Boston College Law Review

Volume 26
Issue 4 *Number 4*

Article 3

7-1-1985

The Limits of Federal Judicial Power over the State: The Eleventh Amendment and Pennhurst II

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NOTE

THE LIMITS OF FEDERAL JUDICIAL POWER OVER THE STATES: THE ELEVENTH AMENDMENT AND *PENNHURST II*

The eleventh amendment provides: "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."[1] The language of the amendment is precise, and closely parallels that of the grant of federal judicial power in article III.[2] The interpretation of the eleventh amendment, however, has been one of the most confused and least understood areas of constitutional law.[3] Despite its precise language, the eleventh amendment has been interpreted to extend beyond its literal terms,[4] and has been held to represent broad principles of federalism and state sovereign immunity.[5] While recognizing that the eleventh amendment represents some type of restraint on the power of the federal judiciary over the states, the United States Supreme Court has never clarified the exact nature of that restraint.[6] One commentator would limit the eleventh amendment to the assertion that article III did not abrogate the sovereign immunity of the states.[7] Other commentators assert that the eleventh amendment operates solely as a check on the power of

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[1] U.S. CONST. amend. XI.

[2] "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2.

[3] *See, e.g.*, Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033 (1983) [hereinafter cited as Fletcher, *Historical Interpretation*]; Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890 (1983).

[4] *See, e.g.*, Monaco v. Mississippi, 292 U.S. 313 (1934) (federal court may not hear suit against a state by a foreign state, even though terms of eleventh amendment only bar suit by citizens of a foreign state); Hans v. Louisiana, 134 U.S. 1 (1890) (federal court may not hear suit against a state by its own citizens, even though terms of eleventh amendment only bar suit by citizens of a different state).

[5] *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 117 (1984) ("Eleventh Amendment's basis in federalism"); *id.* at 140 (Stevens, J., dissenting) ("Eleventh Amendment . . . exemplified the broader and more ancient doctrine of sovereign immunity"); Hutto v. Finney, 437 U.S. 678, 691 (1978) ("principles of federalism that inform Eleventh Amendment doctrine").

[6] The eleventh amendment is treated as a restriction of federal court subject matter jurisdiction in allowing an eleventh amendment challenge to be raised for the first time on appeal. *See* Edelman v. Jordan, 415 U.S. 651, 678 (1974). Unlike a jurisdictional bar, however, states may consent to suits which the eleventh amendment would otherwise prohibit. *See* Clark v. Barnard, 108 U.S. 436, 447 (1883); *see also* Parden v. Terminal Ry. of the Alabama State Docks Dep't, 377 U.S. 184, 196 (1964) (state waived immunity by engaging in activity regulated by Congress).

[7] Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 549 (1977); *see infra* note 60.

the federal courts to take jurisdiction over suits against states, leaving Congress free to extend federal court jurisdiction and abrogate the sovereign immunity of the states.[8] Finally, another commentator asserts that the eleventh amendment only removes state-citizen diversity from the jurisdiction of the federal courts, arguing for separate analysis of general restraints on federal government power over the states.[9] Despite the important differences between these interpretations of the reach of the eleventh amendment, the Court has not settled on an interpretation of the eleventh amendment which defines its reach.[10]

The Court has generally agreed that the eleventh amendment was adopted to overturn a decision by the Supreme Court asserting jurisdiction over a suit against a state by a citizen of another state.[11] How far beyond that particular result the eleventh amendment reaches, however, is unclear. Although the Supreme Court has imposed the amendment's bar in cases falling outside its literal language,[12] in other cases the Court has limited the amendment's reach. For example, the eleventh amendment is not a bar to suit in federal court against state officials for torts,[13] or for violations of the federal Constitution.[14] In a suit against a state official for violating the Constitution, the federal courts employ a legal fiction that the official's conduct is no longer in an official capacity.[15] Instead, this fiction holds that unconstitutional conduct strips the state official of any official or representative character, and subjects the official as an individual to suit.[16] While this fiction may bear little relation to reality in state violations of individual constitutional rights, the Court steadfastly employs this fiction as a primary means of controlling state violations of the Constitution.[17]

This legal fiction has thus prevented the broad application of the eleventh amendment from depriving the federal courts of the ability to enforce the Constitution against encroachments by the states. This fiction has not, however, completely displaced the immunity extended to the state. The Court continues to consider whether the suit is, in fact, against the state.[18] Furthermore, even where suit against a state official is allowed, the eleventh amendment limits the remedies available.[19]

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[8] *See* 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, 1440–41 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693 (1976). *See infra* notes 303–10 and accompanying text.

[9] *See* Fletcher, *Historical Interpretation*, *supra* note 3, at 1130. *See infra* notes 68–70, 296–302 and accompanying text.

[10] *See infra* notes 312–38 and accompanying text.

[11] Hans v. Louisiana, 134 U.S. 1, 11 (1890). *See infra* notes 50–55 and accompanying text.

[12] *See supra* note 4 and cases cited therein.

[13] *See, e.g.*, Johnson v. Lankford, 245 U.S. 541 (1918) (suit permitted against State Bank Commissioner for negligent failure in performing duties); Hopkins v. Clemson Agricultural College of South Carolina, 221 U.S. 636 (1911) (suit permitted against State Agricultural College for trespass to private property); Tindal v. Wesley, 167 U.S. 204 (1897) (action in ejectment permitted against state officials).

[14] *See Ex parte* Young, 209 U.S. 123, 159–60 (1908). *See infra* notes 103–22 and accompanying text.

[15] *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

[16] *Id.*

[17] *See, e.g.*, Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 228 (1964).

[18] *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974).

[19] Damages which will not come from the state official individually, but rather from the state,

For most of its history, the eleventh amendment has generally been ignored.[20] In recent years, however, the amendment has received renewed interest. A recent series of cases, decided by the Supreme Court by slim majorities, are difficult to reconcile on the basis of the eleventh amendment doctrines they espouse.[21] Instead, it appears either that the eleventh amendment means different things in different settings, or that the doctrines and fictions do not represent the true bases for the Court's decisions.[22]

Against this background, in 1984 the Court decided *Pennhurst State School & Hospital v. Halderman*.[23] In a five to four decision, the Court held that the eleventh amendment prohibited a federal court from ordering a state official to conform his conduct to state law.[24] The Court in *Pennhurst II* reasoned that the concerns of eleventh amendment immunity for the state extend beyond questions of relief. The eleventh amendment, the Court held, represents a requirement of state immunity rooted in the Constitution as "an explicit limitation on the judicial power of the United States."[25] The Court interpreted the eleventh amendment to provide broad, constitutional immunity from suit in federal courts, and sharply restricted those doctrines which permitted suit.[26]

The holding in *Pennhurst II* restricts the availability and reduces the effectiveness of the federal courts in suits against state officials which present both federal and state law issues. In such cases, plaintiffs must now either split their claims between federal and state courts, or resort only to the state courts if they wish to have their claims heard together.[27] This limit on the availability of a federal forum will significantly alter the conduct of public law litigation.[28]

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are prohibited. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). Injunctive relief has been limited to injunctions which are prospective in operation. Retrospective relief has been held to run afoul of the eleventh amendment. *See* Edelman v. Jordan, 415 U.S. 651, 677 (1974).

[20] *See* Lichtenstein, *Retroactive Relief in the Federal Courts Since* Edelman v. Jordan: *A Trip through the Twilight Zone*, 32 CASE W. L. REV. 364, 369 n.43 (1982).

[21] *See, e.g.*, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (eleventh amendment no bar to service of process in in rem proceeding against state officials for recovery of artifacts) (5–4 decision on this issue); Cory v. White, 457 U.S. 85 (1982) (eleventh amendment barred executor of Howard Hughes estate from filing statutory interpleader in federal court to resolve conflicting domicile claims of California and Texas) (6–3 decision); Nevada v. Hall, 440 U.S. 410 (1979) (nothing in Constitution bars California from allowing a California citizen to sue the state of Nevada in California state court) (6–3 decision); Edelman v. Jordan, 415 U.S. 651 (1974) (eleventh amendment bars federal court from issuing retroactive injunctive relief) (5–4 decision).

[22] One commentator noted the confusing application of the eleventh amendment, and compared the Court to the parable of the blind men and the elephant, each feeling the same creature but describing it in very different terms. To this commentator, the "elephant" was federalism. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 139, 172 (1977).

[23] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (*Pennhurst II*). The Court's decision was its second consideration of this litigation, having previously remanded the case on different grounds. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (*Pennhurst I*). For clarity, these cases are referred to as *Pennhurst I* and *Pennhurst II*.

[24] *Pennhurst II*, 465 U.S. at 125. The Court reversed the Court of Appeals for the Third Circuit, which had affirmed an injunction against state officials on the basis of a pendent state law claim. *Id.*

[25] *Id.* at 119 (quoting Missouri v. Fiske, 290 U.S. 18, 25 (1933)).

[26] *Id.* at 101–02.

[27] *Id.* at 121–23.

[28] *See infra* notes 350–72 and accompanying text.

This note will analyze the eleventh amendment and the doctrine of state sovereign immunity. Section one will consider the interpretation of the federal judicial power and state sovereign immunity leading up to the ratification of the eleventh amendment. This section will then survey the case law interpreting the eleventh amendment and state sovereign immunity. Section two will review the history of the *Pennhurst* case and the opinions of the lower courts and the Supreme Court in *Pennhurst II*. Section three will analyze the Court's analysis of the eleventh amendment in *Pennhurst II*. This section will discuss the Court's constitutionalization of state sovereign immunity through the eleventh amendment, its restriction of permissible suits against state officials, and its rejection of pendent jurisdiction applied to suits against state officials. By holding that the eleventh amendment constitutionalized state sovereign immunity and by mechanically applying the doctrines allowing suits against state officials, the Court blurs important issues underlying the eleventh amendment. Most important, the Court failed to address the more general underlying issue of federalism, as compounded by problems inherent in public law litigation. As a result, the Court's holding in *Pennhurst II* does not clarify the confused body of eleventh amendment jurisprudence, and instead adds yet another gloss to eleventh amendment doctrines. These doctrines have drifted too far from the foundational issue of federal judicial power, and these unwieldy doctrines are ill suited for the flexible analysis required in addressing the subtle yet central issue of the limits of federal judicial power over the states.

I. The Adoption and Interpretation of the Eleventh Amendment

The doctrines which today surround the eleventh amendment do not arise from the text of the amendment itself. Instead, they are the result of a history of interpretation which has departed from the the literal language of the amendment. These interpretations, however, have been based on an incomplete and inaccurate assessment of the history of the ratification of the Constitution and of the eleventh amendment. Sovereign immunity was reinterpreted in the creation of the American federal system. A survey of the ratification of the Constitution reveals that the issue of state amenability to suit in federal courts was unresolved. The adoption of the eleventh amendment achieved the narrow purpose of removing state-citizen diversity jurisdiction, but beyond this narrow goal its purpose is unclear.

The history of judicial interpretation of the eleventh amendment, also neglected in current doctrines, may be grouped into three major periods.[29] During the Marshall Court, which interpreted the structure and operation of the federal system, the eleventh amendment remained a narrow, technical restriction on federal court jurisdiction. After Reconstruction, the eleventh amendment was reinterpreted beyond its literal terms to stand for a broader notion of state sovereign immunity. This period of reinterpretation culminated, however, in the creation of a fiction to permit suit against state officials in order to assure federal supremacy. Finally, the Burger Court's trend toward a more limited role for the federal courts and increased regard for federalism has included application of the eleventh amendment as a broad bar to suits against states in federal

[29] Professor Shapiro wrote that "[t]he history of judicial interpretation of the [eleventh] amendment illustrates in miniature much of the political and legal controversy since the early days of the Republic." Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61, 61 (1984).

courts. A survey of the history of the adoption and interpretation of the eleventh amendment clarifies the origins of the eleventh amendment doctrines the Court applies today.

A. *State Sovereign Immunity in the United States and the Adoption of the Eleventh Amendment*

Sovereign immunity is an ancient doctrine, with roots extending back to the English monarchy. Originally, the doctrine was founded on the precept that "[t]he King could do no wrong."[30] In practical terms, the doctrine meant that a sovereign could not be sued in his own court. Instead, suit could only be brought in a higher court. Because there was no earthly court higher than the King, however, he was immune from suit.[31]

Although the theory of sovereign immunity was transported to the American colonies, notions of sovereignty derived from a monarchy were difficult to apply to representative governments.[32] In framing a new system of government after the Revolutionary War, Americans reinterpreted and redefined basic principles of government. The American federal system was a novel form of government, presenting unprecedented issues of the relative powers of states and the federal government.[33] Furthermore, this new form of government required substantial adjustment in the concept of sovereignty itself, including immunities.[34] Americans were concerned that basic rights be secure against the government and that the individual have a forum and right of redress, which reflected a change in the relationship between the government and its subjects.[35]

The new American government included a novel role for the federal judiciary. Under the Articles of Confederation, the nation lacked an effective national judiciary which could bind the states in enforcing the provisions of the Peace Treaty of 1783.[36] The lack of an effective national judiciary was an important part of the impetus for the Constitutional Convention,[37] and the power of the federal judiciary was an important part of the debate over the ratification of the Constitution. In particular, the power of the federal courts to hear suits against states remained unsettled. Although many judicial opinions[38] and commentators[39] have relied on an "original understanding" of state

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[30] *See* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 515 (2d ed. 1898).

[31] *Id.* at 518.

[32] *See* Gibbons, *supra* note 3, at 1896–99; *see generally* B. BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198–229 (1967).

