troves and artifacts abandoned on state-owned property, state officials claimed an interest in 25% of the artifacts recovered by Treasure Salvors, Inc., from a Spanish galleon that sank purportedly within Florida's coastal waters. After an unrelated action adjudged the lands under the galleon to be federal lands, Treasure Salvors, Inc., filed an action to recover the portion of the treasure that it had turned over to the state. *See id.* at 673–76. The Court developed a three-part test to determine whether a state official was immune from an action to adjudicate the disposition of property in which both the plaintiff and a state claim an interest: (1) Is the action asserted against state officials or against the state itself? (2) Does the challenged conduct of the state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (3) Is the prayed for relief prospective in nature or is it analogous to a retroactive award that requires the payment of funds from the state treasury? *Id.* at 690. After quickly ascertaining that the first two prongs of the test were met, the Ninth Circuit focused its analysis on determining whether the Tribe's claim satisfied the third prong of the inquiry. *See Coeur d'Alene*, 42 F.3d at 1250–51.

99 *Coeur d'Alene*, 42 F.3d at 1252.

100 *Id.*

101 *See id.* at 1254. Idaho's officials based their argument on several circuit court of appeals cases holding that a federal court does not have the power to adjudicate a state's interest in property without the state's consent. *See id.* at 1252–53 (citing cases). The Ninth Circuit dismissed these cases as indistinguishable from and thus irreconcilable in the face of *Treasure Salvors*. *See id.* at 1253.

claiming an interest in that same land is barred by the Eleventh Amendment, the same suit brought as a *Young* claim against officials of that state, who must act in compliance with federal law and who can be compelled to do so by a federal court, may proceed in a federal forum so long as the relief allowed would not foreclose the state's claim to the disputed property in future judicial proceedings.[102] Thus, on remand, if the district court were to find that the disputed property rightfully belonged to the Tribe pursuant to federal law, the district court may pronounce the Tribe to be the owner of the property against all claimants except Idaho and its agencies.[103] The Ninth Circuit anticipated that its solution would not satisfy either of the parties involved—the plaintiffs in *Treasure Salvors* had complained of such a problem—but the court refused to deny a federal forum to enforce the Tribe's federal rights merely because that forum could not provide to the Tribe the entire relief that it sought.[104]

C. *The Supreme Court's Decision*

The Supreme Court granted Idaho's petition for a writ of certiorari[105] to consider whether an action against state officers for injunctive and declaratory relief, when such relief requires adjudication of a state's equal footing title and will deprive the state of all practical benefits of ownership of the disputed waters and submerged lands, may proceed under the *Ex parte Young* doctrine.[106] Also briefed by the parties, but not addressed by the Court, was whether the President of the United States, acting without explicit congressional authority, can convey title to the beds, banks, and submerged lands to an Indian

102 *See id.* at 1254.

103 *See id.* at 1255.

104 *See id.* The Ninth Circuit also held that the district court's dismissal of the Tribe's complaint for failure to state a claim was improper because the Tribe could have conceivably proven facts that it held title pursuant to the 1873 Executive Order. *See id.* at 1256–57.

105 *See* Idaho v. Coeur d'Alene Tribe, 116 S. Ct. 1415 (1996).

106 The Court denied the Tribe's petition for writ of certiorari. *See* Coeur d'Alene Tribe v. Idaho, 116 S. Ct. 1416 (1996). The Court also denied the Tribe's cross petition for certiorari, in which the Tribe argued as follows: A state can define its sovereignty any way it wishes. Idaho had defined its sovereignty in a limited way as a result of holdings by the Idaho Supreme Court that quiet title actions against the State did not impinge upon its sovereignty. Consequently, the Eleventh Amendment posed no barrier to the Tribe's quiet title action because the amendment protects a state's sovereignty, and this suit, by Idaho's own admission, did not even touch upon that sovereignty. *See* Brief for Respondent at 3, Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997) (No. 94-1474) (citations omitted).

tribe, thereby overcoming the strong presumption in favor of a state's entitlement to such lands under the Equal Footing Doctrine.

1. The Principal Opinion

Justice Kennedy, joined only by Chief Justice Rehnquist, began the principal opinion by laying the groundwork for his attempt to reconfigure the *Ex parte Young* exception into a case-specific balancing test.[107] Justice Kennedy explained that the purpose of the Eleventh Amendment is to limit the jurisdictional reach of Article III courts; the amendment, in essence, recognizes the broad concept of sovereign immunity implicit in the Constitution.[108] Within this framework, *Ex parte Young* is an important exception to the Eleventh Amendment, but applying an "empty" formalistic interpretation of the doctrine whenever prospective declaratory and injunctive relief is sought against a state officer would be inconsistent with and offensive to the broader principles of state sovereignty.[109]

Given this characterization of *Young's* role, Justice Kennedy declared it unsurprising that *Young* jurisdiction has generally been extended in two instances. "The first is when there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law."[110] In looking to *Ex parte Young* itself for support, Justice Kennedy conceded that the ultimate question in that case was whether Minnesota's attorney general could be enjoined from enforcing an allegedly unconstitutional state law fixing railroad fares.[111] Material to the Court's decision to extend federal jurisdiction, however, was the burden the shareholders would bear by being

107 Throughout his opinion, Justice Kennedy referred to *Ex parte Young* as the "*Young* exception," apparently to emphasize his view of the doctrine as subservient to the Eleventh Amendment. He also expressly condemned the Court's continued reliance on *Young's* well-known fiction, indicating that its nature as a fiction counsels hesitance in its application. *See* Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2034 (1997).

108 *See id.* at 2033.

109 *See id.* at 2034 ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.").

110 *Id.* at 2035 ("[P]roviding a federal forum for a justiciable controversy is a specific application of the principle that the plan of the convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy.").

