COEUR D'ALENE, FEDERAL COURTS AND THE SUPREMACY OF FEDERAL LAW: THE COMPETING PARADIGMS OF CHIEF JUSTICES MARSHALL AND REHNQUIST

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In a decade that is witnessing a resurgence of law's development and application to government entities around the world, in newly emerging democracies and in multi-national organizations like the European Union, the United States Supreme Court has moved away from the "political axiom" that the judicial power be co-extensive with the legislative.[1] In two recent cases the Court refused to uphold the jurisdiction of the lower federal courts to enforce federal law as against the states of the Union or their officers.[2] It is a puzzling phenomenon. Perhaps it is explainable as merely an expected swing in the cycle of more or less nationalist views of the judicial power described by Richard Fallon,[3] or perhaps it should be seen as part of a broader discomfort by a five justice majority with what it sees as an expanding and difficult-to-limit federal power.[4] While the reasons may be obscure, the trend towards limitation of the

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1. Federalist 80 (A. Hamilton) ("If there are such things as political axioms, the propriety of the judicial power of the government being coextensive with its legislative, may be ranked among the number."); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 816 (1824).

2. *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). For a third possible invocation of the Eleventh Amendment to bar an injunction against a state officer to restrain an impending execution of a convicted murderer, see *Breard v. Greene*, 118 S. Ct. 1352, 1356 (1998) (noting Eleventh Amendment as additional ground for why Paraguay's suit to restrain execution of its national might not succeed).

3. Richard Fallon, *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141 (1988) (describing "Federalist" and "Nationalist" models of federal courts).

4. The five justices who have supported restricting federal jurisdiction over actions against states and their officers also have insisted on limits on the substantive scope of Congress' powers vis-à-vis the states. See *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 117 S. Ct. 2365 (1997).

ability of the federal courts to hear federal claims against states and their officers is apparent.

Idaho v. Coeur d'Alene Tribe of Idaho,[5] holding that a federal court lacked jurisdiction over a suit for equitable relief against state officers claimed to be interfering with tribal rights to lands under a river in Idaho, marks the second time in two Terms that the Court has found that the lower federal courts lack jurisdiction to decide claims based on federal law, simply because the defendants were state officials. Even for those without an interest in the underlying dispute, *Coeur d'Alene* would be worth at least a brief reflection in light of the case it follows.

In 1996 the Court in *Seminole Tribe v. Florida*[6] held that the Eleventh Amendment stood for a principle of constitutional immunity of states from suits in federal courts, prohibiting Congress from authorizing private suits against states in federal courts to vindicate federal laws enacted pursuant to its Article I powers, such as the Commerce Clause, the Indian Commerce Clause, and, presumably, the Copyright and Bankruptcy Clauses as well. In so holding, the Court reversed the contrary conclusion it had reached only eight years earlier in *Union Gas v. Pennsylvania*.[7] The *Union Gas* holding that Congress did have power to authorize suits against states in federal courts was foreshadowed in the 1964 decision in *Parden v. Terminal Railway*.[8] *Union Gas*, however, was overruled by *Seminole Tribe*.

In the more than thirty years between *Parden* and *Seminole Tribe*, Congress extended a variety of federal statutes to the states, including minimum wage laws, anti-discrimination laws, environmental laws, bankruptcy, and copyright laws.[9] Many of these statutes included remedial and jurisdictional provisions that, read in the ordinary way, would appear to have authorized suits against states in federal courts. Once the Court began, in the 1970s, to require an unusually clear statement of intent to subject states to suits in federal courts,[10] Congress responded by

5. 117 S. Ct. 2028 (1997).
6. 116 S. Ct. 1114 (1996).
7. 109 S. Ct. 2273 (1989).
8. 377 U.S. 184 (1964).
9. See Fair Labor Standards Act, 29 U.S.C. §203(d) (extended to states in 1966); Civil Rights Act, 42 U.S.C. § 2000e-5(g), (k) (extended in 1972); 42 U.S.C. §§ 9601(20), (21), 9607(a) (Superfund amendments of 1986); 11 U.S.C. § 106 (bankruptcy code's limited abrogation of government immunity 1978, with further amendments, 1994); 17 U.S.C. § 511 (copyright laws extended explicitly to abrogate states' immunity, 1990).
10. See, e.g., *Employees v. Department of Health and Welfare*, 411 U.S. 279, 285-87

specifically authorizing suits against states notwithstanding their Eleventh Amendment immunity.[11]

Why did this occur? No doubt a complex set of reasons are involved, among them, perhaps, these. First, state governments over the last 30 years have expanded the size and scope of their operations, in ways often lost in political rhetoric about the expansion of the federal government.[12] As states participated in a broader array of activities, in areas in which private activity was legitimately subject to federal regulation, the distortions to federal policy from exempting states from regulation began to seem higher.[13] Second, in part as a result of the reinvigoration of the

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(1973) (holding that Fair Labor Standards Act minimum wage law's substantive provisions, though substantively applicable to state employees, could not be enforced in federal court against states through remedial and jurisdictional provisions generally authorizing private suit because Congress had not spoken clearly enough to authorize such suits against states in federal courts).

11. See, e.g., Pub. L. 93-259, §26, 88 Stat. 73 (1974) (amending 29 U.S.C. § 216 in response to Court's decision in *Employees v. Department of Health and Welfare*, 411 U.S. 279); Pub L. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (Rehabilitation Act amendments abrogating immunity in response to Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

12. Governmental growth rates can be crudely measured by looking at numbers of employees. In 1972 state governments (not including local governments) employed 2.957 million persons; in 1992 they employed 4.595 million. The Council of State Governments, 30 *Book of the States* at 439 (1994-95). The federal government employed 2.882 million civilians in 1972, and 3.106 million in 1992. U.S. Dept. of Commerce, *Statistical Abstract of the United States* 349 tbl. 537 (1997). In absolute numbers, and in rate of growth, then, state governments in the last 25 years have exceeded that of the federal government. According to the 1997 Statistical Abstract, state and local government employment wholly dwarfs the federal work force: 16.626 million persons were employed by state and local governments in 1995, while the federal government employed 2.895 million civilian employees. U.S. Dept. of Commerce, *Statistical Abstract* 321 tbls. 506, 507 (1997). Projections for the year 2005 are for over 18 million state and local government employees compared with 2.635 million federal civilian employees. 1997 *Statistical Abstract* at 416 tbl. 650. See also Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483 (1997) (arguing that Court's New Deal decisions freed both levels of government, state and federal, to engage in greater levels of regulation than under prior doctrine).

13. So, for example, the expansion of higher education in state as well as private universities in the post World War II period, see U.S. Department of Education National Center for Education Statistics, *Digest of Education Statistics 1996* at 11 tbl. 2, 175 tbl. 168 (1996), has created greater opportunities for state-controlled entities to engage in activities which, like those of their private counterparts, could interfere with areas of federal regulation, e.g., the copyright interests of authors. See, e.g., Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States, Hearings on H.R. 1131 before the Subcommittee on Courts, Intellectual Property and the Administration of Justice of the House Committee on the Judiciary, 101st Cong., 1st Sess. 6-9 (1989) ("Hearings") (statement of Ralph Oman, Registrar of Copyrights) (testifying to substantial concern about unauthorized copying by state agencies, including universities, and their possible unwillingness to provide for payment of royalties absent federal judicial enforcement of statutory damages provisions). It is not my suggestion that all extensions of federal law to the activities of the states can be explained in this way, but that,

Fourteenth Amendment as a constraint on state activities,[14] the notion that states had distinctive claims of immunity from federal law and federal process had less and less political resonance, when put up against claims in the national legislature for equality of treatment by the states—for those employed by or in contact with the states as compared to their private counterparts. Third, as we have gone through waves of regulation and deregulation, of government-initiated ventures to privatization, the collective political sense of what activities "belong" to the "private" and what to the "public" realm has begun to dissipate, just as for some scholars the distinction (on which, for example, the state action doctrine is founded) has become insupportable.[15]

Whatever the reasons, by 1996 a wide range of regulatory laws had been extended in substance to state activities, and the remedies available in federal courts to vindicate those federal policies had also been extended to the states. The Court's decision in *Seminole Tribe*—holding that Congress lacked power to provide federal court remedies against states for federal laws enacted under Article I—was thus an important, and disruptive, reversal in the law. Under *Seminole Tribe*, restrictions on federal judicial power presently appear to exceed those imposed on federal legislative power.[16] And *Seminole Tribe*'s substantial,

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among other factors, this one has some explanatory potential.

