Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe

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SANCTIONING A TYRANNY: The Diminishment of *Ex parte* Young, Expansion of *Hans* Immunity, and Denial of Indian Rights in *Coeur d’Alene Tribe*

John P. LaVelle*

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The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

—Chief Justice John Marshall

They made many promises to us, but they only kept one: they promised to take our land, and they took it.

—Oglala Lakota Chief Red Cloud

I. INTRODUCTION

In recent years, the United States Supreme Court has issued opinions in federal Indian law cases signaling a dramatic retreat from the Court’s historic role as protector of the rights of Indian Tribes under the Constitution, laws and treaties of the United States and as a function of inherent tribal sovereignty. Prior to 1986, when President Reagan appointed then-Associate Justice William H. Rehnquist to the office of Chief Justice of the United States, Indian Tribes’ interests prevailed in most of the Supreme Court’s modern Indian law decisions. Since 1986, and inversely

3. See generally David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CAL. L. REV. 1573 (1996). Professor Getches writes: [T]he courts have generally served as the conscience of federal Indian law, protecting tribal powers and rights at least against state action, unless and until Congress clearly states a contrary intention. The Supreme Court has recently begun to depart from this traditional standard, abandoning entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court’s perceptions of non-Indian interests. Id. at 1573-74.
4. See Robert N. Clinton, The Dormant Indian Commerce Clause, 27 CONN. L. REV. 1055, 1056-57 (1995). Professor Clinton points out that “[t]he overall success rate of tribal claims in cases decided with opinions by the Supreme Court since 1959 is close to fifty percent, with those asserting tribal claims winning approximately 51 out of the 103 cases decided since 1959.” Id. Moreover, as Professor Clinton notes further, “for most five year periods between 1959 and 1986, tribal success rates generally averaged over sixty percent, in some cases reaching nearly seventy percent.” Id.
proportional to the rise of "States' rights" activism on the high court, the percentage of Supreme Court decisions favorable to Tribes' interests in Indian law cases has fallen steadily, year after year.

Today, this striking trend of anti-tribal adjudication by the Rehnquist Court has engendered great consternation and dismay among tribal leaders and Indian law scholars. These observers discern in the Court's disregard of longstanding legal principles protective of Tribes' most elemental rights a return to federal policy themes dominant during the devastating "termination" era of the 1950s, when Congress embarked on a nefarious mission to deprive Indian Tribes of all federal protection by unilaterally declaring an end to the federal government's historic guardianship responsibilities toward Indian Tribes and Indian people. Historically, of

5. Professor Akhil Reed Amar provides provocative commentary on the modern Supreme Court's elaboration of its "States' rights" ideology under the rubric of "Our Federalism":

Victims of government-sponsored lawlessness have come to dread the word 'federalism.' Whether emblazoned on the simple banner of 'Our Federalism' or invoked in some grander phrase, the word is now regularly deployed to thwart full remedies for violations of constitutional rights.

Today's Court seems to have lost sight of the People—and so it has transmogrified doctrines of federalism and sovereignty into their very antitheses. Sovereign immunity allows "sentinels" hired to uphold the law to become gunmen who are a law unto themselves. And "Our Federalism" perverts a structure designed to assure full remedies for constitutional wrongs into a system that regularly frustrates the remedial imperative. Whenever the rhetoric of "states' rights" is deployed to defend states' wrongs, our servants have become our masters; our rescuers, our captors.

Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1425, 1520 (1987) (footnotes omitted); see also Erwin Chemerinsky, The Values of Federalism, 47 FLA. L. REV. 499, 540 (1995) ("During the 1950s and 1960s, objections to federal civil rights efforts were phrased primarily in terms of federalism. Rather than defend discrimination and government-mandated segregation, opponents of civil rights reforms cloaked their arguments in the rhetoric of states' rights. Efforts to use federalism to mask the real issue are not a thing of the past.").

6. See Clinton, supra note 4, at 1057. Professor Clinton writes: "In the period between 1986 and 1990 tribal interests won in the Supreme Court only twenty percent of the time and since 1990 tribal claims have prevailed in only fourteen percent of the cases." Id.

7. In this regard, Professor Ralph Johnson and Berrie Martinis point out that [t]he federal government has experimented with termination before, with devastating results for Indian tribes. Despite the lessons the government learned through its historical policy vacillations, and despite its current commitment to tribal sovereignty and self-determination, Rehnquist is advocating and implementing a judicial termination policy.

One can only hope that Rehnquist loses his majority before his judicial agenda completely devastates tribal sovereignty.

course, it has been Congress which has had the greatest impact of the three branches of the federal government on the political destiny of Indian Tribes, arrogating to itself, with the Supreme Court's approval, a "plenary power" over Indian affairs, exercised at times with the most brutal consequences for the Tribes. Because of this historic dominance by Congress in regulating the relationship between Indian Tribes and the United States government, one might have supposed that worries over a proliferating "judicial termination" of Indian Tribes through the exercise of "judicial plenary power" were

8. The watershed case declaring an expansive congressional "plenary power" over Indian affairs is *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The *Lone Wolf* Court wrote:

> When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy...

> . . . If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.

*Id.* at 566, 568.

9. Johnson & Martinis, *supra* note 7, at 7, 24 (emphasis added). The authors use the phrase "judicial termination" to identify a hallmark of the Rehnquist Court's approach to the rights of Indian Tribes. They point out that

> although Congress has rejected the policy of termination, Rehnquist and the Court seem to have adopted it. Chief Justice Rehnquist has made it his policy to chip away at the sovereignty of Indian nations. His policy contradicts not only the will of Congress, but also a long line of Supreme Court decisions affirming inherent tribal sovereignty.

*Id.* at 7.

10. Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 327-28 (1997) (emphasis added). Professor Pommersheim uses the phrase "judicial plenary power" in criticizing the Rehnquist Court's innovation of "claim[ing] for itself the unfettered power to determine the substantive reach of tribal court authority," explaining further that "even if Congress has not acted—where one would normally presuppose an unimpaired tribal sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law." *Id.*

In a similar vein, Curtis Berkey uses the phrase "judicial plenary power" to characterize the Supreme Court's "implicit divestiture" theory itself, as devised by then-Associate Justice Rehnquist in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Berkey writes:

> In addition to the threat of congressional extinguishment via plenary power, Indian sovereignty is subject to judicial abrogation. In *Oliphant* . . . the Supreme Court expanded congressional plenary power doctrine to include a measure of judicial plenary power over Indian sovereignty. The Court ruled that the Suquamish Tribe had no inherent authority to try and punish non-Indians who violate tribal criminal laws. To reach this result, the Court fashioned an entirely new doctrine of Indian sovereignty, the "implicit divestiture" rule. This rule may prove to be a greater threat to Indian tribal power than acts of Congress.
somewhat exaggerated. However, given the Supreme Court’s recurring inclination in recent Indian law cases to effectively displace Congress’s role in Indian affairs with the Court’s own innovative, “States’ rights”-oriented judicial policymaking, such fears about an impending torrent of irreparable

... Under the [implicit divestiture] doctrine, tribes cannot exercise any power inconsistent with their status as subjugated sovereigns, and the federal judiciary is empowered to survey the political and historical landscape to determine whether or not Indian sovereign powers have been implicitly divested.


11. See, e.g., *El Paso Natural Gas Co. v. Neztsosie*, 119 S. Ct. 1430 (1999) (9-0 decision) (declining to apply tribal court exhaustion doctrine to enable tribal jurisdiction over personal injury and wrongful death claims arising from nuclear accidents and brought against uranium mining corporations pursuant to the Price-Anderson Act, notwithstanding the absence of language in the Act forbidding such jurisdiction); *Arizona Dep’t of Revenue v. Blaze*, 119 S. Ct. 957 (1999) (9-0 decision) (declining to recognize federal preemption of a state tax as applied to contract between the Bureau of Indian Affairs and a business privately owned by a member of, and incorporated by, a Montana Tribe to improve roads on Indian reservations in Arizona); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (9-0 decision) (holding that land alienated from tribal ownership pursuant to the Nelson Act of 1889, but subsequently reacquired by the Tribe, is subject to state taxation, without addressing the Nelson Act’s non-incorporation of the General Allotment Act with respect to the parcels at issue and its absence of any mention of congressional intent to permit state taxation of lands initially distributed under the Act’s provisions but later reacquired by Tribes in fee); *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) (9-0 decision) (holding that lands belonging to Alaska Native Villages and governed by the Alaska Native Claims Settlement Act of 1971 are not “Indian country” within the meaning of federal law, notwithstanding Congress’s express inclusion of “all dependent Indian communities” as “Indian country,” and despite the absence of any language in the 1971 Act expressly divesting Alaska Native Villages’ lands of “Indian country” status); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (9-0 decision) (holding that the Yankton Sioux Reservation was diminished by an 1894 Act of Congress opening the Reservation to settlement by non-Indians, notwithstanding a savings clause stating that nothing in the statute “shall be construed to abrogate” the Tribe’s rights under a prior treaty and that “all provisions of the said treaty . . . shall be in full force and effect, as though this agreement had not been made”); *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) (9-0 decision) (holding that absent congressional authorization, a tribal court has no civil adjudicatory jurisdiction over the conduct of nonmembers on a state highway running through the Tribe’s reservation pursuant to a federally granted right-of-way, without addressing the absence of any language in the grant expressly divesting the Tribe of such jurisdiction and despite the fact that the conduct at issue “jeopardiz[ed] the safety of tribal members”); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (8-1 decision) (striking down as an unconstitutional taking a provision of the Indian Land Consolidation Act which permitted very small fractionated interests in allotted lands to escheat to Indian Tribes).

12. Professor Getches characterizes the Rehnquist Court’s tendency to engage in judicial policymaking when deciding Indian law cases as a “subjectivist trend” that threatens to subvert the “[b]edrock principles of Indian law . . . [that] left Indian country largely to tribal governance, except to the extent that Congress expressly extended federal or state jurisdiction or limited tribal powers.” Getches, supra note 3, at 1575, 1654. Professor Getches is careful to note, however, that this subversive development in Indian law yet may be arrested, since “the newer members of the Court are in a position to determine whether Indian law is brought back on course with
harm issuing from the Indian law decisions of the Rehnquist Court seem well-founded indeed.

This Article analyzes a recent decision of the Supreme Court that illustrates the enormous destructive power of the Rehnquist Court’s peculiar brand of anti-tribal activism, *Idaho v. Coeur d’Alene Tribe*. Ostensibly, *Coeur d’Alene Tribe* is an elaboration of the Court’s “pernicious” and “egregiously incorrect” Eleventh Amendment doctrine—one of the latest in a series of judicial missteps and “wrong turn[s]” along a perilous road that the Court itself has paved by means of “misconceived history and misguided logic” beginning in 1890 with the Court’s grossly erroneous post-Reconstruction era decision in *Hans v. Louisiana*. As yet another badly decided Eleventh Amendment case, *Coeur d’Alene Tribe* is likely to heighten the urgency with which Eleventh Amendment scholars have called for an overruling of *Hans* to ameliorate the damage that *Hans* and its fundamental principles, or whether it will continue as a rudderless exercise in judicial subjectivism.” Id. at 1576.


15. *Id.* at 304 (Stevens, J. dissenting) (quoting Florida Dep’t of Health v. Florida Nursing Home Ass’n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring)).


17. *Id.* at 302 (Brennan, J., dissenting).

18. 134 U.S. 1 (1890). For a discussion of *Hans*, see infra notes 49-70 and accompanying text.

19. Critics of the Supreme Court’s Eleventh Amendment doctrine have included the Justices themselves as well as academic commentators. In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987), Justice Brennan wrote a dissenting opinion in an Eleventh Amendment case expressing the conviction of four Justices that *Hans* should be overruled: “[I]t is time to begin a fresh examination of Eleventh Amendment jurisprudence without the weight of that mistaken precedent.” *Id.* at 521 (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.); see also *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.) (“I would accept Respondent Muth’s invitation to overrule *Hans v. Louisiana*, . . . as that case has been interpreted in this Court’s recent
progeny already have done to the regime of federally protected rights under
the Constitution, laws and treaties of the United States—a regime at the core
of the Framers’ vision of paramount federal law and essential to securing
true liberty for all Americans in a constitutional democracy.

However, Coeur d’Alene Tribe is not exclusively, or even primarily, a
case about the Supreme Court’s profound misconceptions concerning the
Eleventh Amendment and the nature and structure of federalism within the
framework of the United States Constitution. More importantly, Coeur
d’Alene Tribe is a case about the United States government’s systematic
betrayal of Indian Tribes and Indian people, and thus it evinces a story of
affliction, duplicity and treachery that is as old and enduring as the United
States government itself. And for those observers of American
constitutional law who may be inclined to dismiss the Supreme Court’s
Indian law cases as of little importance in the larger scheme of things,
an
examination of Coeur d'Alene Tribe should serve as a sobering reminder of the dire implications for constitutional democracy that necessarily arise whenever Indian Tribes are made to suffer a great injustice at the hands of the United States legal system. For, as Felix Cohen pointed out a half century ago in perhaps the most famous passage in all federal Indian law scholarship,

the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.22

II. THE COEUR D'ALENE TRIBE LITIGATION IN THE LOWER FEDERAL COURTS

A. The Birth and Sudden Death of a Tribe's Request for Justice

The legal dispute that culminated in the Supreme Court's Coeur d'Alene Tribe decision began in 1991, when the Coeur d'Alene Tribe of Idaho and some of its individual tribal members filed a suit in the United States District Court for the District of Idaho against the State of Idaho and several state agencies and officers.23 The Tribe24 claimed that it retained unextinguished aboriginal title to the banks and beds of the navigable waterways25 located within the original boundaries of the Coeur d'Alene Reservation as established by Executive Order in 1873.26 The Tribe asserted further that

the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples.


24. Following the convention adopted by the federal district court in Coeur d'Alene Tribe, see id., this Article hereinafter refers to the plaintiffs collectively as the "Tribe."


pursuant to Congress’s acquiescence in the establishment of the reservation, as well as Congress’s subsequent further recognition of the reservation by statutory enactments, the Tribe was entitled to the exclusive use and enjoyment of the disputed lands. The Tribe asked the federal court to secure the Tribe’s federal rights to these submerged lands by quieting title to them; declaring them to be for the Tribe’s “exclusive use, occupancy, and enjoyment”; declaring invalid all the defendants’ ongoing regulatory actions purporting to impose state dominion over these submerged lands; and enjoining Idaho, its agencies and its officers from any further attempts at regulating these lands and waters or otherwise interfering with the Tribe’s exclusive rights to them.

Instead of answering the Tribe’s complaint, the defendants filed a motion to dismiss the complaint under the Federal Rules of Civil Procedure, arguing that all of the defendants—the State and its agencies, as well as the individually named state officers—were immune from federal suit pursuant to the Eleventh Amendment of the United States Constitution, and that the Tribe had failed to state a claim upon which relief may be granted. Propelled by these initial filings by the parties, the district court proceeded to give its attention exclusively to the defendants’ threshold challenges to the court’s jurisdiction, leaving the substantive allegations in the Tribe’s complaint in a permanently underdeveloped, “preliminary” state for the duration of the litigation. Yet, despite the Tribe’s preliminary claims being


29. Rule 12(b) of the Federal Rules of Civil Procedure provides in relevant part that “the following defenses may at the option of the pleader be made by motion: . . . (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b).


31. For a series of exchanges between the Supreme Court Justices and the Coeur d’Alene Tribe’s counsel during oral argument concerning the Tribe’s frustration for having been denied an opportunity throughout the litigation adequately to present and develop its claims, see United States Supreme Court Official Transcript, Idaho v. Coeur d’Alene Tribe, 521 U.S. 261 (1997) (No. 94-1474), available in 1996 WL 604993. One particular exchange demonstrates this frustration:

QUESTION: . . . Does [the complaint] set forth with any specificity, or do other pleadings, supplemental pleadings set forth with any specificity exactly what these officers are doing that is inconsistent with the ownership that you allege?

MR. GIVENS: The short answer is no, there are no supplemental pleadings, Your Honor, and that’s part of the difficulty of the whole case . . . . [T]his case stems from the most preliminary procedures.

Id. at *26-27.
thus forcibly suspended in a perpetual state of procedural "limbo," neither
the district court nor the Supreme Court subsequently showed any
compunction about condemning the merits of the Tribe's claims while
simultaneously blocking the Tribe's every effort to present those claims in a
developed form.\textsuperscript{32}

\textit{B. The District Court Decision}

The Federal District Court in Idaho ruled against the Tribe and in favor
of the defendants' motion to dismiss.\textsuperscript{33} In concluding that the Coeur d'Alene
Tribe was prohibited as a matter of law from seeking redress in federal court
against the State of Idaho, the state agencies, or the individually named
officers for ongoing violations of the Tribe's federal rights, the district court
divided its analysis into two primary inquiries: (1) whether the Tribe could
sue the State or the state agencies in federal court; and (2) whether the Tribe
could sue the individually named state officers in federal court. To each of
these inquiries, the district court responded in the negative.\textsuperscript{34}

1. Shielding in \textit{Hans/Blatchford} Immunity States' Violations of
Tribes' Federally Protected Rights

The district court first determined that, in view of the Supreme Court's
decision in \textit{Blatchford v. Native Village of Noatak},\textsuperscript{35} the Tribe's claims
against the State of Idaho and the state agencies were completely barred "by
operation of the Eleventh Amendment."\textsuperscript{36} In \textit{Blatchford}, the Supreme Court
dismissed on Eleventh Amendment grounds a complaint filed in federal court
by three Inupiat Indian Villages in Alaska.\textsuperscript{37} The Native Villages had alleged
that a state commissioner had engaged in racially discriminatory conduct to
the Villages' detriment by classifying them as "racially exclusive group[s]" or
"racially exclusive organization[s]" and by refusing to deal with them as

\textsuperscript{32} For a discussion of this effective condemnation of the merits of the Coeur d'Alene
Tribe's claims "at the threshold" by the district court and the Supreme Court, see \textsuperscript{infra} notes 83-
125 and accompanying text, and notes 283-89 and accompanying text.

\textsuperscript{33} \textit{See Coeur d'Alene Tribe}, 798 F. Supp. at 1446.

\textsuperscript{34} \textit{See id.} at 1446-52.


\textsuperscript{36} \textit{Coeur d'Alene Tribe}, 798 F. Supp. at 1448.

\textsuperscript{37} \textit{See Blatchford}, 501 U.S. at 788 (reversing the determination of the Ninth Circuit Court
of Appeals that the Eleventh Amendment affords States no immunity from suits brought by Indian
Tribes).
federally recognized tribal governments. The Blatchford Court treated the Native Villages’ allegation that the commissioner’s allegedly racially discriminatory treatment had deprived them of a legislatively authorized revenue-sharing entitlement as a claim for damages against the State of Alaska itself, and held that, even assuming Alaska Native Villages are Indian Tribes for purposes of federal law, the Eleventh Amendment nevertheless “operates to bar suits by Indian tribes against States without their consent.”

In the Blatchford Court’s reasoning, the Native Villages’ claim for damages was prohibited because (1) the Eleventh Amendment implicitly immunizes States from suits initiated by Indian Tribes, and (2) in specifically

38. Id. at 777-78; see also Brief for Respondent Native Village of Noatak at 1-2, Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) (No. 89-1782), available in 1990 WL 505717 at *1-2. The Supreme Court provided a concise summary of the complex controversy that led to the Blatchford decision:

In 1980, Alaska enacted a revenue-sharing statute that provided annual payments of $25,000 to each “Native village government” located in a community without a state-chartered municipal corporation. The State's attorney general believed the statute to be unconstitutional. In his view, Native village governments were “racially exclusive groups” or “racially exclusive organizations” whose status turned exclusively on the racial ancestry of their members; therefore, the attorney general believed, funding these groups would violate the equal protection clause of Alaska’s Constitution. Acting on the attorney general’s advice, the Commissioner of Alaska’s Department of Community and Regional Affairs... enlarged the program to include all unincorporated communities, whether administered by Native governments or not...

The legislature repealed the revenue-sharing statute in 1985, and replaced it with one that matched the program as expanded by the commissioner. In the same year, respondent[ ] filed this suit, challenging the commissioner’s action on federal equal protection grounds, and seeking an order requiring the commissioner to pay them the money that they would have received had the commissioner not enlarged the program.

Blatchford, 501 U.S. at 777-78 (citations omitted).

39. In that portion of the majority opinion discussing whether suits against States brought by Indian Tribes generally are barred by the Eleventh Amendment, the Court did not address the issue of whether Alaska Native Villages are Indian Tribes. See Blatchford, 501 U.S. at 775-82. However, in its subsequent discussion of whether 28 U.S.C. § 1362 constitutes either a congressional delegation to Indian Tribes of the United States’ exemption from the “bar” of the Eleventh Amendment, or else a congressional abrogation of the States’ immunity from suits brought by Tribes, the Court wrote, in a footnote: “Because we find that § 1362 does not enable tribes to overtake Alaska’s sovereign immunity, we express no view on whether these respondents qualify as ‘tribes’ within the meaning of the statute.” Id. at 788 n.5.

40. Id. at 782-83.

41. See id. at 781-82. The Court asserted that “with regard to Indian tribes, there is no compelling evidence that the Founders thought... a surrender [of state sovereign immunity] inherent in the constitutional compact.” Id. at 781. The Blatchford Court also posited the following Eleventh Amendment doctrine rationale, repeated by the district court in the
authorizing federal jurisdiction over "all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States,"\textsuperscript{42} Congress did not thereby abrogate "by a clear legislative statement" the States' Eleventh Amendment immunity.\textsuperscript{43}

In a dissenting opinion joined by Justices Marshall and Stevens, Justice Blackmun criticized the \textit{Blatchford} majority for "compound[ing] the error of \textit{Hans v. Louisiana} . . . and its progeny" by expanding, to include Indian

\textit{Coeur d'Alene Tribe} litigation, for preventing foreign nations and Indian Tribes from suing States in federal court, while permitting States to sue one another in federal court:

What makes the States' surrender of immunity from suit plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes . . . . [I]f the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

\textit{Id.} at 782; see also \textit{Coeur d'Alene Tribe}, 798 F. Supp. at 1447. This "mutuality of concession" rationale for subjecting States—notwithstanding the Eleventh Amendment doctrine—to federal court suits brought by other States stands in sharp contrast to the rationale for this exemption as put forward in \textit{South Dakota v. North Carolina}, 192 U.S. 286 (1904), the only case cited by Justice Scalia for the existence of the exemption. \textit{See Blatchford}, 501 U.S. at 782. In \textit{South Dakota}, the Supreme Court, quoting from Chief Justice Marshall, indicated that the reason federal courts may have jurisdiction over suits brought by States against other States, notwithstanding the Eleventh Amendment, is that such jurisdiction "might be essential to the preservation of peace." \textit{South Dakota}, 192 U.S. at 316 (internal quotation marks omitted) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821)). In the brief it submitted to the Supreme Court, Circle Village provided additional argumentation for doubting the validity of what emerged from \textit{Blatchford} as a revisionist quid-pro-quo rationale for recognizing federal court jurisdiction over suits against States brought by other States, but not by Indian Tribes:

\textit{[T]he states surrendered a portion of their historic sovereignty upon admission to the Union. Part of that surrender involved a surrender of such immunity as necessary to permit suits by and among the states and federal government to resolve controversies in a manner consistent with the essential need for the peace of the Union. . . .}

\textit{Similarly, upon association with the Union, Indian tribes either surrendered or involuntarily lost a portion of their historic sovereignty. Unlike the states, however, the tribes entered the Union upon decidedly unequal terms. . . . In this day and age the suggestion that Indian tribes must resort to war to seek redress of their complaints is simply bad policy and contrary to the peace of the Union. It therefore follows that Indians should have redress of their political rights in disinterested forums for the same reasons that the state[s] have such access.}

Tribes, the classes of plaintiffs "implicitly" prohibited by the Eleventh Amendment from suing States in federal court. Justice Blackmun further denounced the Blatchford majority for deploying against Indian Tribes the Court's newly invented "clear statement rule," which denies the effectiveness of congressional abrogation of the States' Eleventh Amendment immunity unless Congress declares its intent to abrogate in the text of a statute. Quoting from a dissenting opinion by Justice Brennan in a previous case, Justice Blackmun pointed out that the "clear statement rule" functions as a "hurdle[ ] designed to keep . . . disfavored suits out of the federal courts."

As Justice Blackmun recognized, the Court's decision in Blatchford to immunize lawbreaking conduct by the States from accountability in federal court via suits initiated by Indian Tribes was an exacerbation of the Hans Court's essentially flawed and politically motivated interpretation of the Eleventh Amendment in 1890. While a detailed exploration of Hans is beyond the scope of the present Article, a brief discussion of the meaning of Hans will help underscore the gravity attending the Rehnquist Court's elaboration of the Hans doctrine in modern Indian law cases. For the crosscurrents represented by the Rehnquist Court's aggrandizement of its ersatz Eleventh Amendment doctrine together with its subversion of the Court's own historic Indian law jurisprudence give rise to ominous

44. Id. at 789-90 (Blackmun, J., dissenting) (citing Hans v. Louisiana, 134 U.S. 1 (1890)).
45. See id. at 790-96 (Blackmun, J., dissenting). The Blatchford majority opinion implies that there is authority for the "clear statement rule" from as early as the Court's decision in Atascadero, 473 U.S. at 234. See Blatchford, 501 U.S. at 786. However, as a rule requiring that "evidence of congressional intent [to abrogate state sovereign immunity] must be both unequivocal and textual," Dellmuth, 491 U.S. at 230 (emphasis added), the rule was not invented until the Rehnquist Court's Dellmuth decision in 1989. Moreover, both Atascadero and Dellmuth—like virtually every Eleventh Amendment decision of the modern Supreme Court, including Coeur d'Alene Tribe—sharply divided the Court, with Justices Blackmun, Brennan, Marshall and Stevens filing or joining dissenting opinions in both cases. See supra note 19.
46. Blatchford, 501 U.S. at 790 (Blackmun, J., dissenting) (quoting Atascadero, 473 U.S. at 254 (Brennan, J., dissenting)) (internal quotation marks omitted).
47. See id. at 789-90 (Blackmun, J. dissenting).
48. Justice Stevens has referred to the Supreme Court's "two Eleventh Amendments," the first one enacted by the ratifiers and adopters of the Eleventh Amendment of the United States Constitution, and the second one an ill-conceived product of the Court's own "Hans immunity" doctrine:

It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment . . . . In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like Hans . . . .

implications for accelerating the erosion of core principles of federal Indian law. Indeed, the crosscurrents so starkly manifested in both Blatchford and Coeur d'Alene Tribe threaten the ability of the United States Constitution to protect the American people from tyranny emanating from state governments and state officials. With so much at stake for Indian people and non-Indians alike in the Rehnquist Court's exacerbation of Hans, appreciating the implications of this case becomes all the more important for Americans today, more than a century after that jurisprudential fiasco was inaugurated.

In Hans, the Supreme Court decided that the United States Constitution insulates a resisting State from being sued in federal court by a citizen of that same State for allegedly violating that citizen's federal rights.49 The Hans Court characterized this proposition for sanctioning illegal state action as a logically necessary implication of the Eleventh Amendment,50 which had been ratified and made part of the Constitution a century earlier.51 However, there is a more accurate way to understand the Amendment.

In its entirety, the Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

49. In his opinion for the Court, Justice Bradley purported to discern in the Constitution a "rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals" and to "declare [the rule's] existence." Hans, 134 U.S. at 21. In a brief concurring opinion, Justice Harlan clarified the majority opinion as "holding that a suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends." Id. (Harlan, J., concurring).

50. The Hans Court insisted that unless the Eleventh Amendment were read as protecting a State from a federal question suit brought by a citizen of that same State, we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.

Id. at 10.

51. Professor John Orth elaborates on the ratification of the Eleventh Amendment, as prompted by the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), discussed infra at note 58. Professor Orth writes:

Because of delays, judgment for Chisholm was not entered until February 14, 1794. By March 4, 1794, Congress by two-thirds majorities in both houses had proposed the amendment, and by February, 1795, the legislatures of three-fourths of the states had ratified it. Although the requirements of the U.S. Constitution, article V, were then satisfied, the President did not notify Congress that the amendment was in effect until January 8, 1798. The latter date is the one commonly given for ratification.


52. U.S. CONST. amend. XI.
There is nothing in the text of the Eleventh Amendment that could be read as generally limiting the power of federal courts to hear suits against States (or any other defendants) accused of violating federal law—a power expressly granted the federal courts under Article III of the Constitution.\textsuperscript{53} Rather, a literal or "plain meaning" interpretation of the text of the Eleventh Amendment is that the Amendment ensures only that a State cannot be sued in federal court by either (1) a "Citizen[ ] of another State," or (2) a "Citizen[ ] or Subject[ ] of [a] Foreign State," i.e., an alien.\textsuperscript{54} Moreover, since this language closely tracks the grants of such "state-citizen diversity" and "state-alien diversity" jurisdiction under Article III,\textsuperscript{55} it is reasonable to conclude that the adopters of the Eleventh Amendment intended nothing more than to require that those specific diversity clauses be construed to confer federal jurisdiction only where the State is plaintiff.\textsuperscript{56} The Amendment's precisely targeted instruction for construing the state-citizen and state-alien diversity clauses leaves untouched and intact all the other, independent heads of federal jurisdiction available under Article III—including, of course, that most important type of subject matter jurisdiction known as federal question jurisdiction.\textsuperscript{57}

\textsuperscript{53} See U.S. CONST. art. III, § 2, cl. 1. The Constitution's grant of federal question or "arising under" jurisdiction to the federal courts consists of the following language from Article III: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."\textsuperscript{Id.}

\textsuperscript{54} U.S. CONST. amend. XI; see supra text accompanying note 52.

\textsuperscript{55} Compare U.S. CONST. amend. XI, quoted in full supra at text accompanying note 52, with U.S. CONST. art. III, § 2, cl. 1 (granting the respective types of diversity jurisdiction to the federal courts by means of the following language: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens or Subjects.").

\textsuperscript{56} For elaboration on the "diversity explanation" of the Eleventh Amendment, see, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 76-100 (1996) (Stevens, J., dissenting); id. at 100-68 (Souter, J., dissenting); Welch v. Texas Department of Highways and Public Transportation, 483 U.S. 468, 504-16 (1987) (Brennan, J., dissenting); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 258-302 (1985) (Brennan, J., dissenting). See generally Fletcher, supra note 19 at 1130 (suggesting "that the adopters of the [Eleventh] amendment originally had the more modest purpose of requiring that the state-citizen diversity clause of Article III be construed to confer jurisdiction on the federal courts only when a state sued an out-of-state citizen"); Gibbons, supra note 19, at 2004 (urging "a strict construction of the eleventh amendment . . . that takes full account of its text and actual legislative history," and thus "acknowledge[s] that the eleventh amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status" rather than the assertion of a federal question).

\textsuperscript{57} See U.S. CONST. art. III, § 2, cl. 1; supra note 53.
Notwithstanding the persuasiveness of this "diversity" view of the Eleventh Amendment's meaning, the Hans Court chose instead to proclaim the existence of a new and expansive immunity insulating States from accountability in federal court for violating their own citizens' federal rights. Specifically, the Hans Court granted the State of Louisiana immunity, under the Eleventh Amendment, from federal suit by a Louisiana citizen for nonpayment of state bonds in violation of his federal rights under the Contract Clause of the United States Constitution. Although the Hans Court purported to deduce this immunity directly from the contents of the Eleventh Amendment, the advent of this so-called "Hans immunity" is

58. William A. Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. CHI. L. REV. 1261, 1263 (1989). As Professor Fletcher and others have pointed out, this "diversity explanation" of the Eleventh Amendment's meaning is particularly compelling in view of the historic origin of the Amendment as a reaction to the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). In Chisholm, the Court construed the grants of federal jurisdiction under Article III as permitting the Supreme Court to hear a suit brought by a citizen of South Carolina alleging a state common law violation by the State of Georgia. See id. at 420-21. Chisholm, in other words, was strictly a state-citizen diversity case—not a federal question case—since the plaintiff in Chisholm asserted only a state-law cause of action. See id. at 429-30 (Iredell, J. dissenting) (pointing out that "[t]he action is an action for assumpsit"). Hence, the Eleventh Amendment, as a reaction to the Chisholm Court's controversial affirmation of constitutional power for a federal court to adjudicate a state-law-based suit raised against a State by a citizen of a different State, presumably was drafted to effectuate a narrow overturning of Chisholm by specifically forbidding federal courts from ever again hearing such a suit premised strictly on the grant of state-citizen diversity jurisdiction under Article III. As Professor Fletcher suggests,

Under this interpretation, the adopters of the amendment were following the traditions of common law lawyers in solving only the problem in front of them by requiring a limiting construction of the state-citizen diversity clause. . . . [T]he adopters did not intend it to prohibit a broad range of cases with which they had so far had little or no experience and as to many of which they could then have had little clear idea.

Fletcher, supra note 19, at 1063.

59. The Hans Court purported to rely on Justice Iredell's dissenting opinion in Chisholm in inventing this new sanction for state defiance of federal law:

[O]n this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of Chisholm v. Georgia; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion.

Hans v. Louisiana, 134 U.S. 1, 12 (1890). Ironically, Justice Iredell had insisted in his Chisholm dissent that "the application of law, not the making of it, is the sole province of the Court." Chisholm, 2 U.S. (2 Dall.) at 449 (Iredell, J., dissenting).

60. For an excerpt from the Hans Court's avowed rationale, see supra note 50. Professor Fletcher points out that an obvious flaw of logic in the Hans Court's effort to avoid the "anomalous result" of a State being subjected to federal question suits if brought by state citizens while being insulated from such suits if brought by citizens of other States is the Court's presumption of its conclusion—that the Eleventh Amendment addresses federal questions suits. See Fletcher, supra
properly explained in terms of certain covert political pressures influencing the Court's jurisprudence in post-Reconstruction America of the late nineteenth century. In his dissenting opinion in *Seminole Tribe v. Florida,* Justice Souter reflected on the era-specific politics that spawned the advent of *Hans* immunity:

*Hans* was one episode in a long story of debt repudiation by the States of the former Confederacy after the end of Reconstruction. The turning point in the States’ favor came with the Compromise of 1877, when the Republican Party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes. The troop withdrawal, of course, left the federal judiciary “effectively without power to resist the rapidly coalescing repudiation movement.” Contract Clause suits like the one brought by Hans thus presented this Court with “a draconian choice between repudiation of some of its most inviolable constitutional doctrines and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments.”

Given the likelihood that a judgment against the State could not be enforced, it is not wholly

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note 19, at 1060-61. In this regard, Professor Fletcher suggests how common sense provides a “way out” of the obfuscation that the *Hans* Court has infused into the Eleventh Amendment:

If one reads the amendment literally, and if one assumes it was intended to forbid federal question suits, one is led to the following unlikely result: All suits brought against a state by an out-of-state citizen are prohibited regardless of the existence of a federal question, but at the same time any suit brought against a state by a citizen of that state is permitted, provided a federal question exists. This result appears so unlikely that one must suspect the adopters did not intend the amendment to prohibit federal question suits against the states, for if this was their intent they would have prohibited suits by *all* private citizens, not merely those by out-of-state citizens.

*Id.* (footnotes omitted). Likewise, in his *Seminole Tribe* dissent, Justice Souter criticized the *Hans* Court's “logic” as follows:

The Court rested its opinion on avoiding the supposed anomaly of recognizing jurisdiction to entertain a citizen's federal question suit, but not one brought by a noncitizen. There was, however, no such anomaly at all. . . . [F]ederal-question cases are not touched by the Eleventh Amendment, which leaves a State open to federal-question suits by citizens and noncitizens alike.


61. *See Seminole Tribe,* 517 U.S. at 126 (Souter, J., dissenting) (noting that “many . . . [Supreme Court] opinions . . . have suggested that the *Hans* immunity is not of constitutional stature”).

surprising that the *Hans* Court found a way to avoid the certainty of the State’s contempt.63

Thus viewed in light of American legal and political history,64 *Hans* immunity stands exposed, not only as a reflection of grave deficiencies in the Supreme Court’s logical reasoning and conceptual appreciation of the Constitution’s textual and structural guarantees of federal supremacy, but also as an ignoble capitulation by the Court to base political pressures presumably emanating from—to borrow Alexander Hamilton’s phrase—“[t]he most bigoted idolizers of State authority.”65

Despite these problems manifested in the judicial creation of the doctrine of *Hans* immunity in 1890, the Supreme Court since that time has refused to repudiate this device for countenancing state violations of federal law. On the contrary, the Court periodically has infused *Hans* immunity with even greater destructive potency and reach. Thus, in 1921, the Court extended *Hans* immunity to insulate States from accountability in federal court for violating the rights of individuals asserted in federal admiralty proceedings.66 And in 1934, the Court again extended *Hans* immunity to shield States from

63. *Id.* at 120-21 (Souter, J., dissenting) (citations omitted) (quoting *Gibbons*, *supra* note 19, at 1974, 1981).

64. Interestingly, the Supreme Court majority in *Seminole Tribe* expressed disdain for Justice Souter’s efforts at illuminating the political and historical dimensions of the Court’s 1890 *Hans* decision, lambasting Souter’s critique as an “undocumented and highly speculative extralegal explanation of the decision in *Hans*” and “a disservice to the Court’s traditional method of adjudication.” *Id.* at 68-69. In response, Justice Souter defended his analysis of the political and historical events bearing on the *Hans* decision by pointing out that “it is just because *Hans* is so utterly indefensible on the merits of its legal analysis that one is forced to look elsewhere in order to understand how the Court could have gone so far wrong.” *Id.* at 122-23 n.17 (Souter, J., dissenting).

65. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton used the phrase to stress the importance of the Constitution’s extension of federal judicial power “[t]o cases of admiralty and maritime jurisdiction.” *Id.* at 480. As Hamilton put it, “[t]he most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.” *Id.* at 478.

It is worth noting that, notwithstanding the universally understood importance of the Constitution’s authorization of federal jurisdiction over admiralty proceedings—an issue which, according to Hamilton, “seems scarcely to admit of controversy,” *id.* at 475—the Supreme Court in 1921 extended its *Hans* immunity doctrine to insulate States even from federal court actions sounding in admiralty. *See Ex parte New York*, No. 1, 256 U.S. 490, 498 (1921) (“[I]t seems to us equally clear that [the Eleventh Amendment] cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not.”). However, in the recent case of *California v. Deep Sea Research, Inc.*, the Court appears to have withdrawn a portion of its presumed conferral of *Hans* immunity in admiralty cases, perhaps in strategic preparation for a collateral withdrawal of *Ex parte Young* relief with respect to any case in which state officials are in possession of property to which a plaintiff asserts colorable title under federal law. 523 U.S. 491 (1998); see also infra notes 234-74 and accompanying text.

federal court suits brought by foreign nations as distinguished from individuals. The Court's 1991 *Blatchford* decision constituted yet another entrenchment of the error-laden *Hans* immunity doctrine, with the Court "compound[ing] the error of *Hans* . . . and its progeny by extending the doctrine of state sovereign immunity to bar suits by tribal entities, which are neither 'Citizens of another State,' nor 'Citizens or Subjects of any Foreign State.'" Hence, with this broad shield of immunity from federal suits by Indian Tribes recently fashioned in *Blatchford*, the federal district court in the *Coeur d'Alene Tribe* litigation was freshly licensed to view itself as bound by precedent to "find[ ] that this action is completely barred as against

67. See Principality of Monaco v. Mississippi, 292 U.S. 313 (1934). In *Monaco*, the Principality of Monaco argued that federal jurisdiction over that foreign nation's claim against the State of Mississippi for nonpayment of state bonds was available under the Constitution's extension of federal judicial power "to Controversies . . . between a State . . . and foreign States," see U.S. CONST. art. III, § 2, cl. 1. *See Monaco*, 292 U.S. at 320-21. The *Monaco* Court rejected that argument: "As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State." *Id.* at 330.


69. In fact, the *Blatchford* decision was *doubly* instrumental in effectively sanctioning state violations of Indian Tribes' federal rights, including the Coeur d'Alene Tribe's federally protected rights to submerged lands within reservation boundaries. For, as mentioned previously, see supra notes 41-43 and accompanying text, in addition to holding that the doctrine of Eleventh Amendment "state sovereign immunity," as invented in *Hans*, attaches generally when an Indian Tribe sues a State in federal court, the *Blatchford* majority also held that in expressly conferring federal court jurisdiction over "all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1362 (1994), Congress thereby did not intend to abrogate the States' *Hans* immunity with respect to actions brought by Indian Tribes, since the text of Section 1362 fails to qualify as an abrogation of that immunity under the "clear statement rule" that the Court had announced two years before the *Blatchford* decision, in *Dellmuth* v. Muth, 491 U.S. 223 (1989). *See Blatchford*, 501 U.S. at 786-88; see also supra notes 45-46 and accompanying text.

As Justice Blackmun pointed out in his *Blatchford* dissent, the Court's cavalier application of this "clear statement rule" in the context of Tribe-State disputes on the unremarkable premise that "Congress does not casually alter the 'balance of power' between the Federal Government and the States" is especially troubling. *Blatchford*, 501 U.S. at 790 (Blackmun, J., dissenting). For, as Blackmun noted, in this area, the pertinent "balance of power" is between the Federal Government and the tribes, with the States playing only a subsidiary role. Because spheres of activity otherwise susceptible to state regulation are, "according to the settled principles of our Constitution . . . committed exclusively to the government of the Union" where Native American affairs are concerned, the presumptions underlying the clear-statement rule, and thus the rule itself, have no place in interpreting statutes pertaining to the tribes.