[33] *See* THE FEDERALIST No. 39 (J. Madison) (C. Rossiter ed. 1961).

[34] *See generally* B. BAILYN, *supra* note 32, at 202–29; THE FEDERALIST, *supra* note 33, No. 9, 15, 31, 32, 81 (A. Hamilton), No. 20 (A. Hamilton & J. Madison), No. 39, 40, 44, 45, 62 (J. Madison).

[35] *See* Gibbons, *supra* note 3, at 1898.

[36] *Id.* at 1899; THE FEDERALIST, *supra* note 33, No. 22, at 151 (A. Hamilton).

[37] *See* Gibbons, *supra* note 3, at 1899.

[38] *See* Monaco v. Mississippi, 292 U.S. 313, 323–25 (1934); Hans v. Louisiana, 134 U.S. 1, 13–14 (1890).

[39] *See* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91–96 (1922). Relying heavily on the assurances of Madison, Marshall, and Hamilton prior to ratification that the states would be immune from suit without their consent (*see infra* notes 40–45 and accompanying text), Charles Warren argued that the Federalists struck a deal to achieve ratification. *Id.* at 91, 96.

> The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal

sovereign immunity at the adoption of the Constitution, little evidence supports a contention of any dominantly held view.

Most proponents of an original understanding rely on statements made by Madison and Marshall in the ratification debates in Virginia,[40] and upon Hamilton's statements in *The Federalist* No. 81.[41] In the Virginia ratification debates, antifederalists Patrick Henry and George Mason asserted that the proposed constitution would empower a federal court to force the state to pay its debts, and to force citizens who had paid debts to the state under the state escheat laws to pay again.[42] Madison and Marshall argued that article III conferred no such power, and that at most it enabled a federal court to hear suits with the state as plaintiff.[43] In *The Federalist* No. 81, Hamilton also denied that article III would enable the federal courts to hear a suit against a state, without its consent, brought by a citizen of a different state on public securities issued by the state.[44] Proponents of an "original understanding" point to these statements as evidence of an understanding at the adoption of the Constitution that the states would be immune from suit in federal court.[45]

At the adoption of the Constitution, however, there was no unanimous agreement that the states would be immune from suit in federal courts.[46] Substantial authority supports the argument that article III was, in fact, intended to abrogate state sovereign immunity. Two of the five members of the Committee of Detail which drafted the article

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> Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.

Id. at 91. According to Warren, the Court's decision in *Chisholm*, subjecting Georgia to suit without its consent, violated this general understanding, and created a "shock of surprise." The eleventh amendment was immediately adopted to overturn the result of *Chisholm*, and hold the Federalists to their bargain. *Id.* at 96 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 401 (1791)). See *infra* notes 50–55 and accompanying text for a discussion of this case. Furthermore, Warren argued, the understanding the eleventh amendment restored was that the states retained a broad immunity from suit in the federal courts. Therefore, the eleventh amendment must be read to represent this broad understanding. C. WARREN, *supra*, at 96.

[40] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533, 555–56 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES]; *see* Edelman v. Jordan, 415 U.S. 651, 660 n.9 (1974).

[41] THE FEDERALIST, *supra* note 33, No. 81, at 487–88 (A. Hamilton).

[42] 3 ELLIOT'S DEBATES, *supra* note 40, at 526–27, 543.

[43] *Id.* at 533, 555–56.

[44] THE FEDERALIST, *supra* note 33, No. 81, at 487–88 (A. Hamilton):

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent* . . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal . . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.

Id. (emphasis in original).

[45] *See supra* notes 38–39.

[46] Recent commentators have challenged this traditional view, each starting by questioning the original understanding of state sovereign immunity at the ratification of the Constitution. At most, these commentators conclude, the evidence supports only a conclusion that a broad range of understanding existed. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 40 (1972); Field, *supra* note 7, at 534; Gibbons, *supra* note 3, at 1913; Fletcher, *Historical Interpretation*, *supra* note 3, at 1054. Several contend that if any understanding was predominant, it was that article III *did* abrogate the sovereign immunity of the states. *See* C. JACOBS, *supra*, at 40; Field, *supra* note 7, at 534–35.

III grant of power insisted that the Constitution abrogated state sovereign immunity.[47] State amenability to suit was debated in the state legislatures, and was not resolved even as the Constitution was ratified.[48] The issue remained unsettled after ratification, and plaintiffs filed suits against states in the Supreme Court's first term, assuming the states were not immune from suit.[49]

The Supreme Court first addressed whether article III empowered the federal courts to hear suits against states in *Chisholm v. Georgia*.[50] In *Chisholm*, the Court exercised its original jurisdiction to hear an action in assumpsit by the executor of the estate of a South Carolina merchant against the State of Georgia.[51] The South Carolina merchant had sold military goods to Georgia, and the executor sued the state to collect money owed.[52] Georgia refused to appear to defend, asserting that it was, as a sovereign,

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[47] Edmund Randolph, a member of the Committee of Detail at the Constitutional Convention, declared in the Virginia ratification debates, "I admire that part which forces Virginia to pay her debts." 3 ELLIOT'S DEBATES, *supra* note 40, at 207. Randolph defended the state-citizen grant of jurisdiction from attack and from Madison's and Marshall's construction limiting jurisdiction to suits in which the state is plaintiff: "If a[n independent] government refuses to do justice to individuals [of another independent state], war is the consequence. Is this the bloody alternative to which we are referred?" *Id.* at 573. Randolph would later represent the plaintiffs in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). James Wilson, also a member of the Committee of Detail, defended the clause in the Pennsylvania ratification debates. 2 ELLIOT'S DEBATES, *supra* note 40, at 491. Wilson was a member of the Supreme Court which heard *Chisholm*, and he supported the Court's holding that article III abrogated the sovereign immunity of the states. 2 U.S. (2 Dall.) at 466. *See infra* notes 50–55 and accompanying text.

[48] During the ratification debates, several states proposed amendments to the Constitution to limit or eliminate the states' amenability to suit in federal courts. *See* 3 ELLIOT'S DEBATES, *supra* note 40, at 660–61 (Virginia: amendment to eliminate all diversity and federal question jurisdiction); 4 ELLIOT'S DEBATES, *supra* note 40, at 246 (North Carolina: same); 2 ELLIOT'S DEBATES, *supra* note 40, at 409 (New York: amendment to bar any suit against a state). In Congress, an amendment to the Constitution was proposed during debate of the Judiciary Act of 1789 to strike the article III grant of state-citizen diversity. 1 ANNALS OF CONG. 762 (J. Gales ed. 1789). That these proposed amendments were felt necessary casts doubt that a "general understanding" existed that the states were immune from suit.

[49] *See* Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1796), *dismissed sub nom.* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (eleventh amendment applies to bar pending actions); Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792) (action by British citizen and South Carolina loyalists against state, challenging validity of sequestration laws); Oswald v. New York, 2 U.S. (2 Dall.) 401 (1792) (action by Pennsylvania citizen seeking payment for services rendered); Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791) (action against states by Dutch bankers). *See generally* Gibbons, *supra* note 3, at 1920–21.

[50] 2 U.S. (2 Dall.) 419 (1793).

[51] The facts of the case have engendered some dispute. Warren stated that the suit was on behalf of a British creditor. 1 C. WARREN, *supra* note 39, at 93 n.1. His error has been corrected. *See* C. JACOBS, *supra* note 46, at 47 (1972); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 217 n.38 (1968).

[52] C. JACOBS, *supra* note 46, at 47. The Georgia legislature had refused to satisfy the merchant's claim, suggesting he sue the commissioners who had purchased the goods. Chisholm, the merchant's executor, did not sue the insolvent commissioners, and chose to sue the state in federal court. The district court dismissed his suit, holding the court had no jurisdiction. *Id.* at 47 n.29 (citing Farquhar's Executor v. Georgia (1791) (unreported case)). Chisholm then filed an original bill in the Supreme Court. *Id.* at 47. In the Supreme Court, the plaintiff was represented by Edmund Randolph, who was then Attorney General of the United States. 2 U.S. (2 Dall.) at 419. Randolph had been a member of the Committee of Detail at the Constitutional Convention which had drafted the article III grant of power, and was a defender of that clause granting jurisdiction in federal courts over suits against a state. *See supra* note 47.

immune from suit without its consent.[53] The issue of whether a state was suable by individual citizens of another state was thus squarely presented. The Court in *Chisholm* held that article III granted the federal judiciary power to hear suits against a state by a citizen of another state in the clause granting diversity jurisdiction.[54] Accordingly, the Court held that Georgia must defend the suit, or else a default judgment would be entered against the state.[55]

The Court's decision in *Chisholm* prompted an immediate and hostile reaction. The Georgia House of Representatives resolved that any attempt to enforce the Supreme Court's judgment was a felony, punishable by hanging without benefit of clergy.[56] A resolution introduced into the United States Senate within days of the Supreme Court's decision called for a constitutional amendment to overturn the result in *Chisholm*.[57] In 1794, the eleventh amendment passed both houses, was subsequently ratified by the states, and became effective in 1798.[58]

The purpose of the eleventh amendment was to overturn the result in *Chisholm*. The question remained, however, how far beyond that narrow purpose the eleventh amendment was to extend. The language of the amendment implies that it is not an absolute bar to suit against states.[59] The breadth of the bar, however, was only gradually to be resolved. While overturning the result in *Chisholm*, the adoption of the eleventh

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[53] 2 U.S. (2 Dall.) at 419.

[54] *Id.* at 478 (opinion of Jay, C.J.). The opinions were delivered *seriatim*, with five justices holding the state suable, and one dissenter. Among the majority were Chief Justice Jay and Justice James Wilson, who had been a member of the Committee of Detail at the Constitutional Convention which had drafted the article III grant of power. *See supra* note 47 and accompanying text. The lone dissenter in *Chisholm* was Justice Iredell, who argued that jurisdiction had not been statutorily implemented. 2 U.S. (2 Dall.) at 449 (opinion of Iredell, J.). Justice Iredell went on, in what he labelled dicta, to state that "my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money." *Id.* Some later Courts treated Justice Iredell's opinion as the general understanding that states were immune from suit, and the eleventh amendment as vindicating his opinion. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 18–19 (1890).

[55] 2 U.S. (2 Dall.) at 479.

[56] *See* C. JACOBS, *supra* note 46, at 56–57.

[57] *See* Gibbons, *supra* note 3, at 1927. There is some dispute over how soon after the decision in *Chisholm* was read in the Supreme Court this resolution was introduced. Warren, widely cited, states that the resolution was introduced the next day in the House. 1 C. WARREN, *supra* note 39, at 101. Gibbons contends, from a search of the Annals of Congress and the National Archives, that a resolution was first introduced in the Senate two days later. Gibbons, *supra* note 3, at 1926. In addition, commentators differ on the force of the reaction to *Chisholm*. *Compare* 1 C. WARREN, *supra* note 39, at 96–101, *with* Nowak, *supra* note 8, at 1433–36, *and* Gibbons, *supra* note 3, at 1926–27.

[58] U.S. CONST. amend. XI. The amendment provides:

> 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.

Id.

[59] The language of the eleventh amendment, *see supra* note 58, closely parallels the grant of jurisdiction in article III, *see supra* note 2. Some commentators have asserted that the last fourteen words of the eleventh amendment restrict its operation, and preclude interpreting it as a broad, categorical immunity. This shows, they contend, that the eleventh amendment was intended as a narrow, technical restriction on the jurisdiction based solely on party status, and does not reach the independent grants of jurisdiction, such as federal question jurisdiction. *See, e.g.*, Gibbons, *supra* note 3, at 1927; Fletcher, *Historical Interpretation*, *supra* note 3, at 1060.

amendment did not necessarily constitutionalize a "general understanding" that the states would be immune from suit.[60]

In a recent article, Judge Gibbons examined the historical circumstances surrounding the adoption of the eleventh amendment and its "revision" after 1875.[61] Starting with the premise that there was at most a variety of opinions at ratification of the Constitution whether article III abrogated state sovereign immunity, Judge Gibbons interpreted the eleventh amendment as a narrow, technical restriction on the jurisdiction of the federal courts.[62] The Federalists then in power narrowly framed the amendment to overturn the particular result in *Chisholm*, and thus defuse calls for a new constitutional convention and stem the tide of Republican furor.[63] The Federalists succeeded in overturning *Chisholm* in the narrowest fashion, thus maintaining the enforceability of the Peace Treaty with Great Britain against the states.[64] According to Judge Gibbons, therefore, the eleventh amendment is a narrow, technical bar to jurisdiction when state-citizen diversity is the only basis for jurisdiction in a suit against a state.[65] Thus, the eleventh amendment does not require a broad state sovereign immunity, according to Judge Gibbons; however, an independent doctrine of state sovereign immunity remains.[66] The error presently committed, Judge Gibbons contended, is in reading that separate doctrine into the eleventh amendment.[67]

Professor Fletcher has argued for a similarly limited reading of the eleventh amendment.[68] Professor Fletcher concluded that the eleventh amendment restricts the article III grant of jurisdiction between states and citizens of other states to cases in which the state is the plaintiff.[69] Thus, according to Professor Fletcher, the eleventh amendment does not speak directly to suits which come into federal courts under another head of jurisdiction, such as federal questions.[70]

Despite assertions that the eleventh amendment had the broader purpose of restoring an original understanding of state immunity,[71] the history of the adoption of the

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[60] Professor Field argues that the eleventh amendment only overturned the decision in *Chisholm*; neither the amendment nor article III contain any constitutional requirement of state sovereign immunity. Field, *supra* note 7, at 538. Instead, she contends, the eleventh amendment states simply that the adoption of article III did not abrogate the ancient, common law doctrine of sovereign immunity as applied to the states. *Id.* at 540. According to Professor Field, what exists after adoption of the eleventh amendment is the common law doctrine of sovereign immunity, which may be continued, modified, or repealed by Congress or the courts. *Id.*

[61] Gibbons, *supra* note 3. Judge Gibbons wrote the opinion for the court of appeals in *Pennhurst II*. See *infra* notes 154–73 and accompanying text for a discussion of his opinion.

