UIC Law Review

Volume 35 | Issue 1 Article 1

Fall 2001

Federalism: The Imprecise Calculus of Dual Sovereignty, 35 J. Marshall L. Rev. 1 (2001)

John H. Clough

ARTICLES

FEDERALISM: THE IMPRECISE CALCULUS OF DUAL SOVEREIGNTY

JOHN H. CLOUGH*

INTRODUCTION

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other . . . .

. . . .

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence.

---

* Senior Attorney, Civil Litigation Division, New Mexico Attorney General's Office; Dickinson School of Law, 1965; Member of Pennsylvania, Oregon, New Mexico, Arizona and Montana state bars, and the Navajo Nation Bar. He is lead counsel in *Jackson v. Fort Stanton Hospital and Training School*, 757 F. Supp. 1243 (D.N.M. 1990) and argued *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999). He participated in *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), *prior opinion vacated on reh'g*, 275 F.3d 1253 (10th Cir. 2002); advised on *Lewis v. New Mexico Department of Health*, 261 F.3d 970 (10th Cir. 2001); and was amicus counsel on behalf of twelve states in *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001). Mr. Clough has dealt with issues of federalism and sovereignty for most of his career, beginning with his tenure as a law reform litigation specialist with three legal services projects in Pittsburgh, PA, Portland, OR, and Honolulu, HI, from 1968 to 1972. He was lead counsel and argued *Lindsey v. Normet*, 405 U.S. 56 (1972). From 1972 to 1974, he was with the Appellate Division of the Oregon Attorney General's Office, and in 1987-1988 he was the litigation coordinator for the DNA People's Legal Services at Window Rock, AZ, on the Navajo Reservation. He has been with the New Mexico Attorney General's Office since 1994, where he specializes in the state's unique defenses in federal litigation.

. . . .

> *The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad.*[1]

It is in the judicial branch of our federal government that the sensitivity of our dual system of sovereignty may be abraded. That friction has resulted in many judicial opinions seeking a balance between the states and federal government in litigation. Thus, we begin, and may well end, any discussion of dual sovereignty, within the context of the federal judiciary with the Eleventh Amendment to the United States Constitution. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[2]

The Eleventh Amendment operates as a bar to all suits[3] by citizens against the state, including suits for money judgments,[4] retrospective relief,[5] and for declaratory and injunctive relief.[6] The Amendment operates as a bar to such suits even if the citizen's claim has merit.[7] Generally, the invocation of the Eleventh Amendment presents a threshold jurisdictional question that must be answered before any other issue, because if there were no jurisdiction, any other ruling of the district court would be void.[8] A

---

1. United States v. Cruikshank, 92 U.S. 542, 549-50 (1875).

2. U.S. CONST. amend. XI. This Amendment was adopted in 1795 as a result of the decision in the case of *Chisholm v. Georgia*, in which the Supreme Court held that a state was amenable to suit by individual citizens of another state. 2 U.S. 419 (1793).

3. Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993).

4. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-02 (1984); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Dept. of Treasury of Ind., 323 U.S. 459, 464 (1945).

5. Papasan v. Allain, 478 U.S. 265, 278 (1986).

6. Cory v. White, 457 U.S. 85, 90-91 (1982).

7. The historic purpose of the Eleventh Amendment was to spare the states from having to pay just debts. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994). *Accord Ex Parte* New York, 256 U.S. 490, 500-01 (1921). *See also* Alden v. Maine., 527 U.S. 706, 749-50 (1999) (affirming dismissal of claim brought under Fair Labor Standards Act on the principle of sovereign immunity as the state did not waive its right to immunity and Congress had no authority to abrogate the state's immunity).

8. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-102 (1998). *But see* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765,

motion to dismiss based upon the Eleventh Amendment may be appealed immediately under the Collateral Order Doctrine.[9]

In 1996, the Supreme Court in *Seminole Tribe*[10] held that Congress did not have the authority to abrogate the state's Eleventh Amendment immunity and the doctrine of *Ex parte Young*[11] did not apply in light of the detailed remedial provisions of the Indian Gaming Regulatory Act ("IGRA").[12] In so doing, the Court made it clear that it was relying on the rationale upon which the Court based the results of its earlier decisions.[13] The Court stated that, "we long have recognized that blind adherence upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'"[14]

In 1997 the Supreme Court in *Idaho v. Coeur d'Alene Tribe*[15] held that the effort to divest a state of its ability to regulate the use of land invaded the state's sovereignty interests, and that the *Ex parte Young*[16] "fiction" was inapplicable to avoid the application of the Eleventh Amendment in that case. The Court discussed the role of the state courts in applying federal constitutional and statutory law.[17] The *Coeur d'Alene Tribe* decision has been criticized, and attempts have been made to restrict it to its facts. This will be more fully discussed herein.

In 1999, the Court in *Alden v. Maine*[18] considered the issues of federalism and sovereignty from the state's perspective, when it affirmed the state court's dismissal of a Fair Labor Standards Act cause of action on the grounds of sovereign immunity as expressed by the Eleventh Amendment. In so doing, the Court stated two

---

787 (2000) (holding that a statutory construction issue took precedence because it avoided the constitutional question of the Eleventh Amendment).

9. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993). *Accord* Yousef v. Reno, 254 F.3d 1214, 1217-18 (10th Cir. 2001); S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1027-28 (10th Cir. 1993); Tri-State Generation & Transmission Ass'n v. Shoshone River Power, 874 F.2d 1346, 1351 (10th Cir. 1989). *See generally* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

10. Seminole Tribe v. Florida, 517 U.S. 44, 74-77 (1996).

11. 209 U.S. 123, 163-68 (1908). This case created an exception to the Eleventh Amendment, to wit: If the litigation sought equitable relief to remedy an on-going violation of federal law, the Eleventh Amendment was not available as a bar to the federal litigation. This exception will be referred to throughout as the *Ex parte Young* exception.

12. 25 U.S.C. § 2710(d)(3) (1994); 25 U.S.C. § 2710(d)(7) (1994).

13. *Seminole Tribe*, 517 U.S. at 66-67.

14. *Id.* at 69; Principality of Monaco v. Mississippi., 292 U.S. 313, 326 (1934) (*citing* Hans v. Louisianna, 134 U.S. 1, 15 (1890)).

15. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287-88 (1997).

16. 209 U.S. 123 (1908).

17. Printz v. United States, 521 U.S. 898, 284-88 (1997).

18. 527 U.S. 706, 758-60 (1999).

important principles underlying the federalism issues.[19] The first reserves to the states a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inherent in that status.[20] The second favors a system in which the state and federal governments would exercise concurrent authority over the people.[21]

Through *Seminole Tribe*,[22] *Coeur d'Alene Tribe*,[23] and *Alden*,[24] the Supreme Court has recently re-emphasized the underlying principles of Eleventh Amendment law. It should be clear that the Supreme Court is viewing Eleventh Amendment issues as reaching deeply into the foundations of the structure of our government and the relationship between the states and the federal government. In addition, in six other cases within the past four years, the Supreme Court has also reconsidered the constitutionality of federal legislation pursuant to both the Tenth Amendment[25] and the Eleventh Amendment.[26] These actions invite a *de novo* re-evaluation of virtually every federal statute under which plaintiffs claim remedies against the state.

Thus, nothing may be considered well-settled law in this regard and many cases will be of first impression in light of the Supreme Court's guidance. New issues will be raised and old law will be re-examined by every federal court in the United States. The courts must approach this re-examination with a broad brush, looking to the intent and purpose of the dual sovereignty as expressed in the inherent structure of our form of government. Of course, this approach is nothing new. In 1887, the Supreme Court stated that: "[t]o secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."[27] The most unsettled aspect of the newly developing law is the effect of *Coeur d'Alene Tribe*. However, the issues of federalism do not just present a "win or lose" determination. They pervade all aspects of litigation in both the state and federal courts and will raise several issues that will be of first application, if not of first impression.

---

19. *Id.* at 714.
20. *Id.*
21. *Id.* at 714-15.
22. Seminole Tribe v. Florida, 517 U.S. 44 (1996).
23. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287-88 (1997).
24. 527 U.S. 706 (1999).
25. Printz v. United States, 521 U.S. 898, 923-24 (1997).
26. *See generally* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).
27. *Ex parte* Ayers, 123 U.S. 443, 505-06 (1887).

The issues of federalism may arise in routine litigation, but issues are most likely to surface during major litigation where friction is greatest. Institutional reform litigation is major litigation that has long been criticized as an ineffective way to resolve problems.[28] Although such litigation is couched in terms of prospective equitable relief, the financial impact upon the state may be staggering. There are "hidden" administrative costs involved with the state's compliance with interim and final decrees or consent judgments, and direct costs that include both defense and plaintiffs' attorneys' fees. Attorneys' fee awards in reform litigation run well into the millions of dollars,[29] and it is a fiction bordering upon fantasy to say that such awards are not money judgments against the state. Indeed, attorneys' fees are a factor in assessing the level of intrusion into the state's sovereignty interests, as will be discussed herein. Congress has recognized the problem of major litigation in litigation concerning prison conditions,[30] and the Supreme Court has recently made efforts to curtail the award of attorneys' fees.[31] The Eleventh Amendment

28. *See generally* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983).

29. Institutional reform class actions in New Mexico have consumed an inordinate amount of time and resources. *Duran v. Carruthers* resulted in federal oversight of the state penitentiary through a consent decree for over twenty years. 678 F. Supp. 839, 841 n.2 (D.N.M. 1988). *Duran* cost the state $13,600,000 in plaintiffs' attorneys' fees. *See generally* New Mexico General Services Department/Risk Management Division, *at* http://www.state.nm.us/gsd/rmd/rmd.html (last updated Sept. 13, 2000). *Duran* was disengaged in 1999 except for a small piece concerning mental health services. *Id. Jackson v. Fort Stanton Hosp. and Training School* resulted in federal oversight of the state's delivery of services to the developmentally disabled in two state hospitals for over fourteen years. 757 F. Supp. 1243 (D.N.M. 1990). It has cost the state about $6,000,000 in plaintiffs' attorneys' fees. *See generally* New Mexico General Services Department/Risk Management Division, *at* http://www.state.nm.us/gsd/rmd/rmd.html. *Jackson* is still pending. *Joseph A. v. Ingram* resulted in seventeen years of federal oversight of the state's programs for the adoption of children in state custody through a consent decree. 262 F.3d 1113, 1116 (10th Cir. 2001), *prior opinion vacated on reh'g*, 275 F.3d 1253 (10th Cir. 2002). It cost the state about $1,000,000 in plaintiffs' attorneys' fees. *See generally* New Mexico General Services Department/Risk Management Division, *at* http://www.state.nm.us/gsd/rmd/rmd.html (last update Sept. 13, 2000).

30. *See generally* Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997 (1994). *See* Booth v. Churner, 121 S. Ct. 1819, 1821 (2001) (requiring exhaustion of administrative remedies before suit may be filed concerning prison conditions).

31. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). The term "prevailing party" was held to mean that the applicant for attorneys' fees must have won something through an order, decree or consent agreement before attorneys' fees could be awarded pursuant to *Farrar v. Hobby*, 506 U.S. 103 (1992). *Id.* at 606. The Court specifically refused to extend the term "prevailing party" to attorneys' fees under the "catalyst theory." *Id.* at 607-08 (Scalia, J. concurring).

may also have a salutary impact in this regard.

Although many substantive areas of law will potentially involve issues of federalism, the area of health law may provide a central focus for those issues. There are two types of health law cases where the rapidly evolving law of federalism may play out. The first area of litigation surrounds the waiting list for social service programs for the developmentally disabled.[32] The second litigation area seeks to establish a community-based system of service delivery following the decision in *Olmstead v. L.C. ex rel Zimring*.[33] Both types of cases fall into the category of institutional reform class actions and involve a substantial intrusion into the way states provide social services programs. Thus, the stakes will be high enough to invite consideration of a state's special defenses under the rapidly expanding area of state sovereignty and federalism.

Generally, litigation brought against the state will include a mix of federal constitutional claims and federal statutory claims. Both types of claims invoke federal jurisdiction pursuant to the Civil Rights Act.[34] The litigation that follows *Olmstead* will be typical of this situation. The Supreme Court has implied that a distinction may exist between federal constitutional claims and federal statutory claims for the purpose of determining the effect of the Eleventh Amendment.[35] In any event, it seems fairly clear that an Eleventh Amendment analysis must be undertaken for either claim.[36] This is significant for the resolution of issues of waiver and survival of claims in cases following removal to federal court.

---

32. *See, e.g.*, Lewis v. N.M. Dept. of Health, 261 F.3d 970, 974 (10th Cir. 2001) (discussing the placement on waiting lists of individuals who alleged they were eligible for Medicaid); Doe v. Bush, 261 F.3d 1037, 1041 (11th Cir. 2001) (discussing the placement on waiting lists of developmentally disabled individuals).

