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Pennhurst State School & Hospital v. Halderman: Federalism and the State Law Claim

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CASE NOTE

Pennhurst State School & Hospital v. Halderman: Federalism and the State Law Claim

In Pennhurst State School & Hospital v. Halderman (Pennhurst II), *the Supreme Court extended eleventh amendment protection to state officers when claims against them are based on pendent state law grounds. As a result, the federal court was deprived of properly obtained subject matter jurisdiction. The Court, in its decision, misinterprets the logic of* Ex parte Young *and misconstrues principles of federalism. This Note argues that federalism would best be protected by allowing federal courts to hear claims against state officers based on state law violations. Under this suggested approach, the federal courts could recognize state policies rather than interpret federal statutes or make constitutional determinations. Finally, this Note highlights the majority's language in* Pennhurst II *and concludes that the case stands for the limited proposition that the* Young *exception does not apply to cases granting relief based on state law.*

INTRODUCTION

THE ELEVENTH AMENDMENT to the United States Constitution[1] prohibits federal courts from exercising jurisdiction over suits against states that do not consent to being sued in federal court.[2] It is this amendment which effectively requires federal courts to recognize state claims of sovereign immunity. One exception to the protection sovereign immunity provides is set forth in *Ex parte Young*,[3] which involved a suit against a state officer who was acting pursuant to an unconstitutional state statute. Although the state officer was enforcing state law, the Supreme Court held that because the state had no power to promulgate an unconstitutional law, the suit was not a suit against the state, but merely a suit against the officer in his individual capacity.[4] The sovereign immunity defense was therefore not available to the officer.

Generally, a federal court with subject matter jurisdiction can decide pendent state law claims, as well as all federal claims, if the state claims arise as part of the same case.[5] *Pennhurst State School*

1. U.S. CONST. amend. XI. See *infra* text accompanying note 19 for text of amendment.

2. *See infra* note 20 for discussion of waiving eleventh amendment immunity.

3. 209 U.S. 123 (1908). See *infra* notes 28-45 and accompanying text for further discussion of this case.

4. *See infra* notes 35-38 and accompanying text.

5. See *infra* notes 137-46 and accompanying text for general discussion of pendent jur-

& Hospital v. Halderman[6] (*Pennhurst II*) presented the United States Supreme Court with an *Ex parte Young* fact pattern in the context of a pendent state law violation.[7] In resolving the issues presented by *Pennhurst II*, the Court had the opportunity to explore how the federalism concerns which underlie the eleventh amendment might best be protected.[8] Rather than basing its decision on proper analysis of federalism issues, however, the Court extended eleventh amendment sovereign immunity protection beyond its previous scope[9] in the name of protecting federalism principles,[10] while simultaneously misinterpreting those principles.[11]

After providing eleventh amendment background,[12] this Note explains the facts, the procedural history, and the Supreme Court's opinion in *Pennhurst II*.[13] It then examines the eleventh amendment issues presented by *Pennhurst II* and critiques the Court's analysis of those issues.[14] Contrary to the majority's analysis in *Pennhurst II*, the federalism values underlying the eleventh amendment doctrine of state sovereign immunity are best protected by permitting federal courts to exercise jurisdiction over state law claims against state officers.[15] Moreover, the pendent jurisdiction doctrine supports this conclusion.[16] Finally, this Note identifies language in the Court's opinion that is both unnecessary to its holding and potentially harmful to eleventh amendment principles, and thus should be regarded as dicta.[17]

I. THE ELEVENTH AMENDMENT AND *EX PARTE YOUNG*

The eleventh amendment to the United States Constitution was

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isdiction. It should be noted that the eleventh amendment deprives federal courts of subject matter jurisdiction while the *Ex parte Young* doctrine provides federal courts with subject matter jurisdiction. *See infra* notes 111-25 and accompanying text for discussion of previous eleventh amendment cases where the Supreme Court properly decided the case on pendent state law grounds.

6. 104 S. Ct. 900 (1984).

7. See *infra* notes 46-86 and accompanying text for discussion of facts and issues presented by the *Pennhurst* cases.

8. *See infra* notes 149-53 and accompanying text.

9. *See infra* notes 108-31 and accompanying text.

10. *See infra* note 93 and accompanying text.

11. See *infra* notes 147-53 and accompanying text for discussion of how federalism values can best be protected in a *Pennhurst II*-type case.

12. *See infra* notes 18-45 and accompanying text.

13. *See infra* notes 46-105 and accompanying text.

14. *See infra* notes 106-31 and accompanying text.

15. *See infra* notes 131, 149-53 and accompanying text.

16. *See infra* notes 147-53 and accompanying text.

17. *See infra* notes 154-200 and accompanying text.

adopted in 1798[18] and reads: "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."[19] The amendment functions as a restriction on federal court jurisdiction by prohibiting suit against a state in federal court without its consent,[20] even when its own citizens bring the suit.[21] The eleventh amendment incorporates the common law doctrine of sovereign immunity and rests on structural principles of federalism,[22] a doctrine that insulates certain basic aspects of state authority from federal interference.[23]

It is firmly established that a claim is a "claim" against the state, and therefore barred by the eleventh amendment, if the state is actually named as a defendant[24] or if "the state is a real, substantial

18. Apparently, the eleventh amendment was adopted to overturn Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in which a federal court held the state of Georgia liable to South Carolina citizens for a debt. For a discussion of *Chisholm*, see Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977).

19. U.S. CONST. amend. XI.

20. A state may be held to waive its eleventh amendment sovereign immunity if it does so expressly. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 673 (1974); Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 284-87 (1973). A state's waiver of immunity in its own court does not imply an eleventh amendment waiver in federal court. *See, e.g.*, Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 465 (1945). Further, although Congress can abrogate the eleventh amendment shield to protect fourteenth amendment interests, it must do so explicitly. *See* Quern v. Jordan, 440 U.S. 332, 343, 345 (1979). *See generally* Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1460-64 (1975) (historical relationship of eleventh and fourteenth amendments).

21. Hans v. Louisiana, 134 U.S. 1 (1890) has been interpreted to hold that suits against a state by its *own* citizens are barred by the eleventh amendment. *See, e.g.*, Monaco v. Mississippi, 292 U.S. 313, 322 (1934). *But see Pennhurst II*, 104 S. Ct. at 921-22 (Brennan, J., dissenting). Justice Brennan has consistently argued that the eleventh amendment language, "any suit . . . by citizens of *another* State" (emphasis added) should be given its plain meaning, so that the eleventh amendment would not bar federal court suits against a state by its own citizens. *See generally* Field, *supra* note 18, at 539-40 (analyzing Justice Brennan's position); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1892-94 (1983) ("Justice Brennan's interpretation of the amendment is the only one consistent with its plain language, with the history of its adoption, and with the earliest interpretations of its terms.").

22. *Pennhurst II*, 104 S. Ct. at 907-08.

23. For a general discussion of the protections federalism provides, see Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Wechsler, *Political Safeguards of Federalism*, in SELECTED ESSAYS ON CONSTITUTIONAL LAW 185-217 (1963).

24. *See, e.g.*, Missouri v. Fiske, 290 U.S. 18, 26 (1933); Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738 (1824).

party in interest."[25] Beyond these basic propositions, however, what constitutes a claim against the state is unclear. It is often difficult to establish whether a suit in federal court is in substance a "claim against the state."[26]

The line of cases most relevant to *Pennhurst II* concerns when or whether a suit in federal court against state officers is "against the state." In other words, will the shield of the *sovereign's* eleventh amendment immunity extend to protect the state *officers* from suit in federal court?[27] The leading decision on this question is *Ex parte Young*.[28]

Young was the attorney general of Minnesota.[29] Railway stockholders filed suit in federal court to enjoin Young from enforcing state-set rail freight rates alleged to be unconstitutional.[30] After the federal court had issued the requested injunction,[31] Young violated the injunction by attempting to enforce the rates.[32] The circuit court found him in contempt.[33] Young argued in his defense that the stockholders' suit was an action against the state, and therefore the eleventh amendment shielded him from suit in federal court.[34] The United States Supreme Court held that, despite the eleventh amendment, the lower federal court had jurisdiction to try the case, because a federal question was presented.[35] Further, the Supreme Court reasoned that because the statute was unconstitutional,[36] the state did not have the power to authorize Young's conduct;[37] therefore, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct."[38]

Many commentators believe that *Ex parte Young* is consistent

25. Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945).