*Id.* at 792 (Blackmun, J., dissenting) (citation omitted) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)).
the State of Idaho itself, as well as its agencies, by operation of the Eleventh Amendment."\(^70\)

2. Rendering Irrebuttable *Montana*'s Erroneous Rebuttable Presumption

While the district court apparently found itself compelled by *Hans* and *Blatchford* to dismiss the Coeur d'Alene Tribe's efforts to seek a federal court remedy against *Idaho and its agencies* for the State's allegedly illegal appropriation of the Tribe's property, the court assumed a decidedly more activist posture in dismissing the Tribe's claims against the defendant state officials, who the Tribe alleged were engaged in an ongoing violation of federal law by regulating submerged lands committed to the Tribe's exclusive ownership and use by a combination of federal executive and congressional action.\(^71\) As the court recognized, suits brought in federal court for prospective relief against state officials who violate federal law long have been understood as permitted under the doctrine of *Ex parte Young*,\(^72\) even where *Hans* immunity is deemed to have placed the State itself beyond federal court accountability.\(^73\) Thus the district court intimated that under the *Young* doctrine, "a federal court may issue an injunction to prohibit a state official from violating federal law," and that "such an injunction may govern an official's future conduct, but may not attempt to award retroactive relief."\(^74\) In reaching its extreme conclusion that the Coeur d'Alene Tribe may not seek any relief in federal court under the *Young* doctrine for the alleged ongoing violation of the Tribe's federally protected rights by Idaho officials, the district court distinguished and analyzed separately the Tribe's claims for (1) declaratory relief and (2) injunctive relief.\(^75\)

The district court determined that the Tribe's claims against Idaho officials for declaratory relief were beyond the court's jurisdiction because of the immunity afforded by the Eleventh Amendment—i.e., that the Tribe would not be permitted to pursue these claims in federal court pursuant to the

\(^70\) Coeur d'Alene Tribe v. Idaho, 798 F. Supp. 1443, 1448 (D. Idaho 1992). The district court did not address the Tribe's further contention that, assuming States are generally immune from suits brought in federal court by Indian Tribes, and assuming further that Congress did not abrogate such immunity, the Tribe nevertheless could proceed to the merits of its federal court claim against Idaho since Idaho waived its immunity. See Coeur d'Alene Tribe v. Idaho, 42 F.3d 1244, 1249 (9th Cir. 1994); see also infra note 131 and accompanying text.

\(^71\) See supra text accompanying notes 23-28.

\(^72\) 209 U.S. 123 (1908).

\(^73\) See supra notes 49-70 and accompanying text.

\(^74\) Coeur d'Alene Tribe, 798 F. Supp. at 1448.

\(^75\) See id. at 1448-52.
Young doctrine because the declaratory relief sought by the Tribe was, in effect, retrospective rather than prospective in nature. Quoting from a 1985 Supreme Court opinion reflecting the prevailing trend of modern Court decisions narrowing the scope of relief available under Young, the district court reiterated that “declaratory relief is impermissible where such relief would ‘have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.’” With respect to the Coeur d’Alene Tribe’s claims, the district court held that

the declaratory relief sought by the Tribe would have the same effect as an award of damages or restitution by the court, which is not allowed under the Eleventh Amendment. . . . [T]he Tribe is essentially attempting to execute an “end run” around the rule in Edelman v. Jordan . . . which prohibits suits in federal court against state officials for money damages or the equivalent, under the Eleventh Amendment.

By thus characterizing the Tribe’s request for declaratory relief against the defendant Idaho officials as “essentially” a claim for “money damages or the equivalent,” the district court concluded that—as with the Tribe’s claims against the State itself—“the claims for declaratory judgment and to quiet title against the individual state officials also are barred by the Eleventh Amendment.”

Having relied on the modern Supreme Court’s expansion of Hans immunity to dismiss all the Coeur d’Alene Tribe’s claims against Idaho and its agencies, and having characterized the Tribe’s quiet title action and request for declaratory judgment against the defendant state officials as “really” claims for retrospective relief forbidden, as such, under the expanded Hans immunity doctrine, the federal district court next addressed the question whether the Tribe’s remaining claims for injunctive relief against the state officers could be maintained in federal court. The court’s answer was that even as to the requested injunctive relief—that is, even as to the Tribe’s legal efforts to prevent Idaho officials from continuing to violate

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76. See id. at 1448-49.
77. Id. at 1448 (internal quotation marks added) (quoting Green v. Mansour, 474 U.S. 64, 73 (1985)).
78. Id. (citation omitted) (adverting to Edelman v. Jordan, 415 U.S. 651 (1974)).
79. Id. at 1448-49.
80. See id. at 1449-52.
the Tribe's federal rights in the future—the Tribe's suit must be dismissed summarily from federal court as a matter of law.\[^{81}\]

As it did with the Tribe's claims for declaratory relief, the district court characterized the Tribe's claims for injunctive relief against the defendant Idaho officials as falling outside the reach of federal court jurisdiction permitted pursuant to the doctrine of *Ex parte Young*.\[^{82}\] Here, however, the district court considered the Tribe's claims for Young relief flawed, not because those claims were deemed to be retrospective rather than prospective in nature, but because, in the court's estimation, the Tribe did not and could not sufficiently allege that the defendant state officials in fact were violating federal law—a requirement for accessing the federal courts under the Young doctrine.\[^{83}\] In the blunt judgment of the court—a judgment necessarily devoid of illumination or support from any developed evidentiary record, since no such record as yet existed at this stage of the litigation\[^{84}\]—"the State of Idaho has been in rightful possession of all of the lands and waters at issue in this case since it entered the Union in 1890."\[^{85}\]

This remarkable fiat of the federal district court in Idaho—this summary condemnation, in the name of a threshold jurisdictional determination, of the merits of the Coeur d'Alene Tribe's preliminary and yet-to-be-developed request for injunctive relief—was, in essence, an attempt to expand a flawed ruling from one of the most corrosive decisions in all federal Indian law jurisprudence, the 1981 Supreme Court decision in *Montana v. United States*.\[^{86}\] The *Montana* Court addressed the question, inter alia, of whether the Crow Tribe owned the bed of the Big Horn River within the boundaries of the Crow Reservation in Montana.\[^{87}\] Despite language from the Fort

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81. See id. at 1452 ("[T]he Tribe is not entitled to an injunction against the individual defendants in either their official or individual capacities.").
82. See id. at 1449 (denying Young relief because the Tribe failed to "show that the injunction is necessary to prevent the state officials from continuing to violate rights secured and protected by federal law").
83. See id. (asserting that the Tribe's claims for injunctive relief against Idaho officials were "without foundation" by force of "the court's finding . . . that . . . these state officials are not violating any federal law").
84. See supra notes 31-32 and accompanying text.
87. See id. at 547. In addition to ruling on the ownership of the on-reservation segment of the Big Horn River, the *Montana* Court rendered a second holding that likewise has impaired tribal sovereignty. Concluding that the Crow Tribe lacked inherent authority "to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe," id. at 557, the Court stated:

[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express delegation. . . .
Laramie Treaty of 1868 solemnly promising "that the reservation 'shall be... set apart for the absolute and undisturbed use and occupation' of the Crow Tribe," the Supreme Court voted six to three in favor of the conclusion "that title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union" in 1889.

In rationalizing what was, in effect, a judicial assignment to the State of Montana of Indian reservation lands expressly protected under a federal treaty for the Crow Tribe's exclusive ownership and use, the Montana Court inserted an unprecedented fiction into the field of federal Indian law: that even with respect to an Indian reservation specially set apart by the United States during the territorial period as an exclusive homeland for an Indian Tribe, a "strong presumption" exists that all the navigable lakes, rivers and other watercourses within the boundaries of such reservation were not included as a part of the reservation, but instead were held continuously by the United States alone, acting as trustee for future States, for automatic conveyance to a State at the moment the State entered the Union. This "strong presumption," the Montana Court posited, is compelled by the judicially created "equal footing doctrine": "[T]he ownership of land under navigable waters is an incident of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted. . . . [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate . . . the activities of nonmembers who enter into consensual relationships with the tribe or its members . . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Id. at 564-66 (citations omitted). With this language, the Montana Court subverted the core principle of Indian law that Indian Tribes retain all sovereign authority except for what is expressly divested, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 7 § 1, at 122 (1942 ed.) ("What is not expressly limited remains within the domain of tribal sovereignty."). In place of that principle, the Montana Court erected the antithetical presumption that, with respect to nonmembers' activities within reservation boundaries, Indian Tribes lack all authority except for what is expressly granted. This presumption is rooted in the conviction "that Indian tribes cannot exercise power inconsistent with their diminished status." Montana, 450 U.S. at 565. Hence, both of these "Montana presumptions"—the one described in this note, and the one discussed infra at notes 90-111 and accompanying text—are projections of anti-tribal prejudice that operate to erode tribal sovereignty for the benefit of the States.

89. Id. at 556-57.
90. See id. at 551-52 ("A court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption against conveyance by the United States . . . .")
to such States when they enter the Union and assume sovereignty on an ‘equal footing’ with the established States.” 91 By force of this “general principle,” according to the Montana Court, federal instruments of the nineteenth century establishing Indian reservations must be construed in light of a “strong presumption” that those reservations did not include any of the navigable waterways enclosed within reservation boundaries.92 Applying this “strong presumption” in its analysis of the Crow Tribe’s treaty-based rights, the Montana majority concluded that “[t]he Crow treaties in this case . . . fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty.”93

But the Montana Court’s declaration of the existence of this “strong presumption” in favor of States’ claims to submerged lands located within the boundaries of Indian reservations represents a projection of multiple prejudices and errors in the Court’s analysis. For instance, the Montana Court erred in suggesting that any such general “presumption” existed at all during the nineteenth century, so as to function as a kind of States’ rights “backdrop” for the federal government’s pre-statehood disposals of submerged lands. As the Ninth Circuit Court of Appeals has noted, “[t]here is no evidence . . . that the presumption against pre-statehood federal grants of land under navigable waters had been established” prior to the Court’s first articulation of that “presumption” in 1926.94 Indeed, the Court’s early submerged lands/“equal footing doctrine” cases of Martin v. Waddell (1842)95 and Pollard’s Lessee v. Hagan (1845)96—cases the Montana Court

91. Id. at 551 (citations omitted).
92. See id. at 552-53.
93. Id. at 553.
94. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 961 n.27 (9th Cir. 1982) (citing United States v. Holt State Bank, 270 U.S. 49, 55 (1926)). The Ninth Circuit pointed out that “the earliest statement of the presumption appeared [in Holt in 1926]: ‘[D]isposals [of submerged lands] by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.’ ” Id. (quoting Holt, 270 U.S. at 55) (first alteration in original). But, as explained infra at note 111, Holt itself involved only a post-statehood disposal of submerged lands by the federal government, notwithstanding the Holt Court’s erroneous belief, apparently, that a pre-statehood disposal of submerged lands was at issue in that case. Hence, the Supreme Court’s first articulation in 1926 of its general “presumption” favoring state ownership of submerged lands located within the boundaries of pre-statehood federal disposals of land was, in essence, nothing more than misplaced dicta.
95. 41 U.S. (16 Pet.) 367 (1842) (holding that private land located in New Jersey that originally had been granted via a 17th century British royal charter to the Duke of York in his political capacity gave the successor no title to the enclosed land underlying navigable waters, which title instead was retained by the British Crown as an incident of sovereignty and passed to the
relied on in insisting, in effect, that the Court's "strong presumption" favoring state ownership of on-reservation submerged lands was at large during nineteenth century negotiations between Indian Tribes and the federal government—in fact did not involve pre-statehood disposals of submerged lands at all. As the Ninth Circuit has explained, those cases do not articulate any presumption concerning federal grants of land under navigable waters before a state is admitted to the Union. That presumption is said to flow from the "equal footing doctrine"—that new states enter the Union on an equal footing with the original states, all of which entered the Union owning the land under navigable waters within their borders. But Pollard's Lessee v. Hagan, generally regarded as the source of the equal footing doctrine, dealt with a purported federal grant of land years after Alabama had been admitted to the Union. And Martin v. Waddell, cited for the proposition that ownership of the land under navigable waters is an incident of sovereignty, involved land in one of the original thirteen states. The case required "clear and especial words" in a patent by the English Crown to a private individual because such a patent would transform a portion of the public domain into the individual's private property. The requirement was explicitly characterized as dictum. Moreover, the underlying rationale for this requirement is of doubtful relevance to a reservation of land by a sovereign Indian tribe. Such a reservation does not, properly speaking, involve a "grant" of public land. Nor does it convert public domain into an individual's private property.  

State of New Jersey when the American colonies became sovereign States at the advent of the American Revolution).  

96. 44 U.S. (3 How.) 212, 223 (1845) (holding that a federal land grant executed post-statehood to an individual did not include the lands below navigable waters, title to which had passed previously to Alabama, when Alabama was admitted to the Union "on an equal footing with the original [thirteen] States").  

97. See Montaña, 450 U.S. at 551.  

98. Namen, 665 F.2d at 961 n.27 (citations omitted). As the Namen court pointed out, the passage in Waddell suggesting a requirement that a grant from a sovereign to an individual of lands underlying navigable waters must contain "clear and especial words" in order to be construed as conveying title to those lands was strictly dictum. See id. Thus, the Waddell Court wrote:

Neither is it necessary to examine the many cases . . . [that] show the degree of strictness with which grants of the king are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the
In view of the fact that the Supreme Court did not posit the existence of a general “presumption” in favor of States’ rights to navigable waterways within pre-statehood federal disposals of land until 1926, the Montana Court’s assertion that “Congress was . . . aware of this presumption once it was established by this Court”\(^9\) can mean only that Congress entertained no such “presumption” sixty years earlier, when the Fort Laramie Treaty establishing the Crow Reservation was negotiated and ratified. Hence, it was error for the Montana Court to make any such “presumption” controlling in the Court’s adjudication of the ownership of submerged lands located within the boundaries of the Crow Reservation as established by treaty in 1868, more than two decades before Montana became a State.

Moreover, the Supreme Court’s invention and application of its “Montana presumption” for depriving Indian tribes of on-reservation submerged lands is radically inconsistent with *Worcester v. Georgia*,\(^1\) the foundational Indian law decision prohibiting the operation of state law within the boundaries of federally protected Indian lands. In *Worcester*, the Supreme Court rebuked the State of Georgia for purporting to abolish legislatively the government of the Cherokee Nation and distribute Cherokee sovereign lands—upon which gold had been discovered—among five Georgia counties.\(^1\) The Court

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\(^9\) Montana, 450 U.S. at 552 n.2. Significantly, the Montana majority opinion gives no indication of when “this presumption” was “established by this Court.” *Id.; see also Namen, 665 U.S. at 961 n.27. Moreover, this failure to indicate when the purported “presumption” became “established by this Court” is effectively exacerbated by Justice Stewart’s provision of no dates for any of the cases referenced in the majority opinion. See Montana, 450 U.S. at 544-67.

\(^1\) Waddell, 41 U.S. (16 Pet.) at 411-12 (emphases added).

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entitled an act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for
grounded its repudiation of Georgia's attempted confiscation of Cherokee lands in the "universal conviction" that lands located within the territorial boundaries of Indian nations, as described and protected pursuant to instruments of federal law, are lands over which States have no jurisdiction at all: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."\(^{102}\) Applying this foundational principle of federal Indian law prohibiting the operation of state law within the boundaries of federally protected Indian lands, the Court upbraided Georgia for attempting to defy and subvert

the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere; and that the whole power of regulating the intercourse with them was vested in the United States.\(^ {103}\)

With its strong condemnation of Georgia's attempted seizure of Cherokee lands and destruction of Cherokee sovereignty thus recently announced, the Supreme Court in 1842 doubtless understood its dictum in \textit{Waddell}—suggesting that land grants from a sovereign to an individual should not be construed as including public domain lands "unless clear and especial words are used to denote" such inclusion\(^ {104}\)—as inapplicable to the resolution of title disputes involving lands, submerged or otherwise, \textit{located within the boundaries of federally protected Indian territories}, i.e., lands specifically safeguarded, as such, \textit{from} any "state sovereignty"-based claims to those federally protected areas. Likewise, in invoking an "equal footing doctrine" rationale in \textit{Pollard's Lessee} for favoring the claims of States other than the original thirteen States to submerged lands alleged to have been granted post-

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\item the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory.
\item \textit{Id.} (internal quotation marks omitted). Marshall elaborated that "the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence." \textit{Id.} at 542.
\item Id. at 557, 560 (emphasis added).
\item Id. at 560.
\item Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411 (1842); \textit{see also supra} notes 95, 98.
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statehood to individuals by the federal government, the Supreme Court in 1845 surely would have accepted that rationale as leading inexorably to the conclusion, in light of Worcester, that submerged lands located within the boundaries of federally protected Indian reservations are, consistent with the "equal footing doctrine," entirely free from "state sovereignty"-based claims of title asserted by late-entering States—just as the Cherokee Nation's federally protected lands were free from the "state sovereignty"-based claims asserted by Georgia, one of the original thirteen States.106

The "States' rights" decisions of Waddell and Pollard's Lessee thus provide no justification for the Supreme Court's invocation in Montana of a "presumption" that States own all the navigable waterways within the boundaries of federally protected Indian reservations. Those early submerged lands/"equal footing doctrine" cases were decided subsequent to, and in light of, the Supreme Court's strongly stated view in Worcester that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."107 Hence, the only "presumption" with respect to disputes over submerged lands located within the boundaries of federally protected Indian reservations that might have lain dormant in the Court's analysis in Waddell and Pollard's Lessee is that state claims to any such "completely separated" Indian lands must be repudiated and declared invalid for being—in Worcester's forceful language—"repugnant to the Constitution, laws, and treaties of the United States." 108

Thus it was astonishing that the Montana majority applied the Court's general "presumption" concerning States' rights to submerged lands located within the boundaries of pre-statehood federal disposals of land—a "presumption" first "established" in dicta from a 1926 Supreme Court

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105. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845); see also supra note 96 and accompanying text.

106. See Pollard's Lessee, 44 U.S. (3 How.) at 230. That the holding of Pollard's Lessee never was presumed to apply to disputes concerning submerged lands within the boundaries of federally protected Indian reservations may be inferred from the Court's underlying concern in Pollard's Lessee about federal interference with the States' "right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes." Id. But where States have no jurisdiction to impose general police powers—i.e., within the boundaries of federally protected Indian reservations, as commanded by Worcester, see supra text accompanying note 103—a rationale declaring state ownership of submerged lands as essential to the States' "eminent domain" in exercising general police powers compels the conclusion that this "States' rights" principle does not apply to the construction of federal instruments specially affirming and safeguarding tribal property interest in lands within the boundaries of Indian reservations.


108. Id. at 561 (holding Georgia's acts purporting to destroy the Cherokee Nation and confiscate Cherokee lands "repugnant to the Constitution, laws, and treaties of the United States").
opinion\textsuperscript{109}—to the special context of a dispute concerning submerged lands located within the boundaries of an Indian reservation set apart and safeguarded under federal law for an Indian tribe's exclusive use. Prior to \textit{Montana}, no Supreme Court decision ever had suggested that this gradually devised "general principle" favoring States' claims to submerged lands pursuant to the judicially created "equal footing doctrine" applied to disputes involving federally protected Indian lands; for application of that "general principle" would subvert the fundamental rule of federal Indian law, recognized from the time of \textit{Worcester} onward, that States generally have no jurisdiction over the "completely separated" lands located within the boundaries of Indian reservations.\textsuperscript{110} In forcing its "general principle" favoring States' claims to submerged lands to control an adjudication implicating a sovereign Indian Tribe's rights to a segment of a river located within the boundaries of the Tribe's own reservation, the \textit{Montana} Court forged a doctrinal innovation acutely corrosive of Indian rights.\textsuperscript{111}

\textsuperscript{109} See \textit{supra} notes 94-99 and accompanying text.

\textsuperscript{110} See \textit{supra} text accompanying notes 102 and 107.

\textsuperscript{111} For an incisive examination of the numerous errors of law, misstatements of fact, and general carelessness with precedent manifested in the Supreme Court's decision to vest ownership of the Crow Tribe's treaty-protected submerged lands in the State of Montana, see Russel Lawrence Barsh & James Youngblood Henderson, \textit{Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States}, 56 WASH. L. REV. 627 (1981). One example of what the authors call the Montana Court's "legal contrariness" is the Court's misplaced reliance on \textit{United States v. Holt State Bank}, 270 U.S. 49 (1926), an obscure case of little previous doctrinal significance in the field of federal Indian law. See Barsh & Henderson, \textit{supra}, at 669. As Barsh and Henderson point out, the Montana Court described Holt as a case that involved "an Indian tribe's claim of title to the bed of a navigable lake" that "lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union." \textit{Montana}, 450 U.S. at 552. But, as Barsh and Henderson explain further, this characterization of Holt by the Montana Court embodies a number of critical misstatements of fact. See Barsh & Henderson, \textit{supra}, at 676-78.

First, Holt did not involve any "Indian tribe's claim" at all, but instead consisted solely of a dispute between the United States as plaintiff laying claim to a piece of land on a theory of federal title, and a private bank and other riparian landowners as defendants asserting title to the same land under a state-law theory of accretion. See Holt, 270 U.S. at 51, 52, 54. Second, Holt did not involve land that ever had been contained "wholly within the boundaries" of any Indian reservation specially set apart and recognized as such; rather, the disputed land in Holt consisted of a drained and reclaimed lakebed, once known as Mud Lake, located within an area of aboriginal Indian territory that the Red Lake Band of Chippewas had ceded to the United States in 1889 and that had never been specially set apart and affirmed as an Indian reservation—by treaty, by executive order, or pursuant to any other federal law. See Barsh & Henderson, \textit{supra}, at 668 ("In 1858, [when Minnesota became a State,] the Red Lake Band was without treaty relations with the United States and Mud Lake lay within unceded, original tribal territory.") And third, the pre-statehood treaties cited by the Montana Court in insisting that the land at issue in Holt had been federally set apart and recognized as the Red Lake Band's "reservation" in fact did not involve the Red Lake Band at all, as erroneously adverted to in Montana and as misleadingly insinuated in Holt. See Montana, 450 U.S. at 552 (stating "[Mud L]ake lay wholly within the boundaries of the Red Lake Indian
Although widely regarded as a travesty of judicial decisionmaking in the field of Indian law, *Montana v. United States* did not close off all hope for Reservation, which had been created by treaties entered into before Minnesota joined the Union*); *Holt*, 270 U.S. at 58 (stating “[t]he [Red Lake] reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165.”). Rather, as Barsh and Henderson explain,

the Red Lake Band . . . did not treat with the United States until 1863, [five years after Minnesota achieved statehood in 1858,] at which time the Band ceded a large tract of northern Minnesota. As the [Holt] Court observed correctly of this 1863 treaty, albeit citing erroneously the 1854 and 1855 treaties [which did not involve the Red Lake Band at all], “[t]here was no formal setting apart of what was not ceded, nor affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters.” The Red Lake Band’s [1863] treaty was exceptional in this regard, as the [Holt] Court commented: “Other reservations for particular bands [of Chippewas] were specially set apart, but those reservations . . . are not to be confused with the Red Lake Reservation . . .”

Barsh & Henderson, *supra*, at 667 n.249 (alterations in original) (citations omitted). It is ironic, of course—disturbingly so—that the Holt Court, adverting to the 1863 Red Lake Band treaty, cautioned readers not to confuse the Red Lake Reservation with “specially set apart” reservations, while the Court itself propagated that very same confusion by insinuating, erroneously, that “[t]he [Red Lake] reservation came into being through a succession of treaties” that included the 1854 and 1855 treaties with bands of Chippewa Indians *other than* the Red Lake Band. *Holt*, 270 U.S. at 58.

But it is even more unsettling that the Montana Court, building on Holt’s confusion, suppressed any mention of the Red Lake Band’s *post*-statehood 1863 treaty when purporting to describe how “the Red Lake Indian Reservation . . . had been created,” citing instead only those same pre-statehood 1854 and 1855 treaties, *see Montana*, 450 U.S. at 552, which, as must be reiterated, *did not involve* the Red Lake Band at all.

Holt thus was not a case about “an Indian tribe’s claim of title to the bed of a navigable lake” that “lay wholly within the boundaries” of an Indian reservation that had been set apart and affirmed as such pursuant to pre-statehood federal law. *Montana*, 450 U.S. at 552. Instead, as Barsh and Henderson point out, “the Holt decision was limited to lands claimed by tribes *but never recognized by the United States*.” Barsh & Henderson, *supra*, at 678 (emphasis added). As such, Holt could not serve as a legitimate precedent for resolving an Indian Tribe’s claim of ownership of submerged lands *located within the boundaries of that Tribe’s own federally set-apart and affirmed reservation*—i.e., a claim like the one brought by the Crow Tribe in *Montana*. As Barsh and Henderson point out, “[t]here was no possible argument in *Montana* that the Crow reservation had lacked federal recognition prior to statehood, for it had been expressly confirmed to the Crows in their 1868 treaty.” *Id.*

The significance of the Montana Court’s erroneous portrayal of Holt as a case about an Indian Tribe claiming ownership of submerged lands located within the boundaries of the Tribe’s federally set-apart and recognized reservation cannot be overstated. Without mischaracterizing Holt in just this way—that is, as a case factually indistinguishable from Montana itself—the Supreme Court would have had no precedent for applying its “general principle” about state ownership of lands underlying navigable waters to effectively dispossess an Indian Tribe of submerged lands located on an Indian reservation that had been specially set apart and recognized under pre-statehood federal law as belonging exclusively to the Tribe. Lacking any such precedent in Holt, the Montana Court simply distorted the factual circumstances of Holt to create the illusion that Holt constitutes such a precedent.
Indian Tribes desiring to secure their rights to on-reservation navigable lakes, rivers and other watercourses, for in the final analysis, *Montana's* "strong presumption"112 against tribal ownership of those submerged lands remained rebuttable.113 Indeed, much of Justice Blackmun's dissenting opinion in *Montana* consists of an argument that, assuming the applicability of the Court's "strong presumption," the Crow Tribe rebutted that presumption.114 Moreover, in the aftermath of *Montana*, some plaintiffs have succeeded in lower federal court proceedings in rebutting the *Montana* presumption, thereby securing tribal ownership of on-reservation submerged lands.115 In these cases, the deciding courts have emphasized the prevailing Tribes' historic and traditional dependence on the disputed waterways, and have identified and relied on special "compelling" indicators of congressional intent in concluding that Congress in fact had intended to "convey" submerged lands to these Tribes in establishing the Tribes' reservations.116 Thus, even in the absence of an overruling of *Montana*, some Tribes, at least, should be able to prevail against the marauding *Montana* presumption and thereby escape a judicial extinguishment of tribal title to the lakes and rivers on Indian reservations.

However, in order to maintain even a hope of rebutting the *Montana* presumption, an Indian Tribe whose navigable waterways are threatened by

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112. See supra note 90 and accompanying text.
113. See *Montana*, 450 U.S. at 554 (implying the possibility of "overcom[ing] the presumption against . . . conveyance" of on-reservation submerged lands to an Indian Tribe).
114. See id. at 570-77 (Blackmun, J., dissenting in part) (arguing that Congress had intended to convey to the Crow Tribe the bed of the Big Horn River within Crow Reservation boundaries in order to fulfill the dual public purposes of providing for the Crow Indians and obtaining a cession of aboriginal Crow lands outside the Reservation's boundaries).
115. See, e.g., Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1264 (9th Cir. 1983) (holding that the United States conveyed title to a section of the bed of the Puyallup River to the Puyallup Tribe through a pre-statehood executive order enlarging the Puyallup Reservation); Muckleshoot Indian Tribe v. Trans-Canada Enters., 713 F.2d 455, 456 (9th Cir. 1983) (holding that the United States conveyed title to on-reservation sections of the bed of the White River to the Muckleshoot Tribe through a pre-statehood executive order expanding the Muckleshoot Reservation); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 960-61 (9th Cir. 1982) (holding that the United States conveyed beneficial title to the on-reservation portion of the bed of Flathead Lake to the Confederated Salish and Kootenai Tribes through a pre-statehood treaty establishing the Flathead Reservation); see also infra notes 120-25 and accompanying text.
116. See United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1510-11 (9th Cir. 1991) (collecting and summarizing cases). Among the "compelling factors" identified by the Ninth Circuit that militate in favor of a finding of congressional "conveyance" of an on-reservation navigable watercourse to an Indian Tribe despite the *Montana* presumption are (1) the Tribe's "specific insistence upon inclusion of the [watercourse]"; (2) "[t]he existence of hostilities between the [Tribe] and non-Indian settlers relating to [a] dispute [concerning the watercourse]"; and (3) the presence of "a conveying instrument . . . that by its terms grants the bed of the [watercourse] to the Tribe." *Id.*
the kind of de facto confiscation that Montana generally sanctions must be permitted to argue fully the merits of its case in federal court. By adjudicating "at the threshold," as a matter of law, the undeveloped merits of the Coeur d'Alene Tribe's claim for injunctive relief against Idaho officials allegedly engaged in an ongoing violation of the Tribe's federal rights to submerged lands, the federal district court in Idaho effectively rendered the notorious Montana presumption irrebuttable.\textsuperscript{117} In the district court's view, the Coeur d'Alene Tribe's claims for injunctive relief were foreclosed by the formal similarity between the language of the instruments establishing and confirming the Coeur d'Alene Reservation and describing its boundaries, and the language of the Fort Laramie Treaty of 1868 describing the boundaries of the Crow Reservation:

The court is bound to interpret the 1873 agreement and the formal agreement ratified in 1891, which extended one boundary of the reservation to the center of a portion of the Spokane River, the same way that the Supreme Court interpreted the treaty with the Crow tribe in the Montana case, which had similar provisions. Therefore, because the agreements with the Coeur d'Alene Tribe made no express conveyance of the beds and banks of navigable waters within the reservation, or any other references which could be construed as having done so, the court finds that there is nothing in the agreements which overcomes the strong presumption that these lands were held in trust by the United States and conveyed to the State of Idaho upon its admission to the Union on an "equal footing" with the other States.\textsuperscript{118}

Thus, on the basis of observing a formal similarity between isolated phrases in the respective instruments confirming the reservations at issue in the Coeur d'Alene Tribe litigation and Montana, the district court held that the Coeur d'Alene Tribe's request for injunctive relief against Idaho officials allegedly engaged in an ongoing violation of the Tribe's federal rights was inadequate as a matter of law.\textsuperscript{119}

In so ruling, the district court disregarded clear and directly controlling precedents that establish a comprehensive legal framework for determining whether a rebuttal of the Montana presumption is valid.\textsuperscript{120} Recently, that

\textsuperscript{118} Id. at 1451-52.
\textsuperscript{119} See id. at 1452.
\textsuperscript{120} The relevant Ninth Circuit decisions establishing a legal framework for determining whether a rebuttal of the Montana presumption is valid—cases whose precedential value the district court in the Coeur d'Alene Tribe litigation had no discretion to ignore—are Pend Oreille, 926 F.2d at 1502; United States v. Aam, 887 F.2d 190 (9th Cir. 1989); Puyallup Indian Tribe, 717 F.2d at
legal framework was summarized and utilized in a 1998 decision, *United States v. Idaho*,¹²¹ rendered by a different judge of the Federal District Court for the District of Idaho, in which the court held that the Coeur d'Alene Tribe is indeed the rightful owner under federal law of all the submerged lands located within the boundaries of the Coeur d'Alene Reservation in Idaho, since Congress intended to defeat Idaho's "equal footing" claim by confirming pre-statehood agreements permanently safeguarding the Tribe's exclusive rights to those lands.¹²² In view of the importance of Federal District Court Judge Edward J. Lodge's decision in *United States v. Idaho* that the Coeur d'Alene Tribe owns all the navigable waterways within the Coeur d'Alene Reservation at issue,¹²³ the court's explanation of the proper

¹²¹ *Muckleshoot Indian Tribe*, 713 F.2d at 455; *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983); and *Namen*, 665 F.2d at 951. But in fact, the district court mentioned none of these cases in dismissing the Coeur d'Alene Tribe's claims for injunctive relief as insufficient for failure to state a claim upon which relief may be granted. *See Coeur d'Alene Tribe*, 798 F. Supp. at 1449-52.

¹²² *See id.* at *33-34. The court explained:

By explicitly recognizing, prior to Idaho's statehood, an Executive reservation that included submerged lands, Congress demonstrated the clear intent to defeat the State's equal footing title. Retention of the submerged lands was necessary to achieve the United States' objective, and Congress clearly contemplated continued federal ownership of those lands. The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is "compelling evidence" that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under the southern third of the Lake. Congress could not have carried into effect the terms of the 1889 agreement without retaining title to the submerged lands. Congress clearly demonstrated its intent to reserve the submerged lands... within the 1873 reservation.

*Id.* (citations omitted).

¹²³ The district court in *United States v. Idaho* was able to resolve the issue of the Coeur d'Alene Tribe's beneficial ownership of the submerged lands within the boundaries of the present-day Coeur d'Alene Reservation because resolution of that issue was germane to the United States' own claim to those lands on behalf of the Tribe, as the Tribe's trustee. Unlike Indian Tribes, the United States is considered to be not prohibited by the Eleventh Amendment from suing a State. *See infra* note 467. It should be noted, however, that the United States' successful claim in *United States v. Idaho* did not encompass all the submerged lands within the boundaries of the Coeur d'Alene Tribe's 1873 executive order reservation, i.e., all the lands at issue in the Coeur d'Alene Tribe litigation. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 266 (1997) (stating "[a]fter issuance of the District Court's opinion the United States filed suit against the State of Idaho on
The question of "[w]hether title to submerged lands rests with a State is ultimately a matter of federal intent." . . . When the pertinent documents do not make express reference to the bed and banks, a conveyance or reservation may be implied but a court "will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.'" Thus, the intent of the Federal Government to retain submerged lands may be demonstrated by an express statement or may be inferred from relevant evidence.

In a case such as this one, where it is alleged that the submerged lands were included within an Executive reservation, the inquiry as to federal intent involves three distinct questions. First, whether the actions of the Executive reflected a clear intent to include submerged lands within the reservation. Second, whether Congress authorized the Executive retention of the submerged lands or ratified the same. Third, and finally, whether Congress intended to defeat the future State's title to those lands. Evidence that bears directly on the resolution of these three questions includes (1) the language of the relevant documents, (2) the location of the reservation boundaries in relation to the submerged lands, and (3) the purpose of the reservation. . . .

Special evidentiary considerations apply when it is alleged that an Executive reservation implements an agreement between the United States and a tribe. Specifically, Ninth Circuit cases have formulated a three-part test that bears on the . . . inquiry . . . as to whether the Executive intended to include submerged lands within the reservation. In an effort to give effect to the "principle of construction resolving any ambiguities in agreements with the United States in favor of the Indian tribes," Ninth Circuit decisions have allowed a plaintiff to establish federal intent on this issue by showing (1) the reservation included "within its boundaries a navigable water," (2) the tribe depended on the watercourse for a significant portion of the tribe's needs; and (3) the "Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the [reservation]."
Even if successful in satisfying the three-part test, and therefore demonstrating the Executive intent to reserve submerged lands, the plaintiff also must show that Congress authorized or ratified the Executive reservation and that Congress intended to defeat the future State's title to the submerged lands.  

Had the district court in Coeur d'Alene Tribe discerned from controlling precedents—as Judge Lodge subsequently did—the legal framework for determining whether the Montana presumption has been rebutted, the court could not summarily have declared itself "bound" to reject the Tribe's officer suit; that is, it could not have dismissed the action for failure to state a claim, based on nothing more than the court's detection of a formal similarity between isolated phrases in the Fort Laramie Treaty of 1868 and in the federal instruments establishing and confirming the Coeur d'Alene Reservation. Instead, the court would have found itself "bound" by controlling law to acknowledge that the Coeur d'Alene Tribe clearly had stated a legally sufficient claim against Idaho officials for those officials' ongoing violation of the Tribe's federally protected rights to on-reservation submerged lands. Further, had the court evaluated the Tribe's complaint and ensuing arguments in light of the controlling post-Montana legal criteria, the court would have been "bound" to rule in favor of the Tribe not only on the issue of the legal sufficiency of the Tribe's complaint at the "threshold," but also, ultimately, on the factual and legal merits of the Tribe's claims, as evinced by Judge Lodge's 1998 decision in United States v. Idaho affirming the Tribe's exclusive rights of beneficial ownership in the disputed on-reservation navigable waterways.  


125. See id. at *36. In relevant part, the court's order states the following:  
IT IS HEREBY ORDERED that:  
1. Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation;  
2. The United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation; and  
3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d'Alene Lake
In the end, the district court in the Coeur d'Alene Tribe litigation gave itself license to ignore squarely controlling law for analyzing a rebuttal of the Montana presumption and for applying the doctrine of Ex parte Young because the court allowed two erroneous legal fictions to run riot: (1) the Rehnquist Court's newly announced Blatchford "presupposition" that States are immune from suits initiated by Indian Tribes; and (2) the Montana "presumption," invented by the Court a decade earlier, that States own all the navigable waterways on Indian reservations. Emboldened by these anti-tribal fictions of the modern Supreme Court, the district court itself could "presuppose" that an Indian Tribe should be barred from presenting in a federal forum the merits of its injunctive suit against state officials alleged to be engaged in an ongoing, unlawful appropriation of the Tribe's federally protected on-reservation submerged lands. So, too, could the district court casually "presume" to rebuff the Coeur d'Alene Tribe's officer suit with a summary merits defeat posing as a threshold jurisdictional ruling, thereby handing Idaho and its officers a windfall award of all the Tribe's navigable waterways.

Id.

126. Prefacing the Rehnquist Court's unprecedented decision in 1991 to extend a new form of Hans immunity to States sued in federal court by sovereign Indian Tribes, Justice Scalia, writing for the Blatchford majority, stated:

Despite the narrowness of its terms, since Hans v. Louisiana, we have understood the Eleventh Amendment to stand 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; that the judicial authority in Article III is limited by this sovereignty . . . .

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (emphasis added) (citation omitted); see supra notes 35-70 and accompanying text; infra notes 189-97 and accompanying text.

127. See supra notes 90-111 and accompanying text.

128. The district court also dismissed a civil rights claim based on 42 U.S.C. § 1983 that the Tribe and individual members of the Tribe had raised against Idaho, its agencies and its officers, pursuant to the following reasoning: (1) the Eleventh Amendment shields States and state agencies against such a claim, absent either a State's consent or a valid, express congressional abrogation of the state's immunity to such a claim; (2) "the Tribe [itself] may not bring a Section 1983 action because it is not a 'citizen of the United States or other person' for purposes of Section 1983"; and (3) the individual tribal member plaintiffs are unable to state a claim for which relief may be granted since "[t]he court has determined that the State of 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." Coeur d'Alene Tribe v. Idaho, 798 F. Supp. 1443, 1452 (D. Idaho 1992).
C. The Ninth Circuit Decision: Salvaging Federal Rights from the Wreckage of the Supremacy Clause

The Coeur d’Alene Tribe appealed the district court’s decision to dismiss all the Tribe’s claims for relief. The Ninth Circuit Court of Appeals affirmed the district court’s dismissal of “all claims against the State and the Agencies, as well as the quiet title claim against the Officials,” but reversed the district court’s dismissal of the Tribe’s “claims for injunctive and declaratory relief against the Officials [which] seek only to preclude future violations of federal law.”

In affirming the district court’s dismissal of all the Tribe’s claims against the State and the state agencies, the Ninth Circuit reiterated the district court’s invocation of Hans/Blatchford immunity as a broad shield for States and state agencies engaged in conduct that allegedly violates the rights of Indian Tribes under federal law. The Ninth Circuit also addressed and dismissed the Tribe’s argument that Idaho effectively had waived its sovereign immunity, and thus had consented to the Tribe’s quiet title suit, through various rulings of the Idaho Supreme Court and provisions of the Idaho constitution. With respect to the district court’s dismissal of all the Tribe’s claims against the defendant state officials, however, the Ninth Circuit discerned significant error in the district court’s analysis. The appellate court ruled that, contrary to the district court’s assertions, the Coeur d’Alene Tribe had raised claims against Idaho officials which were not barred by the Eleventh Amendment and which could not be dismissed as a matter of law for failure to state a claim upon which relief may be granted.