[62] Gibbons, *supra* note 3, at 1894.

[63] *Id.* at 1934.

[64] *Id.* at 1934–35. In the treaty with Great Britain, the parties "agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Definitive Treaty of Peace with Great Britain (Treaty of Paris), Sept. 3, 1783, United States-Great Britain, art. IV, 8 Stat. 80, 82 (1783). The American states, especially in the South, objected to these provisions of articles IV, V, and VI of the treaty, which the national government had pledged to enforce. *See* Gibbons, *supra* note 3, at 1899–1902.

[65] *Id.* at 1937.

[66] *Id.* at 2004.

[67] *Id.* at 1936–37, 2004.

[68] Fletcher, *Historical Interpretation*, *supra* note 3, at 1036–37.

[69] *Id.* at 1035. This interpretation is in keeping with the arguments advanced by Madison and Marshall during the ratification debates in Virginia. *See supra* note 43 and accompanying text.

[70] Fletcher, *Historical Interpretation*, *supra* note 3, at 1036.

[71] "The Amendment's language overruled the particular result in *Chisholm*, but this Court has

Constitution reveals no such general understanding. The eleventh amendment was more narrowly tailored to overturn the particular result in *Chisholm*. The expansive interpretation of the eleventh amendment to stand for broad state immunity arose from later judicial interpretation.

B. *Judicial Interpretation of the Eleventh Amendment*

The expansive interpretation given to the eleventh amendment today arose not from an understanding at the adoption of the Constitution or the eleventh amendment, but from judicial reinterpretation in the particular historical circumstances of the post-Reconstruction era. Examining the historical development of eleventh amendment interpretation clarifies the genesis of the doctrines applied today, and illuminates the fundamental issue of federalism which lies behind the Court's eleventh amendment analysis.

The adoption of the eleventh amendment did not resolve the limits of federal judicial power over the states. Initially, the amendment was applied within its narrow terms to bar suits based only on state-citizen diversity. Other aspects of federal judicial power were challenged in the early nineteenth century as the states and the federal government defined and shaped the workings of the novel federal system.[72] The Supreme Court's decisions in this early period, especially those of the Marshall Court, are distinguished by this concern for the federal structure.

Because general federal question jurisdiction was not granted until 1875,[73] the eleventh amendment's reach was only tested in a limited area of article III jurisdiction. Prior to 1875, the eleventh amendment was dispositive in only one case.[74] That case, moreover, fell within the literal terms of the eleventh amendment: federal jurisdiction was based solely on state-citizen diversity.[75] Thus, the Marshall and Taney Courts did not apply the eleventh amendment beyond its terms of a narrow, technical restriction on federal court jurisdiction.

The Supreme Court under Chief Justice Marshall did have occasion to consider the reach of federal judicial power in other, more general instances, however. In *Cohens v. Virginia*,[76] the Court upheld its jurisdiction over a writ of error to a state court decision arising under the Constitution, in which Virginia had convicted the defendant for selling

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recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst II*, 465 U.S. at 98. *Cf.* Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3171 (1985) (Brennan, J., dissenting) ("The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.").

[72] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (Supreme Court review of state court criminal proceedings); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Supreme Court review of federal issues in state court decisions); Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810) (Supreme Court review of actions of state legislatures); Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803) (Supreme Court review of congressional legislation).

[73] Federal question jurisdiction was granted for a brief period in 1801–1802, but was not extended for any significant period until 1875. *See* Gibbons, *supra* note 3, at 1941 n.279.

[74] *Ex parte* Madrazzo, 32 U.S. (7 Pet.) 627 (1833). *See* Gibbons, *supra* note 3, at 1961–68.

[75] *Ex parte* Madrazzo, 32 U.S. (7 Pet.) 627, 632 (1833).

[76] 19 U.S. (6 Wheat.) 264 (1821).

lottery tickets.[77] Chief Justice Marshall rejected Virginia's claim that the eleventh amendment barred this suit because the state was a party to the suit and thus forced to appear.[78] The judicial power, the Court held, extended to cases "arising under the [C]onstitution or laws of the United States,"[79] and to which Congress had passed enabling legislation.[80]

In *Osborn v. Bank of the United States*,[81] the Marshall Court held that the eleventh amendment did not bar district court jurisdiction in issuing an injunction against state officials in a case arising under federal law.[82] Chief Justice Marshall, while holding that the case arose under federal law, also suggested that the eleventh amendment was limited to suits in which the state was named as a defendant.[83] Although Chief Justice Marshall later expanded this interpretation,[84] the limited effect given the eleventh amendment, applying it only within its literal terms, remained the interpretation of the eleventh amendment for over fifty years.

The Civil War and its aftermath worked a fundamental restructuring of the relationship between the federal government and the states. The adoption of the thirteenth, fourteenth, and fifteenth amendments extended the reach of the federal government and limited state power and autonomy. During this period, federal question jurisdiction was extended to the federal courts,[85] and the Civil Rights Act of 1871 created a cause of action for deprivation of constitutional rights under color of state law.[86]

The question of the eleventh amendment's scope was reconsidered during this period of adjustment between the federal government and the states. This reevaluation was precipitated by defaults on bonds issued by southern state governments.[87] Creditors

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[77] *Id.* at 412. *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (writ of error to state court not barred by eleventh amendment even where state-citizen diversity existed between the parties). *See also* Gibbons, *supra* note 3, at 1952–56.

[78] 19 U.S. (6 Wheat.) at 412.

[79] *Id.*

[80] *Id.* at 429–30.

[81] 22 U.S. (9 Wheat.) 738 (1824).

[82] *Id.* at 856. In *Osborn*, the state of Ohio sought to impose a tax on the Bank of the United States, and state officers seized notes and currency from the Bank, ignoring a federal district court injunction. *Id.* at 739–44. The suit in *Osborn* arose under the federal act establishing the bank, not under general federal question jurisdiction. *Id.* at 823.

[83] *Id.* at 857.

[84] In a later case, Chief Justice Marshall expanded this interpretation to include a suit brought against a Governor in his official capacity. Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 123–24 (1828). See Gibbons, *supra* note 3, at 1961–67 for an extensive discussion of this case, arguing that Chief Justice Marshall avoided holding that the eleventh amendment applied to suits in admiralty.

[85] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875).

[86] Ku Klux Klan Act, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1982)).

[87] Defaulted bonds became a serious problem in this period. Defaults by southern states, burdened with debts from the war and from Reconstruction governments, became common. The issue of "adjusting" the bonds became a political cause of resurgent Democrats in the South. *See* Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study in Judicial Power*, 1983 U. ILL. L. REV. 423, 431–35 [hereinafter cited as Orth, *Interpretation*]; Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C.L. REV. 747, 753–64 (1981) [hereinafter cited as Orth, *North Carolina*]; *see also* Gibbons, *supra* note 3, at 1974–82. Defaults were not limited to the South. Defaults elsewhere, however, differed in at least one critical respect. Bonds in the Midwest, another source of frequent bond defaults, were generally issued by cities and local governments. In the South, which was less urbanized, bonds were generally issued and approved by the state legislature. *See* Gibbons, *supra* note 3, at 1976. The Supreme Court enforced the obligations of local bonds,

sued the states in the federal courts, seeking relief they were unable to obtain from the states.[88] At first, the federal courts extended protection to the bondholders.[89]

After the Compromise of 1877,[90] however, the Court began to dispose of default bond cases under the eleventh amendment.[91] In *Hans v. Louisiana*,[92] the culmination of this line of cases, holders of Louisiana bonds sought to avoid the strictures of the eleventh amendment by having a citizen of Louisiana bring suit in federal court under federal question jurisdiction.[93] The bondholders reasoned that the eleventh amendment's terms applied only to suits by citizens of different states. Nevertheless, the Supreme Court held that the federal court did not have jurisdiction to hear this claim against the state.[94] Although the literal terms of the eleventh amendment did not reach this case, the citizen being of the *same* state, the Court reasoned that the states would not have adopted a

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holding that the eleventh amendment protected only the state, not political subdivisions and local governmental units. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890). The distinction between a state and its subdivisions for purposes of the eleventh amendment persists. *See Pennhurst II*, 465 U.S. at 123 n.34. See generally 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88 ch. XIII–XIV (1971), for a discussion of the nineteenth century municipal bond cases.

[88] The Virginia "coupon-killer" laws are an example of state obstruction of efforts of bondholders to protect their rights. The state had previously made bond coupons legal tender for payment of taxes. Legislation passed in 1882 required taxpayers to pay taxes in cash before seeking to compel the tax collector to accept the coupons and refund the cash in a judicial proceeding, in which the taxpayer had the burden of persuading the jury that the coupons were valid. *See* Gibbons, *supra* note 3, at 1986–87.

[89] Louisiana passed legislation in 1875 which had the effect of reducing the value of collateral pledged by the state on issuing bonds. *Id.* at 1977. In an early suit by a Delaware citizen, the Supreme Court affirmed a circuit court injunction restraining Louisiana state officials from attempting to carry out the act. Board of Liquidation v. McComb, 92 U.S. 531, 541 (1875).

[90] By 1877, the Republican Reconstruction governments in the southern states were being replaced by Democrats. The results of the election in 1876 were disputed, provoking a constitutional crisis over whose electors would be seated, and the Democrat-controlled House threatened to let Grant's term expire without resolving the election. In what is generally called the Compromise of 1877, the Republican Hayes secured the Presidency. Soon thereafter, the Republican President ceased using federal troops to protect southern Reconstruction governments, and Congress passed the Posse Comitatus Act, forbidding the use of military personnel in a posse comitatus. The federal government lost its only effective means of enforcing laws in the South, hastening the end of Reconstruction. *See* Gibbons, *supra* note 3, at 1978–81.

[91] In a new state constitution, Louisiana diverted taxes pledged to payments on the bond to the state treasury to meet general expenses. While relying on the precedent of Board of Liquidation v. McComb, 92 U.S. 531 (1875), *see supra* note 89, bondholders pursued other avenues to assure a federal forum. The bondholders assigned bonds to the states of New Hampshire and New York, which sued Louisiana — suits between states did not fall within the terms of the eleventh amendment. The Supreme Court held that a state could not sue another state on behalf of its citizens. New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883). In the suit by bondholders from other states, the Supreme Court held that the suit was barred by the eleventh amendment, despite the precedent of *McComb*. Louisiana v. Jumel, 107 U.S. 711, 725–27 (1882). *See generally* Gibbons, *supra* note 3, at 1968–91; Orth, *Interpretation*, *supra* note 87, at 435–38.

[92] 134 U.S. 1 (1890).

[93] *Id.* at 9.

[94] *Id.* at 15. The Supreme Court has generally interpreted *Hans* as rooting this immunity in the eleventh amendment. *See, e.g.*, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683 n.17 (1982). However, the Court's language in *Hans* may be interpreted as implying the immunity from another source. 134 U.S. at 15. *See* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 314 (1973) (Brennan, J., dissenting) (arguing Court in *Hans* applied a non-constitutional doctrine of sovereign immunity).

provision which barred suits by citizens of different states, while allowing suits by its own citizens.[95]

Examining the circumstances surrounding the adoption of the eleventh amendment, the Court concluded that the decision of *Chisholm* departed from an original understanding that the states would be immune from suit.[96] The *Chisholm* decision, the Court continued, created a "shock of surprise throughout the country."[97] Allowing citizens to sue their own state in federal court, the Court concluded, would be an anomalous result "no less startling and unexpected."[98] The Court therefore reasoned that the principles of the eleventh amendment barred this suit as well.[99]

The revision of eleventh amendment interpretation in *Hans* was a product of the post-Civil War restructuring of the federal system. Bond defaults by southern states posed a severe political problem to federal enforcement of a Court decision against the states.[100] The expansive interpretation of the eleventh amendment in *Hans* avoided confronting this practical limitation on the Court's power.[101]

At the same time that the Court interpreted the eleventh amendment to provide this broad immunity from suit in federal courts, however, a new kind of suit began to be pressed against the states. As states began to regulate railroads and their rates, the railroads sought protection in the federal courts.[102] Only eighteen years after *Hans*, the Supreme Court created an important exception to the broad sovereign immunity protection that the *Hans* Court had read into the eleventh amendment.

In *Ex parte Young*,[103] the Court upheld a district court decree enjoining the Attorney General of Minnesota from bringing suit in state courts against railroads for violation of maximum rates set by the state.[104] The railroads argued that the state-imposed rates were confiscatory, and thus violated their rights under the due process clause of the fourteenth amendment.[105] Furthermore, the state legislation imposed heavy fines and criminal sanctions for failure to comply with these rates.[106]

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[95] *Hans*, 134 U.S. at 15.

[96] *Id.*

[97] *Id.* at 11.

[98] *Id.* at 10–11.

[99] *Id.* at 21. Justice Harlan concurred in the judgment of the Court, but in a brief opinion he disagreed with the Court's statements about *Chisholm*, which Harlan found "based upon a sound interpretation of the Constitution as that instrument then was." *Id.* (Harlan, J., concurring).

[100] *See supra* notes 87–90 and accompanying text.