111 *Id.*

forced to wait until Attorney General Young initiated a state enforcement proceeding in order to challenge the scheme, as well as the "grave risk," run by the railroads' officials, of heavy fines and imprisonment mandated by the regulatory scheme if they failed in their challenge to the statute.[112] Because, however, Idaho's courts were open to and offered the Tribe an adequate remedy, Justice Kennedy stated that the Tribe could not avail itself of this justification to gain entry into a federal forum.[113]

Acknowledging that even if an available state forum could provide a plaintiff with an adequate remedy, Justice Kennedy stated that *Young* jurisdiction has also traditionally been extended when a dispute calls for the interpretation of federal law, that is, when federal intervention affirms "the interest in having federal rights vindicated in federal courts."[114] Justice Kennedy stated that a federal forum assures a peaceful resolution in disputes between two states, suits initiated by the United States against a state, as well as in several other circumstances that he did not identify, but he attacked this justification as potentially leading to an "expansive application of the *Young* exception."[115] This justification, Justice Kennedy stated, is tantamount to basing judicial practice on the assumption that state courts are inherently inferior to federal courts, a precept that conflicts with the basic tenets of federalism.[116] Justice Kennedy explained that no detriment inures to the Supremacy Clause if a federal-question case is heard in a state rather than in a federal court; after all, he added, Article III courts did not obtain federal-question jurisdiction until 1875.[117] Furthermore, federal statutory and constitutional law, he explained, cannot be viewed as "a body of law external to the States, acknowledged

112 *See id.* (citing Ex parte Young, 209 U.S. 123, 166 (1908)). Illustrative that *Young* was not the sole case to rely on the inadequacy or unavailability of a state forum as justification to extend federal jurisdiction, Justice Kennedy cited *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 842–43 (1824) (explaining that if it was within the power of the plaintiff to make the State a party to the suit it would "certainly [be] true" that a suit against state officials would be barred, but if the "real principal" is "exempt from all judicial process" an officer suit could proceed); *United States v. Lee*, 106 U.S. 196 (1882) (permitting suit for injunctive relief to proceed where there did not otherwise exist a legal remedy for the alleged trespass); *Poindexter v. Greenhow*, 114 U.S. 270, 299 (1885) (explaining that the statelaw remedy for Virginia's unconstitutional refusal to accept its own bond coupons in satisfaction of state taxes was, in fact, "no remedy"). *See Coeur d'Alene*, 117 S. Ct. at 2035.

113 *Coeur d'Alene*, 117 S. Ct. at 2036.

114 *Id.*

115 *Id.* at 2036–37.

116 *See id.* at 2037.

117 *See id.*

and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself."[118] Here, however, the Tribe is simply attempting to invoke federal principles to challenge a state administrative action.[119] Because this dispute "has features which instruct and enrich the elaboration of the state's administrative law," Justice Kennedy believed that it would be best adjudged by Idaho's courts, which would benefit measurably by integrating the federal principles "within [its] own system for the proper judicial control of [its] state officials."[120]

After confining the extension of *Young* jurisdiction to the two aforesaid instances, Justice Kennedy segued to his main argument. The Court's recent *Young* cases, he asserted, illustrate that the Court was engaged in "a careful balancing and accommodation of state interests."[121] In other words, courts must carefully measure whether granting the plaintiff in a state-officer suit access to a federal forum would cause such an affront to the state's sovereignty that it would "upset the balance of federal and state interests" embodied in the *Young* exception.[122]

In balancing the federal and state interests, Justice Kennedy painted the Tribe's claim as unusual in that the claim is "close to the functional equivalent of a quiet title [action] in that substantially all benefits of ownership and control would shift from the State to the Tribe."[123] Furthermore, Justice Kennedy found the claim to be "especially troubling" in that the relief sought by the Tribe would divest Idaho of its sovereign control of the submerged lands, which hold "a

118 *Id.* ("It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.").

119 *See id.*

120 *Id.* at 2037–38.

121 *Id.* at 2038.

122 *See id.* As supporting this balancing test, Justice Kennedy cited *Quern v. Jordan*, 440 U.S. 332 (1979), *Milliken v. Bradley*, 433 U.S. 267 (1977), *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This balancing approach, Justice Kennedy added, was recently affirmed in *Seminole Tribe* by the Court's analogy of the *Young* line of cases to the *Bivens* line. *See supra* note 64. Justice Kennedy explained that the *Seminole Tribe* Court's analogy of the lifting of the Eleventh Amendment's jurisdictional bar to the creation of a *Bivens* remedy in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), "reflect[s] a sensitivity to varying contexts, and courts should consider whether there are 'special factors counseling hesitation'" in answering the inquiry in either situation. *Coeur d'Alene*, 117 S. Ct. at 2038–39 (citations omitted).

123 *Coeur d'Alene*, 117 S. Ct. at 2040.

unique status in the law and [are] infused with a public trust the State itself is bound to respect."[124]

Justice Kennedy supplemented the district court's historical narrative about the applicability of the Equal Footing Doctrine,[125] by stressing that the doctrine, as well as the tie between submerged lands and state sovereignty, traces its pedigree back to the Institutes of Justinian and to the Magna Carta.[126] And although America adopted much of its law respecting navigable waters from English law, Justice Kennedy emphasized that America's deeper reverence for these waterways is evidenced by its expansion of the doctrine's scope.[127]

Justice Kennedy found that Idaho, through its enactment of numerous regulations respecting Lake Coeur d'Alene, especially those regulations for the preservation of the lake for public and commercial benefit, evidenced its recognition of the degree to which its submerged lands are integrally related to its sovereignty.[128] Given this unique relationship, extension of *Young* jurisdiction would work an affront to the dignity of Idaho and to its position in the Union.[129] Thus, Justice Kennedy concluded, the Eleventh Amendment prohibited the Tribe's action for declaratory and injunctive relief against Idaho's officials from proceeding in federal court.[130]

2. Justice O'Connor's Concurrence

Joined in her concurrence by Justices Scalia and Thomas, Justice O'Connor began her opinion in agreement with the principal opinion to the extent that the Tribe's claim is distinct from the typical *Ex parte Young* action.[131] In the first respect, by seeking to extinguish all existing regulations and ordinances affecting and the State's regulatory authority over Lake Coeur d'Alene, the Tribe, Justice O'Connor believed, asserted the "functional equivalent" of a quiet title action

124 *Id.* at 2040–41. "To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Id.* at 2040.

125 *See supra* notes 86–91 and accompanying text.

126 *See Coeur d'Alene*, 117 S. Ct. at 2041.

127 *See id.* at 2041–42. For example, although English law recognized that some private landowners retained title to certain navigable waters while allowing the public a right of passage, American law has never recognized such private ownership. Neither did American law recognize any of the distinctions made in English law between the Crown's rights and the public's rights in submerged lands. *See id.* at 2042.

128 *See id.* at 2042–43.

129 *See id.* at 2043.