33. 527 U.S. 581 (1999). In *Olmstead*, the Supreme Court avoided the Eleventh Amendment issues by restricting the issues presented to matters of statutory construction. *Id.* at 587-88. The portions of the Americans with Disabilities Act involved in *Olmstead* remain open issues for the Supreme Court. *See, e.g.*, Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (stating that "[o]ur holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination.").

34. 42 U.S.C. § 1983 (1994) The Civil Rights Act did not create any substantive rights. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). *See generally* Monroe v. Pape, 365 U.S. 167 (1961). Furthermore, evaluation of the constitutionality of the Civil Rights Act does not have the same considerations that are present in Eleventh Amendment analysis.

35. *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 386-91 (1998).

36. *Id.* at 390.

I. THE STATE'S SOVEREIGN INTERESTS: *IDAHO V. COEUR D'ALENE TRIBE*

Justice Kennedy, writing the plurality opinion in *Coeur d'Alene Tribe*, called for a limitation of *Ex parte Young* to those situations where a state forum was unavailable.[37] The three justices who joined together for the concurring opinion in *Coeur d'Alene Tribe* declined to go along with the plurality opinion in this regard.[38] Instead the concurring opinion noted that:

> [t]he *Young* [exception] rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands – – in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands – – it simply cannot be said that the suit is not a suit against the State.[39]

Thus, the full majority of the Court supported the portion of the plurality opinion that analyzed the impact of the litigation on the state's "special sovereignty interests"[40] to determine "whether the *Ex parte Young* fiction is applicable."[41] As part of the analysis, both the plurality opinion and the concurring opinion discussed the functional impact of the posture of the litigation and the relief requested to arrive at the conclusion that the litigation involved the state's special sovereignty interests.[42]

The Tenth Circuit noted that "[t]he Court was badly fractured by the case[.]"[43] Nevertheless, the Tenth Circuit[44] recognized that

---

37. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 263 (1997). The language of *Ex parte Ayers* regarding the method of interpretation of the Eleventh Amendment indicates that *Ex parte Young* may have been wrongly interpreted when read as broadly creating an exception to the Eleventh Amendment. *Ex parte Ayers*, 123 U.S. 443, 505-06 (1887). Thus, the plurality opinion in *Coeur d'Alene Tribe*, notwithstanding its rejection by other members of the Court, may represent an appropriate narrowing of the *Ex parte Young* exception. Furthermore, *Ex parte Young* was an answer to a situation that occurred before principles of administrative law developed reasonably sophisticated administrative due process hearings with judicial review. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976). Thus, the reason for the Court's effort to justify federal jurisdiction in 1908 in *Ex parte Young* is now more a matter of historical interest than current necessity. The absence of a state forum in *Ex parte Young* was fundamental to the plurality opinion in *Coeur d'Alene Tribe*.

38. *Coeur d'Alene Tribe*, 521 U.S. at 288.

39. *Id.* at 296.

40. *Id.* at 281.

41. *Id.* at 288.

42. *Id.* at 281-83, 288-96 (O'Connor, J., concurring).

43. ANR Pipeline Co. v. LaFaver, 150 F.3d 1178, 1190 (10th Cir. 1998).

44. The Tenth Circuit follows the traditional three-part inquiry for determining whether the Eleventh Amendment bars federal jurisdiction. Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 690 (1982). Under the rationale of the *Treasure Salvors* case, the three questions were: (1) whether

Coeur d'Alene Tribe "imposed an important new requirement on federal courts as part of the *Ex parte Young* analysis."[45] The Tenth Circuit broke the *Coeur d'Alene Tribe* inquiry into a two-part analysis requiring the federal courts to first determine whether the relief sought implicated special sovereign interests; and, if so, then to determine whether the requested relief is "the 'functional equivalent' to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment."[46]

Unfortunately, the Tenth Circuit's second part of the inquiry is a misleading statement of the *Coeur d'Alene Tribe* rule. It should be emphasized that the Eleventh Amendment is the rule in this constitutional inquiry. Thus, absent some exception, the Eleventh Amendment would bar all legal relief. *Ex parte Young* provides one exception to the rule, to wit: If the suit claims only equitable relief to enjoin an ongoing violation of federal law, the state may not use the Eleventh Amendment as a bar to the suit.[47] *Coeur d'Alene Tribe* makes it clear that this exception is more an issue of the appropriate balance in the relationship of two sovereigns than a rule to be applied in a "lock-step" fashion. The second part of the inquiry as expressed by the Tenth Circuit reverses the role of the rule and the exception and finds no solace in any part of the *Coeur d'Alene Tribe* opinion.[48] It is, however, fair to state that the *Coeur d'Alene Tribe* inquiry requires an examination of both the substantive sovereign interest and the procedural impact of the litigation in determining whether the suit impacts the special sovereignty interests of the state. In short, how does the federal judiciary ascertain the balance of federalism in matters brought before the federal courts?

II. THE IDENTIFICATION OF THE STATE'S SOVEREIGN INTERESTS

Under *Coeur d'Alene Tribe*, as amplified by *Alden*, the state's

---

the matter was a proper suit against state officials; (2) whether a violation of federal law occurred; and (3) whether the relief sought was permissible prospective relief. *Id.* The Court also follows an additional question raised later by *Coeur d'Alene Tribe*: whether the suit would impact special sovereignty interests. *Coeur d'Alene Tribe*, 521 U.S. at 281.

45. *ANR Pipeline*, 150 F.3d at 1190.

46. *Id. Accord* Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1198 (10th Cir. 1999); Elephant Butte Irrigation Dist. v. Dep't of the Interior, 160 F.3d 602, 608-09 (10th Cir. 1998).

47. *Ex parte Young*, 209 U.S. at 155-56, 159-60.

48. The Tenth Circuit has confused and reversed this point. *See, e.g.*, Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 496 n.6 (10th Cir. 1998) (commenting that "most government policies do not affect core aspects of a state's sovereignty."). *But see*, Alden v. Maine, 527 U.S. 706, 750-751 (1999) (stating that the exercise of national power poses a danger to states because it undermines the states' ability to effect the course of their public policy and the administration of their public affairs).

sovereign interests are truly an integrated package of various programs brought to fiscal balance by the respective state legislative assemblies. Thus, the state's interest may be articulated as simply as it is under a rational basis test in an equal protection analysis.[49] For example, in *Kish v. Michigan State Board of Law Examiners*, a Michigan District Court found the state's interest in controlling admissions to the bar to be a significant sovereign interest.[50] The United States Supreme Court in *Moore v. Sims* found that "[f]amily relations are a traditional area of state concern."[51] In *ANR Pipeline*, the Tenth Circuit found the power to assess and levy property taxes to be a special and fundamental interest under the *Coeur d'Alene Tribe* test.[52] No doubt a perusal of the equal protection cases would disclose a long list of significant state sovereign interests. Some of those interests may have greater or lesser significance, depending upon the eye of the beholder. The isolation of those specific state interests in the analysis sharply limits the significance of the interests and ignores the reality of the function of state government. The better approach would be to look at broad categories of state interests and the ability of the state to manage and balance its various programs.

As noted by the Supreme Court in *Alden*, the subtlety of the consideration of federalism issue requires examination of state policy, as well as the overall balancing of the fiscal needs of the people.[53] Thus, "the allocation of scarce resources among competing needs and interests lies at the heart of the political process."[54] Although *Alden* made this statement concerning the effect of money judgments, the exact same arguments apply to an even greater degree to the intrusion of equitable or injunctive relief. It follows that the true essence of state sovereignty is the ability to make determinations about the nature and extent of a state's social services programs. A state constantly does this within the context of finite financial resources primarily founded upon its tax revenues. If the power to tax is a significant state interest,[55] the right to self-determination as to how to allocate those resources necessarily follows as a concomitant sovereign interest. Alternatively expressed, it is the "vital field of financial administration."[56]

---

49. *E.g.*, Heller v. Doe, 509 U.S. 312, 319-21 (1993).
50. Kish v. Mich. State Bd. of Law Exam'rs, 999 F. Supp. 958, 964 (E.D. Mich. 1998).
51. 442 U.S. 415, 435 (1979).
52. *ANR Pipeline*, 150 F.3d at 1193.
53. *Alden*, 527 U.S. at 750-52.
54. *Id.* at 751.
55. *See* ANR Pipeline, 150 F.3d at 1193.
56. Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944).

In fact, the right of a state to manage its own internal affairs has been a consistent theme of the Tenth Amendment cases that prohibit the federal government from directing a state to regulate in a certain manner.[57] The general state sovereignty interest involved is one that may rise to the level of a Tenth Amendment right.[58] The Tenth Amendment cases discuss the reservation of powers to the states in the context of the enumerated powers relinquished to the federal government by the Constitution.[59] The Eleventh Amendment cases discuss the issues of federalism in terms of a bar to the exercise of judicial power under Article III of the Constitution.[60] Both lines of cases discuss the same principles of federalism.[61] Although the arguments are framed in terms of a jurisdictional bar to the Court's power to hear the case, the Tenth Amendment cases may be invoked as an alternative means of expressing the state's sovereign interests under the *Coeur d'Alene Tribe* analysis. Similar expression of this point may be found in the opinions discussing the limitations on relief that may be granted by federal courts with respect to the interests of state and local authorities in managing their own affairs, consistent with the Constitution.[62] In short, the state's interest in the management of

57. *See, e.g.*, New York v. United States, 505 U.S. 144, 168-69 (1992) (dealing with the state's disposition of toxic waste); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (discussing the state's right to determine the qualifications for state public office, e.g., age of judges); Oregon v. Mitchell, 400 U.S. 112, 126-31 (1970) (discussing the state's right to determine voting qualifications for state elections, e.g., the eighteen-year-old requirement and limitation on voting rights).

58. *Gregory*, 501 U.S. at 473.

59. *See, e.g.*, Printz v. United States, 521 U.S. 898, 917-23 (1997) (noting that residual state sovereignty is implicit in the constitutional "conferral upon Congress of not all governmental powers, but only discrete, enumerated ones"); *New York*, 505 U.S. at 155-59 (noting that that Constitution contains limited and enumerated powers, and that what is not conferred is withheld and belongs to the states); *Gregory*, 501 U.S. at 457-64 (noting that the states retain a substantial sovereign authority under the Constitution).

60. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 53-54 (1996) (noting that the Eleventh Amendment confirms the restriction of the federal courts' Article III diversity jurisdiction).

61. *See* Alden v. Maine, 527 U.S. 706, 713-14 (1999) (noting that the Constitution's structure, history, and interpretations make it clear that the states' sovereign immunity from suit is a fundamental aspect of the sovereignty the states enjoyed before the ratification of the Constitution and still retain today).

62. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 97-100 (1995) (reaffirming the principle that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation") (quoting Milliken v. Bradley, 433 U.S. 267, 280-82 (1977)); Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (noting that in applying equitable principles to the facts of a case, federal courts must look at the nature and scope of the constitutional violation, the decree must be remedial in nature, and the courts "must take into account the interests of

its own internal affairs and the allocation and expenditure of its tax revenues is, *per se*, a special sovereignty interest protected by the Tenth Amendment.[63] Although a Tenth Amendment right alone may not withstand a balancing test with the Fourteenth Amendment,[64] *Alden* suggests that the cases recognizing state's interests, pursuant to Tenth Amendment cases, may be considered in ascertaining the state's sovereign interests under the *Coeur d'Alene Tribe* analysis.[65]

III. THE SCOPE OF INTRUSION INTO THE STATE'S SOVEREIGN INTERESTS

The identification of the state's sovereign interest has frequently been confused with the scope of the intrusion into the state's sovereign interest.[66] This confusion may have arisen out of the legal nature of the sovereign interest involved in *Coeur d'Alene Tribe*, which concerned the title to submerged land. Thus, the *Coeur d'Alene Tribe* statement was made without substantial analysis or explanation of the scope of the intrusion into the state's sovereign interest. The short answer to this point is that the intrusion into the state's interest in *Coeur d'Alene Tribe* was obvious and no further discussion was necessary in that case. Nevertheless, it is relatively easy to identify the state's interest. As suggested by *Alden*,[67] we look not to the specific interest, but to the integrated whole of the state political process. It is more difficult to ascertain the scope of the intrusion into that interest.

The Tenth Circuit held in *J.B. ex rel Hart v. Valdez*[68] that "[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*."[69] It is now the confirmed law of the Tenth Circuit.[70] The

---

state and local authorities in managing their own affairs, consistent with the Constitution").

63. *See, e.g.*, Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944) (noting that when a state authorizes a suit against itself by taxpayers who consider themselves injured, it is inconsistent with a dual system of government for the federal courts to read the consent to include their courts as well as the state courts).

64. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (holding that the Tenth Amendment cannot save legislation already prohibited by the Fourteenth Amendment).

65. *Alden*, 527 U.S. at 713-14.

66. J.B. *ex rel* Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999). *See* discussion herein, *infra*.

67. *Alden*, 527 U.S. at 750-51.