[101] Gibbons, *supra* note 3, at 1989–2003. Judge Gibbons concluded that the Court granted the defaulting southern states this broader immunity in order to avoid reaching a decision which the Court could not enforce, while maintaining jurisdiction over defaulting local governments. *Id.* at 1971, 1976–78, 2000. *See also* Orth, *Interpretation*, *supra* note 87, at 424. See *supra* note 87 for a discussion of the differences between bond defaults by southern states and by local governments.

[102] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 432–34 (1978); Gibbons, *supra* note 3, at 2000. This era marked the rise of substantive due process as the Court struck down legislation infringing liberty of contract. This period is most closely associated with the Court's decision invalidating state regulation of maximum hours for bakers in Lochner v. New York, 198 U.S. 45 (1905).

[103] 209 U.S. 123 (1908). The Court's decision in *Ex parte Young* must be considered in light of the development of substantive due process. In fact, both *Lochner* and *Ex parte Young* were written by Justice Peckham. *See generally* Duker, *Mr. Justice Rufus W. Peckham and the Case of* Ex Parte Young*: Lochnerizing* Munn v. Illinois, 1980 B.Y.U. L. REV. 539.

[104] *Ex parte* Young, 209 U.S. at 126.

[105] *Id.* at 130–31.

[106] *Id.* at 145.

The Court in *Ex parte Young* adopted the fiction that actions of a state official which contravene the federal constitution are not actions of the state.[107] Rather, these were deemed to be individual actions by the state official, not within the protection of the eleventh amendment.[108] The unconstitutional actions stripped the official of any official character, permitting suit to continue against the official as an individual. This separation of the individual acts of the official from those of the state was not new. Prior cases had already held that sovereign immunity did not protect officials for common law torts.[109] The Court in *Ex parte Young* extended this doctrine of individual action of the official, rather than holding that state sovereign immunity did not extend to violations of the federal Constitution.[110]

By employing this fiction of individual action by the official, the railroads could challenge the constitutionality of the state laws. The Court found the other methods by which the railroads could have tested the constitutionality of the state laws insufficient protection for constitutional rights.[111] If the railroad chose to ignore the laws and defend in state court on constitutional grounds, the Court noted, they would be forced to face imprisonment and fines, a "risk the company ought not to be required to take."[112] Therefore, the Court concluded, this case was an appropriate exercise of federal jurisdiction, allowing the railroads to use their constitutional protection as a sword, not merely as a shield,[113] against violations.

Justice Harlan alone dissented, noting that the Court now permitted suits against state officials where they had previously been barred.[114] Justice Harlan argued that there was no basis for suing the defendant other than in his official capacity, and that the

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[107] *Id.* at 159–60.

[108] *Id.* The Court stated:

> It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional . . . and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id.

[109] *See supra* note 13 and cases cited therein. The Supreme Court in *In re Ayers* held that the individual official must threaten plaintiff's personal or property rights, and be personally and individually liable for the conduct. 123 U.S. 443, 500–01 (1887). In other words, the plaintiff must state a cause of action against the individual; the unconstitutionality of his action leaves the official defenseless.

[110] In *Ex parte Young*, the state official sued did not commit a common law wrong to the plaintiffs, as was required in *In re* Ayers, 123 U.S. 443, 500–01 (1887). Thus, *Ex parte Young* extended this separation of the official from the state into a fiction employed to circumvent the broad interpretation of state immunity extended in *Hans*, 134 U.S. at 160. Today, this extension in *Ex parte Young* is viewed almost exclusively as a fiction. *See Pennhurst II*, 465 U.S. at 105; 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4231, at 359 (1978 & Supp. 1984) [hereinafter cited as WRIGHT, MILLER, & COOPER]; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48, at 209 (3d ed. 1976) [hereinafter cited as C. WRIGHT].

[111] *Ex parte* Young, 209 U.S. at 165.

[112] *Id.*

[113] *See* Edelman v. Jordan, 415 U.S. 651, 664 (1974).

[114] *Ex parte* Young, 209 U.S. at 169 (Harlan, J., dissenting). Justice Harlan noted that he, too, had reversed positions. In *Hans*, Justice Harlan had concurred, but disagreed with the *Hans* Court's assertion that *Chisholm* had violated an original understanding of state sovereign immunity. *See supra* note 99.

majority's holding would prevent the state from proceeding in its own courts.[115] This intrusion was severe, he contended, reaching the essential state function of proceeding in its own courts, and left no basis for the fiction that the suit was anything but a suit against the state. Therefore, he concluded, this suit should be barred by the eleventh amendment.[116]

Hans and *Ex parte Young* created a tension in eleventh amendment jurisprudence. The courts interpreted the eleventh amendment as a broad constitutional grant of state sovereign immunity,[117] which extended beyond its literal terms. At the same time, the Court had created the *Young* doctrine, a fiction which enabled the courts to strip state officials, and thus indirectly the state, of that immunity. Subsequent cases reflect this tension, as courts attempted to reconcile the conflicting interests.[118]

Beginning with school desegregation in the 1950's, federal courts increasingly issued affirmative injunctions against state officials to remedy constitutional violations.[119] The fiction of *Ex parte Young* enabled the federal courts to issue injunctions against these state officials, and was thus the vehicle for tremendous growth in the involvement of federal courts in suits against state officials.[120] In 1964, the Supreme Court further limited the protections of eleventh amendment immunity to the states by holding that state involvement in an area regulated by Congress was a waiver of sovereign immunity.[121] This

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[115] *Ex parte* Young, 209 U.S. at 174 (Harlan, J., dissenting). Justice Harlan argued that this suit was:

> [A]s to the defendant Young, one against him as, *and only because he was*, Attorney General of Minnesota. No relief was sought against him individually but only his capacity *as* Attorney General. And the manifest, indeed the avowed and admitted, object of seeking such relief was *to tie the hands* of the *State* so that it could not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes and orders in question.

Id. (emphasis in original).

[116] *Id.* at 204 (Harlan, J., dissenting).

[117] Prior to *Hans*, these notions were not always kept distinct. In *United States v. Lee*, Robert E. Lee's son sued to recover property — the family's Arlington estate — seized by the United States government for nonpayment of taxes during the Civil War. The Supreme Court held that the federal government's sovereign immunity was not a bar to action against the federal officials in this case. 106 U.S. 196, 223 (1882). In dissent, Justice Gray argued that federal and state sovereign immunity were indistinguishable, and that state sovereign immunity was constitutionalized by the eleventh amendment. 106 U.S. at 226–34 (Gray, J., dissenting). *See also* Gibbons, *supra* note 3, at 1973.

[118] The eleventh amendment continued to be interpreted as a broad constitutional bar to suits against states in Monaco v. Mississippi, 292 U.S. 313 (1934). In that case, state bonds which had been repudiated were assigned to the Principality of Monaco, which sued the state in federal court. *Id.* at 317–18. The bonds had been issued in 1833 and 1838, one hundred years before coming into the hands of the Principality of Monaco. *Id.* Although the eleventh amendment's terms do not extend to suits by a foreign state, the Court relied on *Hans* to bar this suit. *Id.* at 322 ("behind the words of the constitutional provisions are postulates which limit and control"). Despite the broad protection thus extended, however, federal courts continued to apply the doctrine of *Ex parte Young* to suits against state officials.

[119] *See, e.g.*, Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 228 (1964) (school desegregation).

[120] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 690 (1978) (prisons); Reynolds v. Sims, 377 U.S. 533 (1964) (voting reapportionment); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (mental hospitals), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[121] Parden v. Terminal Ry., 377 U.S. 184, 196 (1964).

doctrine of constructive waiver extended the range of permissible suits against states in federal courts.[122]

Beginning in 1971, however, the Court began to reexamine the limits on federal judicial power over the states, including the limits imposed by the eleventh amendment.[123] The Court defined the states' eleventh amendment protection in *Edelman v. Jordan*, its most complete statement of the eleventh amendment's bar.[124] In *Edelman*, plaintiffs in a class action sued Illinois officials administering federally assisted programs for the aged, blind, and disabled for failing to comply with federal time limits on processing applications.[125] Plaintiffs sought an injunction to force compliance, and also to remit wrongfully withheld benefits.[126] The district court issued an injunction, and the court of appeals affirmed, characterizing the relief as "equitable" and thus permissible under the eleventh amendment.[127] The Supreme Court reversed, holding that the eleventh amendment barred a federal court from issuing an injunction which granted retroactive relief.[128] Retroactive relief, the Court reasoned, too closely resembled a monetary award directly against the state.[129] This limitation built upon prior Court decisions which reasoned that money damages which clearly would come from the state treasury and not the individual official were too difficult to grant while maintaining the fiction of *Ex parte Young*.[130] The Court stressed that prohibition of retroactive relief was also necessary in order to maintain the fiction of *Ex parte Young* that the suit is against the individual official and not the state.[131]

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[122] *Id.*

[123] *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (Congress may not regulate pursuant to the commerce power where it would "displace the States' freedom to structure integral operations in areas of traditional governmental functions.") (overruled by Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985)); Rizzo v. Goode, 423 U.S. 362 (1976) (federalism prohibits federal court injunction ordering improved police grievance procedures); Warth v. Seldin, 422 U.S. 490 (1975) (broad range of plaintiffs lacked standing to challenge exclusionary zoning laws); Edelman v. Jordan, 415 U.S. 651 (1974) ("Our Federalism" prohibits federal court injunction to stay state court criminal proceeding). *See also* Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

[124] 415 U.S. 651 (1974).

[125] *Id.* at 653.

[126] *Id.* at 653–56.

[127] *Id.* at 665–66. The court of appeals in *Edelman* distinguished equitable relief from an action for damages. *Id.* The Supreme Court had previously held that an action for money damages which clearly would come from the state treasury and not from the individual official was barred by the eleventh amendment. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 50 (1944). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

[128] *Edelman*, 415 U.S. at 665.

[129] *Id.*

[130] *See supra* note 127.

[131] *Edelman*, 415 U.S. at 667. "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id. Edelman*'s distinction between prospective and retrospective injunctive relief has been followed even where the prospective relief involves expenditures directly from the state. *See, e.g.*, Milliken v. Bradley (II), 433 U.S. 267 (1977) (eleventh amendment no bar to injunctions against Michigan Governor to pay share of costs of remedial desegregation of schools). The limit on relief has been modified, however, where Congress, acting

In summary, the law prior to *Pennhurst II* reflected a tension between the doctrine of *Hans*, extending an immunity to the states broader than the terms of the eleventh amendment, and the doctrine of *Ex parte Young*, employing the fiction that a suit against the official was not a suit against the state. *Edelman* limited the reach of the *Young* doctrine, allowing only prospective injunctive relief, but did not remove the tension inherent in granting broad immunity to the states while allowing injunctions against state officials. This tension is the result of the Court's expansive interpretation of the eleventh amendment. The Court's doctrines reflect its concern for issues of federalism, both state autonomy and federal supremacy. By addressing these concerns through the eleventh amendment, however, the resulting doctrines are confused and the focus on federalism is distorted.

II. *Pennhurst State School & Hospital v. Halderman*

The Supreme Court's decision in *Pennhurst II* was the result of a complex institutional suit which was before the Supreme Court for the second time in litigation spanning a decade.[132] This section examines the Supreme Court's decision in *Pennhurst II*. Part A describes the origins of the Pennhurst litigation, and traces the litigation through the court of appeals and to the Supreme Court for the first time in *Pennhurst I*.[133] Part B examines the decision of the court of appeals on remand in *Pennhurst II*.[134] Finally, Part C will consider the opinions of the Supreme Court in *Pennhurst II*.[135]

A. *The origins of Pennhurst and* Pennhurst I

Pennhurst State School and Hospital was a large institution run by the State of Pennsylvania for the care and treatment of the mentally retarded. The institution was overcrowded and grossly understaffed,[136] and the conditions were shocking. Patients were routinely drugged for ease of control, not for treatment,[137] and physically restrained as a control measure in lieu of adequate staffing.[138] The hospital's environment was physically and psychologically hazardous.[139] Patients were unprotected from abuse by other patients or self-abuse,[140] and were physically abused by staff members.[141] Excrement and urine often smeared ward floors, and living areas did not meet minimal standards of cleanliness.[142] Patients at Pennhurst received little or no habilitation. Frequently, patients suffered physical deterioration and behavioral and intellectual regres-

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pursuant to section five of the fourteenth amendment, permits damages against states. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). In other cases, decided by slim majorities, the eleventh amendment's application has been difficult to reconcile. *See supra* note 21 and cases cited therein.

[132] Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *modified*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd* 451 U.S. 1 (1981), *aff'd on remand*, 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd*, 465 U.S. 89 (1984).

[133] Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (*Pennhurst I*).

[134] 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd* 465 U.S. 89 (1984).

[135] 465 U.S. 89 (1984).

[136] 446 F. Supp. at 1303.

[137] *Id.* at 1307.

[138] *Id.* at 1306.

[139] *Id.* at 1308.