130 *See id.*

131 *See id.*

against the State.[132] Such suits, as *Treasure Salvors* has made clear, are barred from proceeding in federal court.[133]

The second difference Justice O'Connor found between the Tribe's claim and that in an ordinary *Young* suit, is that the Tribe did not seek disposition of its interest in "an ordinary parcel of real property."[134] Rather, submerged lands, the peculiar kind of land to which the Tribe claimed title, have been emphasized repeatedly by the Court and throughout history as inextricably tied to state sovereignty.[135]

In light of the uniqueness of the Tribe's claim, Justice O'Connor believed that the precedents upon which the Tribe relied were inapposite.[136] She acknowledged the prior cases in which the Court had allowed ejectment actions to proceed in a federal forum against state and federal officers who had unconstitutionally seized private land.[137] She, however, distinguished those cases from the Tribe's claim, stating that in the prior cases the respective sovereigns were divested only of their possession of the property, but they were not divested of their regulatory authority over those lands.[138] Because the Tribe sought to remove completely the submerged lands from Idaho's sovereign jurisdiction, the relief would impact Idaho to the extent that the state must be considered the real party in interest and the suit therefore barred by the Eleventh Amendment.[139]

Justice O'Connor used the remaining two-thirds of her concurrence to criticize Justice Kennedy's attempt to reconfigure the *Young* doctrine from a straightforward inquiry to a case-by-case balancing test. She argued that although the lack of adequate state relief may be incident to a number of *Young* cases, it has never been a threshold question in pursuit of injunctive relief.[140] She highlighted Justice Kennedy's admission that the cases he cited did not principally rely on

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132 *See id.* at 2043–44.

133 *See id.*

134 *Id.* at 2044.

135 *See id.* Justice O'Connor joined with the principal opinion's discussion of the importance of the relationship between submerged lands and state sovereignty as embodied in the Equal Footing Doctrine.

136 *See id.* Justice O'Connor agreed with Justice Kennedy's reason for rejecting the Tribe's reliance on *Treasure Salvors*, believing the controlling issue in that case to be that Florida's officials lacked a "colorable basis under state law" for claiming 25% of the artifacts; that is, the officials were acting outside the scope of the authority conferred upon them by the state, notwithstanding that the title to the artifacts rested on federal law. *Id.*

137 *See id.*

138 *See id.*

139 *See id.* at 2043–44.

140 *See id.* at 2045.

the absence of an available state forum as a rationale for applying *Young*.[141] More importantly, she asserted that *Young* itself, as well as two factually similar cases on which *Young's* holding is based, allowed federal injunction suits to proceed even though the states had waived their immunity from suit in their own forums, because the states were not the real defendant in interest.[142] Justice O'Connor concluded that Justice Kennedy misinterpreted the *Young* inquiry, and she reiterated that a court's concern is not whether a state forum offering adequate relief is available, but whether, in such a suit, the state is the real party in interest.[143]

Justice O'Connor next agreed with the principal opinion that one of the underlying justifications of *Ex parte Young* is that it promotes federal interests by having federal cases decided by federal courts.[144] However, she found Justice Kennedy's assertion that it is immaterial for purposes of the Supremacy Clause whether a federal suit is brought in a state or in a federal forum to be patently inconsistent with the theoretical underpinnings of the *Young* doctrine and with state-federal jurisprudential philosophy.[145] This precept, she asserted, in no way equates to the proposition, which the principal opinion deems to follow *a fortiori*, that state courts cannot capably interpret and apply federal law.[146] The theory behind the supremacy of federal law never has been based on the characterization that it involves the denigration of the state courts' abilities.[147] Rather, inherent in the notion of preserving the supremacy of federal law is that, while state courts are not inferior, the nature of state relief is.[148]

In addressing Justice Kennedy's central conclusion, Justice O'Connor argued that the Court's more current *Young* cases stand not for the case-by-case balancing approach he advocated, but rather for the proposition that a court's duty is merely to determine whether the remedy sought by a plaintiff who alleges an ongoing violation of federal statutory or constitutional law is more akin to the permissible prospective relief granted in *Ex parte Young* than to impermissible retroactive relief.[149] Nothing Justice O'Connor found in the Court's

141 *See id.*

142 *See id.* (citing Ex Parte Young, 209 U.S. 123, 153–54 (1908)).

143 *See id.* (citing *Young*, 209 U.S. at 154).

144 *See id.*

145 *See id.* at 2045–46

146 *See id.* at 2046.

147 *See id.*

148 *See id.*

149 *See id.* at 2046–47. Justice O'Connor criticized Justice Kennedy's reliance on *Seminole Tribe's* analogy between *Young* and *Bivens* actions, arguing that such reliance

Young jurisprudence supported "the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed."[150]

Justice O'Connor, despite stressing that the principal opinion needlessly mischaracterized much of the Court's *Young* jurisprudence, concluded that when a plaintiff attempts to strip a state of its complete regulatory authority over submerged lands, the state is essentially placed as the real defendant in interest and the suit is barred from federal court by the Eleventh Amendment.[151]

3. Justice Souter's Dissent

Although labeled the dissent, Justice Souter's opinion was joined by three other Justices,[152] a larger number than adhered to either the principal or the concurring opinion. And in contrast to his lengthy and thorough dissertation in *Seminole Tribe* about the history of federalism and the role of state sovereignty, yet with only a limited discussion of *Ex parte Young*, here Justice Souter concisely outlined his view of the *Young* doctrine, affirming its strict, formalistic application as an essential counterbalance to the Eleventh Amendment's jurisdictional bar.

Justice Souter echoed Justice O'Connor's opinion by initially chiding Justice Kennedy for his attempt to replace the formalistic *Ex parte Young* inquiry with a case-specific balancing test.[153] He then chided both opinions for their unnecessary and unwarranted attempts "to redefine and reduce the substance of federal subject-matter jurisdiction to vindicate federal rights."[154] Justice Souter explained that when *Young* has not been displaced by Congress, or what a court deems to be congressional intent, whether a court should extend federal jurisdiction involves a straightforward, two-prong inquiry: First, courts must determine whether the plaintiff has alleged an ongoing violation of his or her federal statutory or constitutional rights. Second, he or she must seek forward-looking relief in order to address the violation.[155] The Tribe, Justice Souter concluded, satisfied this inquiry.

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on one lone citation to a *Bivens* action is in no way supportive of importing a case-by-case balancing approach into *Young* jurisprudence. *Id.* at 2047.

150 *Id.* at 2047.

151 *See id.*

152 Joining Justice Souter in his dissent were Justices Stevens, Ginsburg, and Breyer.

153 *See Coeur d'Alene*, 117 S. Ct. at 2048.