14. In the post-New Deal period, the Amendment emerged as both a shield and a sword for protecting widely held individual civil and political rights. See e.g., *Monroe v. Pape*, 365 U.S. 167 (1961) (construing section 1983 more broadly to authorize suits for damages against state and local government employees for violation of Fourth Amendment rights incorporated against state by 14th amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural due process requirements for termination of state welfare benefits). This is in contrast to earlier phases of its invocation to protect business interests and property rights. See e.g. *Lochner v. New York*, 198 U.S. 45 (1903); *Ex parte Young*, 209 U.S. 123 (1908); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913). Note that the Term that the Court for the first time relied on the Fourteenth Amendment's due process clause to strike down a state economic law, *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890), was the same Term in which the Court extended the Eleventh Amendment to protect states from private suits brought by their own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890).

15. See, e.g., Geoffrey Stone, et al., *Constitutional Law* 1711 (Little, Brown and Company, 3d ed. 1996) (questioning whether state action is not always present, either by way of action or acquiescence).

16. The apparent anomaly of construing the judicial power not to extend to cases to enforce particular federal laws against state officials, nominally on Eleventh Amendment grounds, may be explained in part by a shift in paradigm about the substantive scope of congressional power. In both of the recent Eleventh Amendment cases referred to in text there were significant questions about whether the substantive obligations over which jurisdiction was asserted were themselves within federal power. See *Seminole Tribe*, 116 S. Ct. at 1126 n.10 (noting but not deciding Tenth Amendment challenge to federal law insofar as it was construed to require Governor to engage in negotiations or to require state to conclude a compact); Brief for Petitioner, *Idaho v. Coeur d'Alene*

and complicated, implications are being worked out in the lower federal courts.

First, *Seminole Tribe* appears to reaffirm the constitutionality of Congress' "abrogating" state immunity pursuant to Section 5 of the Fourteenth Amendment, on the basis of which, for example, the extension of Title VII remedies to the states had been upheld in 1974.[17] The lower courts are thus struggling with a set of questions calling into stark relief the contrasting powers of Congress under Article I, simpliciter, and under Section 5 of the Fourteenth Amendment.[18]

Particularly in light of *Boerne v. Flores*,[19] which invalidated the Federal Religious Freedom Restoration Act (RFRA) as beyond Congress' authority, there are many federal statutes—arguably supported by Congress' section 5 powers—whose validity is in doubt insofar as they authorize federal jurisdiction over states. Can either the patent or copyright laws' abrogation of state immunity be saved (or reconstructed) by regarding the in-

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Tribe of Idaho, 117 S. Ct. 2028 (1997) (No. 94-1474) (available in 1996 WL 290997). (State argued, on merits, that President lacked authority by executive order in 1873 to derogate from strong presumption of equality of sovereignty under which all states, including Idaho in 1890, enter Union). In other words, *Seminole Tribe* may be simply an "advance guard" for an even broader set of restrictions on federal legislative power to impose substantive regulation on the states.

If there is a paradigm shift that accounts for these developments, there is not a perfect parallelism in their current development: *Printz v. United States*, for example, left open the question whether Congress can require states to comply with such generally applicable laws, enacted under Article I, as the Fair Labor Standards Act minimum wage laws. See 117 S. Ct. at 2383. Several lower courts have concluded after *Seminole Tribe*, however, that federal courts cannot exercise jurisdiction to enforce those provisions, suggesting that they are enforceable only in state courts. See, e.g., *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996); see also *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 1998) (suggesting that Congress could authorize copyright suits against states in state courts).

17. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

18. In bankruptcy, compare, e.g., *In re Straight*, 1997 U.S. DIST. LEXIS 7400 (D. Wyo. May 15, 1997) (accepting U.S. government argument that Congress validly abrogated states immunities in bankruptcy based in part on privileges and immunities clause) with *Schlossberg v. Maryland*, 119 F.3d 1140, 1146-47 (4th Cir. 1997) (rejecting argument). For an emerging distinction between the minimum wage law and the Equal Pay Act provisions of the Fair Labor Standards Act, compare, e.g.. *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996) (Congress lacked power to abrogate state's immunity to suit on alleged violations of minimum wage provisions, in light of absence of connection between those provisions and concerns of 14th amendment) with *Timmer v. Michigan Dept of Commerce*, 104 F.3d 833 (6th Cir. 1997) (Equal Pay Act provisions of FLSA, and abrogation of immunity thereunder, can be upheld as permissible exercise of Congress's Fourteenth Amendment powers). Cf. *Abril v. Virginia*, 1998 U.S. App. LEXIS 10281 (4th Cir. 1998) (majority concludes FLSA does not constitutionally abrogate state's immunity from federal court suit over a dissent arguing that FLSA's abrogation can be sustained under the 14th amendment).

19. 117 S. Ct. 2157 (1997).

terests created by those statutes as a form of "property" protected by the Due Process clause, and if so, can Congress, under section 5 of the Fourteenth Amendment, make available to those injured by state infringements the same federal judicial remedies available to victims of private violations?[20] Or consider another kind of problem: the Age Discrimination in Employment Act's extension to the states was upheld as an exercise of the federal Commerce Power.[21] If the Commerce Clause is the only constitutional basis for the legislation, however, under *Seminole Tribe* the states cannot be sued in federal courts on this statute. Can the statute be justified as an exercise of Congress' section 5 powers?

While reasonable arguments would support this contention, there is a reasonable counter-argument. In *Massachusetts Board of Retirement v. Murgia*,[22] the Court had held that discrimination, by a state, based on age in retirement requirements did not violate the Equal Protection clause. *Boerne v. Flores*,[23] which held

20. The patent statute's abrogation of state sovereign immunity explicitly invoked the Fourteenth Amendment. See 35 U.S.C. 271(h), 296 (1994). Some lower federal courts have suggested that where an action is brought against a state by a patent holder for infringement of the holder's interest in the patent, abrogation in these circumstances would be valid under the Fourteenth Amendment and permit the suit against the state in federal court. See *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 422-26 (D.N.J.) (holding that patent statute validly abrogated Eleventh Amendment immunity under Fourteenth Amendment but dismissing Lanham Act claims), *affd* as to Lanham Act dismissal, 131 F.3d 353 (3d Cir. 1997) and *affd* as to Eleventh Amendment abrogation on patent claims, No. 97-1246, 1998 U.S. App. LEXIS 14903 (Fed. Cir. June 30, 1998); *Genentech Inc. v. Regents of University of California*, 939 F. Supp. 639, 643-44 (S.D. Ind. 1996) (dictum in case holding that Eleventh Amendment barred action for declaratory judgment against the state when the state holds the patent), *rev'd on other grounds*, 1998 U.S. App. LEXIS 8812 (Fed. Cir. 1998) (finding state waiver of Eleventh Amendment immunity). The Copyright Act's abrogation of immunity did not explicitly refer to the Fourteenth Amendment. See 17 U.S.C. § 511 (1994). If patent rights can be treated as a form of property, which Congress can protect from deprivations without due process of law, a similar rationale could presumably be extended to the Copyright Act, at least if Congress so indicated. Unanswered questions include (1) whether Congress has some obligation to make clear its intent to invoke the Fourteenth Amendment as a basis for action; (2) if so, how it must do so; (3) the degree to which federal law will be conceived of as creating "property" interests for purposes of the Fourteenth Amendment's due process clause; and (4) whether for these purposes a state's provision of remedies in its own courts would satisfy "due process" requirements and preclude Congress from conferring jurisdiction in federal courts on that basis. For discussion, see Carlos Vázquez, *What is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1745-63 & n.331 (1997); see also *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 1998) (holding copyright and Lanham Act abrogations unconstitutional, finding Fourteenth Amendment rationale to go too far in permitting "end run" around *Seminole Tribe*).

