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## Beyond "Marbury": Jurisdictional Self-Dealing In "Seminole Tribe"

Laura S. Fitzgerald

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# Beyond *Marbury*: Jurisdictional Self-Dealing In *Seminole Tribe*

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Laura S. Fitzgerald

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*In Seminole Tribe v. Florida, the Supreme Court held that the Constitution's Article III embodies a principle of state sovereign immunity which so constrains the federal judicial power that it prohibits Congress from granting federal courts subject matter jurisdiction over private lawsuits to enforce Article I legislation against states. At the same time, however, and again in Idaho v. Coeur d'Alene Tribe, the Court reaffirmed its own Ex parte Young doctrine, under which the Court itself unilaterally granted federal courts subject matter jurisdiction over private lawsuits to coerce states to comply with federal law despite state sovereign immunity. Neither in Seminole Tribe nor in Coeur d'Alene Tribe did the Court explain how Article III could so limit Congress's power to grant subject matter jurisdiction in such lawsuits, while leaving intact the Court's own power to do so under Ex parte Young. Arguing that Ex parte Young and the Young doctrine rest on no affirmative principle of law, Professor Fitzgerald suggests that Young's survival of Seminole Tribe reflects the Court's claim for itself of a freestanding judicial power to regulate access to federal courts for private lawsuits challenging state interests—a judicial power that now outstrips both ordinary judicial review and also Congress's constitutional authority over the federal courts.*



# Beyond *Marbury*: Jurisdictional Self-Dealing In *Seminole Tribe*

Laura S. Fitzgerald\*

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## I. INTRODUCTION

Over the past several terms, the Supreme Court has confronted head-on the Constitution's deepest questions about power and the institutions that compete for it. As the Court refereed this competition, however, some institutions fared better than others.<sup>1</sup> Among the institutional winners was the Court itself.

The Court ruled in its own favor each time it decided an overt question about the federal "judicial Power" vested by Article III,<sup>2</sup> consistently voting to fortify the Court's status within the Constitution's structure for the separation of powers, often at

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1. The United States Congress, for one, suffered repeated, dramatic blows to its authority at the Court's hands. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating federal firearms registration legislation as violating Constitution's federalism principle); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (invalidating federal Religious Freedom Restoration Act of 1993 as exceeding Congress' legislative power under Section 5 of the Fourteenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (denying Congress authority under Article I to override state sovereign immunity from suit in federal court to enforce federal legislation); *United States v. Lopez*, 514 U.S. 549, 551-52 (1995) (invalidating federal Gun-Free School Zones Act of 1994 as exceeding Congress' legislative power under Article I Commerce Clause). By contrast, States' interests prevailed before the Court again and again. See, e.g., *Printz*, 521 U.S. at 935; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281-88 (1997); *Lopez*, 514 U.S. at 551-52. See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998).

2. U.S. CONST. art. III, § 1. Article III's vesting clause reads, in full: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

Congress' direct expense.<sup>3</sup> Yet one of the Court's more remarkable "judicial Power" decisions came tacitly, emerging from two cases that did not raise any overt question about the Court's special constitutional role: *Seminole Tribe v. Florida*<sup>4</sup> and *Idaho v. Coeur d'Alene Tribe*.<sup>5</sup>

These two cases were reasoned, announced, and received as decisions about the Constitution's *federalism* principle;<sup>6</sup> more particularly, they expanded federalism's rule of state sovereign immunity, which now protects States from being sued without their consent by private plaintiffs in federal court even if Congress has decreed otherwise.<sup>7</sup> But at the same time, in *Seminole Tribe* and *Coeur d'Alene* the Court also staked its claim to a significant, freestanding

3. See generally *City of Boerne*, 521 U.S. at 511 (holding that once the Court declares scope of First Amendment's Religion Clauses, Congress may not by simple legislation grant greater rights protection); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (holding that once a federal court has entered final judgment in a federal securities fraud lawsuit in reliance on a Supreme Court decision imposing short limitations period onto federal statute supporting cause of action, Congress may not require final judgment to be reopened and the complaint reinstated when it amends statute to restore longer limitations period); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (invalidating environmental legislation's "citizen standing" provision because it authorized federal court lawsuits by plaintiffs who could not meet Court's own standing criteria under Article III "case or controversy" requirement); see also *Raines v. Byrd*, 521 U.S. 811, 814-15 (1997) (holding that plaintiff Members of Congress lacked statutory and constitutional standing to challenge Line Item Veto Act, notwithstanding statute's provision authorizing suit by "any Member of Congress . . . adversely affected" by the Act).

4. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

5. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

6. See, e.g., Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2213 (1996) (criticizing Court's "judicial activism" in siding with States on states' rights challenges to federal economic regulation); Jackson, *supra* note 1, at 2181 & n.1. (citing *Seminole Tribe* and *Coeur d'Alene*, among others, as evidencing revival of "federalism-based limits on national power"); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 499 (1997) ("*Seminole Tribe* must be considered as part of the broader canvass of federalism on which the Court has been working since 1990."); Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 102 (1996) (describing *Seminole Tribe* as "illustration of the importance that a narrow, but solid, five-Justice majority of the Supreme Court attaches to the constitutional underpinnings of 'Our Federalism.'" (footnotes omitted)); Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1295 (1997) (citing *Seminole Tribe* to support author's observation that "the Supreme Court of late has been investing so heavily in the federalism business, so energetically protecting the states from the nation"); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27 (1998) (citing *Seminole Tribe*, among others, to support assertion that "[f]ederalism is back, with a vengeance"). See generally Symposium, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1179 (1997) (collecting more than a dozen articles and comments discussing *Seminole Tribe* and judicial federalism).

7. See *Coeur d'Alene*, 521 U.S. at 281 (holding State constitutionally immune from private federal lawsuit to enforce federal-law claims to real property also claimed by State); *Seminole Tribe*, 517 U.S. at 53, 71-74 (declaring that Congress lacks power under Article I so to "abrogate" state sovereign immunity).

“judicial Power”:<sup>8</sup> the power to dictate the terms on which federal courts may assert *subject-matter jurisdiction*—that threshold authority even to admit a claim into federal court<sup>9</sup>—over lawsuits against state interests; a judicial power that constitutionally outstrips Congress’ legislative power over the federal courts under Article I.

Here is where the Court stakes its claim. In *Seminole Tribe*, the Court held that Article III embodies a principle of state sovereign immunity which so constrains the available federal judicial power that it prohibits Congress from granting federal courts subject-matter jurisdiction over private lawsuits to enforce Article I legislation against unconsenting States: the Court denied Congress the Article I power to abrogate state sovereign immunity.<sup>10</sup> Yet at the same time, in *Seminole Tribe* and *Coeur d’Alene*, the Court reaffirmed its own *Ex parte Young*<sup>11</sup> doctrine, under which the Court has unilaterally granted federal courts subject-matter jurisdiction over private lawsuits to coerce unconsenting States to comply with federal law:<sup>12</sup> the Court reaffirmed its own *judicial* power to abrogate state sovereign immunity.

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8. U.S. CONST. art III, § 1 (vesting “[t]he judicial Power of the United States” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”).

9. Throughout this Article, I use the word “jurisdiction” in its most precise sense, to describe a federal court’s authority even to entertain a claim on the merits: without good subject-matter jurisdiction, a claim may not even cross the federal court’s threshold, no matter how likely that claim’s success on the merits might otherwise be. “The requirement that jurisdiction be established as a threshold matter ‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998) (citation omitted). The Supreme Court has recently emphasized the difference between this threshold constitutional and statutory requirement of federal subject-matter jurisdiction—“i.e., the . . . statutory or constitutional power to adjudicate [a] case”—from other requirements that may stand between a federal plaintiff and a favorable judgment, like the existence of a valid cause of action under which she can state a claim, or the court’s authorization to grant the specific remedy she seeks. *See id.* at 1010. *Steel Co.* held that plaintiff’s standing to sue, a component of the threshold jurisdiction question, must be determined *before* a court reaches the question of whether a cause of action lies, thus rejecting the doctrine of “hypothetical jurisdiction,” under which lower courts had assumed “jurisdiction for the purpose of deciding the merits.” *Id.* at 1012. I mean to maintain the same distinction, and so concentrate my analysis here on the *first* question of jurisdiction, that is, whether a federal court has the power to entertain a case at all, or must instead simply admit its lack of subject-matter jurisdiction and dismiss the complaint altogether. *See* FED. R. CIV. P. 12(b)(1), (b)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”).

10. *Seminole Tribe*, 517 U.S. at 71-72 (explicitly overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989)).

11. *Ex parte Young*, 209 U.S. 123 (1908); *see infra* Part III (discussing *Ex parte Young* and the Supreme Court decisions now comprising the *Young* doctrine).

12. *See Coeur d’Alene*, 521 U.S. at 269 (reaffirming *Ex parte Young*); *Seminole Tribe*, 517 U.S. at 71 n.14, 72 n.16.

But how could *Ex parte Young* survive *Seminole Tribe*? If state sovereign immunity indeed imposes a constitutional outer limit on federal courts' subject-matter jurisdiction, as *Seminole Tribe* held, then one would expect that limit to apply to Court-crafted jurisdictional rules, like *Young*'s, just as it applies to jurisdictional grants from Congress, like the one ruled unconstitutional in *Seminole Tribe*. That is, if Article III slams federal court doors shut when Congress is knocking, how can those same doors swing open at the Court's command?<sup>13</sup>

Yet *Young* survives. Nothing from inside the Court's sovereign immunity doctrine explains why. While it is true that *Ex parte Young* jurisdiction reaches lawsuits that are different from the lawsuit declared unconstitutional in *Seminole Tribe*—*Young* plaintiffs may name as defendants only state officials and not the State itself, while Congress had authorized plaintiffs to sue States by name<sup>14</sup>—that difference is immaterial, both practically and constitutionally. As a practical matter, when private plaintiffs win *Ex parte Young* lawsuits, the federal judgments they obtain judicially coerce state action to comply with federal law, notwithstanding the State's privilege of sovereign immunity.<sup>15</sup> The enforcement actions invalidated in *Seminole Tribe* sought just that result.<sup>16</sup>

More significantly, there is no *constitutional* difference between *Ex parte Young* jurisdiction and the jurisdiction that *Seminole Tribe* placed beyond Congress' power to grant. While state sovereign immunity holds the status of an affirmative constitutional privilege,<sup>17</sup>

13. See *Steel Co.*, 118 S. Ct. at 1012 (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869))).

14. See *Seminole Tribe*, 517 U.S. at 48-50.

15. See, e.g., *Coeur d'Alene*, 521 U.S. at 270 (agreeing with *Ex parte Young* dissenter that the “manifest, indeed the avowed and admitted, object of . . . [a *Young* lawsuit is] to tie the hands of the State.”) (quoting *Ex parte Young*, 209 U.S. at 174 (Harlan, J., dissenting)); see also Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 657 (1985) (“Inevitably, suits to stop officers from applying state law ‘run against the state.’”). In fact, it took *Ex parte Young* to clear state sovereign immunity barriers to federal court lawsuits that produced far-reaching injunctions to remedy racial segregation in public schools. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (holding that *Young* authorizes federal courts to entertain private lawsuit seeking injunction to force Stato to fund comprehensive education for children subjected to racial discrimination).

16. *Seminole Tribe*, 517 U.S. at 57-58.

17. See *id.* at 53-54, 67-68; *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Court has located the Constitution's state sovereign immunity principle variously in the Eleventh Amendment, in Article III, and in certain penumbral values derived from the “understood background against which the Constitution was adopted.” *Pennsylvania v. Union Gas Co.*, 491



this Article suggests that *Ex parte Young*'s "exception" to the sovereign immunity rule rests on no affirmative principle of constitutional law.<sup>18</sup> Indeed, the Court has admitted that *Young* jurisdiction stands entirely on the Court-crafted "fiction" that a federal lawsuit against a State's officials—although sued only in their official capacities and only for relief that will necessarily coerce state action—somehow strips those officials of their official status momentarily, just long enough for federal jurisdiction to attach despite the State's own sovereign immunity.<sup>19</sup>

This fiction, I suggest, has no basis in any substantive interpretation of the Constitution, nor in any other source of law that ordinarily informs judicial review;<sup>20</sup> indeed, the Court claims no such law-based foundation for the *Ex parte Young* rule.<sup>21</sup> Instead the

U.S. 1, 31-32 (1989) (Scalia, J., dissenting in part and concurring in part), *overruled by Seminole Tribe*, 517 U.S. at 71-72; *see also* *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) ("Behind the words of [Article III and the Eleventh Amendment] are postulates which limit and control" extending state sovereign immunity to cases not specifically described by Amendment's text.). *See generally* *Coeur d'Alene*, 521 U.S. at 267-68 (describing a "broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying"). The Court now tends to use the terms "Eleventh Amendment immunity" and "state sovereign immunity" interchangeably when referring generally to this broader constitutional principle invoked in *Seminole Tribe* to invalidate Congress' jurisdictional grant, and I do the same.

18. *See infra* notes 187-90 and accompanying text.

19. *See* *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105 (1984) (describing *Ex parte Young* doctrine as resting on "fiction" and "irony"); *see also* *Coeur d'Alene*, 521 U.S. at 269 (agreeing with *Pennhurst II*'s "observation" that *Young* rests on "fictional distinction between the official and the State"). More particularly, the "fiction" is that state officials are deemed to forfeit their status as "state" officials when, acting in their official capacities, they violate federal law while carrying out the State's work. *See Ex parte Young*, 209 U.S. at 160. Thus stripped, such officials may not claim the State's immunity from private federal-court lawsuits complaining of those federal law violations, and so the officials may be sued—despite the State's own constitutional immunity—for a judgment requiring the State, through its officials, to comply with federal law. *See id.* ("The state has no power to impart to [its official] any immunity from responsibility to the supreme authority of the United States."). But the official is so "stripped" of her official status only for the purpose of establishing federal subject-matter jurisdiction. Once jurisdiction attaches, she becomes the State's again, and her official actions violating federal law constitute "state action" whenever showing state action is required to state a claim on the merits, *see* *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 286-88 (1913), as it is for virtually all claims alleging violations of constitutional rights, *see* *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 284 (1977); *see also* 42 U.S.C. § 1983 (1994) (creating private right of action against any person who deprives plaintiff of federally-secured rights while acting "under color of state law").

20. *See infra* Part V.A.

21. Unsatisfied with the Court's reliance on fiction alone to justify *Ex parte Young* jurisdiction, some scholars have offered more substantive justifications for the rule. For example, some emphasize a common-law tradition, predating *Young*, under which a sovereign's agents could be sued individually for certain injuries they caused while carrying out their official duties, notwithstanding the sovereign's immunity from suit arising out of the official's harmful conduct. *See, e.g.*, David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 150-54; David E. Engdahl, *Immunity and Accountability for*

*Young* doctrine expresses simply the Court's own evolving, pragmatic assessment of the need—notwithstanding the Constitution's state sovereign immunity rule—to use federal courts to enforce state compliance with certain federal laws.<sup>22</sup> Thus, there is no *constitutional* basis for preserving the Court's *Ex parte Young* jurisdiction while invalidating Congress' jurisdictional grant in *Seminole Tribe*.

So how, then, could *Ex parte Young* survive *Seminole Tribe*? The answer may come not from *inside* the Court's sovereign immunity doctrine, but from *outside* it. As a "judicial Power"<sup>23</sup> decision—in which the Court is elaborating its own special role within the Constitution's separation of powers framework—*Ex parte Young*'s survival of *Seminole Tribe* may make more sense.

Return to the puzzle. If, as *Seminole Tribe* holds, Article III's sovereign immunity principle denies Congress the Article I *legislative* power to grant federal courts subject-matter jurisdiction over lawsuits to enforce federal law against unconsenting States, how can Article III permit such lawsuits under the Court's non-constitutional *Ex parte Young* doctrine? Perhaps because Article III is being read to vest the Court with a freestanding *judicial* power to regulate federal jurisdiction in these cases, a judicial power that now constitutionally outstrips Congress' *legislative* authority over the federal courts.<sup>24</sup> That

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*Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 5-28 (1972); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1088 & n.222 (1983); Henry Paul Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1387 & n.153 (1973). As I argue *infra* Part II.C.1, that common law tradition concerned the question whether an injured party had a *cause of action* against the official individually, not the analytically prior question of whether a court could exercise *subject-matter jurisdiction* over any such claim. See, e.g., Engdahl, *supra*, at 23-24 (asserting that post-Civil War Court confused jurisdiction under Eleventh Amendment with traditional cause of action against officials in holding private lawsuit barred by state sovereign immunity). But in an Article III court, of course, the fact that a complaint may state a cognizable cause of action, on the merits, does not automatically confer subject-matter jurisdiction on the federal court to adjudicate that claim: without good subject-matter jurisdiction, that claim may not even cross the federal court's threshold. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998). Even more simply, because the Court itself has never adopted the scholarship's common-law justification for *Ex parte Young*, that alternative theory cannot tell us very much about how the Court views its own authority to preserve *Young* after *Seminole Tribe*. For an evaluation of this and two other alternative justifications for *Ex parte Young*, see *infra* Part II.C.

22. See *infra* notes 187-90 and accompanying text. Not all federal laws have warranted enforcement through *Ex parte Young* jurisdiction. Compare *Coeur d'Alene*, 521 U.S. at 287 (denying *Young* jurisdiction to enforce federal treaty and legislation granting Tribe reservation lands), with *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (granting *Young* jurisdiction to enforce federal requirements for state participation in program under Social Security legislation).

23. U.S. CONST. art. III.

24. As noted *infra* Part V.B.1, there appears to be some agreement that the Constitution grants Congress at least a substantial authority over the federal courts and their subject-matter

is, perhaps the Court is simply claiming for itself—while denying to Congress—a constitutional prerogative to determine independently when to open and shut federal court doors on suits against state interests; the Court is asserting an Article III “judicial Power” to *dictate* federal jurisdiction in these cases, not just to exercise it. What is more, the *Young* cases, including *Coeur d’Alene*, suggest that the Court considers itself free to wield this power over jurisdiction for any reason, even the purely pragmatic.

If so, then *Ex parte Young*—and, more to the point, *Young’s* survival of *Seminole Tribe*—represents no ordinary exercise of the Court’s traditional power of judicial review: the Court’s constitutional prerogative, claimed at least since *Marbury v. Madison*, “to say what the law is.”<sup>25</sup> If *Young* does indeed rest entirely on a “fiction,” as the Court insists, then it says nothing about any “law,” constitutional or not, other than the Court’s own say-so.<sup>26</sup> In preserving *Young*, then, *Seminole Tribe* accomplished even more for the Court than *Marbury* did, for while *Marbury* claimed judicial review’s power to declare what the Constitution and other law-based authorities mean and thus require, *Seminole Tribe* appears to have claimed the power to declare the law on federal jurisdiction based on no legal authority at all.<sup>27</sup>

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jurisdiction, despite persistent scholarly debate over how absolute that power may be. See U.S. CONST. art. III, § 1 (vesting federal judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); see also literature cited *infra* notes 290-91.

25. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

26. I contrast ordinary judicial review with the reasoning behind the Court’s *Ex parte Young* doctrine below, in Part V.A. Of course, one could agree that the Supreme Court was not exercising its ordinary power of judicial review when it preserved *Ex parte Young* after *Seminole Tribe*, and then conclude, simply, that the Court therefore acted outside the scope of its constitutional authority. But I have discovered no cases or commentary suggesting that the Court’s Article III power is necessarily limited to judicial review, defined as the power “to say what the law is.” See *Marbury*, 5 U.S. (1 Cranch) at 177. Accordingly, I have considered here what other species of judicial power could account for the *Young* doctrine and for its survival of *Seminole Tribe*; I offer the hypothesis I do because it might explain what the Court actually accomplished by preserving *Ex parte Young* jurisdiction after *Seminole Tribe*. And despite the separation of powers concerns that this novel judicial power raises, see *infra* Part V.B.2, its novelty need not make it automatically unconstitutional.

27. Even so, *Seminole Tribe’s* claim to power takes a form closely paralleling *Marbury’s*. In both cases, the Court declined a particular statutory grant of federal subject-matter jurisdiction on the grounds that Congress had attempted to expand the federal judicial power beyond the boundaries of Article III. And in both cases, the Supreme Court used the occasion of declining jurisdiction over that one discrete class of lawsuits to assert a more potent prerogative: in *Marbury* it was the power of judicial review itself, and in *Seminole Tribe*, this Article suggests, it was the power to regulate unilaterally the terms of federal court jurisdiction over private lawsuits against state interests.

Any such claim by the Court to a unilateral, jurisdiction-setting authority immediately raises separation of powers concerns.<sup>28</sup> Subject-matter jurisdiction<sup>29</sup> is both a fundamental source for, and a fundamental check on, the institutional authority of Article III courts;<sup>30</sup> jurisdiction is one critical way in which the separation of powers principle expresses itself in the federal judicial branch.<sup>31</sup> Thus, by preserving *Ex parte Young* after *Seminole Tribe*—by preserving its own power to grant federal jurisdiction while constitutionally stripping Congress of the power to do the same—the Court appears to have claimed a privilege rare in the separation of powers world: the institutional right, where private lawsuits challenge state interests, to have not just the last word, but the only word on the scope of its own authority.<sup>32</sup> The Court's claim thus

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28. The Constitution's separation of powers principle concerns not only the dimensions of each branch's individual authority, but also its relationship to the other two branches. Throughout this Article, I mean to invoke that principle in both its individual and its relational senses: I ask what these decisions suggest about the Court's special Article III "judicial Power" and also about the Court's constitutional relationship to Congress.

29. Again, I use the term "jurisdiction" in its most precise sense, to describe a federal court's threshold authorization even to entertain a controversy, quite apart from that court's power to recognize a plaintiff's cause of action or to fashion appropriate relief. *See supra* note 9.

30. Just as the Congress may not legislate on matters beyond its Article I "jurisdiction"—the constitutionally bounded field in which Congress is entitled to exercise federal power, *see generally* *United States v. Lopez*, 514 U.S. 549 (1995)—so federal courts, including the Supreme Court, may not exercise the federal judicial power in cases that lie beyond *their* subject-matter jurisdiction. This, of course, is axiomatic: federal courts are courts of limited jurisdiction and thus "are empowered to hear only those matters explicitly provided for both in the Constitution and federal law." Chemerinsky, *supra* note 15, at 649 & n.35 (explaining that principle of limited federal court jurisdiction "can be traced back . . . to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)").

31. The Court itself has recently reaffirmed this link: "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1016 (1998).

There are other constitutional checks on the federal judicial power as well, including the political process by which federal judges and Justices are appointed, the possibility of impeachment, and the historical specter of court-packing. Likewise, other constitutional provisions seek to preserve the federal judiciary against the encroachments of the federal political branches, including Article III's life tenure and salary requirements. *See* U.S. CONST. art. III. While these other checks on, and safeguards for, federal courts are obviously important to the separation of powers balance overall, they are, perhaps arbitrarily, beyond the scope of this Article.

32. Other claims to judicial independence much less unilateral in nature have sparked considerable controversy. Compare, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 71-75 (1984) (arguing that federal courts violate Article III and separation of powers when they decline, for policy-based reasons, to exercise subject-matter jurisdiction over a controversy within a constitutional statutory grant), with David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547, 550 (1985) (arguing, in response to Professor Redish, that federal courts may constitutionally use discretion, even on pure policy grounds, to decline jurisdiction "despite the existence of statutory

collides with core values—like institutional accountability and inter-branch review—that the separation of powers principle seeks to preserve.<sup>33</sup>

Moreover, the Court's claim to a jurisdiction-setting power that it denies Congress clashes with the Constitution's allocation to Congress of substantial, if not primary, authority to regulate the subject-matter jurisdiction of the federal courts.<sup>34</sup> To be sure, *Seminole Tribe* declared that Congress could also invoke *Ex parte Young* jurisdiction if it wished to open federal court doors to private enforcement of Article I legislation against States.<sup>35</sup> Likewise, the Court will honor Congress' choice, express or implied, to deny *Ex parte Young* jurisdiction to enforce particular legislation, and so legislatively shut federal court doors on private lawsuits that would otherwise satisfy *Young*; indeed, Congress was deemed to have intended that result in *Seminole Tribe*, and so *Young* jurisdiction was withheld.<sup>36</sup> But if *Ex parte Young* can claim no affirmative constitutional foundation—if the *Young* doctrine represents, at bottom, simply the Court's pragmatic views about when judicial enforcement of federal law is desirable despite state sovereign immunity—then it only aggravates separation of powers concerns for the Court so to impose its own policy-based jurisdictional rules on Congress.<sup>37</sup> That Congress may also embrace the Court's "fiction" solves nothing.

It is thus not enough after *Seminole Tribe* to tag the surviving *Ex parte Young* jurisdiction as "fictional" and then move immediately

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authority to adjudicate"). *Seminole Tribe's* jurisdictional claim would also appear to dwarf the literature's persistent controversy over whether Congress may, in the exercise of its own constitutional authority over federal subject-matter jurisdiction, strip federal courts altogether of the power to hear any or all federal claims, like those based on federal constitutional rights. Here, by contrast, the Court is stripping Congress of a power over jurisdiction that the Court preserves for itself. Compare Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-63 (1953) (noting that the Constitution grants Congress primary authority to grant or withhold subject-matter jurisdiction from inferior federal courts), with Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 1-3 (1990) (stating that the Court and Congress share constitutional authority over contours of federal subject-matter jurisdiction, together working out rules through inter-branch dialogue over time). See generally *infra* notes 290-91 (citing additional scholarship addressing the debate over Congress' control over federal courts).

33. See *infra* Part V.B.2 (discussing these separation of powers concerns).

34. While the scope of Congress' authority over federal court jurisdiction is the subject of considerable scholarly controversy, see *infra* notes 290-92 and accompanying text, there is a consensus that Congress' power over jurisdiction is, at least, significant. See *infra* note 290.

35. *Seminole Tribe v. Florida*, 517 U.S. 44, 75 n.17 (1996).

36. *Id.* at 75-76.

37. See *infra* Part V.B.2 (discussing separation of powers implications of *Young* after *Seminole Tribe*).

on to discuss when and why federal courts should exercise that fictitious subject-matter jurisdiction, as Court and commentators have tended to do.<sup>38</sup> If the Court is indeed claiming a freestanding “judicial Power” to dictate the terms of federal jurisdiction over lawsuits challenging state interests, then that claim warrants a careful re-examination, under the separation of powers principle, of the Court’s reasoning in *Young* itself and in other cases developing the full-blown *Young* doctrine reaffirmed in *Coeur d’Alene*.<sup>39</sup> This Article attempts the task.