154 *Id.*

155 *See id.*

Justice Souter argued, in contrast to the principal opinion's apparent assertion that the Tribe's claim to the submerged lands was better characterized as a state administrative action, that the title to the lands, as the State had admitted,[156] is clearly governed by federal law.[157] Not only does the Tribe's right to exclusive possession depend on whether the 1873 Executive Order validly conveyed the submerged lands to the Tribe, but also Idaho has no legitimate authority to enforce its statutes, regulations, and ordinances affecting the land absent the authorization conferred by federal law.[158]

At this point in his analysis, Justice Souter noted that the Tribe's claim differs from *Ex parte Young* itself in that this action concerns the Tribe's claim of title to real property in which a state also claims an interest.[159] This difference, he asserted, is immaterial and has never been used to deny a plaintiff *Young* jurisdiction.[160] *United States v. Lee*[161] and *Tindal v. Wesley*[162] have already outlined the proper inquiry in a *Young* action to determine whether a state is the real party in interest when the plaintiff claims title to real property also claimed by the state.[163] In *Lee*, General Robert E. Lee's son brought an ejectment action against officers of the federal government for seizing and occupying his property allegedly in violation of the Constitution.[164] The *Lee* Court rejected the officers' assertion that they were entitled to immunity by virtue of the federal government's authorization of their actions.[165] Although *Lee* concerned an alleged unconstitutional seizure of real property by federal officials, *Tindal* held that the same inquiry applies even when the suit is for disposition of one's property interest against a state.[166] Therefore, Justice Souter summarized, so long as a plaintiff's title claim rests on federal statutory or constitu-

156 *See id.* at 2049 (citing Brief for Petitioner at 25, Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997) (No. 94-1474) ("[T]he underlying authorization for the actions of the named officials is not the state statutes [regulating] the disputed lands, but rather the Idaho Admission Act and the United States Constitution. State title to submerged lands is the result of federal action in admitting a state to the Union.")).

157 *See id.*

158 *See id.* at 2050.

159 *See id.* at 2049. Justice Souter directed the majority of his analysis not toward the narrow issue of "submerged lands," but rather toward attacking the broader concept of creating a real property exception to *Ex parte Young*.

160 *See id.* at 2050.

161 106 U.S. 196 (1882).

162 167 U.S. 204 (1897).

163 *See Coeur d'Alene*, 117 S. Ct. at 2050.

164 *See id.*

165 *See id.* (citing *Lee*, 106 U.S. at 220).

166 *See id.* (citing *Tindal*, 167 U.S. at 213).

tional law, prior Court precedents have shown that the claim differs none "from any other legal or constitutional matter that may have to be resolved in deciding whether the officer of an immune government is so acting beyond his authority as to be amenable to suit without necessarily implicating his government."[167]

Next, Justice Souter concluded that the relief sought by the Tribe is prospective in nature, thus passing the second prong and deserving of *Young* jurisdiction. The Tribe, he pointed out, sought only to end Idaho's regulation of the land, which the Tribe claimed is inconsistent with federal law; it did not seek damages for past infringement to its title, and thus vitiated concerns of an end run around *Edelman*.[168] Justice Souter conceded that the Tribe's requested relief would have "significant consequences to the state," but such is true whenever *Young* applies.[169] The relief here would merely end a regulatory regime that, according to federal law, Idaho allegedly had no right to maintain, but such relief cannot reposition the State as the real party in interest "so long as its burden upon the State is merely a 'necessary consequence of [the officers'] compliance in the future with a substantive federal-question determination.'"[170] Justice Souter remarked that by finding the relief sought by the Tribe to run against the State, Justices Kennedy and O'Connor apparently confuse the cost of Idaho's compliance with federal law with its character as merely prospective.[171]

The bulk of Justice Souter's opinion treated submerged lands as a subset of all property, and he directed his argument toward the general proposition that *Young* suits requesting disposition of a claim of title to property, real or personal, are not "unique." To the extent that he addressed submerged lands particularly, he again argued that their uniqueness is irrelevant in the *Young* context.[172] The only examination that the Court must undertake, regardless of the underlying subject matter of the suit, is whether the defendant state's officers are exercising "ultra vires" authority over the submerged lands.[173] As long as that threshold inquiry is answered in the affirmative, a federal forum must be offered notwithstanding that the relief, if granted, would place the disputed lands outside the state's regulatory jurisdiction.[174]

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167 *Id.*

168 *See id.* at 2051.

169 *Id.*

170 *Id.* (quoting Edelman v. Jordan, 415 U.S. 651, 668 (1974)).

171 *See id.*

172 *See id.* at 2053–54.

173 *See id.* at 2054.

174 *See id.*

Justice Souter concluded that "[t]his is a perfect example of a suit for relief cognizable under *Ex parte Young*."[175] In adhering to precedent, however, the jurisdictional line must be drawn short of allowing the Tribe to proceed with a quiet title action or by prohibiting Idaho from adjudicating title to the lands in a future action, else such relief would run directly against Idaho.[176] So long as Idaho is free, at its pleasure, to litigate in a future action its title to the disputed lands, the Tribe's suit should be allowed to proceed in federal court.[177]

V. ANALYSIS

The three opinions in *Coeur d'Alene* essentially provide a panoramic set of views regarding federalism, the Eleventh Amendment, state sovereignty, and *Ex parte Young*. The principal opinion allows Justice Kennedy and Chief Justice Rehnquist to indulge in an exploration of, in the context of *Ex parte Young*, the outer contours of the federal-state balance of power and to engage in ample historical and legal revision in marking this outer boundary strongly in favor of the states. The two supplant the traditional *Young* inquiry, whether the state is the real party in interest, with a new inquiry that seeks to determine whether the broader principles of federalism would be disturbed if the *Young* claim were allowed to proceed in a federal forum.[178] Justice Souter's dissent serves as the perfect foil to the prin-

175 *Id.* at 2049.

176 *See id.* at 2051–52. ("It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff."). *Id.* (quoting Tindal v. Wesley, 167 U.S. 204, 223 (1897)).

177 *See id.* at 2052.

178 Except for *Young* claims in which an adequate state forum is unavailable, Justice Kennedy's balancing test would find *Young* jurisdiction to exist in very few instances. This aforementioned first prong of Justice Kennedy's vague, three-prong balancing test provides for the automatic extension of federal jurisdiction if a state forum that could provide to the plaintiff adequate relief is unavailable. Provided that an adequate state forum does exist, the second prong asks whether federal court jurisdiction is necessary to ensure the supremacy of federal law. Justice Kennedy, however, has already answered this question in the negative by characterizing this precept as tantamount to belittling the ability of state courts to interpret and to apply federal law. Assuming these first two prongs do not justify the provision of a federal forum, courts must then determine, by weighing a number of undefined factors, whether allowing the suit to proceed in a federal forum would upset the balance of federal and state interests. The magnitude of the affront required to upset that balance is indeterminable from Justice Kennedy's opinion. While *Treasure Salvors* held that *Young* suits to quiet title to property also claimed by a state are barred by the Eleventh Amendment, Justice Kennedy carefully stated that the Tribe's requested relief was "close to," but was not the "functional equivalent" of a quiet title claim. Earlier in his opinion,

cipal opinion's pro-federalist bent by ardently espousing an automatic extension of *Young* jurisdiction whenever a plaintiff seeks prospective relief against a state official in order to redress an on-going violation of federal statutory or constitutional law.