In the Ninth Circuit’s view, the Coeur d’Alene Tribe’s claims against Idaho officials, alleging continuing violations of the Tribe’s federal rights to submerged lands, fell squarely within the class of claims that qualify for federal court adjudication under the doctrine of Ex parte Young, and thus

130. See id. at 1248-49.
131. See id. at 1249-50. According to the Tribe, the State’s waiver of its immunity was manifested in (1) Idaho Supreme Court decisions “ruling that actions against the state to quiet title are not claims against the sovereign”; and (2) provisions in the State’s constitution wherein the State “disclaims any interest in Indian lands within the state” and proclaims that “Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .” Id. at 1249 (internal quotation marks omitted) (quoting IDAHO CONST. art. 21, § 19). Subsequently, the United States Supreme Court denied the Tribe’s cross-petition for certiorari with respect to the Ninth Circuit’s rejection of this waiver theory. See Coeur d’Alene Tribe v. Idaho, 42 F.3d 1244 (9th Cir. 1994), cert. denied, 517 U.S. 1133 (1996); see also infra text accompanying note 174.
132. See Coeur d’Alene Tribe, 42 F.3d at 1254-55.
133. See id. at 1255-57.
were not barred by the Supreme Court's countervailing Eleventh Amendment doctrine.\textsuperscript{135} In assessing the propriety of the Tribe's officer suit, the Ninth Circuit applied a test developed by a plurality of Justices in the 1979 case of \textit{Florida Department of State v. Treasure Salvors}.\textsuperscript{136} for determining whether state officials—who "[g]enerally . . . are considered to be acting on behalf of the state, and . . . therefore [are] shield[ed] . . . from suit"—are immune from federal court suit pursuant to the Eleventh Amendment, or else are susceptible to federal court accountability by virtue of the \textit{Young} doctrine.\textsuperscript{137}

As the Ninth Circuit explained, the \textit{Treasure Salvors} test consists of three interrelated inquiries: (1) whether the claim is against state officials rather than the State itself; (2) whether the claim asserts conduct by state officials that "either violates federal law, or is wholly unauthorized by state law," rather than conduct that is "merely tortious, and . . . protected by the Eleventh Amendment"; and (3) whether the relief sought is prospective rather than retrospective in nature.\textsuperscript{138} Applying this three-prong test, the Ninth Circuit concluded that because the Coeur d'Alene Tribe had raised claims against state officials that (1) must be deemed, pursuant to the \textit{Young} doctrine, as not raised against the State of Idaho itself; (2) implicated ongoing violations of federal law; and (3) were prospective in nature, these claims were \textit{not} barred by the Eleventh Amendment, and the federal district court thus was obligated to adjudicate them.\textsuperscript{139}

Central to the Ninth Circuit's determination that the Tribe's claims for injunctive relief and prospective declaratory relief against state officials were not barred by the Eleventh Amendment was the court's emphasis on a crucial point ignored by the district court—the indispensable role of \textit{Young} suits in ensuring the supremacy of federal law under the constitutional plan.\textsuperscript{140} As the Ninth Circuit noted:

Under our federalist system, the states are considered unable to act in a manner contrary to federal law. Thus any action on the

\begin{itemize}
\item \textsuperscript{135} See \textit{Coeur d'Alene Tribe}, 42 F.3d at 1254-55.
\item \textsuperscript{136} 458 U.S. 670 (1982).
\item \textsuperscript{137} \textit{Coeur d'Alene Tribe}, 42 F.3d at 1250.
\item \textsuperscript{138} \textit{Id.} at 1250-51.
\item \textsuperscript{139} See \textit{id.} at 1250-55.
\item \textsuperscript{140} See \textit{id.} at 1251; see also U.S. CONST. art. VI, cl. 2. The Constitution's Supremacy Clause provides:
\begin{quote}
The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
\end{quote}
\textit{Id.}
part of state officials that violates federal law cannot be attributed to the state. Because federal law preempts state law, if the property at issue in this case belongs to the Tribe pursuant to federal law, the Officials must conform their actions to that federal law in spite of state statutes that purport to regulate the property as belonging to the state. If the Officials do not act in accordance with federal law, the state's claim of ownership cannot clothe the Officials in Eleventh Amendment immunity from suit. 141

Since the Coeur d'Alene Tribe clearly had "alleged that the actions of the Officials in exercising control over the property at issue violate federal . . . law," the Ninth Circuit recognized that "[t]his case fits within the [Young] exception." 142 And, since the Young doctrine so clearly applied to the Tribe's efforts to obtain injunctive relief and prospective declaratory relief in federal court, "the [Idaho] Officials must be considered the real parties in interest in the claims against them." 143 The first prong of the Treasure Salvors test thus was satisfied.

By virtue of the same observation about the undeniably federal nature of the Tribe's claims, the Ninth Circuit determined further that the second prong of the Treasure Salvors test also was satisfied. 144 As the court pointed out, "a plaintiff need only adequately allege an ongoing violation of a federal right to meet this prong of the test . . . The Tribe adequately alleges an ongoing violation of a federal right and, thus, meets this prong of the test." 145

Applying the third and final prong of the Treasure Salvors test—the requirement that, in order for a plaintiff to proceed with a proffered Young suit, the relief sought must be prospective rather than retrospective in nature—the Ninth Circuit found the requirement satisfied with respect to all the Tribe's claims for injunctive relief and prospective declaratory relief against the state officers. 146 In so ruling, the Ninth Circuit distinguished the Tribe's quiet title claim, which the court determined had been properly dismissed by the district court. 147 In explaining the difference between its disposal of the Tribe's quiet title claim and its disposal of the Tribe's claims for injunctive relief and prospective declaratory relief against Idaho officers, the Ninth Circuit confronted what it termed the "conundrum" 148 created by

141. Coeur d'Alene Tribe, 42 F.3d at 1251 (citation omitted).
142. Id.
143. Id.
144. See id.
145. Id. (citations omitted).
146. See id. at 1254.
147. See id.
148. See id.
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the crosscurrents in the Supreme Court's Eleventh Amendment jurisprudence—a "conundrum" which the district court had evaded by disposing of the Tribe's claims for quiet title and declaratory relief as a unit, equating these claims, on the basis of virtually no analysis, to a claim for "an award of damages or restitution . . . which is not allowed under the Eleventh Amendment."149

The Ninth Circuit explained that the Eleventh Amendment "conundrum" had arisen because of the emergence of two seemingly conflicting rules governing any federal court disposal of claims against state officials that implicate questions of property ownership:

First, federal courts may not hear actions to quiet title to property in which the state claims an interest, without the state's consent.

Second, declaratory and injunctive relief against state officials to foreclose future violations of federal law is available even if that relief works to put the plaintiff in possession of property also claimed by the state.150

Confronted with these facially conflicting rules—the first, the product of the modern Supreme Court's expansion of Hans immunity, and the second, the essential proposition of the Young doctrine—the Ninth Circuit settled upon a "middle ground" approach151 that the court detected in addressing, in view of Supreme Court precedents,152 the decisions of lower federal courts invoked by the Idaho officials.153 Acknowledging these discrepant decisions, the

150. Coeur d'Alene Tribe, 42 F.3d at 1252 (citations omitted).
151. See id. at 1253-54. Elaborating on this resort to a doctrinal "middle ground" for resolving the Coeur d'Alene Tribe's claims for declaratory and injunctive relief against Idaho officials, the Ninth Circuit explained: "The Supreme Court has charted a middle ground between the necessarily conflicting doctrines of state sovereign immunity and the supremacy of federal law. It should come as no surprise that that middle ground does not wholly conform to either doctrine." Id.
152. The Supreme Court precedents that compelled the Ninth Circuit to acknowledge a "middle ground" approach—notwithstanding contrary rulings by other circuit courts, see infra note 153—for determining federal jurisdiction with respect to claims for injunctive relief against state officials that implicate questions of property ownership are Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982); Quern v. Jordan, 440 U.S. 332 (1979); Ex parte Young, 209 U.S. 123 (1908); Tindal v. Wesley, 167 U.S. 204 (1897); Ex parte Tyler, 149 U.S. 164 (1893); In re Ayers, 123 U.S. 443 (1887); and Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824). See Coeur d'Alene Tribe, 42 F.3d at 1252-54. For a discussion of the Supreme Court's subsequent refusal to follow this "middle ground" approach in the Coeur d'Alene Tribe litigation, see infra notes 213-74 and accompanying text.
153. See Coeur d'Alene Tribe, 42 F.3d at 1252-54. Of the lower federal court decisions relied on by the Idaho officials, the Ninth Circuit distinguished outright Harrison v. Hickel, 6 F.3d 1347
Ninth Circuit discerned that this “middle ground” approach consists of “allow[ing] all relief other than relief that would foreclose the State’s claim in future judicial proceedings.” Adhering to this judicially mandated doctrinal compromise, the Ninth Circuit was compelled to affirm the district court’s dismissal of the Tribe’s quiet title claim, since that claim would have to be viewed as running afoul of the modern Court’s extension of the *Hans* immunity doctrine, by force of which States themselves “apparently can claim title to property in derogation of federal law.”

However, this same “middle ground” approach likewise compelled the Ninth Circuit to conclude that the Tribe must be permitted to go forward in federal court with its property-ownership-related claims for injunctive relief and prospective declaratory relief against state officials, as required by virtue

(9th Cir. 1993); Toledo, Peoria & Western R.R. v. Illinois Department of Transportation, 744 F.2d 1296 (7th Cir. 1984); and Aquilar v. Kleppe, 424 F. Supp. 433 (D. Alaska 1976). See Coeur d’Alene Tribe, 42 F.3d at 1253. As the Ninth Circuit explained, “Toledo, Peoria & Western held only that ‘[t]he eleventh amendment bars a federal action against state officials based on state law when the relief sought directly impacts the state,’” and entailed no holding relevant to a suit based on federal law (like the Coeur d’Alene Tribe’s suit) against state officials for those officials’ allegedly illegal appropriation of property claimed by the plaintiff. *Id.* at 1253 (quoting Toledo, Peoria & Western, 744 F.2d at 1299) (emphasis added by Coeur d’Alene Tribe). The Ninth Circuit explained further that Harrison and Aquilar are distinguished because in view of Supreme Court affirmations of the doctrine of *Ex parte Young*, those cases “mean only that an action that would conclusively adjudicate the state’s title to property cannot be brought without the state’s consent,” whereas the Coeur d’Alene Tribe’s injunctive suit would have no such preclusive effect on Idaho’s ability subsequently to adjudicate its asserted interest in the disputed submerged lands. *Id.* (citing Harrison, 6 F.3d at 1348; Aquilar, 424 F. Supp. at 437).

Acknowledging that two other cases relied on by the state officials, John G. & Marie Stella Kenedy Memorial Foundation v. Mauro, 21 F.3d 667 (5th Cir. 1994), and Fitzgerald v. Unidentified Wrecked & Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989), were “more difficult to reconcile,” the Ninth Circuit effectively rejected those cases as erroneously decided in view of Supreme Court precedents affirming the *Young* doctrine. *See Coeur d’Alene Tribe, 42 F.3d at 1253-54. As the Ninth Circuit explained, in Fitzgerald the First Circuit “appear[ed] to hold that when an action includes the state and state agencies as defendants, and seeks an adjudication of the state’s interest in property, that portion of the action that is against state officials for injunctive and declaratory relief is also directed against the state itself, and is therefore barred.” *Id.* at 1253 (citing Fitzgerald, 866 F.2d at 18). Likewise, in Mauro the Fifth Circuit “refused to hear the claims for declaratory and injunctive relief against . . . state official[s] [alleged to be depriving the plaintiff of property without due process of law] because it believed that to do so it would have to adjudicate the state’s interest in the property.” *Id.* The Ninth Circuit recognized that these decisions of other circuit courts could not be reconciled with the Supreme Court’s decision in *Treasure Salvors*, in which the Court held that a federal court claim requesting prospective relief effectively against state officials and implicating an alleged ongoing violation of a plaintiff’s entitlement to property under federal law is permitted pursuant to the *Young* doctrine. *See id.; see also infra* text accompanying notes 213-20.

154. Coeur d’Alene Tribe, 42 F.3d at 1254.

155. Id.
of the presumably still-viable *Young* doctrine. The Ninth Circuit’s explanation for its conclusion that *Young* relief is available to the Tribe—a reversal of the district court’s contrary disposal of this issue—deserves careful attention:

[B]ecause the injunctive and declaratory relief sought by the Tribe would not compensate for past violations of federal law, but would instead preclude future violations, we conclude that this portion of the action is not barred by the state’s immunity. The Tribe is not seeking to have any past violations of its federal rights redressed in any way. It is not seeking damages or restitution for past wrongs, nor is it seeking to rescind a past transfer of property. Rather, it seeks a determination under federal law of the Tribe’s right to possess, use, and control the beds, banks, and waters of navigable waterways within the Coeur d’Alene Reservation in the future. Thus to the extent that the declaratory and injunctive relief binds state officials in accordance with what the district court finds to be the Tribe’s right to the property, it is allowable. Because the state is unable to act in violation of federal law, declaratory relief that determines what federal law is and requires state officials to act accordingly cannot be considered relief against the state. . . . [I]f the district court finds that the property at issue belongs to the Tribe pursuant to federal law, it may decree the Tribe to be the owner of the property against all claimants except the State of Idaho and its agencies.

The Ninth Circuit recognized that in making allowance under this “middle ground” approach for the Tribe’s federal court claims for injunctive relief and prospective declaratory relief against state officials while forbidding the Tribe’s quiet title action, the practical consequence of any subsequent victory for the Tribe on the merits of its claims would be that “neither Idaho nor the Tribe will hold unclouded title to the property.” Once again, however, the Ninth Circuit saw this “problem” as unavoidable in view of the Supreme Court’s conflicting allegiances to the *Hans* immunity doctrine, on the one hand, and to the requirements of the Constitution’s guarantee of the supremacy of federal law, on the other:

[.]Just as we may not exercise jurisdiction over the state to more fully resolve this controversy, we may not decline jurisdiction to the extent that it exists. We will not refuse to enforce the federal

156. See id. at 1254-55.
157. See supra notes 76-85 and accompanying text.
158. Coeur d’Alene Tribe, 42 F.3d at 1254-55 (citations omitted).
159. Id. at 1255.
rights of Indian tribes against action by state officials merely because we cannot afford them complete relief.\textsuperscript{160}

Having thus clarified that the injunctive relief and prospective declaratory relief sought by the Coeur d’Alene Tribe were remedies that were prospective in nature, the Ninth Circuit effectively determined that the third and final prong of the *Treasure Salvors* test was satisfied. With all three prongs of that test thus satisfied, the extended *Hans* immunity of the modern Supreme Court’s Eleventh Amendment jurisprudence could not legitimately be interposed to prevent the Tribe from proceeding to the merits of the Tribe’s federal court action against those Idaho officials.

In controverting the district court’s Eleventh Amendment/\textit{Hans} immunity-based rationale for dismissing all the Tribe’s claims, the Ninth Circuit also addressed the district court’s argument that the Tribe’s claims for injunctive relief should be dismissed as a matter of law for failure to state a claim upon which relief may be granted.\textsuperscript{161} Here, the Ninth Circuit took pains to emphasize another crucial point ignored in the district court’s analysis of the Tribe’s claims: That notwithstanding the “strong presumption” under *Montana v. United States* that the United States did not “convey” submerged lands to an Indian Tribe during the relevant territorial, pre-statehood period,\textsuperscript{162} “\textit{that presumption is rebuttable.}”\textsuperscript{163} Moreover, as the Ninth Circuit pointed out, the Coeur d’Alene Tribe arguably could rebut that presumption at trial, “[a]s it is conceivable that the Tribe could prove facts that would entitle it to the relief sought.”\textsuperscript{164} Hence, the Ninth Circuit

\textsuperscript{160} Id. (citation omitted).

\textsuperscript{161} See id. at 1255-57.

\textsuperscript{162} See supra notes 86-111 and accompanying text.

\textsuperscript{163} Coeur d’Alene Tribe, 42 F.3d at 1255 (emphasis added).

\textsuperscript{164} Id. at 1257. In emphasizing that the Tribe could not be viewed as legally incapable of proving that recognized title to the disputed submerged lands had vested in the Tribe prior to Idaho’s admission to the Union, the Ninth Circuit refuted two novel and expansive arguments put forward by Idaho: (1) “that the federal government [may never] ‘reserve’ submerged lands in a manner sufficient to withstand the ‘equal footing doctrine’”; and (2) “that executive orders creating an interest in bedlands must be issued with explicit prior congressional approval or subsequent ratification,” whereas the Tribe’s recognized title claim rested on a theory of subsequent \textit{implied} congressional authorization of a pre-statehood executive order reserving the disputed submerged lands. \textit{Id.} at 1256. The Ninth Circuit rejected these sweeping arguments because (1) Idaho had misread the Supreme Court’s decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), in which the Court held that congressional language purporting to “reserve” public lands \textit{for the United States alone} was “insufficient to create a ‘reservation’ of interest in submerged land”; and (2) Idaho had failed to note that the Ninth Circuit in *Puyallup Tribe of Indians v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), already had found recognized Indian title on the sole basis of \textit{implied} congressional acquiescence. \textit{Coeur d’Alene Tribe}, 42 F.3d at 1256-57. In invoking *Puyallup Indian Tribe*, the Ninth Circuit recognized the importance of adhering to the controlling legal framework for determining whether a party might be able to rebut the *Montana* presumption—
concluded, the district court's "dismissal for failure to state a claim was error."165

Thus did the Ninth Circuit Court of Appeals navigate a narrow course through the hazardous straits of the Supreme Court's Eleventh Amendment/Hans immunity doctrine in an effort to salvage for the Coeur d'Alene Tribe an opportunity to obtain vindication in federal court of the Tribe's federal rights to its submerged lands. In embarking on this expedition, the Ninth Circuit in effect attempted to preserve the vitality of the Ex parte Young doctrine, which long has been understood as essential to actualizing the Constitution's guarantee of the supremacy of federal law.166 As Justice Brennan has indicated, the Young doctrine is essential for "provid[ing] a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land" and—in the wake of the Court's misguided expansion of Hans immunity in the modern era—for "circumvent[ing] the intolerable constriction of federal jurisdiction that would otherwise occur."167 As the Hans-embracing majority of the modern Court itself conceded in 1985—ironically, in an opinion denying Young relief, authored by then-Associate Justice Rehnquist168—"the availability of

a legal framework whose relevance and binding effect the district court had ignored. See supra notes 117-25 and accompanying text.

165. Coeur d'Alene Tribe, 42 F.3d at 1257. As had the district court, the Ninth Circuit also addressed the civil rights claim based on 42 U.S.C. § 1983 that had been raised by the Tribe and individual tribal members. See id. at 1255; see also supra note 128. By virtue of its determination that the Tribe was not barred by the Eleventh Amendment from seeking prospective relief against state officials alleged to be violating the Tribe's federally protected rights to property, the Ninth Circuit concluded that "[i]njunctive relief is available against state officials in their individual capacities under section 1983." Coeur d'Alene Tribe, 42 F.3d at 1255.

166. In his dissenting opinion in Seminole Tribe v. Florida, Justice Souter explained that the doctrine of Ex parte Young "provide[s] . . . a sensible way to reconcile the Court's expansive view of immunity expressed in Hans with the principles embodied in the Supremacy Clause and Article III," and that it thus embodies a vital and indispensable limitation on the powers of a sovereign that is of ancient lineage:

[T]he rule we speak of under the name of Young is so far inherent in the jurisdictional limitation imposed by sovereign immunity as to have been recognized since the Middle Ages. For that long it has been settled doctrine that suit against an officer of the Crown permitted relief against the government despite the Crown's immunity from suit in its own courts and the maxim that the King could do no wrong.

517 U.S. 44, 170-71 (1996) (Souter, J., dissenting); see also Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 308 (1997) (Souter, J., dissenting) (referring to "a history of officer liability . . . extending back to the Middle Ages").


168. Green v. Mansour, 474 U.S. 64, 73-74 (1985) (holding that federal court process for "notice relief" relating solely to state officials' past violations of plaintiffs' federal rights is prohibited by the Eleventh Amendment absent the State's consent).
prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”

In a similar vein, Justice Souter has observed:

*Ex parte Young*, and the historic doctrine it embodies . . . plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a “fiction,” the long history of its felt necessity shows it to be something much more estimable . . . . The doctrine we call *Ex parte Young* is nothing short of “indispensable to the establishment of constitutional government and the rule of law.”

Nevertheless, despite its wise obedience to constitutional principle in affirming the *Young* doctrine and thereby endeavoring to spare an Indian Tribe from subjugation to despotism, the Ninth Circuit Court of Appeals ultimately was forced to abandon its salvaging expedition at the command of a different court on a different mission.

**III. THE SUPREME COURT’S COEUR D’ALENE TRIBE DECISION**

The Idaho officials petitioned the Supreme Court for review of that part of the Ninth Circuit’s decision recognizing federal court jurisdiction over the Coeur d’Alene Tribe’s *Ex parte Young* action for injunctive relief and prospective declaratory relief against the ongoing conduct of those officials allegedly in violation of federal law. The Coeur d’Alene Tribe cross-petitioned the Court for review of the Ninth Circuit’s determination that the State of Idaho had not waived its immunity to suit. The Supreme Court granted the state officials’ request for review, and denied the Tribe’s.

Five of the Court’s nine members—Chief Justice Rehnquist and Associate Justices Kennedy, O’Connor, Scalia and Thomas—voted to reverse the Ninth Circuit’s ruling on the availability of *Young* relief, and thus to forbid altogether federal court adjudication of the merits of the Coeur d’Alene

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169. *Id.* at 68.


171. *See Coeur d’Alene Tribe*, 521 U.S. at 266.

172. *See Respondent’s Brief, supra* note 25, at *3 n.3.


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Tribe's request for justice against the Idaho officials. Justice Kennedy authored the "principal opinion," a portion of which reflects the views of the five-member Court majority, and a separate portion of which expresses the views of only two members, Justice Kennedy and Chief Justice Rehnquist. Justice O'Connor, joined by Justices Scalia and Thomas, wrote an opinion concurring in part and concurring in the judgment. And Justice Souter wrote a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined.

The varying viewpoints of the Supreme Court Justices in Coeur d'Alene Tribe may be analyzed according to two emergent themes: (1) the specific attack on Indian rights manifested in the Court's decision to deny Indian Tribes access to the federal courts for suing state officials who continue to violate Tribes' federally protected rights to on-reservation navigable waterways; and (2) the general threat to the Constitution and the people's liberty posed by the Court's efforts to dismantle the doctrine of Ex parte Young.

A. Closing the Federal Courts to Indian Tribes Seeking Justice Against State Officials Who Illegally Appropriate On-Reservation Submerged Lands

1. The Charge of the Straw Brigade

In that portion of the "principal opinion" reflecting the views of the Court, Justice Kennedy inaugurated his analysis with a ringing affirmation of the majority's allegiance to the Hans immunity doctrine. Kennedy suggested that the Hans doctrine's conferral of immunity on a State faced with a federal court suit alleging the State's defiance of federal law is necessitated by "the dignity and respect afforded a State."

Kennedy frankly acknowledged that "[t]he Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh

175. See Coeur d'Alene Tribe, 521 U.S. at 287 (finding "the Young exception inapplicable").
176. See id. at 264-70, 281-88 (Parts I, II-A and III).
177. See id. at 271-80 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (Parts II-B, II-C and II-D).
178. See id. at 288-97 (O'Connor, J., concurring in part and concurring in the judgment).
179. See id. at 297-319 (Souter, J., dissenting).
180. See id. at 264-70, 281-88 (Parts I, II-A and III).
181. See id. at 267-69.
182. Id. at 268.
Amendment." Indeed, Kennedy even conceded that the majority's embrace of *Hans* has been subjected to "extended criticisms," and that "various dissenting and concurring opinions have urged a change in direction." Kennedy continued:

Were we to abandon our understanding of the Eleventh Amendment as reflecting a broader principle of sovereign immunity, the Tribe's suit, which is based on its purported federal property rights, might proceed. These criticisms and proposed doctrinal revisions, however, have not found acceptance with a majority of the Court. We adhere to our precedent.

Apart from typifying the Court's tendency to deflect scholarly criticism of the *Hans* doctrine with a "flexing of muscle," this pledge of loyalty to *Hans* mischaracterizes by implication the Coeur d'Alene Tribe's litigation theory, for the Tribe had never asked the Court to "abandon" the *Hans* doctrine. Rather, the Tribe had argued from the start that despite the Court's general embrace of *Hans* immunity, the Tribe's claims against Idaho, its agencies and its officials nevertheless were cognizable in federal court pursuant to the Court's own established exceptions to the reach of *Hans*—i.e., the theories of (1) state consent to suit, and (2) *Ex parte Young*.

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183. Id. at 267.
184. Id. at 268.
185. Id.
186. The Court's "brawny" reaction to the ubiquitous criticisms of the *Hans* immunity doctrine is reminiscent of the same five-member majority's derisive dismissal of Justice Souter's observation in his dissenting opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that "[t]he great weight of scholarly commentary agrees" that the *Hans* doctrine is indefensible in view of "[t]he history and structure of the Eleventh Amendment." Id. at 110 & n.8 (Souter, J., dissenting) (collecting articles). Writing for the *Seminole Tribe* Court, Chief Justice Rehnquist ridiculed the dissent for questioning the validity of "this century-old *Hans* doctrine" by means of "a theory cobbled together from law review articles and its own version of historical events." Id. at 68; see also supra note 64.

In the recently decided case of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), this same majority continued its habit of resorting to ridicule to condemn the dissenting Justices' criticism of the *Hans* doctrine. See, e.g., id. at 2231-32 (stating "Justice Breyer reiterates (but only in outline form, thankfully) the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods").

187. See Coeur d'Alene Tribe v. Idaho, 798 F. Supp. 1443 (D. Idaho 1992), aff'd in part and rev'd in part, 42 F.3d 1244 (9th Cir. 1994). The fact that the Coeur d'Alene Tribe was not asking the Court to overrule *Hans* or otherwise "abandon" the status quo as represented by the *Hans* doctrine is also clear from the cautious references to the "balance of sovereignties" demarcated by *Hans* and *Ex parte Young* in the brief that the Tribe submitted to the Supreme Court:

The Eleventh Amendment caselaw developed during the past century by this Court serves a critical purpose in this nation's Constitutional government. The thoughtfully crafted approach embodied in *Ex parte Young* and its progeny
Hence, Justice Kennedy’s prefatory admonishment about the Court’s intent to hold fast to *Hans* while disposing of the Tribe’s claims for declaratory and injunctive relief against Idaho officials can be understood only as a reproof—to borrow the Court’s phrase—“directed at a straw man.”

Next, Justice Kennedy invoked the Court’s 1991 *Blatchford* decision for the proposition that “States enjoy Eleventh Amendment immunity” from suits brought by Indian Tribes. In resurrecting *Blatchford*’s rationale for expanding *Hans* immunity to insulate States from suits brought by Tribes, Kennedy repeated an erroneous and misleading assertion that was first made by Justice Scalia for the *Blatchford* Court and subsequently was incorporated into the district court’s analysis in the *Coeur d’Alene Tribe* litigation. “In *Blatchford,*” insisted Justice Kennedy, “we rejected the contention that sovereign immunity only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns.” But, in actuality, the Alaska Native Villages in *Blatchford* had never made any such “contention”

honors the sovereignty of our states through its narrowly tailored *exception* to immunity from suit. . . .

. . . Without [the *Young* doctrine], the *Hans* expansion of the Eleventh Amendment would be unchecked, posing a serious threat to the delicate balance of sovereignties that has served this country so well for so long.

Respondent’s Brief, supra note 25, at *5,*12 (emphasis added).

188. *Seminole Tribe,* 517 U.S. at 69. In dismissing “[t]he dissent’s lengthy analysis of the text of the Eleventh Amendment” as “directed at a straw man,” Chief Justice Rehnquist emphasized the fact that, ever since the *Hans* decision, the Supreme Court has avoided what Rehnquist called “blind reliance upon the text of the Eleventh Amendment.” *Id.* In response, Justice Souter reiterated the importance of the Constitution’s “plain text,” noting that deference to text is especially indicated

in construing the jurisdictional provisions of Article III, which speak with a clarity not to be found in some of the more open-textured provisions of the Constitution. That the Court thinks otherwise is an indication of just how far it has strayed beyond the boundaries of traditional constitutional analysis.

*Id.* at 116 n.13 (Souter, J., dissenting) (citations omitted).


191. *See supra* note 41 and accompanying text.

192. In *Blatchford,* Justice Scalia, writing for the Court, asserted the following: “In arguing that sovereign immunity does not restrict suit by Indian tribes, respondents submit, first, that sovereign immunity only restricts suits by *individuals* against sovereigns, not by *sovereigns* against sovereigns . . . .” 501 U.S. at 779-80.


that the Court's Eleventh Amendment doctrine would be inapplicable whenever any sovereign attempted to sue a State in federal court; for such a "contention" clearly would have run afoul of the Supreme Court's 1934 decision in Principality of Monaco v. Mississippi, viz., that a foreign nation (i.e., a type of "sovereign") is barred by the Eleventh Amendment from suing a State in federal court. Indeed, the Alaska Native Villages in Blatchford had taken pains to distinguish Monaco in their briefs, for the very purpose of making it clear that the Tribes emphatically were not claiming the existence of any kind of generic, across-the-board exemption, applicable to all sovereigns as such, under the Court's Eleventh Amendment jurisprudence:

[T]he factors that led this Court in Monaco to find an Eleventh Amendment bar against suits by foreign countries do not apply to suits by Indian tribes. . . . Indian tribes are sovereignties internal, rather than external, to the United States. Suits by Indian tribes do not implicate foreign relations and sensitive questions of foreign policy and negotiations.

. . . Indian Tribes are domestic sovereigns, existing inside "the structure of the Union," and should be understood to have the right to bring suit against a state comparable to the right enjoyed by the other domestic sovereigns.

Despite the Native Villages' careful clarification of their argument, Justice Scalia apparently chose to ignore the theory specified by the Tribes in Blatchford, and instead attributed to the Native Villages an argument never put forward by the Tribes and susceptible to the Court's condemnation in view of Monaco. This enabled Justice Scalia to portray the Native Villages as having proposed a jurisdictional theory squarely at odds with Supreme Court precedent. It also allowed the Blatchford Court to sidestep the real and compelling arguments actually articulated by the Native Villages for insisting that Indian Tribes, like the other domestic sovereigns—the fifty States, and the United States itself—are not barred by the Eleventh Amendment from suing States in federal court.

195. 292 U.S. 313 (1934).
196. See id. at 329-30; see also supra note 67 and accompanying text.
2. Condemning Tribes' *Young* Suits for Failing an "Ordinariness" Test

After thus slaying both a "straw man" of his own making and a hand-me-down one from the *Blatchford* Court, Justice Kennedy turned his attention to the jurisdictional issue for which the Court had granted review—whether "[t]he Tribe's suit . . . is barred by Idaho's Eleventh Amendment immunity," or whether it "falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities." In due course, Kennedy announced the Court's conclusion: "[W]e find the *Young* exception inapplicable. 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."

By this simple pronouncement, the Rehnquist Court closed the doors of all federal courthouses in the United States to all Indian Tribes seeking justice against state officials for effectively confiscating the navigable lakes, rivers and other waterways on Indian reservations in violation of Tribes' federally protected rights. In effectuating this sweeping repudiation of Tribes' federal rights, the Court majority necessarily denigrated and trivialized the doctrine of *Ex parte Young*. Justice Kennedy derided the previously settled understanding that *Young* suits would be universally available for seeking prospective relief in federal court whenever state officials are violating plaintiffs' federal rights, discarding this conviction as mere "adhere[nce] to an empty formalism." Kennedy accomplished this denigration of *Young* while simultaneously avowing that "[w]e do not . . . question the validity of the *Ex parte Young* doctrine." Ironically, this statement appears to illustrate Kennedy's notion of "an empty formalism."

Instead of affirming the applicability of the *Young* doctrine, the *Coeur d'Alene Tribe* majority adopted a new scheme in which the Court itself would retain an independent veto over officer suits that otherwise clearly would qualify for federal jurisdiction. Without citing authority, Justice Kennedy recast the *Young* criteria as necessary but not sufficient for gaining access to

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199. Id. at 287-88.
200. Id. at 270.
201. Id. at 269.
202. *See supra* text accompanying note 200. Rather tellingly, in the same paragraph wherein he purported not to question *Young*, Justice Kennedy adverted to the importance of *Young* strictly in the past tense: "The *Young* exception to sovereign immunity was an important part of our jurisprudence . . . ." *Coeur d'Alene Tribe*, 521 U.S. at 269 (emphasis added).
the federal courts: "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction."203 Certainly, if the word "ordinarily" were omitted from this assertion of Kennedy's, the assertion might pass for a fairly accurate statement of existing law. However, by inserting the modifier "ordinarily" into his assertion, Kennedy modified the Young doctrine, generating a proposition both dangerous and unprecedented—but essential for preventing the Coeur d'Alene Tribe from presenting its request for justice to the federal courts.

To be sure, Justice Kennedy was not alone in sanctioning this change of law regarding the availability of federal court relief under Ex parte Young. Justice O'Connor, in her concurring opinion in Coeur d'Alene Tribe, put forth essentially the same remarkable proposition not once but twice,204 citing on each occasion the single case of Milliken v. Bradley.205 Milliken, however, clearly does not support or countenance the majority proposition announced in Coeur d'Alene Tribe. In Milliken, the Supreme Court permitted a federal district court to award prospective relief against state officials found to be guilty of racial discrimination forbidden by the Constitution.206 As Justice O'Connor conceded elsewhere in her Coeur d'Alene Tribe concurrence,207 the Milliken Court's determination that the district court's order did not violate the Eleventh Amendment focused exclusively on the question of whether the relief awarded—which included a requirement that the State pay for remedial education programs for schoolchildren long subjected to illegal racial segregation—was prospective or retroactive in nature.208 Nowhere in Milliken, either on the pages cited by

203. Coeur d'Alene Tribe, 521 U.S. at 281 (emphasis added); see also id. at 276-77 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (emphasis added) (stating "where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").

204. See id. at 288, 293 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor stated first that "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." Id. at 288 (O'Connor, J. concurring in part and concurring in the judgment) (emphasis added). She later reiterated: "When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar." Id. at 293 (O'Connor, J. concurring in part and concurring in the judgment) (emphasis added).


206. See id. at 282-83.

207. See Coeur d'Alene Tribe, 521 U.S. at 295 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he [Milliken] Court upheld the relief . . . because the remedy was prospective rather than retrospective.").

208. See Milliken, 433 U.S. at 288-90.
Justice O'Connor or anywhere else, did the Supreme Court suggest that a Young suit might be prohibited even where Young’s requirements of an alleged ongoing violation of federal law and a request for prospective relief had been satisfied. Indeed, O’Connor’s twice-iterated assertion that Young suits are merely “ordinarily” available when a plaintiff satisfies the requirements of the Young doctrine might have seemed somewhat less assailable had O’Connor simply followed Justice Kennedy’s lead and not purported to support this ipse dixit with any prior holding of the Court.

209. In asserting that Young suits “ordinarily” may proceed where Young’s criteria are satisfied, Justice O’Connor twice cited to pages 289-90 of the Milliken opinion. See Coeur d’Alene Tribe, 521 U.S. at 288, 293 (O’Connor, J., concurring in part and concurring in the judgment). Later in her Coeur d’Alene Tribe concurrence, in defying the efforts of Justice Kennedy and Chief Justice Rehnquist to turn the Young doctrine into a prescription for a general, discretionary “case-by-case balancing approach” to the availability of Young relief, O’Connor referred once again to those same pages from Milliken, this time dropping the contrivance of grafting the word “ordinarily” onto Milliken’s holding, and instead pointing out that Milliken and all the rest of the Court’s modern Young cases “establish only that a Young suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective.” Id. at 293-94 (O’Connor, J., concurring in part and concurring in the judgment). Writing in dissent, Justice Souter offered the same observation about Milliken: “The sole enquiry [for applying Young in Milliken] was whether the relief sought was fairly characterized as prospective.” Id. at 304 n.6 (Souter, J., dissenting). For further discussion of Milliken’s exclusive focus on the distinction between prospective and retrospective relief, see infra text accompanying notes 534-41.

210. Actually, in that portion of his opinion joined only by Chief Justice Rehnquist, Justice Kennedy did point out that in the previous Supreme Court Term, “we did not allow a suit raising a federal question [and seeking prospective relief] to proceed based on Congress’ provision of an alternative review mechanism.” Id. at 277 (Kennedy, J., joined by Rehnquist, C.J.). Without identifying the case, Justice Kennedy was referring to Seminole Tribe v. Florida, 517 U.S. 44 (1996), in which the Court denied Young relief to a different Indian Tribe. In that case, the Seminole Tribe had sought, inter alia, a federal court order enjoining Florida officials from continuing to violate the Tribe’s federal rights under the Indian Gaming Regulatory Act, 25 U.S.C. § 2702. See Seminole Tribe, 517 U.S. at 51-52. The Court held, inter alia, that “[t]he narrow exception to the Eleventh Amendment provided by the Ex parte Young doctrine cannot be used to enforce [the Act] because Congress enacted a remedial scheme . . . specifically designed for the enforcement of that right.” Id. at 76.

While Seminole Tribe—decided by the same five-member Court majority as Coeur d’Alene Tribe—certainly does represent a significant encroachment on the safeguarding of federal rights as afforded by the Young doctrine, see Vicki C. Jackson, Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex parte Young, 72 N.Y.U. L. REV. 495, 530 (1997), that opinion purports, at least (albeit by dubious reasoning) to attribute to Congress the foreclosure of Young relief. Presumably, Seminole Tribe does not commit the prerogative of allowing or denying Young relief to the Court’s own independent policy predilections—which is, of course, the majority’s innovation in Coeur d’Alene Tribe. In this regard, Justice Souter’s observation in his Coeur d’Alene Tribe dissent is worth noting:

In Seminole Tribe, the Court declared Ex parte Young inapplicable to the case before it, having inferred that Congress meant to leave no such avenue of relief open to those claiming federal rights under the statute then under consideration. The Court left the basic tenets of Ex parte Young untouched,
After forging this new methodology for accepting or rejecting a *Young* suit based on the Court's assessment of the suit's "ordinariness," the *Coeur d'Alene Tribe* majority quickly concluded that the Tribe's suit failed this just-announced "ordinariness" test: "[T]his case is unusual," Justice Kennedy asserted, "in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." Concurring in this finding of a fatal lack of "ordinariness," Justice O'Connor elaborated:

This case is unlike a typical *Young* action in two respects. First, . . . the suit is the functional equivalent of an action to quiet [the Tribe's] title . . . . Second, the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law. Rather, the Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all.

Kennedy and O'Connor then devoted several paragraphs of their respective opinions to evaluating what both opinions conclude were the two distinguishing and disqualifying characteristics of the Tribe's officer suit: (1) the fact that the Tribe's claim for prospective relief resembled a quiet title action; and (2) the fact that the Tribe was challenging the presumption that States have exclusive dominion over submerged lands.

3. Submerging the "Middle Ground" of *Treasure Salvors*

With respect to the first disqualifying characteristic of the Tribe's officer suit—the asserted "functional equivalen[ce]" of the Tribe's request for declaratory and injunctive relief to a quiet title action—both Justice Kennedy and Justice O'Connor attempted to distinguish the case of *Florida Department of State v. Treasure Salvors*, which had provided a framework for the Ninth Circuit's earlier determination that the Tribe's claims were

however, and Congress remained free to remove any bar to the invocation of *Young*, even in a successive suit by petitioners in *Seminole Tribe* itself.

*Coeur d'Alene Tribe*, 521 U.S. at 298 (Souter, J., dissenting) (citations omitted).

211. *Coeur d'Alene Tribe*, 521 U.S. at 281; *see also id.* at 282 ("[T]he declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title . . . .").

212. *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

213. *See supra* notes 211-12 and accompanying text.

cognizable under the doctrine of *Ex parte Young*. In *Treasure Salvors*, the Supreme Court validated the exercise of federal in rem admiralty jurisdiction by a federal court issuing a warrant for seizing artifacts from a sunken, seventeenth-century Spanish galleon in the possession of state officials allegedly acting ultra vires state law and in violation of the plaintiff salvaging company's rights to the artifacts under federal law. A plurality of the Justices held

that the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent.

With this holding—or pair of holdings—the *Treasure Salvors* plurality settled on the same "middle ground" approach to conflicting property claims that the Ninth Circuit subsequently recognized in the *Coeur d'Alene Tribe* litigation. Justice Souter also commented on this "middle ground" approach in his *Coeur d'Alene Tribe* dissent:

[T]his Court has consistently held that a public officer's assertion of property title in the name of a government immune to suit cannot defeat federal jurisdiction over an individual's suit to be rid of interference with the property rights he claims. By a parity of reasoning, we have of course drawn the jurisdictional line short of ultimately quieting title (which would run directly against the State as putative title-holder and not against its officers) or limiting the affected government in any subsequent title action. "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, the latter having shown no valid authority to withhold possession from the plaintiff."

In view of *Treasure Salvors* as well as other precedents involving federal court proceedings implicating conflicting claims of title to property in the

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215. *See Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244, 1252-55 (9th Cir. 1994); *see also supra* notes 136-60 and accompanying text.
216. *See Treasure Salvors*, 458 U.S. at 673-76 (plurality opinion).
217. *Id.* at 682 (plurality opinion).
218. *See Coeur d'Alene Tribe*, 42 F.3d at 1252-55 (9th Cir. 1994); *see also supra* notes 148-60 and accompanying text.
possession of governmental officials, the Coeur d’Alene Tribe confidently could believe itself to be on firm ground—albeit a “middle ground”—in asking the Supreme Court to validate federal court jurisdiction over the Tribe’s Young suit against Idaho officials.

Defying that belief, the Court majority decided to remove the ground from under the Tribe—in more ways than one. In Justice Kennedy’s view, Treasure Salvors was irrelevant to the Tribe’s suit against Idaho officials because “the state officials there were acting beyond the authority conferred upon them by the State, a theory the Tribe does not even attempt to pursue in the case before us.” Justice O’Connor purported to distinguish Treasure Salvors in similar terms:

[W]here the plurality in Treasure Salvors would have permitted the suit to proceed not because the plaintiff’s claim of title arguably rested on federal law, but because state officials were acting beyond the authority conferred on them by the State, quite apart from whether their conduct also violated federal law. Because the Tribe does not pursue such a theory, Treasure Salvors provides little guidance here.

Writing in dissent, Justice Souter underscored the revisionism manifest in the Coeur d’Alene Tribe Court’s reading of Treasure Salvors:

[W]here the plurality’s analysis in Treasure Salvors . . . noted that the plaintiff salvage company claimed that Florida state officials lacked authority to retain treasure recovered from the sunken galleon because the galleon had been found on submerged land belonging to the United States, not Florida, as determined under the Submerged Lands Act . . . . While the plurality noted further that the company claimed that the state officials lacked authority under state law to retain the treasure, there was no question that the company claimed ownership of the treasure under federal law.