26. *See infra* notes 123-30, 160-72 and accompanying text.

27. *See generally* Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 435-51 (1962) (advocating abolition of fiction that suit against state officer is not suit against state).

28. 209 U.S. 123 (1908).

29. *Id.* at 126.

30. *Id.* at 128-30.

31. *Id.* at 132.

32. *Id.* at 133-34.

33. *Id.* at 134.

34. *Id.* at 132, 134.

35. *Id.* at 145.

36. *Id.* at 148.

37. *Id.* at 159.

38. *Id.* at 160. *Ex parte Young* is often referred to as a "fiction" because "[o]f course, the Court well knew that the attorney general was still attorney general while he was enforcing the statute, and the Court well knew that the effect of enjoining the attorney general was

with the common law doctrine of sovereign immunity because immunity from suit was intended only to protect the sovereign itself and not the officers of the sovereign.[39] When the eleventh amendment was adopted, the argument goes, it was well established at common law in England that officers of the sovereign were subject to suit.[40] On the other hand, the *Pennhurst II* Court argued that the *Ex parte Young* exception to the eleventh amendment is justifiable only if the supremacy of federal law is at issue.[41] This theory of exception to the eleventh amendment is premised on the facts of *Ex parte Young*,[42] and on the theory that it attempted to balance the state's eleventh amendment immunity and the federal government's obligation to enforce the guarantees of the fourteenth amendment.[43]

Despite the theoretical controversy, it is well settled that *Ex parte Young* provides plaintiffs with federal court jurisdiction against state officer defendants when federal questions are raised.[44] Whatever the rationale, *Ex parte Young* is a mechanism for lowering the shield of eleventh amendment immunity. Even after proper federal jurisdiction has been established, a valid claim against state officers may become an invalid claim against the state.[45] The ques-

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to enjoin the state from carrying out the unconstitutional statute." Davis, *supra* note 27, at 437.

39. *See, e.g.*, Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-2, 29 (1963).

40. *See id.* at 19-29; Gibbons, *supra* note 21, at 1895-99.

41. *See Pennhurst II*, 104 S. Ct. at 910-11.

42. *Ex parte Young* involved an unconstitutional statute. *See supra* notes 29-38.

43. *Pennhurst II*, 104 S. Ct. at 910-11.

44. For cases where federal questions were raised by unconstitutional state statutes and officers' actions, *see* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (actions of state officer were held to be unconstitutional, even though state statute governing his scope of authority was constitutional); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State."); Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280, 287 (1912) (tax statute found unconstitutional since state official "had no right . . . to collect the money, his doing so in the name of the state cannot protect him"); Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911) (if an act is unconstitutional, it gives no authority to act and therefore does not confer eleventh amendment immunity on state officers). Federal jurisdiction is also upheld when questions are presented concerning federal statutes. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (state statute void under supremacy clause because it conflicted with federal statute; suit allowed against responsible state and local officials); Edelman v. Jordan, 415 U.S. 651 (1974) (conflict between federal and state regulations concerning federal benefit program). These cases also suggest that the *Ex parte Young* fiction is not wholly dependent upon fourteenth amendment violations to abrogate the eleventh amendment protective shield.

45. If, for instance, the court grants relief against the state rather than against the state officer. *See infra* notes 160-76 and accompanying text.

tion raised in *Pennhurst II* is whether the eleventh amendment deprives the federal court of jurisdiction when an otherwise valid pendent state claim is asserted against state officers.

II. FACTS AND PROCEDURAL BACKGROUND OF *PENNHURST II*

Pennhurst State School and Hospital is a Pennsylvania state residential institution for the mentally retarded.[46] The suit that culminated in *Pennhurst II* was first filed in 1974 by a resident of Pennhurst and was certified as a class action by the federal district court in 1976.[47] The plaintiff class consisted of past, present and possible future residents of Pennhurst.[48] The complaint alleged that the conditions at Pennhurst violated various federal constitutional rights[49] and federal[50] and state statutory[51] provisions. Pennhurst, various Pennhurst employees, state and county administrators and officers, and the Pennsylvania Department of Public Welfare were named as defendants.[52]

The District Court for the Eastern District of Pennsylvania found the conditions at Pennhurst deplorable: the facilities were overcrowded, understaffed and unsanitary.[53] Patients were often sedated, or kept in physical restraints or in seclusion rooms, primarily because of an inadequate staff.[54] Physical injuries and abuse were common.[55] The court also found that many residents lost skills they had when they entered Pennhurst,[56] and that they were

46. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd and remanded*, 451 U.S. 1 (1981).

47. *Id.* at 1300.

48. *Id.* Other individual plaintiffs were allowed to intervene as were two groups representing the interests of the mentally retarded (Parents and Family Association of Pennhurst and Pennsylvania Association for Retarded Citizens), as well as the United States. *Id.* at 1301.

49. Specifically, the complaint alleged violations of the first, eighth, ninth, and fourteenth amendments. *Id.* at 1298 n.3.

50. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982); Developmentally Disabled Assistance and Bill of Rights Act, § 6010 (1975), 42 U.S.C. § 6010 (1982).

51. The Mental Health and Mental Retardation Act (MH/MR Act), PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969).

52. 446 F. Supp. at 1301-02.

53. *Id.* at 1302-04.

54. *Id.* at 1304-08.

55. *Id.* at 1308-10.

56. *Id.* at 1308. Although the question of whether a mentally retarded individual has a protected interest in not having skills deteriorate during the period of confinement was not reached by the district court, it is possible that such a right exists. In Youngberg v. Romeo, 457 U.S. 307 (1982), some Justices would have included "within the 'minimally adequate training required by the Constitution' such training as is reasonably necessary to prevent a

not receiving the training necessary for habilitation.[57]

The district court held that mentally retarded individuals in a state residential institution had four distinct rights and that Pennhurst had violated each one. Pennhurst violated (1) its patients' constitutional right under the due process clause to "minimally adequate habilitation under the least restrictive conditions consistent with the purpose of the commitment;"[58] (2) their constitutional right under the eighth and fourteenth amendments to be free from harm;[59] (3) their right to nondiscriminatory habilitation under the equal protection clause[60] and section 504 of the Rehabilitation Act of 1973;[61] and (4) their state statutory right to minimally adequate habilitation under the Pennsylvania Mental Health and Mental Retardation Act (MH/MR Act).[62] The court set out a detailed remedial order,[63] to be administered by a special master, enjoining the defendants from further constitutional and statutory violations and ordering that Pennhurst eventually be closed and "suitable community living arrangements"[64] be established.

Sitting en banc, the Third Circuit Court of Appeals[65] declined to decide the constitutional issues, inasmuch as adequate statutory grounds for decision existed.[66] The appeals court decided the case on a different federal statutory ground than did the district court, holding that section 6010 of the Developmentally Disabled Assist-

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person's preexisting self-care skills from *deteriorating* because of his commitment." *Id.* at 327 (Blackmun, J., concurring). The Court in *Youngberg* held that involuntarily committed mentally retarded individuals had protected liberty interests in safety and freedom of movement and that "minimally adequate training" was constitutionally required to secure these interests. *Id.* at 320.

57. 446 F. Supp. at 1304-06. " 'Habilitation' is the term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development." *Id.* at 1298. Although the trial court noted the technical difference between "habilitation" and "treatment," both the court of appeals and the Supreme Court used the words interchangeably.