68. 186 F.3d 1280 (10th Cir. 1999).

69. *Id.* at 1287. The issue has never been formally fully considered by any panel of the Tenth Circuit. The statement in *J.B.* was uncritically accepted by the panels in both *Lewis* and *Joseph A.* as a decision of a prior panel of the Circuit. Lewis v. N.M. Dept. of Health, 261 F.3d 970, 978 (2001); Joseph A. *ex*

majority panel's decision conflicts with *Alden*,[71] which reaffirmed *Atascadero State Hospital v. Scanlon*,[72] and with *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[73] According to the panel, "[t]he [C]ourt properly recognized that the mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[74] In essence, the Tenth Circuit panel held that the state, by participating in a federal social service program, waives its Eleventh Amendment rights. *College Savings Bank* made it clear when it overruled *Parden v. Terminal Railway of Alabama Docks Department*,[75] that such "waivers by implication" have no place under Eleventh Amendment law. A tortured approach to the identification of the state's sovereign interest should not be used to bypass the settled law in this process. The Tenth Circuit approach seeks to avoid the difficult question of an examination of the reality of what the litigation seeks to accomplish and its potential effect on the state political process.

The "scope of the intrusion" analysis requires a realistic look at the functional effect of the litigation. In other words, the intrusion may be the result of either the procedural mechanism invoked or the nature of the right sought to be enforced – or both. Furthermore, the Eleventh Amendment implications do not stop with the determination of jurisdiction but proceed throughout the life of the litigation.

A. The Procedural Mechanism Invoked: Class Actions

The plaintiffs' choice to use the class action procedural device

---

rel Wolfe v. Ingram, 262 F.3d 1113, 1120 (2001), *prior opinion vacated on reh'g*, 275 F.3d 1253 (10th Cir. 2002).

70. *Lewis*, 261 F.3d at 978; *Joseph A.*, 262 F.3d at 1120.

71. *Alden*, 527 U.S. at 750-51.

72. 473 U.S. 234, 246-47 (1985).

73. 527 U.S. 666 (1999).

74. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). The panel's decision that the mere receipt of federal funds causes a diminishment of the state's sovereign interest far exceeds the extent that the Supreme Court has been willing to go with that concept. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207-08 (1987) (noting that Congress may place conditions on grants of federal funds for highways). Such an analysis is not appropriate to affect the significance of the state's sovereign interest. Its consideration, if valid, must take place at a later point in the analysis pursuant to the specific statute involved and should be conditioned upon whether or not the state actually receives funds pursuant to that statute. This is consistent with the analysis used when considering whether a given federal statute creates a private cause of action pursuant to *Suter v. Artist M.*, 503 U.S. 347 (1992). *See generally* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Blessing v. Freestone, 520 U.S. 329 (1997). In short, the funding inquiry is not appropriate as a threshold inquiry to determine the significance of the state's sovereign interest.

75. 377 U.S. 184 (1964).

to collectively assert individual claims may change the nature of the relief sought into one of broad systemic reform of the targeted state institutions.[76] An institutional reform class action is the most extreme of these examples. Such cases leave hardly an "inch" of the entire state system for the delivery of social services to the plaintiffs untouched by the plaintiffs' claims for relief.[77] Hence, the collective requested relief *per se* may exceed the scope of relief permissible and may also violate the Tenth Amendment.[78] Thus, it may be stated that an institutional reform class action *per se* violates the Eleventh Amendment, and the *Ex parte Young* exception is not appropriate or available in such cases. Plaintiffs seeking institutional reform attempt to control the structure of the state's delivery of services through the remedial portion of the Court's findings against the defendants. Many of such cases are resolved at some point through consent decree settlements.[79] These settlement agreements do not preclude the subsequent assertion of the Eleventh Amendment defense.[80]

---

76. It is not advanced in this Article that the procedural device of a class action pursuant to Federal Rule of Civil Procedure 23 may be limited or denied to plaintiffs in a suit against the state. FED. R. CIV. P. 23. *See, e.g.*, 42 U.S.C. § 2996e(d)(5) (2001) and 45 C.F.R. § 1617.3 (2001) (noting the prohibition against the use of class actions by the Legal Services Corporation). The statutes creating causes of action do not mention the class action procedural device. A bar of the use of the class action device against the state may not violate the equal protection requirements of the due process clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954). *See* United States v. Kras, 409 U.S. 434, 446 (1973) (noting that a filing fee requirement for bankruptcy does not deny equal protection of the law). Such procedural limitations may face only a rational basis test under the federal equal protection clause. Lindsey v. Normet, 405 U.S. 56, 70-74 (1972); Ortwein v. Schwab, 410 U.S. 656, 660-61 (1973). However, such limitations will trigger a balancing examination incorporating the First Amendment right of association. United Mineworkers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 221-22 (1967). Under either a rational basis test or a fundamental interest test, the justification for such an application would be the federalism principles of the Tenth and Eleventh Amendments. This is an unclear issue and should not be involved in the determination of the "special sovereign interest" under the *Coeur d'Alene Tribe* considerations.

77. *See* Oregon v. Mitchell, 400 U.S. 112, 128 (1970) (stating that the enforcement power of the Fourteenth Amendment was "not intended to . . . convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation").

78. It should be noted that the Tenth Amendment has not fared well when balanced against the Fourteenth Amendment. Hunter v. Underwood, 471 U.S. 222, 233 (1985). However, in this context, the Tenth Amendment is an integral part of the calculus to be applied in resolving issues of federalism. Oregon v. Mitchell, 400 U.S. 112, 126-29 (1970).

79. Agostini v. Felton, 521 U.S. 203, 215 (1997); Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 390-93 (1992).

80. Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1194-95 (10th Cir. 1998); Johns v. Stewart, 57 F.3d 1544, 1554 (10th Cir. 1995); Saahir v. Estelle, 47 F.3d 758, 762 (5th Cir. 1995).

Historically, the use of class actions as a tool for achieving institutional reform of state institutions was not developed until the 1970's by the various legal services programs.[81] *Ex parte Young* was decided in 1908. The status of class action litigation in 1908 was defined by old Equity Rule No. 48 (in 1912, this rule was modified by rule No. 38) and generally involved a "pot of gold" over which there was some dispute.[82] At that time, class actions were defined as "true," "hybrid" and "spurious."[83] It was not until the adoption of the revisions to the Federal Rules of Civil Procedure in 1937 that Rule 23 codified class actions. It was the newly articulated Rule 23(b)(2) class action that was, some thirty-five years later, to become the mechanism for the institutional reform class actions. Thus, it was sixty-five years after *Ex parte Young* that institutional reform class actions became a commonly used procedural mechanism to compel states to reform a variety of social institutions.

The presence of an advocacy organization as a plaintiff in litigation presents a variation of the class action theme. Federal legislation enables the operation of Protection and Advocacy System organizations in most states.[84] Their statutory purpose is, among other things, to protect the rights of vulnerable individuals with disabilities.[85] The principle of representational standing enables such organizations to have standing to raise the rights of other persons who are disabled and have been injured.[86] The presence of an advocacy organization plaintiff in any litigation raises and broadens the level of inquiry to that of a class action without any of the safeguards of a class determination under Rule 23 of the Federal Rules of Civil Procedure.[87] Protection and

81. 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.11 (2d ed. 1985). The first well-recognized institutional reform case was *Brown v. Board of Education*, 347 U.S. 483 (1954). *See also Rufo*, 502 U.S. at 380 (recognizing a rise in institutional reform litigation following the Supreme Court's decision in the *Brown* case).

82. *See generally* Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34 (1937).

83. James Wm. Moore & Marcus Cohn, *Federal Class Actions,* 32 ILL. L. REV. 307, 314-21 (1937) (designating and defining the three categories of class action suits).

84. *See, e.g.*, 42 U.S.C. §§ 6000–6001 (1994) (Developmental Disabilities Assistance and Bill of Rights Act) (repealed 2000); 42 U.S.C. § 10801 (1994) (Protection and Advocacy for Mentally Ill Individuals Act); 29 U.S.C. § 794e (1994) (Protection and Advocacy of Individual Rights Act).

85. *See, e.g.*, 42 U.S.C. § 6001; 42 U.S.C. § 10801(b)(1); 29 U.S.C. § 794e(a).

86. United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 546-58 (1996); Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-74 (1982); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-44 (1977).

87. *Compare* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. at 342-44, *with* Kurczi v. Eli Lilly & Co., 113 F.3d 1426, 1435 (6th Cir. 1997), *and* Chateau De Ville Prod., Inc. v. Tams-Witmark Music Library, Inc., 474 F.

Advocacy System, Inc., is a statutorily created entity and, as such, has no membership.[88] Nevertheless, the argument probably will be made that a Protection and Advocacy organization represents all eligible persons by the terms of their enabling statute.[89] Thus, the individual plaintiffs, in conjunction with the organizational plaintiffs, render such litigation tantamount to a class action whether or not Rule 23 is invoked.

Tenth Circuit cases also suggest that an individual case may not have the same impact as a class action, thereby making the infringement on state interests more difficult to establish.[90] However, depending upon the facts and the issues, a single plaintiff's case may cause an invasion of a state's sovereign interest.[91] There is no easy answer to this question because an in-depth inquiry is necessary to resolve the balancing required pursuant to the federalism inquiry.

B. The Nature of the Right Sought to be Enforced

Many of the rights sought to be enforced by plaintiffs will be through private rights of action derived directly, or by implication, from federal legislation.[92] Such claims may present their own statutory construction problems,[93] but it is certain that they will

---

Supp. 223 (S.D.N.Y. 1979).

88. Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (suggesting that a standing issue might arise for lack of "injury in fact").

89. This argument, as a justification for standing, is quite different than any argument supporting a delegation of enforcement powers to the agency. The enforcement powers of the United States cannot be delegated to congressionally created corporations, other entities such as Indian tribes or private individuals without running afoul of the Eleventh Amendment. Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 (1991) (Indian tribes); Smith v. Reeves, 178 U.S. 436, 445-46 (1900) (discussing within the context of a government corporation); United States *ex rel.* Foulds v. Tex. Tech. Univ., 171 F.3d 279, 291-94 (5th Cir. 1999) (private individuals). *See generally*, Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (one state acting as *parens patriae* cannot bring an action against another state without violating the Eleventh Amendment).

90. *See* Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1194-99 (10th Cir. 1998); Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 494-96 (10th Cir. 1998).

91. *See* Kish v. Mich. State Bd. of Law Exam'r, 999 F. Supp. 958, 964 (E.D. Mich. 1998) (noting that a state's interest in controlling admissions to the bar is paramount to an individual's claim for relief). *See also* Am. Trial Lawyers Ass'n v. N.J. Supreme Court, 409 U.S. 467, 468-69 (1973) (stating that federal constitutional issues should be retained by the court, pending the state court proceedings, rather than dismissing them altogether).

92. Alexander v. Sandoval, 532 U.S. 275, 280 (2001); Suter v. Artist M., 503 U.S. 347, 363 (1992); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 (1990).

93. *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778-87 (2000) (describing difficulty in interpreting the standing of an individual to bring suit in federal court on behalf of the United States under the False Claims Act).

raise pleading considerations under *Blessing v. Freestone*. In addition, they may well raise Eleventh Amendment considerations under the analysis of *City of Bourne v. Flores*, and Tenth Amendment considerations under the analysis of *Printz v. United States*. Considering the continuing activity of the Supreme Court in applying the Eleventh Amendment to federal statutes, any federal statute is subject to analysis.[94] Of particular note is Title II of the Americans with Disabilities Act ("ADA") that is subject to the same analysis found in the Supreme Court's opinion in *Garrett*.[95] The *Garrett* Court held that Title I violated the principles of the Eleventh Amendment.[96] However, it is not the purpose of this Article to discuss this particular analysis in depth. The Supreme Court set forth several examples of the analysis[97] and gave clues as to what the Court expects in the form of a record in a case that finds its way to the Court.[98] Suffice it to say that the intrusiveness of the statute invoked has an impact on the degree of invasion of the federal litigation into the state's sovereign interests and has a particular impact upon the resolution of various Rule 12 motions.

C. Substantive Due Process

The concept of substantive due process, forming the constitutional foundation for granting the relief plaintiffs seek in the health law cases, creates a serious problem for our system of federalism. The leading case in this regard is *Youngberg v.*

---

94. *See, e.g.*, Regents of Univ. of Minn. v. Raygor, 620 N.W.2d 680, 684 (Minn. 2001) (stating that "the United States Supreme Court has long recognized Eleventh Amendment immunity as a limit on the reach of the federal judiciary."). *See also supra* note 97 and accompanying text.