Depriving the Coeur d’Alene Tribe of its crucial reliance on Treasure Salvors through a result-driven reading of that plurality opinion, the Coeur d’Alene Tribe majority “pierce[d] Young’s distinction between State and officer,” purporting to discern in the Tribe’s suit a request for relief that was

220. For a discussion of the Supreme Court’s rejection of the Coeur d’Alene Tribe’s reliance on the real property/officer suit cases of United States v. Lee, 106 U.S. 196 (1882), and Tindal, 167 U.S. at 204, see infra notes 290-313 and accompanying text.

221. Coeur d’Alene Tribe, 521 U.S. at 281 (citation omitted).

222. Id. at 290 (O’Connor, J., concurring in part and concurring in the judgment) (citation omitted).

223. Id. at 307 n.9 (Souter, J., dissenting) (citations omitted).
"indistinguishable in practice"—and uniquely so—"from a decree quieting title." But in truth, as Justice Souter, emphasized in dissent, the Tribe's officer suit was indistinguishable, for purposes of applying the doctrine of Ex parte Young, from the arrest warrant proceeding that Treasure Salvors had permitted. As Souter pointed out, "[i]f [the majority's] argument were to the point it would . . . render erroneous the holding[ ] in Treasure Salvors . . . ."

Indeed, Justice O'Connor's argument purporting to distinguish Treasure Salvors would appear to be more in the nature of a conviction that the holding in Treasure Salvors recognizing federal jurisdiction for ordering the arrest of property in the possession of state officials is erroneous and for this reason, the Coeur d'Alene Tribe duly was prevented from relying on that holding. O'Connor, after all, had joined Justice White's dissenting position with respect to the issue of the federal court arrest warrant proceeding in Treasure Salvors, lamenting as an "aberration" the majority's decision to permit the proceeding, and complaining further that the consequences will be unfortunate. Given that all property of the State must be held by its officers . . . there is no item within state possession whose ownership cannot be made the subject of federal litigation . . . . The State must then defend on the merits: it must persuade a federal court that its officers were justified in holding the controverted property. . . . [T]his inquiry will be tantamount to deciding the question of [the State's] title itself.

That Justice O'Connor's disagreement with the arrest warrant holding in Treasure Salvors may have animated her efforts to "distinguish" that case in Coeur d'Alene Tribe is further indicated by the doubt O'Connor raised as to whether Treasure Salvors "remains sound" in light of the Court's intervening decision in Pennhurst State School & Hospital v. Halderman. In Pennhurst, O'Connor was one of five members of the Court who voted to prohibit federal pendent jurisdiction over a suit seeking prospective relief against state officials operating a state mental hospital in a manner hazardous to and abusive of the hospital's patients, in clear violation of state statutory law. In the Pennhurst Court's view, "Young . . . [is] inapplicable in a suit

224. Id. at 306-07 (Souter, J., dissenting).
225. See id. at 306-09 (Souter, J., dissenting).
226. Id. at 307 (Souter, J., dissenting).
227. Treasure Salvors, 458 U.S. at 717 (White, J., concurring in the judgment in part and dissenting in part).
229. See Pennhurst, 465 U.S. at 92-93, 97, 106.
against state officials on the basis of state law." Justice O'Connor's insistence in *Coeur d'Alene Tribe* that *Treasure Salvors* is distinguished because there the validity of federal jurisdiction over the arrest warrant proceeding rested on an allegation that state officials were acting ultra vires state law, together with O'Connor's suggestion that *Treasure Salvors* "was narrowed" by *Pennhurst*, would seem to indicate that O'Connor believes that the *Treasure Salvors* holding no longer is valid. In this regard, the efforts of a majority of the Justices in *Coeur d'Alene Tribe* to "distinguish" the *Young*-driven arrest warrant holding in *Treasure Salvors* would appear to comprise a significant step toward *overruling* that holding and erecting in its place the contrary, *Young*-negating position of the *Treasure Salvors* dissent, i.e., that "enforcement of process by arrest of [property]" in the possession of state officials is "a suit against the State"—even where a plaintiff claims to have paramount rights to such property by operation of federal law.

An eventual *overruling* of the *Young*-driven holding in *Treasure Salvors* may be further anticipated by the Supreme Court's disposal of an Eleventh Amendment case decided in the aftermath of *Coeur d'Alene Tribe*. In *California v. Deep Sea Research*, the Court held that the Eleventh Amendment does not bar an in rem admiralty action brought in federal court against property claimed by a State when the res is not in the State's possession. Like *Treasure Salvors*, the case of *Deep Sea Research* involved a salvaging company's efforts to obtain a federal court adjudication of the company's claim of title to a sunken ship and its cargo. The State of California made an appearance in the company's federal court in rem proceeding against the disputed property to file a motion to dismiss the claim.

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230. Id. at 106.
231. See *Coeur d'Alene Tribe*, 521 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment).
232. But if O'Connor and the rest of the *Coeur d'Alene Tribe* majority are not questioning the continuing validity of the arrest warrant holding in *Treasure Salvors*, then the distinction pressed by both Justice Kennedy and Justice O'Connor would seem strange indeed, for the Court then would appear to be faulting the *Coeur d'Alene Tribe* for not coupling its allegation referring to federal law with an allegation referring to state law that *Pennhurst* apparently doubted to be a valid basis for any federal proceeding premised on *Young*. As such a strange requirement places the Court in an unstable posture with respect to the validity of *Treasure Salvors*, one can predict that the Supreme Court, as presently constituted, eventually will reconsider the type of officer suit permitted in *Treasure Salvors* and reject it as an "aberration" that fails the "ordinariness" test of *Coeur d'Alene Tribe*. See supra notes 203-12 and accompanying text; supra text accompanying note 227; infra notes 234-74 and accompanying text.
235. See id. at 494-95.
236. See id.
on Eleventh Amendment grounds. Under the State’s theory, the company’s in rem suit against the res was an unconsented suit against the State itself, since the State asserted title to the ship and its cargo under both state and federal law, and thus the suit should be barred by the State’s *Hans* immunity. Both the federal district court and the Ninth Circuit ruled that the State had not established by a preponderance of evidence any colorable claim of title to the ship and its cargo under either state or federal law, and accordingly dismissed as a matter of law the State’s Eleventh Amendment-based challenge to the federal courts’ in rem admiralty jurisdiction. The Supreme Court affirmed the dismissal of the State’s Eleventh Amendment challenge, but *not* on the ground specified by the Ninth Circuit, i.e., that “the State must prove its claim to the [res] by a preponderance of the evidence in order to invoke the immunity afforded by the Eleventh Amendment.” Rather, in the Supreme Court’s view, the Eleventh Amendment simply does not apply to federal court in rem admiralty proceedings where the res is not in the State’s possession.

In reaching this result, Justice O’Connor distinguished the pair of Supreme Court precedents—the two *Ex parte New York* cases—that previously had been read as making *Hans* immunity as applicable to the federal courts’ Article III admiralty cases as it is to the federal courts’ Article III federal question cases. According to Justice O’Connor, while *New York I* “explained that admiralty and maritime jurisdiction is not wholly exempt from the operation of the Eleventh Amendment,” the case actually concerned *in personam* admiralty proceedings against a state official in his official capacity, rather than in rem admiralty proceedings. And *New York II*, according to Justice O’Connor, could be distinguished from *Deep Sea Research* on the ground that in that earlier in rem admiralty suit, the res *was* in the State’s possession—or perhaps on the more tantalizing ground that in *New York II*, “the Court did not specifically rely on the Eleventh Amendment

237. *See id.* at 494.
238. *See id.* at 496-97.
239. *See id.* at 497-98.
240. *Id.* at 500.
241. *See id.* at 494-95, 502.
242. *Ex parte New York*, No. 1, 256 U.S. 490 (1921) [hereinafter *New York I*] (holding that an *in personam* admiralty proceeding brought by an individual against a state officer in his official capacity and not involving an allegation that the officer was acting under color of an unconstitutional law is a suit against the State and thus prohibited by the Eleventh Amendment absent the State’s consent); *Ex parte New York*, No. 2, 256 U.S. 503 (1921) [hereinafter *New York II*] (holding that an in rem admiralty proceeding may not be “based upon the seizure of property owned by a State and used . . . solely for [the State’s] governmental uses and purposes”).
244. *See id.* at 503-05.
in its holding."^{245} Thus, in O'Connor's view, it was proper for the Court in *New York I* and *New York II* to conclude that federal jurisdiction was lacking with regard to the respective proceedings—by operation of the Eleventh Amendment or otherwise—whereas the Eleventh Amendment *does not* preclude an in rem admiralty action like the one in *Deep Sea Research*, where the res is not in the State's possession.^{246}

While it may seem odd for a Court as enamored of the *Hans* immunity doctrine as the Rehnquist Court to go to such lengths to identify a latent exception—albeit a narrow one—to the applicability of *Hans*, the Court's facially anomalous decision in *Deep Sea Research* may be understood as a strategic step toward overruling the *Young*-driven holding in *Treasure Salvors*, and consequently toward further expanding *Hans* and contracting *Young*. Thus, in *Deep Sea Research*, Justice O'Connor cast ample additional doubt on whether *Treasure Salvors* "remains sound":

A plurality of the [*Treasure Salvors*] Court suggested that *New York II* could be distinguished on the ground that, in *Treasure Salvors*, the State's possession of maritime artifacts was unauthorized, and the State therefore could not invoke the Eleventh Amendment to block their arrest. . . .

. . . .

. . . In this case, unlike in *Treasure Salvors*, [the plaintiff] asserts rights to a res that is not in the possession of the State. The Eleventh Amendment's role in that type of dispute was not decided by the plurality opinion in *Treasure Salvors* . . . .

. . . .

It is true that statements in the fractured opinions in *Treasure Salvors* might be read to suggest that a federal court may not undertake *in rem* adjudication of the State's interest in property

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245. *Id.* at 503. Justice O'Connor did not elaborate on her suggestion that the Court in *New York II* did not rely on the Eleventh Amendment in dismissing the plaintiff's *in rem* admiralty action on grounds of sovereign immunity. However, the suggestion would appear to be based on the Court's conclusion in *New York II* that "[t]he principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes." *New York II*, 256 U.S. at 511. With this conclusion, the *New York II* Court apparently skirted the Eleventh Amendment issue of "whether a suit in admiralty brought by private parties through process *in rem* against property owned by a State is not in effect a suit against the State." *Id.* at 510.

without the State's consent, regardless of the status of the res. Those assertions, however, should not be divorced from the context of *Treasure Salvors* and reflexively applied to the very different circumstances presented by this case. In *Treasure Salvors*, the State had possession—albeit unlawfully—of the artifacts at issue. Also, the opinion addressed the District Court's authority to issue a warrant to arrest the artifacts, not the disposition of title to them. ... Thus, any references in *Treasure Salvors* to what the lower courts could have done if they had solely adjudicated title to the artifacts, rather than issued a warrant to arrest the res, do not control the outcome of this case, particularly given that it comes before us in a very different posture, *i.e.*, in an admiralty action *in rem* where the State makes no claim of actual possession of the res.

Nor does the fact that *Treasure Salvors* has been cited for the general proposition that federal courts cannot adjudicate a State's claim of title to property prevent a more nuanced application of *Treasure Salvors* in the context of the federal courts' *in rem* admiralty jurisdiction. Although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to State property interests, it does not necessarily follow that it applies to *in rem* admiralty actions, or that in such actions, federal courts may not exercise jurisdiction over property that the State does not actually possess.  

In these passages, Justice O'Connor would appear to be questioning primarily the "soundness" of *Treasure Salvors*' rationale for holding that, as a consequence of Florida's *Hans* immunity, the federal district court lacked the power "to adjudicate the State's interest in the property without the State's consent." In O'Connor's view, none of the opinions in *Treasure Salvors* gave adequate ventilation to the need for a "more nuanced" approach to the question of the proper scope of a federal court's jurisdiction, in light of the Eleventh Amendment, over an in rem admiralty proceeding as such, as contrasted with a more "typical" federal court proceeding implicating a plaintiff's claim to property also claimed by a State.

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247. *Id.* at 503-06 (citations omitted).
248. *Treasure Salvors*, 458 U.S. at 682 (plurality opinion).
249. *See Deep Sea Research*, 523 U.S. at 506 (suggesting "a more nuanced application of *Treasure Salvors* in the context of the federal courts' *in rem* admiralty jurisdiction"); *id.* at 510 (Stevens, J., concurring) ("I am now convinced that we should have affirmed the *Treasure Salvors* judgment [recognizing federal jurisdiction for adjudicating the State's interest in the disputed artifacts, as well as for ordering the arrest of the artifacts in the possession of state officials] in its
However, dormant in these references to Treasure Salvors in Justice O'Connor's majority opinion in Deep Sea Research are new seeds of doubt concerning the "soundness" of the Young-driven holding in Treasure Salvors as well—i.e., that "the federal court had jurisdiction to secure possession of the property from the named state officials."\(^\text{250}\) For instance, in "paraphrasing" Treasure Salvors as having held that "the State's possession of maritime artifacts was unauthorized, and [that] the State therefore could not invoke the Eleventh Amendment to block their arrest,"\(^\text{251}\) Deep Sea Research subtly endorses Justice White's dissenting position in Treasure Salvors—a dissenting position which Justice O'Connor had joined—that the federal court arrest warrant proceeding that Treasure Salvors permitted was really a proceeding against the State itself and thus should have been prohibited by the State's Eleventh Amendment/Hans immunity.\(^\text{252}\) In reality, of course, Treasure Salvors held that the federal court's "execution of the [arrest] warrant and transfer of the artifacts" to the plaintiff was not barred by the States' Eleventh Amendment/Hans immunity because the proceeding was not against the State itself;\(^\text{253}\) rather, the proceeding in effect was directed against state officials who were alleged to be holding the disputed property in violation of the plaintiff's rights under federal law and who thus, by virtue of the Young doctrine, had "no colorable basis on which to retain possession of the artifacts."\(^\text{254}\) By recasting Treasure Salvors as countenancing a federal court proceeding involving a State's "unauthorized" possession of property—where, in O'Connor's words, "the State ha[s] possession[,] albeit unlawfully"\(^\text{255}\)—rather than a proceeding implicating state officials' possession of property claimed to belong to a plaintiff by operation of federal law, Deep Sea Research appears to be positioning the Court for overruling the Young-driven holding in Treasure Salvors.

Moreover, by characterizing Treasure Salvors as having regarded possession of the disputed artifacts in that case as merely "unauthorized,"\(^\text{256}\)
Justice O'Connor glossed over the fact that *Treasure Salvors* recognized the federal court arrest warrant proceeding as cognizable under *Young* because the plaintiff's claim implicated an ongoing violation by state officials of the plaintiff's federal rights, not simply because possession of the disputed property was alleged to be, in a *generic* sense, "unauthorized." This obscuring of the full import of *Treasure Salvors*' *Young*-driven holding is, of course, precisely what enabled the majority in *Coeur d'Alene Tribe* to "distinguish" *Treasure Salvors* by insisting that the *Treasure Salvors* holding was based exclusively on the theory that there, "state officials were acting beyond the authority conferred on them by the State." Given that the *Coeur d'Alene Tribe* dissenters expressly objected to this refusal by the majority to acknowledge the significance of the fact that *Treasure Salvors* implicated a plaintiff's claim of property ownership under federal law, it is surprising to find those same dissenters signing off on an identical gloss in *Deep Sea Research*.

Another foreboding aspect of the *Deep Sea Research* Court's treatment of *Treasure Salvors* is Justice O'Connor's assertion that *Treasure Salvors* "addressed the District Court's authority to issue a warrant to arrest the artifacts, not the disposition of title to them," and O'Connor's further suggestion that had the federal court "solely adjudicated title to the artifacts, rather than issued a warrant to arrest the res," the Supreme Court presumably would have held that the Eleventh Amendment prohibited the proceeding. Perhaps this depiction of *Treasure Salvors* is simply an effort to reflect, accurately, the two divergent holdings in the case—i.e., that a federal court arrest warrant proceeding dispossessing state officials of property allegedly secured to a plaintiff under federal law must be permitted pursuant to the *Young* doctrine, while a federal court quiet title adjudication that pro tanto effectively concludes a State's purported interest in disputed property is prohibited by the Eleventh Amendment in the absence of the State's consent. Alternatively, however, this depiction may represent a subtle interposition by Justice O'Connor of her *disapproval* of the *Young*-driven holding in *Treasure Salvors*. This alternative view of the *Deep Sea*
Research Court’s treatment of Treasure Salvors would help explain why Justice O’Connor abbreviated the Young-driven holding in that earlier case as simply recognizing the federal court’s “authority to issue a warrant to arrest the artifacts,” rather than as authorizing the federal court’s “execution of the warrant and transfer of the artifacts to [the plaintiff],” thereby “secur[ing] possession of the property from the named state officials.”

Thus, while Deep Sea Research’s truncated rendition of the holding pertaining to state officials in Treasure Salvors may be entirely “innocent,” it also may comprise a strategic distortion of Treasure Salvors with a view toward “narrowing” that decision by overruling its crucial Young-driven holding. This alternative view of Deep Sea Research as a “stepping stone” toward further diminishing Ex parte Young seems to be indicated in Justice O’Connor’s reference in Deep Sea Research to the Court’s Eleventh Amendment doctrine as “bar[ring] federal jurisdiction over general title disputes relating to State property interests.” Here, O’Connor’s characterization of Hans immunity as generally barring any federal court proceeding involving a plaintiff’s claim of ownership “relating to State property interests” is compatible, of course, with Justice White’s dissenting position in Treasure Salvors, joined by O’Connor, which would have denied federal jurisdiction entirely in that case, since to permit the federal proceeding on the basis of Young, according to White, is to “indulge[ ] in the fantasy that the enforcement of process by arrest of the [property] is somehow divorced from the action to determine the State’s claim to the [property].”

However, this “Young-devouring” view of the scope of Hans immunity in property title cases is not compatible with Supreme Court precedents—including Treasure Salvors itself—affirming a “middle ground” approach to the applicability of Young in such cases. As Justice Souter explained in his Coeur d’Alene Tribe dissent,

265. Treasure Salvors, 458 U.S. at 700 (plurality opinion) (emphasis added).
266. Id. at 682 (plurality opinion) (emphasis added); supra text accompanying note 217.
268. Deep Sea Research, 523 U.S. at 506 (emphasis added); supra text accompanying note 247.
269. Treasure Salvors, 458 U.S. at 703 (White, J., concurring in the judgment in part and dissenting in part).
270. See supra notes 148-60 and accompanying text; supra text accompanying notes 213-20.
In each of those cases . . . the individual plaintiffs' success against state officers was an aspersion on the government's claim of title. But a consideration of the alternatives shows why such aspersion was rightly accepted as a fair price to pay for the jurisdiction to consider individual claims of federal right in those . . . cases, as it has been accepted generally. The one alternative, of settling the matter of title by compelling the State itself to appear in a federal-question suit, is barred by Eleventh Amendment doctrine. The other, of leaving an individual powerless to seek any federal remedy for violation of a federal right, would deplete the federal judicial power to a point the Framers could not possibly have intended, given a history of officer liability riding tandem with sovereign immunity extending back to the Middle Ages. The holdings [in the title cases] . . . represent a line drawn short of such an extreme, and if the Court may curse it as formalistic so may any line be cursed that must be drawn somewhere between unacceptable extremes. . . . The line is a fair via media between the extremes.  

In the majority opinion in *Deep Sea Research*, Justice O'Connor would appear to be deploying in dicta her view that any claim against state officials that threatens to bring about an "aspersion on [a State's] claim of title" is a claim against the State itself—even where the plaintiff alleges an ongoing violation of federal law, and despite the teaching of *Ex parte Young* to the contrary. Viewed in this way, *Deep Sea Research*—notwithstanding its recognition of a limitation on the scope of *Hans* immunity with respect to a relatively insignificant class of in rem admiralty proceedings—appears as a harbinger for the Court's ultimate "narrowing" of *Treasure Salvors* through the issuing of a general prohibition on any federal court proceeding against a state official wherein the plaintiff's action could conclude a State's claim of title to, or "actual possession" of, disputed property, regardless of whether the claim implicates an ongoing violation of federal law.  

It will be ironic indeed should the *Coeur d'Alene Tribe* dissenters—Justices Souter, Stevens, Ginsburg and Breyer—accede to a

272. See infra text accompanying note 404.
273. *Deep Sea Research*'s dictum that the Eleventh Amendment "bars federal jurisdiction over general title disputes relating to State property interests," 523 U.S. at 506; *supra* text accompanying note 268, gives added, latent meaning to the *Coeur d'Alene Tribe* Court's depiction of the Tribe's suit as "close to the functional equivalent of quiet title" and ipso facto ineligible for *Young* relief, 521 U.S. at 282 (Souter, J. dissenting); *supra* note 211. Both of these innovative assertions portend further activism by the Rehnquist Court in shrinking the scope of federal subject matter jurisdiction by creating a general property exception to *Ex parte Young*. 

“reconsideration” of Treasure Salvors in the hope of facilitating a bright-line exception to the applicability of Hans in all in rem admiralty cases (whether the res is in the State’s possession or not),\(^{274}\) only to find Treasure Salvors’ crucial Young-affirming holding overruled by the Court’s “States’ rights” majority—nullified by perhaps the most dramatic expansion of Hans immunity since Hans itself. Yet such is the danger manifested in Coeur d’Alene Tribe and its aftermath, unloosed by the Young-defying jurisprudential maneuverings of the Rehnquist Court aimed at permanently submerging the “middle ground” of Treasure Salvors.

4. The Ghost of Montana Rides Again

Just as critical to the Coeur d’Alene Tribe majority’s decision to banish the Coeur d’Alene Tribe’s suit from federal court because of its lack of “ordinariness” was the Supreme Court’s recognition that the Tribe’s suit implicated a challenge to the presumption that the United States conveyed to Idaho all the waterways within the boundaries of the Tribe’s reservation at the moment Idaho entered the Union.\(^{275}\) This presumption is, of course, the one first forged by the Supreme Court in 1981 in Montana v. United States—a judicial decision born of the Court’s mischaracterization of facts, misapplication of law, and implicit subversion of the core principles of federal Indian law, as discussed previously.\(^{277}\) Indeed, this “Montana presumption” was, without a doubt, driving the Court’s analysis from beginning to end in Coeur d’Alene Tribe; and yet, as readers familiar with Montana will be amazed to note, nowhere in Coeur d’Alene Tribe—not in the “principal opinion,” not in the concurring opinion, and not in the dissenting opinion—did the Justices even once mention or cite Montana. Perhaps this studious avoidance of invoking Montana by name reflects the Court’s tacit recognition of Montana’s vulnerability to criticism. Be that as it may, what remains clear is that in Coeur d’Alene Tribe, the Supreme Court incorporated and exacerbated the same errors of reasoning that had become ossified in the Court’s Indian law jurisprudence as a result of Montana.

Thus, Justice Kennedy complained about how the prospective relief sought by the Tribe controverted the State’s presumption of “sovereign

\(^{274}\) See supra note 249.
\(^{275}\) See Coeur d’Alene Tribe, 521 U.S. at 283 (“The importance of [submerged] lands to state sovereignty explains our longstanding commitment to the principle that the United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States . . . .”).
\(^{277}\) See supra notes 86-111 and accompanying text.
control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect.” In similar fashion, Justice O'Connor stated, “We have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State’s ability to regulate use of its navigable waters.” These assertions about the heightened interest that States have assumed generally in navigable watercourses within state boundaries impart the Court’s continuing refusal, since 1981, to recognize that such otherwise unremarkable observations have no legitimate application in the special context of disputes over submerged lands located within the boundaries of federally protected Indian reservations, where special rules of federal Indian law apply to exempt such controversies from the confiscatory effects of those generic “States’ rights” assertions.

In this regard, Justice Kennedy’s dissertation on the evolution of general principles of British and American common law concerning the “status” of navigable watercourses is misplaced in a discussion of the Coeur d’Alene Tribe’s rights to submerged lands within the boundaries of the Tribe’s own federally protected reservation—just as Justice Stewart’s comparable generalizations were misplaced in the Montana Court’s discussion of the Crow Tribe’s rights to the Big Horn River within the boundaries of the treaty-protected Crow Reservation.

But there is something far more disturbing in the Rehnquist Court’s portrayal of the Coeur d’Alene Tribe’s officer suit as “unusual,” and ipso facto subject to special burdens vis-à-vis the Young doctrine, than simply a recitation of Montana’s multiple errors of analysis with respect to the issue of Indian Tribes’ federally protected rights to submerged lands. The majority in Coeur d’Alene Tribe went farther than that, and effectively condemned the merits of the Tribe’s claims in the guise of pursuing a threshold jurisdictional inquiry, implicitly concluding—and on the basis of no factual record—that the State of Idaho in fact owned the submerged lands implicated in the Tribe’s suit.

The prejudice inherent in the Supreme Court’s decision to banish the Tribe’s officer suit from federal court is evident in the controlling statements

278. Coeur d'Alene Tribe, 521 U.S. at 283.
279. Id. at 289 (O'Connor, J., concurring in part and concurring in the judgment).
280. See supra notes 90-111 and accompanying text.
281. See Coeur d'Alene Tribe, 521 U.S. at 283-87.
282. See Montana, 450 U.S. at 551-53.
283. See supra notes 90-111 and accompanying text.
284. See supra notes 31-32 and accompanying text.
285. In the litigation in the lower federal courts, the district court similarly prejudged the merits of the Coeur d’Alene Tribe’s claims. See supra notes 83-125 and accompanying text.
made by both Justice Kennedy and Justice O'Connor in their mutual efforts at stating a "submerged-lands-specific" rule for removing the Coeur d'Alene Tribe's "unusual" suit beyond the reach of available federal court jurisdiction. Justice Kennedy, for instance, condemned the Tribe's request for prospective declaratory relief and injunctive relief by asserting that if the Tribe were to prevail on the merits substantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks . . . . The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit 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. 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.

Not only would the relief block all attempts by [state] officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands . . . .

Clearly, Kennedy was basing his decision to deny Young relief to the Coeur d'Alene Tribe on Kennedy's own conclusive presumption that the Tribe did not, in fact, own the submerged lands at issue, but that the State owned them instead. Moreover, by impliedly maintaining that the Coeur d'Alene Tribe could not possibly be the rightful owner of the submerged lands at issue even in the event that the Tribe were to prevail in federal court on the merits of its claims, Justice Kennedy betrayed an unwillingness to entrust the resolution of disputes involving submerged lands to any court that might adjudicate the competing claims in a manner inconsistent with Kennedy's own manifest prejudice against Indian Tribes' asserted rights to those lands.

286. Coeur d'Alene Tribe, 521 U.S. at 282, 283 (emphases added).
287. The Supreme Court's prejudgment of the merits in banishing the Tribe's officer suit in Coeur d'Alene Tribe is particularly troubling in view of the subsequent merits decision of a federal district court in United States v. Idaho that the Coeur d'Alene Tribe—not the State of Idaho—has beneficial title to the submerged lands within the present-day boundaries of the Coeur d'Alene
This same prejudice pervades Justice O'Connor's portrayal of the Coeur d'Alene Tribe's submerged-lands-centered officer suit as ipso facto fatally defective. In keeping with Justice Kennedy's characterization of the Tribe's suit, O'Connor purported to single out one of the "two important respects" in which the Tribe's suit is "unlike a typical Young action," as follows: "[T]he Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue . . . .", and again: "[The] plaintiff seeks to divest the State of all regulatory power over submerged lands . . . ." Like Kennedy's portrayal of the Tribe's officer suit, these assertions embody the prejudicial notion that the Tribe could not possibly have exclusive federal rights to the submerged lands at issue even if the Tribe were to prevail on the merits. This prejudgment of the Tribe's claims by both Kennedy and O'Connor necessarily misrepresents those claims, moreover, as it would have been absurd for the Tribe to ask a federal court to "eliminate" or "divest" or "extinguish" or "diminish" a right to the Tribe's on-reservation submerged lands that no state officer ever had possessed, on behalf of the State or otherwise, from the moment Idaho entered the Union onward.

5. Retracting the Lifeline of Lee and Tindal

The prejudice implicit in Justice O'Connor's description of the unique features of the Tribe's officer suit in turn exerted a corrupting influence on O'Connor's analysis of the Tribe's reliance on "a series of cases in which plaintiffs successfully pursued in federal court claims that federal and state officials wrongfully possessed certain real property." Thus, O'Connor purported to distinguish United States v. Lee and Tindal v. Wesley, both celebrated cases involving title suits against federal officers and state officers, respectively, wherein the Supreme Court affirmed the right of plaintiffs to vindicate their real property claims against acts of confiscation by governmental officials attempting to shield their illegal conduct behind a theory of sovereign immunity. Lee and Tindal were of no help to the Coeur d'Alene Tribe, according to Justice O'Connor, since in those cases


289. Id. at 296 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added).

290. Id. at 290 (O'Connor, J., concurring in part and concurring in the judgment).


292. 167 U.S. 204 (1897).
the Court made clear that the suits could proceed against the officials because no judgment would bind the State. It was possible, the Court found, to distinguish between possession of the property and title to the property. . . [H]owever, this case does not concern ownership and possession of an ordinary parcel of real property. . . . Here, the Tribe seeks a declaration not only that the State does not own the bed of Lake Coeur d'Alene, but also that the lands are not within the State's sovereign jurisdiction. Whatever distinction can be drawn between possession and ownership of real property in other contexts, it is not possible to make such a distinction for submerged lands. For this reason, Lee, Tindal, and analogous cases do not control here.293

Justice O'Connor's attempt at distinguishing the real property title cases is flawed, for several reasons. First, in contrast to O'Connor's myopic focus on whether the Tribe's suit against Idaho officers could be said to "bind the State,"294 the Court's overriding concern in both Lee and Tindal was the need to recognize a remedy against "this evil"295 of governmental officials violating the rights of the people as guaranteed by law:

[W]hat reason is there that the . . . courts shall not give remedy to the citizen whose property has been seized [by governmental officers]?

. . . [The question] seems to be opposed to all the principles upon which the rights of the citizens, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name.296

Significantly, the Lee Court went on to suggest that "compared to this evil," any concern about whether a court's judgment against governmental officials "can bind or conclude the government" "will be seen to be small indeed . . . and much diminished, if [it does] not wholly disappear" in consideration of the fact that "the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."297

293. Coeur d'Alene Tribe, 521 U.S. at 290-91 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted).
294. Supra text accompanying note 293.
295. Lee, 106 U.S. at 221.
296. Id. at 218-19.
297. Id. at 221, 222.
Justice O'Connor's overwrought concern about the Coeur d'Alene Tribe's officer suit "bind[ing] the State" in fact resonates with a hyperbole reminiscent of the dissenting opinion in *Lee*, authored by Justice Gray and joined by three other members of the Court, including Justice Bradley, who eight years after *Lee* would himself write the opinion for the *Hans* Court:

The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued.

That maxim is not limited to a monarchy, but is of equal force in a republic.298

The hostility of the *Lee* dissenters to any title-related claim against governmental officials who purport to possess real property in the name of an immune government rapidly lost favor with the Court's members, so that when *Tindal* was decided fifteen years after *Lee*, the Court unanimously rejected that sentiment, in a case involving—like *Coeur d'Alene Tribe*—a suit against state officials:

The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf.299

As the majority did in *Lee*, the entire Court in *Tindal* regarded the governmental officials' lament that "the judgment in this case may conclude the State" as lacking merit, since "it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute."300 And, as in *Lee*, once again, the *Tindal* Court saw fit to dispose of this "consideration" about the "judgment . . . conclu[d]ing] the State" in a manner demonstrating that the Court viewed this "consideration" as little more than a formalistic objection

298. *Id.* at 226 (Gray, J., dissenting).
300. *Id.* at 223.
of de minimis weight in view of the enormity of the "wrong" that the Court felt compelled to avert:

The withholding of . . . possession by [the state officials] is consequently a wrong, but a wrong which, according to the view of [the officials] cannot be remedied if the [officials] chose to assert that the State, by them as its agents, is in rightful possession. The doors of the courts of justice are thus closed against one legally entitled to possession, by the mere assertion of the [officials] that they are entitled to possession for the State. But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff.

By positing an exalted "concern" that the Tribe's officer suit in Coeur d'Alene Tribe would "bind the State," Justice O'Connor in effect was exhuming the misplaced and exaggerated sentiments of the Lee dissent, replete with its disregard of the paramount importance of safeguarding the people's liberty and property from deprivation at the hands of governmental officials acting in defiance of federal law. In this regard, Justice O'Connor did not distinguish Lee and Tindal so much as she simply refused to follow those precedents for lack of any conviction about their continuing vitality.

301. That the Tindal Court viewed the state officials' argument about the "judgment . . . concluding the State" as relatively unimportant is indicated by the fact that the Court disposed of that objection in the equivalent of an afterthought, limiting its responsive comments to a single paragraph at the end of the Court's twenty page opinion. Most of that solitary paragraph consists, moreover, of an excerpt from Lee, in which the Lee Court summarily rejected essentially the same argument as put forth there by federal officials. See id. at 223-24.

302. Id. at 222.

303. Justice O'Connor's implicit disapproval of the holdings of Lee and Tindal is reminiscent of a striking comment appearing in a footnote of Justice Powell's Pennhurst majority opinion, which O'Connor joined. After referring to Tindal as an "old case[ ]" wherein "the allegation was that the defendant[ ] had committed [a] common-law tort[ ]," Powell asserted that "[t]ort cases such as [Tindal] were explicitly overruled in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 110 n.19 (1984).

But, as Justice Stevens pointed out in dissent in Pennhurst, see id. at 158 n.42 (Stevens, J., dissenting), Larson did not overrule Tindal—a fact which accounts for Justice Powell's failure to cite any particular passage from the twenty-three page Larson opinion which accomplished the supposed overruling. Indeed, Larson cited Tindal with approval, as a case in which the Court properly permitted the plaintiff's suit against state officials to go forward in federal court. See Larson, 337 U.S. at 698 n.20. Thus, after explaining that "specific relief in connection with property held or injured by officers of the sovereign acting in the name of the sovereign" would be available pursuant to "a claim that the taking of the property or the injury to it was not the action of the sovereign because unconstitutional," the Larson Court characterized Tindal as standing for the
Thus, Justice Souter observed that the majority's dismissal of the Coeur d'Alene Tribe's officer suit on the argument that "the relief sought would be consistent with Larson's holding—that "a suit to recover possession of property owned by the plaintiff and withheld by officers of a State [is] analogous to a suit to enjoin the officers from enforcing an unconstitutional statute." Id. at 698 & n.20.

As Justice Stevens suggested further in his Pennhurst dissent, the Pennhurst majority's "incorrect" assertion in dicta that Larson had overruled Tindal, see Pennhurst, 465 U.S. at 158 n.42 (Stevens, J., dissenting), is perhaps best explained by observing that the Pennhurst majority itself distorted Larson by taking a key quotation from Larson out of context, "ignor[ing] sentences immediately preceding and following the quoted passage stating in terms that where an official violates a statutory prohibition, he acts ultra vires and is not protected by sovereign immunity"—the very proposition, in other words, that the Pennhurst majority denied. Id. at 157 (Stevens, J., dissenting) (referring to Larson, 337 U.S. at 689-90). Criticizing the Pennhurst majority's distortion of Larson in trying to make it appear as though Pennhurst were compatible with Larson, Justice Stevens stated:

[W]ithout explanation, the Court repudiates the two-track analysis of Larson permitting state-law-based officer suits in federal court where the plaintiff alleges conduct by state officials that is either (1) beyond the power delegated by the State, or (2) forbidden by the State; see Larson, 337 U.S. at 689] and holds that sovereign immunity extends to conduct the sovereign has statutorily prohibited. Thus, contrary to the Court's assertion, Larson is in conflict with the result reached today.

Pennhurst, 465 U.S. at 157-58 (Stevens, J., dissenting) (footnote omitted).

While the particular officer suit barred by the Pennhurst decision did not, of course, implicate an allegation that federal law—as in Coeur d'Alene Tribe—had been violated, the Pennhurst Court's willingness to distort precedent in order to make bold, new pronouncements of law in both its holding and its dicta clearly portended the kind of dangerous recklessness with precedent manifested in the opinions of both Justice Kennedy and Justice O'Connor in Coeur d'Alene Tribe. More specifically, Pennhurst's off-hand assertion in dicta that Tindal has been overruled provided a basis, sub silentio, for Justice O'Connor's disregard of both Tindal and Lee in banishing the Coeur d'Alene Tribe's officer suit. The trajectory created by the juxtaposition of Pennhurst and Coeur d'Alene Tribe—and perhaps the recently decided Deep Sea Research as well, see supra notes 234-74 and accompanying text—portend that the Rehnquist Court will continue to disregard and distort precedent to the extent such precedent is incompatible with the Court's own innovative "States' rights" ideology.

For good measure, it should be noted that a sensible interpretation of the Pennhurst Court's comment about Tindal having been "explicitly overruled in Larson" is the one put forward by the Ninth Circuit in a footnote in its opinion in the Coeur d'Alene Tribe litigation. Reflecting on a case decided by the Fifth Circuit which "held that the Supreme Court overruled Tindal in Larson . . . and that this line of cases therefore provides no support for the proposition that an action for an injunction against a state official to deliver possession of property is not barred by the Eleventh Amendment," the Ninth Circuit stated, "We respectfully disagree. Pennhurst concludes that to the extent that Tindal was a tort case, it was overruled by Larson. However, to the extent that Tindal alleged a violation of a federal right, it clearly remains valid." Coeur d'Alene Tribe v. Idaho, 42 F.3d 1244, 1252 n.7 (9th Cir. 1994) (citing John G. & Marie Stella Kenedy Mem. Found. v. Mauro, 21 F.3d 667, 673 (5th Cir. 1994) (citing Pennhurst, 465 U.S. at 110 n.19)). Of course, whether the Supreme Court ultimately approves or rejects this sensible explanation of the Court's dicta in Pennhurst remains to be seen. But in view of the Rehnquist Court's continuing efforts at undermining the efficacy of the Tindal line of cases, as evinced in Coeur d'Alene Tribe, the likelihood of a Young-affirming resolution of the questions raised in Pennhurst about those cases seems remote indeed.
indistinguishable in practice from a decree quieting title" in effect "render[s] erroneous" not only the holding in Treasure Salvors, as discussed previously,\textsuperscript{304} but also "the holding[ ] in . . . Lee (as interpreted by Larson).\textsuperscript{305}

A second flaw in Justice O'Connor's efforts at distinguishing on-point real property title cases like Lee and Tindal is O'Connor's disregard of the persuasive reasoning of the Ninth Circuit in its decision to allow the Tribe's suit to proceed to the merits in federal court.\textsuperscript{306} As the Ninth Circuit pointed out, "[t]he Supreme Court has long held that an action against state officials to enjoin an ongoing violation of federal law is not precluded by virtue of the fact that the determination of the controversy necessarily involves a question of the state ownership of property."\textsuperscript{307} For the Ninth Circuit, then, the fact that the Coeur d'Alene Tribe's officer suit implicated such a question could not, consistent with prior Supreme Court holdings, justify a refusal to allow the Tribe to pursue its claims in federal court. As discussed previously,\textsuperscript{308} the Ninth Circuit's solution to negotiating the Hans-driven requirement that an officer suit not (in Justice O'Connor's words) "bind the State"\textsuperscript{309} was to "allow[ ] all relief other than relief that would foreclose the State's claim in future judicial proceedings."\textsuperscript{310} This, of course, was the same solution applied by the Supreme Court when the Court confronted identical "concerns" about "bind[ing] the State" in both Tindal\textsuperscript{311} and Treasure Salvors.\textsuperscript{312} In Coeur d'Alene Tribe, Justice O'Connor offered no explanation for rejecting the Ninth Circuit's determination that the Tribe's officer suit would not "bind the State" in any dispositively significant manner when viewed in light of antecedent Eleventh Amendment decisions of the Supreme Court involving plaintiffs' claims of entitlement to property in the possession of governmental officials.\textsuperscript{313}

\textsuperscript{304} See supra notes 224-33 and accompanying text.
\textsuperscript{306} See supra notes 134-60 and accompanying text.
\textsuperscript{307} Coeur d'Alene Tribe, 42 F.3d at 1252 (citing inter alia Tindal v. Wesley, 167 U.S. 204, 213-22 (1897); and Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 685-87 (1982) (plurality opinion)).
\textsuperscript{308} See supra notes 150-60 and accompanying text.
\textsuperscript{309} Supra text accompanying note 293.
\textsuperscript{310} Coeur d'Alene Tribe, 42 F.3d at 1254; supra text accompanying note 154.
\textsuperscript{311} See supra notes 299-302 and accompanying text.
\textsuperscript{312} See supra text accompanying notes 216-19.
\textsuperscript{313} In a recent article, Professor Vicki Jackson points out another flaw in the majority's efforts at distinguishing precedent in Coeur d'Alene Tribe. Reflecting on the rationale proffered by Justice O'Connor for distinguishing the Court's title cases, see supra text accompanying note 293, Professor Jackson writes:
6. The New Rule for Discriminating Against *Young* Suits Brought by Indian Tribes

What Justice O'Connor *did* explain in connection with the Court's decision to banish the Coeur d'Alene Tribe's officer suit from federal court is that "this case does not concern ownership and possession of an ordinary parcel of real property. . . . Here, the Tribe seeks a declaration not only that the State does not own the bed of Lake Coeur d'Alene, but also that the lands are not within the State's sovereign jurisdiction."\(^{314}\) This observation about the uniqueness of questions concerning land ownership and sovereign jurisdiction within the boundaries of Indian reservations imparts a third major flaw in O'Connor's attempts at distinguishing the title cases upon which the Tribe relied; for, as Justice Souter pointed out in dissent, "[w]hile [O'Connor's] point is no doubt correct, it has no bearing on *Young*’s application in this case."\(^{315}\) As Souter further explained, the Supreme Court has validated *Young* suits in cases with more far-reaching impacts on state regulatory jurisdiction than the impact implicated by the Coeur d'Alene Tribe's suit:

If . . . there were any doubt that claims implicating state regulatory jurisdiction are as much subject to *Young* as cases contesting the possession of property, the facts of *Ex parte Young* itself would suffice to place that doubt to rest. *Young* was a suit to enjoin a State's Attorney General from enforcing a state statute regulating railroad rates and threatening violators with heavy sanctions. One would have difficulty imagining a state activity any more central to state sovereignty than such economic regulation or

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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. 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. 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, 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 . . . .