Charting a more moderate course between the principal's near exenteration of *Young* and the dissent's reaffirmation of *Young's* necessity as a safeguard to ensure the supremacy of federal law and as a check against abuses by the states, Justice O'Connor's controlling opinion must be read as defining the current boundary between permissible and impermissible extensions of *Young* jurisdiction and as providing clues regarding the direction of the Court's future *Young* jurisprudence. To begin with, certainly actions in which a private plaintiff seeks a federal forum for the adjudication of his or her claim to title in submerged lands are now outside the ambit of *Young*. In carving out this small exception, Justice O'Connor rested her opinion on a quite narrow foundation. The first pillar composing that foundation treats the nature of the relief requested by the Tribe as the functional equivalent of a quiet title claim. The Tribe's attempt to force Idaho to rescind both its possession of and its authority to regulate the disputed lands, from Justice O'Connor's vantage point, would award to the Tribe relief that is essentially "indistinguishable" from an award that would quiet title to the disputed lands in the Tribe.[179] In other words, the Tribe sought all the incidents of ownership of the land, yet it simply did not use the impermissible "quiet title" label on its complaint.

The second, and the troubling pillar upon which Justice O'Connor rested her opinion, is the well-established relationship of submerged lands to state sovereignty.[180] Justice O'Connor's inclusion of this postulate as essential to supporting her ultimate conclusion represents the point of departure between her and Justice Souter. Although this divergence is relatively small, a broad reading of Justice O'Connor's opinion, with a concomitant strong reliance on the historical significance of submerged lands, could be interpreted as steer-

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however, Justice Kennedy stated that the Tribe's claim "is the functional equivalent" of a quiet title claim. Whether the distinction between these two statements is irrelevant and Justice Kennedy agreed with Justice O'Connor that the Tribe's claim rose to the level of a quiet title action, the overall tenor of his opinion suggests that his and Chief Justice Rehnquist's conception of a state's pain threshold is much lower than the Court's previous conception, and thus a *Young* claim measuring less than a quiet title action would likely present the requisite affront to a state's sovereignty in order to preclude the extension of *Young* jurisdiction. *Id.* at 2035–40.

179 *See id.* at 2044–45.

180 *See supra* notes 86–91, 125–27 and accompanying text.

ing the Court's *Young* jurisprudence toward a new test (one that is less free-form than Justice Kennedy's, but one for which he and Chief Justice Rehnquist would likely settle): *Young* suits would be barred if the underlying subject matter of the complaint implicates interests in which the states have historically possessed a strong sovereign concern. By drawing on this slightly narrower variation of the principal opinion's balancing test, lower federal courts could begin working a major retrenchment in *Young*'s scope, essentially rewriting the *Young* inquiry and thereby rebalancing federal-state power.

The creation of numerous exceptions to the *Young* doctrine logically follows from Justice O'Connor's importation of the historical inquiry. In fact, using *Ex parte Young* itself as a model, it is easy to demonstrate that this very case is ripe for liquidation. Like any state, Minnesota most certainly believes that essential to its sovereignty is its ability to regulate economic activity within its borders. In particular, in the early 1900s, it surely believed that its regulation of railway rates was necessary to maintain a healthy economic environment, to prevent economic abuses, and thereby to promote the public welfare. In addition, no activity identifies Minnesota's character as an independent sovereign[181] more than its provision of heavy fines and imprisonment for those railroad company officers who violated the railway regulations. The *Young* Court's decision, however, left Minnesota unable to maintain its rate-setting schemes. Yet, as Justice Souter observed: "A state obliged to choose between the power to regulate a lake bed on an Indian reservation and power to regulate economic affairs and punish offenders would not (knowing nothing more) choose the lake."[182] Viewed pragmatically then, one can readily craft a very strong argument, using the same principles on which Justice O'Connor's argument proceeds, to preclude federal jurisdiction over a state-officer suit anytime the underlying subject matter of that suit concerns some facet of a state's authority that has an established pedigree and is of practical importance.

This importation of an historical inquiry also can be read as moving Justice O'Connor's opinion much closer ideologically to the principal opinion, supplanting the formalistic extension of *Young* jurisdiction with a slightly more narrow, but nonetheless, case-specific balancing approach. Even this narrow test is inconsistent with the theoretical underpinnings of the *Young* doctrine, whose very creation

181 *See Coeur d'Alene*, 117 U.S. at 2054 (Souter, J., dissenting).

182 *Id.*

represented a balancing of federal-state interests.[183] *Young* is a compromise between absolute state sovereignty and unrestricted freedom to hale a state into another sovereign's forum, thereby upsetting the balance of federal-state power that the Founding Fathers had, and subsequently the courts have, struggled to strike. The grafting onto *Young* of additional inquiries, historical or otherwise, unnecessarily disrupts this delicate balance. Moreover, Justice O'Connor's opinion appears to equate the invasiveness of the Tribe's prayed for relief with the retrospectivity of relief. Her reasoning posits that the greater the degree to which the invasiveness of the requested relief, regardless of its prospectivity, infringes upon historically sovereign state interests, the more it partakes of the nature of impermissible retrospective relief.[184] But equating invasiveness with retrospectivity is a distinction that has never been used to find a state as the real defendant in interest in a *Young* suit,[185] and making it so works a narrowing of the Court's established *Young* jurisprudence. Lastly, by measuring the historical significance of the underlying subject matter of a *Young* claim, Justice O'Connor is essentially balancing the principles of federalism versus the right of a private party, who alleges to be the victim of a federal constitutional or statutory violation, to litigate in federal court, precluding that right and relegating it to second-class status if it happens to infringe upon a well-established aspect of the states' sovereignty. The Constitution, however, does not prioritize protected rights, and it would be unprecedented for Justice O'Connor to begin

183 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 173 (2d ed. 1988) ("The eleventh amendment lies at the center of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights. The Supreme Court has negotiated this tension both by resort to legal fictions and through complex and often counterintuitive interpretations of the eleventh amendment that have made that amendment far more controversial than its language would, on its face, suggest.").

184 This argument runs directly against that made by Justice Rehnquist in *Edelman v. Jordan*, 415 U.S. 651 (1974), where he essentially argued that, in a *Young* suit, a prospective award of $5.8 million from a state treasury is permissible, while a retroactive award of $132 was patently impermissible because of the great disruptive effect that it would have on a state's budgetary process. *See* Burnham, *supra* note 41, at 561. Although the former award is greatly invasive to the state's fisc, the control over which is certainly of utmost sovereign importance to the state, the nature of the award, according to Justice Rehnquist's analysis, did not partake of retrospective relief merely because of its invasiveness.