21. *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226 (1983).

22. 427 U.S. 307, 312-14 (1976) (applying rational basis review).

23. 117 S. Ct. 2157 (1997)

unconstitutional the Religious Freedom Restoration Act, emphasized that Congress lacks power, under section 5, to define as a constitutional violation something which the Court has said is not. And an assertion that Congress is seeking merely to remedy discrimination that the Court would find prohibited must now be supported by a showing that the remedy is proportional to the identifiable scope of the constitutional violation.[24] How this standard will apply to the ADEA, or other comparable statues,[25] is not clear.[26]

In light of the substantial roadblocks to judicial enforcement of federal law created by *Seminole Tribe*'s first holding, the so-called "Ex parte Young" doctrine assumes greater importance in the constitutional scheme. Under the doctrine of *Ex parte Young*,[27] a suit for prospective relief, against a state officer, to enjoin future violations of federal law, is treated as *not* a suit

24. *Boerne*, 117 S. Ct. at 2164.

25. See, e.g., Americans with Disabilities Act of 1990 (ADA), codified at 42 U.S.C. § 12101 et seq. (1994); Education for All Handicapped Children Act of 1975 (EAHCA), codified as amended at 20 U.S.C. § 1400 (1994). After *Boerne*, the concern whether these laws could be upheld under the Fourteenth Amendment arises from the Court's holdings that there is no fundamental right to education, *San Antonio Ind. Schl. Dist. v. Rodriguez*, 411 U.S. 1 (1973), and that persons with certain disabilities are not a suspect class, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). Thus, state laws in these areas would ordinarily be evaluated for equal protection purposes under rational basis scrutiny, and the Court would be unlikely to hold that, absent federal legislation, states have judicially enforceable duties under the Fourteenth Amendment, e.g., to provide special accommodations for such persons. But *Boerne* also recognized leeway in Congress to enforce Fourteenth Amendment rights, and indicated that whether a purported enforcement scheme will be upheld rests in part on the degree to which the remedy is proportional to the existence of injuries to constitutional rights that the Court would recognize as such. Because the Court, in *Cleburne* and in *Romer v. Evans*, 116 S. Ct. 1620 (1996), has held that irrational fear or prejudice cannot support a state legislative classification even under rational basis analysis, statutes like the ADA or EAHCA might be sustainable on the argument that Congress could have found that irrational fears or prejudice motivated many exclusions or failures to provide accommodations for the disabled.

26. The question whether the substantive law can be upheld as an exercise of Fourteenth Amendment power is important not only for Eleventh Amendment purposes, but for purposes of the rule of *Printz v. United States*, 117 S. Ct. 2365 (1997), that Congress cannot "commandeer" or impose mandatory federal statutory duties on state or local governments or their officials. *Printz*, whose reasoning turns on a view that the original Constitution of 1787 abandoned federal power to act directly on the states, leaves open the possibility that direct commands to the states under the Fourteenth Amendment are permissible. To the extent that statutory requirements under statutes like the ADA or ADEA are conceived of as involving affirmative commands to executive or legislative officials, rather than negative restraints or commands addressed to state courts, *Printz's* rule might come into play but could be nonetheless avoided if the statutes were authorized under the Fourteenth Amendment. For further discussion, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 Harv. L. Rev. 2180 (1998).

27. 209 U.S. 123 (1908).

against the state. For many years this principle had been applied in a way to prohibit suits for "retroactive" or compensatory relief that would come from state coffers, but generally to permit prospective injunctive relief to enforce federal law.[28] This was a rough constitutional modus operandi that, as recently as 1984, the Court justified as necessary to vindicate the supremacy of federal law.[29]

But *Seminole Tribe* had a further holding, whose significance I will explore in the next section of this essay. For the first time since *Ex parte Young* itself, the Court in *Seminole Tribe* held that the Eleventh Amendment barred purely prospective injunctive relief (not involving property of the state or accrued financial liabilities), against a state official (there, the Governor of Florida), to compel his future compliance with federal law (the Indian Gaming Regulatory Act [IGRA], which, plaintiffs argued, required the Governor to negotiate in good faith with the tribe over proposed gambling on tribal lands). This portion of the opinion was quite brief, however, and while the Court did say it found an Eleventh Amendment violation,[30] its reasoning seemed more to suggest that the difficulty was that Congress—in the statutory enforcement scheme itself—had intended to preclude suits against individual state officers.[31] While this was, as David Currie (among others) suggests, an implausible reading of the statute,[32] it certainly left room for the possibility that the discussion of *Ex parte Young* was of minimal precedential value.

28. See, e.g. *Edelman v. Jordan*, 415 U.S. 651 (1974). While damage actions against officers in their individual capacities are not barred by the Eleventh Amendment, see *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974), qualified immunity doctrines substantially limit the practical availability of this remedy in many cases. For this reason, many authorities have described the *Ex parte Young* rule, and the availability of prospective relief to enforce federal law and prevent ongoing violations of federal law, as foundational to the supremacy of federal law and essential to the rule of law. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1180 (Souter, J., dissenting); Charles Alan Wright, *Law of Federal Courts* 292 (West Publishing Co., 4th ed. 1983); Erwin Chemerinsky, *Federal Jurisdiction*, 393 (Little, Brown and Co., 2d ed. 1994); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. Rev. 495, 512, 539-41 (1997).

29. *Pennhurst State School v. Halderman*, 465 U.S. 89, 105 (1984).

30. See *Seminole Tribe*, 116 S. Ct. at 1133 (suit against Governor under IGRA violates the Eleventh Amendment).

31. See id. at 1131-32.

32. David P. Currie, *Ex parte Young after Seminole Tribe*, 72 N.Y.U. L. Rev. 547, 550 (1997); see Jackson, 72 N.Y.U. L. Rev. at 517-19 (cited in note 28).

I. *EX PARTE YOUNG* AND *COEUR D'ALENE TRIBE*

Soon after *Seminole Tribe* was decided, the Court agreed to decide another case involving the availability of "Ex parte Young" relief against state officers, perhaps signalling its intention to rework this area.[33] The Coeur d'Alene tribe of Idaho had sued the state and its officials in federal court, asserting that certain submerged lands under the Coeur d'Alene River belong to the Tribe, not the state, by virtue of executive orders entered in the 1870s. The trial court had dismissed the claims against the state itself as barred by the Eleventh Amendment, as well as the quiet title action and request for declaratory relief against the state officers, and had rejected on the merits the Tribe's claims against the officers for injunctive relief.[34]

The Ninth Circuit agreed with the lower court that the Tribe's quiet title action (against both the state and its officers) was barred by the Eleventh Amendment, because a quiet title action necessarily determines ownership interests and thus would impair the state's claimed interest.[35] However, the Ninth Circuit held, the Tribe's request for declaratory and injunctive relief against state officials to prevent interference with the Tribe's alleged property rights in certain submerged lands, derived from federal law, could proceed under *Ex parte Young*.[36] Because it concluded that the Tribe might be able to prove facts entitling it to relief, the Ninth Circuit reversed the dismissal of the claims for declaratory and injunctive relief against the state officials and remanded.

Following the approach adopted on remand in *Florida Dept. of State v. Treasure Salvors*,[37] the Ninth Circuit indicated that, if the Coeur d'Alene Tribe prevailed on its ownership claims, the relief against state officers would not bind the State (or its agencies),[38] which would evidently allow the State to bring its own

33. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 116 S. Ct. 1415 (1996), granting certiorari in *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244 (9th Cir. 1994). My thanks to my colleague Richard Lazarus for suggesting this point.

34. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F. Supp. 1443 (D. Idaho 1992). Id. at 1449-52 (reaching merits and deciding in favor of state's claim to title, and therefore dismissing the prayer for an "injunction against the individual defendants, to prevent them from regulating or taking any action contrary to the Tribe's claimed right of exclusive use and possession of the disputed lands and waters.")

35. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d at 1248-50.

36. Id. at 1251-55.

37. 458 U.S. 670 (1982).

38. 42 F.3d at 1255 (citing *Florida Dept. of State v. Treasure Salvors, Inc.*, 689 F.2d 1254, 1256) (5th Cir. 1982) (per curiam).

quiet title action against the tribe. The Court of Appeals recognized that by its ruling, neither the Tribe nor the State would have clear title through the federal judgment, but explained the distinction it drew as a necessary compromise between the Eleventh Amendment immunity of the State and the need to prevent future violations of federal law by state officials.[39]

A. THE REASONING OF THE MAJORITY

By the same 5-4 vote as in *Seminole Tribe*, the Supreme Court reversed, holding that the *Ex parte Young* doctrine did not permit federal courts to entertain the action against the state officials.[40] Justice Kennedy, for the Court, wrote that the Tribe had alleged an ongoing violation of federally-protected rights and sought prospective injunctive relief, which "is ordinarily sufficient to invoke the *Young* fiction."[41] However, the Court concluded, this case was unusual in that it was the "functional equivalent of a quiet title action which implicates special sovereignty interests."[42] First, if relief were granted, "substantially all benefits of ownership and control would shift from the State to the Tribe."[43] Second, such a determination would be "in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State," and would "diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory."[44] In light of these "particular and special circumstances," the majority agreed that the *Young* exception was inapplicable.[45]

The application of sovereign immunity notions to real property disputes has been an area of notorious difficulty in drawing

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39. Id. at 1253-54 (referring to the "middle ground between the necessarily conflicting doctrines of state sovereign immunity and the supremacy of federal law").

40. Justice Kennedy wrote the opinion for the Court, in all of which Chief Justice Rehnquist joined and in portions of which Justices O'Connor, Scalia, and Thomas joined. See *Coeur d'Alene*, 117 S. Ct. at 2031 (1997). Justice O'Connor wrote a separate concurrence, joined by Justices Scalia and Thomas. Id. at 2043. Justice Souter wrote a dissent in which Justices Stevens, Ginsburg, and Breyer joined. Id. at 2047.

41. Id. at 2040.

42. Id.

43. Id.; see id. at 2043 (O'Connor, J., concurring in part and concurring in the judgment) (suit is functional equivalent to action to quiet title, since Tribe asks federal court "to declare that the lands are for the exclusive use, occupancy and enjoyment of the Tribe and to invalidate all statutes and ordinances purporting to regulate the lands.").

44. Id. at 2040; id. at 2044 (O'Connor J., concurring in part and concurring in the judgment) (Tribe does not seek merely to possess lands that would otherwise be subject to state regulation, or to bring state regulatory scheme into compliance with federal law, but to eliminate state regulatory power over the lands).

45. Id. at 2043.

principled distinctions. But these conclusions of the *Coeur d'Alene* Court were by no means foregone. Earlier cases had permitted adjudication of claims against state officers for prospective relief to vindicate alleged private interests in property purportedly owned by the state, notwithstanding the functional similarity between prospective relief against state officers and a judgment in a quiet title action.[46]

46. See, e.g., *Tindal v. Wesley*, 167 U.S. 204 (1897); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (Stevens, J., for the plurality); see also *United States v. Lee*, 106 U.S. 196 (1882) (upholding jurisdiction over suit in ejectment against two U.S. army officers to recover possession of property taken from the Lee estate by U.S., and rejecting argument that suit against the officers was prohibited by the sovereign immunity of the United States). Justice Kennedy's opinion for the Court, following the more limited reading of these decisions suggested by *Pennhurst State School v. Halderman*, 465 U.S. 89, 104-05 (1984), distinguished *Treasure Salvors* by asserting that the claim of the state to the property in *Treasure Salvors* was not colorable and thus its officers were acting beyond their authority under state law. *Coeur d'Alene*, 117 S. Ct. at 2040. This distinction seems weak, since one reason the state officials lacked authority in *Treasure Salvors* was that another recent decision, *United States v. Florida*, 420 U.S. 531 (1976) (per curiam) had held that the area of the ocean in which the salvaged property was found did not belong to Florida but to the United States; in *Coeur d'Alene* the Tribe was seeking to obtain an adjudication of who the land in question belonged to. Indeed, the majority decision in *Coeur d'Alene* appears far more compatible with the views expressed by Justice White, dissenting on this point in *Treasure Salvors*, that "a colorable basis for the exercise of authority by state officials may not ultimately be a valid one, but it does serve to invoke the Eleventh Amendment," *Treasure Salvors*, 458 U.S. at 716, at least in claims involving rights to property related to government contracts and controlled by the rule of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Justice O'Connor's concurring opinion distinguished *Lee* and *Tindal* because, she argued, they did not involve a claim that a state could not exercise regulatory jurisdiction. *Coeur d'Alene*, 117 S. Ct. at 2044. It is true that the plaintiff in *Lee* was a private citizen, and not an Indian tribe, and therefore his claim to the property did not bring with it the possibilities for regulatory jurisdiction of Indian tribes as plaintiffs. See text accompanying notes 51-52 (discussing relationship between fact that tribe was plaintiff and consequences, under federal law, for state regulatory authority). But because the lands in question in *Lee* were then being held by the federal government, recognition of the *Lee* claim of private ownership would indeed have substantial consequences for the regulatory jurisdiction of the government in possession: the federal government has power to exercise legislative jurisdiction over areas within states owned by it, especially for military purposes, see Art. I, §8 [12]-[14], [17], while if the property were privately owned, legislative jurisdiction (over real property laws, zoning etc.) would fall to the state (not the federal) government. The distinction proposed by Justice O'Connor, then, is illusory, and particularly so in light of the rationale of the *Lee* case itself, which rested on the (1) lack of justification for sovereign immunity, (2) the fact that it was army officers, and not the U.S. government, who were named as defendants, and the traditions of sovereign immunity law permitting suits against officers and (3) the fact that the judgment would not be binding on the U.S., but only its officers—as the Ninth Circuit proposed in this case. The dissent, by contrast, argued that "an officer suit implicating title is no more or less the 'functional equivalent' of an action against the government than any other *Young* suit," id. at 2053 (Souter, J., dissenting), and agreed with the Ninth Circuit, see note 39, that permitting relief against the officers without precluding the state's claim of title should it choose to bring a quiet title action was a "fair via media between the extremes." Id.

Justice Kennedy invoked existing distinctions in Eleventh Amendment doctrine between prospective and retrospective relief, arguing that the relief sought by Tribe would be "fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury."[47] However, as the dissent pointed out, purely prospective relief—like that granted in *Ex parte Young* itself—is often very intrusive.[48] Thus, intrusiveness does not serve to distinguish among permissible forms of relief.

To the extent that the state's sovereign interests in regulating submerged lands in the future were understood to make the relief more intrusive and hence, in the eyes of the majority, more like prohibited "retroactive" relief than permitted "prospective" relief, the reasoning would expand the scope of what is deemed prohibited "retroactive" relief in suits against state officers. The distinction between prospective and retroactive relief has itself been difficult to define in some circumstances,[49] and the opinion thus can be read to suggest that some future regulatory actions might nonetheless fall on the "retroactive" side of the balance.[50] The decision thereby diminishes the arena of accountability under federal law and expands the domain of immunity, by limiting the officer suit beyond prior doctrine.

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47. See *Coeur d'Alene*, 117 S. Ct. at 2043 (if Tribe were to win, Idaho's interests "would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury").

48. Id. at 2050-51, 2055 (Souter, J., dissenting) (tribe seeks no damages or restitution, nor rescission of past transactions, but only to restrain future violations of law, a form of relief that is plainly prospective; majority wrong to equate "intrusiveness" with retroactivity since prospective relief can be very intrusive).