Jackson, *supra* note 13, at 311 n.46 (citations omitted).


\(^{315}\) Id. at 309 (Souter, J., dissenting).
any more expressive of its governmental character than the provision for heavy fines. A State obliged to choose between power to regulate a lake and lake bed on an Indian reservation and power to regulate economic affairs and punish offenders would not (knowing nothing more) choose the lake. Implications for regulatory jurisdiction, therefore, do nothing to displace Ex parte Young.\textsuperscript{316}

Thus, it would be erroneous to say that Justice O'Connor "explained" the Court's decision to deny the Coeur d'Alene Tribe's request for Young relief. In truth, what O'Connor did was describe a new rule for discriminating against claims for relief under the doctrine of Ex parte Young, forbidding such relief "[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands."\textsuperscript{317}

What is most disturbing about this judicial mandate is that notwithstanding Justice O'Connor's efforts to couch it in ostensibly "neutral" language, this new rule in fact strategically targets all Indian Tribes in the United States as the sole recipients of the discriminatory treatment henceforth required. This is made clear by noting that, as a practical matter, the Court's new rule will operate only where the plaintiff bringing suit over submerged lands against state officials happens to be an Indian Tribe, since in such cases only will regulatory jurisdiction over the lands at issue vary according to whether or not the plaintiff—i.e., the Tribe—has ownership rights to those lands.\textsuperscript{318} Indeed, the fact that the Court's new "submerged-lands-specific" rule will operate, as a practical matter, against Indian Tribes only appears to be the

\textsuperscript{316} Id. at 309-10 (Souter, J., dissenting).
\textsuperscript{317} Id. at 296 (O'Connor, J., concurring in part and concurring in the judgment).
\textsuperscript{318} As Professor Jackson explains, Justice O'Connor's rationale for distinguishing United States v. Lee, 106 U.S. 196 (1882), in excluding from the scope of Young relief Indian Tribes' officer suits implicating questions of the ownership of submerged lands is essentially illusory, since "recognition of the Lee claim of private ownership would indeed have substantial consequences for the regulatory jurisdiction of the government in possession." Jackson, supra note 13, at 311 n.46; see supra note 313. Professor Jackson's important observation concerning the weakness of O'Connor's rationale in purporting to distinguish Lee does not, of course, dilute the point that the rule emerging from Coeur d'Alene Tribe is a rule that places a unique burden on Indian Tribes vis-à-vis the Young doctrine, since the Eleventh Amendment does not bar suits against States brought by the United States to vindicate federal interests, whether related to the ownership and regulation of submerged lands or otherwise. See United States v. Texas, 143 U.S. 621, 646 (1892) (holding that the Eleventh Amendment does not apply to suits brought by the United States); see also infra note 467. Hence, the new rule of Coeur d'Alene Tribe will operate to shield state officials from a claim of unlawful appropriation and regulation of submerged lands brought in federal court by an Indian Tribe, where the Tribe's victory on the merits effectively might preclude state regulatory jurisdiction, but will not impede any comparable federal court claim brought against a State itself by the United States, where the United States' victory on the merits likewise effectively might preclude state regulatory jurisdiction.
The Supreme Court itself has recognized that "[t]he whole intercourse between the United States and [Indian Tribes] is, by our constitution and laws, vested in the government of the United States,"\(^3\) and that "[b]ecause of the local ill feeling, the people of the States where [Indian Tribes] are found are often their deadliest enemies."\(^3\) Congress and the Executive Branch likewise have recognized the crucial importance of providing Indian Tribes with a federal forum for the adjudication of Tribes' federally protected rights. For instance, in enacting 28 U.S.C. § 1362, which authorizes federal court jurisdiction over federal question suits brought by Indian Tribes, Congress included in its accompanying supportive documentation the Assistant Secretary of the Interior's observation that with respect to disputes concerning tribal lands, "[t]he issues involved are Federal issues and the tribes should not be required to conduct the litigation in State courts."\(^3\) As Professor Vicki Jackson explains:

> 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 effects of the acts of a president of the United States in conferring interests on that tribe. Perhaps it is not a coincidence that the two cases the Court chose to narrow the availability of relief against officers involved affirmative claims by Indian tribes.\(^3\)

The decision of the Coeur d'Alene Tribe Court forcing Indian Tribes to bring officer suits concerning the ownership of on-reservation submerged lands only in state courts seriously undermines the federal government's essential and historic obligation to safeguard tribal lands and jurisdiction under federal law.\(^3\) And, needless to say, this decision also places an intolerable burden

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325. H.R. REP. NO. 2040 (1966), reprinted in 1966 U.S.C.C.A.N. 3145, 3148 (statement of Harry R. Anderson, Assistant Secretary of the Interior). The legislative history of 28 U.S.C § 1362 also includes the following endorsement from the Secretary of the Interior concerning federal court adjudication of issues pertaining to the federal-tribal relationship: "There is a large body of Federal law which states the relationship, obligations and duties which exist[ ] between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues." Id. at 3147 (statement of U.S. Dep't of the Interior, Office of the Secretary).
326. Jackson, supra note 13, at 322-23 (footnotes omitted). The other of the two cases to which Professor Jackson alludes is Seminole Tribe v. Florida, 517 U.S. 44 (1996). See infra note 327.
327. Reflecting on the Supreme Court's decision in Seminole Tribe to deny Young relief to a different Indian Tribe, see supra note 210, Professor Jackson provides additional illuminating
precise reason for Justice O'Connor's satisfaction with the Court's decision in *Coeur d'Alene Tribe*; for, as discussed below, O'Connor was loath to condone the more expansive rule of decision proposed by Justice Kennedy, joined by Chief Justice Rehnquist only, as that proposal would threaten to strip *even non-tribal* plaintiffs of an opportunity to vindicate their federal rights in federal court under the doctrine of *Ex parte Young*. Apparently, denying *Young* rights to parties other than Indian Tribes was more than Justice O'Connor was willing to countenance.

The rule of *Coeur d'Alene Tribe* thus stripping all Indian Tribes of *Young* relief against the illegal appropriation of on-reservation submerged lands by state officials constitutes a discriminatory judicial mandate that is especially untenable in view of Tribes' clear, long-recognized, continuing, and growing need to be insulated by the federal government from the destruction of Tribes' rights by state governments. It must be presumed that all five members of the Supreme Court who sanctioned the creation of this discriminatory rule also accepted as credible Justice Kennedy's proposition in that portion of Kennedy's opinion joined by Chief Justice Rehnquist only, that "there is neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State" since "Idaho's courts are open to hear the case." This profession of faith in the sufficiency of state forums for resolving controversies between Indian Tribes and state governments disregards the most essential principle of federal Indian law as reflected in acts of Congress and decisions of the Supreme Court dating back to the very founding of the United States—the federal government's indispensable obligation to safeguard Indian rights under federal law against illegal and invasive encroachments by the States.

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319. *See infra* notes 331-657 and accompanying text.

320. In a recent article, Professor Vázquez speculates that Justice Kennedy's proposal in *Coeur d'Alene Tribe* for diminishing the scope of *Young* may have come close to gaining the acceptance of five members of the Court:

> The structure of Justice Kennedy's "principal" opinion in the case suggests that he was initially writing for a five-Justice majority but ultimately lost the votes of Justices O'Connor, Scalia and Thomas. The portions of Justice Kennedy's opinion that the three Justices ultimately refused to join would have drastically revised *Ex parte Young* doctrine.

Vázquez, *supra* note 13, at 43 (footnote omitted).


322. As the Supreme Court observed in 1945, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).
B. Toward the Dismantling of Ex parte Young

1. Prohibiting Young When a State Forum is Available

The proposal put forward in Coeur d'Alene Tribe by Justice Kennedy, joined by Chief Justice Rehnquist only, is essentially a scheme for overhauling and effectively doing away with Ex parte Young entirely, nullifying that liberty-affirming doctrine through an erroneous, ideology-driven re-interpretation of settled Supreme Court decisions. Under the Kennedy/Rehnquist view, a plaintiff generally would be forbidden from seeking prospective relief in federal court against state officials accused of violating federal law so long as a state court is available to hear the case. This displacement in toto of the Young doctrine is foreordained, under the Kennedy/Rehnquist view, by observing that in the past, Young suits were permitted on the basis of two considerations: (1) the unavailability of state forums for adjudicating suits against state officials; and (2) the belief that when governmental officials commit common law torts (to which violations of federal law purportedly are analogous), they pro tanto are not shielded by sovereign immunity. Since both of these considerations long since have been obviated and rendered moot by intervening developments, so too, in the Kennedy/Rehnquist view, has the general need for the Young doctrine.

The other seven Justices objected to the efforts of Justice Kennedy and Chief Justice Rehnquist to graft onto prior Supreme Court decisions permitting Young relief an unspoken reliance on the unavailability of a state forum. In her concurring opinion, Justice O'Connor pointed out that Kennedy's opinion "cites not a single case in which the Court expressly relied on the absence of an available state forum as a rationale for applying Young." O'Connor also criticized Kennedy's invocation of language from prior decisions in which the Court expressed concern about the lack of a remedy at law in the granting of Young relief, noting that "the inadequacy of a legal remedy is a prerequisite for equitable relief in any case. That we

331. See id. at 270-80 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
332. See infra notes 335-85 and accompanying text.
333. See infra notes 386-446 and accompanying text.
334. See infra notes 382-85 and accompanying text, and notes 388-404 and accompanying text.
335. Justice Kennedy identified as an "instance[ ] where Young has been applied" cases "where 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." Coeur d'Alene Tribe, 521 U.S. at 270 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
336. Id. at 291 (O'Connor, J., concurring in part and concurring in the judgment).
pronounced state legal remedies inadequate before permitting the suit to proceed is unsurprising, and it is not a sufficient basis for the principal opinion's broad conclusion."\textsuperscript{337}

Both the concurring and dissenting opinions in \textit{Coeur d'Alene Tribe} take exception with the Kennedy/Rehnquist "unavailability-of-a-state-forum" requirement for \textit{Young} relief by underscoring the fact that \textit{Ex parte Young} itself relies on two late-nineteenth century cases in which the Court permitted suits against state officers to proceed in federal court notwithstanding the availability of state forums—\textit{Reagan v. Farmers' Loan & Trust Co.}\textsuperscript{338} and \textit{Smyth v. Ames}.\textsuperscript{339} Responding to Justice Kennedy's suggestion that in those older cases, as in \textit{Young} itself, the Court was "reluctan[t] to place much reliance on the availability of a state forum" because of "the prevalence of the [now-abandoned] idea that if a State consented to suit in a state forum it had consented, by that same act, to suit in a federal forum,"\textsuperscript{340} Justice O'Connor stated:

Both \textit{Reagan} and \textit{Smyth}, like \textit{Young}, involved challenges to state enforcement of railroad rates. In each case, the Court permitted the federal suit to proceed in part because state statutes authorized state court challenges to those rates. As \textit{Young} made clear, however, the fact that the States had waived immunity in their own courts was not the sole basis for permitting the federal suit to proceed. Discussing \textit{Reagan}, the \textit{Young} Court stated: "This court held that [language authorizing a suit in state court] permitted a suit in [federal court], but it also held that, \textit{irrespective of that consent, the suit was not in effect a suit against the State} (although the Attorney General was enjoined), and therefore not prohibited under the [Eleventh] [A]mendment. \ldots Each of these grounds is effective and both are of equal force." Similarly, the \textit{Young} Court emphasized that the decision in \textit{Smyth} was not based solely on the state statute authorizing suit in state court; rather, it was based on the conclusion that the suit "was not a suit against a State."\textsuperscript{341}

O'Connor's observation that the \textit{Young} Court did \textit{not} rely on the unavailability of a state forum is supported by the fact that in \textit{Smith v.}

\textsuperscript{337} \textit{Id.} at 292 (O'Connor, J., concurring in part and concurring in the judgment); \textit{see also} infra note \textsuperscript{387} and accompanying text.
\textsuperscript{338} 154 U.S. 362 (1894).
\textsuperscript{339} 169 U.S. 466 (1898).
\textsuperscript{340} \textit{Coeur d'Alene Tribe}, 521 U.S. at 274 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
\textsuperscript{341} \textit{Id.} at 292 (O'Connor, J., concurring in part and concurring in the judgment) (quoting \textit{Ex parte Young}, 209 U.S. 123, 153-54 (1908)) (alterations in original) (citations omitted).
Chief Justice Marshall never suggested that a suit against the officers "would be barred" [as Justice Kennedy posited in Coeur d'Alene Tribe] if the State could be named. Instead, he made clear that since the suit would be allowed to proceed if the State could be made a party, it should be allowed to proceed in its absence. . . . [T]he Court did not suggest that a remedy in state court was absent, or that any significance attached to the availability of a state forum.  

The Kennedy/Rehnquist opinion likewise misreads the Court's decision in United States v. Lee. Lee involved a private suit against federal officials—not state officials—for those officials' unlawful taking of the plaintiff's land in violation of the Fifth Amendment of the United States Constitution. The Lee Court allowed the plaintiff's suit to proceed not because "a state forum

This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. . . . [T]he appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connexion with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign State, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the Court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the Court? . . . [N]o plausible reason suggests itself to us, for the opinion, that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party.

We think it a case in which a Court of equity ought to interpose. Osborn, 22 U.S. (9 Wheat.) at 842-45.


366. 106 U.S. 196 (1882); see Coeur d'Alene Tribe, 521 U.S. at 272 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (describing Lee as "permitting suit for injunctive relief to proceed where there did not otherwise exist a legal remedy for the alleged trespass").

367. See Lee, 106 U.S. at 218 ("[T]he verdict of the jury finds that [the disputed land] is and was the private property of the plaintiff, and was taken without any process of law and without any compensation.").
was unavailable,” as Justice Kennedy suggested in *Coeur d'Alene Tribe*, but because the *Lee* Court recognized that a manifest injustice would result if "the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted [by governmental officers] to the use of the government without lawful authority, without process of law, and without compensation." Indeed, so removed was the *Lee* Court from believing that its decision to permit the plaintiff’s suit was compelled because “a state forum was unavailable” that the Court took pains to reassure the defendants that the Court’s decision would not *condemn* federal officials to defending against suits brought in state forums. Thus, *Lee*, like *Osborn*, clearly provides no support for the Kennedy/Rehnquist proposal in *Coeur d'Alene Tribe* for allowing a federal-law-based injunctive suit against state officials to proceed to the merits in federal court only when a state forum is unavailable.

Similarly misplaced is the Kennedy/Rehnquist opinion’s reliance on *Poindexter v. Greenhow* as a precursor for the “unavailability-of-a-state-forum” theory. In *Poindexter*, the plaintiff taxpayer Poindexter brought a detinue action in state court alleging a violation of the Contract Clause of the United States Constitution against Greenhow, an official charged with

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368. See supra note 352 and accompanying text.
369. *Lee*, 106 U.S. at 220-21; see also supra notes 290-305 and accompanying text.
370. The *Lee* Court explained that federal officials, when sued for allegedly violating plaintiffs’ federal rights, retained the option of escaping potentially hostile state forums via removal to federal court:

> If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the State courts, the answer is, that no case can arise in a State court, where the interests, the property, the rights, or the authority of the Federal government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal government.

> From such a [federal] tribunal, no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority.

*Lee*, 106 U.S. at 222-23.

371. For a discussion of the Kennedy/Rehnquist opinion’s trivializing of the *Lee* plaintiff’s Fifth Amendment-based claim as amounting to nothing more than an “alleged trespass,” see infra notes 394-403 and accompanying text.

addressing the question of the *state official's purported immunity* from suit in state court (with respect to which the Court did not discuss whether an adequate remedy was available in the state forum, since this was not germane to the Court's resolution of the *sovereign immunity* question), and the second part addressing the *merits* of the plaintiff's Contract-Clause-based detinue action (with respect to which the Court explained that the supposed "remedy" available under a Virginia statute was in fact "no remedy," and thus did not operate to defeat the plaintiff's claim on the merits). This kind of conflating of sovereign immunity and merits issues is what makes Justice Kennedy's reliance on Osborn likewise fatally defective as "support" for the Kennedy/Rehnquist "unavailability-of-a-state-forum" theory for recognizing federal jurisdiction over Young suits, as explained above. Hence, none of these early cases—Osborn, Lee, Poindexter—cited by Justice Kennedy as nineteenth century precursors for an "unavailability-of-a-state-forum" prerequisite for Young relief provides impetus for the dismantling of *Ex parte Young*, as advanced by Justice Kennedy and Chief Justice Rehnquist in *Coeur d'Alene Tribe*.

Moreover, as Justice Souter observed, the Kennedy/Rehnquist position maintaining that Young relief generally is permitted only where a state forum is unavailable for resolving a plaintiff's federal-law-based claim for prospective relief against state officials is essentially an insistence that Young relief is to be denied in all cases. This follows from two important

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380. Professor Vázquez points out that Poindexter's discussion of the applicability of the Eleventh Amendment is peculiar and somewhat ambiguous, given the fact that Poindexter was a case that reached the Supreme Court from the state courts:

There are two possible reasons why the [Poindexter] Court thought it necessary to discuss the Eleventh Amendment in this case . . . . First, the Court may have believed that the Amendment applied in state court because it conferred an immunity from liability, not just from federal jurisdiction. Second, the Court may have believed that the Amendment, when it applies, limits the Court's appellate jurisdiction. I suggest[ ] . . . that these two reasons are actually one and the same, for a liability against the states that is not enforceable in the federal courts is, as a practical matter, no liability at all. That the Court in Poindexter engaged in an extended discussion of the Eleventh Amendment in a case brought in the state courts without bothering to say why the Amendment was relevant suggests that the Court, too, regarded the reasons as identical.

Vázquez, supra note 19, at 1736. But regardless of whether the "sovereign immunity" withheld from the state official in Poindexter was conceptualized as an alleged immunity from suit in state court or an alleged immunity from the Supreme Court's appellate jurisdiction, the Poindexter Court disposed of that "sovereign immunity" issue apart from addressing the separate issue of whether the alleged availability of a state-law remedy defeated the merits of the plaintiff's Contract-Clause-based detinue action. See supra notes 374-78 and accompanying text.

381. See supra notes 356-65 and accompanying text.

382. See Coeur d'Alene Tribe, 521 U.S. at 316-17 (Souter, J., dissenting).
observations put forward by Justice Souter: (1) the fact that today, "in all [fifty] states . . . private plaintiffs may obtain declaratory and injunctive relief in state court for the acts of state officials in circumstances where relief would be available in federal court"; and (2) the fact that "in every case in which Ex parte Young supports the exercise of federal-question jurisdiction against a state officer . . . the declination of state jurisdiction over the same officer on state immunity grounds" is prohibited under Supreme Court precedent.384 These observations accentuate the point that, as a practical matter, the Kennedy/Rehnquist scheme in Coeur d'Alene Tribe is a proposal for eliminating Young relief altogether.

2. Eviscerating Young by Equating Violations of Federal Law with Common Law Torts

In destabilizing the Young doctrine generally, the Kennedy/Rehnquist opinion presses a comparison between officer suits that allege violations of

383. Id. at 317-18 n.15 (Souter, J., dissenting).
384. Id. at 317 (Souter, J., dissenting). As Justice Souter explained, the observation that state courts are prohibited from turning away suits that satisfy the traditional criteria for Young relief is compelled by the Supreme Court's decision in General Oil Co. v. Crain, 209 U.S. 211 (1908). In Souter's words, General Oil effectively held that "[s]tate law conferring immunity on its officers [cannot] . . . constitutionally excuse a state court of general jurisdiction from an obligation to hear a suit brought to enjoin a state official's action as exceeding his authority because unconstitutional." Coeur d'Alene Tribe, 521 U.S. at 316 (Souter, J., dissenting).
385. In the recently decided case of Alden v. Maine, the Rehnquist Court appears to have made significant additional strides in dicta toward confining the availability of Young relief to those practically nonexistent circumstances in which no state forum is available for resolving a plaintiff's suit against state officials. See 119 S. Ct. 2240 (1999). In bolstering the Court's decision in Alden to eliminate the power of Congress to subject States to federal question suits in state courts, see id. at 2246, Justice Kennedy, writing for the five-member Alden Court, described the doctrine of Ex parte Young as recognizing "that certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land." Id. at 2263. However, this facial validation of the constitutional significance of the Young doctrine is undercut by Kennedy's ensuing statement that "[i]f we had not understood the States to retain a constitutional immunity from suit in their own courts, the need for the Ex parte Young rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine." Id. (citing Coeur d'Alene Tribe, 521 U.S. at 270-71 (opinion of Kennedy, J., joined by Rehnquist, C.J.)). Here, Kennedy essentially repeated the proposition of the "principal" opinion in Coeur d'Alene Tribe, that Young relief is premised on the unavailability of a state forum — a proposition to which seven Justices objected in Coeur d'Alene Tribe, but which, as dictum in Alden, nevertheless gains the support of five members of the Court. Alden's dictum concerning the significance of Young relief thus either reflects a deliberate change of position by Coeur d'Alene Tribe's concurring Justices—O'Connor, Scalia and Thomas—or else amounts to a strategic co-opting of those Justices' views on this issue. In either event, one can predict that the Rehnquist Court in future opinions will be relying on the Alden dictum, inter alia, to support the Court's dismantling of the Young doctrine.
law violations, governmental officials were cloaked in the sovereign's immunity, according to the Larson Court, so long as those officials acted within the limits of authority validly delegated by the sovereign. The Court stated:

The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet [the] requirement [that the action to be restrained or directed is not an action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

If the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency.

The Larson Court specifically distinguished situations in which the plaintiff's complaint implicates an alleged violation of federal law rather than merely an alleged breach of common law:

There was no claim made that the Administrator and his agents, etc., were acting unconstitutionally or pursuant to an unconstitutional grant of power.

Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions.

Larson, then, foreclosed the availability of officer suits premised solely on allegations that governmental officials are acting in breach of plaintiffs' common law rights, but affirmed the Young principle that ensures that the

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390. See id. at 691-95, 701-02.
391. Id. at 693, 695.
392. Id. at 691, 704.
federal rights and officer suits that allege conduct that is tortious or otherwise in breach of common law.\textsuperscript{386} Both Justice O'Connor's concurring opinion and Justice Souter's dissenting opinion refer to this comparison only obliquely, in connection with rejoinders to the Kennedy/Rehnquist view that in its prior decisions, the Supreme Court implicitly relied on the unavailability of a state forum when permitting officer suits to proceed to the merits in federal court.\textsuperscript{387} Nevertheless, this seemingly gratuitous comparison warrants more extensive analysis, since it appears to embody an attempt by Kennedy and Rehnquist forcibly to assimilate \textit{Young} suits to officer suits that allege only a breach of common law, which, under the rule of \textit{Larson v. Domestic & Foreign Commerce Corporation},\textsuperscript{388} are barred by sovereign immunity.

In \textit{Larson}, a private corporation brought suit against a federal official, the head of the War Assets Administration, seeking declaratory and injunctive relief for an alleged breach of contract by the Administrator in refusing to deliver coal to the plaintiff.\textsuperscript{389} The Supreme Court held that the suit was barred by the sovereign immunity of the United States, since the only rights that the Administrator allegedly had violated were rights that were derived strictly from common law principles; and with respect to claims of common

\begin{footnotesize}
\textsuperscript{386} See \textit{Coeur d'Alene Tribe}, 521 U.S. at 272-73 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

\textsuperscript{387} Justice O'Connor presumably was referring to the violation-of-federal-law/breach-of-common-law comparison when she noted that "the principal opinion invokes language in the Court's opinions suggesting that the plaintiff could not secure an adequate remedy \textit{at law} in a state forum." \textit{Id.} at 291-92 (O'Connor, J., concurring in part and concurring in the judgment). Likewise, Justice Souter referred to this analogy when he wrote:

Nor did the \textit{Young} Court hint that some inadequacy of state remedies was tantamount to the unavailability of a state forum. The opinion in \textit{Young} and other cases did indeed include observations that remedies available at law might provide inadequate relief to an aggrieved plaintiff, and \textit{Young} itself noted that the failure to comply with the state statute would result in criminal penalties and hefty fines. But these remarks about the severity of the sanctions supported the Court's conviction that an equitable remedy was appropriate, not that a state forum was unavailable or federal jurisdiction subject to state preemption [through the provision of an "adequate" state forum]. \textit{Id.} at 315 (Souter, J., dissenting) (citations omitted). With these observations, both Justice O'Connor and Justice Souter properly were suggesting that Justice Kennedy and Chief Justice Rehnquist had confused prior Court discussions bearing on the propriety of granting injunctive relief generally with the relevant criteria for granting \textit{Young} relief specifically. What these observations fall short of detecting, however, is the instrumental value of this "confusion" for purposes of the Kennedy/Rehnquist opinion; for such confusion has utility not only with respect to the argument that the Court always had relied on the unavailability of a state forum in allowing \textit{Young} relief, but also as impetus for equating \textit{Young} cases with \textit{Larson} cases, wherein governmental officers are immunized from suit. \textit{See infra} notes 388-404 and accompanying text.

\textsuperscript{388} 337 U.S. 682 (1949).

\textsuperscript{389} See \textit{id.} at 684.
\end{footnotesize}
federal courts are open and available to adjudicate officer suits premised on allegations that plaintiffs' federal rights are being violated.  

In *Coeur d'Alene Tribe*, the Kennedy/Rehnquist proposal for displacing the *Young* doctrine makes scant reference to *Larson* by name, and yet appears to lay the groundwork for nullifying *Young* by collapsing *Young'*s rationale into the reasoning of *Larson* pertaining to the relationship between sovereign immunity and common law torts. Thus, in describing the genesis of "the *Young* fiction," the Kennedy/Rehnquist opinion posits that—prior to *Larson*—"where the individual [state official] would have been liable at common law for his actions, sovereign immunity was no bar regardless of the person's official position." The Kennedy/Rehnquist opinion then refers the reader to four cases listed in a citation string that includes *Lee* and *Tindal*, each of which is accompanied by the same cryptic parenthetical: "(common-law tort of trespass)." By such stealthy indirection, the Kennedy/Rehnquist scheme imparts the implied view (shared, perhaps, by the three concurring Justices) that *Lee* and *Tindal* in effect were overruled by *Larson*—notwithstanding *Larson*'s clear statements to the contrary—and thus no longer may be relied on as

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393. As elaborated *supra* at note 303, a five-member majority of the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), enforced a revisionist interpretation of *Larson* to foreclose another category of officer suits that *Larson* specifically had indicated would remain available for adjudication notwithstanding the doctrine of sovereign immunity—i.e., suits alleging that "[t]he officer is . . . doing [the business of the sovereign] in a way which the sovereign has forbidden," *Larson*, 337 U.S. at 689. The majority's decision in *Pennhurst* provoked a long and angry dissent by Justice Stevens, joined by Justices Brennan, Marshall and Blackmun. See *Pennhurst*, 465 U.S. at 126-67 (Stevens, J., dissenting).

394. Justice Kennedy cited *Larson* only once, in connection with insisting, as discussed *infra* at text accompanying notes 502-47, that the proposed Kennedy/Rehnquist "case-by-case approach to the *Young* doctrine has been evident from the start." *Coeur d'Alene Tribe*, 521 U.S. at 280 (opinion of Kennedy, J., joined by Rehnquist, C.J.). That brief reference to *Larson*, however, is pregnant with significance: "Before *Larson*, we allowed suits to proceed . . . if the official committed a tort as defined by the common law . . . *Larson* rejected this reliance on the common law of torts . . . ." *Id.* (opinion of Kennedy, J., joined by Rehnquist, C.J.) (citations omitted).


396. Justice Kennedy's opinion does not actually mention *Larson* by name here. See *supra* note 394 and accompanying text.


398. United States v. Lee, 106 U.S. 196 (1882); see *supra* text accompanying notes 290-312.

399. *Tindal v. Wesley*, 167 U.S. 204 (1897); see *supra* text accompanying notes 290-312.


401. See *supra* note 303 and accompanying text.

402. The *Larson* Court stated that *Lee* "represents . . . a specific application of the constitutional exception to the doctrine of sovereign immunity," and that the officer suit approved in
precedents affirming jurisdiction over officer suits in the face of sovereign immunity challenges to such jurisdiction.

But the intrigue does not end there, for the Kennedy/Rehnquist scheme appears to rely on Larson, sub silentio, for denying by implication not only the validity of Lee and Tindal, but also the continuing efficacy of Ex parte Young itself. Thus, after mentioning Lee, Tindal, and other purported "common-law" cases, the Kennedy/Rehnquist opinion cites repeatedly to Young for the following assertions:

Under this line of reasoning, a state official who committed a common-law tort was said to have been "stripped" of his official or representative character.

With the growth of statutory and complex regulatory schemes, this mode of analysis might have been somewhat obscured. Part of the significance of Young, in this respect, lies in its treatment of a threatened suit by an official to enforce an unconstitutional state law as if it were a common-law tort. . . . By employing the common-law injury framework, the Young Court underscored the inadequacy of state procedures for vindicating the constitutional rights at stake. 403

The quoted reference in the first sentence of this excerpt is from Young's instruction that state officials are to be regarded as "stripped" of their official or representative character when they violate federal law:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The

Tindal was properly treated as "analogous to a suit to enjoin the officers from enforcing an unconstitutional statute." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 696, 698 n.20; see supra note 303.

By referring to this famous instruction as the product of a "line of reasoning" and a "mode of analysis" that "employ[ed] the common-law injury framework," the Kennedy/Rehnquist opinion appears to suggest that the *Young* instruction no longer is valid, since its supposed reliance on "the common-law injury framework" has been rendered erroneous and inapposite by *Larson*’s rejection of the notion that an alleged breach of common law rights by a governmental official is a legitimate justification for withholding the shield of sovereign immunity from that official.

Inventive as such a theory for invalidating the *Young* doctrine may be, this proposal nevertheless is both fallacy-ridden and injudicious. First, this forced assimilation of *Young* cases to *Larson* cases impliedly disavows *Larson*’s stated approval of officer suits like those validated in *Lee*, *Tindal* and *Young*, which alleging or implicating violations of federal law as opposed to mere breaches of common law. Second, this theory ignores the crucial role of *Young* suits in ensuring the supremacy of federal law within the constitutional structure of the United States. In this respect, the Kennedy/Rehnquist statement that "[f]or purposes of the Supremacy Clause, it is simply irrelevant whether [an officer suit alleging an ongoing violation of federal law] is brought in state or federal court" stands in sharp contrast to the Court’s inspired affirmations in prior cases of the central importance of the *Young* doctrine in American constitutional jurisprudence.

A third major flaw in the Kennedy/Rehnquist’s scheme’s attempt to dismiss *Young* cases as merely *Larson*-cases-in-disguise is that scheme’s misconstruction of the passages from *Ex parte Young* which it cites in forging its *Young*-negating proposal. For instance, in alluding to the famous passage from *Young*, excerpted above, Justice Kennedy neglected to mention that in deciding to withhold the shield of sovereign immunity from a state official accused of violating federal law, the *Young* Court addressed and rejected two interrelated arguments put forward by the defendant Attorney General of Minnesota that cast crucial light on the significance of the *Young*

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405. See supra note 402 and accompanying text; *supra* note 303.
406. See supra notes 140-41 and accompanying text; *supra* notes 166-70 and accompanying text.
408. See supra notes 166-70 and accompanying text.
409. See supra text accompanying note 404.
Court's decision to permit the plaintiff railway company stockholders to proceed to the merits of their officer suit in federal court.\textsuperscript{410}

Attorney General Young had insisted that the stockholders' officer suit violated the Eleventh Amendment because it would enjoin "his discretionary official duties"\textsuperscript{411} under a state regulatory scheme fixing railroad freight and passenger rates.\textsuperscript{412} This argument took the form of two interrelated sub-arguments. First, the Attorney General argued the he had "a full general discretion whether to attempt [the regulatory scheme's] enforcement or not, and the court cannot interfere to control him as Attorney General in the exercise of his discretion."\textsuperscript{413} Second, the Attorney General argued that he necessarily "was complained of as an officer, to whose discretion is confided the use of the name of the State . . . and that when or how he shall use it is a matter resting in his discretion."\textsuperscript{414} With respect to this latter argument, the Attorney General elaborated that because the conduct against which the stockholders sought a federal injunction was their subjection to a "mandamus [proceeding], which would be commenced by the State in its sovereign and governmental character," and because "the right to bring such action is a necessary attribute of a sovereign government" and is \textit{not} within the power of "an ordinary individual" to exercise,\textsuperscript{415} in initiating the proceeding the Attorney General necessarily would be performing a \textit{discretionary rather than "ministerial" act}, for he then would be acting strictly from within a zone of sovereign power and authority occupied exclusively by the State itself.\textsuperscript{416}

\textsuperscript{410} The relevant context-setting discussion from \textit{Young} that Justice Kennedy ignored appears in the same paragraph from which the noted excerpt is extracted and the four paragraphs immediately preceding it. \textit{See Ex Parte Young}, 209 U.S. 123, 158-59 (1908).

\textsuperscript{411} \textit{Id.} at 134 (statement of the case).

\textsuperscript{412} \textit{See Id.} at 144.

\textsuperscript{413} \textit{Id.} at 158.

\textsuperscript{414} \textit{Id.} at 159.

\textsuperscript{415} \textit{Id.}

\textsuperscript{416} In his dissenting opinion, Justice Harlan quoted directly from the Attorney General's petition, as follows:

The petition . . . alleg[ed], among other things: . . . "That neither by statute nor otherwise is your petitioner charged with any special duty of a ministerial character in the doing or not doing of which said complainants in the said bill of complaint . . . had any legal right, and that whatever duties your petitioner had or has with respect to the several matters complained of in the said bill of complaint, are of an executive and discretionary nature. That in no case could your petitioner, even though it was his intention so to do, which it was not, deprive the said complainants . . . of any property, nor could he trespass upon their rights in any particular, and that all he could do as Attorney General . . . and all that he intended to do or would do, \textit{was to commence formal judicial proceedings in the appropriate court of Minnesota against the}
The Young Court rejected these arguments. With respect to the first argument, the Young Court explained that by enjoining the Attorney General "from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant," there would be "no interference with his discretion," since "[a]n injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer." Thus, the Young Court clearly viewed the allegedly illegal conduct against which the plaintiff stockholders sought an injunction to be conduct that fell outside the zone of discretionary conduct available to the Attorney General as an officer of the State of Minnesota.

But more importantly, the Young Court also viewed this allegedly illegal conduct as falling outside the alternative zone of what might be conceptualized as "merely ministerial" conduct. As the Court suggested, this alternative "ministerial" zone is implicated "where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty." The Young Court then distinguished such "merely ministerial" conduct—with respect to which a court "can . . . direct affirmative action"—from conduct that violates federal law, such as that threatened by Attorney General Young's imminent enforcement of the allegedly unconstitutional regulatory scheme. "In such case," the Court asserted, "no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do."

For the Young Court, then, the "discretionary/ministerial" dichotomy, as pressed by the Attorney General in arguing that enforcement of the state regulatory scheme was within his discretion, was irrelevant to the Court's determination of whether an officer suit implicating an alleged violation of federal law was within a federal court's subject matter jurisdiction. Rather,

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said Northern Pacific Railway Company, its officers, agents and employes, to compel the said company, its agents and servants, to adopt and put in force the schedule of freight rates, tariffs and charges prescribed by said [statute] of the State of Minnesota. " [The Attorney General] renewed the objection that the suit instituted by [the stockholders], in so far as the same is against him, was a suit against the State to prevent his commencing the proposed action in the name of the State, and was in restraint of the State itself . . . .

Id. at 172-73 (Harlan, J., dissenting) (quoting petition of Minnesota Attorney General Edward T. Young).

417. Id. at 158-59.
418. Id. at 158.
419. Id.
420. Id.
421. Id. at 159.
what was relevant to that determination—indeed, what was *legally controlling*—was simply whether a violation of federal law had been alleged. For, in the *Young* Court's view, conduct by a state official in violation of federal law could not be classified or conceptualized as "discretionary"—regardless of whether such conduct could be classified or conceptualized as "ministerial."

This crucial observation by the *Young* Court—that state officials never have "discretion" to violate paramount federal law—was brought into even sharper focus in the Court's response to the Attorney General's insistence that his particular conduct of bringing a mandamus proceeding *must* be viewed as "discretionary," since no "ordinary individual" could perform such an act, but only an individual acting essentially as the State itself. In putting forth this argument, the Attorney General in effect was insisting once again that his conduct must be understood as "discretionary" precisely because it could not be understood as "ministerial," since such conduct could not be conceptualized as falling within a zone of allegedly wrongful acts that are "merely ministerial in . . . nature," such as a "mere" breach of contract or a "merely" tortious act—i.e., acts which are capable of being performed by "an ordinary individual."

Responding to this recurring implicit reliance by the Attorney General on the "discretionary/ministerial" dichotomy, the *Young* Court once again eschewed the relevance of that dichotomy with respect to the question of whether a federal court has jurisdiction over an officer suit alleging a violation of federal law. "The answer to all this," the Court asserted in a tone approaching exasperation, "is the same as made in every case where an official claims to be acting under the authority of the State." The Court then issued its famous instruction, set out at length, above, training attention on the dispositive point that "in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional," a state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Again, in stating the necessary contingency for permitting an officer suit alleging a violation of federal law to proceed to the merits in federal court, the *Young* Court placed no reliance whatsoever on whether the officer's conduct could be thought of as a "ministerial" act, like a common law tort. Instead, the *Young* Court insisted that the suit turned exclusively on

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422. *Id.*
423. *Id.* at 158-59.
424. *Id.* at 159.
425. See *supra* text accompanying note 404.
426. *Young*, 209 U.S. at 159-60.
on Indian Tribes by forcing Tribes to expend their limited litigation resources fighting to maintain ownership and control of reservation rivers and lakes in the congenitally biased courts of the Tribes’ persistent historic and present-day adversaries.328

What emerges as the combined effect of the opinions of Justice Kennedy and Justice O’Connor in Coeur d’Alene Tribe, then, is a new, judicially

community commentary on the general importance of federal forums for resolving disputes implicating Indian rights:

[I]n important respects, Indian tribes are “outside” the majoritarian processes that constitute the state and federal governments. As “dependent sovereigns,” Indian tribes’ abilities to continue to function as quasi-sovereign entities are in some measure at the mercy of federal legislation. But federal courts have played some role in providing tribes with a relatively impartial forum in which to present and resolve their claims to justice. Given the at times oppressive history of relations between the federal government and the Indian tribes, and of state governments and tribes and their members, one might think that tribal claims under federal law are paradigmatic examples of cases that ought to be decided by the most independent decisionmaker available.

Jackson, supra note 210, at 538-39 n.162 (citations omitted).

328. Apparently anticipating Tribes’ protest to being forced to litigate their submerged-lands-related officer suits in state courts, Justice Kennedy insisted that “[a] doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.” Idaho v. Coeur d’Alene Tribe, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J., joined by Rehnquist, C.J.). Kennedy then devoted two additional paragraphs to defending the notion that state courts generally are capable of giving effect to federal law, the supremacy of which state court judges are obligated by the terms of the United States Constitution to respect. See id. at 275-76 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

However, Justice Kennedy’s defense of the “adequacy” of state judicial forums—like his rumination on the history of British and American law relating to submerged lands generally, see id. at 283-87; supra text accompanying notes 278-82—is beside the point, for it is the impropriety and injustice of forcing Indian Tribes to submit to state court determinations of Tribes’ federally protected rights vis-à-vis encroachments by state officials that was the precise issue under consideration in Coeur d’Alene Tribe, not some abstract theory about the “inherent inadequacy of state forums.” Hence, Justice Kennedy once again thrust his sword into a “straw man” when he defied the “doctrine” of “the inherent inadequacy of state forums,” for no such generic “doctrine” had been invoked, relied on, or even suggested in this case. By focusing on this manufactured issue of the “inherent inadequacy of state forums,” Kennedy and the Court strategically avoided addressing the Tribe’s concerns about the particular injustice of having its officer suit condemned to be heard only in the courts of the defendant state officials’ own State. It is not difficult to guess why Kennedy refrained from addressing the weighty issues of fairness and justice implicated in this dispute, for in view of the long history of Tribe-State conflicts in America, there simply is no credible defense for the belief that committing to the exclusive jurisdiction of state courts any class of disputes pitting Tribes’ federally protected rights to on-reservation lands against States’ “interest” in those lands is, in any sense of the word, “adequate.”