58. *Id.* at 1319. Although *Youngberg* limited its holding to involuntarily committed individuals, *see supra* note 57, the court in *Pennhurst* held that Pennhurst's voluntarily committed individuals were similarly entitled to habilitation. 446 F. Supp. at 1310-11.

59. *Id.* at 1320-21.

60. *Id.* at 1321-22.

61. *Id.* at 1323-24.

62. *Id.* at 1322-23.

63. *Id.* at 1326-29.

64. *Id.* at 1326.

65. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd and remanded*, 451 U.S. 1 (1981).

66. *Id.* at 94. *See generally* Ashwander v. TVA, 297 U.S. 288, 323 (1936) (discussing principle of avoiding decision on constitutional issues when possible).

ance and Bill of Rights Act[67] creates a substantive right to treatment or habilitation[68] in "an environment that infringes least on the personal liberties of the mentally retarded."[69] The Pennsylvania MH/MR Act was deemed an alternative ground for finding a right to adequate habilitation.[70] Though it substantially affirmed the trial court's remedial order, the court of appeals ruled that Pennhurst could not be ordered closed,[71] reasoning that for some individuals a large institution was the least restrictive environment for minimally adequate habilitation.[72] Therefore, the court ordered that each resident's needs be assessed to determine appropriate placements.[73]

The Supreme Court, in *Pennhurst I*,[74] held that section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act neither creates substantive rights for the mentally retarded nor imposes obligations on the states.[75] Rather, it is a "mere federal-state funding statute"[76] designed only to encourage states to provide better services for the developmentally disabled.[77] Suggesting that the circuit court's state law determination may have been affected by an incorrect reading of section 6010 and finding that there had been no determination that the MH/MR Act required habilitation in the "least restrictive environment,"[78] the Court remanded the case. It instructed the court below to determine whether the state law could provide an adequate and independent state ground for the remedy,[79] or whether the federal constitutional or statutory claims

67. 42 U.S.C. § 6010 (1982).

68. 612 F.2d at 95-96.

69. *Id.* at 107.

70. *Id.* at 103.

71. *Id.* at 113-14. The court also rejected the argument that the eleventh amendment was a bar with respect to the type of relief ordered, because this relief was prospective only. *Id.* at 109. For a discussion of the distinction between prospective and retrospective relief, see *infra* notes 160-76 and accompanying text.

72. *Id.* at 113-15. The court explicitly noted that the Constitution "does not *preclude* resort to institutionalization" in the appropriate circumstances. *Id.* at 115.

73. *Id.* at 115-16.

74. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

75. *Id.* at 18-27.

76. *Id.* at 18.

77. *Id.* at 20.

78. *Id.* at 31.

79. *Id.* The Court suggested that the appeals court "consider the state-law issues in light of the Pennsylvania's Supreme Court's recent decision" in *In re* Schmidt, 494 Pa. 86, 429 A.2d 631 (1981). 451 U.S. at 31 n.24. See *infra* notes 81-84 and accompanying text for the appellate court's interpretation of *In re* Schmidt, and *infra* notes 149-53 and accompanying text for a discussion of how federalism values are protected by deciding cases on clearly articulated state law grounds.

could support the remedial order.[80]

The court of appeals, again sitting en banc,[81] held on remand that the MH/MR Act provides a state law ground for its prior remedial order.[82] All eight judges agreed that the state supreme court's decision in *In re Schmidt*[83] supported the conclusion that the MH/MR Act creates a right to minimally adequate habilitation in the least restrictive environment.[84] All eight judges agreed that the eleventh amendment was not a bar to deciding the case on the pendent state law claim.[85] However, four judges, in three separate opinions, reasoned that the remedial order—particularly the part that appointed a special master—was inappropriate.[86]

III. THE SUPREME COURT'S HOLDING

The United States Supreme Court, in *Pennhurst II*,[87] again reversed the court of appeals. The Court held that the *Ex parte Young* exception[88] to the eleventh amendment was limited to cases dealing with federal law questions.[89] Reasoning that the only justification for abrogating eleventh amendment immunity was to protect competing fourteenth amendment values,[90] the Court stated that "[t]his need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated

80. 451 U.S. at 31.

81. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd and remanded*, 104 S. Ct. 900 (1984).

82. *Id.* at 656.

83. 494 Pa. 86, 429 A.2d 631 (1981).

84. 673 F.2d at 651-53; *id.* at 662 (Seitz, C.J., dissenting in part); *id.* at 663 (Garth, J., concurring in part and dissenting as to relief).

85. *Id.* at 653-59; *id.* at 662 (Seitz, C.J., dissenting in part); *id.* at 663 (Garth, J., concurring in part and dissenting as to relief).

86. *Id.* at 661-62 (Aldisert, J., concurring); *id.* at 662 (Seitz, C.J., & Hunter, J., dissenting in part); *id.* at 662-71 (Garth, J., concurring in part and dissenting as to relief). Judge Garth noted that the Supreme Court in *Pennhurst I* had particularly disapproved of the district court's appointment of a special master as part of the remedial order. *Id.* at 662. He quoted extensively from Justice White's dissenting opinion and Justice Rehnquist's majority opinion emphasizing the Supreme Court's "virtually unanimous" criticism of the appointment of a special master. *Id.* at 665.

87. 104 S. Ct. 900 (1984).

88. See *supra* notes 28-45 and accompanying text for a discussion of the *Ex parte Young* exception to a state officer's eleventh amendment claim to sovereign immunity.

89. 104 S. Ct. at 911.

90. *See id.* at 910-11 (" '*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.' ") (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)).

state law."[91] Since the suit was decided on a state law ground, the *Ex parte Young* exception did not apply, and the claim became one against the state, barred by the eleventh amendment.[92] Instructing state officials on how to conform their conduct to state law was deemed intrusive and therefore destructive to the notion of federalism underlying state sovereign immunity.[93]

Though acknowledging that *Ex parte Young* permitted prospective relief,[94] the Court reasoned that merely because the plaintiffs asked only for injunctive relief did not answer the question of whether the *Ex parte Young* exception was operative.[95] Rather, the difference between prospective and retrospective relief was only important if *Ex parte Young* applied; and since it was inapplicable when the basis of the claim was a state law violation, the fact that the plaintiffs requested only injunctive relief did not reestablish federal court jurisdiction.[96]

The Court next addressed whether the doctrine of pendent jurisdiction, which normally allows federal courts to decide state law questions once federal jurisdiction is properly obtained,[97] "has a different scope when applied to suits against the State."[98] Even though federal jurisdiction had been established with the federal constitutional and statutory claims in this case, the Court stated that the eleventh amendment inquiry must be applied to each claim.[99] Reading *Ex parte Young* as a fiction to insure supremacy of federal law, the Court concluded that the claim before it was "a claim that state officials violated *state law* in carrying out their offi-

91. *Id.* at 911.

92. *Id.*

93. *Id.* The Court later stated that "[i]n cases of ongoing oversight of a state program that may extend over years, as in this case, the federal intrusion is likely to be extensive. Duplication of effort, inconvenience, and uncertainty may well result." *Id.* at 920 n.32. This limitation on federal interference in state affairs represents a pervasive concern in recent Supreme Court decisions. *See, e.g.*, Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 716 (1978) ("The Supreme Court has made clear that federalism limits federal interference in state activity, and has required the judiciary to leave major policy questions to the democratic decisionmaking process.").

94. 104 S. Ct. at 911.

95. *Id.*

96. *Id.*

97. See *infra* notes 137-46 and accompanying text for discussion of pendent jurisdiction.

98. 104 S. Ct. at 917. The Court held that this was a case of first impression, reasoning that previous eleventh amendment cases involving state officers and pendent state law violations did not directly address the issue. *Id.* at 917-18. See *infra* notes 110-31 and accompanying text for a review of these cases.