185 *See Coeur d'Alene*, 117 U.S. at 2055 (Souter, J., dissenting) ("The exercise of *Young* jurisdiction for vindicating individual federal rights is necessarily 'intrusive,' simply because state officials sued under *Young* are almost always doing exactly what their States' legislative and administrative authorities intend them to do.").

classifying certain federal rights as more paramount and therefore more deserving of protection than others.

Although such a reading of Justice O'Connor's opinion is entirely plausible, her reliance on the historical significance of submerged lands appears to be of no real importance to her opinion or to the Court's future *Young* jurisprudence. The historical inquiry is likely surplusage, added in an attempt to solidify her conclusion. The aforementioned consequences that progress from her reasoning are too sharply inconsistent with her explicit reaffirmation of a formalistic application of *Young* and with her vigorous criticism of Justice Kennedy's attempt to narrow the Court's *Young* jurisprudence to be read otherwise.[186] Indeed, her opinion carries no indication that she, or the justices joining her, have taken or are ready to take the requisite steps needed to uproot "broadly and deeply established traditions."[187] If Justice O'Connor had desired to block, to a larger set of state-officer suits, the avenue to a federal forum made available by *Young*, she could have avoided her problematic reasoning by accepting Idaho's argument that there be a real property exception to *Ex parte Young*.[188] Indeed, Justice O'Connor implicitly, if not explicitly, answered in the negative whether such a real property exception should be created. In distinguishing the Tribe's claim from those in *Lee* and *Tindal*, the two chestnut cases in which the Court allowed ejectment actions to proceed in federal court against government officials whose possession of the plaintiffs' land was allegedly in violation of federal constitutional law,[189] Justice O'Connor in no way questioned their validity. She merely argued that liquidating a state's ability to exercise its regulatory authority over lands was a breed of relief never before allowed in a *Young* suit, and, combined with dispossessing Idaho of the land, would essentially comprise the component parts of a quiet title action. Justice O'Connor strongly concluded that the *Young* doctrine is,[190]

186 Justice Kennedy's dissertation about the historical significance of submerged lands to the sovereignty of the states was, of course, essential in his effort, during the balancing phase of its three-part test, to establish that the invasiveness of the Tribe's requested relief would present such an affront to Idaho's sovereignty that allowing the Tribe to present its case in a federal forum would threaten Idaho's position in the Union. Given Justice O'Connor's reasoning, this necessity is clearly not present in her concurrence.

187 Meltzer, *supra* note 32, at 43.

188 *See* Brief for Petitioner at 22, *Coeur d'Alene Tribe* (No. 94-1474) (arguing that the state is the "real, substantial party in interest" in any *Young* claim seeking disposition of title to real property in which the state also claims an interest).

189 *See supra* notes 161–66 and accompanying text.

190 *See Coeur d'Alene*, 117 U.S. at 2047 ("I would not narrow our *Young* doctrine, but I would not extend it to reach this case.").

and should remain, one of straightforward application[191] in order to counterbalance the Eleventh Amendment's restrictive jurisdictional barrier.

It was assuredly easier for Justices O'Connor, Scalia, and Thomas to find the relief requested by the Tribe as rising to the functional equivalent of an impermissible quiet title claim given that their similar jurisprudential philosophies in the arena of federalism left them predisposed to Idaho's claims. In the short number of years he has been on the Court, Justice Thomas has shown a strong desire to restrain the federal government from interfering with the states' autonomy to handle their own affairs.[192] Justice O'Connor, in her own right, has long been committed to defending state interests from federal encroachment,[193] and as a former member of the Arizona State Senate, she likely held some sympathy for Idaho's efforts to prevent the Tribe from removing a large portion of property from the State's sovereign jurisdiction. To reach her desired result, Justice O'Connor simply moved an extraordinarily narrow set of cases outside *Young*'s scope, while reaffirming *Young*'s underlying tenets. Tacking the submerged lands inquiry onto her argument most probably was an expedient way in which to solidify her conclusion while confining her holding to the particular facts of *Coeur d'Alene* and thus doing little, if any, practical damage to the *Young* doctrine.

The third member of this troika, Justice Scalia, has himself been a consistent defender of state interests in cases involving Eleventh Amendment immunity,[194] and this despite the textualist-historical perspective of his jurisprudence.[195] Justice Kennedy's near pronouncement of absolute state sovereign immunity would intuitively suggest that the principal opinion would attract Justice Scalia's adherence.

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191 *See id.* ("In sum, the principal opinion replaces a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors.").

192 *See* Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 13 (1997).

193 *See* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1448–49 (1990).

194 *See* Gelfand & Werhan, *supra* note 193, at 1458.

195 Despite the paucity of support for *Hans* in the text of the Eleventh Amendment, Justice Scalia has explained "that state immunity from suit in federal courts is a structural component of federalism," which "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." Pennsylvania v. Union Gas, 491 U.S. 1, 38, 32 (1989) (plurality opinion) (Scalia, J., concurring in part and dissenting in part).

But the balancing test that the principal opinion pronounced is antithetical to Justice Scalia's jurisprudential philosophy. Strict rules of law, not discretionary balancing tests are Justice Scalia's preferred solution to a constitutional dispute.[196] Although Justice Scalia has conceded that he himself is guilty of promulgating some balancing tests, in this case Justice Kennedy's test is so ill-defined that it would lead to the unpalatable result of not the Supreme Court deciding the law governing the application of *Ex parte Young*, but the numerous individual appellate and district courts rewriting the doctrine haphazardly in their efforts to apply the nebulous test.[197] Just as important, nothing indicates that Justice Scalia accepts Justice Kennedy's philosophy that *Ex parte Young* is a limited doctrine, subservient to the Eleventh Amendment and applicable only in several well-defined circumstances. Consequently, Justice Scalia would feel more comfortable ideologically by joining Justice O'Connor's more moderate opinion.[198]

Taking an overview of the Court's most recent *Young* jurisprudence, one cannot read *Coeur d'Alene* in conjunction with *Seminole Tribe* as marking the first small steps on the path toward a larger retrenchment, if not a complete preclusion, of private party suits against state officers. The majority in *Seminole Tribe*, when vitiating Congress' Article I authority to abrogate the states' immunity from suit in federal court, stated that *Ex parte Young* still remained an essential mechanism by which to compel the states' compliance with federal law.[199] Moreover, Justice Souter conceded that the Court's holding in *Seminole Tribe* "left the basic tenets of *Ex parte Young* untouched," leaving Congress free to endorse *Young* jurisdiction even in a subsequent suit

196 *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1990). Basic to Justice Scalia's jurisprudence is that cases be decided on broad categorical rules, rather than by flexible case-by-case balancing tests such as the one employed by Justice Kennedy. Such bright-line rules are preferred because they: (1) promote uniformity of decisions and equal protection; (2) increase predictability; (3) reduce arbitrary application of the laws; and (4) give the courts resolve to render decisions that may be contrary to the popular will. *See* Gelfand & Werhan, *supra* note 193, at 1462; Scalia, *supra*, at 1178–80; *see also* Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 226 (1997).