49. As an illustration that the dividing line between retroactive and prospective relief has not always been easy to draw, see *Milliken v. Bradley*, 433 U.S. 267, 295 (1977) (upholding as prospective relief an order that the state pay half the costs of a local school system in improving schools to secure compliance with desegregation orders). But at least where no payments arising from past wrongful conduct were sought, and where there were ongoing violations of federal law, prospective injunctive relief has generally been available. See *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (*Ex parte Young* permits prospective but not retroactive relief against public official, and thus bars restitution of past due welfare benefits); *Papasan v. Allain*, 478 U.S. 265, 279-82 (1986) (claim for future payments based on past breach of trust is barred as involving essentially retroactive relief, while claim based on ongoing alleged violations of the equal protection clause could be adjudicated).

50. As noted below, however, the opinion may be circumscribed, or circumscribable, by the particular aspects of tribal claims to submerged lands, which, because of the special status of submerged lands and features of federal Indian law, may involve greater potential limitation of the state's exercise of regulatory powers than other property disputes do. But see *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1472 (1998) (implying, albeit in dicta, that *Coeur d'Alene* reflects rule that "the Eleventh Amendment bars federal jurisdiction over general title disputes relating to State property interests").

Moreover, the Court's conclusion that the relief sought had consequences "well beyond the typical stakes in a real property quiet title action," because the Tribe's claim, if sustained, would mean "that the lands in question were not even within the regulatory jurisdiction of the State,"[51] is in some sense simply a consequence of the constitutional scope of the national government's power over tribes and their lands.[52] It is not an obvious reason to prefer the exercise of state, rather than federal, judicial power.[53]

Yet in these respects the opinions seem to be quite specifically rooted in the context of tribal claims to submerged lands having "unique status in the law,"[54] and perhaps to have more limited implications for other claims. Whether what was crucial was that the claims to real property were asserted by a tribe (with the ensuing loss of sovereign regulatory authority for the state resulting from the unique status of "Indian Tribes" under federal law), or that the real property in question was submerged land under a riverbed (with their unique associations with state sovereignty and interstate equality under the equal footing doctrine), or the conjunction of these factors, cannot clearly be discerned from the Court's opinion. One might fairly conclude from the *Coeur d'Alene* opinions, however, that some or all of these factors together constituted the circumstance that make the case so "particular and special."[55]

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51. *Coeur d'Alene*, 117 S. Ct. at 2040. In describing the special effects on state sovereignty from the relief sought here, Kennedy's opinion for the Court also emphasized the state's uniquely sovereign interests in ownership of and sovereignty over submerged lands. Id. at 1041-43 (discussing how state ownership of submerged lands has historically been considered an essential attribute of sovereignty and protected by the "equal footing" doctrine). The opinion may be read to suggest that because state ownership of submerged lands is ordinarily protected by the "equal footing" doctrine, it is more closely related to the state's status as sovereign, than if the property in question were something other than submerged lands.

52. See, e.g., *Montana v. United States*, 450 U.S. 544, 557 (1981) (tribe had exclusive jurisdiction to regulate hunting and fishing on tribal lands); cf. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (state law could not be applied to prohibit casino gambling on tribal lands).

53. See *Coeur d'Alene*, 117 S. Ct. at 2054 (Souter, J., dissenting) (it is true but irrelevant to *Young*'s application that state regulatory power is affected since this is always the case where *Young* is invoked) and text accompanying notes 58-63 (describing justices' views of relevance of state court forum in Idaho to availability of *Ex parte Young* relief in federal court).

54. *Coeur d'Alene*, 117 S. Ct. at 2041 (arguing that navigable waters "uniquely implicate sovereign interests").

55. Id. at 2043. Even more recently, however, the Court has implicitly characterized *Coeur d'Alene* more broadly. See *Deep Sea Research, Inc.*, 118 S. Ct. at 1472 ("[T]he Eleventh Amendment bars federal jurisdiction over general title disputes relating to State property interests.") This statement, however, was dicta, for the Court in that case

B. JUSTICE KENNEDY'S ADDITIONAL REASONING

Other portions of Justice Kennedy's opinion, joined only by the Chief Justice, advocated more far-reaching changes in the *Ex parte Young* doctrine. Justice Kennedy urged that the availability of prospective relief based on federal law against state officers should be decided on a case by case basis, based on (1) the availability of a state court forum, (2) the degree of intrusion on state interests posed by the subject matter of the case or form of relief sought and (3) the nature and importance of the federal right asserted by the plaintiff.[56]

The balance Kennedy proposed would give substantial weight to the availability of a state court forum for resolution of the dispute as a reason for rejecting federal jurisdiction in suits for prospective relief against state officers,[57] and to the interests and competence of the states in defining within their own courts the scope of state administrative law and function when federal law challenges arise.[58] Thus, where a state provided a judicial remedy for adjudicating plaintiff's claim, according to Justice Kennedy, this would weigh against the availability of *Ex parte Young* as a basis for proceeding in federal court. Notwithstanding Justice Kennedy's suggestion otherwise, this would be a ma-

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rejected California's argument that the Eleventh Amendment precluded federal adjudication of interests in a shipwreck in an in rem admiralty proceeding where the State did not have possession of the res. Id. at 1472-73. While the case did not involve *Ex parte Young* issues (the State of California being a party in its own name), interestingly the majority opinion and two concurring opinions can be read to suggest a possible narrowing of the application of Eleventh Amendment immunity in admiralty actions. See id. at 1470-72 (noting early views of Justices Story and Washington that the Eleventh Amendment did not apply in admiralty, and narrowly construing later cases holding that it did); id. at 1474 (Stevens, J., concurring) (disavowing his earlier opinion in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) and apparently agreeing with views of Justices Story and Washington); id. at 1474 (Kennedy, J., concurring) (joining the Court's opinion and noting that issue of whether state's possession or nonpossession is critical for Eleventh Amendment purposes in admiralty is "open to reconsideration" in light of "subsisting doubts" about *Treasure Salvors* and Justice Stevens' concurrence).

56. *Coeur d'Alene*, 117 S. Ct. at 2035-40 (Kennedy J., for himself and the Chief Justice).

57. Id. at 2035-36 (Kennedy, J., for himself and the Chief Justice).

58. Id. at 2036-38 (Kennedy, J., for himself and the Chief Justice). As Justice O'Connor notes, "[e]very *Young* suit names public officials," and states have "a continuing interest in" any litigation against its officials, and thus these characteristics on which Kennedy wants to rely "do not distinguish it from cases in which the *Young* doctrine is properly invoked." Id. at 2047 (O'Connor, J., concurring in part and concurring in the judgment). O'Connor and Souter also criticized Justice Kennedy's downplaying of the importance of federal courts enforcing federal law, and his provocative comment that the states may not have consented to suits against officers based on federal law in agreeing to the Supremacy Clause. Id. at 2037 (Kennedy, J., for himself and the Chief Justice); id. at 2045-46 (O'Connor); id. at 2054-55 (Souter, J., dissenting).

jor change in the *Ex parte Young* doctrine (and one which, in light of the existence of state court systems with remedies against state officers, could relegate federal courts to an insignificant supplementary role in actions against state officials).

Kennedy's opinion goes on to acknowledge but then undermine the idea that *Ex parte Young* serves "an important interest" when a case "calls for the interpretation of federal law."[59] "For purposes of the Supremacy Clause," Kennedy argued, it is irrelevant whether state or federal courts adjudicate federal law claims.[60] Emphasizing that federal courts may play an "indispensable role" in disputes between states, and suits brought by the United States, the "[i]nterpretation of federal law is the proprietary concern of state, as well as federal, courts."[61] To permit an *Ex parte Young* action simply because a federal legal issue is involved would be too "expansive."[62] Where (as is often the case in federal litigation against state officials) "the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials."[63] When, then, would the balance favor allowing an *Ex parte Young* action? After implying that it might *not* do so in statutory actions,[64] Kennedy referred to *Milliken v. Bradley*,[65] which had upheld as prospective an injunction that state officials help pay for educational improvements in a school desegregation case, suggesting that it was less the nature of the relief, nor even the federal law nature of the claim, but rather the "substantive provisions of the Fourteenth Amendment themselves [which] offer a powerful reason to provide a federal forum."[66]

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59. Id. at 2036 (Kennedy, J., for himself and the Chief Justice).