[140] *Id.*

[141] *Id.* at 1309. The district court noted that one patient had been raped by a staff member. *Id.*

[142] *Id.* at 1308.

sion.[143] All parties agreed that Pennhurst was inappropriate and inadequate for the habilitation of the retarded.[144]

Terri Lee Halderman, a minor and a retarded resident of Pennhurst, acted as the class representative for all residents in a class action against Pennhurst, its superintendent, and state officials responsible for its operation.[145] The plaintiffs charged that Pennhurst's conditions and operation violated the class members' rights under the federal Constitution,[146] federal statutes,[147] and a state statute.[148] The United States District Court for the Eastern District of Pennsylvania found that conditions at Pennhurst violated plaintiffs' rights on constitutional, federal statutory, and state statutory grounds.[149] Concluding that Pennhurst, as an institution, could not adequately protect the patients' federal and state rights, the district court ordered other provisions for the care of those at Pennhurst and appointed a Special Master to carry out the court's orders.[150] The United States Court of Appeals for the Third Circuit substantially affirmed the district court's decisions, relying primarily on the federal statutory provisions of the Bill of Rights section of the Developmentally Disabled Assistance and Bill of Rights Act.[151]

On appeal, the Supreme Court reversed the Third Circuit, finding that the Developmentally Disabled Assistance and Bill of Rights Act did not confer any substantive rights to the mentally retarded, and thus granted no private cause of action.[152] Noting that the court of appeals had avoided the other grounds for the district court's decision — the Constitution, section 504 of the Rehabilitation Act of 1973, and state law — the Supreme Court remanded the case for consideration of these issues.[153]

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[143] *Id.* at 1309.

[144] *Id.* at 1304.

[145] The plaintiff class was expanded to include all persons who were or might become residents of Pennhurst. *Id.* at 1300–01. In addition, the Pennsylvania Association for Retarded Citizens (PARC) and the United States were allowed to intervene, and defendants ultimately included Pennhurst, several of its officials, the State Department of Public Welfare and several of its Commissioners, county mental retardation administrators, and various other officials of surrounding counties. *Id.* at 1301–02.

[146] Plaintiffs asserted violations of various constitutional rights, primarily under the eighth and fourteenth amendments. *Pennhurst II*, 465 U.S. at 93.

[147] Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1976 ed. & Supp. V); Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 *et seq.* (1976 ed. and Supp. V).

[148] Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, § 4101 *et seq.* (Purdon 1969 & Supp. 1982) [hereinafter cited as "MH/MR Act"].

[149] 446 F. Supp. at 1320, 1322, 1323, 1324. These rights, variously formulated, included rights to "minimally adequate habilitation," *id.* at 1323, "freedom from harm," *id.* at 1321, "nondiscriminatory habilitation," *id.*, and "least restrictive setting for habilitation," *id.* at 1319.

[150] *Id.* at 1325–26. The federal statute relied on was § 504 of the Rehabilitation Act of 1973, *see supra* note 147.

[151] 612 F.2d at 100. The district court had not based its holding on this federal statute. *See supra* note 150. The court of appeals also affirmed the district court in the alternative on state law. 612 F.2d at 103. The court of appeals modified the district court's order that the institution be closed. *Id.* at 114–15.

[152] 451 U.S. at 18.

[153] 451 U.S. at 30–31. The Court responded to plaintiff's argument that state grounds were sufficient to affirm the court of appeals:

> There are, however, two difficulties with that argument. First, the lower court's finding that state law provides a right to treatment may well have been colored by its holding with respect to § 6010. Second, the court held only that there is a right to "treatment," not that there is a state right to treatment in the "least restrictive" environment. As

B. Pennhurst II: *The Court of Appeals for the Third Circuit*

On remand, the court of appeals affirmed the district court's remedies on the basis of state law.[154] In reaching its decision, the Third Circuit relied on the Pennsylvania Mental Health and Mental Retardation Act as interpreted by the Pennsylvania Supreme Court in *In re Schmidt*.[155] The defendants raised for the first time on remand an eleventh amendment objection to affirming relief on the basis of state law.[156] The court of appeals rejected defendants' eleventh amendment argument, finding the eleventh amendment no bar in this case.[157] According to the court, the relief in this case was permissible under the eleventh amendment doctrines of *Ex parte Young*[158] and *Edelman*,[159] because this suit was against numerous state officials[160] and sought only prospective injunctive relief.[161] The effects on the state itself, following from an injunction issued against these officials, were ancillary.[162] Therefore, the court found, no part of those facts contravened the established doctrines of the eleventh amendment and sovereign immunity.[163]

In addition to arguing that the district court's remedies exceeded the permissible limits under the eleventh amendment, the defendants also argued that the eleventh amendment precluded a federal court from deciding a case on the basis of a pendent state law claim.[164] The Third Circuit traced the history of the interpretation of the eleventh amendment, noting that it had first been given an expansive reading in the post-Reconstruction era in response to political and economic pressures.[165] Soon there-

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> such, it is unclear whether state law provides an independent and adequate ground which can support the court's remedial order. Accordingly, we remand the state-law issue for reconsideration in light of our decision here.

Id. In addition, the Court noted that a decision by the Pennsylvania Supreme Court, rendered after the decision of the court of appeals, had held that Pennsylvania state law required habilitation in the least restrictive environment for a mentally retarded adult plaintiff. *Id.* at 31 n.24 ("[o]n remand following our reversal, the Court of Appeals will be in a position to consider the state-law issues in light of the Pennsylvania's [sic] Supreme Court's recent decision") (citing *In re* Schmidt, 494 Pa. 86, 429 A.2d 631 (1981)).

[154] *See supra* note 148.

[155] 673 F.2d at 661.

[156] *Id.* at 656. Although not always treated as a jurisdictional question, courts have held that an eleventh amendment objection to federal court jurisdiction "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 678 (1974). *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466–67 (1945). In the first appeal from the district court in *Pennhurst I*, the defendants raised an eleventh amendment challenge to the relief granted by the district court, arguing that the relief led directly to the expenditure of state funds. The court of appeals rejected this challenge, finding the relief permissible as prospective injunctive relief, citing Edelman v. Jordan, 415 U.S. 651 (1974), and Quern v. Jordan, 440 U.S. 332 (1979). 612 F.2d at 109. The defendants did not raise an eleventh amendment challenge in the Supreme Court in *Pennhurst I*. *See Pennhurst I*, 451 U.S. at 10–11.

[157] 673 F.2d at 659.

[158] *See supra* notes 103–16 and accompanying text.

[159] *See supra* notes 124–30 and accompanying text.

[160] The Pennhurst State School & Hospital and the State Department of Public Health were also named as defendants. *See supra* note 145.

[161] 673 F.2d at 656.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 657.

[165] *Id.* at 659. Judge Gibbons, the author of the opinion for the court of appeals, also wrote an article expanding his views of the history of the eleventh amendment. See *supra* notes 61–67 and accompanying text for a discussion of Judge Gibbons's article.

after, the court reasoned, the Supreme Court "reconsidered" and held that a federal court could entertain an action for injunctive relief against state officials sued in their official capacities.[166] This principle allowing injunctive relief against state officials was not limited to constitutional claims, the court of appeals held.[167] The court of appeals found that this principle applied to pendent jurisdiction, a doctrine which permitted federal courts to take jurisdiction over related state law claims where federal court jurisdiction is established by a federal question.[168] In *Siler v. Louisville & Nashville R.R.*,[169] the court reasoned, the Supreme Court had upheld an injunction against the state railroad commission on the grounds that they had exceeded their state statutory authority.[170] The justification for pendent jurisdiction in *Siler*, according to the court of appeals, had been to avoid unnecessarily reaching constitutional questions.[171] The court of appeals found the goal of avoiding unnecessary constitutional decisions controlling in this case, especially considered in light of the Supreme Court's instructions to reconsider the state law grounds.[172] Accordingly, the court of appeals affirmed on the basis of the Pennsylvania Mental Health and Mental Retardation Act.[173]

C. Pennhurst II: *The Supreme Court*

The Supreme Court again granted certiorari, and in a five to four decision, again reversed the court of appeals, holding that the eleventh amendment prohibits a federal court from issuing an injunction against state officials on the basis of state law.[174] Reasoning that the eleventh amendment embodies a broad, constitutional sovereign immunity for the states,[175] the Court held that pendent jurisdiction is insufficient to overcome the constitutional sovereign immunity granted to the states by the eleventh amendment.[176]

1. The Majority Opinion

Justice Powell, writing for the majority,[177] began by examining the adoption and interpretation of the eleventh amendment. The true significance of the eleventh amendment, the Court held, is that the article III grant of judicial power is limited by the

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[166] 673 F.2d at 657 (citing *Ex parte* Young, 209 U.S. 123 (1908)).

[167] *Id.* at 658.

[168] *Id.*

[169] 213 U.S. 175 (1909). The court of appeals reasoned that *Siler* must be considered in interpreting the *Young* doctrine, since it was decided one year after *Ex parte Young*, and both opinions were written by Justice Peckham. 673 F.2d at 658.

[170] 673 F.2d at 657–58.

[171] *Id.* at 658 (citing Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909)). This doctrine of avoiding unnecessary constitutional decisions was expressed in the frequently cited case, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[172] 673 F.2d at 658–59 (referring to *Pennhurst I*, 451 U.S. at 31 n.24). "Moreover, even if the Commonwealth's unique interpretation of the pendent jurisdiction rule as inapplicable to suits against state officers had any substance, the Court's express mandate that we reconsider the state law issue appears to preclude its adoption in this case by this Court." *Id.* at 659.

[173] *Id.* at 661.

[174] 465 U.S. at 121–23.

[175] *Id.* at 98, 102–03.

[176] *Id.* at 121.

[177] Chief Justice Burger, and Justices White, Rehnquist, and O'Connor joined Justice Powell in the majority opinion.

fundamental principle of sovereign immunity.[178] In this light, the Court reasoned, the protection of the eleventh amendment applies beyond its literal terms.[179] Relying on this broad interpretation of the eleventh amendment, the Court concluded that sovereign immunity is a constitutionally required limitation on federal judicial power.[180]

Having held that state sovereign immunity is constitutionally required, the Court then considered the scope of a state's immunity. While a state may waive its immunity to suit in federal court, the Court noted, a state's consent to suit must be clearly expressed.[181] In addition, while Congress has power to abrogate a state's immunity to vindicate rights protected by the fourteenth amendment, congressional intent must also be unequivocal.[182] Furthermore, the Court noted that a state's immunity protects both *whether* and *where* it may be sued; although a state may waive its immunity in its own courts, that waiver does not by itself lift the constitutional bar against suit in federal courts.[183] These principles, the Court concluded, reflect the vital role sovereign immunity plays in the federal system.[184] The Court held, therefore, that the principles of federalism behind the eleventh amendment must guide the Court's decision.[185]

The eleventh amendment bar to suits against states, the Court held, extends to any suit in which the state itself or one of its agencies is named as the defendant, regardless of the nature of the relief sought.[186] A suit against state officials, the Court noted, raises a question of whether the suit is in fact one against the state.[187] While finding the precedent inconsistent, the Court found an established principle that where the state is the real, substantial party in interest — where the effect of the suit, regardless of the nature of the damages asked, is on the state — the suit is against the state for purposes of the eleventh amendment.[188]

The only exception to the broad bar of eleventh amendment sovereign immunity, the Court held, is the fiction of *Ex parte Young*, which allows suit in federal court against state officials for the vindication of constitutional rights.[189] The Court reasoned that this exception is a narrow one, solely for the enforcement of federal rights and to assure the supremacy of federal law.[190] Furthermore, the Court noted, limitations on available relief have sharply restricted the application of this narrow exception.[191]

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[178] *Id.* at 97. In addition to overturning *Chisholm*, the Court held, the eleventh amendment represents the broader principle of state sovereign immunity. *Id.*

[179] *Id.* at 96–98 (citing Hans v. Louisiana, 134 U.S. 1 (1890) (federal court has no jurisdiction in a suit against a state by a citizen of the same state), and Monaco v. Mississippi, 292 U.S. 313 (1934) (federal court has no jurisdiction in a suit against a state by a foreign state)). *See supra* notes 92–99, 118 and accompanying text.

[180] 465 U.S. at 98.

[181] *Id.* at 99 (citing *Edelman*, 415 U.S. at 673).

[182] *Id.* (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and Quern v. Jordan, 440 U.S. 332, 342 (1979)). The Court did not discuss Congress's power to abrogate a state's immunity in other realms of congressional authority, such as the commerce clause.

[183] 465 U.S. at 99 n.9.

[184] *Id.* at 99.

[185] *Id.* at 100.

[186] *Id.*

[187] *Id.* at 101.

[188] *Id.* at 101–02 (citing Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945)).

[189] *Id.* at 102 (citing *Ex parte* Young, 209 U.S. 123 (1908)). See *supra* notes 103–16 and accompanying text for a discussion of this case.

[190] 465 U.S. at 102.

[191] *Id.* (citing Edelman v. Jordan, 415 U.S. 651 (1974)). See *supra* notes 124–30 and accompanying text for a discussion of this case.

Having defined the contours of the eleventh amendment doctrines, the Court applied those doctrines to the state law claims presented. Because the eleventh amendment sovereign immunity protects the state, the Court noted, the initial question is whether the suit is against the state.[192] The Court rejected plaintiffs' contention that the suit was permissible because the remedy was limited to prospective injunctive relief.[193] The Court reasoned that the *Young* fiction was an exception to the eleventh amendment bar only to vindicate federal rights and to assure the supremacy of federal law.[194] State-created rights presented no compelling need to carve out exceptions to the eleventh amendment immunity of the states.[195] Therefore, the Court held, the fiction of *Ex parte Young*, that a suit against the state official is not a suit against the state, may only be employed to vindicate federal rights, and not to enforce state law.[196]

Having rejected the use of the fiction that the suit was not against the state where state law was violated, the Court considered whether there was any other basis to conclude that the suit was against the individual officials only, and not the state.[197] The Court noted that the relief ordered by the district court was institutional and official in character, rather than directed at the officials as individuals.[198] Indeed, the Court noted, the district court found that the officials had "acted in the utmost good faith . . . within the sphere of their official responsibilities," and were thus not personally liable for damages.[199] The Court held that a suit against an official is not a suit against the state only if the official acts beyond the authority granted by the state.[200] A claim that the officer misapplied the state law, the Court continued, was insufficient to override the sovereign immunity of the state.[201]

Finally, the Court considered whether the doctrine of pendent jurisdiction might enable the relief affirmed by the court of appeals on the basis of state law to escape the bar of eleventh amendment sovereign immunity.[202] The Court posed the question as whether the judge-made doctrine of pendent jurisdiction displaced the eleventh amendment's explicit, constitutional limitation on federal jurisdiction.[203] The Court rejected prior cases which had granted relief against state officials on the basis of state law, holding that they had not confronted the question directly.[204] In addition, the Court

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[192] 465 U.S. at 103.