95. *See, e.g.*, Thompson v. Colorado, 258 F.3d 1241, 1248-55 (10th Cir. 2001) (holding that the analysis for Title I of the ADA in *Garrett* was also applicable to Title II of the ADA). *Accord*, Reickenbacker v. Foster, 274 F.3d 974, 979-81 (5th Cir. 2001) (holding that *Garrett* effectively overruled *Coolbaugh v. Lousiana*, 136 F.3d 430 (5th Cir. 1998) which case upheld the congressional abrogation of state sovereign immunity in the ADA as an exercise of the remedial power of § of the Fourteenth Amendment). *See generally* Alsbrook v. City of Maumelle, 184 F.3d 999, 1005-10 (8th Cir. 1999), *cert. dismissed,* 529 U.S. 1001 (2000); 529 U.S. 1001 (2000); Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698, 705-08 (4th Cir. 1999), *cert. denied,* 531 U.S. 1190 (2001). Both *Alsbrook* and *Brown* were pre-*Garrett* cases involving Title II of the ADA and directly held that Congress did not have the power under § 5 of the Fourteenth Amendment to abrogate the state's sovereign immunity.

96. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

97. *See supra* notes 18 and 19.

98. *See, e.g.*, *Garrett*, 531 U.S. at 373 (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) to demonstrate the necessary quality of congressional record to respond to a serious pattern of constitutional violations). The Court further noted that § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment were virtually identical. *Id.*

Romeo.[99] The premise of *Youngberg* is that the substantive rights of institutionalized plaintiffs derive from the rights of the confined.[100] To date, an independent constitutional right of the developmentally disabled is not recognized by the Supreme Court.[101] Thus, the rights of the plaintiffs in the current health law litigation must rest on statutory grounds such as the ADA.[102] However, even that foundation may be constitutionally infirm in light of the reasoning in *Garrett*.[103] The point is, that if the courts act upon the logic of the advocates of the disabled and class members move from institutions to community-based living, the factual foundation for any heretofore recognized constitutional right is removed. The argument persists, whether this factual irony provides a limiting factor[104] to the enforcement of substantive due process rights. It is the method of defining the substantive rights that creates the intrusion into the state's sovereign interests, thereby invoking the *Coeur d'Alene Tribe* type of consideration.

Youngberg attempts to limit its effect by making the professional decision in a given instance "presumptively valid."[105] In making an individual determination, such a limitation is appropriate. However, systemic reform litigation is more likely to result in a "battle of experts." In the process of structuring any system, one must necessarily deal with hypotheticals, which are the foundation of expert testimony in an institutional reform class action. This fact also brings such a case perilously close to raising the Article III concern whether a case in controversy actually exists.[106]

---

99. 457 U.S. 307 (1982).

100. *Id.* at 315-16.

101. *See Garrett*, 531 U.S. at 366-67 (concluding that a state's decision to act on the basis of a group's "distinguishing characteristics relevant to interests the State has the authority to implement" does not give rise to a constitutional violation) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). *See also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (concluding that the "[court] will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate").

102. 42 U.S.C. § 12101 (1990). In *Garrett*, the Supreme Court did not decide whether the application of the ADA to the health law cases was constitutional. *Garrett*, 531 U.S. at 374 n.9.

103. *See generally Garrett*, 531 U.S. 356; Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001).

104. *Cf.* McClendon v. City of Albuquerque, 79 F.3d 1014, 1021 (10th Cir. 1996) (stating that federal court decrees exceed appropriate limitations if they are aimed at eliminating a condition that does not violate the Consitution). *See generally* Missouri v. Jenkins, 515 U.S. 70 (1995); Milliken v. Bradley, 433 U.S. 267 (1977).

105. Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

106. *See, e.g.*, United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 n.19-21 (1947) (stating that concrete legal issues presented in actual cases are

Furthermore, professional opinion changes over time as various social experiments attempt to find solutions to social and treatment problems. Thus, the constitutional "floor" is unstable and may shift as the opinions of the professional community evolve. *Youngberg* attempted to resolve the problem by refusing to enter into the professional judgment fray.[107] That is a nice concept, but virtually impossible to effectuate in a systemic reform situation. By definition, the court interferes with the state's ability to experiment with its social programs within the context of its limited financial resources.

The process of ascertaining any substantive due process "right" is a process of piecing together a collection of historical statements under the focus of a current controversy. At best, it results in a synthesis and declaration of a right that was never recognized or stated as such in our jurisprudence. It is derived from a variety of sources that, unless they are well grounded, do not have obvious application until the substantive due process right is stated or declared. Congress usually accomplishes this process, such as in the adoption of the ADA, and sometimes by the Court, as in *Youngberg*. However, it is a form of sophistry to say that such a right always existed. The reality of the situation involves the creation of a "new" or heretofore unrecognized "right," for which some state official is held accountable in a retrospective consideration. This process is brought sharply into focus in cases involving the ADA. The intrusion upon the state's sovereign interests becomes exacerbated in substantive due process cases such as in *Youngberg* and in a case where any newly created "rights" are not as well grounded as in other cases involving a more straightforward application of the Bill of Rights, through the due process clause of the Fourteenth Amendment.

No matter how the theory is characterized, the Court uses the same intellectual process as the substantive due process that prevented states from regulating business in the late 1800's.[108] At that time, the social program was a *laissez-faire* approach protecting business interests, and the Supreme Court recognized certain substantive rights based upon freedom of contract. Now the process supports a social agenda through constitutional litigation based upon individual rights. Ironically, both uses of the process profess to protect "liberty" interests; the first as a shield, the second as a sword. Nevertheless, substantive due process, with its constantly moving target, is just as problematic now as it

---

necessary for adjudication of constitutional issues).

107. *See Youngberg*, 457 U.S. at 324-25 (holding that decisions made by the appropriate professionals are entitled to a presumption of correctness).

108. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905) (protecting the individual's right to contract in relation to employment from state interference).

was at the turn of the century when it was used by business interests to avoid social intrusions by the state through regulation of labor laws. Substantive due process is a necessary and legitimate tool through which contemporary values and judgments evolve and gain recognition. However, it is not "substantive;" it is a "process," and "standing alone, confers no liberty interest in freedom from state action."[109] Substantive due process may easily get out of control, as Justice Holmes warned in his famous dissent in *Lochner*.

> But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[110]

The Supreme Court ultimately rejected this application of substantive due process[111] in the same year that it decided *Ex parte Young*. As previously stated, the process of ascertaining rights through substantive due process is an integral part of our common law. It is not the purpose of this Article to suggest that the concept is wrong or deserves rejection. However, the practical operation of the theory has its infirmities and does impact the state's sovereign interests. That impact is taken into consideration in resolving the *Coeur d'Alene Tribe* issues.

Thus, the relief sought through substantive due process necessarily invades the state's sovereign ability to legislate and implement both policy and methodology for the delivery of social service programs within the context of a finite pool of financial resources. Furthermore, if professional standards become the constitutional standard, this presents a constantly evolving standard from which there is no finality to such litigation. This constitutes a major invasion into the state's sovereign interests.

IV. RELATED SOVEREIGNTY CONCERNS: A LOOK TO THE FUTURE

At this time the Supreme Court has a solid coalition of five justices that support some, if not all, of the re-evaluated principles of federalism with respect to the relationship between the federal government, the states, and their citizens. The Court does not appear to be finished with this subject.[112] Therefore, it seems

109. Sandin v. Conner, 515 U.S. 472, 480 (1995).

110. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

111. *See generally* Muller v. Oregon, 208 U.S. 412 (1908).

112. Regents of Univ. of Minn. v. Raygor, 620 N.W.2d 680, *cert. granted*, 121 S. Ct. 2214 (2001). The question presented in this case is whether the tolling

appropriate to indicate a few of the areas where the impact of this re-evaluation takes us in the future. In addition to the matters previously discussed, significant areas of law are critically scrutinized, including: the ability of Congress to abrogate the Eleventh Amendment pursuant to Section 5 of the Fourteenth Amendment; the Doctrine of Abstention; procedural implications in Rule 12 and 26 motions and concomitant stay issues; waiver issues; and appellate procedures.

A. A Re-evaluation of Section 5 of the Fourteenth Amendment

At this time, the Fourteenth Amendment provides the only constitutional authority for Congress to abrogate the Eleventh Amendment.[113] In view of the recent Supreme Court cases dealing with Eleventh Amendment issues, this authority rests upon an infirm foundation.

According to some historians, the Fourteenth Amendment was drafted with the primary concern of enforcing voting rights which were denied on the basis of race, etc.[114] They further claim that the Supreme Court opinions on this subject are less than candid in their assessment of historical facts.[115] In some cases, historical analysis has been absent, with the Court instead relying upon prior cases resolving other issues and assumptions of historical intent. One such case is *Fitzpatrick v. Bitzer*.[116]

Fitzpatrick holds that Section 5 of the Fourteenth Amendment permits Congress to abrogate the Eleventh Amendment. *Fitzpatrick*, without any real historical analysis, assumes that the intent of the Fourteenth Amendment was to give Congress the power to enact remedial legislation under the Fourteenth Amendment.[117] *Fitzpatrick*, therefore, concludes that Section 5 of the Fourteenth Amendment effectively gave Congress the authority to abrogate the state's ability to use the Eleventh Amendment as a bar to federal litigation by private citizens against the state.[118] *Fitzpatrick* has been repeatedly cited in recent cases as a means by which the Eleventh Amendment could be abrogated.[119]

It would seem that any analysis of the effect of the

---

provision of 28 U.S.C. § 1367(d) violates the Eleventh Amendment. *Id.* at 682. Section 1367(d) tolls the statute of limitations for state claims during the time the state claims are pending in federal litigation. *Id.* at 685.

113. Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

114. *See generally* 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 1260-1300 (Macmillan Publishing Co. 1987).

115. *Id.* at 1257-59.

116. 427 U.S. 445 (1976).

117. *Id.* at 455-56.

118. *Id.* at 456.

119. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000).

Fourteenth Amendment should begin with a very basic consideration. That is, if we consider the history of the Eleventh Amendment and the consternation caused by the decision of *Chisholm v. Georgia*[120] along with the unified and immediate reaction to that decision, would the Northern States have been so eager to adopt the Fourteenth Amendment if they realized they would be sacrificing a major element of their sovereignty?[121] It doesn't seem likely that the states would have, but the passage of seventy-five years and the events of the Civil War might have altered that fundamental view of sovereignty.

The constitutional scholar, Horace E. Flack, in his 1908 study of the adoption of the Fourteenth Amendment, approached the subject with a close analysis of the Congressional record of the Amendment and the legislation that preceded and followed the adoption of the Amendment.[122] Flack makes only one reference to the Eleventh Amendment in his work.[123] He uses it as support for the proposition that only the Court may interpret the Constitution, not the Congress. However, Congress may give its interpretation to its own acts. The context of the statement is in reference to the Thirteenth Amendment, but the recognition of the Eleventh Amendment's continuing validity and absence of any further reference to the Eleventh Amendment is significant. Flack also recognizes that "although the Federal Government has today, under the Fourteenth Amendment, greater powers than it possessed under the old Constitution, there has been no revolutionary change in the respective powers of the States and the General Government."[124]

In keeping with Flack's suggested broad analysis, cases shortly after the Civil War reflected a theme that was undoubtedly an after-the-fact recognition of the support for the statutory response of Congress through the Civil Rights Acts. This theme involved a way of dealing with individuals in state power whose attitude reflected a willingness to deny citizens equal protection under the law.[125] It was the need to deal with individuals who perpetuated this violation that led to the perceived need to resolve

120. 2 U.S. 419 (1793).

121. *See* Alden v. Maine, 527 U.S. 706, 715-29 (1999) (discussing the states' reluctance to concede their sovereign immunity); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.2 (1985) (discussing whether the states would have ratified the Constitution if they were stripped of their sovereign authority).

122. HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 11 (John Hopkins Press 1908).

123. *Id.* at 33-34.

124. *Id.* at 8.

125. *Compare* United States v. Cruikshank, 92 U.S. 542, 554-55 (1875), *with Ex parte* Virginia, 100 U.S. 339, 345-48 (1879), *and* Virginia v. Rives, 100 U.S. 313, 321-22 (1879).

the problem by way of federal statutes. A statement from the opinion in *Ex parte Virginia* is very telling: "We do not perceive how holding an office under a State, and claiming to act for the State, can believe [sic] the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience."[126] The dichotomy of individual versus state action was the foundation of the need to have further statutory remedial power.[127] Was it also the need to obviate the effect of the Eleventh Amendment? If so, what does that say about the effect of the Fourteenth Amendment?