Part II sets the foundation. It shows how *Seminole Tribe* fits into the Court’s century-long process of heightening the constitutional status of state sovereign immunity begun in *Hans v. Louisiana*.<sup>40</sup> Noting *Seminole Tribe*’s preservation of *Ex parte Young*, it considers and critiques three alternative justifications for *Young*—none of which the Court itself embraces—offered to explain how the Court-crafted *Young* rule could survive where Congress has been constitutionally barred. Part II then argues that by treating sovereign immunity as a firm *jurisdictional* limitation, *Seminole Tribe* necessarily raised the stakes on *Ex parte Young*: *judicial* abrogation of States’ immunity under a Court-created “fiction” became a far more serious matter once *congressional* abrogation was declared unconstitutional. Thus, *Seminole Tribe* intensified the need to review the foundations on which *Ex parte Young* jurisdiction rests.

Part III then offers my core observation. A close reading of *Ex parte Young* demonstrates that the Supreme Court based its jurisdictional exception to state sovereign immunity on no affirmative *legal* principle—constitutional, statutory, common-law, or otherwise. Indeed, the *Young* rule makes best sense not as a rule of law but as a

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38. See *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 270-71 (1997); see also David P. Currie, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 550 (1997) (concluding that *Young* remains available after *Seminole Tribe* for the “most important cases,” those “involving constitutional claims against state officers”); Monaghan, *supra* note 6, at 132 (“If the reality is that state officials can still be held accountable under *Young* . . . then being unable to sue the state *eo nomine* in federal court will prevent a federal forum only in rare situations . . .”); *id.* at 127 n.168 (identifying “narrow domain” in which *Young* would not provide jurisdictional exception to state sovereign immunity).

39. The fully-developed *Young* doctrine grants federal subject-matter jurisdiction over a private lawsuit challenging state interests so long as the plaintiff sues only state officials and not the State itself, see *Ex parte Young*, 209 U.S. 123 (1908); and seeks only prospective relief, see *Edelman v. Jordan*, 415 U.S. 663, 668 (1974); to compel future compliance with federal and not state law, see *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105-06 (1984). See *Coeur d’Alene*, 521 U.S. at 288 (O’Connor, J., concurring) (reciting criteria for *Young* jurisdiction); see also *Breard v. Green*, 523 U.S. 371 (1998) (holding *Ex parte Young* jurisdiction unavailable where plaintiff alleged no continuing violation of federal law).

40. *Hans v. Louisiana*, 134 U.S. 1 (1890).

rule of policy; a rule depending not on the law-based reasoning that characterizes ordinary judicial review, but on purely pragmatic considerations. Part IV then argues that the principal Supreme Court decisions that develop *Young* into the full-blown *Ex parte Young* doctrine affirmed in *Coeur d'Alene* further erode any legal basis for *Young* jurisdiction, while expanding that rule's dependence on straightforward judicial policymaking.

Based on these observations, Part V suggests that the Court's preservation of *Ex parte Young* after *Seminole Tribe* cannot be accounted for as an ordinary exercise of the Court's traditional judicial review authority. Instead, I propose, *Young's* survival reflects the exercise of a different species of "judicial Power": a freestanding prerogative to regulate federal court access for claims challenging state interests. Part V then considers some separation of powers implications of the Court's claim to such unilateral control over the scope of its own subject-matter jurisdiction.

## II. THE CONSTITUTIONAL RULE AND ITS NON-CONSTITUTIONAL EXCEPTION

### A. *Immunity Gets Jurisdictional: From Hans to Seminole Tribe*

In *Seminole Tribe*, a five-Justice majority held that Congress has no power under Article I to override, or to "abrogate," state sovereign immunity,<sup>41</sup> overruling in the process a 1989 Supreme Court decision that held to the contrary.<sup>42</sup> *Seminole Tribe* thus finally

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41. See *Seminole Tribe*, 517 U.S. at 72. The Court invalidated the jurisdictional provisions of 1988's Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2710(d)(3)(A) (1994). IGRA was enacted pursuant to Congress' plenary Article I power "to regulate Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, and it gave States the right to participate in the regulation of gambling activities on Indian reservations within state lines. See *Seminole Tribe*, 517 U.S. at 48. With this right, however, Congress imposed on States an obligation to negotiate with the Indian Tribes in good faith towards an agreement, or compact, to set the terms on which reservation gambling could proceed. See 25 U.S.C. § 2710(d)(3)(A) (1994); *Seminole Tribe*, 517 U.S. at 48. And to enforce this obligation to negotiate, Congress gave Tribes a right of action against States in federal court to seek a court order requiring the States to conclude negotiations for a gambling compact within 60 days. See 25 U.S.C. § 2710(d)(7)(B)(iii). The Supreme Court invalidated this jurisdictional provision, but left the rest of IGRA intact. See *Seminole Tribe*, 517 U.S. at 48. Although IGRA itself raised only the question of Congress' abrogation power under the Indian Commerce Clause, the *Seminole Tribe* majority declared that *no* provision in Article I gives Congress that power, not even the Interstate Commerce Clause or the Necessary and Proper Clause. *Id.*

42. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), overruled by *Seminole Tribe*, 517 U.S. at 71-72, a five-Justice majority voted that Article I authorized Congress to abrogate state

quelled a notion that had developed alongside the Court's sovereign immunity doctrine itself: the idea that Article I empowered Congress to authorize federal court enforcement of particular federal legislation, even if sovereign immunity would otherwise bar federal courts from hearing those same lawsuits against unconsenting States.<sup>43</sup> Rejecting this notion, the *Seminole Tribe* Court declared that the entire "judicial Power" available under Article III is constrained by a broad immunity principle that places an absolute limit on the reach of federal subject-matter jurisdiction, at least so far as Article I legislation is concerned.<sup>44</sup> Since it is "fundamental that Congress [may] not [under Article I] expand the jurisdiction of the federal courts beyond the bounds of Article III,"<sup>45</sup> and since the abrogation power would permit Congress to do just that by granting

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sovereign immunity in order to permit private enforcement actions in federal court against unconsenting States that failed to comply with federal environmental legislation enacted pursuant to the Interstate Commerce Clause, found in Article I, section 8. See *Seminole Tribe*, 517 U.S. at 59-60 (describing *Union Gas* holding); *id.* at 66 (announcing that *Union Gas* "was wrongly decided and . . . it should be, and now is, overruled").

43. Analytically, abrogation depended on an interpretation of Article I that treated its grants of legislative power to Congress as, in effect, a consent by every ratifying State to the jurisdiction of federal courts in private actions to enforce legislation enacted under those power grants, like the power to regulate interstate commerce. Every such grant of legislative power to Congress by a ratifying State carried with it, in effect, a waiver of that State's pre-constitutional sovereign immunity. As Justice Brennan observed, writing for a plurality in *Pennsylvania v. Union Gas Co.*:

[T]he States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce . . . [B]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. . . . [Accordingly,] the power to regulate commerce includes the power to override States' immunity from suit.

*Union Gas*, 491 U.S. at 14-15 (citations omitted).

44. See *Seminole Tribe*, 517 U.S. at 52 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). The Court reaffirmed its former ruling, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976), that Congress does enjoy the power to abrogate state sovereign immunity to authorize subject-matter jurisdiction over private, federal-court lawsuits to enforce legislation enacted under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 65 (reiterating *Fitzpatrick's* reasoning that "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," thus constitutionally distinguishing Fourteenth Amendment abrogation from Article I abrogation (citing *Fitzpatrick*, 427 U.S. at 454)). At the time this Article went to print, the Supreme Court had recently granted certiorari to hear several cases raising questions about the extent of Congress' power to insulate its abrogation efforts by claiming to legislate under Section 5 of the Fourteenth Amendment. See *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999) (No. 98-791); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343 (Fed. Cir. 1998), *cert. granted*, 67 U.S.L.W. 3424 (U.S. Jan. 12, 1999) (No. 98-149) (consolidating two cases questioning Congress' abrogation power to enforce Lanham Act and patent legislation).

45. *Seminole Tribe*, 517 U.S. at 65 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803)).



subject-matter jurisdiction against States notwithstanding their sovereign immunity,<sup>46</sup> then abrogation represented an unconstitutional expansion of the “judicial Power” beyond the bounds of Article III and hence exceeded Congress’ authority under Article I.<sup>47</sup>

In this, *Seminole Tribe* continued the Court’s century-long process of constitutionalizing the idea of state sovereign immunity, begun in earnest in *Hans v. Louisiana*.<sup>48</sup> To be sure, a common-law tradition of sovereign immunity, protecting monarchs from lawsuits brought against them in their own courts, long predated the Constitution.<sup>49</sup> But the question whether American States within the Constitution’s federal system could claim a “sovereign’s” immunity from suit in federal court—in the court of a *different* and, in many respects, *superior* sovereign<sup>50</sup>—was not explicitly addressed in the

46. In the Court’s view, abrogation meant “that Congress could under Article I expand the scope of the federal courts’ jurisdiction under Article III[, which] ‘contradicted our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal court jurisdiction.’” *Id.* (quoting *Union Gas*, 491 U.S. at 39 (Scalia, J., dissenting)).

47. *Id.*

48. *Hans v. Louisiana*, 134 U.S. 1 (1890).

49. See Fletcher, *supra* note 21, at 1064-69 (providing detailed account of how the experience of America’s colonial and framing eras would have contradicted English and European political philosophers’ concept of sovereignty “as a centralized, indivisible power”); see also *Seminole Tribe*, 517 U.S. at 101-04, 130-41 (Souter, J., dissenting) (asserting that principle has roots merely in English common law, which was viewed with selective skepticism by American Framers). But see *id.* at 68-69 (retorting that principle sinks its roots “in the much more fundamental jurisprudence in all civilized nations”). Traditionally, sovereign immunity preserved not only this jurisdictional privilege, but a substantive privilege as well, for the “King or the Crown, as the font of law, [was] not bound by the law’s provisions.” *Id.* at 101-04 (Souter, J., dissenting). As translated into the American constitutional system, sovereign immunity is ordinarily discussed only in its jurisdictional sense, and I limit myself to that sense as well. See *id.* at 103 & n.2 (Souter, J., dissenting) (observing that substantive immunity, the idea that the “King can do no wrong” and was thus above the law, was never adopted in America). But see Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1730 (1997) (suggesting that Court’s sovereign immunity caselaw may reflect principle that States should be immune from *substantive* regulation by Congress, not just from subject-matter jurisdiction of federal courts).

50. See, for example, the Constitution’s Supremacy Clause, which declares:

This 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, anything in the Constitution or laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2; see also *id.* art. I, at § 10 (denying States certain traditional attributes of sovereignty, including power to make treaties, to coin money, and to keep troops); Engdahl, *supra* note 21, at 2-3 (explaining that, in hierarchical English feudal system, each petty lord enjoyed only “sovereign immunity” against unconsented suit in his own court and in courts beneath him in the hierarchy; “if there existed any other court with power, according to the feudal hierarchy, over him, he remained subject to coercive suit there”). Justice Stevens has observed that the two-tiered nature of the federal system should make the common law’s sovereign immunity principle irrelevant to federal jurisdiction over States. He noted:

body of the Constitution, nor in the first ten amendments ratified in 1791 as the Bill of Rights. When the Court first considered that question, in *Chisholm v. Georgia*,<sup>51</sup> it ruled that Article III extended no special privilege to States immunizing them from federal-court jurisdiction in cases to which Article III explicitly extended the federal “judicial Power,” thus denying States immunity from private federal lawsuits that fell within an otherwise valid jurisdictional grant from Congress.<sup>52</sup> Negative political reaction to *Chisholm*, of course, led to the Eleventh Amendment, which provides, in full: “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

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In this country, the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign. For that reason, [the common-law] . . . explanation for a rule that allows a State to avoid suit in its own courts does not even speak to the question whether Congress should be able to authorize a federal court to provide a private remedy for a State's violation of federal law.

*Seminole Tribe*, 517 U.S. at 98 (Stevens, J., dissenting).

A lively scholarly literature, and an equally lively Supreme Court caselaw, are devoted to detailing which attributes of sovereignty other than jurisdictional immunity the States retained under the Constitution's federalism principles. See, e.g., *Printz v. United States*, 521 U.S. 98 (1997) (invoking principles of state sovereignty to invalidate provisions of federal Brady Handgun Violence Prevention Act of 1993, which required state law enforcement officials to conduct background checks on those wishing to purchase handguns); *New York v. United States*, 505 U.S. 144 (1992) (holding that Tenth Amendment prohibits Congress from “commandeering” sovereign state legislature into enacting federal regulatory scheme). See generally Jackson, *supra* note 1 (exploring arguments for federalism-based limits on national power); Yoo, *supra* note 6 (examining original understanding of federalism to establish “the normative purposes of federalism”). The Court has tended to treat federalism's Tenth Amendment issues separately from federalism's Eleventh Amendment issues. See *Seminole Tribe*, 517 U.S. at 61 n.10 (refusing to reach question whether IGRA provisions violated the Tenth Amendment because issue not considered in lower federal courts); see also Jackson, *supra* note 6, at 499 (observing that Court's recent decisions adjusting federal-state balance of power, based on various constitutional provisions, offer “no coherent principle . . . [to] tie together the Court's emerging federalism jurisprudence, other than [an] intuition in favor of more limits on federal power”); Monaghan, *supra* note 6, at 119 (observing that “[the] Tenth Amendment may have provided a more secure foundation for the Court's federalism concerns” in *Seminole Tribe* than did the Eleventh Amendment).

51. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

52. Article III explicitly authorizes the federal judicial power to reach three categories of cases in which States are parties, if not unconsenting defendants: cases (1) “between two or more States”; (2) “between a State and Citizens of another State”; and (3) “between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” U.S. CONST. art. III, § 2, cl. 1. The cause of action in *Chisholm*, a private assumpsit claim brought by the executor of a South Carolina merchant to recover for supplies furnished under a contract with the State of Georgia, fell within the scope of section 13 of the First Judiciary Act of 1789, in which Congress granted the Supreme Court original jurisdiction over civil actions between a State and citizens of another State. See *An Act to Establish the Judicial Courts of the United States*, ch. 20, 1 Stat. 73 (1789); see also *Chisholm*, 2 U.S. (2 Dall.) at 431 (Iredell, J., dissenting) (citing section 13). *But see id.* at 434-37 (arguing that neither section 13 nor any other provision of the First Judiciary Act created a compulsory action for the recovery of money from a state; instead, it only granted jurisdiction for those claims recognized by principles and usages of the common law, which did not permit a private lawsuit against an unconsenting sovereign).

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>53</sup>

But not until *Hans v. Louisiana*,<sup>54</sup> decided a century after the Eleventh Amendment's ratification, did the Court begin to develop the constitutional principle of state sovereign immunity—far broader than that Amendment's literal terms—invoked in *Seminole Tribe* to deny Congress an Article I abrogation power. *Hans* held that sovereign immunity protected States from federal-court lawsuits brought by their own citizens claiming state violations of the federal Constitution<sup>55</sup> and not just lawsuits by out-of-state plaintiffs as the Amendment specifies.<sup>56</sup> Following *Hans*, the Court steadily broad-

53. U.S. CONST. amend. XI.

54. *Hans v. Louisiana*, 134 U.S. 1 (1890). One reason for the long gap between the Eleventh Amendment's ratification and *Hans* was the Court's 1824 ruling that the Eleventh Amendment prohibited federal jurisdiction in private lawsuits only where the State was itself named as a defendant, thus permitting plaintiffs to elude sovereign immunity simply by naming a state official in place of the State. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824) (Marshall, C.J.); see also Jackson, *supra* note 6, at 496-97; *infra* notes 133-36 and accompanying text (discussing *Osborn* and its significance to *Ex parte Young*).

55. *Hans*, 134 U.S. at 10. In *Hans*, a private Louisiana citizen holding a State-issued bond filed suit against Louisiana in federal court, alleging that Louisiana's efforts to disclaim its obligations under its Reconstruction-era public bonds amounted to a "Law impairing the Obligation of Contracts," and thus violated the United States Constitution. See *id.* at 3, 21; see also U.S. CONST. art. I, § 10 (familiarily known as the Contract Clause). The Court found that sovereign immunity barred federal subject-matter jurisdiction over plaintiff's claim. See *Hans*, 134 U.S. at 21.

56. Criticism of *Hans*, and criticism of that criticism, has produced a voluminous literature, of which the following citations represent barely a drop in the bucket. Compare Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1476 (1987) (arguing that *Hans* contradicted the text of the Eleventh Amendment and resulted in an "inexplicable throwback to the jurisdictional regime of the Articles of Confederation"), and Fletcher, *supra* note 21, at 1087-91 (developing view that *Hans* erred in extending Eleventh Amendment beyond cases invoking federal courts' diversity jurisdiction), and John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1998-2002 (1983) (same), and Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 90 YALE L.J. 1, 60 (1988) (same), with William E. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1261-64 (1989) (offering a general discussion of the diversity theory of the Eleventh Amendment), and Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1343 (1989) (arguing that diversity theory of Eleventh Amendment is "thoroughly unfaithful" to text, which refers to "any" suit), and William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1372-75 (1989) (same).

Supreme Court justices have weighed in on all sides of the controversy. Compare *Seminole Tribe*, 517 U.S. at 108-19 (Souter, J., dissenting) (canvassing pre-*Hans* history of Eleventh Amendment to support conclusion "that federal question cases are not touched by the Eleventh Amendment"), and *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting) (concluding that Eleventh Amendment did not reach federal question cases), with *Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare (Government Employees Case)*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring) (endorsing *Hans*' view that Eleventh Amendment denies federal jurisdiction in all private lawsuits against states, even federal questions).

ened the practical sweep of States' constitutional immunity, eventually prohibiting federal-court jurisdiction over lawsuits against States by foreign States,<sup>57</sup> and over lawsuits against States pled in admiralty.<sup>58</sup>

In this same line of cases, the Court steadily heightened the constitutional status of the *idea* of state sovereign immunity. Building on *Hans*' relatively modest Eleventh Amendment interpretation, which stressed that the Amendment's ratifiers would have wished to avoid the "anomaly" of having a State's exposure to federal jurisdiction depend on the fortuity of a plaintiff's citizenship,<sup>59</sup> the Supreme Court developed a more virulent principle of state sovereign immunity and rooted it more deeply in the Constitution. In the Court's view, far from being the Constitution's *last* word on state sovereign immunity, the narrowly-drawn Eleventh Amendment was not even a primary constitutional source for giving that principle meaning. Instead, the "root of the constitutional impediment" to federal jurisdiction over an unconsenting State "is not the Eleventh Amendment but Art[icle] III."<sup>60</sup> As for the Eleventh Amendment itself, the Court minimized it as "but an exemplification" of the "fundamental rule" privileging States from federal jurisdiction, a privilege already rooted in Article III.<sup>61</sup> Indeed, long before *Seminole Tribe*, the Court declared, "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given."<sup>62</sup>

57. See *Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934).

58. See *Ex parte New York*, 256 U.S. 490, 497-500 (1921); see also *California and State Lands Comm'n v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (holding that Eleventh Amendment does not bar federal court jurisdiction over *in rem* admiralty action where res is not within State's possession).

59. *Hans*, 134 U.S. at 10-15.

60. *Government Employees Case*, 411 U.S. at 291-92 (Marshall, J., concurring).

61. *Ex parte New York*, 256 U.S. at 497; see Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 523 n.35 (1978) (citing this statement, but noting that "[o]n the next page . . . the Court talks as though the Eleventh Amendment, standing alone, supports all state sovereign immunity rules," and concluding that "Court's view of the precise source of immunity is thus somewhat confused") (citing *Ex parte New York*, 256 U.S. at 497-98); see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.").

62. *Ex parte New York*, 256 U.S. at 297; see also *Pennhurst II*, 465 U.S. 89, 98 (1989) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III."). As the Court asserted in *Monaco v. Mississippi*:

Manifestly, we cannot rest with a mere literal application of the words of section 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control . . . [including] the

So, in *Seminole Tribe*, by denying Congress the Article I abrogation power, the Court denied Congress the power to carve *legislative* exceptions out of what the Court had declared to be a firm *constitutional* rule:<sup>63</sup> the judicial power available under Article III is inherently bounded by the principle of state sovereign immunity, and Congress may not grant federal jurisdiction exceeding that limit any more than Congress may exceed the Constitution's limits on the original jurisdiction of the Supreme Court.<sup>64</sup>

### B. EX PARTE YOUNG: PRESERVING THE FICTION

But having denied Congress the Article I power to abrogate state sovereign immunity, *Seminole Tribe* then declared that federal courts may still exercise subject-matter jurisdiction, through *Ex parte Young*, over private lawsuits seeking to coerce state action in compliance with federal law—even Article I legislation—so long as a plaintiff names not the State but only the state officials responsible for carrying out that state action.<sup>65</sup> That is, *Seminole Tribe* held, while Article III absolutely prohibits Congress, under Article I, from creating *legislative* exceptions to States' constitutional immunity, the Court-crafted "exception" to that same Article III privilege, under *Ex*

postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."

*Monaco*, 292 U.S. at 322-23 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)); see also *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (holding that sovereign immunity protects States from "indignity" of federal court lawsuits by private plaintiffs); cf. *Seminole Tribe v. Florida*, 517 U.S. 44, 96 (1996) (reaffirming that Constitution so protects States' dignity).

63. See Monaghan, *supra* note 6, at 118 ("[S]tate sovereign immunity is largely a body of judge-made law.")

64. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803). State sovereign immunity does differ in some respects from other limits on federal subject-matter jurisdiction. For example, a State may waive its immunity, or otherwise consent to suit in federal court, even though parties ordinarily may not waive defects in a federal court's subject-matter jurisdiction. See *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2052 (1998) (citing *Atascadero State Hosp. v. Scanlon*, 472 U.S. 234, 241 (1985)). Likewise, unlike other jurisdictional defects, a federal court apparently need not raise the sovereign immunity problem *sua sponte*, but can ignore the defect if no party raises the question. See *id.* (citing *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982)). Neither of these anomalies affects the question this Article considers: how *Young's* judicial abrogation of state sovereign immunity, where the State has not waived the privilege and where the jurisdictional problem has been raised, can operate where Congress' Article I abrogation may not.

65. *Seminole Tribe*, 517 U.S. at 71 n.14, 73 n.16 (affirming *Ex parte Young*); *supra* note 19 (more fully describing *Young's* distinction between a state and its officials); *infra* Part III.C (detailing *Ex parte Young's* reasoning behind distinction).

*parte Young*,<sup>66</sup> remains intact. Indeed, the *Seminole Tribe* majority cited *Ex parte Young* jurisdiction to counter dissenters' protests that denying Congress an Article I abrogation power left States free to flout federal law with impunity, at least from federal-court enforcement through private lawsuits.<sup>67</sup> What is more, the Court suggested, Congress' own jurisdictional grant might have passed constitutional muster if only Congress had followed the Court's lead and drafted its legislation to conform to the *Ex parte Young* model.<sup>68</sup>

And why is the *Ex parte Young* exception constitutionally valid while Congress' Article I exceptions are absolutely barred? The *Seminole Tribe* Court did not say. Nor did the Court address that question the following Term, when, in *Idaho v. Coeur d'Alene Tribe*, all nine Justices reaffirmed *Ex parte Young*'s central jurisdictional rule: despite Article III's state sovereign immunity principle, federal courts may exercise subject-matter jurisdiction over private lawsuits against state officials seeking to coerce States' compliance with

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66. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) ("The *Young* exception to sovereign immunity was an important part of our jurisprudence" when the Court held in *Seminole Tribe* that "Congress, in the exercise of its power to regulate commerce . . . may not abrogate state sovereign immunity."). Commentators also commonly refer to *Young* as creating an "exception" to the Constitution's state sovereign immunity rule. See, e.g., Monaghan, *supra* note 6, at 102.

67. *Seminole Tribe*, 517 U.S. at 71 n.14. In addition to *Ex parte Young*, the Court lists two other "methods of ensuring the States' compliance with federal law": first, the federal government may itself, through the Executive branch, bring enforcement actions against States in federal court; and, second, the Supreme Court may exercise federal appellate jurisdiction to review state court decisions, even in cases where a state citizen alleges that a State violated federal law. *Id.*

68. See *id.* at 75 n.17. The Court refused to permit the Tribe's claim to go forward against the Governor of Florida using *Ex parte Young* jurisdiction because, the Court concluded, Congress had intended for federal courts to have only limited remedial options—namely, an injunction to require the State to negotiate in good faith towards a gaming compact—when exercising their statutory jurisdiction to enforce IGRA's state obligations. See *id.* at 73-74. Declaring that *Ex parte Young* jurisdiction necessarily invested the federal court exercising that jurisdiction with "the full remedial powers of a federal court, including, presumably, contempt sanctions," *id.* at 75, the Court reasoned that IGRA's more limited remedial options meant that Congress must have intended to preclude *Ex parte Young* jurisdiction to supplement or to substitute for IGRA's actual jurisdictional grant. See *id.* That is, having struck down IGRA's grant of federal jurisdiction on sovereign immunity grounds, the Court relied on the congressional intent behind that stricken jurisdictional package to deny *Ex parte Young* jurisdiction for the Tribe's claim. See *id.* For a thorough critique of the Court's reasoning on this question, see Jackson, *supra* note 6, at 512-30, where the author refutes what she describes as the "flawed" and "unconvincing" analysis of congressional intent in IGRA as the reason the Court denied *Ex parte Young* jurisdiction over the Tribe's claim; see also *Coeur d'Alene*, 521 U.S. at 298 (Souter, J., dissenting) (noting that "[w]hen Congress has not so displaced the *Young* doctrine, a federal court has jurisdiction in an individual's action against state officers" for prospective relief enforcing future compliance with federal law).

federal law.<sup>69</sup> While the Justices disagreed sharply about *when* a federal court should exercise its *Young* jurisdiction,<sup>70</sup> no Justice questioned the premise, necessarily underlying their debate, that it is an appropriate exercise of the Article III judicial power for the Court to set the terms on which *Young* jurisdiction should be available. And no Justice offered a *constitutional* reason—nor, indeed, any legal reason at all—why that jurisdiction does not violate Article III's sovereign immunity principle, declared an absolute constitutional bar to Congress in *Seminole Tribe*.<sup>71</sup>

Indeed, in the nine decades since *Ex parte Young* was decided, the Supreme Court has never offered an affirmative, law-based justification for *Young*'s jurisdictional distinction between a State and its officials. In fact, the Court has admitted that, in its view, *Ex parte Young* jurisdiction rests entirely on a court-crafted "fiction"<sup>72</sup> lacking a substantive basis in the Constitution or any other source of law besides the *Young* decision itself.<sup>73</sup> Moreover, this Article suggests, a

69. See *Coeur d'Alene*, 521 U.S. at 269 ("The *Young* exception to sovereign immunity was an important part of our jurisprudence when the Court . . . held that Congress . . . may not abrogate state sovereign immunity. . . . We do not, then, question the continuing validity of the *Ex parte Young* doctrine." (citing *Seminole Tribe*, 517 U.S. at 71 n.14)); see also *infra* Part IV.A (discussing *Coeur d'Alene* opinions). Immediately following the decision in *Seminole Tribe*, however, the status of *Ex parte Young* seemed less than certain. Compare Monaghan, *supra* note 6, at 103 (asserting that after *Seminole Tribe*, "the rule of *Ex parte Young* remains in full force"), with Jackson, *supra* note 6, at 498, 510-46 (developing argument that *Seminole Tribe*'s "analysis of *Ex parte Young* . . . may threaten more generally the availability of federal courts as enforcers of the supremacy of federal law as against state officials").