[193] *Id.* at 106. The plaintiffs contended that *Ex parte Young* and *Edelman* held that a suit against a state official is not a suit against the state where the state official acts contrary to law (federal or state) and relief is limited to prospective relief. See *infra* notes 229–62 and accompanying text for a discussion of this analysis in Justice Stevens's dissent.

[194] 465 U.S. at 105–06.

[195] *Id.* at 106.

[196] *Id.*

[197] *Id.*

[198] *Id.* at 108.

[199] *Id.* (citing 446 F. Supp. at 1324).

[200] *Id.* at 112 n.22, 113–14 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

[201] *Id.* at 112.

[202] *Id.* at 117.

[203] *Id.* at 118.

[204] *Id.* at 118–19. The Court held the question an open one, reasoning "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Id.* at 119 (citing Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974)).

rejected the "implicit view" of previous cases that the federal question which established jurisdiction resolved any problems raised by the eleventh amendment, and that pendent state law claims raised no new eleventh amendment problems.[205] Instead, the Court held, a federal court must examine each claim presented to determine whether it satisfies the requirements of the eleventh amendment.[206]

Pendent jurisdiction is insufficient to overcome the explicit, constitutional bar against jurisdiction represented by the eleventh amendment, the Court held.[207] The basis for the exercise of pendent jurisdiction, whether interpreting "case" as used in article III,[208] or avoiding deciding constitutional questions,[209] amounted to a "judge-made doctrine of expediency and efficiency."[210] Pointing out that the eleventh amendment acts as an independent limitation on all exercises of federal judicial power, the Court concluded that the amendment's bar could not be overcome by pendent jurisdiction.[211]

In holding that federal courts may not hear claims against state officials on the basis of state law, the Court recognized that plaintiffs might be forced to split their claims between federal and state court, or to forego the federal forum to have their claims heard together.[212] The Court also recognized that efficiency might be impaired and constitutional questions might not be avoided.[213] Nevertheless, the Court held that these policy considerations could not overcome the constitutional bar to jurisdiction found in the eleventh amendment.[214]

The eleventh amendment protection extended to state officials does not extend to county officials, the Court observed.[215] Nevertheless, the Court reasoned, the exercise of pendent jurisdiction to permit a federal court to hear state claims against those county officials depends on considerations of efficiency, fairness, and convenience.[216] In this case, the Court held, an injunction against the county officials alone would be ineffective and incomplete.[217] Therefore, the Court held that the exercise of the discretionary doctrine of pendent jurisdiction to hear state law claims against the county officials in this case was not warranted.[218]

The Court thus reversed the decision of the court of appeals on all claims before it.[219] The other claims raised in the district court, based on the Constitution and a federal

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[205] *Id.* The Court referred to Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909), Greene v. Louisville & Interurban R:R., 244 U.S. 499 (1917), and Louisville & Nashville R.R. v. Greene, 244 U.S. 522 (1917). 465 U.S. at 118.

[206] 465 U.S. at 121.

[207] *Id.*

[208] *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819–23 (1824); *see also* United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

[209] *See, e.g.*, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Siler*, 213 U.S. at 193.

[210] 465 U.S. at 120.

[211] *Id.* at 121.

[212] *Id.* at 121–22.

[213] *Id.* at 122–23.

[214] *Id.* at 123.

[215] *Id. See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

[216] 465 U.S. at 124.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 125.

statute, were not properly before the Court because the court of appeals in *Pennhurst II* had based its decision solely on state law.[220] Therefore, the Court remanded the case for consideration of whether the remedy granted by the district court could be upheld on the basis of the remaining federal statute, or under the eighth and fourteenth amendments of the U.S. Constitution.[221]

2. The Dissenting Opinions

In a short dissenting opinion, Justice Brennan adhered to an interpretation of the eleventh amendment which restricts its operation to its literal language, leaving a separate and distinct doctrine of sovereign immunity to be applied by the courts.[222] In Justice Brennan's view, the eleventh amendment is a narrow jurisdictional bar to be applied only within its literal terms.[223] Sovereign immunity, Justice Brennan argued, is a distinct, non-constitutional doctrine which is not rooted in the eleventh amendment.[224] It is the non-constitutional doctrine of sovereign immunity, Justice Brennan contended, under which a state is immune from suit by its own citizens.[225] The eleventh amendment had no bearing in this case, Justice Brennan concluded, because there was no state-citizen diversity.[226] Furthermore, the non-constitutional doctrine of sovereign immunity did not bar this suit because the state officials acted ultra vires in disobeying state law.[227] According to Justice Brennan, the judgment of the court of appeals should have been affirmed.[228]

Justice Stevens wrote a lengthy dissenting opinion, joined by Justices Brennan, Marshall, and Blackmun.[229] Justice Stevens found the majority's position on the eleventh amendment unprecedented, reasoning that "[n]o rational view of the sovereign immunity

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[220] *Id.* at 124–25.

[221] *Id.* at 125. The district court had issued its relief on constitutional, federal statutory, and state law grounds. *See supra* notes 149–50 and accompanying text. The court of appeals initially affirmed on the Bill of Rights provision of the Developmentally Disabled Assistance and Bill of Rights Act. *See supra* note 151 and accompanying text. On remand from the Supreme Court's decision in *Pennhurst I*, *see supra* notes 152–53 and accompanying text, the court of appeals affirmed the relief granted by the district court on the basis of state law support. *See supra* notes 154–73 and accompanying text. Thus, the court of appeals had never considered the remaining federal statutory and constitutional grounds for relief. Since the Court's decision in *Pennhurst II*, the parties have settled the case. *See* New York Times, April 6, 1985, at 6, col. 5; New York Times, July 15, 1984, at 18, col. 3.

[222] 465 U.S. at 125 (Brennan, J., dissenting). Justice Brennan also joined in the dissenting opinion by Justice Stevens. *Id.* at 126 (Brennan, J., dissenting). Justice Brennan incorporated by reference his opinions in Yeomans v. Kentucky, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting from denial of certiorari); Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting); and Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting).

[223] 465 U.S. at 125 (Brennan, J., dissenting).

[224] *Id.*

[225] *Id.* at 125–26 (Brennan, J., dissenting). Justice Brennan has argued that the Court in *Hans* applied a non-constitutional doctrine of sovereign immunity. *See* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 320–21 (1973) (Brennan, J., dissenting).

[226] 465 U.S. at 125 (Brennan, J., dissenting).

[227] *Id.* at 126 (Brennan, J., dissenting).

[228] *Id.*

[229] *Id.* (Stevens, J., dissenting).

of the States supports this result."[230] Justice Stevens also found that the majority reversed the court of appeals for doing what the Court ordered it to do in *Pennhurst I*.[231] Good faith on the part of the officials, which the majority stressed, had no bearing on whether suit against the officials was permissible under the eleventh amendment, Justice Stevens argued.[232] Moreover, Justice Stevens noted, good faith immunity from damage suits is not applicable to injunctive relief.[233] Justice Stevens concluded that the majority abandoned an established, simple rule that federal courts may enjoin state officials whose conduct exceeds the scope of authorized discretion.[234]

Justice Stevens then considered eleventh amendment state sovereign immunity in a broader context. The eleventh amendment has not been limited to its literal terms, Justice Stevens noted, and instead stands for a broader notion of sovereign immunity.[235] The proper focus of inquiry, he contended, is on the doctrine of sovereign immunity, rather than the eleventh amendment itself.[236] To place this doctrine of sovereign immunity in its historical context, Justice Stevens traced the development of the doctrine from its roots in England.[237] Even under a monarchy, Justice Stevens found, sovereign immunity did not mean that government officials were immune from suit.[238] Rather, according to Justice Stevens, the doctrine of sovereign immunity historically meant only that the unlawful acts of the King's agents were not considered to be the acts of the sovereign.[239]

Relying on the historical interpretation of the doctrine of sovereign immunity, Justice Stevens reasoned that the pivotal question in a sovereign immunity analysis is whether the action complained of is the action of the sovereign state or of the agent.[240] This

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[230] *Id.*

[231] *Id.* Justice Stevens wrote, "the only error committed by the Court of Appeals was its faithful obedience to this Court's command." *Id.* Justice Stevens contended that the majority overruled a long line of cases in which federal courts had issued injunctions based on state law. *Id.* at 130–39 (Stevens, J., dissenting). Among the cases Justice Stevens discussed are Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (injunction against state for return of property withheld); Cory v. White, 457 U.S. 85 (1982) (eleventh amendment barred executor of Howard Hughes estate from filing statutory interpleader in federal court to resolve conflicting domicile claims of California and Texas); Johnson v. Lankford, 245 U.S. 541 (1918) (no immunity for bank commissioner who acted in negligent or willful disregard of his duties, failure to safeguard assets of bank); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917) (federal court may enjoin state official from proceeding to collect unconstitutional tax); Scully v. Bird, 209 U.S. 481 (1908) (injunction issued against state official who acted under color of office to injure plaintiff's business); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 390–91 (1894) (no immunity for state official for commission of state law tort); Rolston v. Missouri Fund Commissioners, 120 U.S. 390 (1887) (injunction may issue to require officer to do what a statute requires of him in transferring funds to a sinking fund for state bond repurchase). From these cases, Justice Stevens concluded that a state official has no discretion to violate the laws of either the state or federal government. 465 U.S. at 138 n.15 (Stevens, J., dissenting).

[232] 465 U.S. at 138–39 (Stevens, J., dissenting).

[233] *Id.* at 139 (Stevens, J., dissenting).

[234] *Id.*

[235] *Id.* at 140–41 (Stevens, J., dissenting) (citing Hans v. Louisiana, 134 U.S. 1 (1890), and Monaco v. Mississippi, 292 U.S. 313 (1934)).

[236] *Id.* at 141–42 (Stevens, J., dissenting).

[237] *Id.* at 142–43 (Stevens, J., dissenting).

[238] *Id.*

[239] *Id.*

[240] *Id.* at 143–44 (Stevens, J., dissenting).

distinction between the sovereign and its agents is firmly embedded in our law, Justice Stevens reasoned, and focusing on this issue is in accord with the precedent.[241] The majority's holding is flawed, Justice Stevens argued, in extending overly broad sovereign immunity protection to officials, and allowing suit against state officials only for violations of federal law.[242] This formulation, he argued, reduced the doctrine allowing suit against state officials for unconstitutional conduct to "an unprincipled accommodation."[243] Instead, Justice Stevens contended, an analysis which focuses on the established doctrines separating actions of the agent from those of the sovereign is in accord with both the principles contained in the eleventh amendment and its precedent.[244]

Because the pivotal question is whether the acts of the agent are the acts of the sovereign, Justice Stevens asserted, when an agent acts contrary to law, it does not matter whether that law is state or federal.[245] The interest of the sovereign state, Justice Stevens contended, lies in the enforcement of its own law.[246] Prior cases did not distinguish violations of the federal constitution from violations of state law, he noted, and treated the Constitution as part of the state's law rather than as a separate entity.[247] Furthermore, Justice Stevens continued, the states adopted the eleventh amendment because they feared that federal courts would force them to pay their Revolutionary War debts; an injunction in this case is not the same threat to the state treasury.[248] Finally, a decision based on state law is less intrusive than one based on federal law, he reasoned, because the state may change its own law.[249] The states are bound by a decision based on federal law, on the other hand, and are powerless to change it.[250] Thus, Justice Stevens concluded, a decision based on state law is in accord with proper respect for the decision-making capabilities of the states in the federal system.[251]

Justice Stevens concluded that the same sovereign immunity analysis applied to violations of state or federal law.[252] In essence, he stated, sovereign immunity is a shield to protect the sovereign. Although a state may extend that shield to protect its agents — its officials[253] — the shield is not absolute and unconditional. It is struck down when the official contravenes the federal constitution,[254] and is not extended to protect an official who commits a tort,[255] or acts outside his official authority.[256] In any of these three situations, Justice Stevens concluded, the official is not protected by the shield of state sovereign immunity.[257]

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[241] *Id.* at 145–46 (Stevens, J., dissenting).
[242] *Id.*
[243] *Id.* at 146–47 (Stevens, J., dissenting).
[244] *Id.* at 147 (Stevens, J., dissenting).
[245] *Id.* at 146–47 (Stevens, J., dissenting).
[246] *Id.* at 150 (Stevens, J., dissenting).
[247] *Id.* at 147–48 (Stevens, J., dissenting) (citing Poindexter v. Greenhow, 114 U.S. 270, 292–93 (1885)).
[248] *Id.* at 151–52 (Stevens, J., dissenting).
[249] *Id.*
[250] *Id.*
[251] *Id.* at 150–51 (Stevens, J., dissenting).
[252] *Id.*
[253] *Id.* at 158 (Stevens, J., dissenting).
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* at 158–59 (Stevens, J., dissenting).