60. Id. at 2037 (Kennedy, J., for himself and the Chief Justice).

61. Id. at 2037 (Kennedy, J., for himself and the Chief Justice). While Kennedy was willing to "assume" that, apart from litigation between states or suits brought by the United States, the federal courts may have a "special role" in the interpretation and application of federal law "in other instances" as well, id., his argument for state court parity looks in the opposite direction.

62. Id. at 2236-37 (Kennedy, J., for himself and the Chief Justice).

63. Id. at 2037-38 (Kennedy, J., for himself and the Chief Justice).

64. In discussing *Edelman v. Jordan*, 415 U.S. 651 (1974) for example, Justice Kennedy noted that "there was no need for the *Edelman* Court to consider the . . . relief granted by the district court, prospectively enjoining state officials from failing to abide by federal requirements, since it was conceded that *Young* was sufficient for this purpose." *Coeur d'Alene*, 117 S. Ct. at 2038 (Kennedy, J., for himself and the Chief Justice).

65. 433 U.S. 267, 295 (1977).

66. *Coeur d'Alene*, 117 S. Ct. at 2039 (Kennedy, J., for himself and the Chief Justice). Query whether this might suggest that neither state officials, nor the states, could

Specifically invoking *Seminole Tribe*'s citation of *Schweiker v. Chilicky*,[67] Justice Kennedy went on to argue that *Seminole Tribe*'s "implicit analogy of *Young* to *Bivens* is instructive [because both] *Young* and [the] *Bivens* lines of cases reflect a sensitivity to varying contexts,"[68] and thus courts should consider whether there are "special factors counselling hesitation,"[69] before allowing either a *Bivens* suit or an *Ex parte Young* action to proceed. *Bivens v. Six Unknown Fed. Narcotics Agents*[70] is the case establishing the existence of constitutional causes of action for damages against federal officials, whose scope has been limited in more recent decisions (such as *Chilicky*). The analogy to *Bivens*, drawn in *Seminole Tribe* and repeated by Justice Kennedy in *Coeur d'Alene*, thus suggests that *Ex parte Young* relief in both constitutional and statutory causes might be limited.

Justice O'Connor, however, in an opinion joined by Justices Scalia and Thomas, rejected Justice Kennedy's "case-specific analysis," as "unnecessarily recharacteriz[ing] and narrow[ing] much of our *Young* jurisprudence."[71] Particularly critical of Kennedy's "casting doubt" on the importance of having federal courts interpret federal law, and of the "basic principle of federal law" that "[w]hen a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar,"[72] O'Connor disputed that prior case law supports his view that availability of a state forum is relevant to whether *Ex parte Young* permits prospective relief.[73] Her

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be sued for (at least for "affirmative") relief under federal statutes enacted under Article I of the Constitution? This result would not be inconsistent with the spirit of *Printz v. United States*, 117 S. Ct. 2365 (1997) (Congress lacks power under Article I to require state or local officials to administer federal laws). See note 16 (discussing possible paradigm shift).

67. 487 U.S. 412 (1988), cited in *Seminole Tribe*, 116 S. Ct. at 1132. For discussion, see Jackson, 72 N.Y.U. L. Rev. at 527-33 (cited in note 28).

68. *Coeur d'Alene*, 117 S. Ct. at 2039 (Kennedy, J., for himself and the Chief Justice).

69. Id. (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)).

70. 403 U.S. 388 (1971).

71. *Coeur d'Alene*, 117 S. Ct. at 2045 (O'Connor, J., concurring in part and concurring in the judgment).

72. Id. at 2046, 2045 (O'Connor, J. concurring in part and concurring in the judgment) (referring specifically to Kennedy's discussion of whether states had consented to suits against state officers for prospective relief to vindicate federal law, and assertion that Supremacy Clause interests are satisfied by either state or federal court action).

73. Id. at 2045 (O'Connor, J. concurring in part and concurring in the judgment). Justice O'Connor is quite clearly correct that prior case law did not rely on the unavailability of a state court forum as a basis for invoking *Ex Parte Young*. It is worth recalling that in *Ex parte Young* itself, Justice Harlan's dissent from the Court's ruling in favor of federal jurisdiction over the action against the state Attorney General argued that there

opinion further disagreed with Kennedy's suggestion that federal courts must evaluate the importance of the federal right at stake (rather than whether the relief sought is prospective or retrospective) before allowing the suit to proceed.[74] And, she argued, the lone citation to *Chilicky* in *Seminole Tribe* "by no means establishes that a case-by-case balancing approach to the *Young* doctrine is appropriate."[75] Further disagreement with the approach advocated by Justice Kennedy and Chief Justice Rehnquist was expressed by the four dissenting justices.[76]

A majority of the Court thus rejected Justice Kennedy's effort drastically to revise the *Ex parte Young* doctrine. Three of the five justices in the majority in both *Seminole Tribe* and *Coeur d'Alene* were unprepared to endorse grand shifts in the articulated doctrine, beyond *Seminole Tribe*'s rule that "where Congress prescribes a detailed remedial scheme for enforcement of a statutory right, a court should not lift the Eleventh Amendment bar to apply its 'full remedial powers' in a suit against an officer in a manner inconsistent with the legislative scheme."[77]

But a devotee of what Richard Fallon has called the "Nationalist" vision of the federal courts should not be entirely tranquil about the implications of *Coeur d'Alene*.[78] For the second time in two Terms, prospective (or arguably prospective) relief against individual state officers, based on federal law, has been found barred by the Eleventh Amendment. The five members of the majority seemed willing to interpret *Ex parte Young* narrowly in order to promote "Eleventh Amendment" interests in

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was a state court proceeding for mandamus (initiated by the Attorney General and leading to the contempt finding) in which the constitutionality of the state law could have been adjudicated. *Ex parte Young*, 209 U.S. at 174-83 (Harlan,. J. dissenting); see *Coeur d'Alene*, 117 S. Ct. at 2056-57 (Souter, J., dissenting) (discussing availability of state court forum in cases relied on in *Young*); see also *Poindexter v. Greenhow*, 114 U.S. 270, 288-93 (1885) (in action initiated in state court, precursor to *Ex parte Young* doctrine invoked to justify availability of relief against state officer notwithstanding state sovereign immunity). *Poindexter* was, somewhat mysteriously, cited by Justice Kennedy in *Coeur d'Alene*, 117 S. Ct. at 2035. For further disagreement with Justice Kennedy on this point, see id. at 2057-59 (Souter, J. dissenting) (arguing that state courts are obligated, under *General Oil v. Crain*, 209 U.S. 211, 226-27 (1908), to provide a forum "in every case in which *Ex parte Young* supports the exercise of federal-question jurisdiction against a state officer," so that availability of a state court forum would count against *Ex parte Young* in every case).

74. *Coeur d'Alene*, 117 S. Ct. at 2047 (O'Connor, J. concurring in part and concurring in the judgment).

75. Id. at 2047 (O'Connor, J., concurring in part and concurring in the judgment).

76. Id. at 2048, 2054-57 (Souter, J., dissenting).

77. Id. at 2047 (quoting *Seminole Tribe*, 116 S. Ct. at 1132-33) (O'Connor, J., concurring in part and concurring in the judgment).