70. Compare *Coeur d'Alene*, 521 U.S. at 270-78 (proposing standard for determining whether *Young* action appropriate in particular case along with Chief Justice Rehnquist), with *id.* at 288-96 (O'Connor, J., concurring in part and concurring in the judgment) (rejecting principal opinion's standard along with Justices Scalia and Thomas), and *id.* at 297-317 (Souter, J., dissenting) (rejecting interpretation of *Young* in both principal opinion and concurrence along with Justices Stevens, Ginsburg, and Breyer). See generally *infra* Part IV.A (discussing three *Coeur d'Alene* opinions).

71. Interestingly, even as the Justices in *Coeur d'Alene* debated when *Ex parte Young* jurisdiction ought to be available, no one actually argued that the *Young* rule is constitutionally founded. Indeed, when Justice Kennedy and Chief Justice Rehnquist argued that the Constitution's federalism principles counsel a limited use of *Young*, see *Coeur d'Alene*, 521 U.S. at 274-80, the other Justices disagreed, but mentioned no affirmative constitutional counter-principle in *Young*'s favor. See *id.* at 287-89 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 295-97 (Souter, J., dissenting). See generally Part IV.A (discussing three *Coeur d'Alene* opinions).

72. See *supra* note 19.

73. See *Coeur d'Alene*, 521 U.S. at 270 (agreeing with *Pennhurst II*'s "observation" that *Young* rests on a "fictional distinction between the official and the State"); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105-06 (1984) (describing *Ex parte Young* doctrine as resting on "fiction" and "irony"); see also Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1135-37 (1989) (acknowledging *Young*'s creation of legal fiction, but observing that Justice Peckham himself does not admit to doing so); Monaghan, *supra* note 6, at 127 (asserting that "[e]veryone now recognizes that nothing but a fiction is involved" in *Young*'s stripping an official of her official

close reading of *Young* shows that it depends on no source of law, constitutional or otherwise, for its jurisdictional rule.<sup>74</sup>

C. *Doing the Court's Work: Alternative Justifications for*  
*Ex parte Young*

Although the Court resolutely insists the *Ex parte Young* jurisdiction rests on fiction, others have proffered more substantive justifications for the rule. Here are three alternatives, none of which, I suggest, can account for *Young's* survival of *Seminole Tribe*.

1. *Young's* Common-Law Roots

Some commentators observe that, by permitting federal-court lawsuits against state *officials* even though lawsuits against *States* are constitutionally prohibited, the *Young* doctrine perpetuates a common-law tradition—long predating the Constitution's Article III and Eleventh Amendment—under which a sovereign's official agents could be sued for certain injuries caused in the conduct of their official duties, notwithstanding the sovereign's own immunity from suit for the officials' harmful conduct.<sup>75</sup> These scholars argue, accordingly, that *Ex parte Young* imported that common-law practice into the sovereign immunity principle incorporated in the American Constitution. *Young's* common-law pedigree, under this view, gives the doctrine an affirmative legal footing equal, or at least sufficiently equivalent, to the constitutional status held by the sovereign immunity rule that *Young* abrogates.<sup>76</sup>

But this justification for *Ex parte Young* cannot explain *Young's* survival of *Seminole Tribe*, and not only because the Court

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status solely in order to obtain federal jurisdiction despite the Eleventh Amendment); Monaghan, *supra* note 21, at 1386 (describing rationale for *Young* jurisdiction as "shaky"); see also CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 48, at 311 (5th ed. 1994) ("The decision in *Ex parte Young* rests on purest fiction. It is illogical. It is only doubtfully in accord with the prior decisions.").

74. See *infra* notes 187-90 and accompanying text.

75. See, e.g., Currie, *supra* note 21, at 150-54; Engdahl, *supra* note 21, at 5-28; Fletcher, *supra* note 21, at 1042-45; Jackson, *supra* note 56, at 60.

76. See, e.g., Jackson, *supra* note 56, at 60 (criticizing Court in *Pennhurst II* for divorcing *Young's* jurisdictional fiction from the "traditional range of remedies available at common law against officers"); see also Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 2 (1998) (asserting that *Young's* sovereign immunity exception "did not originate with that case"); see generally sources cited *supra* note 75.



itself ignores this view.<sup>77</sup> The common-law tradition of officer liability did not concern the Article III problem of subject-matter jurisdiction—that threshold authorization for a federal court even to entertain a claim—on which the Supreme Court has now unequivocally focused the Constitution’s state sovereign immunity principle.<sup>78</sup> Instead, that tradition recognized certain common-law *causes of action* that were permitted to proceed against public officials because those *substantive claims*, on the merits, were deemed to lie against an official as an individual, and not merely against him as representative of the sovereign, which stood immune from such substantive claims.<sup>79</sup>

But outside the common law, and inside Article III courts, the fact that a complaint states a recognized cause of action, on the merits, does not automatically confer subject-matter jurisdiction on a

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77. See *infra* Part III.C (discussing *Young’s* departure from common-law tradition permitting lawsuits against officials despite sovereign immunity).

78. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 65 (1996). The Court’s jurisdictional view of state sovereign immunity is by no means the only way to interpret the Eleventh Amendment, as abundant scholarship demonstrates. See Chemerinsky, *supra* note 15, at 645, 648, 653 (criticizing *Pennhurst II* Court for adopting theory of Eleventh Amendment as imposing “constitutional restriction on [the] subject matter jurisdiction” of the federal courts, where alternative non-jurisdictional immunity theories were equally supported by constitutional text, structure, and history and, most importantly, where alternatives would permit more federal court enforcement of federal law); see also Field, *supra* note 61, at 538-49 (offering alternative theory under which state sovereign immunity enjoys only common-law status, and thus is subject to legislative displacement by Congress); Fletcher, *supra* note 21, at 1045-63, 1091 (offering alternative theory under which state sovereign immunity only removes diversity jurisdiction between a State and citizens of another State from Article III’s available heads of jurisdiction, thus limiting the principle to the literal words of the Eleventh Amendment; criticizing Court’s *jurisdictional* view of sovereign immunity as “based on a false premise”). But after *Seminole Tribe*, if not well before, see *Pennhurst II*, 465 U.S. at 120, it would appear clear that the Supreme Court has definitively rejected these alternative theories of state sovereign immunity, in favor of the view that it constitutes an inherent Article III constraint on all exercises of federal subject-matter jurisdiction. See *Seminole Tribe*, 517 U.S. at 54, 64-65.

79. See, e.g., Chemerinsky, *supra* note 15, at 656 n.70 (citing common law agency cases, and RESTATEMENT (SECOND) OF AGENCY, for principle that “an agent may not claim immunities of a principal”); Currie, *supra* note 21, at 153-55 (arguing that *Ex parte Young* was consistent with common law agency rules holding agent personally liable for his own torts, but not for breach of contract between his principal and a third party); Engdahl, *supra* note 21, at 14-21 (describing pre-*Young* tradition distinguishing those actions—namely, in tort—that could be maintained against a private or public agent, from actions—in contract—that could not be maintained against a public or private agent; explaining that *public* agents sued on a cause of action allowed to lie against them personally could not invoke the sovereign immunity of the state-principal, even if the principal had authorized the tortious act). See generally Fletcher, *supra* note 21 (developing theory of sovereign immunity that begins with question whether substantive cause of action can be created by federal government, and only then asks whether sovereign immunity values are served by permitting such actions against a State, or only against that State’s officials, in federal court).

federal court to adjudicate that claim.<sup>80</sup> Quite the contrary. As *Seminole Tribe* itself makes clear, sovereign immunity denies federal courts subject-matter jurisdiction to entertain lawsuits against States no matter how well-founded a plaintiff's claim might be: without good subject-matter jurisdiction, that claim may not even cross the federal court's threshold.<sup>81</sup> Thus, now that the Court has unequivocally declared state sovereign immunity to be *jurisdictional*, the Court has rendered obsolete any defense of *Ex parte Young* that depends on the traditional availability of common-law *causes of action* against public officials: while that tradition might well reinforce the federal courts' authority to create private rights of action under the Constitution or other federal laws, the tradition cannot supply the *jurisdiction* to enforce those claims in federal court that *Seminole Tribe's* sovereign

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80. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869))); see also 28 U.S.C. § 1332 (1994 & Supp. 1996) (granting federal jurisdiction to hear state claims only if brought between diverse parties and if the "amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs").

81. The *Seminole Tribe* Court did not question whether Congress had the authority to impose on States the obligation to negotiate in good faith towards compacts with Indian Tribes to govern their in-state gaming activities. *Seminole Tribe*, 517 U.S. at 61 n.10 (refusing to reach question whether IGRA's substantive obligation on States to negotiate with Tribes over gaming activities exceeded Congress' authority as limited by Tenth Amendment). *But see* Monaghan, *supra* note 6, at 119 (observing that Tenth Amendment "may have provided a more secure foundation for the Court's federalism concerns" in *Seminole Tribe* than did Eleventh Amendment). Indeed, the Court acknowledged that Article I vests Congress with the "exclusive" authority to regulate commerce—apparently, including gaming activities—with the Indian Tribes. See *Seminole Tribe*, 517 U.S. at 71-74; see also U.S. CONST. art. I, § 8, cl. 3; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (holding that, absent federal legislative authorization, States may not regulate commercial activities of Indian Tribes). Notwithstanding Congress' legislative authority to impose that obligation on States, the federal court still lacked subject-matter jurisdiction to hear the Tribe's claim to enforce that obligation on the merits. In the Court's words:

Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

*Seminole Tribe*, 517 U.S. at 72-73 (concluding that Tribe's suit "must be dismissed for lack of jurisdiction"). *But see* *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 818-19 (1824) (Marshall, C.J.) ("[T]he legislative, executive, and judicial powers, of every well-constructed government [must be] potentially coextensive . . . All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws.") (emphasis added); THE FEDERALIST NO. 80, at 516 (Alexander Hamilton) (Edward M. Earle ed., 1941) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with the legislative may be ranked among the number.").

immunity principle has taken away.<sup>82</sup> On its own terms, then, the traditional pedigree attributed to *Ex parte Young* fails to explain *Young's* survival of *Seminole Tribe*.

Even more simply, the Court itself has never adopted the scholarship's common-law justification for *Young* jurisdiction. Starting with *Ex parte Young* itself and continuing through *Coeur d'Alene*, the Court has treated *Young* as a parentless rule, a *sui generis* exception to state sovereign immunity whose precise contours are for the Court to decide, without serious fidelity to *Young's* putative common-law forebears.<sup>83</sup> Moreover, while the Court, in the century between the Eleventh Amendment's ratification and *Ex parte Young*, borrowed from the common law tradition to fashion a constitutional party-of-record rule to determine when a federal lawsuit against a state official was "in effect" an improper suit against the State itself, these pre-*Young* cases never adopted the common-law tradition wholesale: in this era, the Court prohibited federal lawsuits that the common law would have permitted, and permitted some that the common law would not have done.<sup>84</sup> What is more, in *Ex parte Young* the Court departed sharply even from this nineteenth-century precedent, leaving farther behind whatever remnants of the common law tradition the old party-of-record rule had preserved.<sup>85</sup>

In fact, scholars who emphasize *Young's* common-law foundations have criticized the Court for ignoring that pedigree,<sup>86</sup> and for

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82. So, for example, then-Professor Fletcher argued that, contrary to the Court's view that sovereign immunity is jurisdictional, where the Constitution otherwise authorizes Congress or the Court to create private rights of action to enforce federal law, no theory of state sovereign immunity should be adopted that would deny federal subject-matter jurisdiction to enforce those claims in federal court. See Fletcher, *supra* note 21, at 1108-31 (advocating an approach to sovereign immunity that would find federal judicial power to enforce any cause of action within the federal government's power to create); see also *Seminole Tribe*, 517 U.S. at 76 (Stevens, J., dissenting) ("This case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right.").

83. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 663-71 (1974).

84. See Currie, *supra* note 21, at 153. See generally *The Virginia Coupon Cases*, 114 U.S. 269 (1885) (permitting private federal lawsuit against state officials who had seized or threatened to seize personal property to satisfy state taxes already paid with state bond interest coupons, even though complaint alleged that bond repudiation amounted to an unconstitutional state impairment of contract, and even though common law did not recognize action against agent to enforce contract made by principal).

85. See *infra* Part III.C.

86. Commentators convinced that *Young* jurisdiction was "indispensable" for enforcing federal law against recalcitrant States have roundly criticized the Court for admitting the fiction to be fiction and have proposed alternative, non-fictional justifications for the *Ex parte Young* rule. See, e.g., WRIGHT, *supra* note 73, at 292 ("[I]n perspective the doctrine of *Ex parte Young* seems indispensable to the establishment of Constitutional government and the rule of law."); Jackson, *supra* note 56, at 60 (criticizing *Pennhurst II* Court for not justifying *Young*

thus relegating so venerable a tradition to the vulnerable status of "legal fiction."<sup>87</sup> Accordingly, if *Young's* survival of *Seminole Tribe* does, as I suggest, raise questions about how the Court perceives its own freestanding power—apart from Congress—to regulate federal jurisdiction over lawsuits challenging state interests, then those questions cannot be answered by an account of *Young* that the Court itself ignores, no matter how compelling that alternative might otherwise be.

## 2. Where There is a Federal Right, a Federal Judicial Remedy Follows

Some commentators offer another justification for *Ex parte Young* jurisdiction, one also not embraced by the Court.<sup>88</sup> This alternative makes no attempt to provide a law-based foundation for *Young's* particular distinction between the State and its officials; instead, this argument emphasizes, more generally, how important federal courts are, within the Constitution's institutional framework, in maintaining the rule of law against errant States.<sup>89</sup> Starting from

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fiction "by reference to the traditional range of remedies available at common law against officers"). But the Court adopted none of these alternatives, and in *Coeur d'Alene* it reaffirmed its view that *Young* rests on a fiction and nothing more. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (agreeing that *Young* rests on a "fictional distinction between the official and the State"); see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself."). But see *id.* at 71 n.10 (stating that "[o]f course" a suit against an official in an official capacity for injunctive relief is not treated as an action against the State because of the *Ex parte Young* doctrine).

87. Not only did *Young's* fiction stand out as unprincipled even among the Court's labyrinthine sovereign immunity cases, see Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 53-59 (1990) (describing Court's case law on Constitution's principle of state sovereign immunity as replete with "[n]umerous unconvincing doctrinal formulations," of which *Ex parte Young* is only one), but it also looked vulnerable to being abandoned by the Court as spontaneously as it had been embraced. See *id.* at 99-100 n.196 (observing that, "[l]ogically, the recognition of the fiction of *Young* might lead a court . . . to abandonment of that fiction if it concludes, in light of state remedies and Congress's power to create causes of action, that it is no longer necessary to vindicate supreme federal law"); see also Chemerinsky, *supra* note 15, at 657-58 (arguing that *Pennhurst II's* characterization of *Young* as a fiction leaves the rule unprincipled and therefore *Young* "will survive only so long as the Supreme Court believes that the fiction produces the desirable result").

88. I am particularly grateful to Barry Friedman and Lawrence Lessig for raising this argument to me.

89. See, e.g., Monaghan, *supra* note 21, at 1386 ("[S]ince *Ex parte Young* it has been understood that sovereign immunity does not prohibit enjoining official action which threatens individual rights in violation of the Constitution."); *id.* (describing *Young* jurisdiction as "indispensable to our understanding of 'the rule of law'").

the traditional view that the Supreme Court enjoys a special role in identifying which *rights* the Constitution accords individuals,<sup>90</sup> the argument posits that federal courts must therefore also have a special role in vindicating those individual rights—that is, of enforcing the Constitution—when they are violated by government action, whether state or federal.<sup>91</sup> That means, in turn, that federal courts *must* have subject-matter jurisdiction, despite state sovereign immunity, to entertain private plaintiffs' claims that States are violating the Constitution, because otherwise federal courts could not fulfill their special role of remedying constitutional violations. In short, jurisdiction must follow automatically from the courts' authority to decide individuals' constitutional claims on the merits: *Young's* distinction between a State and its officials may not derive from any particular source of law, but, overall, it reflects an acceptable, statesmanlike compromise between Article III's sovereign immunity value and the value of state accountability<sup>92</sup>—a compromise, again, that the Court is uniquely equipped to strike because of its special role in identifying constitutional rights.

This justification for *Ex parte Young* jurisdiction, like the common-law view, fails to explain *Young's* survival of *Seminole Tribe*. Again, now that the Court has declared sovereign immunity to be an anterior limitation on the Article III judicial power—now that sovereign immunity is emphatically *jurisdictional*—the constitutional *merits* of any plaintiff's claim of harm lie beside the point: without good subject-matter jurisdiction, that claim may not even cross the federal court's threshold.<sup>93</sup> Indeed, even in *Marbury v. Madison* itself

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90. See *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (stating that *Marbury* declared the federal judiciary "supreme in the exposition of the law of the Constitution"); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that the Court defines which "fundamental rights" are protected by Constitution's due process guarantees); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that once the Court defines the scope of the First Amendment's Religion Clauses, Congress may not contradict it; thus the federal Religious Freedom Restoration Act was invalidated as exceeding Congress' legislative power under Section 5 of the Fourteenth Amendment).

91. See, e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293-94 (1995) (stating Article's thesis that Constitution should be judicially enforceable without congressional authorization and that "separation of powers principle demands judicial enforcement"); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1534 (1972) ("Once substantive legal norms have been declared to be in the Constitution, there is much to be said for a judicial prerogative to fashion remedies that give flesh to the word and fulfilment to the promise those norms embody.").

92. See *Pennhurst II*, 465 U.S. 89, 105 (1984) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.").

93. See FED. R. CIV. P. 12(b)(1) (authorizing federal district court to dismiss complaint, prior to defendant's answer, for "lack of jurisdiction over the subject matter"); *supra* notes 77-82

(which enshrined the maxim that where there is a right, the law will provide a remedy)<sup>94</sup> the Court refused to enforce Marbury's legal entitlement because the Court lacked subject-matter jurisdiction to hear that claim.<sup>95</sup>

Moreover, even taken on its own terms, this alternative justification for *Young* is unconvincing. First, the linkage between constitutional rights and judicial remedies, on which the argument depends, is neither so tight nor so hallowed as the argument suggests. Even

and accompanying text (discussing relationship between jurisdiction over claim and claim's merits). Or, as Professor Wechsler stated in another context more than a generation ago:

Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so they must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison* was all about.

Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965). Again, the Court has never adopted the view that the existence of a good claim on the merits somehow automatically confers federal subject-matter jurisdiction. Remember, the *Seminole Tribe* Court found nothing invalid about Congress' decision, under Article I, to impose an obligation on States to negotiate with Indian Tribes over in-state gaming; but for sovereign immunity's bar to federal subject-matter jurisdiction, the Tribe's effort to enforce that statutory obligation—to state a good claim on the merits under IGRA—would apparently have survived at least a motion to dismiss. Indeed, the only instance in which the substance of a claim, on the merits, would appear to affect the sovereign immunity bar, under *Seminole Tribe*'s reasoning, would be where the claim arose out of a constitutional provision ratified after the Eleventh Amendment, as from the Fourteenth Amendment's equal protection or due process guarantees, since “the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.” *Seminole Tribe*, 517 U.S. at 65-66 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976)).

94. Asking, “If [Marbury] has a right, and that right has been violated, do the laws of his country afford him a remedy?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154 (1803), Justice Marshall declared:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . 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.

*Id.* at 163.

95. *Id.* at 137 (invalidating Congress' jurisdictional grant over Marbury's case because it exceeded bounds of Article III). Likewise, when the Court first addressed the question whether the Constitution authorized private rights of action for damages caused by federal officials' violations of constitutional rights, the Court assumed the subject-matter jurisdiction for any such claim derived not from any inherent judicial power to remedy constitutional wrongs, but from Congress' statutory grant of jurisdiction over any civil action that “arises under the Constitution or laws of the United States.” *Bell v. Hood*, 327 U.S. 678, 680 (1946) (holding that lower court erred in dismissing, for want of subject-matter jurisdiction, private claims under the Fourth and Fifth Amendments; citing predecessor to 28 U.S.C. § 1331); *see also Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (recognizing implied private right of action for damages against federal officials for violations of the Fourth Amendment).

when federal courts *do* have good subject-matter jurisdiction over claims of constitutional harm, not every injured right receives a remedy: sometimes, federal courts identify constitutional rights but then leave them unremedied and unenforced.<sup>96</sup> Likewise, federal constitutional claims may be pursued in *state* courts, thus further undermining the suggestion that a federal constitutional right so necessarily entails a remedy *from a federal forum* that its presence in a lawsuit automatically overcomes Article III's sovereign immunity bar to subject-matter jurisdiction.<sup>97</sup>

In addition, while this alternative view springs from federal courts' special status as defenders of federal *constitutional* rights, the Court has also made *Ex parte Young* jurisdiction available for claims that States, through their officials, are violating federal *statutory* requirements,<sup>98</sup> which do not trigger the courts' special role. Thus, even if this alternative could provide a law-based foundation for *Ex parte Young* jurisdiction, it could only do so for some of the claims that *Young* authorizes.

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96. See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992) (conducting full analysis of this observation). Professor Friedman describes the phenomenon in this way:

If *Marbury's* fundamental tenet were correct, we would expect to find a tight congruence in constitutional law between right and remedy. What emerges from a study of the law of remedy and enforcement, however, is the picture of a system in which there is tremendous flexibility in the fit between right and remedy and therefore a system in which rights receive far less respect than the rhetoric would suggest.

*Id.* at 738; see also *id.* at 741-67 (detailing the slippage between constitutional rights and their remedies when infringed).

97. In another context, some commentators argue that federal courts' special prerogative to identify constitutional rights means that Congress must grant them subject-matter jurisdiction to hear claims arising from those rights, on the theory that such claims fall within an Article III-driven, constitutionally mandated core of federal subject-matter jurisdiction that Congress must authorize courts to exercise. See, e.g., *Webster v. Doe*, 486 U.S. 592, 599-601 (1988) (discussing cases where Congress did or did not express a statutory intent to prohibit judicial review). Compare Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985) (purporting to establish that the Framers did not intend to require the creation of lower federal courts; but did intend instead that some federal court be open to hear and resolve finally any given federal question), with Hart, *supra* note 32, at 1372 (arguing that Congress has plenary power to dictate jurisdiction of inferior federal courts). But not even these "mandatory jurisdiction" advocates suggest that the Court may—where Congress is constitutionally barred—grant itself subject-matter jurisdiction over cases outside of Article III, as the Court has done by preserving *Young* after *Seminole Tribe*.

98. See, e.g., *Edelman v. Jordan*, 415 U.S. 663, 664-68 (1974) (holding that *Young* jurisdiction is available for private claim seeking injunction requiring state officials to comply with requirements of federal Aid to the Aged, Blind, or Disabled program operating under the federal Social Security Act); see also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (noting obligation of Article III courts to ensure the supremacy of Federal statutory law); *Seminole Tribe*, 517 U.S. at 73-76 (suggesting that Congress could use *Young* jurisdiction to enforce provisions of ordinary legislation enacted pursuant to Commerce Clause).

The Supreme Court itself has never said that *Young* derives any *legal* support from the Court's special authority to define constitutional rights. But the Court does share one view with those who do: that *Young* jurisdiction, however fictional its roots, fills a critical need for federal-court enforcement of some federal laws against recalcitrant States,<sup>99</sup> a need created when *Hans v. Louisiana* extended state sovereign immunity to bar federal jurisdiction even over claims arising under the Constitution or federal statute.<sup>100</sup>

But the *need* to guarantee state compliance with federal law—to enforce the Constitution's Supremacy Clause—does not transform the *Ex parte Young* fiction into a rule of constitutional law. The Supremacy Clause, which declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land,”<sup>101</sup> says nothing at all about federal court *jurisdiction* to enforce that supremacy on the merits in lawsuits against non-complying States, whether on *Young*'s terms or any other.<sup>102</sup> Indeed, the Supremacy Clause makes only one reference to any court at all, and that is to *state* courts, declaring that “the Judges in every State shall be bound” by federal law.<sup>103</sup>

99. See, e.g., *Coeur d'Alene*, 521 U.S. at 269 (stating that the *Young* doctrine serves the “need to prevent violations of federal law”); *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89, 105-06 (1984) (emphasizing that the *Young* doctrine “rests on the need to promote the vindication of federal rights”); see also *Seminole Tribe*, 517 U.S. at 174 (Souter, J., dissenting) (“The doctrine we call *Ex parte Young* is nothing short of indispensable to the establishment of constitutional government and the rule of law. [It] marks the frontier of the enforceability of federal law against sometimes competing state policies.”) (internal quotations omitted).

100. See *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890); *supra* notes 54-62 and accompanying text (discussing *Hans* and *Seminole Tribe*).

101. U.S. CONST. art. VI. In the Court's words, “the availability of 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.” *Green v. Mansour*, 474 U.S. 64, 68 (1986) (citing *Pennhurst II*, 465 U.S. at 102). But see *Jackson*, *supra* note 56, at 60 (criticizing *Pennhurst II* Court for justifying *Ex parte Young* remedy “solely by reference to the superior demands of the Constitution in the face of prohibited state conduct”).

102. While the Supremacy Clause thus establishes a choice of law rule to govern a court having jurisdiction over the merits of a controversy, it is silent on the source of that jurisdiction itself. See U.S. CONST. art. VI.

103. *Id.*; see *Coeur d'Alene*, 521 U.S. at 275-76 (stating that the Supremacy Clause creates “one system of jurisprudence” binding together state and federal law; this means that States have “proprietary concern” to interpret federal law and to integrate those sources into state law (quoting *Clafin v. Houseman*, 93 U.S. 130, 137 (1876))). While some commentators have cited the Supremacy Clause in arguing that Congress may not, by simple legislation, strip federal courts altogether of the jurisdiction to hear certain kinds of constitutional claims, I have found none who make the further argument that the Supremacy Clause independently grants federal courts the jurisdiction to hear private lawsuits that would otherwise be barred by state sovereign immunity principles.