The Court's increasing reliance upon two 1883 cases in the Eleventh Amendment analysis invites a critical re-evaluation of the premise that the Fourteenth Amendment constitutionally permits Congress to abrogate the Eleventh Amendment. Those cases are *United States v. Harris*[128] and the *Civil Rights Cases*.[129] As stated in the *Civil Rights Cases*, corrective legislation is not primary and direct, with the assumption that the subject is "one that belongs to the domain of national regulation."[130] Under that test, the statutory abrogation of the Eleventh Amendment, as the Supreme Court has many times stated, must be clear and specific. This begs the question of whether or not the Fourteenth Amendment authorizes this abrogation in the first place. It may be appropriate or even necessary to abrogate the Eleventh Amendment for some valid purpose, but it would seem that without some direct language to the contrary, a federal statute may not "trump" a specific constitutional provision either directly or indirectly. As noted previously, Flack makes but one supportive passing reference to the Eleventh Amendment.[131] Even assuming by some implication that the Fourteenth Amendment may authorize the abrogation of the Eleventh Amendment, the Court has never considered this issue in light of the Doctrine of Separation of Powers and the propriety of a delegation of federal power to private individuals.

This entire line of cases may eventually be re-evaluated in light of *Alden v. Maine*[132] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[133] Under our federalism, Congress has power to take direct action against the states pursuant to the Fourteenth Amendment. However,

126. *Ex parte Virginia*, 100 U.S. at 348.
127. *See* Mitchum v. Foster, 407 U.S. 225, 241-42 (1972) (stating the purpose of the Act of 1871 was to extend federal power to remedy the failure of states to secure the peoples' constitutional rights).
128. 106 U.S. 629, 638 (1883).
129. 109 U.S. 3, 17-18 (1883).
130. *Id.* at 19.
131. FLACK, *supra* note 122, at 136-39.
132. 527 U.S. 706 (1999).
133. 527 U.S. 666 (1999).

Congress has no authority, under any provision of the Constitution, to abdicate its responsibility to directly deal with the various states, either by use of an explicit or *de facto* delegation of that power to private citizens through abrogation of the state's sovereign immunity as guaranteed by the Eleventh Amendment. This may have been the *sub silentio* rationale behind the holding in *Seminole Tribe v. Florida* concerning the inapplicability of the *Ex parte Young* exception where Congress has adopted a detailed remedial scheme.[134]

The Fourteenth Amendment was directed against state action and limited to remedying that state action.[135] Thus, there is no issue if the federal government is the litigant against the state. However, that rationale becomes more problematic when extended to any private litigation by citizens to support the abrogation of both the Eleventh Amendment and the doctrine of separation of powers. Neither the Tenth Amendment, nor the Eleventh Amendment or Separation of Powers, are mentioned in the text of the Fourteenth Amendment, and repeals by implication are traditionally not favored.[136] Although this is a rule of statutory construction, the same considerations apply to any constitutional construction where the provision asserted is at odds with another provision and is not even referenced in that other provision. In light of our constitutional history, where this record is silent, it would seem that any presumption or bias must be in favor of the Eleventh Amendment, not against it. In such an event, is abrogation by legislation a permissible answer, or is the *Ex parte Young* exception to the Eleventh Amendment the only appropriate safeguard in this situation?[137]

The ADA and many other similar statutes are really "cut of a different cloth." The statutes, consistent with their broad sweep against both the private and public sector, may grant a private statutory cause of action to individuals against all persons (including by implication or specificity the state). This type of statutory authorization of litigation was an aftermath of *Parden v. Terminal Railway of Alabama State Docks Department*.[138] The

134. Seminole Tribe v. Florida, 517 U.S. 44, 73-76 (1996).

135. United States v. Morrison, 529 U.S. 598, 621-23 (2000); City of Boerne v. Flores, 521 U.S. 507, 524-26, 532-33 (1997); United States v. Harris, 106 U.S. 629 (1883); The Civil Rights Cases, 109 U.S. 3 (1883). The subsequent adoption of the Fifteenth Amendment did not alter this fact. Cases decided pursuant to the Fifteenth Amendment, such as *City of Rome v. United States*, are different than those decided under the Fourteenth Amendment, even though they may be used to interpret the procedural effect of § 5 by analogy. 446 U.S. 156 (1980).

136. Rodriguez v. United States, 480 U.S. 522, 524 (1987).

137. Alden v. Maine, 527 U.S. 706, 747 (1999); General Oil Co. v. Crain, 209 U.S. 211, 225-27 (1908).

138. 377 U.S. 184 (1964).

United States Supreme Court expressly overruled *Parden* in *College Savings Bank*.[139] Thus, the courts recognized the nature of this *Parden* type of litigation as a recent development in the law (since the 1960's), and the fact of its existence was considered to be of little precedential value.[140] The constitutional question, therefore, is really one involving the inherent structural concept of separation of powers.[141] "The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary[.] The power to interpret the Constitution in a case or controversy remains in the Judiciary."[142]

Thus, it would seem that, notwithstanding Article III, § 2 of the Constitution, Congress cannot use the Fourteenth Amendment to conscript the federal judiciary to resolve statutory causes of action by private citizens against the states without running afoul of the Eleventh Amendment and the doctrine of separation of powers.[143]

As noted in *Alden*, the Tenth and Eleventh Amendments, Article III, § 2 of the Constitution, and the doctrine of separation of powers must be read together in resolving this issue.[144] Upon entering the union, the states consented only to the ability of the United States to sue a state in the Supreme Court or inferior courts as may be established in accordance with the sovereign dignity accorded a state.[145] It is an improper delegation to delegate

---

139. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635 (1999).

140. *Alden*, 527 U.S. at 744.

141. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-91 (1949); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). As stated previously, the Eleventh Amendment is a constitutional prohibition that applies primarily to the judicial branch of the government. Thus, the Doctrine of Separation of Powers suggests that any attempt by Congress to interfere with that constitutional mandate is *per se* invalid. The history of the Doctrine, however, indicates that it may be prudent to also involve other constitutional provisions in a cumulative effort to resolve the federalism issues. *Alden*, 527 U.S. at 713-15.

142. City of Boerne v. Flores, 521 U.S. 507, 523-24 (1997).

143. *See generally* Printz v. United States, 521 U.S. 898 (1997).

144. *Alden*, 527 U.S. at 713-15. *See generally* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

145. *Cf.* Seminole Tribe v. Florida, 517 U.S. 44, 67-73 (1996) (stating that the Eleventh Amendment prevents congressional authorization of citizens bringing a private action against a non-consenting state); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (stating that the Eleventh Amendment recognizes that the states maintain sovereign immunity); Hans v. Louisiana, 134 U.S. 1, 13 (1890) (stating that every state in the union enjoys sovereign immunity); *Ex parte Ayers*, 123 U.S. 443, 505 (1887) (explaining that the objective of the Eleventh Amendment was "to prevent the indignity of subjecting a State to the coercive process of judicial

enforcement authority under the Fourteenth Amendment or any other clause of the Constitution[146] to private individuals directly or on behalf of others.

The Supreme Court held in *Hawaii v. Standard Oil Co. of California* that allowing another state to bring a *parens patriae* lawsuit cannot bypass the Eleventh Amendment.[147] *Standard Oil* held that "[a]n action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals."[148] The same logic may apply to the federal government,[149] thereby qualifying and limiting the enforcement of statutory rights.

Notwithstanding *Fitzpatrick*, an action by an individual seeking to recover against a state on behalf of the United States constitutes an improper delegation of the United States' authority to sue a state directly,[150] which the Eleventh Amendment bars.[151] The Supreme Court in *Vermont Agency of Natural Resources v. U.S. ex rel Stevens*[152] recently resolved the issues raised in the *qui tam* cases.[153] The delegation issue was avoided by some judicious statutory construction, and therefore remains an open issue.

---

tribunals at the instance of private parties").

146. This assumes that the power exists to direct the states to do any given act by appropriate legislation.

147. 405 U.S. 251 (1972).

148. *Id.* at 259 n.12. *See also*, New Hampshire v. Louisiana, 108 U.S. 76, 88-91 (1883) (holding that owners holding bonds of a state who are precluded from suing the state in their own name cannot bring suit in the name of their home state); North Dakota v. Minnesota, 263 U.S. 365, 375-76 (1923) (holding that a suit for damage to land resulting from altering drainage of surface water against Minnesota by North Dakota on behalf of its citizens violates the principles of the Eleventh Amendment).

149. The Supreme Court has described the federal government as "the ultimate *parens patriae* of every American citizen." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

150. *See generally Seminole Tribe*, 517 U.S. at 44; United States v. Texas, 143 U.S. 621 (1892).

151. United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 291-92 (5th Cir. 1999) (a *qui tam* action). *Cf.* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 785 (1991) (holding that the United States could not delegate authority to bypass Eleventh Amendment state sovereignty because the United States holds no such ability).

152. 529 U.S. 765 (2000).

153. A *qui tam* action is one that is pursued by a private person known as the "relator" against a person who knowingly presents or causes to be presented a false or fraudulent claim for payment or approval. *See generally* The False Claims Act, 31 U.S.C. §§ 3729-3733 (2001). A *qui tam* action may be pursued for the person and for the United States Government against the alleged false claimant in the name of the Government. In *United States ex rel. Foulds v. Texas Tech University*, the Fifth Circuit citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991), held that the United States' power to sue the states could not be delegated to private persons. 171 F.3d 279, 291-94 (5th Cir. 1999)

Delegating the ability to enforce legislation against a state to private persons in their individual capacity, or in their collective capacity, in a class action may violate the Tenth and Eleventh Amendments, Article III, § 2 of the Constitution and the doctrine of separation of powers.[154]

An indication of this resolution may be forecast in the way the Supreme Court handled the presence of a remedial scheme for the enforcement of a particular federal right in *Seminole Tribe*.[155] It held that, in such event, the *Ex parte Young* exception to the Eleventh Amendment was unavailable and the Eleventh Amendment therefore barred the suit.[156] This logic may extend to any attempt to delegate the broad enforcement powers of the federal government to private individuals.[157] The issue of *Fitzpatrick* may not be immediately resolved for a variety of reasons.[158] However, it seems that the Court will eventually deal with the matter.

B. The New Role of the Doctrine of Abstention

The doctrine of abstention developed over the years into an important part of the approach towards federalism. There are four categories of circumstances in which abstention is appropriate. The first category is in cases that present a federal constitutional issue but that a state court, determining pertinent state law, might either find moot or presentable in a different posture. This

154. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that the Eleventh Amendment preserves the states' sovereign immunity and that nothing in Article I of the Constitution delegates to Congress the power to force a non-consenting state to defend against private actions); Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (holding that "[e]ven 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."); Smith v. Reeves, 178 U.S. 436, 445-46 (1900) (holding that a congressionally created corporation is barred from suing a state by the Eleventh Amendment); United States *ex rel* Foulds v. Tex. Tech Univ., 171 F.3d 279, 293-94 (1999) (holding that the Eleventh Amendment barred the suit). *See generally* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

155. 517 U.S. 44 (1996).

156. *Id.* at 76.

157. *See* Joseph A. v. Ingram, 262 F.3d 1113, 1121-24 (10th Cir. 2001), *vacated by*, 275 F.3d 1253 (10th Cir. 2002) (holding that Congress meant to preclude reliance on *Ex parte Young* in a suit to enforce the statutory standards governing state child adoption and welfare services).

158. It may be that *Fitzpatrick* embodies the spirit of the Fourteenth Amendment and there is no interest in tackling that issue at this time. It may also be that the preservation of the *Fitzpatrick* rule is part of the glue that binds the majority of five together at this point on the issues of federalism. Or, it may be that *Fitzpatrick* was Justice Rehnquist's opinion and the Court may be reluctant to overturn a decision written by a sitting Chief Justice.

category is commonly referred to as "Pullman abstention."[159] The second category presents itself in cases where difficult questions of state law bear upon policy concerns whose importance transcends the result in the case at bar. Abstention is appropriate if the exercise of federal review would be disruptive to state efforts with respect to matters of substantial public concern. This category is commonly referred to as "*Burford* abstention."[160] The third category occurs where federal intervention would disrupt pending state judicial proceedings. This is commonly referred to as "*Younger* abstention."[161] The fourth category consists of cases that do not fit into the foregoing three categories, yet principles of federalism and judicial economy dictate abstention as the appropriate course of action. This is commonly referred to as "*Colorado River* abstention."[162] The Doctrine of Abstention presupposes the existence of federal jurisdiction for purposes of its application. Thus, the federal courts have the option to retain the case or dismiss the case.[163] For the most part, Eleventh Amendment federalism is premised upon the fact that federal jurisdiction does not exist. Thus, under the Eleventh Amendment, dismissal is mandated because the same options do not exist. Nevertheless, the spirit of the forms of abstention may now be considered as part of the Eleventh Amendment analysis.

It is not difficult to see why the adequacy of state forums became an issue in *Coeur d'Alene Tribe*. In addition to the underlying theme of *Ex parte Young*, abstention cases also expressed the idea as a critical consideration in the decision whether to retain jurisdiction or dismiss the case.[164] Regardless of the arguable status of the plurality opinion in *Coeur d'Alene Tribe*, one may conclude that *Coeur d'Alene Tribe* emphasized the responsibility of the state courts in resolving issues of federal constitutional and statutory law as they may arise in cases before them. *Alden* picked up this theme, and it goes hand in hand with the theme expressed in *Younger* abstention. The theme may also

159. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). *See generally* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

160. *See* L.A. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959) (holding that federal court should abstain from deciding eminent domain case due to the need to maintain "harmonious federal-state relations in [] matter[s] close to the political interests of a State"). *See generally* Burford v. Sun Oil Co., 319 U.S. 315 (1943).