78. Fallon, 74 Va. L. Rev. 1141 (cited in note 3).

restricting federal question jurisdiction. In a portion of Justice Kennedy's opinion that was for the Court, he reasoned that

> to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, . . . would be to adhere to an empty formalism and to undermine the principle, reaffirmed . . . in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction.[79]

Accordingly, the opinion of the Court continued, "[a]pplication 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."[80] How much this "obvious fiction" is to be narrowed, either in application or through shifts in doctrine (e.g., what counts as "retroactive" relief), must await future developments.[81]

II. THE MARSHALL AND REHNQUIST COURTS' VISIONS OF FEDERAL COURTS IN VINDICATING THE SUPREMACY OF FEDERAL LAW AGAINST THE STATES

Having described and briefly analyzed the logic of the arguments and decision in *Coeur d' Alene*, let me now step back and consider the prior two Terms' Eleventh Amendment decisions in a longer perspective. For I want briefly to compare this Chief Justice's vision of the role of the federal courts in vindicating the supremacy of federal law,[82] with that of Chief Justice Marshall's court.

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79. *Coeur d'Alene*, 117 S. Ct. at 2034 (emphasis added).

80. Id.; see also id. at 2043 (in closing, the opinion for the Court states that the "dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."). Although Justice O'Connor joined in these portions of the opinion, the references to the state courts seem strongly in tension with her separate opinion disavowing both the relevance of state fora in the development of the *Young* doctrine and the desirability of changing the *Young* doctrine. See notes 58, 73. This augurs for caution in reading these passages too broadly.

81. For subsequent discussions, see *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1472 (1998) and *Breard v. Greene*, 118 S. Ct. 1352, 1356 (1998); see also notes 2, 50, and 55.

82. I will take as this Chief Justice's vision the opinion for the Court in *Seminole Tribe*, which he wrote, and those portions of Justice Kennedy's opinion in *Coeur d'Alene* in which Chief Justice Rehnquist (and no others) joined.

In *Marbury v. Madison*,[83] one of the important questions addressed by the Court was whether the Secretary of State could be the subject of a writ of mandamus. Notwithstanding the sovereign immunity of the United States,[84] Marshall had no trouble in concluding that when an executive officer "is directed by law to do a certain act affecting the absolute rights of individuals," then the "courts of the country" have a "duty of giving judgment that right be done to an injured individual."[85] Speaking implicitly about the relationship between the possible sovereign immunity of a government office, and the amenability of a government's officers to being restrained, Marshall wrote:

> If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.[86]

It is well known that the Marshall Court did not in fact issue the mandamus.[87] But if we listen to what Marshall says, and not what he does, the vision that is held up is one of public accountability to law, through an order issued to an executive branch person to do what the law requires.

Now let us consider *Osborn v. Bank of United States*.[88] In addition to asserting a very broad understanding of the constitutional scope of arising under jurisdiction, Chief Justice Marshall was confronted with an argument that the jurisdiction of the federal courts was barred by the Eleventh Amendment. *Osborn* involved an action by officers of the Bank of the United States to prevent Ohio from collecting a state tax on the bank which, under the Supremacy Clause preemption principle of *McCulloch v.*

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83. 5 U.S. (1 Cranch) 137 (1803).

84. At the time of this decision, the sovereign immunity of the United States had been discussed by the Court on at least one occasion, in terms suggesting that the United States itself could not be sued without its consent. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Sovereign immunity for the United States and for the States has developed in tandem, with cases in one line frequently referring to or relying on cases in the other. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 77 (1988).

85. *Marbury*, 5 U.S. at 171.

86. Id. at 170.

87. Whether in an act of judicial statesmanship, see Robert G. McCloskey, *The American Supreme Court* 40-41 (U. of Chicago Press, 1960), power grabbing of a sort in establishing judicial review, sheer judicial prudence in not issuing an order that might be disobeyed, or some combination, we need not address.

88. 22 U.S. (9 Wheat.) 738 (1824).

Maryland,[89] was not constitutionally valid. Acting on behalf of the state, an agent of the state physically seized money from the Bank of the United States and took it to the state treasury. Admitting the direct interest of the state, the Court stated that, if the state could be made a party it should, but since it could not, the action would proceed against the officers, and the Amendment deemed to apply only when the state was a party of record.[90] Far from considering the possible availability of a state court action as a basis for invoking an Eleventh Amendment bar to the suit against the state officers, Marshall asserted broadly the jurisdiction of the federal courts when a federal question was presented in an action against a state officer.[91]

Finally, let us recall Justice Story's opinion for the Marshall Court in *Martin v. Hunter's Lessee*.[92] In discussing the jurisdiction of the Supreme Court to review state court judgments, Justice Story articulated several elements of what Professor Fallon has called the "Nationalist" vision. Rejecting the argument that actions in the state courts would be sufficient to vindicate the supremacy of federal law, he wrote:

> The constitution has presumed... that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence in controversies between states; between citizens of different states... it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.... In respect to the other enumerated cases—the cases arising under the constitution, laws and treaties of the United States...—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive ju-

89. 17 U.S. (4 Wheat.) 316 (1819).

90. *Osborn*, 22 U.S. (9 Wheat.) at 845-48. Note that the jurisdictional provision on which the Court relied authorized the Bank to sue or be sued in any state court, or any federal court. Id. at 817. Can one imagine telling the Bank of the United States it would need to go to state court in Ohio to obtain an injunction against the state's highest officers? Under Justice Kennedy's approach in *Coeur d'Alene*, however, this might have been the appropriate disposition.

91. While I recognize that Chief Justice Marshall himself did not always apply the party of record rule, see *Governor of Georgia v. Madrazzo*, 26 U.S. (1 Pet.) 110 (1828), it is worth noting Marshall's effort there to limit and distinguish the case by finding no claim of federal law violation. Id. at 124. See also *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627 (1833) (apparently involving no federal claim).

92. 14 U.S. (1 Wheat.) 304 (1816).

risdiction [to the national tribunals]."[93]

Thus, Justice Story argued, both the local biases of the states, and the greater capacity of the federal tribunals to protect the "safety, peace, and sovereignty of the nation" required that the federal courts be able to hear such cases.[94]

We thus see very different visions—of law (and its relationship to judicial remedies),[95] of the importance of remedies against government officers for wrongs committed in their office,[96] and of the relative roles of the state and federal courts in securing the supremacy of federal law.[97] Much of our present

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93. Id. at 347.

94. Id. Interestingly, Justice Johnson, (the first justice appointed by President Thomas Jefferson, see Geoffrey Stone et al., *Constitutional Law* at lxv (Little, Brown and Co., 2d ed. 1991)), wrote separately to emphasize his view that process would not run to the state courts as such but rather to individual parties, and was thus not inconsistent with the dignity of the state courts. In doing so, he wrote:

> [n]o sense of dependence can be felt from the knowledge that the parties, not the court, may be summoned before another tribunal. With this view, by means of laws, avoiding judgments obtained in the state courts in cases over which Congress has constitutionally assumed jurisdiction, **and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the *habeas corpus ad subjiciendum*,** . . . the full extent of the constitutional revising power may be secured to the United States, and the benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the state tribunals . . . .

Id. at 381-82 (emphasis added). Justice Johnson thus placed weight on the importance of injunctive and habeas corpus relief against individuals who "infringe the constitutional rights of others," that is presumably, government officials.

While it is, of course, true that the issue in *Martin* concerned the appellate jurisdiction of the Court, Story's description of the reasons for the extension of judicial power to the party-based heads of jurisdiction, and his suggestion of the even greater importance of federal jurisdiction over federal question cases, fairly suggest that Congress ought to be able to extend to the lower federal courts jurisdiction over all questions of federal law, and would favor a narrow, rather than broad, understanding of Eleventh Amendment immunity designed to facilitate suits against state officers to vindicate federal law.

95. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (the essence of civil liberty requires a judicial remedy for breach of rights) with *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1119 (1996) (invalidating the only provision authorizing judicial review of the states' statutory duty to negotiate).

96. Compare *Marbury*, 5 U.S. at 165-66 (high cabinet-level office will not be a defense to a judicial order to enforce clear duty) with *Coeur d'Alene*, 117 S. Ct. at 2040 (noting high state offices held by named defendants as basis for concluding that sovereign interests of state were so implicated that jurisdiction could not be sustained).