Justice Kennedy’s steadfast refusal to ground his analysis in Coeur d’Alene Tribe in relevant principles of federal Indian law bears out the prediction made by Professor Getches that “Kennedy certainly will not motivate the Court to return to foundational principles [of Indian law]. He has displayed a profound disinterest in Indian law and should be counted as likely to vote with the other subjectivist Justices.” Getches, supra note 3, at 1645.
created rule mandating discrimination against a class of officer suits initiated by Indian Tribes—a rule rooted in the prejudicial and misguided views of five members of the Supreme Court concerning Indian Tribes' rights to the navigable lakes, rivers and other waterways located within the boundaries of Indian reservations. By force of this discrimination mandate, lower federal courts henceforth are prohibited from hearing such suits brought by Indian Tribes under the doctrine of *Ex parte Young*, and Tribes are put on notice that if they desire to seek justice against state officials who illegally appropriate the Tribes' on-reservation waterways, they must do so, if at all, only in the courts of the very States whose officers are being accused of such conduct. Although both Justice Kennedy and Justice O'Connor engaged in elaborate posturing in their respective opinions to make it appear as though a coherent doctrinal rationale underlay the decision to banish the Coeur d'Alene Tribe's officer suit from federal court, that decision is best understood as an exercise of judicial activism in disregard of fundamental principles of federal Indian law and in service to the Court's own "States' rights" ideology. As Justice Souter emphasized repeatedly in dissent, the Coeur d'Alene Tribe had presented "a perfect example of a suit for relief cognizable under *Ex parte Young*" and the majority's doctrinally inexplicable but ideologically expedient decision to bar the Tribe's suit "redefine[s] and reduce[s] the substance of federal subject-matter jurisdiction to vindicate federal rights."  

The Rehnquist Court's *Coeur d'Alene Tribe* decision thus represents a manifestation of profound injustice—the very kind of injustice, in fact, that the doctrine of *Ex parte Young* was designed to protect against. However, due to the controlling influence of Justice O'Connor's concurring opinion, the majority rule in *Coeur d'Alene Tribe* was carefully circumscribed to level its oppressive effects on Indian Tribes only—at least for now. The next section of this Article analyzes the proposal in *Coeur d'Alene Tribe* subscribed to by Justice Kennedy and Chief Justice Rehnquist only, which would subject parties *in addition to Indian Tribes* to a contraction of federally guaranteed liberty through a withdrawal of *Young* relief under the banner of "States' rights."

329. *Coeur d'Alene Tribe*, 521 U.S. at 300 (Souter, J., dissenting).
330. *Id.* at 298 (Souter, J., dissenting).
Reeves,342 decided eight years before Young, the Court squarely had rejected the notion that a State’s consent to suit in state court is tantamount to the State’s consent to suit in federal court:

Nothing heretofore said by this court justifies the contention that a State may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts . . . .343

In view of Smith, the Young Court obviously would not have been “reluctan[t]” to rely on the unavailability of a state forum because of “the prevalen[t] . . . idea” that a State’s consent to state court suits amounted to consent to federal courts suits.344 In fact, according to Smith, that “idea” had never been “prevalen[t]”; and in any event, it could not, after Smith, have forced the Supreme Court to disguise its “true” rationale for recognizing federal jurisdiction over the officer suit in Young.345

Writing for the four dissenting Justices, Justice Souter likewise faulted Justice Kennedy and Chief Justice Rehnquist for substituting a new, revisionist rationale for that of the Court in permitting the plaintiffs in Reagan, Smyth and Young to sue state officials in federal court. As Souter reiterated,

Ex parte Young itself gives no hint that the Court thought the relief sought in federal court was unavailable in the Minnesota state courts at the time. Young, indeed, relied on prior cases [Reagan and Smyth] in which federal courts had entertained suits against state officers notwithstanding the fact, as the Young Court expressly noted, that state forums were available in which the plaintiffs could have vindicated the same claims.346

Justice Souter summarized the dissenters’ objection to the Kennedy/Rehnquist proposed “unavailability-of-a-state-forum” prerequisite by observing that the “notion that availability of a state forum should have some bearing on the applicability of Ex parte Young is . . . as much at odds with precedent as with basic jurisdictional principles.”347
With respect to those "basic jurisdictional principles," both Justice Souter and Justice O'Connor expressed alarm at the Kennedy/Rehnquist opinion's disregard of the importance of the federal courts' federal question jurisdiction, which the Young doctrine is essential for upholding. Justice Souter pointed out that "[f]ederal-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." 348 Justice O'Connor likewise criticized the Kennedy/Rehnquist proposal for "call[ing] into question the importance of having federal courts interpret federal rights," pointing out that the Court has "frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." 349 As both Justice O'Connor and Justice Souter apparently recognized, by imposing the unprecedented requirement that any plaintiff seeking Young relief first show that a state forum is unavailable, the Kennedy/Rehnquist scheme would fatally undermine the core jurisdictional principles upon which the Young doctrine was built. 350

348. Id. at 313 (Souter, J., dissenting).
349. Id. at 293 (O'Connor, J., concurring in part and concurring in the judgment).
350. In making his proposal for limiting Young relief to cases in which a state forum is unavailable seem consistent with the framers' understanding of the proper scope of federal court authority within the framework of the Constitution, Justice Kennedy asserted:

Where there is no available state forum the Young rule has special significance. In that instance providing 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.

Id. at 271 (opinion of Kennedy, J., joined by Rehnquist, C.J.). To support this view of the limited importance of the Young doctrine, Kennedy extracted a brief quote from Alexander Hamilton: "'[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions.'" 351 Id. (quoting THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1982) (alteration in original)). Kennedy neglected to explain, however, that Hamilton made this point to support his explication of the "proper objects" for the exercise of jurisdiction by the federal courts, in contradistinction to the state courts:

To judge with accuracy of the proper extent of the federal judicature it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation . . . .

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the
collecting taxes for the State of Virginia, to recover personal property that Greenhow had seized after Poindexter had tendered payment of state taxes in state-issued coupons that Greenhow refused to accept.\(^3\) On review, the Supreme Court rejected, inter alia, as unavailing Greenhow's efforts to defend himself against Poindexter's suit on sovereign immunity grounds.\(^3\) The Court explained that Poindexter's suit against Greenhow was not a suit against the State of Virginia, since the Virginia statute upon which Greenhow purported to immunize his seizure of Poindexter's property on behalf of the State was void because it was unconstitutional.\(^3\) The *Poindexter* Court's explanation for rejecting the state official's argument that the plaintiff's suit

\(^{373}\) See *Poindexter*, 114 U.S. at 273-74.

\(^{374}\) See id. at 292-93.

\(^{375}\) In elaborating, the *Poindexter* Court provided an important justification for allowing suits against state officials who violate federal law to proceed to the merits notwithstanding those officials' claims of sovereign immunity:

> That which . . . is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.

> . . . The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise, that Constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a State, which is in violation of the Constitution of the United States, as his authority for taking or holding property, to which the citizen asserts title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the State, ignores the fundamental principles on which the Constitution rests . . . and, practically, makes the statutes of the States the supreme law of the land within their respective limits.

> . . . [I]nasmuch as, by the Constitution of the United States, which is also the supreme law of Virginia, that contract [binding Virginia to accept its bonds], when made, became thereby unchangeable and irrepealable by the State, the subsequent act . . . and all other like acts, which deny the obligation of that contract and forbid its performance, are not the acts of the State of Virginia. . . . The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the State of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name, and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. The State of Virginia has done none of these things with which this defence charges her. The defendant in error [Greenhow] is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without her authority, but contrary to her express commands. The plaintiff in error [*Poindexter*], in fact and in law, is representing her, as he seeks to establish her law, and vindicates her integrity as he maintains his own right.

*Id.* at 290, 292-93.
should be dismissed on sovereign immunity grounds makes no reference to whether the state-law "remedy" proffered by Virginia was adequate or not, because the adequacy of that "remedy" had no bearing on the Court's inquiry into whether the State's sovereign immunity barred the suit.\(^{376}\)

However, in a different part of its opinion addressing the merits of the plaintiff's suit, the Poindexter Court rejected separately Greenhow's argument that because a Virginia statute afforded the plaintiff a "remedy" for vindicating his asserted right to the seized property, Greenhow's conduct had not infringed Poindexter's rights under the Contract Clause of the federal Constitution.\(^{377}\) As the Court explained, the proffered statutory "remedy" of requiring the plaintiff to "acquiesce in the wrong, pay his taxes in money which he was entitled to pay in coupons, and bring suit to recover it back" in fact was "no remedy," since the essence of Poindexter's constitutional right under the Contract Clause was the "right . . . to have his coupon received for taxes when offered."\(^{378}\) Justice Kennedy's suggestion in Coeur d'Alene Tribe that Poindexter is an "example" of a case where an officer suit was allowed to proceed because of the Supreme Court's "concern over the lack of a [state] forum"\(^ {379}\) derives from Kennedy's conflating of language from two separate and distinct parts of the Poindexter Court's analysis—the first part

\(^{376}\) See id. at 292-93; supra note 375.

\(^{377}\) See id. at 300.

\(^{378}\) Id. at 298, 299-300. The Court elaborated:

It is contended . . . that the [Virginia statute] under which [Greenhow] justified his refusal of the tender of coupons, does not impair the obligation of the contract between the coupon-holder and the State of Virginia, inasmuch as it secures to him a remedy equal in legal value to all that it takes away, and that consequently, as the State may lawfully legislate by changing remedies so that it does not destroy rights, the remedy thus provided is exclusive, and must defeat the plaintiff's action.

. . . [Poindexter] offered [the coupons] and they were refused. He chose to stand upon the defensive and maintain his rights as they might be assailed. His right was to have his coupon received for taxes when offered. That was the contract. To refuse to receive them was an open breach of its obligation. It is no remedy for this that he may [pursuant to the "remedy" prescribed by the Virginia statute] acquiesce in the wrong, pay his taxes in money which he was entitled to pay in coupons, and bring suit to recover it back . . . . He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrong-doer the officer who seizes his property to enforce it.

To dilute the objection that its “unavailability-of-a-state-forum” theory for granting *Young* relief is “at odds with precedent,” the Kennedy/Rehnquist opinion purports to locate additional support for this theory in three Supreme Court decisions of the nineteenth century—*Osborn v. Bank of United States*; *United States v. Lee*; and *Poindexter v. Greenhow*. However, none of these early decisions intimates any such prerequisite for recognizing federal jurisdiction over suits alleging violations of federal law by governmental officials. The Kennedy/Rehnquist opinion parenthetically alludes to *Osborn* as

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.

But this heavily edited extract from *Osborn*, as Justice Souter noted in his *Coeur d'Alene Tribe* dissent, “rest[s] on a misreading of *Osborn* as holding that the officer suit could proceed only because a suit directly against the State was prohibited.” To appreciate Souter’s point about the Kennedy/Rehnquist opinion’s “misreading” of *Osborn*, a closer examination of the context in *Osborn* corresponding to Justice Kennedy’s extract is helpful.

*Osborn* raised numerous important questions of constitutional, statutory and common law implicated in a suit for injunctive relief brought in a federal court by a federally chartered bank against an official of the State of Ohio and seeking to prevent that official from enforcing a state statute imposing a heavy tax on all banks transacting business within the State without authorization from the State. Ruling ultimately in the bank’s favor on the

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351. *Coeur d'Alene Tribe*, 521 U.S. at 316 (Souter, J. dissenting); *supra* text accompanying note 347.
352. *See Coeur d'Alene Tribe*, 521 U.S. at 272 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (positing that “*Young* was not an isolated example of an instance where a state forum was unavailable”).
355. 114 U.S. 270 (1885).
357. *Id.* at 315 n.12 (Souter, J., dissenting) (citation omitted).
issue of the federal court's jurisdiction, and substantially affirming the circuit court's decision in favor of the bank on the merits as well. Chief Justice Marshall divided his examination of what he called "the merits of the cause" into seven enumerated sections. The sixth of these sections addresses the question of whether the Eleventh Amendment prohibits federal jurisdiction over the bank's suit against the Ohio official, and concludes that the Amendment does not prohibit such jurisdiction.

The fifth of Marshall's enumerated sections does not deal with the Eleventh Amendment issue at all, but instead addresses the state official's argument "that the case . . . does not warrant the interference of a Court of Chancery." This fifth section, in other words, deals exclusively with the question of whether injunctive relief is an appropriate remedy; indeed, Marshall made it clear that this section of the Court's opinion concerns the issue of the appropriateness of granting equitable relief entirely apart from the Eleventh Amendment issue. Despite Marshall's clarification that he was not addressing the state official's Eleventh Amendment-based argument in this section of Osborn, the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe frames its extract from this section so as to convey the impression that Marshall was addressing the Eleventh Amendment issue therein. But as Justice Souter reiterated:

359. See id. at 818, 823, 828, 870-71.
360. See id. at 828-29.
361. See id. at 847, 859.
362. Id. at 838.
363. Chief Justice Marshall elaborated in the fifth section of Osborn as follows:
We suspend . . . the consideration of the question, whether the interest of the State of Ohio . . . shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings. That question . . . is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a Court of equity, against the defendants, and to the protection of an injunction. . . . The question, then, is reduced to the single inquiry, whether the case is cognizable in a Court of equity.
Id. at 839.
364. See supra text accompanying note 356. When the fragments from this section of Osborn, as selected and compressed by Justice Kennedy, are restored to the original context which gives them meaning, the Kennedy/Rehnquist opinion's suggestion that Osborn supports the notion that Young suits should be disallowed whenever a state forum is available is shown to be erroneous, since this section of Osborn is restricted to the issue of the propriety of equitable relief:
If the State of Ohio could have been made a party defendant, it can scarcely be denied, that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the Court, a suit cannot be sustained against the agents of that party; and cases have been cited, to show that a Court of Chancery will not make a decree, unless all those who are substantially interested, be made parties to the suit.
whether the defendant officer's conduct allegedly violated federal law. Hence, in urging that *Ex parte Young* represents the Supreme Court's "[t]reatment of a threatened suit to enforce an unconstitutional statute as a tort," the Kennedy/Rehnquist opinion in *Coeur d'Alene Tribe* imparts a gross mischaracterization of the core holding and reasoning of the *Young* decision.

Moreover, the Kennedy/Rehnquist opinion attempts to reinforce this mischaracterization by means of multiple out-of-context and highly selective references to language from the *Young* opinion. For instance, the Kennedy/Rehnquist opinion alludes to the following language from *Young* to support an insistence that the *Young* Court viewed "a threatened suit by an official to enforce an unconstitutional state law as if it were a common-law tort"—"treating this possibility," as Justice Kennedy parenthetically suggested, "as a 'specific wrong or trespass'".

In the course of the opinion in the *Fitts case* the Reagan and *Smyth* cases were referred to (with others) as instances of state officers specially charged with the execution of a state enactment alleged to be unconstitutional, and who commit under its authority some specific wrong or trespass to the injury of plaintiff's rights. In those cases the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer.

The *Young* Court's reference in the first line of this excerpt is to *Fitts v. McGhee*, in which the Supreme Court held that a suit brought against officials of the State of Alabama seeking to enjoin enforcement of legislation fixing the rates for a toll bridge was prohibited by the Eleventh Amendment, since the legislature had directed that penalties for violating the allegedly

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427. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 273 (opinion of Kennedy, J., joined by Rehnquist, C.J.); see also supra text accompanying note 403.
428. *Coeur d'Alene Tribe*, 521 U.S. at 273 (opinion of Kennedy, J., joined by Rehnquist, C.J.); supra text accompanying note 401.
431. 172 U.S. 516 (1899).
unconstitutional statute were to be collected directly by the overcharged parties. As the Fitts Court pointed out, "neither of the State officers named [in the suit] held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement." The Young Court underscored this observation, pointing out that with respect to the officer suit in Fitts, "[a] state superintendent of schools might as well have been made a party." The Young Court thus endorsed the rule of Fitts that for an officer suit to be valid, "[the] officer must have some connection with the enforcement of the [allegedly unconstitutional] act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." But the Young Court then distinguished Fitts by observing that "[i]t has not . . . been held that it was necessary that [an officer's] duty should be declared in the same act which is to be enforced." The Court elaborated:

The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the [allegedly unconstitutional] act itself, is not material so long as it exists.

It was in the larger context of discussing the impact of Fitts on the question of the validity of the disputed officer suit in Young that the Young Court made a passing comparison between "the threatened commencement of

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432. See Young, 209 U.S. at 156.
433. Fitts, 172 U.S. at 530, quoted in Young, 209 U.S. at 157.
434. Young, 209 U.S. at 156.
435. Id. at 157.
436. Id.
437. Id. According to the Young Court, then, Fitts could not be construed as closing the federal courts to officer suits like the one brought against Attorney General Young, since being specially charged with the duty to enforce [an allegedly unconstitutional] statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State.

Id. at 158. The Young Court thus clearly recognized that Fitts did not compel dismissal of the plaintiff stockholders' suit against Attorney General Young: 

[If]individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Id. at 155-56.
[a] suit[ ] to enforce [an allegedly unconstitutional] statute” and “some specific wrong or trespass,”438 as parenthetically invoked by Justice Kennedy in Coeur d’Alene Tribe.439 This context makes it clear, however, that contrary to the truncated, out-of-context reading urged by the Kennedy/Rehnquist opinion, the Young Court suggested this comparison not to show any reliance on an analogy to common law torts; for, as discussed previously, there was no such reliance in Young.440 Rather, Young analogized enforcement of an unconstitutional railway rate-fixing scheme to “some specific wrong or trespass” merely to emphasize the existence of a connection between any such regulatory scheme and the enforcement duties of those state attorneys general named as defendants in officer suits like the ones validated in Reagan, Smyth and Young—a connection required by Fitts and specifically argued (albeit unsuccessfully) to be lacking in Young by defendant Attorney General Young himself. Justice Kennedy’s recurring insistence that the Young Court viewed violations of federal law by state officials as different from sovereign acts by virtue of those violations of federal law being similar to common law torts is an argument without merit when the isolated language from Young upon which Kennedy purported to rely is read and appreciated in its original context.

Moreover, in its zeal to equate violations of federal law with common law torts, the Kennedy/Rehnquist opinion ignores not only the context of the fragments it extracts from Young, but also statements from Young that clearly contradict the Kennedy/Rehnquist opinion’s ideological slant on Young’s meaning. For instance, according to the Kennedy/Rehnquist opinion, “[t]reatment of a threatened suit to enforce an unconstitutional statute as a tort found support in Reagan and Smyth”441 But in the Young Court’s view, federal jurisdiction over the officer suit at issue in Reagan was perfected, as Reagan itself proclaimed, not because the state attorney general’s imminent, allegedly unlawful conduct resembled a common law tort, but “by virtue of the statutes of Congress, under the sanction of the Constitution of the United States”442—i.e., by force of the fact that federal law allegedly was about to be violated. And, according to Young once again, the officer suit in Smyth was permitted not because of any similarity in appearance between a threatened

438. Id. at 158.


440. See supra notes 409-27 and accompanying text.


enforcement of the rate-fixing scheme at issue there and a common law tort, but because such enforcement was alleged to be pursuant to "an unconstitutional enactment" threatening "injury of the rights of the plaintiff," thus rendering the officer suit one that "was not a suit against a State within the meaning of the [Eleventh] Amendment." As the Young Court elaborated, "[t]he suit [in Smyth] was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rates being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment." By suggesting that the Young Court relied on Reagan and Smyth because of those cases' "[t]reatment of a threatened suit to enforce an unconstitutional statute as a tort," the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe lionizes a gratuitous comparison that was irrelevant to Young's reliance on those cases, and ignores the real reason for Young's reliance—the fact that the plaintiffs in Reagan and Smyth, like the plaintiffs in Young, had alleged an imminent violation of federal law. Once again, by examining the relevant context, it

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443. Young, 209 U.S. at 154.
444. Id. (emphasis added).
445. Coeur d'Alene Tribe, 521 U.S. at 273 (opinion of Kennedy, J., joined by Rehnquist, C.J.); supra text accompanying note 441.
446. Another example of the Kennedy/Rehnquist opinion's out-of-context misappropriation of language from Young is Justice Kennedy's reference to the following sentence fragment from Young: "The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature . . . ." Young, 209 U.S. at 167, quoted without use of ellipsis in Coeur d'Alene Tribe, 521 U.S. at 273 (opinion of Kennedy, J., joined by Rehnquist, C.J.). The quoted fragment appears in a discussion at the end of the Young opinion, in which the Court considered Attorney General Young's objection that "the necessary result of upholding this suit . . . will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions." Id. In rejecting that argument, the Young Court pointed out that federal courts long since had proved themselves quite capable of managing their equity jurisdiction, with respect to suits alleging "direct trespass upon or interference with tangible property" as well as suits of the sort at issue in Young: "A bill filed to prevent the commencement of suits to enforce an unconstitutional act . . . is no new invention . . . ." Id. at 167.

The Young Court then issued the language excerpted by Justice Kennedy, above, adding at the end of the same sentence that the minimal "difference" cited between a federal injunction affecting governmental officials' use of property and a federal injunction affecting governmental officials' enforcement of an unconstitutional statute "does not extend, in truth, the jurisdiction of the courts over the subject matter." Id. The Young Court's elaboration is worth examining carefully: In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the
is evident that notwithstanding Justice Kennedy’s multiple citations to *Young* as well as to *Reagan* and *Smyth* in purporting to discern support for the *Young*-negating proposal to which both Justice Kennedy and Chief Justice Rehnquist subscribed in *Coeur d’Alene Tribe*, in truth that maverick proposal finds no support at all in the essential teachings of those liberty-affirming, landmark Supreme Court decisions.

3. *Young* as an Application of the Doctrine of Comity

Nor does the Kennedy/Rehnquist proposal for dismantling the doctrine of *Ex parte Young* find support in the 1930 essay on federal comity by Professor Charles Warren,\(^447\) from which Justice Kennedy extracted a fragment, in the following manner:

> The enforcement scheme in *Young*, which raised obstacles to the vindication of constitutional claims, was not unusual. In many situations . . . the exercise of a federal court’s equitable jurisdiction was necessary to avoid “excessive and oppressive penalties, [the] possibility of [a] multiplicity of suits causing irreparable damage, or [the] lack of proper opportunities for [state] review.”\(^448\)

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Although Professor Warren was no admirer of the Young doctrine,\(^\text{449}\) his 1930 essay in general, and the language quoted by Justice Kennedy in particular, concern the importance of the exercise of comity by the federal judiciary strictly in circumstances not involving Young suits at all. Thus, Professor Warren expressed approval of the Supreme Court's decision in Prentis v. Atlantic Coast Line Co.,\(^\text{450}\) issued just eight months after Young, for its holding, as paraphrased by Professor Warren, that "as a matter of comity, the federal court ought not to issue an injunction against [a state commission in the process of establishing railway rates], until the railroad affected by the commission's allegedly unconstitutional order had exhausted the right of appeal to the highest court of the state given to it by the state constitution."\(^\text{451}\) Professor Warren immediately clarified, however, that "[l]ater cases . . . have held that this doctrine of comity is . . . inapplicable if the appeal provided for by the state law is of a judicial and not a legislative nature,"\(^\text{452}\) and elaborated further, in a footnote, that "[i]n such cases, it is held that comity yields to constitutional right."\(^\text{453}\)

Clearly, then, Professor Warren was suggesting, via the language quoted out-of-context by Justice Kennedy, that if state legislatures would be more careful in drafting "the penal and remedial provisions of state statutes regulating public utility and other corporations,"\(^\text{454}\) they might induce federal courts to exercise restraint as a matter of comity in the face of complaints alleging unconstitutionally onerous effects of the States' administrative ratemaking processes. Professor Warren never suggested that such comity would be appropriate, or indeed constitutionally permitted,\(^\text{455}\) with respect to a Young suit as such, alleging a violation of federal law in the operation of a

\(^{449}\) Professor Warren disparaged the Young doctrine in the following terms:

Such a doctrine, in its results, clearly violates the spirit and theory which inspired the Act of 1793 [authorizing federal courts to issue injunctions, but not to stay state court proceedings] and . . . evaluates the right of an individual to resort to the federal court more highly than the right of a state to resort to its own courts. It authorizes federal interference with the due performance by state officials of duties which they are sworn to perform, and directly promotes collisions between the two sovereignties.

Warren, supra note 447, at 375; see also infra note 457.

\(^{450}\) 211 U.S. 210 (1908).

\(^{451}\) Warren, supra note 447, at 376.

\(^{452}\) Id. at 376-77.

\(^{453}\) Id. at 377 n.146.

\(^{454}\) Id. at 378.

\(^{455}\) The Young Court quoted from Chief Justice John Marshall in underscoring the federal courts' obligation to exercise jurisdiction when Young's criteria are satisfied: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), quoted in Ex parte Young, 209 U.S. 123, 143 (1908).
firmly fixed enforcement scheme, the end-product of final legislative ratemaking.\footnote{456} Thus, Justice Kennedy’s juxtaposition of the fragment from Professor Warren’s discussion about judicial comity with Kennedy’s own efforts at transmogrifying Young suits into a mere projection of “the common-law injury framework” is, once again, a confounded and essentially futile attempt to locate support for disassembling the Young doctrine where no such support exists.\footnote{457}

4. Young as a Vacant Exception to the Unavailability of Young

The Kennedy/Rehnquist opinion in \textit{Coeur d'Alene Tribe} thus lays the foundation for dismantling \textit{Ex parte Young} by insisting that Young relief generally is precluded whenever a state forum is available to adjudicate an officer suit alleging an ongoing violation of federal law, which violation is to be regarded, by judicial fiat, as functionally indistinguishable from a common law tort. The Kennedy/Rehnquist opinion then ostensibly contradicts itself by appearing to admit of an exception: “Even if there is a prompt and effective remedy in a state forum, a second instance in which Young may serve an important interest is when the case calls for the interpretation of federal law.”\footnote{458} What is peculiar about this “exception” to the proposed Kennedy/Rehnquist rule that Young suits generally are not available is that it is an “exception” that appears to be virtually devoid of

\footnote{456. The \textit{Prentis} Court—which, again, was the same Court that decided \textit{Ex parte Young}—emphasized the appropriateness of applying principles of comity with respect to constitutional challenges to a State’s legislative ratemaking processes, but specifically noted that once allegedly unconstitutional rates had been firmly fixed, an aggrieved plaintiff could bring an action in federal court for relief under the Young doctrine. \textit{See} \textit{Prentis v. Atlantic Coast Line Co.}, 211 U.S., 210, 230-31 (1908) (citing, inter alia, \textit{Reagan v. Farmers’ Loan & Trust Co.}, 154 U.S. 362 (1894); \textit{Smyth v. Ames}, 169 U.S. 466 (1898); \textit{Ex parte Young}, 209 U.S. 123 (1908)).

457. As mentioned supra at note 447 and accompanying text, Professor Warren disapproved of the Young doctrine generally, even though his 1930 essay did not deny the obligatory availability of Young relief for plaintiffs subjected to state officials’ threatened enforcement of allegedly unconstitutional regulatory schemes. In fact, Professor Warren was a strong proponent of the Supreme Court’s Hans immunity doctrine, and is credited with propagating “the profound shock theory of the eleventh amendment”—i.e., the theory that, “[i]n the words of the Hans Court, the Chisholm [v. Georgia] decision created ‘a shock of surprise throughout the country’ by departing from an original understanding that the states would be immune from suit without their consent,” and that “[t]he amendment merely restored the original understanding that states would be immune from suit in all circumstances . . . . This ‘profound shock’ theory, as Professor Charles Warren later popularized it, was soon enshrined as an irreducible historical fact.” \textit{Gibbons}, supra note 19, at 1893-94 (footnote omitted) (quoting Hans v. Louisiana, 134 U.S. 1, 10 (1890), and citing 1 C. \textit{Warren}, \textit{THE SUPREME COURT IN UNITED STATES HISTORY} 91-96 (rev. ed. 1935)).

content. For instance, the Kennedy/Rehnquist opinion seems bent on canceling this "exception" altogether when it posits the following paradoxical caveat: "This reasoning [justifying the Young exception] . . . can lead to expansive application of the Young exception." The opinion continues:

It is difficult to say States consented to these types of suits in the plan of the Convention. Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be applicable in federal court but for an exception based on Young.

As Justice Souter pointed out in dissent, this "difficulty" bedeviling the Kennedy/Rehnquist opinion is easily explained by that opinion's refusal to embrace Young's core teaching that as sovereigns bound by the "plan of the Convention," States are conceived as having no power to violate paramount federal law, and hence, "[b]ecause a suit against a state officer to enjoin an ongoing violation of federal law is not a suit against a State, the scope of state consent to suit at the founding has no bearing on the availability of officer suits under Young." Curious, too, is the very protestation that the Eleventh Amendment would bar certain federal court suits "but for an exception based on Young." Here, the Kennedy/Rehnquist opinion seems to be lamenting the fact that the Eleventh Amendment would apply to Young suits but for the fact that the Eleventh Amendment does not apply to Young suits!

A further example of how the Kennedy/Rehnquist opinion admits of an essentially vacant "exception" to that opinion's proposed baseline rule of the general unavailability of Young relief is the manner in which the opinion illustrates its reluctant concession that "[i]n some cases, it is true, the federal courts play an indispensable role in maintaining the structural integrity of the constitutional design." Here, the opinion cites only two cases, South Dakota v. North Carolina and United States v. Texas, neither of

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459. Id. (opinion of Kennedy, J., joined by Rehnquist, C.J.).
460. Id. at 274-75 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
461. In Papasan v. Allain, 478 U.S. 265 (1986), the Supreme Court explained the core teaching of Young in the following instructive terms: "[The Young] holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity." Id. at 276.
462. Coeur d'Alene Tribe, 521 U.S. at 299 n.2 (Souter, J., dissenting).
463. Id. at 275 (opinion of Kennedy, J., joined by Rehnquist, C.J.); supra text accompanying note 460.
465. 192 U.S. 286 (1904).
which involved a suit against governmental officials.\textsuperscript{467} As to whether the Kennedy/Rehnquist scheme would countenance any officer suit, as such, proceeding to the merits in federal court, the Kennedy/Rehnquist opinion is conspicuously silent, admitting only that "we can assume there is a special role for Article III courts in the interpretation and application of federal law in other instances as well."\textsuperscript{468} Indeed, as discussed below, the Kennedy/Rehnquist proposal apparently would revise the rationales and holdings of those prior Court decisions that validated, directly or indirectly, officer suits seeking prospective relief for violations of federal law—decisions which the Kennedy/Rehnquist opinion cites as "illustrations" of that opinion's proffered "case-by-case" balancing approach to the availability of Young relief.\textsuperscript{469} It may not be too far off the mark to suggest that Justice Kennedy and Chief Justice Rehnquist envision a future in which an "exception" to the general unavailability of Young suits exists as a strictly theoretical construct, capable of containing, as a practical matter, no "real-world" cases at all.

\begin{itemize}
\item 466. 143 U.S. 621 (1892).
\item 467. In \textit{South Dakota v. North Carolina}, the Supreme Court held that the Eleventh Amendment does not apply to suits against States when brought by other States. The Court maintained that "the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right." \textit{South Dakota}, 192 U.S. at 318.
\item In \textit{United States v. Texas}, the Court held that the Eleventh Amendment likewise does not apply to suits against States when brought by the United States. The Court reasoned that the framers of the Constitution could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law.
\item \ldots\ldots The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty.
\item \textit{United States v. Texas}, 143 U.S. at 644-46 (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400, 410 (1819)).
\item 468. \textit{Coeur d'Alene Tribe}, 521 U.S. at 275 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
\end{itemize}
5. Young as an Affront to the Primacy of State Courts in Interpreting Federal Law

That the elimination of Young relief altogether is the objective toward which the Kennedy/Rehnquist scheme in Coeur d'Alene Tribe effectively reaches is further evinced by Justice Kennedy's "blind faith" assertions regarding the ability of state courts to adjudicate federal question disputes with unassailable disinterestedness. Thus, Justice Kennedy invoked the civil rights/federal habeas cases of Stone v. Powell\(^470\) and Allen v. McCurry\(^471\) to posit "our 'emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so.'\(^472\) But this remark is little more than a repetition of the Allen Court's aggrandizement of Stone's meager commentary—confined to a single footnote in the lengthy Stone opinion—concerning the ability of state courts fairly to adjudicate federal constitutional rights. The Stone Court wrote, "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."\(^473\) Obviously, this bare assertion does not comprise the lofty vote of confidence in state court adjudications of federal constitutional claims that both Allen and the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe subsequently intimated it to be.

Furthermore, the imprimatur that the Kennedy/Rehnquist opinion confers on Stone's presumption of the integrity of state court criminal proceedings implicating federal civil rights issues represents an entrenchment of the Court's disregard of grave criticisms concerning Stone's refusal to allow state prisoners federal habeas relief when petitions for such relief are predicated on the introduction at trial of unconstitutionally obtained evidence.\(^474\) This refusal prompted a stinging dissent from Justice Brennan, joined by Justice Marshall, in which Brennan took the majority to task for its "denigration of constitutional guarantees and constitutionally mandated procedures" which "must appall citizens taught to expect judicial respect and support for their constitutional rights" and which transgressed "this Court's

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\(^471\) 449 U.S. 90 (1980).
\(^472\) Coeur d'Alene Tribe, 521 U.S. at 275 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (quoting Allen, 449 U.S. at 105) (omission and alteration in original).
\(^473\) Stone, 428 U.S. at 494 n.35.
\(^474\) See id. at 494.
sworn duty . . . to uphold that Constitution [forged by the Framers] and not to frame its own." 475 Justice Brennan continued:

What possible justification then can there be for denying vindication of [constitutional] rights on federal habeas when state courts do deny those rights at trial? To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend. . . . Enforcement of federal constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of federal habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences . . . . 476

Clearly, it was Justice Brennan's dissent, not the Court's majority opinion, which articulated an "emphatic" argument in Stone on the issue of state courts' ability to enforce federal rights; and Brennan's "emphatic" point was that the denial of federal habeas review of state court proceedings allegedly implicating violations of criminal defendants' Fourth Amendment rights against unreasonable searches and seizures amounts to an abdication of the federal judiciary's obligation to safeguard the civil liberties guaranteed by the federal Constitution.

Similarly, Allen v. McCurry, upon which the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe relies in advocating for the primacy of state courts in the adjudication of federal rights, is hardly the monolithic endorsement of the integrity of state court proceedings that it formally purports to be. In Allen, a six-member Court majority held that the doctrine of collateral estoppel applied to prevent a criminal defendant, denied federal habeas relief because of the Stone ruling, from bringing a federal civil rights claim in federal court pursuant to 42 U.S.C. § 1983 against the city of St. Louis, its police department and several police officers for allegedly violating his Fourth Amendment rights. 477 The Court's entire position with respect to the adequacy of state courts in adjudicating federal rights was delineated in two sentences at the end of the Allen opinion:

475. Id. at 523-24 (Brennan, J., dissenting).
476. Id. at 524-25 (Brennan, J., dissenting) (footnote omitted).
477. See Allen, 449 U.S. at 91-92, 105.
The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that Stone v. Powell provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so.\textsuperscript{478}

Allen then cites the Stone footnote, discussed above;\textsuperscript{479} but, again, the contents of that footnote hardly can be viewed as justifying the pro-state-courts and anti-federal-courts leaning of the Supreme Court majority on the issue of the exercise of federal question jurisdiction,\textsuperscript{480} since the Stone Court's "position" as conveyed in that single footnote is little more than an adulatory and patently insubstantial gesture, as is the corresponding two-sentence "argument" in Allen.

Moreover, it is important to note that Allen, like Stone, gave rise to a crucial dissenting opinion, written by Justice Blackmun with Justices Brennan and Marshall joining, which raised objections to the majority's uncritical embrace of "the capacity of the state courts to render correct decisions on constitutional issues."	extsuperscript{481} As Justice Blackmun pointed out, in enacting 42 U.S.C. § 1983, "Congress deliberately opened the federal courts to individual citizens in response to the States' failure to provide justice in their own courts. . . . Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights."\textsuperscript{482} Eschewing the majority's conclusory presumption of the adequacy of state court adjudications of constitutional claims in both Stone and Allen, Justice Blackmun made numerous specific references to the legislative history of § 1983 showing Congress's justified lack of confidence in state court proceedings pertaining to federal civil rights.\textsuperscript{483} Thus, Blackmun pointed out, one senator supporting the civil rights bill that became § 1983 made the following statement:

\textsuperscript{478} Id. at 105 (citations omitted).
\textsuperscript{479} See supra text accompanying notes 473-76.
\textsuperscript{480} In his Stone dissent, Justice Brennan referred to the majority's foreclosure of Fourth Amendment-based federal habeas relief from state court convictions as "a manifestation of this Court's mistrust for federal judges." Stone, 428 U.S. at 530 (Brennan, J., dissenting).
\textsuperscript{481} Allen, 449 U.S. at 105.
\textsuperscript{482} Id. at 108-09 (Blackmun, J., dissenting).
\textsuperscript{483} See id. at 107-10 (Blackmun, J., dissenting).
SANCTIONING A TYRANNY

If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; i.e., the full and complete administration of justice in the courts.484

Another legislator asserted:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so.485

And another supporter of the bill expressed concern that "the [state] courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"486 Summarizing the thrust of congressional concerns supporting the enactment of § 1983, Justice Blackmun reiterated that

[t]he legislators perceived that justice was not being done in the States then dominated by the Klan, and it seems senseless to suppose that they would have intended the federal courts to give

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484. Id. at 107 n.3 (Blackmun, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871) (statement of Sen. Osborn)).

485. Id. at 107 n.4 (Blackmun, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess., App., at 79 (1871) (statement of Rep. Perry) (omission in original)). Justice Blackmun quoted further from similar concerns vividly expressed by Senator Osborn:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these [Klan] gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

Id. at 108-09 n.7 (Blackmun, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871) (statement of Sen. Osborn)).

486. Id. at 109 n.7 (Blackmun, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess., App., at 153 (1871) (statement of Rep. Garfield)).
full preclusive effect to prior state adjudications. That supposition would contradict their obvious aim to right the wrongs perpetuated in those same [state] courts.\(^{487}\)

By relying on nothing more than unsubstantiated avowals in *Stone* and *Allen* concerning state courts’ ability faithfully to vindicate federal rights—avowals weakened by substantial, well documented opposing positions set forth in the dissenting opinions of Justice Brennan and Justice Blackmun, respectively—the Kennedy/Rehnquist opinion in *Coeur d’Alene Tribe* appears effectively to concede the paucity of any legitimate support for the notion that state courts can be counted on consistently to operate as disinterested forums for resolving legal disputes implicating federal rights in general\(^{488}\) or federal *Indian* rights in particular.\(^{489}\)

\(^{487}\) *Id.* at 109-10 (Blackmun, J., dissenting). Justice Blackmun also quoted from *Mitchum v. Foster*, 407 U.S. 225 (1972), to underscore the point that in enacting § 1983, Congress “was concerned that state instrumentalities could not protect [federally created] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.” *Id.* at 242, quoted in *Allen*, 449 U.S. at 112 n.11 (Blackmun, J., dissenting).

\(^{488}\) In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall articulated a concern about state court adjudication of federal rights that has as much relevance today as it did when it first was written:

> It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . . .

*Id.* at 386-87. Chief Justice Marshall’s concerns about safeguarding the role of federal courts in the adjudication of federal rights are prescient with respect to modern habeas cases. Reflecting on his own involvement in such cases as a law clerk for Justice Blackmun, federal prosecutor Edward Lazarus writes:

> The conservatives’ habeas revolution . . . elevated an ideological passion for protecting state sovereignty over the plain realities of the judicial process. Underlying the Court’s habeas innovations was the assumption that state judges were as well suited as federal judges to protect federal constitutional rights. Such faith in state court systems was simply blind. As practicing lawyers know, in aggregate, state court judges are just not as good as federal court judges. They tend to be less well educated and less distinguished in the profession. Many lack experience with or sophistication about federal constitutional law. State courts also lack the resources of federal courts, including top-flight law clerks and even, in some places, the rudiments of a federal law library.

> But even assuming an equality of talent between state and federal judges, state judges remain intrinsically inferior for the purpose of deciding individual
6. Young as an Unwanted Impediment to the Saturation of State Law in Indian Country

Defying further the Young doctrine's affirmation of the indispensability of federal courts in interpreting federal law when that law allegedly is being violated by state officials, the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe characterizes federal law as "the proprietary concern of state, as well as federal, courts." In the context of a dispute between an Indian Tribe and state officials over those officials' appropriation of lakes and rivers within the boundaries of the Tribe's own reservation, this invocation of state courts' "proprietary concern" is quite telling, for it unwittingly accentuates the inevitability of a state court's intrinsic "interestedness," as a functionary of the State's sovereignty, in the outcome of such a dispute—a dispute which, of course, implicates the most profound tribal sovereignty concerns.EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT, 503-04 (1998) (endnote omitted).

As discussed previously, with respect to the adjudication of federal Indian rights, the concern about the inability of state courts to adjudicate fairly and dispassionately is even more compelling, since "[b]ecause of the local ill feeling, the people of the States where [Indian Tribes] are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886). See supra notes 321-28 and accompanying text.

489. The irony should be noted once more of the concurring Justices in Coeur d'Alene Tribe presumably rejecting the Kennedy/Rehnquist view that there is no need for federal courts to vindicate federal rights generally since state courts are adequate for that task, while presumably accepting the even more incredible notion that there is no need for federal courts to vindicate the federally protected rights of Indian Tribes vis-à-vis competing sovereignty claims to on-reservation submerged lands, a notion likewise proffered on the theory that state courts are adequate for that task. See supra notes 321-28 and accompanying text.


491. Thomas Pacheco has observed:
For the Tribes, many of which are in economic distress, establishing title to submerged lands may offer some relief in the battle for survival. . . . In addition to the obvious economic benefits, Tribes are likely to regard the confirmation of their title to submerged lands as a milestone in the exercise of tribal sovereignty.

claims of constitutional right. The vast majority of state judges do not enjoy the life tenure that federal judges are guaranteed under the Constitution. And without life tenure state judges, however well intentioned, are hostages to passions of their communities. Those passions run particularly hot in high profile criminal cases, especially the capital cases at which the Court's new states-friendly habeas corpus regime was aimed. For state judges in many locales, issuing a pro-defendant ruling in a death penalty case, no matter how well justified, is tantamount to professional suicide. Even one or two "soft on crime" rulings can result in a potentially career-ending and always costly recall campaign; any hope for promotion, by either appointment or election, vanishes instantly.