What is more, even if the Supremacy Clause could give a constitutional status to *Young's* jurisdictional rule, then it is unclear why it would not also save Congress' jurisdictional grant rejected in *Seminole Tribe*. That is, if the need to use federal courts to enforce federal law against States were enough to constitutionalize the *Young* model, then that same need would seem to be enough to constitutionalize Congress' *Seminole Tribe* model as well. But the *Seminole Tribe* Court rejected that view: Congress' view of the *necessity* of having federal courts enforce the statutory obligations at issue conferred no constitutional authority on Congress to grant that jurisdiction despite sovereign immunity.<sup>104</sup> The Supremacy Clause thus appears to provide no particular *law*-based foundation for any exception to Article III's state sovereign immunity privilege. And the Supreme Court has never claimed otherwise.

### 3. A Structural Foundation

A third alternative justification for *Ex parte Young* resembles the second. Not only does the Court hold the power to define constitutional rights, but it also plays a special role in "say[ing] what the law is" on the Constitution's *structural* principles, like federalism<sup>105</sup> and the separation of powers.<sup>106</sup> If *Young's* jurisdictional distinction between States and their officials rested on a substantive tenet of *federalism*—like the Tenth Amendment rule that the federal government may not "commandeer" state officials to carry out federal

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104. Compare *Seminole Tribe*, 517 U.S. at 61-66 (overruling *Union Gas's* reasoning that Congress' Article I power to regulate interstate commerce must include the abrogation power because "in many situations, it is only money damages that will carry out Congress' legitimate objectives" in exercising commerce power), with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989) (plurality opinion) (stating that Article I's grant of commerce power to Congress "would be incomplete without the authority to render States liable in damages" when they violate Commerce Clause legislation). Yet, Congress might have used the federal courts to enforce States' IGRA obligations if it had chosen the Court's *Ex parte Young* jurisdictional model. See *Seminole Tribe*, 517 U.S. at 75 n.17.

105. Compare *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the Court should exercise aggressive judicial review to enforce Constitution's federalism principles against congressional legislation that violates them), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* for too aggressively regulating federalism's balance of power between federal and state government; declaring that "principal means chosen by the Framers to ensure the role of the States in the federal system" lies in States' political representation in Congress). See generally Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (discussing Court's shift in attitude between *National League of Cities* and *Garcia*—and controversy among commentators—about the proper judicial role in enforcing substantive federalism principles).

106. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-89 (1952).

policy<sup>107</sup>—then *Young* jurisdiction would not be “fictitious” at all. Indeed, like the sovereign immunity bar itself, *Young*’s exception to that rule would express an affirmative constitutional command: although Article III and the Eleventh Amendment prohibit direct federal lawsuits against States to enforce federal law, some other substantive federalism principle authorizes indirect lawsuits to do the same thing.

But there is no such other federalism principle, and the Court, again, has pointed to none. While *Ex parte Young* furthers the goals of constitutional federalism—while *Young*, as a practical matter, helps maintain a balance between federal supremacy and state autonomy—the *Young* rule itself is not compelled or even suggested by any law-based source of constitutional meaning about federalism. Unless the Court’s power to *interpret* the Constitution’s structural principles also conveys the power to make them up—“to say what the law is” based on no legal authority at all—then this alternative justification must also fail to explain how *Young* could survive *Seminole Tribe*.

This Article proposes, however, that *Ex parte Young* jurisdiction does reflect an exercise of the Court’s special power to define the Constitution’s other structural principle: the separation of powers among the federal branches of government. If it is true that *Young*’s sovereign immunity exception rests on no substantive legal standard outside the Court’s say-so, then the next question is inevitable. What Article III “judicial Power” authorizes the Court—where Congress is constitutionally barred—unilaterally to grant federal courts jurisdiction over private lawsuits challenging state interests?

#### D. *Seminole Tribe Raises the Ex parte Young Stakes*

Before *Seminole Tribe*, the question of whether *Young* jurisdiction could claim any affirmative constitutional foundation was less pressing; any one of these three or other alternative grounds for the *Young* fiction might well have sufficed.<sup>108</sup> So long as the Court

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107. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (invoking Constitution’s substantive federalism principles to invalidate federal legislation concerning firearms registration). See generally *Jackson*, *supra* note 1, at 2183-205 (detailing Court’s development of anticommandeering rule).

108. The question raised in this Article—whether *Ex parte Young*’s fiction can claim a law-based foundation—has received very little attention in legal scholarship outside the work analyzing the tradition of official liability predating *Young*. See *supra* Part II.C.1. This is not to say that *Ex parte Young* jurisdiction has been uncontroversial: the decision sparked a public outcry in its day. See *WRIGHT*, *supra* note 73, at 311 (describing harsh public criticism of

suggested that Congress might abrogate state sovereign immunity in the exercise of its Article I powers—thus *legislatively* granting federal courts subject-matter jurisdiction over private lawsuits to enforce federal law against unconsenting States—the Court's *judicial* abrogation through *Ex parte Young* simply closed the doctrinal circle. The principle of state sovereign immunity could be understood, with at least internal consistency, as a State's *presumptive* constitutional privilege, subject to withdrawal when one of the Constitution's federal branches<sup>109</sup> decided that the federal interest in having federal courts enforce federal law overcame the background presumption of state immunity from such lawsuits.<sup>110</sup> Before *Seminole Tribe*, that is, abrogation could make sense as a power belonging generally to the federal government because of its constitutional supremacy, and available for use by any one of the Constitution's three institutional decisionmakers acting within its own sphere.<sup>111</sup>

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decision and citing literature observing that outcry was "reminiscent" of public response to *Chisholm v. Georgia*). But Congress focused its anxiety on the remedial aspect of *Young's* ruling—that lower federal court judges could enjoin the enforcement of state law—and responded not with legislation denying federal courts that subject-matter jurisdiction altogether, but instead, with legislation requiring *Ex parte Young* claims to be heard in the first instance by three-judge courts, with direct appeal to the Supreme Court, a requirement that remained in place, in some form, until 1976. *See id.* at 315-16.

109. Before *Seminole Tribe*, in some sense, the doctrinal circle connected all three points of the Constitution's federal framework, since even before *Ex parte Young* the Court had already announced that "the Federal Government"—embodied, of course, in the Executive branch—"can bring suit in federal court against a State" to enforce compliance with federal law, notwithstanding the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892), and noting that rule's justification was its "necess[ity] to the 'permanence of the Union'"). *Seminole Tribe* preserved this rule along with *Ex parte Young's*. *Id.*

110. The potential for federal abrogation either by Congress, by the Executive, or by the Court could thus be folded into the core definition of state sovereign immunity itself, much like the fact that States may *wave* sovereign immunity, thereby removing the jurisdictional bar, even though ordinary parties may not by consent confer subject-matter jurisdiction on a federal court which lacks it. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

111. *Cf. In re Debs*, 158 U.S. 564 (1895) (holding that the President's power to invoke federal courts' equity jurisdiction to enforce federal law against individual is coextensive with entire federal government's power to enforce federal law). To the extent that commentators before *Seminole Tribe* discussed abrogation not only from *within* sovereign immunity doctrine but from a separation of powers perspective, they suggested that Congress' claim to the abrogation power should outrank the Court's because the States' political representation in Congress meant that Congress could best protect the States' interests as against the federal government, including their interest in immunity from federal jurisdiction. *See* Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 695 (1976); *see also* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1413-14 (1975) (arguing that Eleventh Amendment meant particularly to target *federal courts'* power over States and so should not limit Congress' legislative power to regulate federal jurisdiction or to create substantive federal causes of action).

Moreover, so long as Congress was thought empowered to grant federal courts formal subject-matter jurisdiction over States *qua* States, despite sovereign immunity, *Young's* fictitious jurisdiction over state officials manifested no remarkable judicial independence: however much *Young* authorized federal courts to drive without a license, it was at least no more than what Congress *might* license the Courts to do.<sup>112</sup>

But when *Seminole Tribe* constitutionally disabled Congress from abrogating state sovereign immunity under Article I, while preserving the Court's own abrogation power in *Ex parte Young*, it broke the old doctrinal circle. It is something else again for Article III courts to exercise fictitious subject-matter jurisdiction over lawsuits that are, both in practice and in principle, indistinguishable from lawsuits that *Seminole Tribe* has now *constitutionally* barred Congress from admitting to the federal courts. In this light, the standard "fiction" invoked by the Court to justify *Ex parte Young* jurisdiction will not suffice. *Young's* survival of *Seminole Tribe* requires a closer reading of *Ex parte Young* itself, and of Supreme Court decisions developing *Young* into the full-blown jurisdictional doctrine reaffirmed in *Coeur d'Alene*.

### III. JUDICIAL ABRIGATION OF STATE SOVEREIGN IMMUNITY: *EX PARTE YOUNG*

In *Hans v. Louisiana*, recall, the Court held that the Constitution's state sovereign immunity principle denied federal subject-matter jurisdiction over private lawsuits against unconsenting States, even when plaintiffs alleged state violations of the federal

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112. Indeed, *Young* reached fewer lawsuits than Congress might have authorized through legislative abrogation. For example, Congress could have granted federal subject-matter jurisdiction over private lawsuits seeking retrospective relief in the form of damages, in addition to prospective equitable remedies like injunctions. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976). By contrast, *Ex parte Young* jurisdiction extends only to lawsuits seeking prospective injunctive and declaratory relief; *Young* does not confer subject-matter jurisdiction over retrospective damage claims. Compare *Edelman v. Jordan*, 415 U.S. 651, 675-78 (1974) (denying *Young* jurisdiction to lawsuits seeking damages for past violations of federal law), with *Seminole Tribe*, 517 U.S. at 58 (stating that "the relief sought by a plaintiff suing a State [itself] is irrelevant to the question whether the suit is barred by the Eleventh Amendment"). See also *infra* Part III.D.3 (arguing that *Edelman's* jurisdictional distinction between prospective and retrospective remedies itself rests only on policy grounds, and not on law-based authority).

Constitution.<sup>113</sup> Eighteen years later, the Court cracked back open federal court doors in *Ex parte Young*.<sup>114</sup>

A. *Ex parte Young: The Dispute and the Rule*

Between 1906 and 1907, the Minnesota legislature enacted a series of laws fixing the maximum railroad rates that could be charged for freight and passengers transported between stations in-state, setting the rates at levels well below what the railroads had been charging.<sup>115</sup> The penalties for disobedience were very high: any railroad officer or employee who caused a railroad to charge more than the fixed rates could be prosecuted criminally and jailed for ninety days.<sup>116</sup>

On the day before the rate schedules were to take effect, railroad shareholders filed suit in federal court on behalf of the regulated railroads.<sup>117</sup> Invoking the court's original subject-matter jurisdiction over questions arising under federal law,<sup>118</sup> plaintiffs claimed that the Minnesota rate legislation violated the United States Constitution in two ways. First, the low rates were themselves "unjust, unreasonable, and confiscatory" and would therefore deprive the railroads and their shareholders of their property "without due process of law."<sup>119</sup> Second, the legislation's severe criminal penalties for violating the rate schedules were "so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the [schedules'] validity" without risking loss of property and long imprisonment; in this way, too, plaintiffs contended the Minnesota rate legislation violated due process.<sup>120</sup>

Plaintiffs asked the federal court to declare the Minnesota rates unconstitutional. Citing threats by defendant Edward Young, the state attorney general, to prosecute criminally any railroad official who violated the rate schedules, plaintiffs requested an injunction prohibiting Young and the other named Minnesota officials from taking steps to enforce the rate legislation, and, particularly, prohibiting

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113. See *supra* notes 55-56 and accompanying text.

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

115. See *id.* at 127-28.

116. See *id.* at 128-29. Such violation was a misdemeanor. See *id.* at 129.

117. The shareholders brought their lawsuit as a derivative action. See *id.*

118. See *id.* at 143-44 (citing an 1875 statute granting general federal question jurisdiction to inferior federal courts, consistent with Article III, § 2).

119. *Id.* at 130 (framing claim also as violation of Constitution's equal protection guarantee).

120. *Id.* at 131 (framing claim also as violation of Constitution's equal protection guarantee).

them from instituting any proceedings against the railroad companies or their officers and directors for exceeding the fixed rates.<sup>121</sup> In response, the federal court entered a temporary restraining order prohibiting Young “from taking any steps against the railroads to enforce the remedies or penalties specified” in the rate legislation, including criminal penalties against railroad managers.<sup>122</sup>

On the next day, despite this federal injunction, Young went to Minnesota state court, bringing an action “for and in behalf of the state,”<sup>123</sup> and obtained an order commanding one of the railroads to adopt the freight rates fixed by Minnesota law.<sup>124</sup> The federal court promptly found Young in contempt and had him arrested.<sup>125</sup>

Seeking habeas corpus relief from the United States Supreme Court, Young argued that the federal trial court lacked subject-matter jurisdiction to hear the injunction action against him in the first place because the shareholders’ federal lawsuit challenging the Minnesota rate legislation was, “in effect, [a suit] . . . against one of the states of the Union.”<sup>126</sup> Consequently, Young insisted, the Eleventh Amendment barred the lawsuit and made the injunction against him unenforceable, by contempt or otherwise.<sup>127</sup>

The Supreme Court disagreed: Attorney General Young could not claim for himself the protection of *Minnesota’s* immunity from federal jurisdiction so to avoid a lawsuit challenging his enforcement of a state law allegedly violating the United States Constitution.<sup>128</sup> The Court, through Justice Peckham, announced:

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 State has no

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121. *See id.* at 129-30. Plaintiffs also sought injunctions prohibiting defendant railroad companies from adopting and complying with the rate schedules. *See id.* at 129.

122. *Id.* at 132.

123. *Id.* at 134.

124. *See id.* at 133-34.

125. *See id.* at 126, 134. The federal court first offered Young an alternative: a \$100 fine and Young’s dismissal of his state court action. Upon Young’s refusal, he was “committed to the custody of the marshal until [the federal injunction] was obeyed.” *Id.* at 126-27 (Peckham, J., separate statement).

126. *See id.* at 142, 149-51; *see also id.* at 134 (noting that Young resisted contempt in trial court on same Eleventh Amendment grounds).

127. *See id.* at 149-51.

128. *See id.* at 159.

power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>129</sup>

Once the state official is so “stripped” of his official character, the Court concluded, the federal lawsuit against him cannot be characterized as an action against the State; thus the Eleventh Amendment simply does not apply, and the lawsuit may proceed in federal court.<sup>130</sup> *Ex parte Young* thus carved out a substantial exception to the broad constitutional rule of state sovereign immunity that the Court had adopted in *Hans v. Louisiana*,<sup>131</sup> and launched the Court on a new jurisdictional path.

### B. *Young's Ancestors*

Well before *Hans* or *Young*—well before Article III, for that matter—traditional sovereign immunity doctrines had incorporated an exception that resembled *Ex parte Young's*. While the monarch was not subject to suit in its own courts, the Crown's officers enjoyed no such immunity and could themselves be sued without implicating the Crown's privilege.<sup>132</sup> Indeed, in post-Eleventh Amendment America, it first appeared that the Supreme Court might adopt this traditional sovereign immunity exception wholesale. In *Osborn v. Bank of the United States*, written by Chief Justice Marshall in 1824, the Court held that the Eleventh Amendment only applied to private lawsuits in which a State was itself formally named as a party defendant, and not where a state official was named instead.<sup>133</sup>

129. *Id.* at 159-60 (emphasis added) (citing *In re Ayers*, 123 U.S. 443, 507 (1887)).

130. *See id.*

131. *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890).

132. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 171 (1996) (Souter, J., dissenting) (citing authorities supporting the assertion that since the Middle Ages “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”). As I have indicated, some commentators consider the resemblance close enough to provide *Ex parte Young* with the law-based justification that the Court has not. *See Jackson, supra* note 56, at 60; *see also* sources cited *supra* note 21.

133. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857-58 (1824). Chief Justice Marshall reasoned:

It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. . . .

. . . The state not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of this jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

*Id.* Chief Justice Marshall concluded, “Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity,

Four years later, in *Governor of Georgia v. Madrazo*,<sup>134</sup> Chief Justice Marshall refined *Osborn's* broad exception and substituted a subtler standard, still in place when the Court heard *Ex parte Young*: even where a plaintiff names as party defendant only a state official, and not a State itself, the Eleventh Amendment bars federal subject-matter jurisdiction if the *relief* sought would, as a practical matter, run directly against the State, and not just against that official as an individual.<sup>135</sup> In such a case, *Madrazo* held, the lawsuit must be recognized as an action against the State despite plaintiff's artful pleading, and therefore beyond the court's subject-matter jurisdiction.<sup>136</sup>

So, in *Madrazo*, the federal court lacked subject-matter jurisdiction over a Spanish slave trader's lawsuit against the Governor of Georgia, seeking to recover certain slaves and proceeds from the sale of other slaves held by the State, because *only* the State—and not the Governor acting on his own<sup>137</sup>—could return the slaves if plaintiff prevailed.<sup>138</sup>

Likewise, under the *Madrazo* principle,<sup>139</sup> a plaintiff could sue the Richmond city Treasurer in federal court to recover an office desk

limited to those suits in which a State is a party on the record." *Id.* at 857. Accordingly, in that case the federal court could exercise subject-matter jurisdiction over a claim by the National Bank against the Ohio state Treasurer seeking to recover specie and bank notes in the Treasurer's possession, which the Treasurer had caused to be seized "by violence" from the bank's Ohio branch to pay state banking taxes declared unconstitutional in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Osborn*, 26 U.S. (9 Wheat.) at 857. While Ohio itself could not be "[brought] before the [federal] court," *id.* at 869, Ohio's officials could not claim the State's Eleventh Amendment immunity from federal court jurisdiction. *See id.* at 870-71.

134. *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828).

135. *See id.* at 124.

136. *Id.*

137. The unsold slaves were "in [the] possession of the [Georgia] government." *Id.* at 123. Further, the cash proceeds had been "paid into the treasury, where they [had] become a part of the funds of the state, not subject to [the Governor's] control." *Id.* at 120.

138. The Supreme Court also found *Madrazo's* lawsuit to be an improper suit against the State because the Governor had been sued in his official capacity only:

The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially. . . .

. . . The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. *In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record.*

*Id.* at 123-34 (emphasis added). The Court noted that if the State were *not* deemed the real party in interest, given the fact that the Governor was not sued in his individual capacity, there would be "no party against whom a decree [could] be made." *Id.* at 124.

139. Some commentators describe this pre-*Young* practice of officer liability by emphasizing not the relief a plaintiff could seek—as *Madrazo* does—but instead the causes of action that



(valued at \$30) that the Treasurer had wrongfully seized and held in his possession as payment for plaintiff's allegedly delinquent taxes, even though the plaintiff had tendered Virginia bond coupons which state law had declared to be receivable in payment for those taxes.<sup>140</sup> Since the Treasurer, acting on his own, could return that desk to the plaintiff, the lawsuit was not deemed a suit against the State itself barred by the Eleventh Amendment.<sup>141</sup>

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plaintiff was allowed to maintain against an official individually, despite the State or Crown's immunity. See Jackson, *supra* note 56, at 60; see also sources cited *supra* note 21. Described from either angle—relief or cause of action—the principle of officer liability in this era worked the same way. If an officer's action caused plaintiff what was recognized as a private harm that could be remedied by the officer acting individually, then sovereign immunity worked no bar. By contrast, if the plaintiff's lawsuit sought relief that only the State could give, for a harm that only the State could cause, then the lawsuit could not proceed. As I argue above, under doctrinal rules in place now and when *Seminole Tribe* was decided, the existence of a cognizable cause of action does not automatically confer subject-matter jurisdiction on an Article III court to hear that claim, where state sovereign immunity imposes its jurisdictional bar. See *supra* notes 77-82 and accompanying text.

140. See generally *Poindexter v. Greenhow*, 114 U.S. 270 (1884) (reported, along with seven other Supreme Court decisions issued on the same day, as one of the *Virginia Coupon Cases*, 114 U.S. at 269 (1885)). Rejecting the Treasurer's defense on the merits that a subsequent Virginia law had, in effect, made the coupons unacceptable as payment for state taxes, the Court determined that the later legislation was an unconstitutional law impairing the obligation of contracts. See *id.* at 280, 282; see also U.S. CONST. art. I, § 10, cl. 1 (Contracts Clause). Once the plaintiff had paid his taxes with bond coupons, deemed lawful tender under the prior Virginia legislation:

The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another.

*Poindexter*, 114 U.S. at 282-83; see also Engdahl, *supra* note 21, at 14-20 (noting that common law recognized a cause of action in tort against official individually for wrongful detainer of property).

141. See *Poindexter*, 114 U.S. at 287-88. Similarly, in *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U.S. 446, 452 (1883), the Court noted that the Eleventh Amendment posed no bar to federal jurisdiction in that:

class of cases . . . where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. . . .

. . . In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer.

*Id.* But see *Poindexter*, 114 U.S. at 290 (asserting as a general principle that "[t]hat 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"). See generally *Pennoyer v. McConaughy*, 140 U.S. 1, 18 (1890) (private plaintiff permitted to sue Oregon officials comprising state Board of Land Commissioners to enjoin them from selling parcel of land to which plaintiff claimed title under a state-law grant; Court reasoned that lawsuit, charging sale would unconstitutionally impair State's contract with plaintiff, was not suit against State because plaintiff sought only negative injunction against defendants individually).

By contrast, the Supreme Court invoked the Eleventh Amendment to bar private federal actions against state officials, named only in their official capacity, where the relief sought could only be performed by the State itself, as where federal plaintiffs sought an order compelling defendant officials to perform the State's contracts.<sup>142</sup>

[W]here the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, *would constitute performance by the State*, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.<sup>143</sup>

Similarly, the Court dismissed a federal lawsuit on Eleventh Amendment grounds where plaintiff sought an injunction ordering the defendant state officials to honor the State's obligation to redeem state bonds, because such federal relief would "require the appropriation of money from the treasury of the State in accordance with the contract," again, an act beyond the individual capacity of the named official defendant.<sup>144</sup>

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142. See, e.g., *In re Ayers*, 123 U.S. 443, 507-08 (1887); *Hagood v. Southern*, 117 U.S. 52, 69-71 (1886).

143. *In re Ayers*, 123 U.S. at 504 (emphasis added). The Court also emphasized *Hagood's* reasoning that suit against state officials seeking an order that they cause the State to perform its contract should be deemed a suit against the State, and so should be barred by the Eleventh Amendment, because the State was the:

[A]ctual party to the alleged contract, the performance of which is decreed; the one required to perform the decree; and the only party by whom it can be performed. Though not nominally a party to the record, [the State] is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State.

*Id.* at 491. Similarly, in *Poindexter*, 114 U.S. at 293, the Court contrasted the detinue action permitted there against the Richmond Treasurer, in his individual capacity for the return of his office desk, to those actions that would be barred as actions against a State:

[T]his cannot be considered to be a suit against the State. The State is not named as a party in the record; the action is not directly upon the contract; it is not for the purpose of controlling the discretion of executive officers, or administering funds actually in the public treasury . . . ; it is not an attempt to compel officers of the State to do the acts which constitute a performance of its contract by the State . . . .

*Id.* 144. *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883) (refusing, absent State consent, "to set up [courts'] jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State"); see also *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 123-34 (1828) (holding that a private federal action to recover proceeds from the sale of seized slaves was barred by the Eleventh Amendment

In these pre-*Young* decisions, thus, the Court approached the constitutional question of whether sovereign immunity barred a private federal-court lawsuit against a state official by asking the more straightforward question of whether that lawsuit was, in fact, an action "against the State" itself.<sup>145</sup> And the Court, in turn, answered *that* question with a practical, enforcement-oriented test: if a defendant had the capacity, as an individual acting alone and without the State's official participation, to comply with the relief plaintiff sought, then the plaintiff's claim was *not* an action against the State and so faced no sovereign immunity bar.<sup>146</sup>

### C. *Young's Leap: The Internal Logic*

*Ex parte Young*, however, took a distinctly different tack.<sup>147</sup> The Court declared that the Minnesota Attorney General could be sued in federal court despite the Eleventh Amendment, even though the relief sought—an injunction against enforcement of Minnesota's rail rate legislation—could not be performed by Edward Young as an individual, but only in his official role as an agent of the State, authorized by state law to enforce that legislation.<sup>148</sup> In fact, *Ex parte Young's* jurisdictional rule—that a state official enforcing an unconstitutional state action is automatically "stripped" of his official character and therefore subject to federal-court jurisdiction despite the State's sovereign immunity<sup>149</sup>—sounds more like the blanket exception denying officials the Crown's immunity privilege, attributed to

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where proceeds had been paid into the State's general treasury funds and were no longer under the particular control of the defendant Governor). For a post-*Young* decision reverting to this pre-*Young* principle, see *Ford Motor Co. v. Indiana Department of the Treasury*, 323 U.S. 459 (1945), which invoked sovereign immunity to deny federal jurisdiction over a lawsuit against state tax officials seeking to recover taxes paid under protest, because that remedy could only be satisfied by the State, from the State's treasury, and not by officials individually.

145. See, e.g., *Madrado*, 26 U.S. (1 Pet.) at 123-24.

146. See *supra* text accompanying notes 139-41.

147. See *Ex parte Young*, 209 U.S. 123, 152 (1908) (admitting, after canvassing case law on when a federal lawsuit against a state official should be deemed an improper action against the State, that "[t]he cases above cited do not include one exactly like this under discussion").

148. What is more, the Attorney General was sued in his official capacity only. See *id.* at 159. The Court did not contradict Young's assertion that:

[T]he only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the State, in its sovereign and governmental character . . . [T]he complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned . . . .

*Id.*

149. *Id.* at 159-60.

the English tradition, and not the more subtle American rule developed from *Madrazo* forward.<sup>150</sup> Because *Ex parte Young* thus departs from the Court's own precedents,<sup>151</sup> the logic that drives Justice Peckham's opinion for the Court deserves particular attention, to determine what legal *principle*—constitutional or otherwise—can explain *Young*'s jurisdictional rule.