97. Compare *Martin*, 14 U.S. at 343, 347 (rejecting argument that federal government cannot act on and bind the states in their corporate capacities, and noting the importance of federal jurisdiction over issues of federal law "touching the safety, peace and sovereignty of the nation") with *Coeur d'Alene*, 117 S. Ct. at 2037-38 (Kennedy, J., joined by Chief Justice Rehnquist) (arguing that the availability of state court for resolving federal questions against state officials may render lower federal court jurisdiction unnecessary and thus barred by the Eleventh Amendment); cf. *Printz*, 117 S. Ct. at 2367 (federal government cannot, other than in carrying out constitutionally specified duties, require

federal judicial system has been built on the Marshall Court's constitutional foundations. The Marshall Court cases are still studied, in part because of their insistence on federal judicial power to enforce federal law and on public officials' accountability to law.

Yet perhaps we are simply in the swing of an enduring cycle, or dialogue, between federalist and nationalist visions. While one might wonder whether, had a different Chief Justice been appointed in 1801, the strong "rule of law" traditions of U.S. constitutionalism would have had their foundations so well-laid,[98] perhaps it is now time in our constitutional development for a dose of what Richard Fallon has called the "Federalist," or anti-nationalist, vision. Perhaps it is only in the founding period, or at other particular moments in history, that the constitutional system needs the Marshallian vision of federal courts, fully empowered to enforce federal law, whether against state or federal government agents, when they fail to do that which the law requires.[99]

Or perhaps the Court has fallen off track in sustaining the design of a constitutional system whose fragility may be obscured by its longevity.[100] If there is any kind of case in which federal, rather than state courts, would seem to be better suited to judicial resolution of a dispute, it would be in a dispute between a federally protected Indian tribe, and a state, over the effect of the acts of a president of the United States in conferring interests on the tribe.[101] Perhaps it is not a coincidence that the two cases the Court chose to narrow the availability of relief

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state or local governments other than state courts to administer or execute federal law).

98. See Jackson, 111 Harv. L. Rev. at 2224-28 (cited in note 26); Richard H. Fallon, Jr., *"The Rule of Law" As A Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1 (1997).

99. Perhaps this wholly overstates the importance of the Court, and its decisions, in the political development of the judicial power.

100. For a thoughtful treatment of potentially destabilizing excesses in both "Federalist" and "Nationalist" models and arguing for decisionmaking "between the poles" of these models, see Fallon, 74 Va. L. Rev. at 1224-51 (cited in note 3). Moreover, as noted earlier, more is going on here than the "parity" debate about whether state courts are constitutionally interchangeable with the lower federal courts in the adjudication of federal claims. A deeper set of disagreements about the nature of law, and the relationship of courts to law, of law to the actions of governments, and of federal courts to federal law, is at stake.

101. In *Coeur d'Alene*, the underlying substantive dispute turned in part on whether an Executive Order, issued by the President in 1873, giving the Tribe a beneficial interest (subject to the trusteeship of the United States) in the beds and banks of all navigable waters within the original boundaries of the Coeur d'Alene Reservation, secured the tribe's beneficial interests after the admission of Idaho to the Union in 1890 under the "equal footing" doctrine. See *Coeur D'Alene*, 117 S. Ct. at 2032.

against officers involved affirmative claims by Indian tribes.[102] But whether coincidence or no, the reasoning in these cases affects federal jurisdiction over a range of federal issues.

Let me return to the puzzle with which I began. The differing paradigms of Chief Justice Marshall and Chief Justice Rehnquist make one wonder what vision will best serve this nation now, as it goes into the 21st century a sophisticated, complex and large world power, built on a system of substantial federal regulation of many aspects of economic and social life, and increasingly tied into obligations under international agreements that may impose constraints and duties on the states.[103] Perhaps the retrenchment of federal judicial power in these two recent decisions, and *Coeur d'Alene's* insistence on the physically territorial attributes of state sovereignty,[104] can be understood, in part, as symbolic acts of resistance to political, economic and informational centralization, not only in the United States but in the global community of which it is increasingly obviously a part.

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102. For description of the underlying dispute in *Coeur d'Alene*, see text accompanying notes 33-39. *Seminole Tribe* involved a dispute between the Seminole Tribe and the State of Florida over negotiations concerning gambling on tribal lands under the federal Indian Gaming Regulation Act. The Indian Tribes referred to in U.S. Const., Art. 1, § 8, do not have the status as constitutional sovereigns that states enjoy; indeed, Indian Tribes' continued existence as quasi-autonomous governing bodies poses a threat to the "federalist" vision of dual (not triple) sovereignty. Perhaps it is not surprising that the unavailability of judicial relief, or federal judicial relief, on serious questions of federal law in actions brought by those most immediately affected, emerges in claims by Indian tribes, an historically disadvantaged group that also operates largely outside the national political process, cf. Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543 (1954), and, recently, has been unable affirmatively to invoke the jurisdiction of the federal courts to resolve disputes with the state governments that, as permitted by the federal government, hold power over them.

103. For a recent illustration of the degree to which jurisdictional doctrine can affect the international position of the United States, see *Breard v. Greene*, 118 S. Ct. 1352 (1998). The Court there refused to stay Virginia's execution of a Paraguayan convicted of murder, notwithstanding the request of the International Court of Justice, and of Paraguay, that a stay be entered to permit full consideration of Paraguay's and Breard's pending claims that his conviction was invalid because state authorities had concededly failed to advise Breard during the investigation of his right to consult with a representative from the Paraguayan embassy. After concluding that there was no implied right of action for Paraguay under the treaty, the Court noted that the Eleventh Amendment "provides a separate reason why Paraguay's suit might not succeed." Id. at 1356. Although Paraguay named the Governor as the defendant, the Court found that the *Ex parte Young* "exception" was not available because, unlike in *Milliken v. Bradley*, 433 U.S. 267 (1977), there was "no continuing effect" from a past violation of law. Id. at 1356. Cf. Hearings at 56 (cited in note 13) (discussing possible implications of the United States having recently joined the Berne Convention for whether Congress should act clearly to abrogate state immunity from suit for copyright infringements).

104. 117 S. Ct. at 2041-43 (describing in great detail the historic importance of control of navigable waters to state sovereignty).

Note, though, that neither decision prevents the United States government itself from bringing suits against states,[105] nor limits the power of the Supreme Court to review state court decisions in cases brought in state courts.[106] Thus, at another level, the decisions can be understood as reinforcing the powers of both the United States government's executive branch—by curtailing the powers of individual citizens and groups to sue states under Article I-enacted statutes, giving the United States theoretical control over what suits to bring—and of the Court itself, which may become the only federal court able to interpret certain federal laws applicable to the states.[107]

Ultimately, however, there remains something quite mystifying to me in the Rehnquist Court's eagerness to curtail the jurisdiction of federal courts in actions brought by individual federal claimants against states and their officials. The traditions of judicial federalism and constitutionalism have long relied on suits against officers to secure the effective enforcement of law, and in particular, federal law, against government, and especially state government, officials. I cannot help but wonder whether the early 19th century vision of the Marshall Court does not commend itself more to the world of today than does the vision of federal judicial power recently advanced in the Rehnquist Court.

105. See *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

106. See *Seminole Tribe*, 116 S. Ct at 1141 n.14 (noting that Court can review state court decisions in actions brought with consent in state courts). For a thoughtful discussion, see Vázquez, 106 Yale L. J. at 1700-09 (cited in note 20) (suggesting that such language could be read to support an "immunity from liability" interpretation of the Eleventh Amendment). Under the "immunity from liability" view, states need not consent to being sued on federal claims in their own courts. For reasons, some of which Professor Vázquez anticipates, id. at 708, discussing inter alia, *Nevada v. Hall*, 440 U.S. 410 (1979), I would not read the Amendment as providing such an immunity.

107. See Jackson, 72 N.Y.U. L. Rev. at 498-99 & n.20 (cited in note 67).