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# Justices Take the 11th

Richard C. Reuben
*University of Missouri School of Law*, reubenr@missouri.edu

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## Obscure amendment becomes federalism fodder for Supreme Court

BY RICHARD C. REUBEN

Until not long ago, the 11th Amendment with its barrier to some citizen suits in federal courts was a largely ignored provision of the U.S. Constitution.

Those days may be coming to an end, however, as the Supreme Court has resurrected the dusty old amendment in its steady, if not always consistent, march toward a new federalism—or what some scholars are calling the "anti-federalist revival."

The justices have agreed to hear two 11th Amendment cases this term. One of them, *Idaho v. Coeur d'Alene Tribe,* No. 94-1474, could have a significant practical impact on civil rights claims brought under 42 U.S.C. § 1983, which broadly establishes the actions.

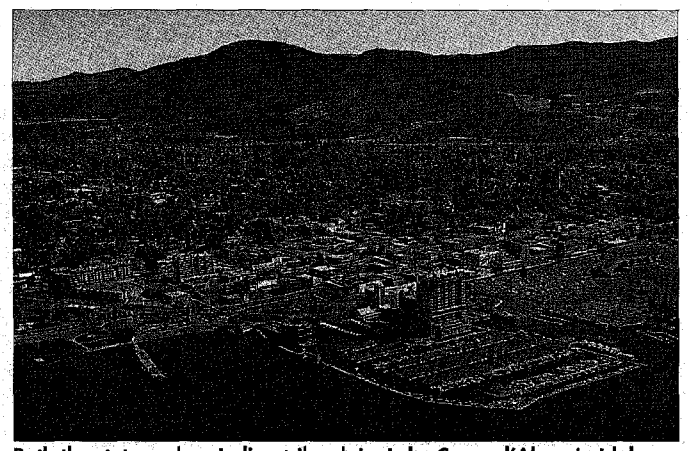
"While the 11th Amendment's jurisprudence has bumbled along, the Court has the opportunity here for a fairly significant development," says Larry Kramer, a former U.S. Supreme Court law clerk now teaching at New York University School of Law.

The 11th Amendment is a fine thread in the larger tapestry of American federalism but certainly a part of the deal the framers struck in creating the union. The amendment bars the federal courts from hearing lawsuits by citizens of one state seeking monetary damages from another state.

Nearly a century ago, however, the Supreme Court recognized, in *Ex Parte Young,* 209 U.S. 123 (1908), a significant exception, permitting plaintiffs to breach the 11th Amendment wall when seeking "prospective" injunctive relief from a continuing violation of their federal rights.

Since then, the Court's 11th Amendment jurisprudence has been sporadic. But the Rehnquist Court made it clear last term that it was taking the oft-overlooked amendment as seriously as other constitutional provisions relating to federalism.

In *Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114 (1996), the Court, in an opinion written by Chief Justice William H. Rehnquist, determined that Congress cannot use its commerce powers to limit a state's sovereign immunity from civil suits. The decision reversed *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989).



Both the state and an Indian tribe claim Lake Coeur d'Alene in Idaho.

Significantly, the Court in *Seminole Tribe* also limited the *Young* doctrine itself. The justices held that suits seeking injunctive relief from violations of federal rights may only get past the 11th Amendment barrier if Congress has not already enacted a "detailed remedial statute" for the enforcement of those rights.

### Narrowing the Scope of a Doctrine

Now, experts say, the justices have another chance in *Coeur d'Alene Tribe* to limit the *Young* doctrine by narrowing the definition of prospective relief available to a plaintiff against a state.

The case centers on ownership of scenic Lake Coeur d'Alene, a popular recreation spot in northern Idaho. The state contends that the lake was part of public lands when it was admitted to the union in 1890. The tribe, however, contends that most of the lake belongs to it under a presidential executive order creating the reservation in 1873.

Relying on the *Young* doctrine, the tribe filed an action to quiet title, asserting its ownership and jurisdiction over the lake.

Ruling on a state motion to dismiss, a federal district court dismissed the state on 11th Amendment grounds, then ruled in favor of state officers on the merits and on similar grounds. But the 9th U.S. Circuit Court of Appeals based in San Francisco reinstated the claim, holding that state officials' enforcement of laws and regulations would violate the tribe's federal sovereignty rights if it were ruled to own the lake.

Idaho, backed by nearly half the nation's attorneys general in amicus briefs, has cast the case before the Supreme Court as a bedrock issue involving the very land that constitutes the state itself.

Idaho broadly contends that "the presumption of state title removes this case from the doctrine of *Ex Parte Young,*" and further argues that the declaratory relief sought is retroactive in nature because it essentially attacks the sovereignty the state has held over the land since it came into the union.

The Coeur d'Alene tribe, backed by several civil rights organizations, insists that there is no "real property exception" to the *Young* doctrine and, drawing on historically conservative arguments, insists that the relief sought is wholly prospective.

"It's a close call, and depending upon what the Court does, it could put a lot of civil rights actions out of bounds" by permitting declaratory judgment actions to be characterized as claims for retroactive relief, says Kramer of NYU.

Regardless of what the Court does, it is clear that the 11th Amendment is back in constitutional play. ■

*Richard C. Reuben is a lawyer and journalist in Culver City, Calif.*



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