99. 104 S. Ct. at 919.

cial responsibilities."[100] The eleventh amendment, therefore, barred the claim. The Court stated further that its conclusion was not altered by virtue of the claim having been asserted as a pendent state claim.[101]

The majority devoted much of its opinion to answering the dissent's arguments, rather than adequately addressing what it considered to be the relevant issues. The majority chided the dissent at length for suggesting that the claim asserted was not against the state.[102] The majority gave three reasons in support of its conclusion that the suit was against the state of Pennsylvania: (1) the remedy operated against the state because "in effect [the relief sought and ordered] was that a major state institution be closed and smaller state institutions be created and expansively funded;"[103] (2) the defendants had acted in good faith and, therefore, the relief was "institutional" in character, making this a complaint against the state for "not fulfilling its legislative promises;"[104] and (3) the defendants were vested with "broad discretion in operating Pennhurst," and were not acting outside of their authority.[105]

IV. CRITIQUE OF *PENNHURST II*

The majority misread the eleventh amendment and sovereign immunity cases. The *Ex parte Young* exception is not merely premised on the vindication of federal law,[106] and even if this doctrine were so limited, the Court's decision to abolish properly obtained federal court jurisdiction misconstrues the meaning of federalism and addresses the wrong concerns. Rather than focusing on whether the purposes of *Ex parte Young* are satisfied when the suit is decided on state law grounds, the inquiry should be whether the

100. *Id.* (emphasis added).

101. *Id.* The Court acknowledged that its conclusion might encourage claim splitting or trying cases in state courts, but noted that this "is not uncommon in this area," *id.* at 920, and that limiting the choice of forum is "inherent in our system of federalism." *Id.* (*quoting* Employees v. Missouri Pub. Health & Welfare Dep't, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in the result)). The Court contended that allowing this type of claim to be decided in federal court would not promote the policies that underlie the pendent jurisdiction doctrine. *Id.* at 920 n.32.

102. See *infra* notes 154-200 and accompanying text for a critique of this portion of the Court's opinion.

103. 104 S. Ct. at 911.

104. *Id.* at 912.

105. *Id.* at 914. See *infra* notes 122-31 and accompanying text for a discussion of the relevance of determining whether an officer is acting ultra vires.

106. *See infra* notes 110-31 and accompanying text; *Pennhurst II*, 104 S. Ct. at 933 (Stevens, J., dissenting).

purposes of the eleventh amendment are furthered.[107]

A. *The* Ex parte Young *Doctrine*

Commentators disagree as to how far the eleventh amendment sovereign immunity protective shield is intended to extend.[108] Precedent supports the view that deciding a case on state law grounds is permissible under the eleventh amendment and that the *Ex parte Young* exception should be read to incorporate general notions of the ultra vires doctrine.[109] The analysis of whether the officer's actions should be considered those of the sovereign—in other words, whether such actions are ultra vires—is not affected by whether the claim is founded on a state or federal ground. If an officer has violated state law, "the suit is to get a state officer to do what a [state] statute requires of him. *The litigation is with the officer, not the state.*"[110] Actions taken in violation of state law should not be considered actions of the sovereign.

The cases that most clearly support the theory that the eleventh amendment is not a bar to deciding pendent state law claims are *Greene v. Louisville & Interurban Railroad* (*Greene*),[111] and its two companion cases, *Louisville & Nashville Railroad v. Greene*[112] and *Illinois Central Railroad v. Greene*.[113]

In *Greene*, a railroad company sued officers of the state board of valuation and assessment, the auditor of public accounts, and the attorney general and his assistants.[114] The railroad requested injunctive relief from enforcement of certain "franchise taxes."[115] Jurisdiction was based on federal constitutional claims, and there was a pendent state claim alleging violation of the state constitution.

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107. *See infra* notes 149-53 and accompanying text.

108. *See supra* notes 39-43 and accompanying text.

109. In *Pennhurst II*, both the majority, 104 S. Ct. at 914-16, and the dissent, *id.* at 936-39 (Stevens, J., dissenting), rely on Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), to define when an officer's actions are ultra vires. *See infra* notes 126-31 and accompanying text for a discussion of the *Larson* case.

110. Rolston v. Missouri Fund Comm'rs, 120 U.S. 390, 411 (1887) (emphasis added).

111. 244 U.S. 499 (1917). Inasmuch as *Greene* directly addresses the eleventh amendment issues and the companion cases merely rely on its rationale, only *Greene* merits discussion here.

112. 244 U.S. 522 (1917).

113. 244 U.S. 555 (1917). Another important pendent jurisdiction case, Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909), also involved a suit against a state officer based on state law. *Siler* did not discuss eleventh amendment issues, perhaps because the Court did not think that the eleventh amendment could obstruct valid pendent jurisdiction. Thus, *Siler* may have foreshadowed the explicit holding of *Greene* eight years later.

114. 244 U.S. 499, 502.

115. *Id.*

The Court stated that *Ex parte Young* held that injunctive relief issued by a federal court against state officers to prevent the exercise of state-authorized duties does not violate the eleventh amendment.[116] The Court further noted that *Ex parte Young* was not limited to cases involving violations of the federal constitution.[117] Deciding the case on the state law ground,[118] the Court reasoned that state law claims against state officers were not beyond redress in the federal courts.[119]

The *Pennhurst II* Court argued that the Court in *Greene* did not address the question of whether the eleventh amendment bars the consideration of a pendent state claim.[120] However, the *Greene* Court clearly went through a thoughtful eleventh amendment analysis to conclude that the *Ex parte Young* exception is not limited to federal constitutional claims, even though the only other violations alleged in *Greene* were due process and equal protection claims under the United States Constitution.[121] The Court impliedly suggests in *Pennhurst II* that the *Greene* Court went through this intellectual exercise for nothing, and that the Justices had not grasped the true implications of the problem at hand. This argument is unpersuasive.

When a state officer acts in violation of state law, the claim against him should not be considered a claim against the state. *Johnson v. Lankford*[122] illustrates this point. In *Lankford*, a bank commissioner was sued for failing to perform certain state statutory duties and for violating federal constitutional rights.[123] The Court dismissed the assertion that this was a claim against the state, noting that

> [t]o answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment.[124]

By acting outside his authority, a state officer cannot be said to be acting for the state.[125]

116. *Id.* at 506-07.
117. *Id.* at 507.
118. *Id.* at 508.
119. *Id.* at 514.
120. 104 S. Ct. at 917-18.
121. 244 U.S. at 507.
122. 245 U.S. 541 (1918).
123. *Id.* at 543.
124. *Id.* at 545.
125. *See also* Cory v. White, 457 U.S. 85, 91 (1982)("[T]he Eleventh Amendment bars

This analysis is further supported by *Larson v. Domestic & Foreign Commerce Corp.*[126] *Larson* involved a federal officer, and addressed the question of whether the officer's actions were ultra vires or whether they were rightfully attributable to the sovereign and thus protected by sovereign immunity. Larson was the War Assets Administrator.[127] The plaintiff corporation requested injunctive relief to prevent Larson from selling or delivering coal that the plaintiff claimed it owned pursuant to a contract.[128] The Court stated that suits involving officers acting outside their statutory authority would not be considered suits against the sovereign:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign action. *The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden.* [Emphasis added.] His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power.[129]

The dissent in *Larson* also observed that "[r]ecovery has been sustained where, although the official acts under a valid statute, he actually exceeded the authority with which the statute had invested

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suits against state officers unless they are alleged to be acting contrary to federal law *or against the authority of state law.*" (Emphasis added)).

126. 337 U.S. 682 (1949).

127. *Id.* at 684.

128. *Id.*

129. *Id.* at 689-90. The dissent in *Pennhurst II* correctly noted that this passage of *Larson* establishes a two-track analysis that inquires into whether the officer's actions are authorized or whether they are forbidden. *Pennhurst II*, 104 S. Ct. at 937 (Stevens, J., dissenting). Commentators have criticized the *Larson* court's extension of immunity to officers. *See, e.g.*, Davis, *supra* note 27, at 455-56; Shapiro, *Comment: Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 72-76 (1984).

Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), applies the *Larson* rule that actions are ultra vires when the officer does "business which the sovereign has [not] empowered him to do." In *Treasure Salvors*, artifacts from a 17th-century Spanish galleon were discovered by Treasure Salvors, Inc. *Id.* at 673. Florida claimed ownership under a state statute governing "state-owned sovereignty submerged lands," and later entered into contracts with Treasure Salvors. *Id.* at 673-74. It was eventually determined, however, that the United States owned the submerged property upon which the Spanish galleon was found, therefore vitiating Florida's claim to the artifacts. *Id.* at 675-76. The Court held that the eleventh amendment was not a shield for state officers who were holding the property. *Id.* at 692. The Court reasoned that "[t]his conclusion follows inevitably from *Ex parte Young.* If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, *conduct undertaken without any authority whatever* is also not entitled to Eleventh Amendment immunity." *Id.* at 697 (emphasis added).

him."[130]

In light of precedent, the theory of *Ex parte Young* may arguably rest on the question of whether the actions complained of are those of the sovereign. This approach is logical because state officers should not be protected by their sovereign's immunity if their actions are unauthorized or forbidden.[131] Even if the majority in *Pennhurst II* is correct in assuming that *Ex parte Young* is premised upon the vindication of federal rights, it does not necessarily follow that ultimately deciding a case on state law grounds should automatically deprive a federal court of properly obtained pendent jurisdiction.

B. *The Court's Eleventh Amendment Exception to Exercising Pendent Jurisdiction*

The Court, after holding that the *Ex parte Young* exception to eleventh amendment sovereign immunity does not apply when the claim against a state officer is based on state law, addressed the interaction between the eleventh amendment and the doctrine of pendent jurisdiction.[132] Acknowledging that state law claims generally can be adjudicated in federal court once jurisdiction is established,[133] the majority then declared that "[t]he Court has not addressed whether that doctrine has a different scope when applied to *suits against the State*."[134] In other words, the Court begins its

130. 337 U.S. at 716 (Frankfurter, J., dissenting).

131.

> No doubt the [Court] that produced . . . *Young* would be shocked to discover that conduct authorized by state law but prohibited by federal law is not considered conduct attributable to the State for sovereign immunity purposes, but conduct prohibited by state law is considered conduct attributable to the very State which prohibited that conduct.

Pennhurst II, 104 S. Ct. at 934 (Stevens, J., dissenting).

132. *See supra* notes 97-101 and accompanying text.

133. 104 S. Ct. at 917.

134. *Id.* (emphasis added). See *infra* notes 155-200 and accompanying text for a discussion of how the Court broadly defines a "claim against the state." If taken literally, the Court could be limiting pendent jurisdiction to purely private claims. Although counties and municipalities are not protected by the eleventh amendment, Lincoln County v. Luning, 133 U.S. 529 (1890), the majority in *Pennhurst II* overturned the appeals court's judgment against the defendant county officials as well. 104 S. Ct. at 920. The Court stated that it is not clear whether a state law claim against county officials could be maintained in federal court, and that "a suit against officials of a county or other governmental entity is barred *if the relief obtained runs against the State*." *Id.* at 920-21 n.34 (emphasis added). For further criticism of this result, see Shapiro, *supra* note 129, at 81-82. Shapiro argues that the Court in *Pennhurst II* may be rethinking the eleventh amendment protection for local governments: "To begin analyzing every lawsuit against a city or county or its officials to determine whether the relief sought actually 'runs against the State' is to take one more step into the quicksand of sovereign immunity doctrine." *Id.* at 82.

analysis presupposing that this was a claim against the state, not state officers. Under this approach, the eleventh amendment shield is already erected, and federal jurisdiction is eliminated. The Court then asks whether the pendent jurisdiction doctrine can lower the eleventh amendment shield in order to reestablish federal subject matter jurisdiction. Such an analysis treats pendent state claims in a procedurally backwards manner[135] and ignores the policies that support both the pendent jurisdiction doctrine and the eleventh amendment.[136]

1. *The Pendent Jurisdiction Doctrine*

The operation of pendent jurisdiction is explained in *Siler v. Louisville & Nashville Railroad*:[137]

> [H]aving properly obtained [federal jurisdiction], that court ha[s] the right to decide all the questions in the case, even though it decide[s] the Federal questions adversely to the party raising them, or even if it omit[s] to decide them at all, but decide[s] the case on local or state questions only.[138]

Therefore, once a federal court has jurisdiction over the case, the pendent state law claims may also be decided and may even provide the sole basis for the decision.

United Mine Workers of America v. Gibbs[139] sets forth the prerequisites of pendent jurisdiction:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority . . . ," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[140]

135. *See infra* notes 147-49 and accompanying text.

136. *See infra* notes 149-53 and accompanying text.

137. 213 U.S. 175 (1909).

138. *Id.* at 191.

139. 383 U.S. 715 (1966).

140. *Id.* at 725 (emphasis in original).

In order to exercise pendent jurisdiction, then, the critical question is whether the state law claims are all part of the same case.

Pendent jurisdiction is a judicially created doctrine, and its "justification lies in considerations of judicial economy, convenience and fairness to litigants."[141] It prevents parties from having to bring multiple suits to try a case, or from being forced into state courts to try federal claims. This doctrine also facilitates the judicial rule that "[w]here a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued."[142] Pendent jurisdiction therefore aids in preventing the unnecessary adjudication of constitutional questions.

Lee v. Bickell,[143] moreover, illustrates that deciding cases on state statutory grounds can do more than merely avoid deciding constitutional issues—it also provides the state courts or legislatures the opportunity to alter or even disregard the federal court's holding.[144] This promotes federalism in two very important ways: it recognizes the policy-making role of the states[145] and it allows states to retain some control over the outcome of federally decided cases.[146]

2. *Pendent Jurisdiction in* Pennhurst II

By presuming that *Pennhurst II* was a claim against the state when it examined the issue of pendent jurisdiction, the Court reversed the procedural order in which pendent jurisdiction operates. The plaintiffs in the *Pennhurst* cases had established proper federal jurisdiction by virtue of having raised adequate federal constitutional and statutory claims against state officers, which are within the exception of the *Ex parte Young* case. Once federal jurisdiction is established, state claims may be appended if they are derived

141. *Id.* at 726.

142. *Siler*, 213 U.S. at 193.

143. 292 U.S. 415 (1934).

144. In *Lee*, the plaintiff alleged that certain state tax levies were unconstitutional and that the state statute had been violated. *Id.* at 417. Holding that the statute did not permit the contested taxation, the Court did not need to reach the constitutional claims. *Id.* at 425. The Court noted that if the state court later determined that the statute allowed these taxes, the constitutionality of the statute could then be examined. *Id.*

145. *See* FERC v. Mississippi, 456 U.S. 742, 775-97 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating that it is against the principles of federalism to make states accountable to the federal government for basic policy decisions); Kaden, *supra* note 23, at 849-57.

146. *See Pennhurst II*, 104 S. Ct. at 941-42 (Stevens, J., dissenting). See also *infra* note 153 and accompanying text for a discussion of the varying degrees of permanency that different types of court decisions have.

"from a common nucleus of operative fact."[147] No one contends that the plaintiffs lacked federal subject matter jurisdiction[148] or that the lower federal courts incorrectly appended the state law claim. With proper jurisdiction, the eleventh amendment shield had been lowered properly by virtue of the *Ex parte Young* exception. This consideration operates *before* a court determines upon which grounds the case will be decided.

Therefore, when addressing what effect exercising pendent jurisdiction will have on sovereign immunity, the appropriate inquiry is whether the eleventh amendment shield must be erected—not, as the majority suggests, whether the eleventh amendment shield must be lowered. By virtue of the *Ex parte Young* exception, before exercising pendent jurisdiction the suit simply is not a suit against the state. When the question of whether to decide the case on a pendent ground is addressed by a court, the officers are assumed to be the proper defendants, unprotected by their sovereign's immunity under the eleventh amendment.