197 *See* Scalia, *supra* note 196, at 1179.

198 Justice Thomas has not given much of an indication as to the degree to which he favors bright-line rules over balancing tests, but if one reasons from his near identical voting record to that of Justice Scalia, it is plausible to assume that he too would prefer the limited exception propounded by Justice O'Connor rather than the free-form balancing test propounded by Justice Kennedy.

199 *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131 n.14 (1996).

by the Seminole Tribe.[200] *Seminole Tribe* arguably was simply an application of *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[201] in which the Court read a comprehensive statutory remedial scheme to preclude a § 1983[202] remedy.[203] *Ex parte Young* is, after all, essentially a § 1983 action.[204] Even Justice Souter agreed in his *Seminole Tribe* dissent that nothing precluded the ability of a court to require a clear statement or inference of congressional intent authorizing *Young* suits regarding a piece of legislation before a federal court extended federal jurisdiction.[205] Pushing aside then Justice O'Connor's historical inquiry as superfluous to her true analysis, *Coeur d'Alene* amounts to a de facto quiet title action, which is impermissible under the Eleventh Amendment. Thus, read in conjunction, *Seminole Tribe* and *Coeur d'Alene* mark no significant change in the Court's philosophy regarding the role of *Ex parte Young* in the federalist system. These cases are better characterized as presenting unique factual situations that led to more cosmetic rather than to substantive restrictions in the doctrine.

The trouble still lingering after *Coeur d'Alene* is the Supreme Court's overall willingness to eliminate avenues into federal court. By carving out small exceptions to *Young*, as well as limiting the conferral

200 *See* Coeur d'Alene Tribe v. Idaho, 117 S. Ct. 2028, 2048 (1997) (Souter, J., dissenting).

201 453 U.S. 1 (1981).

202 42 U.S.C. § 1983 (194) provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

203 *See* David P. Currie, Ex parte Young *After* Seminole Tribe, 72 N.Y.U. L. REV. 547, 548–49 (1997). Currie approves of the doctrinal theory that, according to *Sea Clammers*, a federal statutory remedy may expressly or implicitly limit or preclude relief under an *Ex parte Young* claim. Currie, however, disapproves of its application in *Seminole Tribe*. The *Seminole Tribe* Court held that the application of *Young* was precluded by the section in the IGRA that authorized federal court actions against states. The "essential characteristic" of an unconstitutional provision, however, is that it has no effect. *See id.* at 549–50. Meltzer, however, argues that *Young* jurisdiction can be partially or completely precluded, expressly or impliedly by statute, and that the Court in *Seminole Tribe* should have narrowed the remedy available against Governor Chiles to the extent that it would have been congruent with that allowed by the IGRA. *See* Meltzer, *supra* note 32, at 39–41.

204 *See* Currie, *supra* note 203, at 549.

205 *Seminole Tribe*, 116 S. Ct. at 1180 (Souter, J., dissenting).

of federal court jurisdiction in other circumstances[206]—such as over implied rights of action and over § 1983 actions[207]—there are increasingly fewer instances in which private parties can enlist federal forums in order to force the states' compliance with federal law.[208] This willingness, allowed to proceed unchecked, grants the states greater latitude in which to violate federal law without the specter of federal forced compliance.[209] Moreover, the debate remains unsettled whether a state forum must be made available to hear state-officer suits barred from a federal forum by the Eleventh Amendment.[210] Thus, while *Coeur d'Alene* signals no immediate threat to the continued vitality of the *Young* doctrine, viewed in this broader context, whether the doctrine will remain free from encroachment by the Court is arguably questionable.

Just as important as the Court's discussion of federal court jurisdiction and the role of *Ex parte Young*, the background facts underlying the Tribe's dispute with the State of Idaho present concerns encompassing state-tribal relations, state gaming regulation, and environmental protection, and therefore cannot escape undiscussed.

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206 *See* Meltzer, *supra* note 32, at 42 (noting that there has been a "considerable contraction" of the availability of private remedies for violations of federal statutory law, and a broad trend in the Court's march toward federalism, but believing that trend to be overstated).

207 *See id.* (citing RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 830–46, 1133–37(4th ed. 1996)).

208 *See* Jackson, *supra* note 6, at 540–41 (noting that although the federal government may sue states in federal courts in order to vindicate federal laws, the federal government cannot be relied upon to vindicate the rights of all its people).

209 *See id.*

210 *See id.* at 504. Monaghan writes that in *Reich v. Collins*, 513 U.S. 106 (1994), "a unanimous Court made clear that state courts must provide adequate relief when state officials deprive persons of their property in violation of federal law, irrespective of 'the sovereign immunity States traditionally enjoy in their own courts.'" Monaghan, *supra* note 32, at 125 (quoting *Reich*, 513 U.S. at 109–10). This statement may be a severe stretch of *Reich's* holding, as that case and the antecedent cases on which it relied were exclusively tax cases, and the Court did not expand its reasoning to hold that for all deprivations of property by state officers in violation of federal law a state forum must be available to afford an aggrieved party redress. *Reich* in particular dealt with the State of Georgia, which had held out a postdeprivation remedy for taxpayers to recover unlawfully collected taxes, then later stated that this remedy did not exist, thereby rendering the plaintiff unable to recover taxes that he had paid under a state law violative of the federal Constitution. The Court, in the only language on point, though dicta in *Reich*, reaffirmed the limited proposition expounded by *Reich's* antecedent cases, that the Due Process Clause requires that a state's courts be available to afford a taxpayer recovery of state taxes extracted in contravention of federal statutory or constitutional law, the state's sovereign immunity in its own courts notwithstanding. *See Reich*, 513 U.S. at 109–12.