### 1. Step One: A Jurisdictional Question Gets a Remedial Response

Justice Peckham took three steps of logic. Although he acknowledged that the Eleventh Amendment issue was *jurisdictional*<sup>152</sup>—the question was whether the circuit court might exercise the federal judicial power to entertain that lawsuit *at all*<sup>153</sup>—he immediately reframed that jurisdictional issue as a question about which *remedies* were within a federal court's power to grant:

The question that arises is whether there is a *remedy* that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation

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150. See *supra* notes 134-46 and accompanying text; see also *Seminole Tribe v. Florida*, 517 U.S. 44, 171-76 (1996) (Souter, J., dissenting) (reasoning that the *Young* rule "is so far inherent in the jurisdictional limitation imposed by sovereign immunity as to have been recognized since the Middle Ages" and concluding that *Young* represented the Court's restoration of a rule that was "temporarily muddled" in nineteenth century Supreme Court cases limiting suits against state officials to those where the wrong alleged, considered as defendant's personal act, "constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character" (quoting *In re Ayers*, 123 U.S. 443, 502 (1887))).

151. Some commentators argue that the *Young* rule is fully consistent both with the common law sovereign immunity exception and with the Supreme Court's own case law as it stood in 1908. See, e.g., *Seminole Tribe*, 517 U.S. at 171-72 (Souter, J., dissenting); Jackson, *supra* note 56, at 60 (criticizing the Court in *Pennhurst II* for divorcing *Young*'s jurisdictional fiction from the "traditional range of remedies available at common law against officers"). Even among these scholars, however, there is debate over the degree to which *Ex parte Young* simply imported the common law tradition into the American Constitution's sovereign immunity principle. See, e.g., Currie, *supra* note 21, at 155 (arguing that *Young* was innovative in adopting fiction to permit officials to be sued); Engdahl, *supra* note 21, at 55 (arguing that *Young* was dependent on traditional rules for suits against government officials); see also *supra* Part II.C.1 (discussing common law justification for *Young* after *Seminole Tribe*).

152. "[T]he most material and important objection made to the jurisdiction of the Circuit Court . . . [is] that the suit is, in effect, one against the State of Minnesota . . ." *Ex parte Young*, 209 U.S. at 149.

153. See *id.*; see also *id.* at 142 (describing the sovereign immunity issue as "the material and most important objection to the *jurisdiction* of the circuit court") (emphasis added); *id.* at 149-50 (noting that "[t]he Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens" of any State, and citing the Eleventh Amendment and *Hans v. Louisiana*, 134 U.S. 1 (1890)).

of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary [or permanent] injunction.<sup>154</sup>

Justice Peckham thus first shifted focus away from the threshold question—whether the federal court had subject-matter jurisdiction over the railroads' complaint—and onto the constitutional basis, on the *merits*, of the railroads' claims.<sup>155</sup>

## 2. Step Two: Was This Injunction Within the Federal Court's Remedial Power?

Next, after canvassing the Supreme Court's principal post-*Madrazo* decisions, Justice Peckham acknowledged that they developed the general proposition that the Eleventh Amendment bars a private action where the relief sought reveals it to be, in reality, a suit against a State, but permits a private action against a state official for relief he can individually perform.<sup>156</sup> Then, considering *In re Ayers*,<sup>157</sup> one of the decisions in which the Court *denied* jurisdiction on sovereign immunity grounds because the relief sought there could only be performed by the State itself,<sup>158</sup> Justice Peckham observed:

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154. *Ex parte Young*, 209 U.S. at 149 (emphasis added). Here, Justice Peckham borrowed the analytic framework crafted by Justice Marshall in *Madrazo*, under which the practical question whether the relief sought in a federal-court lawsuit would run against the defendant official as an individual, or against the State itself, determined whether that lawsuit was deemed to lie against the State, and thus barred by state sovereign immunity. See *supra* notes 134-46 and accompanying text; see also *Ex parte Young*, 209 U.S. at 150.

155. See *Ex parte Young*, 209 U.S. at 144. By contrast, in *Osborn*, Chief Justice Marshall had promoted his formalistic party-of-record test for sovereign immunity, in part, by reasoning that any more searching an inquiry into a non-party State's actual interest in a private lawsuit would, illogically, require a federal court to evaluate a claim's merits before that court had established its own jurisdiction to do so. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 825-53 (1824). Marshall stated:

In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depends, not on this plain fact, but on the interest of the State, what rule has the constitution given, by which this interest is to be measured? If no rule be given, is it to be settled by the Court? If so, the curious anomaly is presented, of a Court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

*Id.*; see also *id.* at 857 (concluding a string of rhetorical questions, including the one quoted above, by stating a "rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record"). For some commentators' views that *Ex parte Young* not only created a new jurisdictional path into federal court but also crafted a new, judicial cause of action on the merits for constitutional violations, see sources cited *infra* note 164.

156. See *Ex parte Young*, 209 U.S. at 150-52 (citing, *inter alia*, *Madrazo*, *Osborn*, *Poindexter*, *Hagood v. Southern*, and *In re Ayers*, all discussed *supra* Part III.B).

157. *In re Ayers*, 123 U.S. 443 (1887).

158. See *Ex parte Young*, 209 U.S. at 152-53 (considering *In re Ayers*, 123 U.S. at 487).

But the injunction asked for [there, to prohibit state officials from enforcing state tax law claimed to impair state bond obligations, in violation of Constitution's Contract Clause] . . . was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. *It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits.*<sup>159</sup>

Having thus de-linked the question of federal remedial power from the question of federal jurisdiction, Justice Peckham proceeded to ask whether—*assuming* good subject-matter jurisdiction—a federal court had the power to enter an injunction to address injuries other than those at issue in the successful post-*Madrazo* lawsuits.<sup>160</sup> He noted, “[i]t was not stated [in *In re Ayers*] that the [permissible] suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.”<sup>161</sup>

Accordingly, Justice Peckham undertook to decide which alleged injuries were sufficient to justify a federal injunction against a state official; to decide, more particularly, whether the harm that the railroads alleged in their lawsuit challenging the Minnesota rail rate legislation justified such federal relief. In his own words, he undertook to decide “[w]hether the commencement of a suit [to enforce the Minnesota rail rate legislation] could ever be regarded as an actionable injury to another equivalent in some cases, to a trespass such as is set forth in some of the foregoing cases [including *In re Ayers*].”<sup>162</sup>

Justice Peckham concluded that the threat of state enforcement was indeed “equivalent,” at least for federal remedial purposes, to a direct trespass infringing a property interest: “It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it *ought to be within the jurisdiction of a court of equity.*”<sup>163</sup> To convert that “ought” into an

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159. *Ex parte Young*, 209 U.S. at 152-53 (emphasis added).

160. As noted above, *supra* notes 140-41, the successful complaints usually alleged either direct violations of tangible, possessory property interests (like the seizure of personal property in *Poindexter*, or, for that matter, the cash in *Osborn*) or violations of a more intangible property interest in contract rights allegedly impaired by state legislation (as in *Pennoyer v. McConnaughy*, 140 U.S. 1 (1890)).

161. *Ex parte Young*, 209 U.S. at 153; see also *supra* note 139 (suggesting that same pre-*Young* practice of officer liability can be described by looking either at causes of action allowed or at remedy available).

162. *Ex parte Young*, 209 U.S. at 158.

163. *Id.* at 160 (emphasis added).

“is,” moreover, given the Court’s own precedent, Justice Peckham explained:

[T]he only difference in regard to the case of *Osborn* and the case in hand . . . [is] that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn* Case, an actual and direct trespass upon or interference with tangible property. . . . 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 . . . .<sup>164</sup>

Justice Peckham rested this equation largely on a cluster of Court cases from the 1890s deciding federal constitutional challenges to state railroad rate regulation,<sup>165</sup> among which Justice Peckham emphasized two, *Reagan v. Farmers’ Loan & Trust Co.*<sup>166</sup> and *Smyth v. Ames*.<sup>167</sup> In both cases, the Court rejected sovereign immunity challenges to federal jurisdiction when private railroads sued state officials to enjoin enforcement of rate restrictions alleged to violate the federal Due Process Clause.<sup>168</sup> Moreover, in both cases, the Court did sanction federal injunctions to bar civil or criminal enforcement of the allegedly offending rates, on a showing that the rate regulation was, indeed, unconstitutional.<sup>169</sup>

In fact, read as Justice Peckham seemed to do, the rail regulation cases offered such strong authority for the sovereign immunity exception he was about to announce, one wonders why he addressed the Court’s other post-*Madrazo* sovereign immunity decisions at all.

164. *Id.* at 167. Justice Peckham’s analytic transmutation of jurisdiction into merits has supported the view among some commentators that *Young* not only created a jurisdictional rule to avoid *Hans*’ absolute bar, but also created a new, implied federal cause of action in favor of private citizens to enforce federal law against States. See, e.g., RICHARD H. FALLON ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1065 (4th ed. 1996) (arguing that *Ex parte Young* recognized an implied right of action for violation of federal law). But see Jackson, *supra* note 6, at 515 (noting, more qualifiedly, that “the *Ex parte Young* doctrine appears to stand . . . for the proposition that an implied cause of action for injunctive relief to enforce federal law will be available when a court otherwise has jurisdiction over the case”) (emphasis added). See generally *id.* at 515 n.79 (citing literature suggesting that *Young* created a federal right of action for equitable relief against state officials’ violation of federal law).

165. See *Ex parte Young*, 209 U.S. at 153-58. Justice Peckham observed that his own principal inquiry—whether the injunctions available in cases like *Osborn* were “necessarily confined to a case of a threatened direct trespass upon or injury to property” or whether, instead, “the commencement of a suit could ever be regarded as an actionable injury to another, equivalent, in some cases to a trespass”—had “received [some] attention in the rate cases. . . .” *Id.* at 153 (emphasis added).

166. *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362 (1894).

167. *Smyth v. Ames*, 169 U.S. 466 (1898).

168. See *id.* at 522, 518-19; *Reagan*, 154 U.S. at 390, 396.

169. See *Smyth*, 169 U.S. at 516-17; *Reagan*, 154 U.S. at 399, 413.

For if *Smyth v. Ames* had indeed announced a general rule “that a suit against individuals, for the purpose of preventing them, as officers of the state, from enforcing . . . an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a state within the meaning of the [Eleventh] Amendment,”<sup>170</sup> no matter what “injury” plaintiff alleges to which “rights,” and no matter what effect such injunction would have on the State itself, then *Smyth* and like rail regulation cases had, in effect, tacitly superseded the basic rule laid down in *Madrazo*, which ousted federal jurisdiction whenever the relief sought against state officials was deemed to run against the State.<sup>171</sup>

But *Smyth* did not so overturn *Madrazo*, and neither did *Reagan*. In both of those decisions, the Court did follow *Madrazo*’s analytic model in order to determine whether the injunction actions were in fact actions seeking a remedy running against a State, and thus beyond the federal court’s subject-matter jurisdiction. *Reagan*, in particular, painstakingly distinguished the injunction demanded there, to prohibit Texas officials from enforcing state rate regulations, from other remedies, like a monetary award to be paid out of the State’s general treasury, which would in the Court’s view have placed the lawsuit squarely within the Eleventh Amendment bar.<sup>172</sup>

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170. *Ex parte Young*, 209 U.S. at 154 (emphasis added) (citing *Smyth*, 169 U.S. at 518).

171. See *supra* notes 134-38 and accompanying text. When Justice Peckham reached the denouement of his jurisdictional analysis—declaring that the state official enforcing an unconstitutional state law is “stripped” of his official character for sovereign immunity purposes—he cited only *In re Ayers*, and not the rate regulation cases. See *Ex parte Young*, 209 U.S. at 160. But see Currie, *supra* note 21, at 154-55 (arguing that rate cases decided after *Ayers* “had already allowed suits against officers who had done nothing more than threaten suit under statutes attacked as unconstitutional” and thus offered direct authority for the *Young* injunction).

172. *Reagan*, 154 U.S. at 390. The Court there rejected the defendants’ argument that the lawsuit could not “be maintained because the real party against which alone in fact the relief is asked . . . is the State . . .” *Id.* The Court observed:

So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. *Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered.*

*Id.* (emphasis added).



What *Smyth* and *Reagan* did do, rather than change the sovereign immunity rules in place since *Madrazo*, was to enlarge the idea of what constituted a *trespass* by state officials giving rise to an action against them individually. And to do that, in turn, the rate cases enlarged the idea of what constituted a *property* right protected against such trespass: the Court decided, in effect, that those who invest capital in railroads have a protected property interest, although intangible, in obtaining a reasonable return on their investment.<sup>173</sup> Accordingly, state officials who enforce a confiscatory rail rate interfere illegally with a railroad's protected property interest just as though the officials had seized possession of a \$30 office desk in payment for taxes the owner had already paid.<sup>174</sup> In both instances, following the rail rate cases, the property owner could seek an injunction preventing such trespass in a lawsuit against the individual official; and because a trespass remedy was deemed to run only against the individual trespasser, the Eleventh Amendment did not apply.<sup>175</sup>

To the extent that the rail cases decided that a state official's enforcement of a confiscatory rate amounts to an actionable trespass on property,<sup>176</sup> they might have recognized a *cause of action* against the official to remedy such a trespass, but they did not grant federal courts a general power, despite the Eleventh Amendment, to exercise *subject-matter jurisdiction* over lawsuits seeking to enjoin violations of federal law by state officials. The rail cases did not, on their own, provide authority for the judicial power exercised in *Young*. And Justice Peckham did not treat them as though they did.

The *Young* plaintiffs, at least so far as Justice Peckham was interested in them, were not primarily threatened with the trespass that a confiscatory rate commits—that is, a trespass on their property

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173. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 129-32 (1997) (describing the rate cases' development of constitutional protections against state regulation of private property under both due process and takings analyses).

174. See *Poindexter v. Greenhow*, 114 U.S. 270, 273 (1885); see also *supra* notes 140-41 and accompanying text.

175. See *Pennoy v. McConnaughy*, 140 U.S. 1, 10 (1891) (suggesting that the federal court has the power to enjoin violations of vested property rights by state officials even though the Eleventh Amendment denies the federal court power to force these same officials to take steps constituting specific performance of the State's contract with a private plaintiff); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (noting, without elaborating, that the decision invoking the Eleventh Amendment to deny jurisdiction over a private lawsuit under the Constitution's Contract Clause seeking to force the State to perform contract to honor bonds did not mean that the State could also invade private property rights under state contract with federal impunity).

176. See Woolhandler, *supra* note 173, at 130 n.268 (citing commentary that treats *Reagan* as the Court's first substantive due process decision).

interest in a reasonable return on invested capital.<sup>177</sup> Instead, the injury most relevant to Justice Peckham's jurisdictional analysis was plaintiffs' having to endure the enforcement proceeding itself: "It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment . . ." <sup>178</sup> Justice Peckham did not suggest that that injury implicated any property interest, tangible or otherwise, to justify the injunction under the post-*Madrazo* trespass cases; he made no argument that the enlargement of the idea of "property" begun in the rate cases should continue there. Indeed, he appeared to acknowledge that the injunction sought in *Young* was more like the injunction denied in *In re Ayers*, where the Court declined jurisdiction to prohibit state officials from "commencing suits" to enforce allegedly unconstitutional state tax laws "in the name of the State and brought to recover taxes for [the state's] use."<sup>179</sup> Notwithstanding *Ayers*, however, *Young* authorized the federal lawsuit to proceed even though the injunction sought not to prevent state action threatening a direct trespass to plaintiffs' property interests,<sup>180</sup> but instead to prevent the more generalized harm of being

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177. Of course, the *Young* plaintiffs had challenged the Minnesota rail rates on precisely those grounds, and had even won that claim on the merits in the circuit court, thus obtaining the injunction. *Ex parte Young*, 209 U.S. 123, 130, 133 (1908). But the Supreme Court did not even reach the question of whether the rail rates set by the Minnesota legislation were themselves in fact so low as to be confiscatory, instead holding, on the merits,

that the provisions of the acts relating to the enforcement of the rates, either for freight or for passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates.

*Id.* at 148. *But see id.* at 165 (suggesting in passing that investors in railroads "are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less").

178. *Id.* at 160. Justice Peckham elaborated:

To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take.

*Id.* at 165 (discussing the objection that the injunction was improper on ordinary equity standards, since the plaintiffs had an adequate remedy at law by raising the Fourteenth Amendment challenge as a defense to a state enforcement proceeding against them).

179. *Id.* at 152 (emphasis added). The similarity between the two injunctions was at least strong enough to move Justice Peckham to cite *Ayers* for the proposition that the federal court "would have [had] power to grant the restraining order preventing the commencement of suit" had the Eleventh Amendment not barred federal jurisdiction over the lawsuit altogether as "one against the state, to enforce its alleged contract." *Id.* at 152-53.

subjected to state enforcement of a law alleged to violate the Fourteenth Amendment on procedural grounds.<sup>181</sup>

In light of this case law, there appears to have been little foundation for Justice Peckham's conclusion that the threat of state enforcement of a law that is unconstitutional, on any grounds, confers federal subject-matter jurisdiction to enjoin that violation despite state sovereign immunity. Indeed, Justice Peckham offered little more than his view that such threat of enforcement causes an injury "equivalent" to those trespasses on property by state officials that could be remedied through private federal actions against officials individually from *Madrazo* forward.<sup>182</sup>

180. Contrast, for example, *Pennoyer v. McConnaughy*, 140 U.S. 1, 10-17 (1890), in which the Court canvassed its own standards for determining when a private action against a state official would be deemed an improper action against the State and observed:

"A broad line of demarkation separates . . . cases . . . in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, [from] those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void."

*Id.* at 16-17 (emphasis added) (quoting *Hagood v. Southern*, 117 U.S. 52, 70 (1885)). The Court concluded:

The vital principle in all such cases [in which private federal actions against state officials were permitted because deemed not against the State] is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable.

*Id.* at 17 (emphasis added) (quoting *In re Ayers*, 123 U.S. 443, 501 (1887)).

181. See *supra* notes 119-20 and accompanying text (discussing the nature of the plaintiffs' Fourteenth Amendment claims). Upon concluding his analysis of the post-*Madrazo* trespass cases and the rate cases as well, Justice Peckham declared:

The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of 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.

*Ex parte Young*, 209 U.S. at 155-56. But cf. *Younger v. Harris*, 401 U.S. 37, 43-46 (1971) (concluding that federal courts should ordinarily abstain from granting equitable relief against state officials conducting an enforcement proceeding in state court); *Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943) (citing the traditional rule of equity that a state citizen suffers no injury entitling her to federal court injunctive relief when the State enforces even unconstitutional state laws against her in a good faith proceeding).

182. Justice Peckham's determination to equate the *Young* injunction to the post-*Madrazo* trespass remedies may explain, in part, his insistence that a *Young* plaintiff sue the state officials who are specifically authorized to enforce the allegedly unconstitutional state law. That requirement strengthens the parallel to ordinary trespass cases where an official is sued for a remedy only he can actually perform, like returning a plaintiff's tangible personal property within the official's personal possession. For quite apart from the pragmatic need to have before the court a party who can in fact comply with any judgment, Justice Peckham insisted:

In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some

### 3. Step Three: Jurisdiction Redux

Once Justice Peckham so approved the specific remedy sought in *Young*—the injunction prohibiting enforcement of the rate regulations—he turned back to the case’s Eleventh Amendment problem, the “most material and important objection made to the jurisdiction of the Circuit Court.”<sup>183</sup> And he answered that objection with a fairly summary conclusion: since the injunction sought in *Young* fell within the federal courts’ remedial powers (see step two), then the federal court must therefore have subject-matter jurisdiction to hear the lawsuit in which that injunction was requested.<sup>184</sup> And since the court must thus have jurisdiction, then the Eleventh Amendment must not apply.<sup>185</sup>

This left Justice Peckham to declare, in *Ex parte Young*’s most familiar passage:

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 State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>186</sup>

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connection with the enforcement of the act, or else it is merely making him a party as representative of the State, and thereby attempting to make the State a party.

*Ex parte Young*, 209 U.S. at 157.

183. *Id.* at 149.

184. *Id.* at 156, 160. *But see* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869))).

185. Conveyed as a proof, Justice Peckham’s reasoning in *Young* might look something like this:

1. The Eleventh Amendment poses a potential bar to federal court jurisdiction.
2. Jurisdiction over a lawsuit turns on the remedy sought in that lawsuit.
3. The remedy sought here is authorized because it is equivalent to remedies authorized in other federal lawsuits.
4. *Ergo*, the Eleventh Amendment poses no bar to jurisdiction.

For one critique of the view that federal courts enjoy an inherent power to remedy constitutional wrongs, see John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996) (stating thesis that federal courts lack inherent remedial authority).

186. *Ex parte Young*, 209 U.S. at 159-60 (emphasis added) (citing only *In re Ayers*, 123 U.S. 443 (1887)). Compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 871 (1824) (Marshall, C.J.) (holding that Eleventh Amendment applies only where State is named a formal party defendant), with *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 123-24 (1828)

It is this last step of logic that has led the contemporary Supreme Court to conclude that *Ex parte Young* jurisdiction rests on a fiction.<sup>187</sup> It is difficult to read Justice Peckham's opinion otherwise: it neither adhered to the sovereign immunity rules established in the Court's own precedents<sup>188</sup> nor offered a law-based reason—constitutional or otherwise—for expanding those rules to authorize an injunction in *Young's* circumstances, where the state official was sued in his official capacity for a wholly official "harm" and only for relief that coerced not individual but state action.<sup>189</sup>

Far from offering a *constitutional* justification for the *Young* doctrine's exception to *Seminole Tribe's* emphatic constitutional rule, *Ex parte Young* makes the most sense when legal precedent and constitutional rules are set aside in favor of one overriding *public policy* imperative: without *Young's* jurisdictional fiction, *Hans v. Louisiana* would have precluded all original federal jurisdiction over citizens' lawsuits to enforce state compliance with federal law.<sup>190</sup> Pragmatism,

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(Marshall, C.J.) (holding that the Eleventh Amendment applies where plaintiff seeks relief requiring action by the State).

187. See *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89, 104-05 (1984) (noting that *Young's* "fiction" created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment" (citing *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (Stevens, J.)); see also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (agreeing with *Pennhurst II's* "observation" that *Young* rests on a "fictional distinction between official and the State"); Althouse, *supra* note 73, at 1135-37 (acknowledging *Young's* creation of legal fiction, but observing that Justice Peckham himself did not admit to doing so); Jackson, *supra* note 56, at 62 (criticizing *Pennhurst II* Court for admitting *Young* reasoning to be a fiction); Monaghan, *supra* note 6, at 127 (asserting that "everyone now recognizes that nothing but a fiction is involved" in *Young's* stripping an official of her official status solely in order to obtain federal jurisdiction despite the Eleventh Amendment (citations omitted)). See generally WRIGHT, *supra* note 73, at 292 ("The decision in *Ex parte Young* rests on purest fiction. It is illogical. It is only doubtfully in accord with the prior decisions.").

188. Again, not everyone agrees with this reading of *Young*. See Currie, *supra* note 21, at 1154-55 (arguing that *Ex parte Young* rule "did not require a significant modification of the theory that lay behind *Ayers* and the other Contract Clause cases"). But see Currie, *supra* note 38, at 547-48 (arguing that *Young* "squarely contradicts" *Hans v. Louisiana*, and observing, about the Eleventh Amendment, that "[o]ne does not go to the trouble of amending the Constitution in order to alter the caption on the complaint"). See generally *supra* notes 165-75 and accompanying text (discussing arguable similarities between *Young* injunction and injunctions granted in railroad rate cases like *Reagan* and *Smyth*).

189. Compare *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 390-91 (1894) (justifying suit against state official individually as actionable trespass on personal property), and *supra* notes 165-75 and accompanying text, with *Pennhurst II*, 465 U.S. at 104 (observing that "the injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character'" (emphasis added)).

190. This, of course, repeats the standard reading of *Ex parte Young*. See, for example, *Pennhurst II*, 465 U.S. at 105, which notes:

[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of

and not constitutional law, best explains *Young's* "exception" to state sovereign immunity.

*D. Young Becomes the Young Doctrine: Edelman v. Jordan*

If the Court in *Ex parte Young* exercised a unilateral "judicial Power" to dictate its own subject-matter jurisdiction over lawsuits against state interests, the Court wielded that power even more freely to develop *Young* into the full-fledged jurisdictional doctrine reaffirmed in *Seminole Tribe* and *Coeur d'Alene*. In *Edelman v. Jordan*,<sup>191</sup> the Supreme Court ruled that *Ex parte Young* jurisdiction extends only to federal court lawsuits seeking prospective injunctive and declaratory relief, hence excluding claims for retrospective relief in the nature of compensation.<sup>192</sup> The Court, indeed, stated this distinction as a *constitutional* imperative: the Eleventh Amendment bars all claims for retrospective compensatory relief against state officials sued in their official capacity, and it permits all claims for prospective relief ordering compliance with federal law, even if such compliance requires the expenditure of funds out of a State's general treasury.<sup>193</sup>

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the United States." [Our] decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.

*Id.* (quoting *Ex parte Young*, 209 U.S. at 160); see also *supra* Part II.C.2 (critiquing notion that such need, alone, can provide *Young* with law-based justification).

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

192. *Id.* at 664-68. In that case, a class of plaintiffs entitled to assistance under the federal Aid to the Aged, Blind, or Disabled ("AABD") program, a program co-funded by the federal and state governments pursuant to the federal Social Security Act, alleged that the Illinois Department of Public Aid had been delaying the processing of plaintiffs' aid applications beyond the time permitted by statute, and were thus in violation of federal law. See *id.* at 653-55. The plaintiffs brought an action in federal court, suing several Illinois officials responsible for administering the AABD program at the state and county level. See *id.* at 655. Contending that the processing delays violated federal regulations promulgated under the AABD legislation as well as the Fourteenth Amendment's equal protection guarantee, see *id.* at 653 n.1, plaintiffs sought two kinds of relief from the federal court. First, they sought declaratory and injunctive relief requiring the defendant state officials to comply in the future with all federal time limits in processing aid applications; second, they sought "a permanent injunction enjoining defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld" during the roughly three-month period covered by the complaint. *Id.* at 656 & n.5. That is, plaintiffs sought orders compelling future compliance with federal law and also requiring state officials to make plaintiffs whole for the benefits they had been denied as a result of the improper delays. The district court granted both. See *id.*

193. See *id.* at 665, 667-68. Even those court orders that require significant expenditures from a State's general public funds are within federal jurisdiction so long as such "fiscal consequences to the state treasury . . . [are] the necessary result of compliance with decree which by their terms [are] prospective in nature. . . . Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Id.* at 668 (emphasis added). But see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997)

*Edelman* thus adopted a measure of *time* to determine whether a private lawsuit naming a state official is barred by the Eleventh Amendment; this idea of time became a proxy for, and indeed took the place of, the old sovereign immunity question of whether a private lawsuit in fact seeks relief that will require action by the State itself. After *Edelman*, hence, federal jurisdiction under the Eleventh Amendment came to depend principally on whether the relief sought against a named official was most fairly characterized as forward-looking or backward-looking.<sup>194</sup>

Yet, the reasoning behind this time-based constitutional distinction, between retrospective and prospective federal relief, makes relatively little sense in light of the Eleventh Amendment case law invoked to support it.<sup>195</sup> It is more coherent, rather, as a policy-driven exercise of a unilateral judicial power to set the scope of federal jurisdiction on the Court's own terms. Then-Justice Rehnquist, writing for a five-vote majority, maintained that the *Edelman* distinction follows inevitably from the Court's 1945 decision in *Ford Motor Co. v. Indiana Department of Treasury*,<sup>196</sup> in which the Eleventh Amendment was held to deny federal jurisdiction over a private lawsuit to recover corporate income taxes paid under protest that the state tax laws violated the Constitution's dormant Commerce Clause.<sup>197</sup> Although the *Ford Motor* plaintiff had followed *Ex parte Young's* pleading model, and named as defendants only those officials whom state law made specifically responsible for enforcing its tax provisions,<sup>198</sup> the

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(denying *Ex parte Young* jurisdiction even over prospective injunctive and declaratory relief where effect on State was "functional equivalent" of an adverse quiet title judgment); *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (refusing to extend *Ex parte Young* jurisdiction over claim for prospective relief where Court concluded Congress intended to supplant *Young* jurisdiction in favor of statutory jurisdictional model ruled unconstitutional). See generally Vázquez, *supra* note 76 (providing overview of debate over prospective/retrospective relief).