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This implicit endorsement of state courts' "interestedness" in adjudicating federal-law-based disputes pitting Tribes' interests against States' interests is carried forward in the Kennedy/Rehnquist opinion's approval of state courts' role in facilitating the saturation of state law and state jurisdiction within state boundaries, even where Indian reservations exist within those boundaries:

In the States there is an ongoing process by which state courts and state agencies work to elaborate an administrative law designed to reflect the State's own rules and traditions concerning the respective scope of judicial review and administrative discretion. An important case such as the instant one has features which instruct and enrich the elaboration of administrative law that is one of the primary responsibilities of the state judiciary. Where, as here, 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.492

For readers mindful of the ignominious history of state encroachments on the sovereign rights, jurisdiction and resources of Indian Tribes, this seemingly technical passage imparts a chilling message. It exposes the willingness of at least two members of the highest court in the United States to abandon Indian Tribes to the proven devastating effects of the forced application of state law in Indian country.493 In effectively promoting the compulsory propagation of "the State's own rules and traditions" within the boundaries of an Indian reservation, the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe illustrates the Rehnquist Court's signatory tendency to adjudicate disputes implicating both state and tribal interests in disregard of fundamental tenets of federal Indian law, in order to "enrich" the States at the expense of the

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492. Coeur d'Alene Tribe, 521 U.S. at 276 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

493. In this regard, the Kennedy/Rehnquist opinion's advocacy for the "elaboration" of state law in Indian country is strikingly incompatible with the Supreme Court's historic prerogative of protecting Indian Tribes and Indian country from the "elaboration" of state law, as represented in the Marshall Court's landmark decision of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). For a discussion of Worcester, see supra notes 100-10 and accompanying text.
Tribes. And, as all the members of the Rehnquist Court doubtless can appreciate, the state courts, if given license by a Supreme Court majority animated by a "States' rights" ideology, can be expected to play a central and powerful role in this ethnocidal "enrichment" process prescribed in Coeur d'Alene Tribe.

7. Reducing Young to a Discretionary Balancing Test

After thus intimating its strong preference for having state courts instead of federal courts adjudicate federal question disputes generally and federal-Indian-law-based disputes in particular, the Kennedy/Rehnquist opinion once again tentatively approaches the threshold of a concession: "Our precedents do teach us, nevertheless, that where prospective relief is sought against state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar." However, the

494. Coeur d'Alene Tribe, 521 U.S. at 276 (opinion of Kennedy, J., joined by Rehnquist, C.J.); supra text accompanying note 492. As this portion of the Kennedy/Rehnquist opinion appears to hold more directly in view the majority's decision to force Indian Tribes to adjudicate officer suits implicating federal-Indian-law-based claims to on-reservation navigable waterways only in the States' own courts (if at all), it presumably reflects the sentiments of the three concurring Justices as well. This could explain why Justice O'Connor's concurring opinion contains no criticism of this portion of the Kennedy/Rehnquist opinion.

495. For a provocative discussion of the role of centralized state power generally in the imposition of ethnocide on American Indian societies, see PIERRE CLASTRES, ARCHEOLOGY OF VIOLENCE 43-51 (Jeanine Herman, trans., Semiotext(e) 1994) (1980). Clastres writes:

[E]thnocide results in the dissolution of the multiple into One. Now what about the State? It is, in essence, a putting into play of centripetal force, which, when circumstances demand it, tends toward crushing the opposite centrifugal forces. The State considers itself and proclaims itself the center of society, the whole of the social body, the absolute master of this body's various organs. Thus we discover at the very heart of the State's substance the active power of One, the inclination to refuse the multiple, the fear and horror of difference. At this formal level we see that ethnocidal practice and the State machine function in the same way and produce the same effects: the will to reduce difference and alterity, a sense and taste for the identical and the One can still be detected in the forms of western civilization and the State.

496. Coeur d'Alene Tribe, 521 U.S. at 276-77 (opinion of Kennedy, J., joined by Rehnquist, C.J.) For a discussion of the implications of Justice Kennedy's inclusion of the qualifying phrase
Kennedy/Rehnquist opinion then promptly backs away from this qualified concession, laying emphasis not on the validity of that Young-affirming proposition, but rather on newly devised grounds for doubting that proposition's validity. Hence, the Kennedy/Rehnquist opinion stresses the fact that in Seminole Tribe v. Florida,497 decided in the Term prior to the one in which Coeur d'Alene Tribe was decided, "we did not allow a suit raising a federal question to proceed based on Congress's provision of an alternative review mechanism."498 The Kennedy/Rehnquist opinion then elaborates a general argument for refusing to recognize the applicability of the Young doctrine in circumstances where, prior to Coeur d'Alene Tribe, federal jurisdiction under Young would have been obligatory:499

Whether the presumption in favor of federal-court jurisdiction in this type of case is controlling will depend upon the particular context. What is really at stake where a state forum is available is the desire of the litigant to choose a particular forum versus the desire of the State to have the dispute resolved in its own courts. The Eleventh Amendment's background principles of federalism and comity need not be ignored in resolving these conflicting preferences. The Young exception may not be applicable if the suit would "upset the balance of federal and state interests that it embodies."500

As Justice Souter suggested in dissent, this expression of a desire to allow or disallow Young suits strictly according to the Court members' own policy predilections in situations where Young's requirements of an assertion of an ongoing violation of federal law and a request for prospective relief clearly are met ignores the settled understanding that "Young's rule . . . itself strikes the requisite balance between state and federal interests. Where these

497. 517 U.S. 44 (1996). Justice Kennedy did not actually name or cite Seminole Tribe in this portion of the Kennedy/Rehnquist opinion, but he doubtless was referring to that case. See Coeur d'Alene Tribe, 521 U.S. at 277 (opinion of Kennedy, J., joined by Rehnquist, C.J.). One reason that Justice Kennedy may have wished to avoid mentioning Seminole Tribe by name here is that to do so would draw unwanted attention to the fact that the Rehnquist Court presently is accomplishing its piecemeal destruction of the Young doctrine by pursuing primarily the task of eliminating the liberty and sovereignty rights of Indian Tribes, in conformity with the hostile interests of many of the States in which Indian reservations are located.


499. See supra note 455.

conditions are met, no additional ‘balancing’ is required or warranted.”

And, in view of the majority’s decision in *Coeur d’Alene Tribe* to deny relief to an Indian Tribe that had satisfied *Young*’s settled criteria, the Kennedy/Rehnquist opinion’s subversion of *Young* through the transformation of *Young*’s requirements into a mere “presumption” of eligibility for *Young* relief is essentially a fait accompli, having effectively procured the assenting votes by five members of the Court.

In the final portion of the Kennedy/Rehnquist opinion in *Coeur d’Alene Tribe*, Justice Kennedy stated the preference of himself and Chief Justice Rehnquist for replacing the *Young* doctrine as traditionally understood with a “case-by-case approach,” in which the Court would undertake “a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case.” Here, the Kennedy/Rehnquist opinion does not merely advocate for the adoption of this novel “balancing” approach to *Young*; rather, the opinion insists that this “case-by-case approach” may be seen as operant in “[o]ur recent cases” and indeed “has been evident from the start.” As examples of the “recent cases” which “illustrate” this “case-by-case approach” to *Young*, the Kennedy/Rehnquist opinion cites *Edelman v. Jordan*, *Quern v. Jordan* and *Milliken v. Bradley*. But, as both Justice O’Connor and Justice Souter demonstrated in their respective opinions in *Coeur d’Alene Tribe*, an

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501. *Id.* at 304 n.6 (Souter, J., dissenting). It should be noted, too, that contrary to the implication that might be drawn from Justice Kennedy’s invocation of the “balance of federal and state interests” language from *Papasan v. Allain*, the *Papasan* Court did *not* maintain or suggest that *Young* authorizes a discretionary balancing process for federal judges to employ in deciding whether to permit or deny federal jurisdiction over officer suits, as urged by the Kennedy/Rehnquist opinion in *Coeur d’Alene Tribe*. Rather, the *Papasan* Court simply posited that the “balance of federal and state interests” as already “embodied” by the *Young* doctrine necessarily excludes from the reach of federal jurisdiction pursuant to *Young* “cases in which [the requested] relief against [a] state official] is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation” and not “directly bring an end to [an ongoing] violation of federal law.” *Papasan*, 478 U.S. at 277-78.

502. *See supra* notes 203-12 and accompanying text.


504. *Id.* at 278 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

505. *Id.* (opinion of Kennedy, J., joined by Rehnquist, C.J.).

506. *Id.* at 280 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

507. *Id.* at 278, 280 (opinion of Kennedy, J., joined by Rehnquist, C.J.).


511. *See Coeur d’Alene Tribe*, 521 U.S. at 293-95 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 304 n.6 (Souter, J., dissenting).
examination of these cases reveals that none of them manifests the Kennedy/Rehnquist "balancing" approach to the applicability of Young.

In *Edelman*, the Supreme Court addressed an Eleventh Amendment defense to a class action suit brought against Illinois officials by plaintiffs seeking declaratory and injunctive relief and alleging that those officials were violating federal regulations and denying the plaintiffs equal protection by not complying with time-limit requirements of federal-state programs of Aid to the Aged, Blind or Disabled (AABD), under which participating States were required promptly to process applications and disburse benefits to applicants determined to be eligible. The Court denied Young relief with respect to that portion of the class action suit seeking a payment of retroactive benefits, rationalizing this withholding of federal subject matter jurisdiction by asserting that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury." The Court repeatedly emphasized a distinction between retroactive and prospective relief as controlling the determination of whether federal jurisdiction over the suit existed, arguing that here, the plaintiffs' suit would require[] payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule . . . . [T]his retroactive award of monetary relief . . . is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

512. See *Edelman*, 415 U.S. at 653-56.
513. See id. at 658-59.
514. Id. at 677 (citations omitted).
515. Id. at 668. In the follow-up case of *Quern v. Jordan*, 440 U.S. 332 (1979), discussed infra at notes 526-33 and accompanying text, then-Associate Justice Rehnquist—the author of the majority opinions in both *Edelman* and *Quern*—again repeatedly referred to the decision in *Edelman* as turning on a distinction between retroactive and prospective relief:

In *Edelman* we held that retroactive welfare benefits awarded by a Federal District Court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.
Notwithstanding the precision of Edelman’s insistence—albeit controversial—that the Young doctrine countenances requests for prospective relief only and does not permit an award of retroactive relief, the Kennedy/Rehnquist opinion in Coeur d’Alene Tribe asserts that in Edelman, “we concluded the suit was barred by the Eleventh Amendment because it was not necessary for the vindication of federal rights.”\(^{517}\) While this characterization of Edelman fits with the Kennedy/Rehnquist opinion’s efforts to “redefine the [Young] doctrine, from a rule recognizing federal jurisdiction to enjoin state officers from violating federal law to a principle of equitable discretion,”\(^{518}\) it does not fairly represent what the Supreme Court “concluded” in Edelman; for there is no discussion in Edelman as to whether the Court believed recognition of federal jurisdiction for adjudicating the officer suit was “necessary” or not. In this regard, Justice Souter’s critical observation in dissent is well worth noting:

While the principal opinion suggests [Edelman, Quern and Milliken] embody a “careful balancing and accommodation of state interests when determining whether the Young exception applies in a given case,” in fact they simply reflect the Court’s effort to demarcate the line between prospective and retrospective relief. That Young represents a “balance of federal and state interests” does not mean the doctrine’s application should be balanced against other factors in any given case.\(^{519}\)

In her concurring opinion in Coeur d’Alene Tribe, Justice O’Connor addressed another defect in the Kennedy/Rehnquist opinion’s treatment of

\(^{516}\) In a subsequent case, Justice Stevens commented on the controversial nature of the Court’s decision in Edelman: “I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court’s jurisdiction of a case and merely restricts the kind of relief the federal court may grant . . . .” Fitzpatrick v. Bitzer, 427 U.S. 445, 459 (1976) (Stevens, J., concurring in the judgment).

\(^{517}\) Coeur d’Alene Tribe, 521 U.S. at 278 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (emphasis added).

\(^{518}\) Id. at 297 (Souter, J. dissenting).

\(^{519}\) Id. at 304 n.6 (Souter, J., dissenting) (citations omitted).
Edelman,”520 as represented in the following Kennedy/Rehnquist assertion: “There was no need for the Edelman Court to consider the other 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.”521 Here, the Kennedy/Rehnquist opinion is referring to Edelman’s passing comment that in petitioning the Court, the state officials had not asked the Court to review the lower federal courts’ decision to grant the plaintiffs prospective relief in the form of “a permanent injunction requiring [the state officials’ future] compliance with the federal time limits for processing and paying AABD applicants”;522 for, as the Edelman Court observed, “Petitioner concedes that Ex parte Young is no bar to that part of the District Court’s judgment that prospectively enjoined [the state officials] from failing to process applications within the time limits established by the federal regulations.”523 In Coeur d’Alene Tribe, Justice O’Connor astutely detected an unsettling “hidden purpose” in the Kennedy/Rehnquist opinion’s reference to the state officials’ concession in Edelman concerning the propriety of granting prospective relief:

The principal opinion appears to suggest that the Court could have found such [prospective] relief improper in the absence of this concession. But surely the State conceded this point because the law was well established. Indeed, Edelman is consistently cited for the proposition that prospective injunctive relief is available in a Young suit.524

While this observation is instructive, the irony must be noted once again of Justice O’Connor chafing at a scheme to close off Young relief to plaintiffs who seek prospective relief against state officials accused of ongoing violations of federal law, while delivering the necessary votes to accomplish that same result when the plaintiff is an Indian Tribe seeking prospective relief against state officials accused of violating the Tribe’s federal rights to navigable waterways.525

In addition to effectively prescribing a change of rationale for the Court’s decision in Edelman, the Kennedy/Rehnquist opinion in Coeur d’Alene Tribe also appears to press for a revisionist interpretation of Quern v. Jordan,526 as

520. See id. at 294 (O’Connor, J., concurring in part and concurring in the judgment).
521. Id. at 278 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
523. Id. at 664 (emphasis added) (citation omitted).
524. Coeur d’Alene Tribe, 521 U.S. at 294 (O’Connor, J., concurring in part and concurring in the judgment) (citation omitted).
525. See supra notes 314-30 and accompanying text.
Justice O'Connor pointed out in her concurring opinion. In *Quern*, the Court validated an award of “notice relief” to the same class of plaintiffs implicated in the *Edelman* litigation; this relief consisted of “order[ing] . . . state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past [AABD] welfare benefits.” The Supreme Court concluded that the district court’s “notice relief” order did not violate the Eleventh Amendment, but instead was permitted under the *Young* doctrine:

We think this relief falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side . . .

The notice . . . is more properly viewed as ancillary to the prospective relief already ordered by the court. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue. Petitioner raises no objection to the expense of preparing or sending it. The class members are “given no more . . . than what they would have gathered by sitting in the courtroom.”

In *Coeur d'Alene Tribe*, the Kennedy/Rehnquist opinion’s reference to *Quern* consists largely of quoting from this passage. However, as Justice O’Connor suggested, considering the context of the Kennedy/Rehnquist argument purporting to discern in “our recent cases” a “balancing” approach

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527. See *Coeur d'Alene Tribe*, 521 U.S. at 294-95 (O'Connor, J., concurring in part and concurring in the judgment).
528. *Quern*, 440 U.S. at 334.
529. Id. at 347-49 (citations omitted) (final omission in original) (quoting Jordan v. Trainor, 563 F.2d 873, 877-78 (7th Cir. 1977)).
530. Justice Kennedy wrote:

The second time the *Edelman* litigation came before the Court, in *Quern v. Jordan*, we made a point of saying the relief sought pursuant to the *Young* action was a notice “simply inform[ing] class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures . . . Petitioner raises no objection to the expense of preparing or sending it. The class members are given no more . . . than what they would have gathered by sitting in the courtroom.”

*Coeur d'Alene Tribe*, 521 U.S. at 278-79 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (citations omitted) (alterations and omissions in original) (quoting *Quern*, 440 U.S. at 349).
to the applicability of Young, this reference to Quern harbors a dubious implication:

[B]y focusing on the Court's statement in Quern v. Jordan that the state officials did not object to preparing or sending notice of class members' possible remedies under state administrative procedures, the principal opinion implies that the Court upheld the prospective relief granted there because the relief was not particularly invasive. But the question in Quern was whether the notice relief was more like the prospective relief allowed in typical Young suits, or more like the retrospective relief disallowed in Edelman. The Quern Court permitted the relief to stand not because it was inconsequential, but because it was adjudged prospective.\(^5\)

Indeed, Justice O'Connor may have underestimated the sweep of Justice Kennedy's implication in quoting from Quern, for the Kennedy/Rehnquist opinion may be suggesting that the prospective "notice relief" allowed in Quern passed muster under the Court's Eleventh Amendment doctrine not by virtue of being "inconsequential,"\(^5\) but simply because the defendant state officials "raise[d] no objection to the expense of preparing or sending it."\(^5\)

The third of "our recent cases" that the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe invokes to "illustrate" the supposed longstanding existence of a "balancing" approach in the Court's application of the Young doctrine is Milliken v. Bradley.\(^5\) As mentioned previously,\(^5\) the Supreme Court in Milliken validated a federal district court's award of prospective relief in the form of remedial education programs, ordered to be funded in part by the State of Michigan, for schoolchildren long subjected to illegal racial segregation at the hands of state officials guilty of unconstitutional racial discrimination.\(^5\) In explaining why the officer suit did not violate the Eleventh Amendment but instead was valid under Young, the Milliken Court repeatedly emphasized, as its sole rationale for permitting the suit, the prospective nature of the relief sought by the plaintiffs:

The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance

\(^{531}\) Id. at 294-95 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted).

\(^{532}\) See id. (O'Connor, J., concurring in part and concurring in the judgment); see also supra text accompanying note 531.

\(^{533}\) Quern, 440 U.S. at 349; see also supra text accompanying note 529.

\(^{534}\) 433 U.S. 267 (1977). For additional discussion of the Coeur d'Alene Tribe court's reliance on Milliken, see supra note 204-209 and accompanying text.

\(^{535}\) See supra text accompanying note 206.

\(^{536}\) See Milliken, 433 U.S. at 282-83.
exception reaffirmed by Edelman. That exception, which had its genesis in Ex parte Young, permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. The order challenged here does no more than that. The educational components, which the District Court ordered into effect prospectively, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.

... That the programs are also “compensatory” in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.537

Despite Milliken’s exact focus on the prospectivity of the relief sought, the Kennedy/Rehnquist opinion in Coeur d’Alene Tribe ignores the Court’s stated rationale for its Eleventh Amendment holding in Milliken. Instead it places inordinate emphasis, unaccompanied by any citation to Milliken, on the Kennedy/Rehnquist opinion’s own observation that the Milliken plaintiffs had sought “to vindicate [their] civil liberties, not to establish ownership over state resources or funds.”538 Both Justice O’Connor and Justice Souter criticized the Kennedy/Rehnquist opinion’s attempt at replacing Milliken’s stated rationale with one specially designed to support the Kennedy/Rehnquist proposal for eviscerating Ex parte Young.539 Justice O’Connor wrote:

[T]he principal opinion explains this Court’s decision in Milliken... by focusing on the fact that the federal interests implicated by the claim in that case were particularly strong. Again, however, the Court upheld the relief not because the complaint sought to vindicate civil liberties, but because the remedy was prospective rather than retrospective. Our case law simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer’s suit to proceed.540

537. Id. at 289-90 (citations omitted).
539. See infra notes 540-41 and accompanying text.
540. Coeur d’Alene Tribe, 521 U.S. at 295 (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted).
Similarly, Justice Souter observed:

The principal opinion suggests that we held *Young* to apply in *Milliken v. Bradley* because the complaint sought to vindicate civil liberties and accordingly involved strong federal interest. The undeniable federal interest in protecting civil liberties, however, was not the reason we applied the *Young* remedy in *Milliken*. The sole enquiry in this regard was whether the relief sought was fairly characterized as prospective.\(^5\)\(^4\)

Again, while Justice O’Connor’s and Justice Souter’s common criticism concerning the revisionism manifest in the Kennedy/Rehnquist opinion’s treatment of *Milliken* is instructive, that criticism falls short, perhaps, of appreciating the full sweep of the Kennedy/Rehnquist proposal for diminishing *Young*. Nowhere does the Kennedy/Rehnquist opinion concede either expressly or by necessary implication that *Young* relief generally should be available even where the federal interest at stake in an officer suit is “strong.” Rather, the Kennedy/Rehnquist opinion appears to tolerate the *Milliken* holding only insofar as it implicates relief that Congress, if it chose to act, would be able in any event to exact from the States themselves, by expressly abrogating the States’ immunity pursuant to Congress’s power under section five of the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of” that Amendment.\(^5\)\(^4\)\(^2\)

Thus, in discussing *Milliken*, Justice Kennedy elaborated the view that “[i]f Congress pursuant to its § 5 remedial powers under the Fourteenth Amendment may abrogate sovereign immunity, even if the resulting legislation goes beyond what is constitutionally necessary, it follows that the substantive provisions of the Fourteenth Amendment themselves offer a powerful reason to provide a federal forum.”\(^5\)\(^4\)\(^3\) As Justice Souter suggested in dissent, this statement seems out of place in a discussion of the availability of *Young* relief since, “[g]iven that we do not view a suit against a state officer for prospective relief as a suit against the State, the fact . . . that Congress may abrogate state immunity from suit in legislation enacted pursuant to § 5 of the Fourteenth Amendment has no bearing on *Young*’s application.”\(^5\)\(^4\)\(^4\) Hence, a likely purpose for Justice Kennedy’s inclusion of this assertion is to suggest that *Young* relief ought to be limited to that narrow range of officer suits aimed at redressing civil rights violations and

\(^{541}\) *Id.* at 304 n.6 (Souter, J., dissenting) (citations omitted).
\(^{542}\) U.S. CONST. amend. XIV, § 5.
\(^{543}\) *Coeur d’Alene Tribe*, 521 U.S. at 279 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (citation omitted).
\(^{544}\) *Id.* at 304 n.6 (Souter, J., dissenting) (citation omitted).
theoretically capable of eliciting the creation of private remedies against offending States by means of the exercise of Congress's circumscribed power under the Fourteenth Amendment.\footnote{That the Kennedy/Rehnquist opinion posits only a conditional acceptance of the validity of officer suits implicating alleged civil rights violations—conditioned on whether Congress theoretically could make States directly accountable for such violations "even if the resulting legislation goes beyond what is constitutionally necessary," \textit{id.} at 279 (opinion of Kennedy, J., joined by Rehnquist, C.J.); \textit{supra} text accompanying note 543—would appear to have accreted an enhanced significance in the aftermath of \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997), issued two days after \textit{Coeur d'Alene Tribe}.

In \textit{Flores}, the Supreme Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), which Congress enacted in 1993 in a rare showing of near-unanimous approval by both Houses, in response to the Court's widely criticized decision in \textit{Employment Division, Department of Human Resources v. Smith}, 494 U.S. 872 (1990). In \textit{Smith}, the Court voted five to four effectively to eliminate state and federal courts' use of the longstanding "compelling governmental interest" test in First Amendment Free Exercise of Religion cases—a test which, prior to \textit{Smith}, was understood as indispensable to effectuating "the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society." \textit{id.} at 903 (O'Connor, J., concurring in the judgment). Subsequently, the fractured \textit{Flores} Court struck down RFRA as unconstitutional insofar as it purported to require use of the "compelling governmental interest" test in Free Exercise cases testing the constitutionality of general laws enacted by the States, and held that to that very extent, Congress had exceeded the limits of its delegated power to effectuate religious freedom values through the Fourteenth Amendment's enforcement provision. \textit{See Flores}, 521 U.S. at 532-36.

Read in light of \textit{Flores}' restrictive view of Congress's power to enforce Fourteenth Amendment values, then, Justice Kennedy's conditional acceptance of the validity of civil-rights-based \textit{Young} suits like \textit{Milliken} would appear to amount to an expression of doubt concerning the validity of such suits. And, by the same token, Justice Kennedy would appear implicitly to be raising a collateral doubt concerning the power of Congress to abrogate the States' sovereign immunity pursuant to the Fourteenth Amendment, by pointedly interjecting in the midst of his discussion of the conditional validity of \textit{Milliken} a reference to \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445 (1976). \textit{See Coeur d'Alene Tribe}, 521 U.S. at 279 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

\textit{Fitzpatrick} held that Congress may abrogate the States' sovereign immunity pursuant to an exercise of Congress's Fourteenth Amendment power; the Court stated that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." \textit{Fitzpatrick}, 427 U.S. at 456. However, the \textit{Fitzpatrick} Court expressly reserved consideration of whether any particular purported congressional abrogation of the States' immunity would be "a proper exercise of congressional authority under § 5 of the Fourteenth Amendment," since the defendant state officials had not raised that issue in the \textit{Fitzpatrick} litigation. \textit{id.} at 456 n.11.

Since \textit{Flores} subsequently imposed severe restrictions on what may constitute "a proper exercise" of Congress's power under the Fourteenth Amendment, Justice Kennedy's reference to \textit{Fitzpatrick} in \textit{Coeur d'Alene Tribe}—penned in knowledge of the yet-to-be-announced \textit{Flores} decision—can be read as portending the creation of additional judge-made theories for impeding the ability of Congress to make States and state officials accountable to the commands of paramount federal law, even when Congress endeavors to do so by abrogating, pursuant to § 5 of the Fourteenth Amendment, the States' Eleventh Amendment/\textit{Hans} immunity. Indeed, the prediction culled from \textit{Coeur d'Alene Tribe} that the Rehnquist Court is preparing to diminish the ability of Congress to abrogate States' sovereign immunity pursuant to the Fourteenth Amendment appears
Young relief would exclude, of course, many cases in which the federal interest at stake in an officer suit seeking prospective relief for an ongoing violation of federal law is "strong."\textsuperscript{546}

Thus, it appears that the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe would deny or question the validity of the officer suits declared or presumed valid in all three of the cases that the opinion invokes to "illustrate" the "balancing" approach to Young that the Kennedy/Rehnquist opinion advocates. Yet, despite the Kennedy/Rehnquist opinion's apparent preference for re-deciding the Eleventh Amendment issues in Edelman, Quern and Milliken, that preference is devoid of any support from the Court's reasoning in those cases, for on closer inspection, it is clear that none of those cases employed the Kennedy/Rehnquist "balancing" approach to Young. Rather each of those cases merely represents, to reiterate Justice Souter's apt observation, "the Court's effort to demarcate the line between prospective and retrospective relief."\textsuperscript{547}

8. Young as a Type of Bivens Remedy

As a final contention in Coeur d'Alene Tribe, the Kennedy/Rehnquist opinion cites Seminole Tribe v. Florida\textsuperscript{548} as reflecting "the importance of case-by-case analysis" under the Young doctrine.\textsuperscript{549} In making this

\begin{itemize}
\item[546.] If the Justices were to develop an appreciation for the importance of the federal government's obligations to safeguard the rights of Indian Tribes in the field of federal Indian law—obligations dating back to the founding of the United States government—they would be incapable of lightly denying, as they effectively did in Coeur d'Alene Tribe, the strength of the federal interest at stake in redressing allegations that state officials are appropriating lakes and rivers on an Indian reservation in ongoing violation of an Indian Tribe's federally protected rights to those waterways. See supra notes 321-29 and accompanying text. Yet even this exceptionally strong federal interest, if ever properly acknowledged as such by the Court, presumably would be insufficient, under the Kennedy/Rehnquist view, to justify making Young relief available to an Indian Tribe offended by this type of egregious, unlawful conduct by state officials.
\item[547.] Coeur d'Alene Tribe, 521 U.S. at 304 n.6 (Souter, J., dissenting); supra text accompanying note 519.
\item[548.] 517 U.S. 44 (1996).
\item[549.] Coeur d'Alene Tribe, 521 U.S. at 280 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
\end{itemize}
argument, Justice Kennedy observed that in denying Young relief to an Indian Tribe offended by state officials’ ongoing violation of the Tribe’s rights under the Indian Gaming Regulatory Act, the Supreme Court in Seminole Tribe posited a reliance on Schweiker v. Chilicky, a case not involving Eleventh Amendment issues at all, but pertaining instead to the question of whether the provisions of the Bill of Rights give rise to implied causes of action for damages against federal officials accused of violating the constitutional rights of individuals. Since the Kennedy/Rehnquist opinion insists that Seminole Tribe’s reliance on Chilicky constitutes evidence of a longstanding “case-by-case approach” in the Supreme Court’s Young jurisprudence, a brief discussion of Chilicky and its purported connection with the Young doctrine is called for.

Chilicky followed in a train of decisions originating in the landmark 1971 case of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, in which the Supreme Court first articulated the importance of recognizing implied “constitutional tort” causes of action against federal officials in order to effectuate a vindication of the individual rights singled out for special protection by the text of the Constitution itself. Unlike the

552. See id. at 414; see also id. at 431 (Brennan, J., dissenting) (pointing out that despite the majority’s particular holding in the case, “[t]he Court today reaffirms the availability of a federal action for money damages against federal officials charged with violating constitutional rights”).
554. 403 U.S. 388 (1971).
555. Chilicky, 487 U.S. at 419 (quoting Chilicky v. Schweiker, 796 F.2d 1131, 1134 (9th Cir. 1986)).
556. In justifying recognition of an implied cause of action for damages against federal officers for an alleged violation of a plaintiff’s Fourth Amendment rights against unreasonable searches and seizures, Justice Brennan, writing for the Bivens Court, stated:
[The Fourth Amendment] guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”
Bivens, 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (footnote omitted)).

In a concurring opinion, Justice Harlan likewise emphasized the general importance of such implied causes of action. Responding specifically to the federal officers’ argument “that, where Congress has not expressly” created a cause of action by statute, proper judicial deference to Congress militates in favor of courts declining to recognize an implied cause of action for alleged constitutional violations except where “‘essential,’ or ‘indispensable for vindicating constitutional rights,’” id. at 406 (Harlan, J., concurring in the judgment) (quoting Brief for Respondents 19, 24), Justice Harlan wrote:
[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth
Court in Bivens, however, the Chilicky Court declined to recognize an implied cause of action for damages against federal officials for violations of a constitutional right.557 Specifically, the Court in Chilicky refused to recognize a private cause of action for an alleged Fifth Amendment Due Process violation by officials responsible for administering the Social Security disability benefits program,558 whereas in Bivens, the Court did recognize a private cause of action for an alleged violation of the Fourth Amendment by Federal Bureau of Narcotics agents.559 Writing for the Chilicky majority, Justice O'Connor concluded that "such a remedy, not having been included in the elaborate remedial scheme [of the Social Security disability benefits program] devised by Congress, is unavailable."560

In explaining Chilicky's refusal to recognize a so-called "Bivens remedy,"561 Justice O'Connor invoked language from Bivens employed by Justice Brennan to justify the Bivens Court's recognition of an implied cause of action for an alleged Fourth Amendment violation. "The present case," Brennan stated in Bivens, "involves no special factors counselling hesitation in the absence of affirmative action by Congress."562 By contrast, a "special factor" was discernible in the circumstances of Chilicky, according to Justice O'Connor, in the form of what O'Connor believed were "indications that congressional inaction [in not expressly creating the contended damages remedy when designing or reforming the Social Security disability benefits program] has not been inadvertent."563 O'Connor elaborated, "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies."564 Reading Congress's silence in the statutes that created and reformed the elaborate Social Security disability benefits program as bespeaking a clear intent by Congress to preclude the availability of "the

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557. See Chilicky, 487 U.S. at 414.
558. See id. at 418-20.
559. See Bivens, 403 U.S. at 389.
561. See id. at 421.
562. Bivens, 403 U.S. at 396.
564. Id.
kind of remedies that respondents seek in this lawsuit," 565 Justice O'Connor concluded that

Congress . . . has addressed the problems created by state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision. 566

Justice Brennan—the author of Bivens—registered a stern disapproval of the Chilicky majority's decision. Dissenting on behalf of himself, Justice Marshall and Justice Blackmun, Justice Brennan pointed out that "Congress never mentioned, let alone debated, the desirability of providing a statutory remedy for . . . constitutional wrongs." 567 Brennan reiterated the general importance—as he first had articulated it in Bivens—of a court considering whether "special factors counse[l] hesitation [even] in the absence of affirmative action by Congress" before recognizing a Bivens remedy, 568 but he vigorously maintained that notwithstanding the Court's assertions to the contrary, no such "special factors" were present in Chilicky:

The mere fact that Congress was aware of the prior injustices [in the administration of the Social Security disability benefits program] and failed to provide a form of redress for them [when enacting reform legislation], standing alone, is simply not a "special factor counseling hesitation" in the judicial recognition of a remedy. 569

565. Id. at 426.
566. Id. at 429 (citation omitted).
567. Id. at 431 (Brennan, J., dissenting).
569. Id. at 440 (Brennan, J., dissenting). Brennan explained further:
Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent, all the more so where Congress is legislating in the face of a massive breakdown [in an administrative scheme] calling for prompt and sweeping corrective measures. In 1984, Congress undertook to resuscitate a disability review process that had ceased functioning: that the prospective measures it prescribed to prevent future dislocations included no remedy for past wrongs in no way suggests a conscious choice to leave those wrongs unremedied. I therefore think it altogether untenable to conclude, on the basis of mere legislative silence and inaction, that Congress intended an administrative scheme that does not even take cognizance of constitutional
For an understanding of the impropriety of the Supreme Court's reliance on Chilicky in the Seminole Tribe decision, it is important to take special note of Justice Brennan's allusion to a narrow zone of apparent "common ground" shared by the otherwise divergent majority and dissenting views in Chilicky. Adverting to two prior cases in which the Court unanimously declined to recognize Bivens remedies, Brennan pointed out that "[i]n both those cases, we declined to legislate in areas in which Congress enjoys a special expertise that the Judiciary clearly lacks." Brennan went on to criticize the Chilicky majority for failing to accept in its entirety the rationale for those unanimous precedents, and for insisting instead that "congressional authority over a given subject" alone can constitute a "special factor" for inducing the Court's "hesitation" when deciding whether to recognize a Bivens remedy. As Brennan emphasized, the Court's decision not to recognize Bivens actions in those earlier cases rested not merely on "congressional competence to legislate" in a particular field, but also—and necessarily—on "our recognition that [the Judiciary] lacked the special expertise Congress had developed in such matters." But all the Justices in Chilicky apparently agreed that to justify rejection of a requested Bivens remedy for an alleged "constitutional tort," at the very least Congress alternatively must be capable of providing the requested relief by filling, at its option, the remedial gap left open by the court's decision not to recognize an implied cause of action out of deference to legislative discretion. As addressed further below, Seminole Tribe's reliance on Chilicky is incompatible with Chilicky's tacit acknowledgment of this necessary (if not sufficient, per Justice Brennan's dissent) prerequisite for finding a "special factor counseling hesitation" in a Bivens determination.

See infra notes 582-84 and accompanying text.

570. The cases are Chappell v. Wallace, 462 U.S. 296 (1983) (declining to recognize a Bivens remedy for military personnel who had accused their superior officers of injurious and unconstitutional conduct) and Bush v. Lucas, 462 U.S. 367 (1983) (declining to recognize a Bivens remedy for a federal employee who had accused supervising officials of demoting him for engaging in speech protected by the First Amendment, thereby causing him emotional distress).

571. Chilicky, 487 U.S. at 441 (Brennan, J., dissenting).

572. Id. at 442 (Brennan, J., dissenting).

573. Id. (Brennan, J., dissenting) (emphasis added).

574. See infra notes 582-84 and accompanying text.

575. In Bivens itself, Justice Brennan, writing for the Court, distinguished United States v. Standard Oil Co., 332 U.S. 301 (1947), a case in which the Court "refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization." Bivens v. Six Unknown Agents of Fed.
Seminole Tribe's wayward reliance on Chilicky consists of the following key passage:

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. Schweiker v. Chilicky. Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in Ex parte Young, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young. 576

As Justice Souter emphasized in his Seminole Tribe dissent, the majority's forced importation of Chilicky's rationale for disallowing a Bivens remedy is inappropriate and misplaced, since "[t]he Bivens issue in Chilicky . . . is different from the Young issue here in every significant respect." 577 Souter elaborated:

Young is not an example [like Bivens] of a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized; it is a general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began. Young does not provide retrospective monetary relief [like Bivens] but allows prospective enforcement of federal law that is entitled to prevail under the Supremacy Clause. [Young] requires not money payments from a government employee's personal pocket [like Bivens], but lawful conduct by a public employee acting in his official capacity. Young would not function here to provide a merely supplementary regime of

577. Id. at 177 (Souter, J., dissenting).
compensation to deter illegal action [like a Bivens remedy], but the sole jurisdictional basis for an Article III court’s enforcement of a clear federal statutory obligation . . . . One cannot intelligibly generalize from Chilicky’s standards for imposing the burden to justify a supplementary scheme of tort law to the displacement of Young’s traditional and indispensable jurisdictional basis for ensuring official compliance with federal law when a State itself is immune from suit.  

From the vantage point of Coeur d’Alene Tribe, the significance of Chief Justice Rehnquist’s blurring in Seminole Tribe of the distinction between an inquiry into the availability of a Young suit and a determination whether to recognize a “supplementary scheme of tort law” in the form of a Bivens remedy (a blurring that the Kennedy/Rehnquist opinion describes as “Seminole Tribe’s implicit analogy of Young to Bivens”) is clarified somewhat. The merging of these disparate doctrines would seem to mesh well with the Kennedy/Rehnquist scheme in Coeur d’Alene Tribe for destabilizing the Young doctrine by equating state officials’ ongoing violations of federal law—redressable under Young—with mere common law torts, as discussed above.  

But aside from this “hindsight” observation, it was clear even at the time Seminole Tribe was decided that forcing a Bivens analysis in the context of a Young case is highly injudicious, both for the reasons stated by Justice Souter, and for the additional reason that in the Bivens framework, any judicial decision not to recognize an implied “constitutional tort” necessarily presumes the ability of Congress to provide such a remedy expressly, by enacting legislation. However, as Seminole Tribe itself dramatically demonstrates, in the context of cases in which plaintiffs seek relief in federal court for alleged violations of federal law by States or state officials, any presumption that Congress can provide such relief simply by expressly “filling the gap” with new legislation has now been rendered highly doubtful. Hence, a Bivens analysis—even if it were

578. Id. (Souter, J., dissenting).
579. Id. (Souter, J., dissenting); supra text accompanying note 578.
581. See supra notes 386-446 and accompanying text.
582. Justice Souter may have been alluding to the concern elaborated here when he observed that the Seminole Tribe’s Young theory constituted “the sole jurisdictional basis for an Article III court’s enforcement of a clear federal statutory obligation.” Seminole Tribe, 517 U.S. at 177 (Souter, J., dissenting); see also supra text accompanying note 577.
583. See supra notes 570-75 and accompanying text.
584. In addition to denying Young relief to the Seminole Tribe of Florida “because Congress enacted a remedial scheme . . . specifically designed for the enforcement of” the Tribe’s rights under the Indian Gaming Regulatory Act, Seminole Tribe, 517 U.S. at 76, Seminole Tribe also
SANCTIONING A TYRANNY

held—even more dramatically—that Congress has no power under Article I of the Constitution to abrogate the States' Eleventh Amendment/Hans immunity and thereby make States answerable in federal court for violating plaintiffs' federal rights created pursuant to Congress's legislative power under that Article. See id. at 47, 66, 72-73, 76 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). Thus, in Seminole Tribe the Rehnquist Court, by a five to four vote, struck down as a violation of the Eleventh Amendment those provisions of the Indian Gaming Regulatory Act in which "Congress . . . provided an 'unmistakably clear' statement of its intent to abrogate" the States' Hans immunity and to require States to be accountable in federal court for violating Tribes' rights under the Act. Id. at 56 (quoting Delmuth v. Muth, 491 U.S. 223, 228 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1989))).

Notwithstanding Seminole Tribe's drastic curtailment of Congress's power textually to abrogate the States' Hans immunity and thereby make States accountable for violating federal law, the Seminole Tribe majority went to some length to insist that it was "not hold[ing] that Congress cannot authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme," even going so far as inexplicably accusing the dissent of claiming that the Court had so held. Id. at 75 n.17. Still, given the Rehnquist Court's burgeoning creativity in implementing its "States' rights" ideology in the context of Eleventh Amendment cases generally, it seems doubtful that the Court as presently constituted would allow Congress to authorize Young suits statutorily in circumstances where Congress clearly is forbidden from making States themselves directly accountable in federal court for violating federal law.

This fear seems justified, for example, in view of the manner in which the Court framed the Young issue in Seminole Tribe itself. Chief Justice Rehnquist asserted that "[h]ere . . . the question . . . is whether the Eleventh Amendment bar should be lifted, as it was in Ex parte Young, in order to allow a suit against a state officer." Id. at 74 (emphasis added); supra text accompanying note 576. This characterization of a Young-authorized suit against a state officer as a "lifting" of a "bar" imposed by the Constitution reflects the Seminole Tribe Court's refusal to view a suit against a state officer who violates federal law as anything other than a suit against the State itself, notwithstanding Young's core instruction to the contrary, supra text accompanying note 404. It was a similar tacit refusal to accept the validity of Young's jurisprudential underpinnings that caused Justice Souter twice to castigate the Kennedy/Rehnquist opinion in Coeur d'Alene Tribe for its similarly dismissive remarks. See supra text accompanying notes 460-62, 543-44.