In addition to misapplying established principles of sovereign immunity, Justice Stevens argued, the majority also sacrificed the important policy of avoiding unnecessary constitutional questions.[258] This policy, he contended, serves as an integral part of judicial review.[259] Furthermore, he noted, adherence to this policy gives greater respect to the application of state policy, which the states remain free to modify.[260] Neglecting this important policy, Justice Stevens concluded, forces the federal courts to decide cases unnecessarily on federal grounds.[261] The majority, Justice Stevens charged, cast aside the fundamental doctrines of the law of the case, stare decisis, sovereign immunity, pendent jurisdiction, and judicial restraint, in a decision which amounted to a "voyage into the sea of undisciplined lawmaking."[262]

III. *PENNHURST II* AND ELEVENTH AMENDMENT ANALYSIS

A. *The Constitutionalization of State Sovereign Immunity*

The Court in *Pennhurst II* confronted the tension between granting the states broad immunity from suit while allowing suits against individual officials. This tension is not, however, an inevitable result of the eleventh amendment. It is the product of the Court's interpretation of the source of state sovereign immunity and the scope of the eleventh amendment.

In *Pennhurst II*, the majority interpreted sovereign immunity to provide broad protection to the states from suit, and rooted the requirement of state sovereign immunity in the Constitution.[263] Interpreting the eleventh amendment as a constitutional requirement was an important part of the Court's holding that pendent jurisdiction could not override the states' immunity.[264] The Court thus applied an immunity broader than the terms of the eleventh amendment, while holding the eleventh amendment itself required this broad protection.

The flaw in the Court's holding in *Pennhurst II* is twofold. First, the Court in *Pennhurst II* neglected to distinguish sovereign immunity as a general doctrine protecting governmental actions from the unique limits imposed by federalism on the federal judiciary's power over the states. Instead, the Court presented a single doctrine of state sovereign immunity which it purported to apply to all issues brought against states in federal courts. Second, compounding this confusion, the Court held that this broad state sovereign immunity was required by the Constitution. In reaching this conclusion, the Court relied on abstract notions of sovereignty and a historically inaccurate conception of the understanding of the framers of the Constitution and the eleventh amendment.[265] The result is a confusing and inconsistent body of law.

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[258] *Id.* at 159–60 (Stevens, J., dissenting).

[259] *Id.* (citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), and *Siler*, 213 U.S. 175, 191 (1909)).

[260] *Id.* at 163 (Stevens, J., dissenting).

[261] *Id.*

[262] *Id.* at 165–66 (Stevens, J., dissenting). Justice Stevens concluded as he had begun, with the statement, "this case has illuminated the character of an institution." *Id.* at 167 (Stevens, J., dissenting).

[263] 465 U.S. at 98.

[264] *Id.* at 117–18.

[265] *Id.* at 98–99.

The constitutionalization of this confused doctrine of state sovereign immunity has important, but very subtle effects. First, identifying a constitutional source for this doctrine of broad state sovereign immunity makes modification and refinement of the doctrines more difficult and less likely. Second, the Court applied this doctrine rigidly, finding it to be an "explicit limitation" required by the Constitution.[266] This rigid application is unwarranted, given the historical uncertainty of the eleventh amendment's meaning and the Court's merger of governmental immunity and the limits on federal judicial power over states in the federal system. Finally, the weight given this constitutionalized doctrine of state sovereign immunity and the Court's rigid application of this doctrine deflect consideration of the issues of federalism raised by the eleventh amendment. As a result, the Court's holding in *Pennhurst II* will distort the analysis and development of the eleventh amendment's requirements.

The constitutionalization of a broad state sovereign immunity in *Pennhurst II* was not a sharp break with the Court's prior holdings. The fusion of sovereign immunity with the limits imposed by the federal structure on the power of the federal courts developed gradually since the Court first expanded state immunity in *Hans*.[267] Although the term "sovereign immunity" does not appear in the text of the eleventh amendment,[268] the Court's decisions have nevertheless read sovereign immunity into the eleventh amendment, ignoring that governmental immunity from individual suit is distinct from limits on the federal judiciary's power over states. The fusion of these distinct doctrines distorts the application of each. For example, much of the Court's decision in *Pennhurst II* relies on a case involving the sovereign immunity of the federal government from suit by an individual.[269] This governmental immunity, which imposes limits on the ability of individuals to sue the federal government, has no explicit constitutional source.[270] An individual's suit against a state government raises similar issues of the degree to which the government allows itself to be sued. Federal sovereign immunity, however, has no relation to the issues of federalism involved in federal court jurisdiction over suits against states. Nevertheless, the Court in *Pennhurst II* did not distinguish these different kinds of immunity. As a result, the Court slips from governmental accountability to federalism without differentiating them.[271]

Identifying the source of this broad sovereign immunity applied by the Court has been an area of great confusion in prior cases.[272] In general, the Court has agreed that state sovereign immunity is required by the Constitution. The Court has generally followed the traditional view that there was a general understanding of state sovereign immunity which *Chisholm* violated, prompting adoption of the eleventh amendment to overturn the Court's "mistake" in *Chisholm*.[273] Even with this understanding, however,

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[266] *Id.* at 118.

[267] *See supra* notes 90–118 and accompanying text.

[268] *See supra* note 58.

[269] 465 U.S. at 112 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

[270] Justice Frankfurter, criticizing the Court's holding in *Larson* upholding federal sovereign immunity, stated, "[a]s to the States, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United States, it is derived by implication." 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting).

[271] *See, e.g.*, 465 U.S. at 99–100.

[272] *See, e.g.*, Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), in which the majority opinion, Justice Marshall's concurring opinion, and Justice Brennan's dissenting opinion differ on the source of state sovereign immunity.

[273] *See supra* notes 59–70 and accompanying text.

these prior cases were unclear on whether the eleventh amendment merely restored the original understanding or imposed a new constitutional requirement of state sovereign immunity.[274] Even if the eleventh amendment restored an original understanding, these cases did not clearly hold whether that understanding was that article III did not abrogate common law sovereign immunity, or imposed a new constitutional requirement of state sovereign immunity.[275]

Despite these difficulties, the Court in *Pennhurst II* held that broad state sovereign immunity is required by the Constitution without precisely establishing its constitutional foundation. Justice Stevens, in dissent, approached the issue with a slightly different focus. Noting that the eleventh amendment is applied beyond its terms, he concluded that the proper focus was on the doctrine of sovereign immunity.[276] The eleventh amendment, he argued, "incorporated" and "embodied" the "traditional sovereign immunity of the States."[277] Justice Stevens's approach to the eleventh amendment is thus to read past its terms, interpreting its language only as a repudiation of the decision in *Chisholm*. Justice Stevens's opinion is unclear, however, whether the eleventh amendment restores a pre-existing immunity or imposes a new immunity.[278] Neither the majority opinion nor Justice Stevens's dissenting opinion, therefore, illuminates the discussion of the source of state sovereign immunity. As a result, neither opinion deals with the principles which lie behind state sovereign immunity in the federal system.

Only Justice Brennan follows an approach which would limit the application of the eleventh amendment and consider a separate doctrine of state sovereign immunity.[279] Since 1973,[280] Justice Brennan has tried without success to convince the Court to limit the application of the eleventh amendment to its literal terms. Justice Brennan argues that the eleventh amendment is a narrow restriction on state-citizen diversity jurisdiction.[281] Nevertheless, Justice Brennan maintains, a separate, non-constitutional doctrine of sovereign immunity exists.[282] It is this non-constitutional doctrine of sovereign immunity which Justice Brennan applies in concurring with Justice Stevens's opinion in *Pennhurst II*.[283] In limiting the eleventh amendment to its terms and reasoning that a separate, non-constitutional doctrine of sovereign immunity exists, however, Justice Brennan does not consider whether the federal structure imposes limits on federal judicial power over the states.[284]

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[274] *See supra* note 272.

[275] *Compare* Employees v. Department of Pub. Health & Welfare, 411 U.S. at 280 n.1 (immunity doctrine "embodied in the Eleventh Amendment"), *with id.* at 320 (Brennan, J., dissenting) (state immunity derived from traditional, non-constitutional principles).

[276] 465 U.S. at 140–41 (Stevens, J., dissenting).

[277] *Id.*

[278] *See id.*

[279] *Pennhurst II*, 465 U.S. at 125–26 (Brennan, J., dissenting); *see also Edelman*, 415 U.S. at 687 (Brennan, J., dissenting); Employees v. Department of Pub. Health & Welfare, 411 U.S. at 320 (Brennan, J., dissenting). Justice Brennan presented his most complete interpretation of the eleventh amendment in a case decided after *Pennhurst II*. *See* Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3150 (1985) (Brennan, J., dissenting).

[280] *See* Employees v. Department of Pub. Health & Welfare, 411 U.S. at 298 (Brennan, J., dissenting).

[281] *Id.* at 320 (Brennan, J., dissenting).

[282] *Id.*

[283] *Pennhurst II*, 465 U.S. at 125–26 (Brennan, J., dissenting).

[284] In *Atascadero State Hosp. v. Scanlon*, Justice Brennan rejected the argument that state sover-

Despite the confusion which has permeated eleventh amendment analysis, the underlying issues of federalism may nevertheless be observed in the case law. For example, the issues of federal structure are clear in cases which, while maintaining state sovereign immunity broader than the terms of the eleventh amendment, permit suits against states by the United States[285] and by sister states.[286] In addition, the Court has allowed a state to be sued without its consent in the courts of a sister state.[287] Furthermore, while purporting to apply a broad state sovereign immunity, the Court has maintained the fiction that a suit against a state official for unconstitutional actions is not a suit against a state in order to assure the supremacy of federal law, the foundation of federalism.[288] The concerns of federalism are also evident in the limitations on remedies the Court has imposed when the *Young* fiction is employed. Limitations on damages and retroactive injunctive relief protect the state's fiscal stability and autonomy.[289] Finally, the Court's rejection of the *Edelman* distinction between retroactive and prospective relief as the litmus test of permissible suits against states suggests recognition that the Court's eleventh amendment doctrines inadequately serve the underlying concerns of federalism.[290]

The Court's failure to address separately the issues underlying governmental immunity and federalism while rigidly applying a constitutionalized broad state sovereign immunity results in a confused and inflexible doctrine of state immunity in the federal courts. State immunity is better approached from a consideration of how states fit into the federal structure as autonomous decisionmaking bodies. In certain circumstances, immunity may be implied from the federal structure.[291] In other circumstances, the federal structure requires that state immunity be abrogated.[292] Distinct policies support

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eign immunity is required by the federal structure. 105 S. Ct. 3142, 3171 n.41, 3178 (1985) (Brennan, J., dissenting). Justice Brennan's dissent focused on whether state immunity is required by the federal structure, and did not consider whether that structure might otherwise impose limits on federal judicial power over the states.

[285] *See* United States v. Mississippi, 380 U.S. 128, 140–41 (1965).

[286] *See* North Dakota v. Minnesota, 263 U.S. 365, 372–73 (1923). *Compare* South Dakota v. North Carolina, 192 U.S. 286 (1904) (state may sue on its own behalf on defaulted bonds issued by another state), *with* New Hampshire v. Louisiana, 108 U.S. 76 (1883) (state may not sue another state on defaulted bonds where suit is on behalf of individual citizens).

[287] Nevada v. Hall, 440 U.S. 410, 421 (1979).

[288] Although the majority limits the doctrine of *Ex parte Young*, it does not dispense with it. *Pennhurst II*, 465 U.S. at 105–06. *But see id.* at 104 n.13 ("[w]e do not decide whether the District Court would have jurisdiction under this reasoning [under *Ex parte Young* and *Edelman*] to grant prospective relief on the basis of federal law"); *id.* at 146–47 (Stevens, J., dissenting) (majority treats *Ex parte Young* as an "unprincipled accommodation between federal and state interests that ignores the principles contained in the Eleventh Amendment"). Because it assures the supremacy of federal law, *Ex parte Young* is frequently cited as a seminal case in establishing federal judicial power in the federal system. *See, e.g.*, WRIGHT, MILLER, & COOPER, *supra* note 110, § 4231, at 352. "Indeed it is not extravagant to argue that Ex parte Young is one of the three most important decisions the Supreme Court of the United States has ever handed down." *Id.*

[289] *See supra* notes 124–31 and accompanying text.

[290] *Pennhurst II*, 465 U.S. at 104–05 & n.13. Justice Blackmun has compared the Court's constitutionalization of broad state sovereign immunity through the eleventh amendment to the recently overruled holding of *National League of Cities v. Usery*; both "gave broad scope to circumscribed language by reference to principles of federalism said to inform that language." Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3179 (1985) (Blackmun, J., dissenting).

[291] *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 430 (1979) (Blackmun, J., dissenting); *id.* at 441 (Rehnquist, J., dissenting).

[292] *See supra* notes 285–88 and accompanying text.

the separate issue of governmental immunity in general. For example, individual immunity for legislators and judges has survived without being rooted in explicit terms in the Constitution.[293] By focusing instead on abstract notions of sovereignty, the Court has afforded to the states an immunity "broader than had ever been enjoyed by the king of England,"[294] at the same time that states are increasingly involved in areas beyond their traditional governmental functions.

Recent commentators have challenged the Court's interpretation of the eleventh amendment's historical purpose and its proper role in the federal system. The Court's assumptions about the amendment's adoption are faulty, these commentators contend, and the Court's subsequent interpretation has drifted from the central issues.[295] Most important, these commentators offer new structures for analyzing state sovereign immunity in the federal system. These new perspectives, although of limited impact to date, suggest important directions for the future course of eleventh amendment analysis. By carefully defining the scope of the eleventh amendment, these commentators restore the focus on the fundamental issue of federalism.