194. See, e.g., *Green v. Mansour*, 474 U.S. 64, 71-73 (1985) (Rehnquist, C.J.) (noting that the Eleventh Amendment prohibits federal private lawsuit against state officials seeking declaration that officials violated federal law in the past, since *res judicata* rules would cause declaratory judgment to "have much the same effect as a full-fledged award of damages or restitution by the federal court"); see also Vázquez, *supra* note 76, at 22-40 (detailing Court's "transformation," over a series of decisions, of *Edelman* rule, barring retrospective monetary relief, into doctrine barring all retrospective relief).

195. See *Seminole Tribe*, 517 U.S. at 56 (stating that "the relief sought by a plaintiff suing a State [itself] is irrelevant to the question whether the suit is barred by the Eleventh Amendment").

196. *Ford Motor Co. v. Indiana Dep't of Treasury*, 323 U.S. 459 (1945).

197. See *id.* at 460-61 (recounting non-resident manufacturing corporation's charge that state income tax law based on in-state sales violated the federal Commerce Clause, U.S. CONST. Art. I, § 8, and the Fourteenth Amendment); see also *Edelman*, 415 U.S. at 663.

198. *Ford Motor Co.*, 323 U.S. at 463 (noting that plaintiff sued State's Governor, Treasurer, and Auditor, who together comprised State's Department of Treasury); see also *Ex*

Supreme Court held that plaintiff's claim was nonetheless a claim against the State, and was thus barred from federal court by the Eleventh Amendment.<sup>199</sup>

Justice Rehnquist cited *Ford Motor* for the principle that "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."<sup>200</sup> Reasoning that compliance with a federal judgment for retrospective compensation would require the payment of money that "must inevitably come from the general revenues of the State,"<sup>201</sup> Justice Rehnquist concluded that lawsuits seeking such awards are, under *Ford Motor*, improper suits against a State and therefore beyond federal court jurisdiction.<sup>202</sup>

So far, and at this level of generality, Justice Rehnquist's use of *Ford Motor* to support the *Edelman* rule is not remarkable. *Ford Motor* certainly did bar a private lawsuit seeking to recover money wrongfully collected in the past by state tax authorities; the *Edelman* plaintiffs certainly did seek to recover money wrongfully withheld in the past by state public assistance authorities: both cases, so far, seemed to hold that the Constitution's sovereign immunity principle prohibits federal lawsuits seeking to force unconsenting States, directly or indirectly, to pay money to private plaintiffs based on past wrongdoing.<sup>203</sup> At the next more specific level of analysis, however, the analogy wobbles.

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*parte* Young, 209 U.S. 123, 157 (1908) (noting that the jurisdictional fiction applies only if defendant official has "some connection with the enforcement" of the challenged state law).

199. *Ford Motor Co.*, 323 U.S. at 463-64.

200. *Edelman*, 415 U.S. at 663 (emphasis added) (quoting *Ford Motor Co.*, 323 U.S. at 454). From this observation, according to Justice Rehnquist, "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944)).

201. *Id.* at 665 (declaring that retrospective awards "thus resembl[e] the monetary award against the State itself" prohibited in *Ford Motor Co.*).

202. *See id.*

203. In this sense, *Edelman's* ruling that lawsuits against state officials, in their official capacities, seeking monetary awards to compensate plaintiffs for past state wrongs does appear to fall squarely within the Court's traditional Eleventh Amendment rules. *See supra* notes 134-46 and accompanying text (discussing principle, governing since *Madrazo*, that while compensatory relief for past trespasses could be obtained from state officials individually, sovereign itself was subject to traditional tort remedies only upon its consent). However traditional, *Edelman's* Eleventh Amendment reading has drawn substantial scholarly criticism. *See, e.g.,* Vázquez, *supra* note 49, at 1685-86 & n.16 (arguing that Eleventh Amendment doctrine contradicts Constitution's rule-of-law ideal by immunizing States from accountability for even egregious past violations of federal Constitution (citing Amar, *supra* note 56, at 1489)); *see also* Vázquez,



### 1. *Ford Motor* Limits Federal Jurisdiction More Than *Edelman* Admits

The *Ford Motor* decision actually stands on a sovereign immunity reading that is substantially more restrictive of federal jurisdiction than *Edelman*. Read in full, *Ford Motor* would appear to bar federal claims against state officials even for *prospective* injunctive relief if compliance with such an order would require the affirmative expenditure of money from the States' general treasury.<sup>204</sup>

This is so largely because *Ford Motor* reverts to the Court's pre-*Young* reasoning about state sovereign immunity: the Court asked itself the *Madrazo* question—whether the lawsuit to recover taxes paid under protest was, in fact, an improper suit against the State of Indiana<sup>205</sup>—and answered by asking in turn whether, as a practical matter, the plaintiffs sought a *personal* judgment against the defendant state officials, to be satisfied by the defendants individually, based on their personal liability for personal wrongdoing.<sup>206</sup> The Court concluded that the *Ford Motor* plaintiff had sued the official defendants “as representatives of the state, not as individuals against whom a personal judgment is sought.”<sup>207</sup> Moreover, “[t]he [plaintiff] did not assert any claim to a personal judgment against these individuals for the contested tax payments. The [plaintiff's] claim was for a ‘refund,’ not for the imposition of personal liability on individual defendants for sums illegally exacted.”<sup>208</sup>

*supra* note 76, at 2 (asserting that *Young* jurisdiction has partially “alleviated the rule-of-law problems” caused by sovereign immunity).

204. *Cf. Vázquez, supra* note 76, at 94-100 (proposing “return” to *Edelman*'s “original” holding, that only retrospective *monetary* relief is barred under *Young* doctrine).

205. *Ford Motor Co.*, 323 U.S. at 462; *see also* *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 123-24 (1828).

206. The Court distinguished this claim from a lawsuit “against a tax collector to recover a personal judgment for money wrongfully collected under color of state law.” *Ford Motor Co.*, 323 U.S. at 462; *see also id.* at 463-64; *Poindexter v. Greenhow*, 114 U.S. 270, 293 (1885) (reported as one of the *Virginia Coupon Cases*, 114 U.S. 269 (1885)) (permitting a private lawsuit against the Richmond Treasurer to recover possession of a desk wrongfully seized in payment of taxes); *supra* Part III.B (discussing pre-*Young* case-law following same principle).

207. *Ford Motor Co.*, 323 U.S. at 464.

208. *Id.* at 463-64. The Court reinforced its conclusion about the “essential nature and effect” of plaintiff's claim, *id.* at 464, by emphasizing that plaintiff's federal complaint had invoked a state statute establishing a refund procedure for obtaining a refund from the State of illegally exacted taxes, *see id.* at 463. Noting that the state statute unequivocally “provide[d] for an action against the State,” the Court found that plaintiff's refund action under that statute had to be characterized that way as well for Eleventh Amendment purposes. *Id.* at 463-64. And although the State had consented in that statute to suit for tax refunds in its own courts, the Court declined to read the statute as granting consent to refund actions in federal court, too. *See id.* at 464-66 (“[W]hen we are dealing with the sovereign exemption from judicial

Indeed, so rooted is the *Ford Motor* decision in the Court's pre-*Young* doctrine that it did not cite *Ex parte Young* even once. The Court relied instead on cases like *In re Ayers*, which, again, denied federal jurisdiction to hear a private claim for an injunction prohibiting state officials, in the future, from enforcing state tax laws alleged to violate the federal Contract Clause because that lawsuit was, in effect, a suit against the State, seeking relief that only the State could provide.<sup>209</sup> And the Court relied on *Great Northern Life Insurance Co. v. Read*,<sup>210</sup> in which the Court likewise invoked the Eleventh Amendment to deny federal jurisdiction to a private plaintiff who sought an injunction compelling Oklahoma tax officials to refund taxes paid under protest against an allegedly unconstitutional state law—even though the disputed taxes were, at time of suit, kept segregated from the State's general Treasury and thus still formally within the defendant tax collector's individual control.<sup>211</sup> And *Ford Motor* relied, too, on *Smith v. Reeves*,<sup>212</sup> which, written eight years before *Young* and by *Young's* lone dissenter,<sup>213</sup> held that the Eleventh Amendment barred federal jurisdiction over a private lawsuit against a California tax official seeking a tax refund because:

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interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

209. See *Ford Motor Co.*, 323 U.S. at 464. *Edelman* cited *In re Ayers*, 123 U.S. 443 (1887), along with *Hagood v. Southern*, 117 U.S. 52 (1886), as cases in which the Court denied federal jurisdiction over actions "against state officers for specific performance of a contract to which the State was a party." *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (rejecting suggestion that Eleventh Amendment permits jurisdiction over suits against state officials for any relief that can be characterized as "equitable"). *Edelman's* citation of *Ayers* (where prospective injunctive relief was denied because it would have had the same effect as a direct ruling against the State) seems disingenuous, given *Edelman's* larger ruling that prospective relief to comply with federal law—presumably including the Constitution's Contract Clause—falls within the federal jurisdiction created in *Ex parte Young*. *Id.* at 663-68.

210. *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944). This case was cited by *Edelman* and *Ford Motor Co.* for the rule that "suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663; *Ford Motor Co.*, 323 U.S. at 464-66.

211. *Great N. Life Ins. Co.*, 322 U.S. at 53. For Eleventh Amendment purposes, the Court there declared it "immaterial" that the disputed taxes were formally within the control of the named official defendant, so that an award for plaintiff could technically be satisfied by the official. The suit "was against the official, not the individual." *Id.* (relying as well on Oklahoma refund statute invoked by plaintiff, which provided for action in state court against the State itself).

212. *Smith v. Reeves*, 178 U.S. 436, 439 (1900) (Harlan, J.).

213. See *Ex parte Young*, 209 U.S. 123, 181 (1908) (Harlan, J., dissenting) (concluding that private action to enjoin Minnesota Attorney General from enforcing state rail rate legislation in state courts was action against State and thus barred from federal court by Eleventh Amendment).

[T]he relief sought is a judgment against that officer [the state Treasurer] *in his official capacity*; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint.<sup>214</sup>

Accordingly, these cases offer little support for *Edelman's* constitutional rule that permits federal jurisdiction over private lawsuits seeking to require *future* state expenditures, but that denies federal jurisdiction over suits seeking to require expenditures to compensate plaintiffs for *past* wrongdoing. Simply stated, under *Ford Motor* and its precedents, time is irrelevant: any judgment requiring the payment of funds out of a state treasury, and not an official's private purse, constitutes a suit against the State barred by the Eleventh Amendment from crossing the federal court's threshold.<sup>215</sup>

## 2. *Ex parte Young* Limits Federal Jurisdiction More Than *Edelman* Admits

*Edelman's* time-oriented jurisdictional rule also authorizes federal jurisdiction beyond what *Ex parte Young* itself sanctioned. It is true, as the *Edelman* Court stressed, that the injunction for which jurisdiction was authorized in *Ex parte Young* was *prospective* in nature: it prohibited Edward Young, as Minnesota Attorney General, from taking steps *in the future* to enforce the state rail rate regula-

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214. *Smith*, 178 U.S. at 439. The Court distinguished that case, for which federal jurisdiction was deemed lacking, from "those in which we have held that a suit would lie by one person against another person [a state official] to recover possession of specific property," and from those in which jurisdiction in a lawsuit against a state official was proper "to compel him to perform a plain ministerial duty," as well as from "a suit to enjoin the defendant [official] from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property." *Id.* (discussing *Louisiana v. Jumel*, 107 U.S. 711, 726-28 (1882)). As the Court later explained itself, the Eleventh Amendment barred federal jurisdiction in *Smith v. Reeves* because "[a]s the suit was against a state official as such . . . to compel him to carry out with the state's funds the state's agreement to reimburse moneys illegally exacted under color of the tax power . . . it was a suit against the state. *The state would be required to pay.*" *Great N. Life Ins. Co.*, 322 U.S. at 50 (emphasis added).

215. See *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 123-24 (1828). Consider again Justice Rehnquist's statement in *Edelman* that *Ford Motor* and its precedents prohibit an action seeking to "recover[ ]" money from a State. *Edelman*, 415 U.S. at 663 (quoting *Ford Motor Co.*, 323 U.S. at 464). If this Article's reading of *Ford Motor Co.* and its precedents is accurate, then it is not entirely possible to read the word "recover" to mean only compensation for past harms, as Justice Rehnquist appears to do, see *id.* at 665. See Vázquez, *supra* note 76, at 17 (describing other Supreme Court decisions between *Ford Motor* and *Edelman* that returned to pre-*Young* sovereign immunity approach barring suits seeking relief that would coerce state action; observing, "[t]aken literally, these standards would bar the typical *Ex parte Young* suit").

tions against plaintiff railroads in state courts.<sup>216</sup> At the same time, however, the *Young* injunction was purely negative: it prohibited the State from acting to enforce its unconstitutional laws,<sup>217</sup> but it required no affirmative action by the Attorney General or any other agent of the State; significantly, that injunction ordered no affirmative expenditure of state resources, monetary or otherwise.<sup>218</sup>

In *Edelman*, by contrast, the claim for which the Court granted federal jurisdiction sought an injunction requiring Illinois to take affirmative steps to change state policy in a way that would increase state expenditures indefinitely.<sup>219</sup> Nevertheless, because the injunction was formally “prospective”—it ordered state officials to conform their future conduct to federal law—to Justice Rehnquist it was sufficiently “analogous” to the injunction granted in *Ex parte Young* that the jurisdictional rule created there should apply in full force in *Edelman* as well.<sup>220</sup>

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216. *Ex parte Young*, 209 U.S. at 155-56; see also *Edelman*, 415 U.S. at 664 (emphasizing that “the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment”).

217. *Ex parte Young*, 209 U.S. at 154 (claiming authority for injunction under precedents authorizing private lawsuits against state officials “for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff” (citing *Smyth v. Ames*, 169 U.S. 466, 518 (1898))); *Great N. Life Ins. Co.*, 422 U.S. at 51 (listing, among lawsuits permitted under Eleventh Amendment, private action naming state official “to enjoin an affirmative act to the injury of plaintiff”).

218. This is not to say that the *Ex parte Young* injunction did not have a direct impact on the State of Minnesota, nor to say that that impact had no monetary component. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 104 (1984) (acknowledging that *Young* injunction had direct impact on State *qua* State). At the very least, Minnesota was forced to forego the fines and other penalties that it would have been entitled to assess against railroads violating the state rate legislation, as Justice Rehnquist stressed. See *Edelman*, 415 U.S. at 667.

219. Specifically, the *Edelman* injunction required Illinois to abandon state regulations that had established a schedule for processing aid requests under the federal-state AABD assistance program. See *Edelman*, 415 U.S. at 655-56 & un.4-5; see also *supra* note 192 (describing complaint in some detail). Those state regulations effectively delayed the date on which a specific assistance award began to be paid out to its recipient; it was for this reason, along with a pattern of more general administrative delay, that the lower federal courts found the State to have violated federal law in the first place. See *Edelman*, 415 U.S. at 655-56. Accordingly, the *Edelman* injunction, by ordering Illinois officials to conform their AABD processing time to meet federal standards *in the future*, also required the State, by definition, to pay each recipient her benefits earlier and thus for a longer period of time. *Id.*

220. *Id.* at 664. This conclusion, as the dissents point out, blunts the edge of the majority’s holding that the Eleventh Amendment denies federal jurisdiction over *retrospective* damage awards against state officials for state wrongdoing because they would “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.” *Id.* at 668; see also *id.* at 682 (Douglas, J., dissenting) (criticizing the majority on this ground); Currie, *supra* note 21, at 160-61 (noting that majority opinion in *Edelman* is written too broadly for its precedents: if the Court really meant to permit any *prospective* relief against a state official, no matter how certainly compliance would require

### 3. *Edelman* Rests on Policy, Not on Law

Justice Rehnquist did not ignore the poor fit between *Edelman* and its legal precedents. Indeed, the Court frankly admitted that its overt shift from an *effects*-oriented Eleventh Amendment analysis to an exclusively *time*-oriented one was driven not by law but by policy.<sup>221</sup> Justice Rehnquist acknowledged that prospective injunctions against state officials can, and perhaps "inevitably" do, have the very effect on a State that the Eleventh Amendment was designed to prevent: the forced expenditure of money from general treasury funds at the order of a federal court.<sup>222</sup> But federal jurisdiction should extend to lawsuits seeking even costly prospective injunctions despite the Eleventh Amendment, because, simply stated, the Court considered it good policy to preserve a federal judicial forum to enforce state compliance with federal law: that is a good use for the federal courts. "[The *Ex parte Young*] holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."<sup>223</sup>

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payment of treasury funds, then the opinion would "contradict [its] own insistence that an officer could not be ordered to take money from the treasury" under *Ford Motor Co.*); see also Vázquez, *supra* note 76, at 94 (urging a return to the "original" *Edelman* holding).

221. The *Edelman* majority protested that the financial impact ancillary to the prospective injunction there—to comply with accelerated federal time limits for processing aid applications—should not be considered the same, for Eleventh Amendment purposes, as the financial impact on a State of a retrospective order to pay benefits improperly withheld under the State's slower schedule. *Edelman*, 415 U.S. at 668. Equating the prospective cost with the retrospective cost, the majority reasoned,

neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will *invariably mean there is less money available for payments for the continuing obligations* of the public aid system.

*Id.* at 666 n.11 (emphasis added) (responding to Justice Douglas' dissent). The majority did not here elaborate why this distinction should make a *constitutional* difference, as it is thought to do. See *id.* One explanation—that a State may somehow raise the budget to fund a *future* obligation more easily, and with less overall disruption, than the budget to fund a *past* obligation—may make sense as a matter of policy, but it would seem to have no compelling constitutional basis, other than the Court's own say-so in *Edelman* itself. *Id.* at 666-67.

222. See *id.* at 663 (citing "rule" that private lawsuit seeking to win a judgment that "must be paid from public funds in the state treasury is barred by the Eleventh Amendment" (citations omitted)); *id.* at 667-68 (approving federal court jurisdiction over lawsuits against state officials, alleging state violation of federal law and seeking relief having "greater impact on state treasuries than did that awarded in *Ex parte Young*").

223. *Id.* at 664 (describing *Young* as a "watershed case"); see also *Pennhurst II*, 465 U.S. at 105 ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights."). But see *supra* Part II.C.2 (critiquing notion that *Young*'s practical utility can supply doctrine with law-based foundation after *Seminole Tribe*).

So long as federal jurisdiction is exercised to compel future *compliance* with federal law, particularly the federal Constitution, then that compliance can, apparently, cost a State any amount of money, despite sovereign immunity.<sup>224</sup> This policy-based jurisdictional rule, although undoubtedly valuable,<sup>225</sup> stands a long way off from a state sovereign immunity principle so fundamental to Article III that it absolutely prohibits Congress from granting federal jurisdiction over lawsuits against States to enforce Article I legislation.<sup>226</sup>

#### IV. *EX PARTE YOUNG* IN *COEUR D'ALENE*

In *Seminole Tribe*, the Court declared, without explanation, that even though Article III prohibits Congress from abrogating state

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224. See *Edelman*, 415 U.S. at 668 (authorizing federal jurisdiction to grant injunction with “ancillary effect on the state treasury”). Retrospective damage awards, by contrast, apparently do nothing to ensure future compliance with federal law, and *therefore* federal jurisdiction over such claims for relief was deemed unconstitutional. See *id.* at 668-69 (distinguishing *compliance* goal from *compensation* goal). More recently, Justice Rehnquist, again writing for the Court, offered an even more bluntly policy-driven explanation for *Edelman*’s time-oriented jurisdictional rule:

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of 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. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

*Green v. Mansour*, 474 U.S. 64, 68 (1985) (denying federal jurisdiction over claim against state officials seeking relief requiring that notice be sent to members of plaintiff class announcing that State had in past violated federal law governing computation of benefits under federal Aid to Families With Dependent Children program). As one commentator has put it more bluntly, “The rub is that making the state pay is hard”; but prospective remedial decrees are more likely to involve negotiation between parties and a federal court, thus increasing the likelihood of state compliance. Friedman, *supra* note 96, at 770-71.

225. There is no question but that *Ex parte Young* serves a critical function in holding States accountable to federal law. See *supra* notes 99-100 and accompanying text. Rather, the question here is how *Young* avoids the sovereign immunity limit on subject-matter jurisdiction that *Seminole Tribe* invoked to prohibit Congress from pursuing that same goal.

226. In the third other principal decision forming the *Young* doctrine, the Court displayed the same reliance on policy that *Young* and *Edelman* did. In *Pennhurst II*, the Court withheld *Young* jurisdiction and concluded that sovereign immunity barred a lawsuit against a state official, seeking only prospective relief, where the plaintiff claimed that the official had violated state law in carrying out his official duties, even though, under *Young*’s rationale, a State may never lend its own immunity to cloak an official’s illegal act. *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89, 104-06 (1984); Vázquez, *supra* note 76, at 16 & n.103 (noting that this point was made by the *Pennhurst II* dissenters). But because the plaintiff’s state-law claim did not implicate the policy behind the *Young* doctrine—that some federal-court jurisdiction is necessary despite *Hans* to enforce state compliance with federal law—the Court allowed the defendant official to claim the State’s sovereign immunity from suit in federal court. See *Pennhurst II*, 465 U.S. at 105-06.

sovereign immunity under Article I, *Ex parte Young* jurisdiction would nonetheless continue to authorize federal subject-matter jurisdiction over suits to coerce state compliance with federal law.<sup>227</sup> The following Term, all nine Justices reaffirmed this jurisdictional rule: the Constitution's sovereign immunity principle does not bar federal courts from adjudicating lawsuits against state interests so long as *Young's* fictional State-official distinction is maintained.<sup>228</sup> While the Justices disagreed sharply about *when* a federal court should exercise its *Young* jurisdiction,<sup>229</sup> no Justice questioned the premise, necessarily underlying their debate, that it is an appropriate exercise of Article III judicial power for the Court, acting unilaterally, to dictate the terms on which *Young* jurisdiction should be available.

And no Justice addressed the central anomaly of *Seminole Tribe* and *Coeur d'Alene*: that, even though Congress has been denied the Article I power to grant federal jurisdiction over unconsenting States to enforce federal law because of a sovereign immunity principle inherently limiting the scope of the Article III judicial power, the Court's own non-constitutional grant of jurisdiction to itself for the same purpose survives. Although *Coeur d'Alene* is thus perhaps most compelling, from a separation of powers perspective, for what it does but does not say about a unilateral judicial power to regulate federal jurisdiction, the several opinions do offer insight into how the Court, and the individual Justices, perceive the judiciary's special role within the Constitution's separation of powers framework.

#### A. *Coeur d'Alene: The Dispute and the Ruling*

The *Coeur d'Alene* Indian Tribe, a federally recognized tribe, claimed the beds and banks of all the navigable waterways in Idaho's *Coeur d'Alene* water system, collectively called the "submerged lands," under an 1873 Executive Order from President Grant establishing the *Coeur d'Alene* Reservation within what was then the

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227. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996).

228. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (Kennedy, J., for five-Justice majority) ("The *Young* exception to sovereign immunity was an important part of our jurisprudence when the Court . . . held that Congress . . . may not abrogate state sovereign immunity. . . . We do not, then, question the continuing validity of the *Ex parte Young* doctrine." (citing *Seminole Tribe*, 517 U.S. at 71 n.14)).

229. Compare *Coeur d'Alene*, 521 U.S. at 269-80 (proposing, with Chief Justice Rehnquist, a standard for determining whether *Young* action appropriate in particular case), with *id.* at 291-97 (O'Connor, J., concurring in part and concurring in the judgment) (rejecting, with Justices Scalia and Thomas, the principal opinion's standard), and *id.* at 297 (Souter, J., dissenting) (rejecting, with Justices Stevens, Ginsburg, and Breyer, interpretation of *Young* in both principal opinion and concurrence).

Idaho territory.<sup>230</sup> Grant's Executive Order was subsequently ratified by Congress in 1891, soon after Idaho became a State in 1890.<sup>231</sup>

When in 1989 Idaho officials undertook to regulate the submerged lands and waters of Lake Coeur d'Alene as a recreational area and health resort,<sup>232</sup> the Tribe brought suit in federal court seeking to force those state officials to comply with federal law granting the submerged lands to the Tribe.<sup>233</sup> Specifically, the Tribe sought federal injunctive and declaratory relief that would, among other things, determine that federal law granted the Tribe "exclusive use and occupancy" of the submerged lands and therefore prohibited Idaho from enforcing state regulations on the Tribe's lands.<sup>234</sup>

A majority of the Supreme Court held that the Constitution's state sovereign immunity principle prohibited federal subject-matter jurisdiction over the Tribe's claim, and that *Ex parte Young's* jurisdictional exception should not be invoked to save the lawsuit. The Court produced three separate opinions. Reduced to its essentials, the opinion of the Court, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, reasoned that the Tribe's claims could not proceed under *Ex parte Young* because the relief sought—a federal court order effectively divesting Idaho of all sovereign authority over land it claimed as its own—was too much like a lawsuit seeking relief against Idaho itself to justify the *Young* fiction there.<sup>235</sup> In the majority's words, the Tribe's claims were "close to the functional equivalent of [a] quiet title [action] in that substantially all benefits of ownership and control would shift from the State to the Tribe."<sup>236</sup> Beyond this essential decision, however, there was little agreement about when *Ex parte Young* jurisdiction should be meted out in this and other controversies. The Court's three opinions each offer a distinctive vision of *Ex parte Young* and the uses to which the judicial power should be put.<sup>237</sup>

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230. See *id.* at 264; *id.* at 299 (Souter, J., dissenting).