Idaho Governor Phil Batt has throughout his tenure in office led the vigorous opposition to the Coeur d'Alene's aggressive attempts to expand their gaming activities. The Tribe, which signed a tribal-state gaming compact, pursuant to the IGRA, with Idaho in December of 1992,[211] currently operates on its reservation a single complex that houses a 1,200 seat bingo hall and 600 videogame machines.[212] Governor Batt has conceded that the gaming activities conducted by the Indian tribes throughout Idaho have generated millions of dollars in revenue and have created hundreds of jobs, thereby revitalizing the formerly depressed reservation economies.[213] On the other hand, he believes that even legal forms of gambling promote crime, hurt families, and have "a tendency to impoverish those willing to gamble before taking care of essential expenses."[214] In balancing these conflicting consequences, Governor Batt has staked out a moderate political position by advocating a "status quo" in the tribes' gaming pursuits. He favors permitting current tribal gaming operations to continue, but would prohibit any marked expansion of that activity.[215] Since beginning their gaming operations in 1992, the Coeur d'Alene have attracted recognition in the gaming industry for their aggressive and prominent attempts to expand their gaming activities both inside

211 *See* Coeur d'Alene Tribe v. Idaho, 842 F. Supp. 1268, 1271 (D. Idaho 1994) (deciding the respective rights and obligations of the Coeur d'Alene, Kootenai, and Nez Pierce Tribes and the State of Idaho under the IGRA).

212 *See Tribe's Operation Earned $8 Million Last Year*, Dow Jones News Service, Feb. 4, 1998, *available in* WL, ALLNEWSPLUS database [hereinafter *Tribe's Operations*]. In 1992, Idaho voters approved a state constitutional amendment that prohibits casino gambling in the state. Under federal law, Indian tribes can engage in any gambling activities that are legal elsewhere in the state, thus in Idaho, the Tribe is allowed to conduct only lotteries, bingo, and horse, mule, and dog racing. *See Court Rejects Indian Appeal*, LAS VEGAS REVIEW-JOURNAL, Oct. 12, 1995, *available in* 1995 WL 5802554. The State and the Tribe have been in a tug-of-war over whether the electronic pull-tab machines operated by the Tribe are violative of the 1992 constitutional amendment or are the equivalent of the state lottery and thus legal. *See Batt Softens Stand on Gambling Acknowledging Economic Benefits to Tribe, Governor Calls for Legislative Study*, SPOKESMAN REVIEW, Feb. 27, 1997, at A1, *available in* 1997 WL 7704911 [hereinafter *Batt Softens Stand*]. On March 7, 1997, the State legislature conceded the point to the Tribe, abandoning legislation that would outlaw the video pull-tab machines, which are the Tribe's most lucrative games. Yet, the state's anti-gambling forces, led by Governor Batt, did not waver in their desire to halt any future expansion of tribal gaming. *See Senate Panel Saves Face, Drops Gaming Legislation*, IDAHO STATESMAN, Mar. 8, 1997, *available in* 1997 WL 5428322.

213 *See Batt Softens Stand*, *supra* note 212.

214 Julie Titone, *Coeur d'Alenes Drop Horse Racing Idea After Governor Expresses Opposition*, SPOKESMAN REVIEW, Dec. 18, 1996, at A1, *available in* 1996 WL 15104596.

215 *See id.*

and outside of Idaho's borders.[216] Most recently, in early 1997, the Tribe announced and immediately faced vigorous opposition to its ambitious twenty-eight million dollar planned expansion of its current gaming facilities; the Tribe is seeking to add a new area for electronic gaming machines and a new bingo area that would double as a special events center.[217] Given the Tribe's reputation in the gaming industry, it is arguable that a number of observers believed that motivating the Tribe's quest to obtain the lands surrounding Lake Coeur d'Alene is a desire to establish a gambling venue on the shores surrounding the picturesque lake. Whether these background facts played even the slightest role in the dispositions of the case as it rose through the courts, an ancillary result thus far has been the prevention of any commercial development of the lands surrounding Lake Coeur d'Alene.

VI. CONCLUSION

Although resting on a legal fiction, the *Ex parte Young* doctrine provides a necessary exception to the Eleventh Amendment's jurisdictional bar by allowing private plaintiffs access to a federal forum in order to compel the compliance of state officials, and thereby the states, with federal statutory and constitutional law.[218] This availability of a federal forum assures lower federal courts of the opportunity to vindicate the supremacy of federal statutory and constitutional law and to curb abuses of that law by the states.[219] The majority of the justices in *Coeur d'Alene* reaffirmed this estimable role that *Young* plays in the federalist system. However, the problematic aspect of *Coeur d'Alene*, beyond the muddled reasoning of the controlling opinion, is

216 In 1994, the Coeur d'Alene sought to establish a play-by-phone lottery, but had to abandon the plan after law-enforcement officials convinced telephone companies not to provide the Tribe with a toll-free line for what the officials said was an illegal game. *See Tribe's Operations*, *supra* note 212. In December of 1996, the Tribe scuttled its plans to bring horse racing to Post Falls, Idaho, by buying the Coeur d'Alene Greyhound Park after the Governor's outspoken opposition. *See* Titone, *supra* note 214.

217 *See* IDAHO STATESMAN, Dec. 16 1997, at 5B, *available in* 1997 WL 15048482.

218 *See, e.g.*, Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) ("The doctrine of *Ex parte Young* . . . is regarded as carving out a necessary exception to Eleventh Amendment immunity."); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 312 (5th ed. 1994) ("[T]he doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law.").

219 *See Coeur d'Alene*, 117 S. Ct. at 2055 (1997) (Souter, J., dissenting) ("Federal question jurisdiction turns on subject matter, not the need to do some job a state court may wish to avoid; it addresses not the adequacy of a state judicial system, but the responsibility of federal courts to vindicate what is supposed to be controlling federal law."); *supra* note 55 and accompanying text.

that the Court appears to be engaged in a critical reexamination, spanning so far two cases, of the continued efficacy of the *Young* doctrine. Rather than concentrate on whether the plaintiff had pled the requisite elements to satisfy an extension of *Young* jurisdiction (seeking prospective or injunctive relief in order to remedy an allegedly ongoing federal statutory or constitutional violation), the Court has felt more content to engage in a debate over the importance of protecting the states' unique roles in the constitutional system versus the importance of providing federal forums to resolve federal claims.[220] And the result of this debate in *Coeur d'Alene,* as well as in *Seminole Tribe,* was the removal of a small set of state-officer claims from *Young's* scope.

Against the broader tapestry of pro-federalist decisions that the Court has woven, however, the Court has largely tempered its adjustment of the balance of power between federal and state governments in the arena of *Ex parte Young.* In *Coeur d'Alene* specifically, although the Court did remove claims to submerged lands from *Young's* scope, the holding adds very little to the sovereignty of each state. Important is the overall tenor of Justice O'Connor's controlling opinion, which, combined with Justice Souter's dissent, solidifies *Young's* role as a vital exception to the Eleventh Amendment. *Coeur d'Alene,* therefore, should present little if any hindrance to the continued availability of federal forums in state-officer suits.

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220 *See* Nell Jessup Newton, *In the Supreme Court: State of Idaho Seeks a Real Property Exception to the* Ex parte Young *Doctrine,* WEST'S LEGAL NEWS, Oct. 16, 1996, *available in* 1996 WL 590118.

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