The Court's strategic language in Seminole Tribe thus forcing the perception that application of Ex parte Young entails a "lifting" of "the Eleventh Amendment bar," together with Seminole Tribe's unprecedented constitutionalizing of that "bar," would seem to suggest that notwithstanding its apparent protestation to the contrary, the Court now is poised to deprive Congress of the power to make Young relief available in circumstances where Congress no longer can make the States themselves accountable for violating federal law. Such an additional curtailment of Congress's power would be consistent with the proliferation of Rehnquist Court decisions (in addition to Seminole Tribe) in recent years eviscerating Congress and implementing the Court's "States' rights" ideology. See, e.g., Alden v. Maine, 119 S. Ct. 2240 (1999) (5-4 decision) (striking down provisions of the Fair Labor Standards Act of 1938 purporting to authorize private suits against States in state courts for violations of the Act as exceeding, in light of the Constitution's incorporation of state sovereign immunity as implicitly recognized by the Tenth and Eleventh Amendments, Congress's Article I powers to enact legislation); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (5-4 decision) (striking down a provision of the Trademark Remedy Clarification Act that purported textually to abrogate States' Eleventh Amendment immunity and thereby to subject States to federal court suits for false and misleading advertising prohibited by the 1946 Lanham Act as exceeding Congress's constitutional power to enforce the Fourteenth Amendment); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, (1999) (5-4 decision) (striking down a provision of the Patent and Plant Variety Protection Remedy Act that purported textually to abrogate States' Eleventh
proper to analogize to Bivens in a Young case—certainly would yield no "special factors counseling hesitation" in the judicial granting of relief under these newly restrictive conditions, where a court is called upon either to permit the requested Young relief or else to leave open no conceivable avenue of federal court relief at all.

It should be clear, then, that the Seminole Tribe Court’s reliance on Chilicky’s misapplication of the Bivens doctrine was inapposite and illogical—but nonetheless instrumental in reaching the result of withholding Young relief from an Indian Tribe seeking to have its federal rights under the Indian Gaming Regulatory Act vindicated in the face of unlawful obstructionism by state officials. But it also is clear that while Seminole Tribe’s interposition of a Chilicky/Bivens analogy certainly does establish a new and unprecedented limitation on the scope of Ex parte Young, this appropriation of Chilicky does not prove that the Supreme Court’s Young jurisprudence now has been reduced to nothing more than the discretionary "case-by-case analysis" advanced by the Kennedy/Rehnquist opinion in Coeur d’Alene Tribe. For Seminole Tribe’s novel instruction regarding the Young inquiry is in the nature of a “bright line” limitation that does not implicate any judicial “balancing” at all. Thus, according to the Seminole Tribe command, if Congress provides a detailed remedial scheme for vindicating a federal right, this, without more, in and of itself necessarily shows that Congress intended to preclude all supplementary remedies—no “balancing” is performed at all. With reference to the terminology that Seminole Tribe implicitly imported from Bivens via Chilicky, one could say that under the Seminole Tribe instruction, the existence of the “special factor” of a detailed congressional remedial scheme “counsels hesitation” for the sole purpose of allowing a court to satisfy itself that the scheme contains no indications that Congress meant anything other than what that scheme expressly provides. As soon as this closely managed inquiry into Amendment immunity and thereby make States accountable in federal court for patent infringements as exceeding Congress’s constitutional power to enforce the Fourteenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (5-4 decision) (striking down a provision of the Brady Handgun Violence Prevention Act of 1993 as an intrusion upon the Constitution’s implicit protection of state sovereignty); City of Boerne v. Flores, 521 U.S. 507 (1997) (6-3 decision) (striking down the Religious Freedom Restoration Act of 1993, as applied to state and local law, as exceeding Congress’s constitutional power to enforce the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (5-4 decision) (striking down the Gun-Free School Zones Act of 1990 as exceeding Congress’s constitutional power under the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (6-3 decision) (striking down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 as inconsistent with the Tenth Amendment’s allocation of power between the federal government and state governments).

585. 521 U.S. at 280 (opinion of Kennedy, J., joined by Rehnquist, C.J.).
586. See supra text accompanying note 562.
congressional intent is completed, the court’s “hesitation” comes to an abrupt end, and the court ineluctably declares Young relief to be unavailable. Again, the crucial point is that Seminole Tribe does not instruct a court to “hesitate” in order to conduct some sort of discretionary “balancing” test when determining the availability of Young relief. Rather, Seminole Tribe simply establishes a new, “bright line” presumption that Congress intended to foreclose Young relief whenever Congress provides a detailed remedial scheme for vindicating a federal right.

One other problem should be noted in connection with the Kennedy/Rehnquist opinion’s attempt in Coeur d’Alene Tribe to portray Seminole Tribe as illustrating the Court’s use of a “balancing” approach to the Young doctrine.\(^587\) Quoting from Justice Brennan’s majority opinion in Bivens, the Kennedy/Rehnquist opinion entreats courts to “consider whether there are ‘special factors counseling hesitation’ before allowing a suit to proceed under either [a Bivens or Young] theory.”\(^588\) The Kennedy/Rehnquist opinion then appends the following comment, accompanied by a citation to Justice Harlan’s concurring opinion in Bivens: “The range of concerns to be considered in answering this inquiry is broad.”\(^589\) With this juxtaposition, the Kennedy/Rehnquist opinion makes it appear that Justice Harlan in Bivens had been advancing the notion that there are many reasons why a court might want to “hesitate” when deliberating whether to recognize a Bivens remedy, and hence that Harlan presumably would have supported the analogous notion that this kind of judicial “hesitation” is appropriate in the Young context as well.

But this adroitly crafted appearance\(^590\) masks a reality that is quite to the contrary; for in the cited passage from the Bivens concurrence, Justice

\(^{587}\) See Coeur d’Alene Tribe, 521 U.S. at 278 (opinion of Kennedy, J., joined by Rehnquist, C.J.).

\(^{588}\) Id. at 280 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (citation omitted) (quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971)).

\(^{589}\) Id. (opinion of Kennedy, J., joined by Rehnquist, C.J.) (citation omitted).


[O]f late, such adroitness by the United States Supreme Court has more often than not been in derogation of tribal sovereignty and Indian rights. . . .

. . . [C]onsider the ill-famed Oliphant v. Suquamish Indian Tribe, perhaps the most consistently criticized Indian law case of the past half-century. . . .

The majority opinion in Oliphant, written by then-Justice Rehnquist, adroitly constructed what it called an “unspoken assumption,” shared by the three branches of the federal government, that tribes had no criminal
Harlan, far from "counseling hesitation" for the purpose of pondering a "broad" "range of concerns" militating against judicial recognition of *Bivens* remedies, was making precisely the opposite point—i.e., that judicial recognition of *Bivens* remedies properly can be supported by a wide variety of "policy considerations." Specifically, Justice Harlan was responding to the federal government's theory that

where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is "essential," or "indispensable for vindicating constitutional rights."

Justice Harlan firmly rejected the government's attempt to restrict by means of this asserted "essentiality' test the judiciary's ability to recognize implied causes of action for violations of constitutional rights by federal officers:

These arguments for a more stringent test to govern the grant of damages in constitutional cases seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment...

... [T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

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591. *See supra* text accompanying note 589.
592. *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment).
593. *Id.* at 406 (Harlan, J., concurring in the judgment) (quoting Brief for Respondents 19, 24).
594. *Id.* (Harlan, J., concurring in the judgment).
The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred. 595

It is understandable that Justice Kennedy would want to garner prestigious support for his maverick Coeur d'Alene Tribe proposal for diminishing Young by finding an "approval-in-spirit" in the judicial opinions of the late Justice Harlan. But it is improper for Kennedy to have inferred such an endorsement when Harlan's stated position on the propriety of judicial recognition of remedies against lawbreaking governmental officials clearly shows a conviction that is opposite Kennedy's.

9. Déjà Vu: Justice O'Connor's Role in Closing the Doors of Liberty

For her part, Justice O'Connor in her Coeur d'Alene Tribe concurrence took exception with the Kennedy/Rehnquist opinion's appropriation of Seminole Tribe's reliance on Chilicky, which O'Connor herself had authored on behalf of the six-member Chilicky Court. 596 However, having signed her name in the first instance to Seminole Tribe's inventive use of Chilicky to deprive an Indian Tribe of all federal court remedies against state officials' defiance of the Tribe's federal rights, O'Connor was reduced in Coeur d'Alene Tribe to objecting only that "[t]he single citation to a Bivens case in

595. Id. at 407-08 (Harlan, J., concurring in the judgment) (footnotes and citations omitted).
Seminole Tribe by no means establishes that a case-by-case balancing approach to the Young doctrine is appropriate or consistent with our jurisprudence." The relative impotence of O'Connor's objection to this aspect of the Kennedy/Rehnquist scheme for dismantling the Young doctrine points up a fundamental truth about Indian law which is reflected in Felix Cohen's "miner's canary" analogy, cited previously, and which sooner or later is comprehended by all serious students of the field: that every destruction of Indian rights in time leads to an erosion of the liberty of all Americans, and that whenever an American lawmaker authorizes the former, he or she inevitably becomes an architect of the latter.

This is a truth about which Justice O'Connor, unfortunately, appears to be in chronic denial; for Coeur d'Alene Tribe is not the first high court melodrama in which O'Connor has expressed discomfort at seeing her own acquiescence in the constriction of Indian rights wielded by her colleagues in a manner that endangers the liberty of all Americans. In Employment Division, Department of Human Resources v. Smith, Justice O'Connor expressed great concern—and justifiably so—to witness five members of the Court manage virtually to nullify Americans' fundamental right to religious practice, as putatively guaranteed by the Free Exercise Clause of the First Amendment. In Smith, the Court effectively banished judicial use of the longstanding “compelling governmental interest” test to resolve Free Exercise cases, and announced in its place a new, contrary command that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." The case involved the issue of whether the First Amendment protects the Native American Church from being effectively persecuted by governmental authorities because of the Church's sacramental use of peyote. The Court decided that it does not; and although Justice O'Connor concurred in that judgment denying religious freedom to the

597. Id. at 296 (O'Connor, J., concurring in part and concurring in the judgment).
598. See supra text accompanying note 22.
600. See id. at 892-903 (O'Connor, J., concurring in the judgment).
601. The majority opinion in Smith was authored by Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Stevens and Kennedy. See id. at 873 (syllabus).
603. Smith, 494 U.S. at 886 n.3.
604. See id. at 874-76
605. See id. at 890 (Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").
Native American Church, she wrote a separate opinion to register her passionate disapproval of the sweeping change of law effectuated by the majority’s decision to cast aside judicial use of the compelling governmental interest test in Free Exercise cases:

[T]oday’s holding dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation’s fundamental commitment to individual religious liberty.

... The compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a “luxury” is to denigrate “[t]he very purpose of a Bill of Rights.”

While Justice O’Connor thus emerged as a presumptive champion for religious liberty in her Smith concurrence, the Smith majority’s evisceration of the Free Exercise Clause in fact was built squarely on a foundation that O’Connor herself had laid as author of the Court’s majority opinion in Lyng.

606. See id. at 903-07 (O’Connor, J., concurring in the judgment). Justice O’Connor stated: “I would . . . adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents’ religiously motivated conduct ‘will unduly interfere with fulfillment of the governmental interest.’” Id. at 907 (O’Connor, J., concurring in the judgment) (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

In his dissenting opinion in Smith, Justice Blackmun, joined by Justices Brennan and Marshall, found fault with Justice O’Connor’s insistence that if the respondents’ religious use of peyote had been subjected to the compelling governmental interest test, the balance would have weighed in favor of the State:

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.

... The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church’s internal restrictions on, and supervision of, its members’ use of peyote substantially obviates the State’s health and safety concerns.

... Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents’ right to the free exercise of their religion.

Id. at 911-13, 921 (Blackmun, J., dissenting) (footnote and citations omitted).

607. Smith, 494 U.S. at 891, 903 (O’Connor, J., concurring in the judgment) (citation omitted) (quoting majority opinion, id. at 888; West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
v. Northwest Indian Cemetery Protective Ass'n,\(^608\) handed down two years before Smith. Like Smith, Lyng involved the question of whether the First Amendment's Free Exercise Clause protects the indigenous religious practices of American Indian people.\(^609\) In Lyng, an Indian organization, several individual Indians, and other plaintiffs sued the Secretary of Agriculture, the United States Forest Service, and other federal governmental defendants to prevent the Reagan Administration from proceeding with plans to construct a logging road through a portion of Six Rivers National Forest in northern California.\(^610\) The road threatened to desecrate specific "high country" sacred sites of the Yurok, Karuk and Tolowa Tribes, thereby destroying three traditional American Indian tribal religious systems of ancient origin.\(^611\) In the proceedings in the lower federal courts, both the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals determined that the government's plan to build the "G-O road" violated the First Amendment Free Exercise rights of the Indian plaintiffs and therefore must be permanently enjoined.\(^612\) In so deciding, both courts conducted a straightforward application of the compelling governmental interest test, as was the longstanding convention in Free Exercise cases. Using this traditional balancing test, the Ninth Circuit concluded "that the proposed government operations would virtually destroy the . . . Indians' ability to practice their religion,"\(^613\) and that—as paraphrased by Justice Brennan in his Lyng dissent—"the Government's interests in building the road and permitting limited timber harvesting . . . did not justify the destruction of [the Indians'] religion."\(^614\)

In 1988, the Supreme Court voted five to three to reverse the Ninth Circuit's decision.\(^615\) Writing for the Lyng majority, Justice O'Connor refused to apply the compelling governmental interest test to the Forest


\(^{609}\) See id. at 441-42.

\(^{610}\) See id. at 443.

\(^{611}\) See id. at 442. For a sensitive judicial description of the "high country" religious traditions of the Yurok, Karuk and Tolowa Tribes, see id. at 458-62 (Brennan, J., dissenting).

\(^{612}\) See id. at 443-45. The proposed road acquired the name the "G-O road" because it would link the northern California timbering towns of Gasquet and Orleans. See id. at 442.

\(^{613}\) Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986), quoted with emphasis added in Lyng, 485 U.S. at 464 (Brennan, J., dissenting) (omission in original).

\(^{614}\) Lyng, 485 U.S. at 465 (Brennan, J., dissenting) (citation omitted).

\(^{615}\) The Lyng majority opinion was written by Justice O'Connor, joined by Chief Justice Rehnquist, and by Justices White, Stevens, and Scalia. Justice Brennan dissented, joined by Justices Marshall and Blackmun. Justice Kennedy did not participate in considering or deciding the case. See id. at 441 (syllabus).
Service’s proposed road-building plan, and instead declared that the government was exempt from having to justify its proposal under the traditional Free Exercise test:

[Int] incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification for its otherwise lawful actions.

Even if we assume that we should accept the Ninth Circuit’s prediction, according to which the G-O road will “virtually destroy the . . . Indians’ ability to practice their religion,” the Constitution simply does not provide a principle that could justify upholding [the Indians’] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.

. . . .

. . . Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land.616

616. Id. at 450-53 (quoting Peterson, 795 F.2d at 693 (omission in original) (citation omitted)).

In holding that the religious freedom claims of the Indian respondents in Lyng would not be adjudicated according to the compelling governmental interest test, Justice O’Connor purported to rely on Bowen v. Roy, 476 U.S. 693 (1986). Roy involved a Free Exercise challenge to the federal government’s use of a social security number to process the plaintiff’s infant daughter’s food stamps application; according to plaintiff Roy, the government’s use of that computer-generated number would “prevent [his daughter] from attaining greater spiritual power.” Id. at 696. With respect to this particular challenge to the government’s use of information already in the government’s possession, the Court unanimously rejected Roy’s Free Exercise claim:

Never to our knowledge has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter.

As a result, Roy may no more prevail on his religious objection to the Government’s use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government’s filing
Justice Brennan issued a strongly-worded reprimand to the Court’s decision effectively to exclude all American Indian religious practices that take place on governmental lands from the protection conventionally afforded by the First Amendment’s Free Exercise Clause:

Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped . . . Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision “should be read to encourage governmental insensitivity to the religious needs of any citizen.” I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government’s determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of [the Indians’] religion impossible. Nor do I believe that [the Indians] will derive any solace from the knowledge that although the practice of their religion will become “more difficult” as a result of the Government’s actions, they remain free to maintain their religious beliefs. Given today’s ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom . . . fails utterly to accord with the dictates of the First Amendment.617

News of the Lyng Court’s virtual elimination of First Amendment protection for all American Indian sacred practices that take place on governmental lands was received with grievous disbelief by tribal leaders and traditional Indian religious practitioners in reservation communities across the United States, and it precipitated a wide-ranging grassroots campaign in Indian country to obtain Congress’s help in the face of this judicial assault on

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617. Lyng, 485 U.S. at 476-77 (Brennan, J., dissenting) (quoting majority opinion, id. at 453) (citation omitted).

617. Lyng, 485 U.S. at 476-77 (Brennan, J., dissenting) (quoting majority opinion, id. at 453) (citation omitted).
tribal religions. However, because Lyng's injurious impact fell on Indian Tribes only—since only Indian Tribes conduct religious rituals on what are now government-owned lands—neither the American public generally nor legal scholars in particular took much notice of the decision.

But when Smith was decided two years after Lyng, and the Court's destruction of the efficacy of the Constitution's religious freedom guarantee threatened the religious practices of all Americans, the alarm that had been sounding loudly in Indian country because of Lyng became audible to non-Indians as well. Smith immediately generated a nationwide outcry from religious leaders of all faiths and denominations, civil rights groups, First Amendment scholars and others; and in response to that outcry, Congress, with overwhelming approval in both Houses, passed the Religious Freedom


In 1988, three national organizations, the Native American Rights Fund of Boulder, Colorado, the National Congress of American Indians in Washington, D.C., and the Association on American Indian Affairs in New York City, N.Y., formed the American Indian Religious Freedom Coalition. Since its inception, the AIRFA Coalition has expanded to include Indian tribes and other Indian, religious, environmental, and human rights organizations. The Coalition's purpose is to advocate for the protection of Native American religious freedom and to educate the American public and Congress about the devastating effect of the Lyng and Smith decisions upon traditional Native American communities.

Id. at 384-85 (footnote omitted); see also S. REP. NO. 103-411, at 4 (1994) ("Indian Tribes and Native American organizations established a precedent setting, broad based coalition which includes leading environmental, human rights and religious organizations committed to supporting the passage of a measure which would provide protection for the exercise of Native American religion . . . .").


Members of the media, academics, members of Congress, and religious interest groups greeted the [Smith] decision with condemnation and despair. A lead editorial in the Los Angeles Times denounced the decision as an exercise of "pure legal adventurism." Of the sixteen law review articles and notes written on the case, all but one condemned the result. Professors Edward M. Gaffney, Douglas Laycock and Michael W. McConnell described the decision as a "sweeping disaster for religious liberty." Congressman Stephen J. Solarz reaction was even more dramatic: "[W]ith the stroke of a pen, the Supreme Court has virtually removed religious freedom from the Bill of Rights." Kim Yelton, director of government relations of Americans United for Separation of Church and State, concurred with Solarz' description: "[T]here's really no such thing as free exercise (of religion) anymore . . . ." Finally, Rabbi David N. Saperstein called the decision "the most dangerous attack on our civil rights in this country since the Dred Scott decision in the 1850s declared that blacks were not fully human beings."

Id. at 1409-10 (footnotes omitted).
Restoration Act (RFRA)\textsuperscript{620} in 1993. The Act comprised a federal \textit{statutory} mandate directing courts to continue using the compelling governmental interest test in Free Exercise cases notwithstanding the Supreme Court's rejection of that test as a \textit{constitutional} mandate.\textsuperscript{621} In a White House ceremony, President Clinton signed the bill into law, expressing his own enthusiastic endorsement of this national campaign to restore to the American political and legal landscape a high solicitude for the religious freedom values cherished by the ratifiers of the Bill of Rights and nullified, in effect, by the Rehnquist Court's \textit{Smith} decision.\textsuperscript{622}

On June 25, 1997, two days after \textit{Coeur d'Alene Tribe} was decided, the Supreme Court issued its six to three decision in \textit{City of Boerne v. Flores},\textsuperscript{623} striking down RFRA as an unconstitutional exercise of congressional power to the extent of its intended applicability to state law.\textsuperscript{624} With the Court's decision in \textit{Flores}, the severe damage to religious freedom wrought by \textit{Lyng} and \textit{Smith} was exacerbated in the Rehnquist Court's aggrandizement of its own power at the expense of the other branches of the federal government, and of "States' rights" at the expense of Americans' fundamental liberties.\textsuperscript{625}


\textsuperscript{621} In relevant part, the Religious Freedom Restoration Act provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). The Act further provides that "[t]his [Act] applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [the enactment of this Act]." 42 U.S.C. § 2000bb-3(a).


\textsuperscript{623} 521 U.S. 507 (1997).

\textsuperscript{624} On behalf of the \textit{Flores} majority, Justice Kennedy concluded that RFRA "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." \textit{Id.} at 534.

\textsuperscript{625} Professor Douglas Laycock, who represented respondent Archbishop Flores in the \textit{Flores} litigation, has written that, as a result of the decision, Congress's power to protect liberty in the states appears to have shrunk dramatically.

\textit{Flores} appears to say that [Congress's] power [to protect liberty in the states] has no independent content, that it is derivative of judicial interpretation, that there are not three federal branches empowered to protect liberty in the states, but only one. The Court now asserts unchecked power to
In her *Flores* dissent, Justice O'Connor was silent about the pivotal role her *Lyng* majority opinion played in *Smith*'s evisceration of the Free Exercise Clause. Because *Coeur d'Alene Tribe* now bears witness to the emergence of another serious threat to the liberty of all Americans stemming from the Supreme Court's experimental destruction of Indian rights via a pattern of decisions replicating the *Lyng/Smith/Flores* fiasco in Free Exercise law, it is

_626._ *Flores*, 521 U.S. at 547, 564-65 (O'Connor, J., dissenting).
instructive to consider how Justice O'Connor's "controlling [view]"\(^{627}\) in Coeur d'Alene Tribe foreshadows and facilitates the dismantling of Ex parte Young in the same way that her majority opinion in Lyng paved the way for Smith's cancellation of the people's constitutionally guaranteed religious liberty.

First, it is important to note just how Smith relied on Lyng. In two key passages in Smith, Justice Scalia, writing for the Court, asserted the following:

In recent years we have abstained from applying the [compelling governmental interest] test (outside the unemployment compensation field) at all. . . . In Lyng we declined to apply [compelling governmental interest] analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices. . . ."

. . . .

. . . Although . . . we have sometimes used the [compelling governmental interest] test to analyze free exercise challenges to [generally applicable criminal] laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling[,]" . . . contradicts both constitutional tradition and common sense.\(^{628}\)

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627. See Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 298 (1997) (Souter J., dissenting) (referring to Justice O'Connor's view as put forth in her concurring opinion in the case as "the controlling one").

628. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 883, 884-85 (1990) (citations omitted) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)). It should be noted that Justice Scalia was wrong when he asserted that the Court never had invalidated a generally applicable criminal law under a Free Exercise/compelling governmental interest analysis. See Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down a generally applicable Wisconsin statute making it a crime to refuse to send one's children between
In her concurring opinion in Smith, Justice O’Connor objected to Justice Scalia’s appropriation of the quoted language from Lyng to support the Court’s elimination of the use of the compelling governmental interest test in Free Exercise cases not involving American Indian religious practices on governmental lands. O’Connor insisted that Lyng’s refusal to apply the traditional Free Exercise balancing test was justified on the [exceptional] ground that the First Amendment does not “require the Government itself to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” This distinction makes sense because “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”

Justice Scalia, in turn (in a footnote) issued an inventive rebuttal to O’Connor’s effort to distinguish Lyng from what O’Connor called “paradigm free exercise cases.” In that footnote, Scalia exploited the fact that the quotation at the end of the excerpt, above, from O’Connor’s concurring opinion in Smith was from Justice Douglas’s concurring opinion in Sherbert v. Verner, the landmark 1963 decision in which the Court extracted from its Free Exercise jurisprudence the first modern articulation of the compelling governmental interest test, which thereafter became known as the “Sherbert test.” Justice Scalia wrote:

[S]ince Justice Douglas voted with the majority in Sherbert, [the Douglas] quote obviously envisioned that what “the government

[kind of]....
cannot do to the individual" includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs (in Sherbert, state unemployment compensation) in such fashion as to harm the individual's religious interests. Moreover, it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, [as in] Lyng . . . 634

Here, Justice Scalia presumed to clarify that Justice Douglas, unlike Justice O'Connor, "envisioned" that the Free Exercise Clause would apply in the same way in cases like Smith (a Free Exercise challenge to the government's indirect enforcement of a generally applicable criminal prohibition) and cases like Lyng (a Free Exercise challenge to the government's operation of an administrative program), and that O'Connor's reliance on the quote from Douglas for insisting on a distinction between these two types of cases in Free Exercise law therefore was mistaken. While this observation is correct, it serves primarily as a subterfuge for Justice Scalia's even more radical subversion of what Douglas "envisioned"; for, by concurring in Sherbert, Justice Douglas demonstrated that what he "envisioned" was widespread application of the Sherbert test in cases involving religious freedom challenges to generally applicable laws and governmental programs alike.635

634. Smith, 494 U.S. at 885 n.2 (quoting Sherbert, 374 U.S. at 412 (Douglas, J., concurring)).

635. Justice Douglas's robust solicitude for the Constitution's religious freedom values as mediated by the Sherbert test—a solicitude absent from both Justice Scalia's majority opinion in Smith and Justice O'Connor's majority opinion in Lyng—is evident in Douglas's Sherbert concurrence:

[M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views.

. . . .

. . . [South Carolina] asks us to hold that when it comes to a day of rest a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits.

. . . The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. . . .

This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the
Justice Scalia, on the other hand, would (and did) "resolve" the dilemma created by the lack of "any reason in principle or practicality" to distinguish between Free Exercise challenges to generally applicable laws and Free Exercise challenges to governmental programs by denying application of the Sherbert test in both types of cases. Clearly, the elimination of the Sherbert test that Justice Scalia "envisioned," and that was made manifest by the Smith decision, is a far cry from what Justice Douglas—or the modern Supreme Court as a whole, prior to Smith—“envisioned” concerning the scope of religious liberty afforded by the First Amendment.

What is instructive about Justice Scalia’s response to Justice O’Connor’s concerns regarding the Smith Court’s reliance on Lyng is the agility with which Scalia took a doctrinal denial of religious liberty—which O’Connor would have confined to the context of land-centered American Indian religious practices—and generalized it to abolish the fundamental religious liberty of all Americans. Agility of this sort is a hallmark of the Rehnquist Court, and it animates the dynamic identified by Felix Cohen whereby the erosion of Indian rights “marks the shifts from fresh air to poison gas in our political atmosphere.” The prevalence of this kind of agility on the high court gives fair warning of the danger posed by Coeur d’Alene Tribe’s elimination of Indian Tribes’ Ex parte Young rights with respect to on-reservation submerged lands. And so, while some observers, including Justice O’Connor, might have been shocked when the Smith Court harmonized Lyng with “paradigm Free Exercise cases”—not by extending the Free Exercise franchise to include Indian religions, but by abruptly withdrawing the franchise from all other religions as well—it should come as a surprise to no one, given the many signs of Young’s bleak future, when the Court follows suit in its Eleventh Amendment jurisprudence and relies on language from the “principal” and “controlling” views in Coeur d’Alene Tribe’s Ex parte Young.

government cannot do to the individual, not in terms of what the individual cannot exact from the government.

Those considerations, however, are not relevant here. . . . [T]his case does not involve the problems of direct or indirect state assistance to a religious organization — matters relevant to the Establishment Clause, not in issue here. Sherbert, 374 U.S. at 411-13 (Douglas, J., concurring). This longer excerpt from Justice Douglas’s concurrence suggests that Douglas “envisioned” that the Sherbert test would be applicable in all cases of governmental infringement of private religious practice in which governmental accommodation would not violate the Establishment Clause. This expansive “vision” of constitutional religious liberty obviously is one that is incompatible with the restrictive “visions” manifested in both Smith and Lyng.

636. Smith, 494 U.S. at 885 n.2; supra text accompanying note 634.

637. Cohen, supra note 22, at 390; see also text accompanying supra note 22.
Tribe to implement a general constriction of the people’s liberty through the denial of Young relief to all Americans—not just Indian Tribes.

This objective could be accomplished by any of the agile members of the Court, and in a variety of predictable ways. For instance, an agile Justice might point out that since five members of the Court in Coeur d’Alene Tribe agreed that the presence of “special sovereignty interests” in a Young suit—such as a State’s “sovereign interest” in possessing the lakes and rivers on an Indian reservation—is a factor that weighs in favor of withholding federal jurisdiction from that suit, the Court’s Young doctrine must now be understood as requiring a discretionary “case-by-case” factor analysis to allow the Court to inspect every Young suit for the presence or absence of this type (or any other type) of disqualifying characteristic.638

Or, an agile Justice might point out that since there was basically no objection by the concurring or dissenting Justices in Coeur d’Alene Tribe to the comparison pressed by Justice Kennedy between violations of federal law and common law torts, all the Justices must have agreed “implicitly” that Young cases are really Larson cases in disguise; hence, federal jurisdiction over such cases is “barred” by the Eleventh Amendment absent a State’s consent, unless some exceptional factor is present in the suit that makes it “necessary” for the case to be heard by a federal court rather than a state court. This factor presumably would have to be far more exceptional than the “mere” fact that a plaintiff suing the state officials happens to be an Indian Tribe whose sovereign interest in exclusive tribal dominion over the lakes and rivers within the boundaries of the Tribe’s own reservation is directly adverse to the deciding state court’s own sovereign interest in facilitating state dominion over those lakes and rivers.

Or, an agile Justice might, in a future case, extract from the concurring opinion in Coeur d’Alene Tribe the single concern that “[t]he parties have not briefed whether . . . a shift in the Young doctrine is warranted,” and point out that that concern now has been obviated by a regular submission of briefs. In any event, the agile Justice could insist that the stated concern was mooted when the “shift in the Young doctrine” occurred as a result of the

638. See Idaho v. Coeur d’Alene Tribe, 521 U.S. 261, 281 (1997) (“We must examine the effect of the Tribe’s suit and its impact on these special sovereignty interests in order to decide whether the Ex parte Young fiction is applicable.”).
639. See supra notes 500-02 and accompanying text.
640. See supra notes 386-88 and accompanying text.
641. See supra notes 388-404 and accompanying text.
642. See supra text accompanying notes 516-18.
643. See supra notes 321-28, 490-95, 546 and accompanying text.
Court’s decision in Coeur d’Alene Tribe—or Deep Sea Research, or Seminole Tribe, or Chilicky, or Pennhurst, or Quern, or Milliken, or Edelman, or Bivens, or Larson, or almost any other randomly selected case, dealing with officer suits or not, “from the start” onward (and perhaps before). The list of cases from which a Supreme Court member might extract “support” for neutralizing the Young doctrine could be as expansive as that jurist’s agility. Clearly, the opportunities for doctrinal revisionism and nullification flowing from unbridled judicial agility are legion. And when the agility of the Justices themselves is supplemented with that of the Justices’ law clerks, there can be little doubt that many roads

646. Seminole Tribe v. Florida, 517 U.S. 44 (1996); see supra notes 210, 497-98, 548-95 and accompanying text.
647. Schweiker v. Chilicky, 487 U.S. 412 (1988); see supra notes 548-95 and accompanying text.
653. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); see supra notes 386-405 and accompanying text.
655. See supra notes 351-81 and accompanying text.
656. For criticism of the increasingly prominent role of the Supreme Court Justices’ law clerks in the production of the Rehnquist Court’s opinions, see Bernard Schwartz, A History of the Supreme Court 369-72 (1993). Professor Schwartz writes:

It may be doubted that Justices such as Holmes or Brandeis used their clerks as more than research assistants. In fact . . . Justice Hughes worried at the time that if the clerks were used too much, “it might be thought that they were writing our opinions.” That, indeed, is what happened. In recent years the Justices have given their clerks an ever-larger share of responsibility, including even the writing of opinions.

. . . . There is all the difference in the world between writing one’s own opinions and reviewing opinions written by someone else. It is hard to see how an editor can be a great judge. Can we really visualize a Holmes coordinating a team of law clerks and editing their drafts?

According to a federal appellate judge, “We need to reduce our dependence on the system of judicial apprenticeships and on a mass production model that will soon swallow us up.” In the Supreme Court, as in most
indeed are now available for conveying the Rehnquist Court on its prospective journey from Coeur d'Alene Tribe to the annihilation of Ex parte Young.

Should the Court finally succeed in doing away with the Young doctrine through any combination of the Young-negating theories proffered in Coeur d'Alene Tribe, Justice O'Connor can be expected to respond with passionate disapproval, just as she did when the Court abolished Americans' constitutional right to religious freedom in Smith. However, it will be evident to discerning observers that O'Connor will have played as strategic a role in the dismantling of Young as she did in the nullification of the Free Exercise Clause, her sincere words in defense of liberty notwithstanding. For, in both the Free Exercise context and the Ex parte Young context, Justice O'Connor will have made the tragic mistake of devising and deploying a rationale for depriving Indian Tribes of essential aspects of liberty available to all other Americans, in the expectation that such doctrinal repression can be contained within the limited arena of Indian rights.

But history shows that such an expectation is dangerously naive; for—as must be repeated—the destruction of Indian rights always reveals itself in time as a precursor to the destruction of American liberty generally. That is the harsh and undeniable truth to be learned about the law's treatment of Indian Tribes in the historic and continuing story of "the rise and fall in our democratic faith," as Felix Cohen understood so well. For the sake of restoring "our democratic faith," it is essential that the lawmakers entrusted with upholding the people's liberty on our nation's highest court likewise begin taking seriously this fundamental truth.

IV. CONCLUSION

The Supreme Court's decision in Idaho v. Coeur d'Alene Tribe is compelling evidence that the Rehnquist Court is proceeding apace with its mission of expediting the destruction of tribal sovereignty and the dispossession of tribal lands, jurisdiction, and resources, in disregard of fundamental principles of federal Indian law, and in service to the Court's own "States' rights" ideology. The decision bars Indian Tribes from institutions, the balance of power has shifted increasingly to the bureaucrats and away from the nominal heads. The Justice have become the managers of a growing corps of law clerks, who increasingly write the opinions even in the most important cases. The swelling system of judicial apprenticeships threatens to repeat the story of the Sorcerer's Apprentice.

Id. at 370, 372 (endnotes omitted).

657. Cohen, supra note 22, at 390; see also supra text accompanying note 22.
accessing the federal courts, via the doctrine of *Ex parte Young*, for the purpose of obtaining relief against the ongoing, illegal appropriation of on-reservation submerged lands by state officials. The decision thus is tantamount to the sanctioning of a "tyranny" against Tribes, as Justice Souter intimated in dissent,\(^\text{658}\) for it comes perilously close to leaving Tribes without in the prophetic words of Chief Justice John Marshall—"no remedy for the violation of a vested legal right."\(^\text{659}\)

Until *Coeur d'Alene Tribe* is overruled, Indian Tribes will have to rely on the United States to bring suit in federal court, as the Tribes' trustee, whenever state officials "presume" to appropriate the submerged lands located within reservation boundaries.\(^\text{660}\) At a time in American history when federal Indian policy ostensibly is one of supporting tribal self-determination and autonomy,\(^\text{661}\) it is ironic, to say the least, that the Supreme Court has held that the federal government is not amenable to suit for defending its claim to submerged lands within reservation boundaries.

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658. Justice Souter observed:

> [A]n issue of property title is no different 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. Indeed, the decisions of this Court have so held or assumed as far back as the time of Chief Justice Marshall's statement in *United States v. Peters* that "it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." The contrary rule, *Lee* later explained, would "sanctio[n] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." Thus did the Chief Justice foresee that governmental officials are not any the less amenable to suit for relying on their government's claim to property title, and no decision before today's would have turned the envious eyes of the old monarchs toward Idaho.


661. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 2 § F, at 180 (1982 ed.):

The federal government has gradually moved away from the policies that guided federal Indian policy during the termination era . . . . [N]ew programs evolved in response to the demands of Indians and to the officially expressed support of five presidents for self-determination by Indian people.

The self-determination era is premised on the notion that Indian tribes are the basic governmental units of Indian policy. . . . Self-determination has
Court is forcing Tribes into a position of dependency on the United States for protecting the lifeblood of tribal homelands—the lakes, rivers, and other bodies of water located on Indian reservations. This ironic state of affairs lends credence to the perception that the Rehnquist Court is taking federal Indian policy out of the hands of Congress and the Executive Branch, and effectively placing Tribes in the path of invasive forces emanating from the States.

As a profound and sweeping denial of the federally protected rights of Indian Tribes, Coeur d'Alene Tribe also portends future incursions on the constitutional liberty of all Americans. Some observers may believe that the case is little more than an isolated, anomalous exception to the Court's "ordinary" recognition of the applicability of Ex parte Young when a plaintiff seeks prospective relief to end an ongoing violation of federal law by state officials. But readers familiar with the role that the repression of Indian rights has played historically in American political life will discern in Coeur d'Alene Tribe many signs and portents warning of an impending paradigm shift in the Young doctrine that promises to afford States and state officials unprecedented "enjoyment" in ignoring people's rights and violating federal law, unhampered by the prospect of federal court accountability. For these readers, the only uncertainty lies in anticipating which pathway to the annihilation of Ex parte Young the "States' rights" Rehnquist Court eventually will take, and when the Court will take it.

In the meantime, Indian Tribes, and the defenders of Indian rights, will need to do everything possible to counteract the harmful effects of the Rehnquist Court's formal rhetoric equating the States' "dignity and status" operated on a number of fronts to promote the practical exercise of inherent sovereign powers possessed by Indian tribes.

Id. at 304-05 n.16.

662. See supra notes 3, 7-12 and accompanying text; infra note 665.

663. Cf. Jackson, supra note 13:

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. . . . 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.

Id. text accompanying note 199: cf. Coeur d'Alene Tribe, 521 U.S. at 268 (adverting to "the dignity and respect afforded a State, which [Hans] immunity is designed to protect"); supra text accompanying note 182. In the recently decided case of Alden v. Maine, 119 S. Ct. 2240 (1999), the same five-member majority that decided Coeur d'Alene Tribe invoked the "dignity and respect" language from Coeur d'Alene Tribe to support Alden's dramatic holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private
with the latitude to violate Tribes' federally protected rights and invade sovereign tribal lands. As the twentieth century draws to a close, it is a sobering commentary on the integrity of the American legal system that the survival of Indian Nations seems hardly more assured than it was at the close of the nineteenth century. To the extent that Indian people today are forced to continue wondering whether America's "real," unspoken Indian policy is one of exterminating Tribes from the face of the earth, the suits for damages in state court." Id. at 2246, 2263 (quoting Coeur d'Alene Tribe, 521 U.S. at 268, as "recognizing 'the dignity and respect afforded a State, which the immunity is designed to protect'"). Writing in dissent, Justice Souter criticized the Alden majority for equating States' "dignity" with the power to violate federal law with impunity, as newly conferred on States by the Rehnquist Court:

It is symptomatic of the weakness of the structural notion proffered by the Court that it seeks to buttress the argument by relying on "the dignity and respect afforded a State, which the immunity is designed to protect" . . . . Apparently beguiled by Gilded Era language describing private suits against States as "neither becoming nor convenient," the Court calls "immunity from private suits central to sovereign dignity," and assumes that this "dignity" is a quality easily translated from the person of the King to the participatory abstraction of a republican State. . . . It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American government's immunity from private suit, it is not dignity.

Id. at 2289 (Souter, J., dissenting) (citations omitted). In a footnote, Justice Souter added, "[T]he very idea of dignity ought also to imply that the State should be subject to, and not outside of, the law." Id. at 2289 n.35 (Souter, J., dissenting).

665. Indeed, the Rehnquist Court has been criticized for continually breathing new life into the failed allotment and assimilation policy of the late nineteenth century, which Congress repudiated in 1934. See Getches, supra note 3, at 1622-26 ("In many of its recent cases, the Court has used the short-lived allotment policy as the touchstone for deciding how much governmental authority the tribes should exercise."); see also Judith V. Royster, The Legacy of Allotment, 27 ARIZ. ST. L.J. 1 (1995). Professor Royster writes:

[Allotment's] legacy lingers on, and in recent years has been revived by the Court in a series of cases that give present effect to the discredited policy of allotment and assimilation. In the process, the Court has chosen to diminish tribal territories and to restrict tribal sovereign control over the territory that remains. By deciding cases in accord with the assimilation policy, the Court has undercut the sovereignty and territorial integrity of the Indian nations.

. . . . Shall we . . . continue to give effect to the policy of allotment, recognized as a failure and a disaster for the tribes, officially repudiated by Congress, and contrary to every manifestation of current Indian policy? Unfortunately, the answer from the Supreme Court appears to be yes. It not only persists in giving effect to a policy that has failed, but does so in ways that disrespect the branch of government charged with authority over Indian affairs and mock the Court's own precedents in the field.

Id. at 6-7.
United States appears to have "progressed" morally and politically no farther than from one "Century of Dishonor"666 to the next. For ensuring that the last two decades of the twentieth century will be looked upon by future generations of American Indian people as an era of governmental dishonor, duplicity and betrayal, the Rehnquist Court's anti-tribal, "States' rights" decisionmaking in the field of federal Indian law will bear the brunt of the blame.

666. See generally HELEN JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES (1885) (series of historical accounts "show[ing] our causes for national shame in the matter of our treatment of the Indians").