231. See *id.* at 299 (Souter, J., dissenting).

232. See *id.*

233. See *id.* at 264.

234. *Id.*

235. See *id.* at 281-82 (portion of Justice Kennedy's principal opinion joined by Chief Justice Rehnquist as well as Justices O'Connor, Scalia, and Thomas); *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

236. *Id.* at 282; see also *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

237. For a detailed analysis of the three *Coeur d'Alene* opinions and what each suggests about the current state of *Edelman's* distinction between prospective and retrospective relief in *Young* actions, see Vázquez, *supra* note 76, at 42-51.



### B. Viewing Judicial Power Under *Ex parte Young*

Justice Kennedy, speaking for the Court, declared that the central aim of the sovereign immunity principle is to “protect” the “dignity and respect afforded a State” under the Constitution.<sup>238</sup> Since every exercise of *Ex parte Young* jurisdiction represents a breach of this critical constitutional shield,<sup>239</sup> *Young* should be invoked only when the private lawsuit seeking federal enforcement of federal law does not, on balance, pose too great an “affront” to the State.<sup>240</sup> That is, in place of what Justice Kennedy and Chief Justice Rehnquist characterized as the ordinary “presumption”<sup>241</sup> that *Young* jurisdiction should be exercised in every lawsuit satisfying the *Young* doctrine’s criteria,<sup>242</sup> they proposed a multi-factored balancing test to weigh, in each case, the interests served by opening federal court doors against a State’s interests in keeping those doors shut.<sup>243</sup>

Not every interest weighs the same. Where a plaintiff has no effective remedy for her federal claims in state court, for example, *Ex parte Young* jurisdiction should ordinarily be granted.<sup>244</sup> Where,

238. *Coeur d’Alene*, 521 U.S. at 268 (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890)); see also *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146-47 (1993) (holding that a district court’s denial of a state sovereign immunity claim is subject to immediate appeal because immunity entitles a state or state representative to avoid the indignity of trial, not just the burden of an adverse judgment).

239. See *Coeur d’Alene*, 521 U.S. at 269-70.

240. *Id.* at 277 (opinion of Kennedy, J., joined by Chief Justice Rehnquist only); see also *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105 (1984) (“*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.” (internal quotations omitted)).

241. *Coeur d’Alene*, 521 U.S. at 277 (“Whether the presumption in favor of federal-court jurisdiction in this type of case is controlling will depend upon the particular context.”).

242. Namely, that the lawsuit name only state officials, see *Ex parte Young*, 209 U.S. 123, 168 (1908); and seek only prospective relief, see *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); to compel future compliance with federal law, see *Pennhurst II*, 465 U.S. at 105. See also *Coeur d’Alene*, 521 U.S. at 288 (O’Connor, J., concurring in part and concurring in the judgment).

243. See *Coeur d’Alene*, 521 U.S. at 278-81.

244. See *id.* at 271. They explained:

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.* (citing only THE FEDERALIST NO. 80 (Alexander Hamilton)). In this, Justice Kennedy and Chief Justice Rehnquist appeared to attempt an actual constitutional foundation for *Ex parte Young* jurisdiction in very limited circumstances: that is, that the States actually consented, by ratifying the Constitution, to federal jurisdiction on *Young*’s terms where such States have closed their own courts’ doors to the federal claim pursued. Cf. *supra* notes 43-47 and accompanying text (discussing similar theory of state consent-by-ratification, offered to justify the congressional abrogation of state sovereign immunity under Article I, which *Seminole Tribe* rejected). Justice Kennedy returned to this notion to diminish the importance of *Young*

however, a state forum is available, the plaintiff's interest in *Ex parte Young* jurisdiction diminishes significantly. There, nothing is at stake other than "the desire of the litigant to choose a particular forum"; and when that interest is weighed against the State's "desire . . . to have the dispute resolved in its own courts,"<sup>245</sup> the plaintiff's simple forum preference should give way, and *Young* jurisdiction should be denied.<sup>246</sup>

Moreover, a plaintiff may not bolster her side of the balance by claiming a special interest in having her *federal* claim adjudicated by a *federal* court.<sup>247</sup> Discarding the standard justification for *Ex parte Young* jurisdiction—that a federal forum is necessary to vindicate the supremacy of federal law<sup>248</sup>—these Justices rejoined:

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*. For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court.

. . . .  
 . . . It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole ration-

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jurisdiction where there is an alternative state remedy, so that the only reason for federal jurisdiction is to vindicate a federal interest in having federal courts decide federal rights. See *Coeur d'Alene*, 521 U.S. at 274 ("It is difficult to say States consented to these types of suits in the plan of the convention."). This attempt to support *Young* on an argument paralleling the abrogation argument rejected in *Seminole Tribe* appears only half-hearted: Justice Kennedy offered only one quote, from Alexander Hamilton, that does not directly bear on the question of federal-court jurisdiction. Moreover, Justice Kennedy's suggestion met with instant criticism from other Justices, even those who concurred in the judgment. See *id.* at 291-92 (O'Connor, J., concurring in part and concurring in the judgment).

245. *Id.* at 277.

246. Under the Kennedy-Rehnquist approach, once compared to a plaintiff's now-devalued interest in invoking federal court jurisdiction, the State's interest in demanding its own chosen forum is weighty indeed: "States have real and vital interests in preferring their own forum in suits brought against them, interests that ought not to be disregarded based upon a waiver presumed in law and contrary to fact [i.e., the *Ex parte Young* fiction]." *Id.* at 274 (citing *Edelman*, 415 U.S. at 673). To drive home the point that a plaintiff's interest in a federal forum weighs little against the State's interest in its own courts, these Justices observed: "The Eleventh Amendment's background principles of federalism and comity need not be ignored in resolving these conflicting preferences." *Id.* at 277. In this lawsuit, Idaho courts were open to hear the Tribe's complaint, so the balance should tip against the Tribe: "[T]here [was] 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." *Id.* at 274.

247. See *id.* at 274-75; see also *supra* Part II.C.2 (critiquing notion that federal court's special role in defining constitutional rights on the merits automatically confers subject-matter jurisdiction over rights-based claims despite state sovereign immunity).

248. See *id.* at 274 (identifying view that *Ex parte Young* may serve an "important interest . . . when the case calls for the interpretation of federal law" (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105 (1984))).

ale that state courts are inadequate to enforce and interpret federal rights in every case.<sup>249</sup>

By contrast, a presumption in favor of *Young* jurisdiction may remain where a complaint implicates the Constitution's structural principles, like federalism itself.<sup>250</sup> "In some cases, it is true, the federal courts play an indispensable role in maintaining the structural integrity of the constitutional design. A federal forum assures the peaceful resolution of disputes between the States and suits initiated by the United States against States."<sup>251</sup>

Although this interest balancing test would, at one level, reduce the number of federal complaints invoking *Ex parte Young* that

249. *Coeur d'Alene*, 521 U.S. at 274-75. Not only is there no special interest, weighing in favor of *Ex parte Young* jurisdiction, in having a federal court decide federal law claims, but in fact States themselves have a strong and affirmative interest in having their own courts decide federal questions alongside state law questions, in order to "integrat[e] those [federal] sources of law within their own system for the proper judicial control of state officials." *Id.* at 276. This state interest further tips the balance against *Ex parte Young* jurisdiction in any single case. *See id.*

250. *See supra* Part II.C.3 (critiquing notion that Court's special role in defining Constitution's structural principles automatically confers subject-matter jurisdiction over structural claims despite state sovereign immunity).

251. *Id.* at 275 (citations omitted). While the Kennedy-Rehnquist faction "assume[s] there is a special role for Article III courts in the interpretation and application of federal law in other instances as well, we do not for that reason conclude that state courts are a less than adequate forum for resolving federal questions," presumably meaning those federal questions that could not be said to trigger the "special role" of Article III courts. *Id.* *But see id.* at 279 (suggesting that federal courts may have a constitutionally "special role" in providing remedies when States violate the Fourteenth Amendment's equal protection guarantee against race discrimination; discussing *Milliken v. Bradley*, 433 U.S. 267 (1977)).

This analysis offers an interesting contrast to these Justices' views about Congress' legislative power over federal jurisdiction. Discussing the Court's decisions, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress has power to abrogate state sovereign immunity when using its special authority to enforce Fourteenth Amendment guarantees, these two Justices reasoned that a special *judicial* role in enforcing the Fourteenth Amendment must therefore also be inherent in those same constitutional provisions, even though the Amendment grants no explicit enforcement power to the federal courts. *See* U.S. CONST. amend. XIV. That is, while the Court under *Young* claims a power over federal jurisdiction that Congress lacks, *see Seminole Tribe*, 517 U.S. at 44, these Justices found it incoherent to read the Fourteenth Amendment to give Congress any power over federal jurisdiction that the Court does not also have. *See Coeur d'Alene*, 521 U.S. at 279 ("If Congress pursuant to its § 5 remedial powers under the Fourteenth Amendment may abrogate sovereign immunity . . . it follows that the substantive provisions of the Fourteenth Amendment themselves offer a powerful reason to provide a federal forum") (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (emphasis added))). Under this reasoning, moreover, not only is it inconceivable that Congress could have a constitutional authority over federal jurisdiction that the Court lacks, but in fact Congress needs the explicit grant of such authority in Section 5, and would lack abrogation power without it, while the Court needs no special constitutional grant of authority but exercises at least an equivalent power over federal jurisdiction simply by virtue of Article III's grant of "judicial Power." In this view, Congress requires a special constitutional grant of power over jurisdiction just to bring it up to the level of authority that the Court enjoys automatically under Article III.

would survive a state sovereign immunity challenge,<sup>252</sup> it would at the same time dramatically *increase* the power of each federal court to decide when its own doors should be opened or shut on private lawsuits challenging state interests. Justice Kennedy and Chief Justice Rehnquist invited federal courts to extend or withhold *Young* jurisdiction according to any cluster of policy values deemed compelling in any particular case: “[T]he *Young* fiction is an exercise in line-drawing. There is no reason why the line cannot be drawn to reflect the *real interests of States*.”<sup>253</sup> This opinion thus advocates a free-form judicial power under *Ex parte Young*, concentrating broad discretion over federal subject-matter jurisdiction in the hands of individual federal judges. Following hard on the heels of *Seminole Tribe*’s ruling that Article III denies Congress *all* Article I authority to abrogate state sovereign immunity<sup>254</sup> no matter how weighty the federal interests to be served by such federal judicial enforcement, this opinion’s vote for so broad a judicial discretion over subject-matter jurisdiction is indeed noteworthy.

The two other *Coeur d’Alene* opinions<sup>255</sup> both soundly reject any suggestion that the Court should substitute a case-by-case interest-balancing test for the *Ex parte Young* formula, which authorizes federal jurisdiction over private lawsuits against state officials seeking prospective relief compelling future compliance with federal law.<sup>256</sup> They differ from each other, primarily, in their two views about whether the Court should recognize an exception to *Ex parte Young* and deny federal jurisdiction where, as in *Coeur d’Alene*, the prospective relief sought against the state officials would dispose finally of a State’s claim to own or to regulate land within its boundaries.

In an opinion written by Justice O’Connor, concurring with the Kennedy-Rehnquist faction’s judgment and concurring in part of its reasoning, she and Justices Scalia and Thomas adopted a slightly

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252. Cf. Jackson, *supra* note 6, at 498-99 (arguing that *Seminole Tribe* diminished judicial power by decreasing number of cases entitled to federal jurisdiction).

253. *Coeur d’Alene*, 521 U.S. at 280 (emphasis added). Indeed, *Young* jurisdiction should be extended or withheld based on a wide-ranging canvass of state interests: “The range of concerns to be considered in answering this inquiry [the interest-balancing] is broad.” *Id.*

254. *Seminole Tribe*, 517 U.S. at 47 (1996) (Rehnquist, C.J., writing for the Court).

255. See *Coeur d’Alene*, 521 U.S. at 293-94 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 298 (Souter, J., dissenting).

256. See *Ex parte Young*, 209 U.S. 123, 168 (1908) (holding that plaintiff may name only state officials); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (holding that plaintiff may seek only prospective relief); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105 (1983) (holding that plaintiff may seek to compel future compliance with *federal* law only and not state law); see also *Coeur d’Alene*, 521 U.S. at 293-94 (O’Connor, J., concurring).

more focused exception to *Ex parte Young*: Where a plaintiff's claim implicates a State's "special sovereignty interests," as defined by the Court, then the *Young* fiction should be pierced, and the State entitled to claim its constitutional immunity from suit in federal court even though the plaintiff names only state officials as defendants.<sup>257</sup> Although rejecting the Kennedy-Rehnquist view that *Ex parte Young* jurisdiction should in each case depend on the relative value of the federal and state interests at issue,<sup>258</sup> the O'Connor faction nonetheless concluded that *Young* jurisdiction should be withheld *in that case* because of what these three Justices considered the inordinate weight of Idaho's interest in the property at stake.<sup>259</sup>

The dissent, written by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer, rejected any exception to *Young* jurisdiction based on the relative importance to a State of the federal claim at issue. Asserting that *Ex parte Young* is now a component of the Court's mandatory jurisdiction over federal questions,<sup>260</sup> the dissenters contended that *Young* jurisdiction should be granted in every case in which Congress has not acted to foreclose that path into federal court.<sup>261</sup> And any intrusion on state interests that a *Young* suit entails is outweighed by the value of empowering "an individual . . . to seek any federal remedy for violation of a federal right."<sup>262</sup> Indeed, to

257. See *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor elaborated that *Young* jurisdiction should be unavailable where plaintiff's claim is not simply to possess land also claimed by another under state law, see *United States v. Lee*, 106 U.S. 196, 220-23 (1882), but instead is a claim:

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. 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.

*Coeur d'Alene*, 521 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted); see Vázquez, *supra* note 76, at 45-50 (reading O'Connor's opinion as creating "exception" to *Edelman* rule permitting prospective relief where State's claims to property are at stake).

258. See *Coeur d'Alene*, 521 U.S. at 295 (O'Connor, J., concurring in part and concurring in the judgment) ("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.")

259. See *id.* at 296; see also Vázquez, *supra* note 76, at 48.

260. See *id.* at 297 (Souter, J., dissenting); cf. Redish, *supra* note 32, at 71-72 (arguing that judge-made abstention doctrines are constitutionally suspect because they permit federal courts on their own initiative to decline cases within their mandatory federal question jurisdiction granted by Congress, as in 28 U.S.C. § 1331 (1994 & Supp. 1996)).

261. See *Coeur d'Alene*, 521 U.S. at 297 (Souter, J., dissenting); *id.* at 298 (explaining that *Seminole Tribe* held that where Congress has not "displaced" the *Young* doctrine, a federal court has jurisdiction over a suit against an official so long as the *Young* requirements themselves are met).

262. *Id.* at 308.

strike the balance otherwise would be to “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.”<sup>263</sup>

As these three *Coeur d'Alene* opinions demonstrate, the Court considered the question of federal subject-matter jurisdiction over the Tribe's claims as one entirely within the Court's power to decide; indeed, the three opinions all assumed that granting or denying federal jurisdiction in that case turned on the Justices' own views about where a *policy-driven* line should be drawn between a plaintiff's interest in federal-court enforcement of federal-law rights and a State's interest in avoiding federal-court enforcement of those rights. Not one of the Justices even suggested that this assertion of unilateral judicial power to regulate federal subject-matter jurisdiction even theoretically conflicts with *Seminole Tribe's* ruling, only a year before, that state sovereign immunity constitutionally curtails the entire federal judicial power under Article III.<sup>264</sup> In *Coeur d'Alene*, the Court simply assumed a broad and unilateral authority to dictate the terms upon which federal court doors will be opened or shut on claims against state interests.

## V. JUDICIALIZING FEDERAL JURISDICTION

### A. *No Ordinary Exercise of Judicial Review*

If my reading of these decisions is supportable, then by preserving *Ex parte Young* after *Seminole Tribe* the Supreme Court has claimed an independent judicial prerogative to decide when to open and shut federal court doors on lawsuits challenging state interests; the Court has claimed a judicial power to *dictate* federal jurisdiction in these cases, not just to exercise it. That claim departs from the Court's traditional power of judicial review, and it marks out a different species of Article III “judicial Power.”

The simplest definition of *judicial review* is also the most familiar: “It is emphatically the province and duty of the judicial de-

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263. *Id.* (citations omitted); see also *supra* Part III.B (discussing nineteenth-century cases developing American version of common law exception to sovereign immunity where plaintiffs sued officials).

264. See, e.g., *Coeur d'Alene*, 521 U.S. at 267 (acknowledging that sovereign immunity rules limit the “reach or extent” of federal judicial power under Article III).

partment to say what the law is.”<sup>265</sup> Along with this “lawsaying”<sup>266</sup> power comes another, even more potent authority: the power to invalidate acts of Congress and the Executive if they violate the “law”—constitutional, statutory, or otherwise—as declared by the Court.<sup>267</sup> And when the Court turns its “lawsaying” attention to the Constitution, the Court’s word is the last word: the political branches can contradict it only by amending the Constitution itself.<sup>268</sup>

But in *Seminole Tribe* and *Coeur d’Alene*, the Court offered no affirmative reading of Article III, of the Eleventh Amendment, nor indeed of any constitutional provision or other law-based authority, to explain why a private lawsuit against a state *official*, in his *official* capacity, and for relief that can only be provided through *state action*, could be heard by a federal court even though a lawsuit naming the State itself was absolutely barred by *Seminole Tribe*’s sovereign immunity ruling.<sup>269</sup> Indeed, the Court has claimed no affirmative constitutional support for *Ex parte Young* jurisdiction, candidly admitting

265. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

266. Ann Althouse coined this apt term for judicial review. See Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1177, 1182 n.22 (1991).

267. As the Court recently noted: “The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the ‘powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.’” *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (quoting *Marbury*, 5 U.S. (1 Cranch) at 176). There is no controversy over this basic definition of the Court’s power of judicial review. Indeed, so commonplace and familiar is the idea of “judicial review” that legal commentators routinely introduce the term without defining it at all. See, e.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997) (observing, without citation, “[T]here is also, however, this matter of judicial review, which sometimes makes Congress wish that federal judicial competence were not quite as broad as it is”). By contrast, the Court’s *exercise* of the traditional judicial review power to overturn the political decisions of majoritarian institutions, like Congress and the Executive, has in this century been so controversial as to be described as “the central obsession of modern constitutional scholarship.” See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-35 & n.1 (1998) (citing scholarship debating how to “reconcil[e]” judicial review by unelected judiciary with principle of “popular governance in a democratic society”).

268. Once the Court declares what the Constitution means, Chief Justice Marshall reasoned in *Marbury*, that meaning cannot be altered by simple legislation, else the Constitution would no longer be “superior paramount law, unchangeable by ordinary means.” *Marbury*, 5 U.S. (1 Cranch) at 177. Indeed, if Congress could contradict the Court’s constitutional rulings at will, the Constitution itself would fall to the “level with ordinary legislative acts, and, like other acts, [be] alterable when the legislature shall please to alter it.” *Id.*; see also *City of Boerne*, 521 U.S. at 536 (quoting *Marbury* excerpt to support ruling that Congress lacks authority under Fourteenth Amendment’s Section 5 to alter Court’s declaration on scope of First Amendment’s protection of religious freedom). Although the Court’s claim to the last word on constitutional meaning is challenged from time to time, that claim enjoys enough respect among courts and commentators to include it within this Article’s basic definition of the judicial review power. See, e.g., Monaghan, *supra* note 21, at 1363 (“[T]he Court is universally acknowledged to be the final and authoritative expositor of the Constitution.”).

269. See *supra* Part III.C.

that *Young* depends on a judicially-crafted “fiction”<sup>270</sup> adopted not because the Constitution substantively embodies that sovereign immunity exception, but because the Court has identified a *need* to have certain federal laws enforced in federal courts despite state sovereign immunity.<sup>271</sup> Thus, unlike Court decisions that define the substantive content of constitutional rights<sup>272</sup> or constitutional structures,<sup>273</sup> the cases comprising the *Ex parte Young* doctrine say little about what the *law* is—constitutional or otherwise—except to assert a judicially-crafted, non-constitutional exception<sup>274</sup> to what the Constitution would otherwise require: dismissal of private lawsuits seeking to coerce state action for lack of subject-matter jurisdiction under Article III.<sup>275</sup>

*Ex parte Young*’s survival of *Seminole Tribe* departs from the traditional judicial review model in a second way as well. When the Court exercises its power “to say what the law is” concerning a constitutional principle<sup>276</sup>—even one affecting federal court jurisdiction, like

270. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 105-06 (1984) (describing *Ex parte Young* doctrine as resting on “fiction” and “irony”); *see also Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 269 (1997) (agreeing with *Pennhurst II*’s “observation” that *Young* rests on a “fictional distinction between official and the State”).

271. *See, e.g., Coeur d’Alene*, 521 U.S. at 262 (stating that the *Young* doctrine serves “need to prevent violations of federal law”); *Pennhurst II*, 465 U.S. at 105-06 (emphasizing that the *Young* doctrine “rests on the need to promote the vindication of federal rights”); *Edelman v. Jordan*, 415 U.S. 651, 655 (1974) (stating that the *Ex parte Young* “holding permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect”); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 174 (1996) (Souter, J., dissenting) (“The doctrine we call *Ex parte Young* is nothing short of indispensable to the establishment of constitutional government and the rule of law. [It] marks the frontier of the enforceability of federal law against sometimes competing state policies.”); *supra* Part II.C.2 (criticizing notion that *need* for *Young* jurisdiction can provide doctrine with legal foundation).

272. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-23 (1997) (defining which “fundamental rights” are protected by Constitution’s due process guarantees); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating federal Religious Freedom Restoration Act as exceeding Congress’ Fourteenth Amendment legislative power, since Congress may not contradict the Court’s decision on the scope of the First Amendment’s Religion Clauses); *supra* Part II.C.2 (discussing Court’s traditional power to define individuals’ constitutional rights).

273. *See, e.g., Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating federal firearms registration legislation for violating the Constitution’s principle of federalism prohibiting the national government from commandeering state officials in order to implement federal policy); *see also supra* Part II.C.3 (discussing Court’s traditional power to enforce the Constitution’s structural principles).

274. Indeed, the Court has made its *Young* regulations overtly non-constitutional: the Court has chosen to deny federal court access on purely pragmatic grounds, like those justifying *Edelman*’s bright line distinguishing prospective from retrospective relief. *See supra* notes 221-26 and accompanying text. And the Court has also chosen to grant federal court access on purely pragmatic grounds, like those justifying *Ex parte Young* jurisdiction in the first place. *See supra* note 190 and accompanying text (discussing the Court’s reliance on the “necessity” of *Young* jurisdiction despite state sovereign immunity).

275. *See* FED. R. CIV. P. 12(b)(1).

276. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).



standing or state sovereign immunity—that law then ordinarily applies equally to Congress and Court alike. So, neither Congress nor the Court may authorize subject-matter jurisdiction over a controversy outside the categories listed in Article III.<sup>277</sup> And neither Congress nor the Court may authorize lawsuits by plaintiffs who do not meet Article III's standing requirements.<sup>278</sup>

*Seminole Tribe* would have conformed to this tradition had it held that neither Congress *nor the Court* may constitutionally authorize federal jurisdiction over a private lawsuit to force a State to comply with federal law enacted under Article I. Indeed, had *Seminole Tribe* stopped there, it would have reinforced the Court's judicial review tradition by holding that Congress must comply with the constitutional rule of state sovereign immunity that the Court imposed on itself in *Hans v. Louisiana*,<sup>279</sup> so that all constitutional actors would be bound by the same substantive constitutional constraint.<sup>280</sup>

Of course, the Court did not adopt so evenhanded a rule. Instead, *Seminole Tribe* decided, subject-matter jurisdiction over lawsuits against state interests on Congress' terms violates the Constitution, while on the Court's terms, it does not.<sup>281</sup>

277. *Cf. id.* (holding that Congress may not assign original jurisdiction to the Supreme Court in cases other than those listed in Article III).

278. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992) (invalidating environmental legislation's "citizen standing" provision because it authorized federal court lawsuits by plaintiffs who could not meet the Court's own standing criteria, based on Court's interpretation of Article III); *see also Raines v. Byrd*, 521 U.S. 811, 815, 830 (1997) (dismissing constitutional challenge to the federal Line Item Veto Act brought by six Members of Congress because they lacked Article III standing despite specific congressional intent that Members be permitted to challenge that legislation).

279. *Hans v. Louisiana*, 134 U.S. 1 (1890); *see also supra* notes 54-56 and accompanying text (discussing *Hans*).

280. *See Seminole Tribe v. Florida*, 517 U.S. 44, 65-67 (1996) (noting that before *Union Gas*, "it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III").

281. Moreover, if the Court were exercising its traditional judicial power to say "what the law is" for all constitutional actors, one might expect the Court to limit *Young* jurisdiction to those causes of action arising from the Reconstruction Amendments, *see* U.S. CONST. amends. XIII-XV, since *Seminole Tribe* limited Congress' power to abrogate state sovereign immunity to legislation enacted under those Amendments. *Seminole Tribe*, 517 U.S. at 65-66 (reaffirming *Fitzpatrick v. Bitzer's* holding that Reconstruction Amendments altered state-federal relationship, so state sovereign immunity principle in Article III and Eleventh Amendment does not apply with equal force, thus permitting the abrogation of state sovereign immunity to enforce those Amendments and legislation enacted thereunder). The Court did not so limit *Young*; to the contrary, the *Seminole Tribe* majority suggested that Congress might provide for federal court enforcement of Article I legislation if its jurisdictional grants conformed to the *Ex parte Young* model. *Id.* at 75 n.17; *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 274-75 (1997) (opinion of Court); *id.* at 299-300 (Souter, J., dissenting) (observing that Tribe's cause of action arose from Executive Order, ratified by Congress, defining boundaries of Coeur d'Alene Reservations; neither Executive Order nor ratifying legislation enacted under Reconstruction Amendments).

The Court said “no” to Congress, but “yes” to itself.<sup>282</sup>

Even this asymmetry would fit the tradition of judicial review, moreover, if the difference between Congress’ jurisdictional terms and the Court’s could be explained on constitutional grounds. That is, if *Young* jurisdiction rested on an affirmative principle of law—a principle having constitutional status equal to the sovereign immunity principle invoked *against* Congress’ jurisdictional grant—then *Seminole Tribe* could be understood as holding, simply, that Congress must comply with *Young*’s constitutional rule,<sup>283</sup> just like the Court.