161. *See generally* Moore v. Sims, 442 U.S. 415 (1979); Younger v. Harris, 401 U.S. 37 (1971).

162. *See generally* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

163. *See, e.g.*, *MacMullan*, 406 U.S. 498, 512-13 (1972) (affirming decision of district court to abstain because resolution of ambiguous state law would not significantly affect a federal question). *Accord* Am. Trial Lawyers Ass'n v. N.J. Supreme Court, 409 U.S. 467, 469 (1973).

164. Lake Carriers' Ass'n v. MacMullan, 406 U.S. at 512-13.

be expressed in terms of a significant state sovereign interest in the proper functioning of the state judicial system.[165]

Younger abstention developed as a special type of abstention based upon a federal statutory codification of a long-standing judicial policy.[166] There are three conditions for *Younger* abstention, to wit: (1) there must be a pending or ongoing state proceeding that is judicial in nature; (2) the state proceedings must implicate important state interests; and (3) the state proceedings must afford an adequate opportunity to raise any constitutional issues.[167] Abstention must be invoked once the conditions are met.[168] There is little room for discretion in the application of *Younger* abstention, and the implication of "important state interests" rings a sympathetic chord with special sovereignty interests as expressed in *Coeur d'Alene Tribe*. The two tests previously discussed may be analogously, if not similarly, interpreted.

One can read *Coeur d'Alene Tribe* to convey a message to the states to honor the dual system of sovereignty and federalism by paying careful attention to federal constitutional and statutory issues. If the system is to work, there must be mutual trust and respect between the two sovereign partners. *Ex parte Young* acts as the safety valve if something goes amiss along the way. Nevertheless, one may conclude that the spirit of *Younger*

---

165. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (holding that the ability of a state to regulate practicing lawyers constitutes a situation where abstention by the federal court is necessary for allowing a state judicial system to function properly).

166. *See* 28 U.S.C. § 2283 (2001) (The Anti-Injunction Act) (codifying federal court ability to delay injunction to stay proceedings in the state court except when specifically authorized by Congress or where necessary in aid of its jurisdiction, or to protect the court's judgments). *See also Younger*, 401 U.S. at 40 (showing district court acting according to 28 U.S.C. § 2284 in preventing district attorney from prosecuting defendant Harris).

167. *Middlesex County*, 457 U.S. at 432.

168. Many courts have applied these three conditions in deciding application of the *Younger* abstention. *See generally id.* (applying the *Younger* exception to determine that federal courts should not interfere with the licensing and disciplining of attorneys who have been admitted to practice in New Jersey); Trainor v. Hernandez, 431 U.S. 434, 442 n.7 (1977) (considering the principles of *Younger* to be broad enough to counsel against a federal court's interference in challenging the constitutionality of the Illinois Attachment Act); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 n.22 (1976) (taking the *Younger* abstention exception into consideration, and then deciding it inappropriate to dismiss upon abstention grounds); Kugler v. Helfant, 421 U.S. 117, 124-25 (1975) (recognizing that the delicate federal-state relation is one of restraint and that there was no need for federal intervention in a pending state criminal prosecution); Taylor v. Jaquez, 126 F.3d 1294, 1297 (10th Cir. 1997) (finding that the federal court should abstain from intervention because of Colorado's significant state interest); Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 709, 711 (10th Cir. 1989) (issuing a preliminary injunction from state action because a federal interest predominated).

abstention is now part of the jurisdictional considerations of the Eleventh Amendment.

The congressionally created remedial scheme recognized in *Seminole Tribe* resonates with the ideas of both *Colorado River* abstention and *Burford* abstention. Again, it is not the same, but an analogous comparison. These types of abstention may be the "mirror" issue to the "detailed remedial scheme" used in *Seminole Tribe*.[169]

Congress has recognized this theme through the exhaustion requirement of the Prison Litigation Reform Act.[170] As discussed later, the idea of *Pullman* abstention may be incorporated into the Eleventh Amendment considerations when expressed as a right of the state to seek certification to the State Supreme Court for interpretations of state laws that are unclear. Thus, the spirit of abstention, if not the actual doctrine, is now part of the fabric of Eleventh Amendment jurisdictional considerations.

Consideration of the various types of abstention, and their kinship to the rationale of the Eleventh Amendment federalism, suggests that primary consideration be given to abstention as a "jurisdictional" consideration. This does not effect a change in the settled principles of the abstention doctrines. As a matter of judicial economy[171] in light of our federalism, the focus should shift to one of primary consideration, subject to the collateral order doctrine permitting immediate appeal of rulings on abstention. This is a matter particularly within the province of the judiciary.[172]

C. The Doctrine of Waiver

The issue of waiver of Eleventh Amendment immunity is one that has heretofore had mixed results. The Supreme Court has indicated that the immunity may be waived.[173] The Court set forth

---

169. Seminole Tribe v. Florida, 517 U.S. 44, 73-76 (1996). *See generally Trainor*, 431 U.S. 434; Juidice v. Vail, 430 U.S. 327 (1977).

170. *See* Booth v. Churner, 121 S. Ct. 1819, 1821 (2001) (requiring that before a prisoner may address a federal court, he must first exhaust all administrative options, even if he seeks monetary damages, which an administrative remedy cannot provide).

171. *Cf.* SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (stating the judicial economy considerations and the "right for any reason" appellate rule).

172. *Cf.* 28 U.S.C. §§ 2071-77 (1994) (Rules Enabling Act of 1934) (proscribing the judiciary's power to make general rules of evidence and procedure for the United States District Courts).

173. Clark v. Barnard, 108 U.S. 436, 447-48 (1883). *Gunter v. Atlantic Coast Line Railroad Co.* was a case seeking to enjoin the assessment of a state tax previously held to be constitutionally invalid by the Supreme Court in prior litigation in which the state had fully participated. Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 284 (1906). In resolving this issue immediately prior to *Ex parte Young*, the Court included a discussion of waiver by the state's participation in the previous litigation. *Id.* However, *Gunter* is contemporaneous with, and falls squarely as an exception to, the Eleventh

the traditional analytical process for waiver in the 1945 opinion of *Ford Motor Co. v. Indiana*.[174] Regardless of what position the parties take, the primary question is whether the parties had the power under state law to do so under their state's Constitution, statutes and decisions.[175] Regardless of the answer, the Supreme Court is clear that they will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."[176] Thus, if the power to waive the Eleventh Amendment immunity legally exists in the appropriate person, the standard for making the necessary factual determination of waiver is very strict. It is unlikely that the present Supreme Court will endorse any concept of waiver by implication.[177]

The legal question of the power to waive immunity is not a clear issue. For example, in New Mexico, only the legislature[178] or the Supreme Court[179] may address the waiver of sovereign immunity. The Tenth Circuit has recognized that New Mexico sovereign immunity is limited and governed by statute.[180] New Mexico history suggests there may be some dual authority between the legislative and judicial branches, but once the legislature assumes control as it did through the Tort Claims Act,[181] a constitutional crisis could develop over this matter. In view of this potential, it is unlikely that New Mexico's executive branch would ever share in this authority,[182] notwithstanding the

---

Amendment pursuant to the *Ex parte Young* rationale. Thus, the litigation sought to enjoin an ongoing constitutional violation rather than being a "waiver" case. Functionally and historically, the "dicta" in *Gunter* is not a sound "waiver" precedent.

174. Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945).

175. *Id.* at 467-69. *Accord* Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 430-32 (8th Cir. 1997).

176. Edelman v. Jordan, 415 U.S. 651, 673 (1974); Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

177. *See, e.g.*, College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676-79 (1999) (describing the Court's dislike of the doctrine of constructive waiver).

178. N.M. STAT. ANN. §§ 41-4-1 - 41-4-29 (Michie 1978) (addressing tort liability); N.M. STAT. ANN. § 37-1-23 (Michie 1978) (addressing valid written contracts).

179. *See* Hicks v. New Mexico, 544 P.2d 1153, 1154-55 (N.M. 1976) (abolishing state sovereign immunity in New Mexico for tort actions). This case triggered the legislative action in adopting the New Mexico Tort Claims Act. *See* N.M. STAT. ANN. §§ 41-4-1 - 41-4-29 (Michie 1979) (establishing New Mexico Tort Claims Act).

180. Garcia v. Bd. of Ed. of Socorro Consol. Sch. Dist., 777 F.2d 1403, 1407 (10th Cir. 1985).

181. Note particularly the declaration in N.M. STAT. ANN. § 41-4-2.

182. *See* New Mexico *ex rel.* Clark v. Johnson, 904 P.2d 11, 22 (N.M. 1995) (stating that pursuant to the New Mexico Constitution, the legislature creates the law and the executive branch executes the law).

Attorney General's plenary authority over litigation.[183] Thus, unless waiver is found in a clear, general expression of the legislature, there can be no other waiver of the state's Eleventh Amendment immunity in New Mexico.[184]

Assuming that the power to waive the immunity exists in either the party defendant or the State Attorney General, several types of actions in the conduct of litigation have been advanced as constituting waiver. The Supreme Court has suggested that the filing of a proof of claim in bankruptcy proceedings constitutes a waiver of the Eleventh Amendment immunity.[185] The Tenth Circuit has held that the entry into a settlement agreement does not act as a waiver of the state's constitutionally protected immunity.[186] It is the issue of the exercise of removal of a state case to federal court that will next draw the attention of the Supreme Court.[187] The Tenth Circuit has held that removal constitutes a waiver of the Eleventh Amendment immunity.[188] In resolving the issue of waiver in removal cases, it is less important that waiver is found, and more important to determine exactly what is waived by the action of removal. This is important in

---

183. *See* N.M. STAT. ANN. § 36-1-22 (Michie 1978) (proscribing the New Mexico Attorney General's power to control litigation); Lyle v. Luna, 338 P.2d 1060, 1065 (N.M. 1959) (upholding the attorney general's plenary power to enter into settlement agreements on behalf of New Mexico). However, the New Mexico Attorney General does not have common law powers. *See generally* State v. Reese, 430 P.2d 399; State v. Davidson, 275 P. 373 (N.M. 1929).

184. Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 468-69 (1945).

185. Gardner v. New Jersey, 329 U.S. 565, 574 (1947); Clark v. Barnard, 108 U.S. 436, 447-48 (1883); *In re* Innes v. State Univ. Kan., 184 F.3d 1275, 1281-82 (10th Cir. 1999). *But see* Straight v. Wyo. Dept. of Transp., 248 B.R. 403, 414 (10th Cir. B.A.P. 2000) (refusing to extend the waiver by filing a proof of claim as to all aspects of the case). It should be noted that *Gardner* recognized the unique and exclusive nature of bankruptcy proceedings. *Gardner*, 329 U.S. at 577. The nature of bankruptcy is to determine the rights and liabilities of the debtor over a trust corpus, and it is not transformed into a "suit against the state" simply because the state asserts one of many competing claims to property in the bankrupt's estate. *Id.* at 573-74. Although bankruptcy cases have discussed the matter in terms of a "waiver," they really support a unique rationale that is applicable only to situations concerning the bankrupt's trust estate. Thus, the Eleventh Amendment simply does not apply within the context of bankruptcy proceedings.

186. Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1195 (10th Cir. 1998); Johns v. Stewart, 57 F.3d 1544, 1554 (10th Cir. 1995). *Accord* Saahir v. Estelle, 47 F.3d 758, 762 (5th Cir. 1995).

187. Lapides v. Bd. of Regents., 251 F.3d 1372 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 456 (2001). *See* Wis. Dept. of Corr. v. Schacht, 524 U.S. 381, 397 (1998) (Kennedy, J. concurring) (recognizing the need for the Court to address the issue of waiver of sovereign immunity by removal in a later case).

188. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1235 (10th Cir. 1999). *Accord* Gallagher v. Cont'l Ins. Co., 502 F.2d 827, 830 (10th Cir. 1974).

cases involving multiple causes of action. The lesson from Indian law sovereignty cases is that waiver of one claim does not waive other claims that may be brought in the litigation.[189] It may be that removal petitions will need to specify which causes of action are being removed and the state will have to state a disclaimer as to all other claims in order to protect its sovereign immunity.