The proper question, therefore, is whether the eleventh amendment shield must be reactivated when the case is decided on a pendent state law ground. The majority suggests that this question is answered by focusing on whether the justification for the *Ex parte Young* exception continues to be in force.[149] Because deciding a case on state law grounds does not uphold the supremacy of federal law, the majority would argue that the eleventh amendment shield comes into effect, and that the state thus becomes the party defendant.

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147. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966). In Edelman v. Jordan, 415 U.S. 651 (1974), the Court held that pendent jurisdiction had been properly exercised with respect to a state statutory claim, even though this was an eleventh amendment case. *Id.* at 653. Although the Court held that retroactive relief could not be granted on the basis of the pendent state law claim, *id.* at 678, its holding focused on the nature of retroactive relief, not pendent jurisdiction. See *infra* notes 160-76 and accompanying text for further discussion of prospective versus retroactive remedies.

148. The district court's holding that the conditions at Pennhurst violated constitutionally protected rights supports the position that the plaintiffs presented a "real and substantial question under the Constitution of the United States." Davis v. Wallace, 257 U.S. 478, 482 (1922). *See also* Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974) ("[C]ivilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition.").

149. By doing this, the Court rejects the longstanding doctrine of pendent jurisdiction, presumably because of its interpretation of federalism concerns. One commentator suggests that the Supreme Court's federalism concern centered on whether "a branch of the federal government is directing the allocation of state funds." Frug, *supra* note 93, at 734. However, this would seem irrelevant if the federal court were implementing state rather than federal policy.

The proper inquiry, however, should focus on how exercising pendent jurisdiction will affect the principles of federalism that underlie the eleventh amendment. Specifically, the ultimate issue is whether deciding the case on state law grounds will damage, promote, or not affect the federalism values underlying the state's constitutional right to sovereign immunity. If deciding the case on pendent state law grounds does not do violence to federalism, but in fact promotes federalism values by recognizing states as valid policy-making bodies, there is no reason to raise the eleventh amendment shield once again. After all, it is the policy underlying the eleventh amendment, rather than the policy underlying the exception to the amendment, that should be the courts' concern.

To have the *Pennhurst II* decision rest on state law grounds would respect and promote the federalism values underlying the eleventh amendment. The state of Pennsylvania through its legislature[150] and its highest state court[151] had announced a particular policy regarding the mentally retarded. *Pennhurst II* was not a suit against the state, but rather a suit to enforce a policy promulgated by the state. The federal courts, in deciding the case on state law grounds, were recognizing and implementing state policy and applying state law against officers alleged to be acting in violation of state law. *Pennhurst II* is therefore not a case that involved unnecessary determinations of state law questions.[152]

Deciding the state law issues presented would also promote federalism because of the less permanent effect that such a course has on the state. The Pennsylvania legislature could change its laws, or its courts could determine that the law had been misapplied. In this way, the state retains power over policy making. In contrast, when a federal court is forced to decide a case on constitutional grounds, the effects are permanent, until overturned, because the decision imposes obligations on the state to uphold constitutional rights.[153] In

150. The legislature established state policy by enacting the MH/MR Act, and by allocating money to fund community facilities for the mentally retarded. *See infra* note 172 (discussing allocations).

151. *In re* Schmidt, 494 Pa. 86, 429 A.2d 631 (1981).

152. The majority in *Pennhurst II* stated that the federal court's remedy was "based on *inferences drawn from dicta in a state court opinion*," 104 S. Ct. at 920 n.32 (emphasis added), even though all eight appellate court judges agreed on the interpretation of *In re* Schmidt. *See supra* note 84 and accompanying text. If the state law issue truly were unclear, it would more properly be dealt with under the *Pullman* abstention doctrine. Under this doctrine federal courts may decline to decide state law issues involving statutes that have not been interpreted by the state court. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941).

153. *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947) (cited by the

short, a decision on federal constitutional grounds limits the options available to a state to implement its chosen policies.

C. *Dicta of the Court: When is a Claim "Against the State"?*

Part III-B of the majority's opinion in *Pennhurst II*[154] is the most confusing and distressing aspect of this case. It is difficult to distinguish the Court's holding from its dicta. The Court further complicated its task by misapplying settled doctrine in an attempt to counter the dissent's arguments, although the lengthy discussion is irrelevant to the majority's holding.

After concluding that the *Ex parte Young* exception is "inapplicable in a suit against state officials on the basis of state law,"[155] the majority states in part III-B that "[t]he contrary view of Justice Stevens' dissent rests on fiction, is wrong on the law, and, most important, would emasculate the Eleventh Amendment."[156] In a footnote, the majority explained that it was "prompted to respond" to the dissent's reading of a number of eleventh amendment cases.[157] This section should first be recognized for what it is: a response to the dissent. Moreover, it should properly be considered dicta. Because the majority argued that *Ex parte Young* is inapplicable, and because they viewed it as the only available exception to sovereign immunity, the federal courts lacked subject matter jurisdiction to decide the issues presented in this case. This is the essence of their holding, and therefore, the question of whether relief ran against the state is irrelevant because the court could not grant a remedy without having jurisdiction.

1. *Relief Operating Against the State*

The majority argued that the relief in *Pennhurst II* operated against the state, and therefore, was barred by the eleventh amendment. This discussion is not only irrelevant to the Court's holding,[158] it also contradicts the majority's position in the previous

dissent in *Pennhurst II*, 104 S. Ct. at 941-42, in support of its argument against unnecessarily deciding federal constitutional issues).

154. 104 S. Ct. at 911-17.

155. *Id.* at 911.

156. *Id.*

157. *Id.* at 911 n.14.

158. Cases such as Edelman v. Jordan, 415 U.S. 651 (1974), illustrate that a valid claim against state officers can become an invalid claim against the state if the remedy ordered will affect the state treasury. However, if a suit against state officers based on state law cannot be entertained by federal courts at all, then the remedy has no significance because the court lacks subject matter jurisdiction to hear the case. The question of the appropriateness of the

section of the case. The majority had already reasoned that the type of relief sought was only an appropriate question when *Ex parte Young* was applicable.[159] To then argue that the relief sought ran against the state is nothing more than doubletalk. The issue of relief either matters or does not.

There are also substantive problems with the Court's dicta. The suggestion that the relief here was "relief against the state" blurs the distinction between prospective and retrospective relief.[160] In previous eleventh amendment cases, the Court has consistently inquired whether the relief sought would affect the state treasury. However, no decision has gone so far as to state that *any* impact on the state funds would convert a legitimate suit against state officials into a suit against the state. Instead, the Court has consistently inquired whether the relief is essentially the equivalent of monetary damages, and it has upheld costly prospective relief that has been incident to satisfying an equitable claim.

In *Edelman v. Jordan*,[161] for instance, the Court held that retroactive payments could not be ordered because such a ruling would be tantamount to requiring the payment of money out of the state treasury.[162] In *Quern v. Jordan*,[163] the Court articulated the distinction between *Ex parte Young* and *Edelman*:

> [W]e also pointed out that under the landmark decision in *Ex parte Young* . . ., a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury . . . . The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other.[164]

Hutto v. Finney[165] stressed this aspect of *Edelman*:

> [T]he distinction [between retrospective and prospective relief] did not immunize the states from their obligation to obey costly federal-court orders. The cost of compliance is 'ancillary' to the prospective order enforcing federal law. . . . The line between

remedy therefore should only be raised once proper jurisdiction over the parties and claims has been established.

159. *Pennhurst II*, 104 S. Ct. at 910-11.

160. This distinction had already been blurred to some extent in Cory v. White, 457 U.S. 85 (1982).

161. 415 U.S. 651 (1974).

162. *Id.* at 664-65.

163. 440 U.S. 332 (1979).

164. *Id.* at 337.

165. 437 U.S. 678 (1978).

> retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief.[166]

In *Hutto*, the Court went so far as to uphold the lower court's order that attorney's fees be paid from public funds.[167]

Moreover, the *Pennhurst II* Court's conclusion does not make clear whether it is the relief *sought* or the remedy *granted* which runs against the state. The majority noted that the "relief sought and ordered here. . .was that a major state institution be closed,"[168] even though the appellate court specifically held that ordering Pennhurst to close could not be supported.[169] If *Pennhurst II* means that deciding whether a suit is against the state should be governed by the plaintiff's complaint—the relief *sought*, as opposed to the relief *granted*—then the federal court would have lacked jurisdiction from the day the lawsuit was filed.[170] In *Edelman*, however, part of the relief sought was denied by the Supreme Court because it was retroactive in nature and directed against the state.[171] The entire case in *Edelman* was not dismissed for lack of jurisdiction; the Court merely overturned the retroactive remedy in order to meet the eleventh amendment requirements. Therefore, if *Pennhurst II* is read to suggest that the type of relief *sought* transforms a legitimate claim against state officers into a suit against the state, then *Edelman* and other eleventh amendment cases are implicitly overruled.[172]

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166. *Id.* at 690.

167. *Id.* at 691-92. This suit was against prison officials who were found to have acted in bad faith. The Court noted that in some instances fines will be a less intrusive remedy:

> If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief.

Id. at 691.

168. 104 S. Ct. at 911.

169. *See supra* notes 71-72 and accompanying text.

170. The plaintiffs sought to close Pennhurst, to erect community facilities, and to obtain adequate habilitation and money damages. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1298. Not all of these remedies were granted.

171. *See supra* notes 158, 161-62 and accompanying text.

172. Further, a review of the case history reveals that the Court erroneously stated that Pennhurst was ordered to be closed. The court of appeals twice said this was not part of the remedy. 612 F.2d at 113-14; 673 F.2d at 660. Though the Supreme Court stated that establishing community living facilities would be very costly to Pennsylvania, 104 S. Ct. at 911, the district court's findings suggest that this would be less costly than operating large institutions. 446 F. Supp. at 1312. It cost approximately $63 per resident per day at Pennhurst, while at most $17.64 per resident per day in less restrictive environments. Further, the Pennsylvania legislature had already allocated $21 million for implementing plans to place the mentally

If the problem concerns the remedy *granted*, it is more appropriate to modify the remedy, as was done in *Edelman*, than to deny federal court jurisdiction altogether.[173] The majority strongly suggested that the remedy granted was overly intrusive, and therefore, damaging to federalism values.[174] However, lessening the intrusiveness of the remedy can be accomplished by changing the remedy itself.[175] Eliminating federal jurisdiction results in potential harm to the litigants,[176] the state, and federalism values.

2. *Good Faith*

In considering whether the relief in *Pennhurst II* ran against the state, the majority embarked on a discussion of the defendants' good faith.[177] The court noted that the defendants were found by the lower court to be acting in good faith and "apparently took every means available to them to reduce the incidents of abuse and injury, but were constantly faced with staff shortages."[178] The majority stated that these findings supported its conclusion that the "relief ordered by the courts below was institutional and official in character. To the extent there was a violation of state law in this case, it is a case of a State itself not fulfilling its legislative promises."[179] In a footnote, the Court then acknowledged that good faith is only relevant to the issue of immunity from damages

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retarded in less restrictive environments. By the time the district court decided the case, seven years after the allocation, $18 million had yet to be spent. *Id.*

173. "The difficulty with relying on the eleventh amendment to bar direct federal court mandates on the state treasury is that eleventh amendment prohibitions are absolute, denying federal power to provide the remedy under any circumstances." Frug, *supra* note 93, at 755.

174. 104 S. Ct. at 911-12, 920 n.32.

175. *Cf.* Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979) (discussing remedy options that protect federalism in § 1983 suits, school desegregation suits, and procedural due process claims, among others).

176. Although the majority states that claim splitting is common in the eleventh amendment context, 104 S. Ct. at 919-20, the pendent jurisdiction doctrine was created to address the inherent unfairness and inconvenience that results from having to try a case in more than one forum. *See supra* notes 138-42 and accompanying text.

177. 104 S. Ct. at 912.

178. *Id.* This finding of good faith appears on its face to relate only to the defendants at Pennhurst Hospital itself, and probably not to higher level state officials.

179. 104 S. Ct. at 912. State legislatures ultimately will bear the burden of correcting the violations complained of in many eleventh amendment cases. It is interesting that the Supreme Court intimates that Pennsylvania was not fulfilling its legislative promises, rather than realizing that perhaps responsible state officials were not spending the money appropriated. The problem of state officials not spending money already allocated is not uncommon. *See, e.g.*, Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977) (after noting that funds for a new prison had been approved, the court "expresse[d] the hope that the difficulties encountered in naming a location for the new prison [would] be speedily resolved").

when a court has proper jurisdiction, but "[t]he point is that the courts below did not have jurisdiction because the relief ordered so plainly ran against the State."[180]

It is no wonder that "[t]he dissent appears to be confused about [the majority's] argument here."[181] The Court ignores its own holding that because *Ex parte Young* is inapplicable in this case, the lower courts lacked jurisdiction. The holding that *Ex parte Young* is inapplicable has nothing to do with the type of relief ordered. Further, the Court's whole argument is circular: good faith is recognized as a defense available to *state officers* against damages. But in the *Pennhurst II* dicta, the Court asserts without explanation that good faith is an indicator of whether relief runs against the state, which can then deprive a federal court of jurisdiction.

Good faith has never before been regarded as a factor that provides state officials with absolute eleventh amendment protection. *Edelman v. Jordan*[182] illustrates this point. The defendants in that case were officials who were acting pursuant to state regulations for distributing federal assistance funds. Although their actions violated federal law, the officers were not only acting in good faith by following the invalid regulations, but they could not have acted otherwise under state law. The officers' good faith did not, however, provide them with eleventh amendment immunity. Rather, the effect of the *Edelman* case was to instruct a state legislature to repeal invalid regulations by enjoining state officers. That order would certainly qualify as "institutional" relief, as the *Pennhurst II* Court describes it, yet the *Edelman* Court held it to be appropriate under the eleventh amendment.[183]

The Court's reasoning suggests that the legislature is responsible

180. 104 S. Ct. at 912 n.17.

181. *Id.*

182. 415 U.S. 651 (1974).

183. *Id.* at 651. Eighth amendment prison cases stand for the proposition that lack of funding is not an excuse for violating substantive rights, even if the defendant state officers acted in good faith. In Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), the district court stated, "Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish." Nor *should* good faith provide prison officials with an eleventh amendment defense. If that were the case, unconstitutional conditions might never be eradicated. This reasoning should not be limited to constitutional violations because federalism dictates that federal courts should acknowledge state-created substantive rights. *Cf.* Milliken v. Bradley, 433 U.S. 267 (1977) (lack of funding does not excuse failure to meet constitutionally mandated school desegregation objectives); Wyatt v. Alderholt, 503 F.2d 1305, 1314-15 (5th Cir. 1974) (state institutions for the mentally ill and mentally retarded).

for making every decision that affects the rights of the mentally retarded. Although the legislature had passed a law and had allocated money for smaller community facilities, it is not clear which Pennsylvania official was to be in charge of spending this money. Certainly, the legislature does not specify all of the arrangements for establishing community living facilities.[184] Lack of funding was probably not the only reason for staff shortages; when paid staff left Pennhurst, the vacancies were rarely filled.[185] It is conceivable that with expected employee attrition, those state officers responsible for replacing staff either were unable to attract qualified staff to work in such deplorable conditions, or chose to use staff funds in alternative areas.

These factual disputes aside, however, the danger inherent in the majority's analysis is clear: good faith should neither be the measure for whether state officers are acting within their statutory authority nor serve to immunize them from injunctive relief.[186]

3. *Discretion*

The final disconcerting aspect of part III-B of the majority's opinion is the Court's discussion of whether the defendants were, in fact, acting within their statutory authority.[187] Although this analysis is essential to the dissent's theory,[188] it is irrelevant to the majority's holding. The majority held that *Ex parte Young* is premised on the theory of vindicating federal rights;[189] thus, the Court cannot

184. As the court in *In re* Schmidt, 494 Pa. 86, 429 A.2d 631 (1981) explained, the counties have a great deal of responsibility under the MH/MR Act for providing the mentally retarded with residential facilities. *See Pennhurst*, 673 F.2d 647, 652-56.