But, again, no principle of law—only the Court’s own say-so—supports *Young*’s jurisdictional distinction between a State and its officials. Thus, by preserving the *Ex parte Young* doctrine after *Seminole Tribe*, the Court has effectively asserted a species of judicial power largely unlike ordinary judicial review: a freestanding Article III authority, outstripping Congress’ power under Article I, to open and shut federal court doors on lawsuits against state interests as the Court sees fit.

### B. *Ex parte Young and the Separation of Powers*

Any such claim implicates separation of powers concerns on at least two fronts. It clashes with the Constitution’s textual allocation to Congress of substantial, if not primary, authority to regulate federal court jurisdiction. And it collides with core values—like institutional accountability and inter-branch review—that the separation of powers principle seeks to preserve.

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282. *But see Marbury*, 5 U.S. (1 Cranch) at 137. After *Marbury*, the Supreme Court preserved for itself no more power than it had allowed Congress to authorize original Supreme Court jurisdiction over the claims of the Midnight Judges: under *Marbury*, the Constitution said “no” to jurisdiction over those lawsuits, and said “no” to the Court and to Congress alike. By contrast, the *Seminole Tribe* Court, by preserving *Ex parte Young*, dealt itself the authority to extend federal jurisdiction over essentially the same lawsuits that it declined to accept from Congress’ hand, thus saying “no” to Congress, but “yes” to itself.

283. *Seminole Tribe*, 517 U.S. at 75 n.17 (suggesting that Congress could constitutionally grant federal jurisdiction on *Ex parte Young* model to coerce state compliance even with Article I legislation).

## 1. Congress and Federal Jurisdiction

By its own terms, the Constitution vests authority in Congress to regulate the federal courts, including federal jurisdiction over particular cases and controversies. Article III provides, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>284</sup> Article I, correspondingly, includes among Congress' enumerated legislative powers the authority "[t]o constitute Tribunals inferior to the supreme Court."<sup>285</sup> Moreover, while the Constitution specifically established the Supreme Court itself,<sup>286</sup> it nonetheless placed in Congress' hands significant control even over the subject-matter of the Court's appellate jurisdiction.<sup>287</sup> Indeed, so far as the Constitution's structural text goes, Congress' power over all federal courts and their subject-matter jurisdiction is limited principally by Article III's heads of jurisdiction, which describe the outer reach of the federal "judicial Power,"<sup>288</sup> and by Article III's requirement that federal jurisdiction always be limited to actual cases or controversies.<sup>289</sup> Thus, it is ordinarily considered Congress' prerogative—and not the Supreme Court's—to define the judicial power's reach to any particular kind of lawsuit.<sup>290</sup>

This is not to say that the Constitution vests an absolute and unchecked power in Congress to command or to deny federal jurisdiction over any sort of case and on any terms it chooses, so long as

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284. U.S. CONST. art. III, § 1 (emphasis added).

285. *Id.* at art. I, § 8, cl. 9.

286. *Id.* at art. III, § 1.

287. *Id.* at art. III, § 2 (noting that the Supreme Court shall have appellate jurisdiction over all cases or controversies enumerated in Article III, section 2, "with such Exceptions, and under such Regulations as the Congress shall make").

288. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (rejecting Congress' attempt to grant the Supreme Court original jurisdiction over cases not included in Article III, section 3).

289. See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1017 (1998); *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992).

290. I here echo a widespread—though not undisputed—view that the Constitution does appear to vest in the Congress at least a primary authority to define and regulate federal court jurisdiction. See Friedman, *supra* note 32, at 1-2 (noting that commentary about federal court jurisdiction tends to "proceed[d] from [this] common starting point" of primary congressional control based upon the Constitution; the article then proceeds to offer an alternative premise); see also *id.* at 1 n.4 (citing to an extensive body of scholarship assuming congressional control of federal jurisdiction). The Supreme Court has offered conflicting opinions on the question. Compare *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1868) (stating that Congress' power to make "exceptions" to the Supreme Court's appellate jurisdiction carries with it the power to deny jurisdiction not affirmatively granted by Act of Congress), with *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that a "serious Constitutional question" would arise if Congress "den[ie]d] any judicial forum for a colorable Constitutional claim").

Article III's formal limits have been observed. There exists a serious and durable controversy about whether and to what extent the Constitution empowers Congress to *strip* federal courts altogether of jurisdiction over certain types of controversies.<sup>291</sup> And, correlatively, courts regularly *refuse* to hear cases that Congress has granted them jurisdiction to decide.<sup>292</sup>

Likewise, the Court has always wielded its ordinary power of judicial review to enforce constitutional limits—text-based and otherwise—on Congress' grants of federal subject-matter jurisdiction, just like any other legislation. After all, *Marbury v. Madison* itself invoked the judicial power “to say what the law is” in order to strike down a statute granting original jurisdiction to the Supreme Court in a case not contemplated by Article III.<sup>293</sup>

But by preserving *Ex parte Young* after *Seminole Tribe*, the Court accomplished something different. Here, *the Court has stripped Congress* of the power to grant federal subject-matter jurisdiction over

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291. For two archetypal entries in the debate over Congress' power to control the federal courts, see generally Hart, *supra* note 32, wherein Professor Hart argued that Congress enjoys broad discretion to define lower federal courts' original jurisdiction, and Wechsler, *supra* note 93, wherein Professor Wechsler discussed both the political and moral limits to the courts' power of judicial review. See, e.g., Amar, *supra* note 97, at 208-10 (arguing that Congress enjoys power to strip federal courts of some kinds of jurisdiction listed in Article III, but not over others that Article III makes “mandatory”); John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2513-15 (1998); Harrison, *supra* note 267, at 255 (arguing that Congress enjoys “substantial” power to control federal jurisdiction under Article III); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2448-55 (1998) (discussing three possible relationships between Congress and the Court); James S. Leibman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 773-850 (1998) (dividing Congress' power over the Court based on the quality and quantity of federal jurisdiction); see also Friedman, *supra* note 32, at 5-7 (describing “two schools of thought” in debate over extent of Congress' power to control federal court jurisdiction and surveying the literature in both categories). For an alternative account of the Constitution's allocation of power over federal courts, emphasizing a practice under which Congress and the Court have an interactive relationship in defining federal jurisdiction, see *id.* at 2-3.

292. Whether a federal court may legitimately decline to decide a case within its statutory subject-matter jurisdiction—to refuse what Congress has granted—is a question debated with an intensity approaching that of the debate over Congress' power to strip federal courts of jurisdiction over controversies altogether. Compare Redish, *supra* note 32, at 71 (arguing that congressional authority over federal courts renders judge-made abstention doctrines constitutionally suspect), with Shapiro, *supra* note 32, at 547, 550 (arguing, in response to Professor Redish, that federal courts may constitutionally use discretion, even on pure policy grounds, to decline jurisdiction “despite the existence of statutory authority to adjudicate”; and citing non-constitutional “prudential” limitations the Court has superimposed on the Constitution's standing requirements). See generally Friedman, *supra* note 32, at 7-8 & nn.29-36 (surveying cases and commentary debating whether federal courts have or have not a “virtually unflagging obligation” to exercise the jurisdiction granted them by Congress” (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983))).

293. *Marbury*, 5 U.S. (1 Cranch) at 177.

lawsuits to enforce state compliance with Article I legislation, only to retain for the Court itself the power to grant an equivalent jurisdiction under *Ex parte Young*. The Court has asserted the authority to do something—set terms authorizing federal jurisdiction over private lawsuits challenging state interests—that Congress is now prohibited from doing under Article I.<sup>294</sup>

Moreover, by denying Congress this jurisdictional authority on *constitutional* grounds, the Court has hindered Congress' participation in any further development of the rules governing federal jurisdiction to coerce state action. To be sure, after *Seminole Tribe* Congress may also invoke *Ex parte Young* jurisdiction to enforce Article I legislation against States,<sup>295</sup> and the Court will honor Congress' choice, express or implied, to deny *Ex parte Young* jurisdiction over a particular kind of case, and so legislatively shut federal court doors on lawsuits that would otherwise satisfy *Young*.<sup>296</sup> But if the *Young* doctrine rests only on the Court's pragmatic, non-law based views about when federal judicial enforcement of federal law is desirable despite state sovereign immunity, then it only aggravates separation of powers concerns for the Court to impose these policy-based jurisdictional rules on Congress. Thus, unlike other instances where the Court has engaged in a "dialogue" with Congress over the appropriate scope of federal jurisdiction,<sup>297</sup> after *Seminole Tribe* there appears little room left for inter-branch collaboration: Congress may either adopt the *Ex parte Young* model or else amend the Constitution.<sup>298</sup>

Given the Constitution's textual allocation to Congress of at least substantial control over Article III courts, the Court's assertion of this predominant judicial power over jurisdiction raises separation of powers concerns.<sup>299</sup> Not only has the Court trespassed on Congress'

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294. Because in *Seminole Tribe* the Court is stripping Congress of authority over federal jurisdiction, the scholarly controversy about whether Congress may return the favor is largely beside the point here. See *supra* note 291 and accompanying text. Accordingly, I do not enter that debate.

295. *Seminole Tribe v. Florida*, 517 U.S. 44, 75 n.17 (1996).

296. Indeed, Congress was deemed to have intended that result in *Seminole Tribe*. See *id.* at 75-76.

297. See Friedman, *supra* note 32, at 10-28, 48-49 & nn.241-43 (describing examples of what that author describes as "dialogic" process by which Congress and the Court together—more or less cooperatively—determine the proper scope of federal jurisdiction).

298. *Seminole Tribe*, 517 U.S. at 74 & n.17.

299. One commentator has pursued this thinking to argue, as a separation of powers matter, that Congress' power to abrogate state sovereign immunity should be deemed an integral element of its Article I authority to regulate interstate commerce because, as a matter of constitutional structure, the Congress is institutionally better suited to maintain the balance

territory, but it appears to have ousted Congress from a field it is entitled at least to inhabit, if not monopolize.<sup>300</sup>

## 2. *Ex parte Young* and Separation of Powers Values

The *Ex parte Young* doctrine's freestanding judicial power to regulate federal jurisdiction over lawsuits against state interests also collides with values lying at the core of the separation of powers. Foremost among these is the proposition that no constitutional decisionmaker may exercise public power unlimited by discernible standards *external* to that decisionmaker's own will.<sup>301</sup> For Congress, some of those external limits have recently emerged, for example, from Article I<sup>302</sup> and the Tenth Amendment.<sup>303</sup>

And for the Court, its external standards derive from the requirement that no judicial power may be wielded absent an affirmative basis for federal subject-matter jurisdiction: Jurisdiction is both a fundamental source for, and a fundamental check on, the institutional authority of Article III courts.<sup>304</sup> Jurisdiction is one critical way in which the separation of powers principle expresses

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between state and federal governments since the States themselves are politically represented in the Congress, and not in the federal courts. See Tribe, *supra* note 111, at 693-96, 713.

300. Cf. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (noting that the separation of powers principle provides a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

301. As James Madison put it: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 56 (James Madison) (Edward Mead Earle ed., 1941). Addressing a slightly different question, Professor Gwyn observed that early rationales for the separation of powers emphasized this kind of institutional accountability: "If the same persons both made and executed the law, government would no longer be under law since those persons in their legislative capacity would always modify the law to excuse whatever they might do in their executive capacity." W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 35-36 (1965).

302. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551-52 (1995) (holding that the Gun-Free School Zones Act of 1994 exceeded Congress' Commerce Clause power).

303. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating federal firearms registration legislation as violating the Constitution's federalism principle); *New York v. United States*, 505 U.S. 144 (1992) (holding that the Tenth Amendment prohibits Congress from "commandeering" a sovereign state legislature into enforcing a federal regulatory scheme).

304. Just as Congress may not legislate on matters beyond its Article I "jurisdiction"—the constitutionally bounded field in which Congress is entitled to exercise federal power, see *Lopez*, 514 U.S. at 567-68—so federal courts, including the Supreme Court, may not exercise the federal judicial power in cases that lie beyond *their* subject-matter jurisdiction. This, of course, is axiomatic. Federal courts are courts of limited jurisdiction and thus "are empowered to hear only those matters explicitly provided for both in the Constitution and federal law." See Chemerinsky, *supra* note 15, at 649 n.35 (explaining that principle of limited federal court jurisdiction can be traced back to *Marbury v. Madison*).

itself in the federal judicial branch.<sup>305</sup> Thus, by preserving *Ex parte Young* after *Seminole Tribe*—by preserving the power to grant itself jurisdiction where Congress is constitutionally barred—the Court appears to have claimed an unusual privilege: the institutional right, where private lawsuits challenge state interests, to have not just the last word but the only word on the scope of its own constitutional authority.<sup>306</sup>

Moreover, any claim by the Court to a unilateral power to regulate federal jurisdiction would also collide with the larger separation of powers aim that no constitutional decisionmaker may exercise public power unchecked and unreviewed by a co-equal branch.<sup>307</sup> When the Court wields its ordinary power of judicial review to “say what the law is,” its accountability is enhanced by the interpretive nature of the enterprise itself.<sup>308</sup> If the Court adopts what is considered an erroneous reading of the “law” when deciding the merits of a

305. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1016 (1998) (holding that, “[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects”).

306. Again, other claims to judicial independence much less unilateral in nature have sparked considerable controversy. See *supra* note 32 (citing examples).

307. The Court’s own political question doctrine, under which otherwise justiciable federal controversies are deemed nonjusticiable because they involve functions committed entirely to the unreviewable discretion of one of the two political branches, is the exception that proves this rule. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); *Baker v. Carr*, 369 U.S. 186 (1962).

308. See, e.g., Monaghan, *supra* note 21, at 1363 & n.2 (citing “the great weight of professional opinion” that judicial office restricts federal judges to “reasoned elaboration of fundamental principles” (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 23-28 (1962))). By contrast, if the *Ex parte Young* cases set the example, the Court’s freestanding power to regulate jurisdiction over lawsuits against state interests can be used not simply to interpret and apply legal standards to a particular case, but also to add, discard, and modify jurisdictional rules for reasons based entirely on pragmatic policy factors, like a State’s fiscal ability to plan ahead for costly prospective but not retrospective injunctive relief. Cf. *Edelman v. Jordan*, 415 U.S. 651 (1974). Or, according to the Kennedy-Rehnquist faction in *Coeur d’Alene*, it may be used even more loosely to advance any cluster of policy values deemed compelling to a majority of the Court in any particular lawsuit seeking to coerce state action. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 280-82 (1997) (Kennedy, J.). After all, “the *Young* fiction is an exercise in line-drawing. There is no reason why the line cannot be drawn to reflect the *real interests of States*.” *Id.* (emphasis added). To the extent that the *Ex parte Young* doctrine empowers the Court thus to grant or deny federal jurisdiction because of its case-by-case choices among various competing public policy values, and not based on an existing law-based standard, then that power begins to veer away from the judicial functions ordinarily performed by Article III courts, and to take on a cast ordinarily more associated with the federal legislative power. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952); see also *Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091, 2106 (1998) (holding that the line-item veto legislation violated the Constitution’s bicameralism and presentment requirements in part because the President’s authority to “cancel” individual appropriations amounts to “reject[ion of] the policy judgment made by Congress and rel[iance on] his own policy judgment,” thus distinguishing this cancellation power from the ordinary Executive power to interpret and apply laws in particular factual circumstances).

controversy, it can be criticized by other actors—including later Courts—who can offer an alternative view either through legislation altering the Court's interpretation, or through more indirect political control of the courts institutionally.<sup>309</sup> Even the Court's interpretations on the merits of constitutional provisions, difficult as they are to override through the amendment process, at least expose the Court to the direct and indirect review of Congress and the President, as well as their political constituencies.<sup>310</sup> Thus, although the Court may not be directly accountable to an electoral constituency for any particular decision, its accountability is ordinarily assured through indirect political limits and also through the constraints of reasoned decision-making inherent in the interpretative enterprise itself.<sup>311</sup>

But, after *Seminole Tribe*, the *Young* doctrine empowers the Court not simply to decide the legal merits of controversies otherwise properly within the federal courts' statutory and constitutional subject-matter jurisdiction, but instead to control—without Congress' participation—the very *forum* in which the federal judicial power is to be exercised at all.<sup>312</sup> *Young* empowers the Court unilaterally to determine, in lawsuits against state interests, the terms and reach of its own constitutional authority.<sup>313</sup> At the very least, this raises separation of powers issues that merit close consideration.

## VI. CONCLUSION: WHITHER THE JUDICIAL POWER?

Quite apart from these separation of powers concerns, *Ex parte Young's* survival of *Seminole Tribe* poses a more general question: If the Court is indeed claiming a freestanding power to regulate federal

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309. See *supra* note 31 (identifying other political and structural checks on, and safeguards for, the federal courts' exercise of Article III's judicial power).

310. See Friedman, *supra* note 96, at 738 (discussing federal courts' sensitivity to majoritarian politics in deciding when and how to enforce individual rights); see also Friedman, *supra* note 32, at 10-20 (discussing federal courts' ordinary sensitivity to the political branches when they make decisions affecting jurisdiction).

311. See *supra* note 308 (noting *elaborative* quality of traditional judicial review).

312. Cf. *INS v. Chadha*, 462 U.S. 919, 929-31 (1983).

313. Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 742-49 (1979) (Powell, J., dissenting) (arguing that federal courts violate the separation of powers when they imply private rights of action to enforce federal statutes based on the courts' independent evaluation of the policy goals served by judicial involvement, in part because the implied actions necessarily expand the courts' own subject-matter jurisdiction); see also Tribe, *supra* note 111, at 693-96, 713 (arguing, as a separation of powers matter, that Congress is institutionally better suited to maintain the balance between the state and federal governments since the States themselves are politically represented in Congress, not in federal courts).



jurisdiction over lawsuits against state interests, where will that new power lead?

One possibility is that the Court is undertaking to carve out a special and dominant constitutional role for itself in mediating the relationship between States and the federal political branches. While it is not new for the Court to take on the task of elaborating the *substance* of the Constitution's federalism principles,<sup>314</sup> *Ex parte Young's* survival of *Seminole Tribe* suggests that the Court is now also assuming control over the *forum* and *process* in which those principles are debated and resolved.

Because both *Seminole Tribe* and *Coeur d'Alene* exempted States from having to answer in federal court for actions claimed to violate federal law, it is tempting to predict that any new power that the Court claims to mediate federalism questions is likely to benefit States at the expense of federal interests and federal decisionmakers.<sup>315</sup> If that prediction comes true, it would in one respect align the post-*Coeur d'Alene* Court with its pre-*Ex parte Young* forebears. In *Hans* and afterwards,<sup>316</sup> the Court's sovereign immunity rulings effectively shifted power from the federal government to the States, for by leaving States unaccountable in federal court for violations of federal law harming private individuals, *Hans* augmented the States' ability to act as they chose towards their citizens and others, notwithstanding federal law to the contrary.<sup>317</sup> Likewise, if the post-*Coeur d'Alene* Court uses its power over federal jurisdiction routinely to shield

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314. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. Lopez*, 514 U.S. 549, 551-52 (1995). Even this ordinary exercise of traditional judicial review to say what the Constitution's federalism principles mean has generated controversy. See Jackson, *supra* note 1, at 2213-28 (discussing value of securing Constitutional role of States). Compare *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (indicating that the Court should exercise judicial review to enforce the Constitution's federalism principles against congressional legislation that violates them), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47, 550 (1985) (overruling *National League of Cities* for too aggressively regulating federalism's balance of power between federal and state government; declaring that "principal means chosen by the Framers to ensure the role of the States in the federal system" lies in the States' political representation in Congress). See generally Kramer, *supra* note 105 (discussing the Court's shift in attitude between *National League of Cities* and *Garcia* as well as the controversy among commentators concerning the proper judicial role in enforcing substantive federalism principles); Symposium, *National Power and State Autonomy: Calibrating the New Federalism*, 32 IND. L. REV. 1 (1998) (exploring the balance of federalism left in the wake of recent Court decisions).

315. See Weinberg, *supra* note 6, at 1295 (citing *Seminole Tribe* to support the author's observation that the Supreme Court "of late has been investing . . . heavily in the federalism business . . . energetically protecting the states from the nation").

316. See, e.g., *Monaco v. Mississippi*, 292 U.S. 313 (1934); *Ex parte New York*, 256 U.S. 490 (1921).

317. See Vázquez, *supra* note 76, at 11-12 (describing *Hans's* "offensiveness" to rule-of-law values).

States from federal-court consequences of their federal-law violations, then *Seminole Tribe's* jurisdictional federalism may come to mean virtual state impunity for federal violations, except when the United States itself brings an enforcement action<sup>318</sup> or the Court hears an appeal from state court raising a federal claim against state action.<sup>319</sup>

If so, then the Court may be signaling a shift in how it views its core “constituency,” the group or interest it has a special institutional role in protecting.<sup>320</sup> Six decades ago, in *United States v. Carolene Products*, the Court appeared to propose for itself the task of reviewing majoritarian legislation that demonstrated “prejudice against discrete and insular minorities” defined by religion, race, or national origin.<sup>321</sup> This proposal suggested that the Court meant to carve out for itself a judicial constituency comprised of those who, for

318. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (reaffirming decision in *United States v. Texas*, 143 U.S. 621 (1892), that state sovereign immunity does not bar an action by the United States against a State in federal court).

319. See *Seminole Tribe*, 517 U.S. at 71 n.14. The Court made this point in a slightly ambiguous way, citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), for the proposition that “this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit.” *Seminole Tribe*, 517 U.S. at 71 n.14. But in a much more recent case, the Court observed that state sovereign immunity posed no bar to the Supreme Court’s appellate jurisdiction over state-court decisions involving state parties not because of any sovereign immunity waiver by such States, but because of *Cohens’* conclusion that an “appeal” is not a “suit” within the language of the Eleventh Amendment. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 27, 31 (1990) (“The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from the state courts.”); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (holding that State’s consent to waive sovereign immunity to suit in its own courts does not constitute consent to suit in federal court). See generally Jackson, *supra* note 56, at 13-29 (discussing the Supreme Court’s tradition of exercising appellate jurisdiction over claims against States, notwithstanding state sovereign immunity); Vázquez, *supra* note 76, at 11 n.71 (noting current split among state supreme courts about whether Supremacy Clause requires state courts to hear unconsented federal law suits against States even though sovereign immunity would bar same lawsuit from federal court).

320. To suggest that the federal Judiciary has a constituency is not to suggest that that constituency is necessarily political, defined in terms of outright electoral politics. See generally Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 681-85 (1997) (discussing how the Constitution organizes “the People” as a whole into series of nested constituencies corresponding with the federal political branches). Prominent Framers did appear to consider “every branch of the constitution and government to be popular and regarded the president, Senate, and even the judiciary as well as the House of Representatives as somehow all equal agents of the people’s will.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 549 (1969) (emphasis added); Friedman, *supra* note 96, at 738 (stating thesis that the “idealized notion of counter-majoritarian courts must give way to a vision of courts as bodies different from, but nonetheless responsive to, popular will”). Yet, while the Constitution ties the judiciary to electoral politics by making judges and Justices political appointees, at the same time Article III insulates the judiciary from politics by granting judges life tenure and guaranteed salary. See U.S. CONST. art. III; see also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982) (describing how Article III provisions ensure the judiciary’s independence from the federal political branches).

321. *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938).

one reason or another, are unable to compete fairly within their own *political* constituent groups.<sup>322</sup>

But if the Court uses its post-*Seminole Tribe* power over jurisdiction to shield States from private federal-law claims, then that may suggest that the Court now considers *States*—and not those who claim individual rights against state violations—its new core constituency.<sup>323</sup> Whereas the *Carolene Products* model envisioned the Court policing what political winners do to political losers, that is, the Court may now see itself policing what one group of political winners—the Congress—does to another—those who run state governments.<sup>324</sup>

But even if the Court's view of its own constituency is shifting in this way, the upshot is not clear. Now that *Young* has survived *Seminole Tribe*, the Court holds the power not just to shut *but also to open* federal court doors to lawsuits seeking to coerce state compliance with federal law. This puts the Court in a stronger position than it occupied immediately after *Hans*, for no State can afford to ignore the Court's views—nor any group of Justices' views, for that matter—about when state action implicates federal concerns seriously

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322. See generally BICKEL, *supra* note 308, at 181 (developing the view that countermajoritarian judicial review is appropriate where it protects those chronically disfavored in the majoritarian political processes); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (developing the view that countermajoritarian judicial review is appropriate where the majoritarian process is distorted by a defect, like the systematic exclusion of racial minorities from political participation).

323. See Chemerinsky, *supra* note 15, at 663-64 (1985) (criticizing the *Pennhurst II* Court's denial of *Ex parte Young* jurisdiction to claims under state law because ruling undermined "one core role of the federal courts [which] is to uphold the United States Constitution by hearing complaints of unconstitutional actions by governments and government officers at all levels").

324. Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985) (declaring that the "principal means chosen by the Framers to ensure the role of the States in the federal system" lies in the States' political representation in Congress). There is one striking parallel between the Court's apparent current solicitude for States' interests and any post-*Carolene Products* solicitude for individual rights. With both, the Court selected a constituency that not only helps define the Court's own role within the Constitution's separation of powers structure, but that makes that judicial role—and the decisions made about the chosen constituency—essentially unassailable, because constitutionally founded, through ordinary political processes. Moreover, to the extent the Court has substituted States' rights for individual rights in choosing its preferred judicial constituency, it has freed itself substantially from the need to ensure cooperation from the Executive to enforce judicial decisions made in that constituency's interests: so long as protecting States means *prohibiting* enforcement of federal regulations against them, there will be no need to call out the National Guard. Cf. Friedman, *supra* note 96, at 738 (discussing the reality that courts may not always achieve enforcement of individual rights that they declare because of resistance from the political entities necessary for enforcement).

enough to justify federal jurisdiction over a lawsuit challenging that action.<sup>325</sup>

Even if the future of the federal judicial power is opaque, however, the more immediate implications of *Ex parte Young*'s survival of *Seminole Tribe* are not. By asserting a freestanding prerogative to control its own subject-matter jurisdiction over lawsuits against state interests, this Supreme Court has dealt itself a remarkable constitutional power, moving it a step beyond *Marbury*.

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325. See *supra* Part IV.B and accompanying text (describing *Coeur d'Alene*'s three opinions and their varying views on when federal jurisdiction under *Ex parte Young* is warranted notwithstanding state sovereign immunity).