D. The Continuing and Pervasive Nature of the Sovereign Immunity Issues in Litigation Subject to an Exception to the Eleventh Amendment

As *Coeur d' Alene Tribe* correctly points out, *Ex Parte Young* was to be the safety valve for the "case gone awry" in the state judicial system. However, it seems clear that facial reliance upon the bald fiction created by the *Ex Parte Young* exception to the Eleventh Amendment makes no logical sense unless it is viewed as a "controlled safety valve" recognizing the continuing validity of the fundamental principles of dual sovereignty. The circumstances of the last fifty years have considerably altered the landscape of major litigation against the states and compel another look at *Ex Parte Young*. This reconsideration may be as basic as the recognition that the Eleventh Amendment is the rule and an exception to the rule merely opens the door to enable the litigants to have jurisdictional access to the federal judicial system. The reality is that the litigation is seeking equitable relief against the state through its officers. These cases can be more disruptive of the state's sovereignty than any money judgment. It is equally true that the rule and the reasons for the rule are still in place and compel special treatment and control of such litigation as it proceeds through the federal courts. In short, the Eleventh Amendment issues do not stop with the decision to invoke the exception. *Coeur d' Alene Tribe* implicitly calls out for this reevaluation and the federal courts should develop the answer proactively either by case law or by rules of procedure.

1. Certification of Issues of State Law

The issues of federalism as recently discussed by the Supreme Court reflect a dual set of responsibilities on both the federal and state judicial branches. One area of sensitivity may develop when litigation raises issues of ambiguous state law. This parallels what is known as *Pullman* abstention. Abstention was long criticized because it created delays.[190] This criticism was answered

189. *See, e.g.*, Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (addressing compulsory counterclaims); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 511-12 (1940) (addressing cross-claims).

190. *See, e.g.*, England v. La. State Bd. of Med. Exam'r, 375 U.S. 411, 423-37 (1964) (Douglas, J. concurring) (describing the cost placed upon the judiciary

in part by the development of certification procedures.[191] Therefore, if the resolution of any state law issue is to become the foundation upon which federal constitutional rights are determined,[192] the availability of certification procedures[193] may be required as a matter of right in cases where the Eleventh Amendment would otherwise be applicable and abstention might be otherwise inappropriate. In such event, it would be unwise for a state supreme court to fail to honor the request.[194] A decision to disregard the state's role may have the consequence of a *de facto* intrusion into the state's sovereignty by the federal courts simply proceeding to resolve the constitutional issue without the contribution of the state courts. Nevertheless, a decision to certify should be considered early on in the litigation and promptly made whenever applicable. If such a motion is denied, it should be possible to immediately appeal the order.

2. Motion Practice

The issues concerning motion practice in general may be driven by the desire of plaintiffs in litigation against the state to build their case. However, most states have freedom of information acts[195] and with a bit of pretrial informal "discovery," the plaintiffs may have their legal theories well in hand at the time they file their complaint. As discussed previously, the major purpose of the Eleventh Amendment is to preserve the dignity of the sovereign states from being held to answer through the discovery process at the insistence of private party litigants. This process is entirely within the control of the federal judiciary.[196]

---

system and the litigants by the doctrine of abstention).

191. *See, e.g.*, N.M. STAT. ANN. § 12-607 (Michie 1978) (addressing the New Mexico certification procedure).

192. *See, e.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972) (stating preference for abstention to allow clarification); Zwickler v. Koota, 389 U.S. 241, 248-49 (1967) (citing "special circumstances" for using abstention); Harman v. Forssenious, 380 U.S. 528, 534 (1965) (affirming the availability of the doctrine of abstention); Harrison v. NAACP, 360 U.S. 167, 176 (1959) (deciding that the federal court should have abstained from deciding the merits of the case).

193. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 78 (1997) (determining that certification procedures deserved "more respectful consideration"); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 394-97 (1988) (using certification to aid in determining whether a statute and enforcement of the statute is constitutional); Huggins v. Isenbarger, 798 F.2d 203, 209 (7th Cir. 1986) (stating that "judicial interpretations of the law by the highest court supersede the executive interpretations.").

194. *But see* Schlieter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) (declining to certify question presented by federal district court).

195. *See* N.M. STAT. ANN. § 14-2-1 (Michie 1978) (incorporating the Freedom of Information Act into New Mexico statutory reform).

196. What is not controlled by Federal Rule of Civil Procedure 26 is generally controlled by Federal Rule of Civil Procedure 83. FED. R. CIV. P. 26 ;

Recent cases suggest that this control must be exercised and meaningfully applied at the request of the state as a matter of constitutional obligation.

a. Rule 12 Motion Practice

The Eleventh Amendment may support a right to seek clarification of the plaintiffs' legal theories early in the litigation. Jurisdictional issues will, of course, be raised by a Rule 12(b)(1) motion.[197] However, other matters will invite a re-evaluation of a variety of other Rule 12 motions that may seem at odds with Rule 8.[198] Historically, the adoption of the federal rules in 1937 was an effort to distance the federal courts from the "pleading game" occasioned by the pleading practices of various state systems. Nevertheless, a Rule 12(e) motion to make more definite and certain may be utilized to compel imprecise plaintiffs to declare and refine the statutory basis of their causes of action.

The rationale for this is obvious. The Supreme Court has clearly stated that a section-by-section specific analysis is required to determine at least four major issues.[199] First is the determination of whether a statutory right of action exists under a given federal statute.[200] Second is a section-by-section analysis required to determine whether Congress exceeded its authority in abrogating the Eleventh Amendment.[201] Third is whether waiver is an issue as waiver may apply to only one claim and not to others.[202] Finally, the fourth step involves determining which claims may survive in a case removed from state court.[203] There is a possible fifth step of analysis if an issue of statutory construction may be dispositive of the litigation.

A broad approach to pleading is no longer acceptable under

FED. R. CIV. P. 83.

197. FED. R. CIV. P. 12(b)(1).

198. FED. R. CIV. P. 8(a) (stating that a pleading must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends . . . [and] a short and plain statement of the claim showing that the pleader is entitled to relief . . . ").

199. The section-by-section analysis has no real precedent. However, it appears that is the way the Court is analyzing *Younger* abstention and Eleventh Amendment issues. *See generally* Joseph A. v. Ingram, 262 F.3d 1113 (10th Cir. 2001), *vacated*, 275 F.3d 1253 (10th Cir. 2002).

200. Blessing v. Freestone, 520 U.S. 329, 340 (1997).

201. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672-73 (1999) (limiting Congress' ability to abrogate the Eleventh Amendment).

202. *See* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (dealing with compulsory counterclaims). *See also* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 511-12 (1940) (dealing with cross-claims determined by statutory construction).

203. *See* Wis. Dep't. of Corr. v. Schacht, 524 U.S. 381, 386-90 (1998) (determining which claims survive removal).

Blessing v. Freestone.[204] This presents an obligation on litigants to focus their pleadings sufficiently to enable the state defendants to avail themselves of a Rule 12(c) motion for judgment on the pleadings, or a Rule 12(b)(6) motion for failure to state a claim. The latter may be converted to a Rule 56 motion for summary judgment. The tool necessary to refine the pleadings as a foundation for either of these motions is the Rule 12(e) motion for a more definite statement. The responsibility of the federal courts would be to stay all discovery and require prompt resolution of these issues. The state may also have a right to seek review of such rulings pursuant to the rationale of the collateral order doctrine.

b. Rule 26 Motion Practice

The settlement of major litigation imposing equitable relief raises several problems that require protective orders from the Court, and based on Eleventh Amendment considerations. Invariably the settlement only provides the skeletal outline of such relief and initiates an on-going settlement process between the parties. This process generally includes the opportunity for plaintiffs' counsel to be privy to information and many documents that may otherwise be privileged. In fact, the settlement process itself may require the generation of certain documents and reports that, but for the litigation, would not be created in the first instance. In addition, experts and monitors may be privy to considerable information that requires protection to ensure that the settlement process works. Ordinarily, Rule 408 protects pre-trial settlement negotiations. However, there is no specific provision of the Rules that covers the subject in the post-settlement context.

> The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties .... To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose.[205]

The district court has the ability to regulate proceedings

204. 520 U.S. at 346 (requiring focus pleading).

205. *Ex parte* Ayers, 123 U.S. 443, 505-06 (1887). *Accord* Alden v. Maine, 527 U.S. 706, 728-29 (1999) (discussing how "[t]he Eleventh Amendment confirmed . . .sovereign immunity as a constitutional principle . . . ."); Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) (explaining that "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury' . . . ."); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (stating the objective of the Eleventh Amendment).

before it.[206] Improprieties of conduct are "prejudicial to the administration of justice" and are in violation of the Rules of Professional Conduct.[207] The conduct also may expose a conflict of interest in violation of the Rules.[208] In addition, the conduct may not avoid the appearance of impropriety, thus violating Canon 9 of the ABA Code of Professional Responsibility.[209] It should be noted that such matters should not be the subject of a bar complaint, but are more appropriately addressed by the Court.[210]

Plaintiffs' counsel may create a conflict of interest with the settled litigation by initiating and/or participating in other litigation, or giving notice of proposed tort claim litigation against the state defendants. Such actions by plaintiffs' counsel, individually and collectively, jeopardize the settlement and are improper. Defendants not only have standing to raise these issues, but defense counsel is ethically bound to disclose these matters to a court as they directly affect the proceedings in the litigation.[211] The practical result of this situation is that the post-settlement proceedings result in a stream of "unopposed discovery" that may be used to support the merits of new cases against the state defendants.

The guarantee of confidentiality is essential to the proper functioning of any stipulated settlement.[212] Many stipulated settlement agreements require ongoing discussion and negotiation for the duration of the case, until it is dismissed. The confidential nature of all settlement discussions is essential and must be protected by the Federal Rules of Evidence.[213] Use of information derived in the course of settlement proceedings is a serious breach

206. FED. R. CIV. P. 83(b).

207. N.M. R. PROF'L CONDUCT R. 16-804(D) (1978).

208. N.M. R. PROF'L CONDUCT R. 16-107(B) (1978).

209. The New Mexico Supreme Court by Order of February 7, 1974, adopted Canon 9. MODEL CODE OF PROF'L RESPONSIBILITY Cannon 9 (1980). The Lawyer's Creed adopted by the District Court specifies that lawyers "will avoid the appearance of impropriety" N.M. RULES OF PROF'L CONDUCT Lawyer's Creed D(12) (1974). D.N.M.L.R-CIV. 83.9 (2001).

210. That forum is foreclosed by the adopted "Scope" of the New Mexico Rules of Professional Conduct. N.M. R. PROF'L CONDUCT R. 1-001 (2002).

211. *See* United States v. Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976) (discussing that once "an attorney discovers a possible ethical violation concerning a matter before a court, he is . . . obligated to bring the problem to that court's attention . . . "); N.M. RULES OF PROF'L CONDUCT R. 16-803(A) (2002); N.M. RULES OF PROF'L CONDUCT Lawyer's Creed E(3) (2002). *See also* Gas-A-Tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir. 1976) (explaining that an "associate was not disqualified because no substantial relationship existed between the pending litigation and matters . . . he had worked . . . [on] during his prior association . . . ").

212. *See* Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) (reasoning that "revealing statements or comments made at a settlement conference . . . [are] a serious breach of confidentiality).

213. *See* FED. R. EVID. 408 (requiring confidentiality).

of confidentiality.[214]

> If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program, which has led to settlements and withdrawal of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.[215]

The attempt to use any captive expert or monitor in the litigation as a witness in other litigation appears to be an effort to compromise him or her as an expert or monitor witness in settled litigation. This, too, is improper.[216] The captive experts have continuing responsibilities throughout the litigation so long as they are employed in that capacity. The trust and confidence of all parties in the expert or monitor is necessary to provide accurate information upon which the parties can base their opinions. This trust and confidence is an integral part of the disengagement process. If the expert or monitor can be called as a witness against any one of the defendants in other litigation, it will destroy the confidence of that defendant in that expert or monitor and will disrupt the disengagement process. Such use of an expert or monitor also violates the Rules of Professional Conduct.[217]

The Federal Rules of Civil Procedure require that the representative parties will fairly and adequately protect the interests of the class.[218] This requirement is interpreted to focus an inquiry on the abilities of plaintiffs' counsel to protect such interests. Since institutional reform litigation is generally brought as a class action, the principles of Federal Rule of Civil Procedure 23 would apply, not only in the initial decision to certify the class, but also in any instance where the actions of counsel are called

---

214. *See Clark*, 957 F.2d at 746 (violating non-disclosure may "subject counsel to sanctions"); Lake Utopia Paper, Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2nd Cir. 1979) (deploring action of disclosure by counsel).

215. *Lake Utopia Paper*, 608 F.2d at 930.

216. *See* Procter & Gamble Co. v. Haugen, 183 F.R.D. 571, 573-74 (D. Utah 1998) (agreeing that "the court has inherent authority to disqualify counsel or a witness . . . ."); Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 583-84 (D.N.J. 1994) (explaining that there is a reason to do more than just disqualify the expert); Parkinson v. Phonex Corp., 857 F. Supp. 1474, 1476-77 (D. Utah 1994) (stating that "the sanction of disqualification of counsel . . . should be measured by the facts of each particular case . . . ."); English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498, 1505 (D. Colo. 1993) (describing that the policy against disqualification of a witness it to retain the information the witness has).