185. 446 F. Supp. at 1303. This theory is applicable only if it is assumed that money is allocated for the particular *position* that a staff person fills before he or she decides to leave Pennhurst.

186. Good faith has been held to be relevant in determining whether certain state officials will be immune from money damages in § 1983 claims. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975) (school board officials); Scheuer v. Rhodes, 416 U.S. 232 (1974) (state executive officers). In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court addressed both the issue of good faith immunity for state mental retardation hospital officials and the issue of inadequate funding to make changes, saying: "In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability." *Id.* at 323. Even if there were a budget deficiency problem in *Pennhurst II*, therefore, good faith should only be relevant to whether money damages will be awarded—*not* to whether the eleventh amendment bars the suit.

187. 104 S. Ct. at 912-14.

188. The dissent correctly argues that *Ex parte Young* incorporates the notion that "conduct that exceeds the scope of an official's lawful discretion is not conduct the sovereign has authorized and hence is subject to injunction." 104 S. Ct. at 929 (Stevens, J., dissenting).

189. *See supra* notes 88-93.

also consistently argue that the ultra vires cases are part of the *Ex parte Young* doctrine. In other words, the issue of whether an individual officer was acting pursuant to his authority does not answer the question of whether a federal court has proper jurisdiction to decide the case. If the case is to be decided on a state law ground, the Court reasons that the *Ex parte Young* exception is inapplicable, and the eleventh amendment destroys the court's jurisdiction. It becomes irrelevant whether the officers were actually acting within their authority.[190]

The majority states, however, that the state officers were not acting ultra vires to their statutory authority because they had broad discretion to make operational decisions.[191] The principal difficulty with the Court's conclusion is that it blurs the distinction between legislative means and ends. Although officers may in fact have broad discretion in selecting the means to implement state policy,[192] they will always have less discretion with respect to the ends.[193] Having some discretion does not necessarily answer the question of whether an officer is acting beyond his authority because this discretion is only relevant with respect to the means used. Nor does having discretion with respect to means automatically exclude an officer from being challenged in court, because discretion can always be subject to a claim of abuse.[194] If an officer "has no power at all to do the act complained of,"[195] he can be enjoined; if the actions are within the officer's discretion, he cannot be.[196]

The "acts" complained of in *Pennhurst II* were the living condi-

190. If the court has jurisdiction to decide the case, then the court may reach the issue of whether the officer exceeded his scope of authority.

191. 104 S. Ct. at 914.

192. For example, the *Pennhurst* defendants had "broad discretion to provide 'adequate' mental health services." *Id.* at 909 n.11. Although courts may defer to professional judgment on the manner in which "adequate" service can best be provided, "[t]he essence of respondents' claim is that petitioners have not provided such services adequately." *Id.* The inadequacy of the service relates to what the legislative goal was for Pennhurst. See *infra* notes 198-99 and accompanying text for a discussion of the legislative plan set out in the MH/MR Act.

193. Establishing state policy is a legislative function, and to delegate that power to the executive or judicial branch would damage the democratic decisionmaking process. Frug, *supra* note 93, at 734.

194. *See, e.g.*, Philadelphia Co. v. Stimson, 223 U.S. 605, 620 (1912) (suit against federal officer was not against the sovereign since it rested "upon the charge of abuse of power").

195. Noble v. Union River Logging R.R., 147 U.S. 165, 172 (1893).

196. *Id.* at 171. Similarly, this is not a case like Wood v. Strickland, 420 U.S. 308 (1975), where the Court determined that the school board had discretionary powers to act promptly. The issue in *Wood* concerned immunity from monetary damages, not injunctive relief. The *Pennhurst* case involves a fact situation illustrating years of harm inflicted upon helpless mentally retarded residents. Discretion to prolong these conditions does not warrant protection.

tions that existed at the Pennhurst institution for the mentally retarded—filth, overcrowding, abusive patient treatment, restraint and drugging of patients, and the lack of adequate staff and training necessary for the habilitation of the mentally retarded.[197] The conditions at Pennhurst were deplorable. Nor was it within the discretion of any of the state officers to house the mentally retarded in such an environment. The Pennsylvania Supreme Court had interpreted the Pennsylvania legislature's goal in enacting the MH/MR Act to be the minimally adequate habilitation of the mentally retarded in the least restrictive environment.[198] The legislative design was not being implemented by the responsible state officials. To interpret the failure of these officers to maintain minimal conditions as a legitimate exercise of their discretion would be to suggest that the officers themselves were empowered to establish the state legislative policy.[199]

The United States Supreme Court, therefore, has paid little respect to the Pennsylvania court's statement of its own law. Rather than promoting federalism values, as the Court professes to do, it has created more friction between state and federal courts than applying the clearly articulated state policy would have done.[200]

The majority uses a broad brush in part III-B of its opinion in finding a claim against the state. This section must be recognized as dicta because it is unnecessary to the Court's holding that the eleventh amendment shield will protect state officers when a decision is based on a state law claim. Moreover, the Court's reasoning runs contrary to the established case law regarding how the type of relief granted might affect eleventh amendment protection; the role of a

197. *See supra* notes 53-57 and accompanying text. These conditions were also inconsistent with the concept of housing the mentally retarded in the least restrictive environment. *See supra* note 58 and accompanying text.

198. *In re* Schmidt, 494 Pa. 86, 96-98, 429 A.2d 631, 636-37 (1981). *Cf.* Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455, 491-96 (1984) (constitutional and statutory rights to habilitation must be recognized).

199. Although the majority in *Pennhurst II* stated that this interpretation of the MH/MR Act was merely dicta of the Pennsylvania court, 104 S. Ct. at 920 n.32, the state court's statement "cannot be read as other than an official interpretation of the Commonwealth's statutory scheme." *Pennhurst*, 673 F.2d at 667 n.7 (Garth, J., concurring in part and dissenting as to relief).

200. If the majority is suggesting that Pennsylvania law in fact permitted these conditions to exist at Pennhurst, then it is not only second guessing the state supreme court and lower federal courts' interpretation of the MH/MR Act, but it is leaving open the possibility that the MH/MR Act could be found unconstitutional for allowing these conditions to exist. *See* Youngberg v. Romeo, 457 U.S. 307, 316-19 (1982) ("minimally adequate or reasonable training" constitutionally required to secure protected liberty interests in safety and freedom of movement).

defendant's good faith in determining the issue of immunity from damages and injunctive relief; and how sovereign immunity, the issue of discretion, and the concept of ultra vires actions interrelate.

V. CONCLUSION

The *Pennhurst II* holding should be read as narrowly as possible. It should stand for the limited proposition that the *Ex parte Young* exception to eleventh amendment sovereign immunity will not apply to cases that grant relief on the basis of a pendent state law claim. The other aspects of the Court's opinion should be considered dicta and be accorded little weight.

The Court intimated that it was displeased with the intrusiveness of the lower court's remedial order. In light of other Supreme Court cases, it appears that the Court's concern for federalism will continue to cloud its reasoning.[201] Federalism interests can be protected by focusing on the appropriateness of the remedial order, and when necessary, by modifying it. This approach would have properly respected Pennsylvania's legislative goals, while sustaining the policies underlying pendent jurisdiction and the principles of federalism that inform the eleventh amendment.

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201. One commentator has noted the trend of the Burger Court to limit substantive rights in the name of federalism. *See* Durchslag, *supra* note 175, at 737-42. *But cf.* Frug, *supra* note 93, at 716, 733-34 ("[T]here must be some limit to federal judicial power to commandeer affirmative legislative and executive power even to enforce its decision defining constitutional rights.").