217. N.M. R. OF PROF'L CONDUCT R. 16-804(D) (1978).

218. FED. R. CIV. P. 23(a)(4).

into question as affecting the proceedings. The adequate representation requirement "lies at the heart of the rationale supporting the class action[s],"[219] and invokes a heightened or fiduciary standard upon which their conduct would be judged.[220]

Similar to class certification determinations, the Court may take into consideration counsel's conduct in other litigation in any post-certification consideration of the adequacy of class counsel.[221] If class counsel's conduct creates a conflict of interest, it would be inappropriate to permit counsel to remain on the case.[222] The conflict of interest may be technical and only rise to the level of creating the appearance of impropriety.[223] However, the heightened standard of conduct for class attorneys exacerbates the conflict of interest.

> The sanction of disqualification of counsel in litigation situations should be measured by the facts of each particular case as they bear upon the impact of counsel's conduct upon the trial. The egregiousness of the violation, the presence or absence of prejudice to the other side, and whether and to what extent there has been a diminution of effectiveness of counsel are important considerations. In addition, equitable considerations such as hardship to the other side and the stage of trial proceedings are relevant. The essential issue to be determined in the context of litigation is whether the alleged misconduct taints the lawsuit.[224]

Depending upon a variety of considerations, the only effective remedy to resolve the conflicts problems may be a dismissal of the litigation. This depends upon the stage of the litigation at the

---

219. Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 531 (W.D. La. 1976).

220. *See* Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 599 (S.D.N.Y. 1992), ("In passing upon the adequacy of counsel, courts hold attorneys to a 'heightened standard' in light of their great responsibility to the absent class.") (quoting Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154, 163 (D. Kan. 1978)); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) (complaining that "class action counsel possess, in a very real sense, fiduciary obligations to those not before the court"); Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir. 1973) (stating that class counsel "serves in something of a position of public trust"); Wagner v. Lehman Bros. Kuhn Loeb, Inc., 646 F. Supp. 643, 661 (N.D. Ill. 1986) (explaining that there is a fiduciary duty of the counsel to the class).

221. *Kingsepp*, 142 F.R.D. at 599-600.

222. Savino v. Computer Credit, Inc., 173 F.R.D. 346, 353 (E.D.N.Y. 1997); Bachman v. Pertschuk, 437 F. Supp. 973, 975 (D.D.C. 1977).

223. Fechter v. HMW Indus., 117 F.R.D. 362, 364 (E.D. Pa. 1987); *Bachman*, 437 F. Supp. at 976. *See also* United States v. Troutman, 814 F.2d 1428, 1441-42 (10th Cir. 1987) (explaining that the Tenth Circuit appears to adopt the rule that the "appearance of professional impropriety" alone without a concurrent violation of one of the other disciplinary rules is insufficient to disqualify an attorney).

224. Parkinson v. Phonex Corp., 857 F. Supp. 1474, 1476 (D.C. Utah 1994).

time the issue is addressed.[225] It would be difficult to separate the two cases if the plaintiffs' counsel was a sole practitioner.

As an alternative to dismissal of the litigation, the disqualification of counsel may be sought. The preservation of confidentiality in any case involves a question of access to information.[226] Therefore, class counsel's dismissal as counsel from all aspects of this case may be appropriate and necessary.[227] The conflict of interest created by plaintiffs' counsel's representation of other clients whose interests conflict with the subject class raises serious concerns. Not only is it of concern to defendants that a direct pipeline of information and documents flows to feed the other litigation, but it should be of concern that it impairs plaintiffs' "counsel's ability to vigorously pursue the interests of both classes."[228]

As an alternative to dismissal of certain plaintiffs' counsel, state defendants may seek the issuance of a "fire wall" protective order. As a remedy for ethical conflicts, the "fire wall" approach is a traditional method of handling the conflict of interest problem in a law firm situation to enable the law firm to proceed to handle both matters. In essence, those attorneys and their support staff involved in the subject litigation would be barred from participation in the other litigation. Similarly, the attorneys and the support staff involved in the second litigation would be barred from participation in the subject litigation. In addition, the law firm would be required to segregate the records and files of the two cases and ensure that the "fire walled" attorneys and staff do not have access to the material.

General protective orders may be sought to make it clear that the entire litigation settlement process is protected by a blanket order of confidentiality with respect to both documents and information. Defendants should not be required to forgo the protections of federal discovery rules, engage in ongoing settlement discussion with the plaintiffs and risk having any admissions or self-critical analysis used against them in other litigation.

It is the use of documents and experts captive to the subject litigation in other litigation that is the problem. The documents,

---

225. *See* David C. v. Leavitt, 13 F. Supp. 2d 1206, 1212 (D. Utah 1998).

226. *See* Graham v. Wyeth Lab. Div. of Am. Home Products Corp., 906 F.2d 1419, 1423 (10th Cir. 1990) (stating that preserving confidentiality is a question of access to information) (quoting Parker v. Volkswagenwerk, 718 P.2d 1099, 1105 (Kan. 1989)).

227. *Bachman*, 437 F. Supp. at 977.

228. Kuper v. Quantum Chem. Corp., 145 F.R.D. 80, 83 (S.D. Ohio 1992). *Accord* Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 679 (N.D. Ohio 1995); Jackshaw Pontiac, Inc. v. Cleveland Press Publ'g Co., 102 F.R.D. 183, 192-93 (N.D. Ohio 1984); Sullivan v. Chase Inv. Serv. of Boston, 79 F.R.D. 246, 258 (N.D. Cal. 1978).

some of which were generated specifically for the settlement discussions in the litigation, and many of which involve matters of privilege,[229] are ones that would be protected by privilege in any other context. But for the disclosure of those documents in the settlement process, their use would be either *de facto* (by not being created in the first instance) or directly (by protective order) foreclosed. This is a direct abuse of the litigation process and the defendants should be protected from that abuse.[230] It is no answer to this problem to say that the parties should go to the (most likely different) trial judge in the other case to see if he or she will protect the state litigant. Moreover, the process envisioned by the general rules not only triggers premature and irrelevant conflict, it also places the parties on a judicial merry-go-round[231] inviting duplicated effort and inconsistent results, thereby squandering judicial resources and violating the defendants' due process rights.[232]

3. *The Collateral Order Doctrine and Supervisory Control Through Appeals*

It seems obvious that many Eleventh Amendment matters will be raised by interlocutory motions, some of which may only be appealable within the short time frames of 28 U.S.C. § 1291, and others appealable only by way of the common law writs of certiorari or mandamus issued pursuant to the All Writs Statute, 28 U.S.C. § 1651. The collateral order doctrine[233] supports immediate use of the appellate process in these matters.[234] Furthermore, many issues will invite their resolution through this exercise of supervisory control over the district courts. The

---

229. *See, e.g.*, Self-critical analysis under the Review Organization Immunity Act, N.M. STAT. ANN. § 41-9-5 (Michie 1978); Attorney-Client Privilege, N.M. SUP. CT. R. § 11-503; New Mexico *ex rel.* Attorney General v. First Judicial Dist. Ct., 629 P.2d 330, 333 (N.M. 1981) (recognizing executive privilege).

230. *See, e.g.*, Zapata v. IBP, Inc., 160 F.R.D. 625, 626 (D. Kan. 1995) (finding that defendants should be protected from dissemination of the information they provide).

231. Marino v. Ragen, 332 U.S. 561, 564-65 (1947).

232. *Id.* (stating that since most cases against the state in federal court are against individuals acting in their various official capacities, this practice violates their due process rights). If the case were against the state itself, the practice would violate the state's Eleventh Amendment rights, as discussed herein.

233. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1933). *See generally* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

234. These matters also include appeals from administrative agencies. *See, e.g.*, Hensel v. Office of the Chief Admin. Hearing Officer, 38 F.3d 505, 508 (10th Cir. 1994) (stating that a person under Title VII is defined to include governments, government agencies, and political subdivisions).

recommended practice would be to simultaneously file a notice of appeal in the district court and an application for a common law writ of certiorari in the circuit court of appeals. The two proceedings should be consolidated and the record and briefing combined.[235]

CONCLUSION

The Supreme Court in *Coeur d'Alene Tribe* attempted to re-evaluate the *Ex parte Young* exception to the Eleventh Amendment. Although this attempt failed to attract a unified majority of the Court, it is clear that the extended fiction of *Ex parte Young* requires a critical re-evaluation in light of the principles of dual sovereignty. On the one hand, it is easy to say that an individual constitutionally abusing his or her authority is acting *ultra vires* and is, therefore, amenable to suit in his or her individual status, notwithstanding his or her concomitant status as a state official. It is quite another thing to make the leap that an individual who is acting in an official capacity as a state officer is somehow both acting as the state and covered by the Eleventh Amendment, yet is amenable to equitable suit as an individual to remedy an ongoing violation of federal law which can only be remedied through his or her status as a state official. Such fictions have no logic. Maintenance of such a fiction necessarily implies that some protection should still be afforded the state under the principles of the Eleventh Amendment. Just what those protections are or should be are matters for the Court to resolve. However, they do pervade all phases of federal litigation including what has been heretofore referred to as limitations on relief. For example, a consent decree cannot be solely analyzed under principles of contract law. It cannot be extended to cover additional matters by arguments of a plaintiff unless there is a constitutional basis to do so. This, as with other matters, must be considered on a case-by-case basis as the courts begin to refocus their viewpoint through the lens of the principles of dual sovereignty.

Almost from the inception of our system of government, "federalism" has been the word used to describe our system of dual sovereignty. These principles have been well known throughout our nation's history.[236] The Tenth Circuit has recently attempted

235. *See generally* Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952).

236. The argument could be made that the very idea for our system of dual sovereignty was adapted from the form of government developed by the Six Nations of the Iroquois Confederacy. WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE 434-47 (Univ. of Oklahoma Press 1998). As Fenton indicates, some of our colonial fathers, in particular Benjamin Franklin, were well aware of the Iroquois Confederacy of Nations. *Id.* Thus, it may be that our government's uniqueness has a greater foundation in the native culture

to deal with the concepts of federalism and has turned them inside out. As a result, their misinterpretation of *Coeur d'Alene Tribe* is certainly understandable. In addition, they have sought to avoid the task before them through the creation of improvident "quick fix" rules without thinking through the process. The Tenth Circuit is not alone in this regard. The principles of federalism have taken a back seat to an extensive period of judicial activism over the past forty-five years. The recent Supreme Court cases are a reminder that our federalism lies at the very foundation of our system of government, and we need to pay greater attention to it. Perhaps, we will learn through our mistakes, but in the meantime we will most assuredly stumble along a tortured and rocky path.[237]

All that the Supreme Court has done in the past five years is refine the calculus for the application of the principles of federalism to cases coming before the federal courts at any level. As our society has evolved and become more complex, we find that awareness of these fundamental principles must be developed at every stage of the litigation process. We are also finding that the calculus of federalism is an imprecise one at best. There is no "spotted cow" case that resolves the issues of federalism. The plain truth is that the state defendant is a special defendant in our judicial system. It may not consent to federal jurisdiction by removal or by direct invocation of jurisdiction, in all or part of the case brought against it. The state may be successful in obtaining dismissal of the case. If not, as a sovereign, the state has constitutional rights to special deference and considerations to preserve its dignity, at such times as it may be required to submit to the federal judicial forum, whether directly or through its officials.

Federalism considerations as they have evolved into our modern political context are complex and reach into all aspects of the litigation process of the judicial branch of the government. There have been no new principles articulated by the Supreme Court in this area of the law. However, the environment of judicial activism fostered in our recent history almost places the judiciary at odds with itself as it addresses federalism issues. Thus, the application of the recent Supreme Court case law has been difficult and any attempt to ascertain a precise calculus for the resolution of those issues through the traditional case-by-case

---

than we have heretofore been willing to acknowledge. In which event, it is indeed ironical that litigation with the Indian tribes through the two major cases, *Seminole Tribe* and *Coeur d'Alene Tribe*, provided the present day vehicles to remind us of our dual sovereignty.

237. *See generally* Thompson v. Colorado, 258 F.3d 1241, 1247 (10th Cir. 2001). Also note the vacillation in the panel's opinions in *Joseph A. ex rel. Wolfe v. Ingram*. 262 F.3d 1113 (10th Cir. 2001), *prior opinion vacated on reh'g*, 275 F.3d 1253 (10th Cir. 2002).

common law process has been rendered even more difficult. The natural extension of the problem is focused on those cases that are not dismissed outright through the invocation of the Eleventh Amendment. Those cases must proceed through the litigation process. It may make sense to consider the adoption of rules of procedure tailored to address the federalism issues involved in ongoing litigation in a balanced fashion. Unless we experience a fundamental change in our constitutional form of government, the federalism problems will persist and continue to demand a resolution. If the judiciary does not address the problems in a proactive way, state and federal relations will continue to be exacerbated at the expense of the people served by our two governments. In the meantime we will continue to apply the imprecise calculus of dual sovereignty as best we can. It is, after all, our federalism.