Professor Fletcher has argued that the eleventh amendment serves only to restrict article III's grant of state-citizen diversity jurisdiction to those cases in which a state is the plaintiff.[296] The effect of Professor Fletcher's interpretation of the eleventh amendment is to clarify and simplify the analysis of the amendment's reach. This clarification is achieved by separating the explicit but narrow bar of the eleventh amendment from the broader issues of state sovereign immunity in the federal system; mixing them clouds the analysis.[297]

According to Professor Fletcher, the broader issues of state sovereign immunity are based on questions of national power and federal structure.[298] The Court's analysis of state sovereign immunity should, therefore, focus on these issues rather than confusing the analysis with separate conceptions of sovereignty and the eleventh amendment's requirements. Professor Fletcher proposed an inquiry based on an analysis of the particular clause under which national power is exerted over the states.[299] Only by focusing on the particular national power can the place of that power in the federal structure be analyzed, he concluded.[300] Professor Fletcher's analysis is based on an inquiry into the

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[293] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for prosecutor acting within scope of discretion); Pierson v. Ray, 386 U.S. 547 (1967) (absolute immunity for judges); Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951) (absolute immunity for legislators).

[294] *Pennhurst II*, 465 U.S. at 146 n.30 (Stevens, J., dissenting).

[295] *See* C. JACOBS, *supra* note 46, at 40; Field, *supra* note 7, at 534; Fletcher, *Historical Interpretation*, *supra* note 3, at 40; Gibbons, *supra* note 3, at 1913; Nowak, *supra* note 8, at 1441; Tribe, *supra* note 8, at 693.

[296] Fletcher, *Historical Interpretation*, *supra* note 3, at 1035. Judge Gibbons contends that the eleventh amendment removed all state-citizen diversity jurisdiction from the article III grant. Gibbons, *supra* note 3, at 1937. Both agree, however, that the eleventh amendment does not apply to suits in federal court under another head of jurisdiction, such as a federal question. Fletcher, *Historical Interpretation*, *supra* note 3, at 1036; Gibbons, *supra* note 3, at 1937.

[297] Fletcher, *Historical Interpretation*, *supra* note 3, at 1037.

[298] *Id.*

[299] *Id.* at 1118–20.

[300] *Id.* This analysis may then take into account the different role of national power in the federal structure when the national power is exerted pursuant to the fourteenth amendment, *see id.* at 1120–22 (citing Milliken v. Bradley (II), 433 U.S. 267 (1977) (eleventh amendment no bar to injunction against Michigan Governor to pay share of costs of remedial desegregation of schools));

inherent limitations of the grants of federal power rather than limits on federal court jurisdiction contained in the eleventh amendment.[301] The relative interests of the national and state governments depend on the power exerted, Professor Fletcher asserted, and the Court's decisions would benefit from straightforward consideration of these issues.[302]

Professor Nowak and Professor Tribe have each suggested an alternative analysis, interpreting the eleventh amendment as a limitation on the power of the federal judiciary, but not the power of Congress to subject the states to suit.[303] Professor Tribe argued that the correct interpretation of the eleventh amendment is that article III did not, of its own force, abrogate the sovereign immunity of the states.[304] The language of the amendment limits construction, a judicial function, Professor Tribe contended, without limiting the power of Congress.[305] Therefore, according to Professor Tribe, Congress may abrogate the immunity of the states pursuant to its article I powers.[306] Professor Nowak reached the same conclusion, relying in part on the colonists' fears of federal court enforcement of state debts, particularly in suits brought by Tories.[307] The eleventh amendment, Professor Nowak concluded, was not intended to reach Congressional powers.[308]

Much of the argument of Professors Nowak and Tribe rests on the presumption that, as a matter of structure, the concerns of federalism should be resolved by Congress, in which the states are represented, and not by the courts, in which they are not.[309] The Court's role, according to Professor Tribe, is to require a clear statement that Congress

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the contract clause, *see* Fletcher, *Historical Interpretation*, *supra* note 3, at 1122–24 (noting the special concern of the enforcement of contracts against the states at the time of the adoption of the Constitution); and the spending clause, *see id.* at 1124–27 (citing *Edelman*, 415 U.S. at 673 (Congress had not made a sufficiently clear statement of intent to abrogate states' immunity for state participation in federal welfare program)).

[301] Fletcher, *Historical Interpretation*, *supra* note 3, at 1106. As a result of his analysis, Professor Fletcher contends, the Court's doctrines distinguishing states from their subdivisions would be placed in a larger context, and would better serve the current distribution of government. *Id.* at 1106–07.

[302] Professor Fletcher noted that the results of the Court's prior decisions might not be different under the analysis he suggests, but contends that the Court's reasoning and principles would be clearer. *Id.* at 1131.

[303] Nowak, *supra* note 8, at 1441; Tribe, *supra* note 8, at 693.

[304] Tribe, *supra* note 8, at 693–94; *see also* Nowak, *supra* note 8, at 1441.

[305] Tribe, *supra* note 8, at 694. Professor Tribe quotes the eleventh amendment language: the "judicial power . . . shall not be [so] construed." *Id.* (quoting U.S. CONST. amend. XI (editing by Tribe)).

[306] *Id.* at 694. Professor Tribe defined the limits of Congressional power to abrogate the sovereign immunity of the states: Congress may not confer jurisdiction on an article III court beyond the textual confines of article III; Congress must act pursuant to a power delegated to it by article I; finally, the tenth amendment provides a limit to how far Congress may intrude into the autonomy of a state, affecting its integrity and ability to function. *Id.* at 696–97.

[307] Nowak, *supra* note 8, at 1441, 1428. In part, Professor Nowak relies on resolving Hamilton's statements in THE FEDERALIST No. 80 with those in No. 81. Nowak, *supra* note 8, at 1429. In addition, Professor Nowak stresses the colonists' fears of suits by Tories. This may partially be a result of the confusion about the facts of *Chisholm* — Nowak erroneously believed that Chisholm sued on behalf of a British creditor. *See supra* note 51.

[308] Nowak, *supra* note 8, at 1441.

[309] Tribe, *supra* note 8, at 695–96, 695 n.71; Nowak, *supra* note 8, at 1441. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

intended to abrogate the immunity of the states after considering the issues of federalism; the further Congress infringes on state autonomy, the more careful consideration the Court should require.[310] Both Professor Tribe and Professor Nowak reject reading the eleventh amendment as a broad constitutional grant of state sovereign immunity, and limit the amendment to the assertion that article III did not empower the federal judiciary to subject the states to suit without the action of Congress.

These commentators have made an important step in suggesting analyses for the application of the eleventh amendment and resolution of issues of federalism. In addition, the analysis of a state's immunity in federal court would be more clearly focused if the Court considered what aspects of a state's autonomy were being protected from suit, and the policies which support that protection. Assuring the supremacy of federal law would not then be accomplished through the "unprincipled accommodation"[311] of the fiction of *Ex parte Young*. Instead, the federal structure would define the boundaries of the state's protection. The results of the cases might not change. The Court's current approach, however, diverts attention from the fundamental questions of federalism involved in the immunity granted to states in the federal system.

B. *The Fiction of the Individual State Official and the Ultra Vires Doctrine*

The Court in *Pennhurst II* held that a suit against a state official is not a suit against the state for purposes of the eleventh amendment if the official acts beyond the authority granted by the state.[312] Although the Court rejected the broader interpretation of the ultra vires doctrine[313] asserted by the dissent,[314] its holding nevertheless leaves open the question whether the eleventh amendment will apply in a suit against a state official. The Court's construction of the fiction of *Ex parte Young*, limiting it to federal claims, creates a separate doctrine of ultra vires for claims against state officials not based on federal law. The doctrine of ultra vires defines the reach of sovereign immunity, and is a central issue in determining whether a state official may be sued in federal courts. The Court's analysis in *Pennhurst II*, however, fails to clarify this doctrine.

Although sovereign immunity protects the state from suit, state officials are not immune from suit for all of their actions. Private actions taken by an individual who happens to be a state official are not protected by the state's immunity — the classic example is the sale of an official's private house; the purchaser may sue to prevent the official from conveying the house to a third person.[315] While this extreme is clear, the

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[310] Tribe, *supra* note 8, at 695.

[311] *Pennhurst II*, 465 U.S. at 147 (Stevens, J., dissenting).

[312] *Pennhurst II*, 465 U.S. at 104–05 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

[313] The ultra vires doctrine is an expression of the limit of official action, defining the boundary between actions of an individual official in an official capacity and those in an individual capacity. The term ultra vires is used to represent many different definitions of this boundary, and can therefore be misleading. Within the issue of state immunity from suit, whether based on state sovereign immunity, federalism, or the eleventh amendment, ultra vires is used to represent the line between a suit against an individual and a suit against an official for actions within an official capacity so that the concerns for state immunity from suit are implicated. This section explores the various ways the Court formulates the definition of that line.

[314] *Pennhurst II*, 465 U.S. at 106–17 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

[315] *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949).

boundary of permissible suits against individual officials is clouded. In *Pennhurst II*, the Court further clouded this issue with a mechanical approach to suits against state officials and an overly restricted view of when suits against state officials are otherwise permissible. The center of the debate between the majority and Justice Stevens's dissent was whether a state official whose actions violate state law was nonetheless protected by the state's immunity from suit in federal court. The majority's analysis of this issue addressed only the positive grant of authority to the state official, without considering the scope of the official's discretion and the purpose and permissibility of the state's extension of immunity. The problem is one of focus. Instead of asking how far the state has extended its immunity, the Court considered only the question of when the official *is* the state.

Distinguishing conduct of state officials which is protected by sovereign immunity from unprotected actions is required unless the eleventh amendment and sovereign immunity were held to apply only where the state is named as a party.[316] Because the state acts through its officials, some means must be available to distinguish those acts to which the state's immunity extends. In early cases, the Court asked whether the effect of the suit was against the state.[317] Recently, the question is often posed from the other angle — whether the official may be sufficiently pried away from the state to allow this suit.[318] Neither approach yields a satisfying test.

In *Pennhurst II*, both the majority and dissenters agreed that unconstitutional actions by a state official were not actions of the state for purposes of the eleventh amendment and state sovereign immunity.[319] This creates the "irony" that state action is required under the fourteenth amendment in order to raise the constitutional issue, and at the same time, the action must be individual action in order to avoid the Court's application of the eleventh amendment.[320] The doctrine of *Ex parte Young*,[321] holding that unconstitutional conduct of state officials is not conduct of the state for purposes of the eleventh amendment, is frequently regarded as a fiction employed solely to assure the enforceability of federal law against state legislative and executive action.[322]

Constitutional violations have not, however, been the only conduct for which federal courts have permitted suit against state officials. A long line of cases permitted suit where the official's action amounts to a common law tort.[323] Permitting suit where a state official commits a tort may be because torts are individual actions rather than the actions of the sovereign. Alternatively, these suits may be permitted because of the requirement that a lawsuit in the nineteenth century fit into a common law cause of action to raise the plaintiff's legal claims.[324] Under this latter view, there is little cause for considering the

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[316] Although Chief Justice Marshall initially applied the eleventh amendment only to suits where the state was named as a party, he later expanded that view to include a suit against a governor sued in his official capacity. *See supra* notes 83–84 and accompanying text.

[317] *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); *In re* Ayers, 123 U.S. 443, 487–92 (1887).

[318] *See Edelman*, 415 U.S. at 665. Thus, the application of the *Young* doctrine allows a suit to proceed against an individual official, but limitations are placed on remedies to minimize the connection to the state. *Id.*

[319] *See* 465 U.S. at 102; *id.* at 158 (Stevens, J., dissenting).

[320] *Id.* at 105. *See* C. WRIGHT, *supra* note 110, § 48, at 208.

[321] 209 U.S. 123, 159–60 (1908). *See supra* notes 103–16 and accompanying text.

[322] *See supra* note 110.

[323] *See supra* note 13 and cases cited therein.

[324] *In re* Ayers, 123 U.S. 443, 500–01 (1887). *See supra* notes 109–10.

actions of the official not the actions of the sovereign merely because the action amounts to a common law tort. As long as the Court focuses on whether the official *is* the sovereign, allowing common law tort actions appears not to fit into a conceptual framework. Indeed, the majority in *Pennhurst II* rests uneasily with these cases without resolving their implications on the basis on which suit was permitted, reasoning only that a prior case had limited them.[325]

The major focus of the debate between the majority and dissent in *Pennhurst II* became the other means by which an official is separated from the state, the doctrine of ultra vires, which recognizes that there is some limit to the immunity granted to officials.[326] The majority in *Pennhurst II* limited that doctrine to actions beyond the authority granted to the official.[327] The majority would thus allow suit against state officials in two circumstances: when the action of the official is beyond his authority, and when the action is in conflict with federal law, in which case the fiction of *Ex parte Young* allows suit to vindicate supreme federal law.[328]

Justice Stevens's dissent reconciles the different circumstances in which a suit is allowed against an official under a unified theory of ultra vires. To Justice Stevens, the doctrine of *Ex parte Young* is an integral part of the doctrine, rather than the majority's "unprincipled accommodation."[329] Justice Stevens treats sovereign immunity as a shield protecting the official. The shield is either not extended in the first place, or struck down in those situations in which a suit is allowed against the official. Justice Stevens's dissent relies heavily on prior cases, and the borrowings from agency law they contained. Fundamental in *Pennhurst II* was the question of whether an official who acts in a way the state has forbidden is protected by that state's immunity.[330] To Justice Stevens, the answer is clear — the state's interests are served by giving effect to its prohibitions, for the state has itself prohibited that official action.[331]

The pivotal issue in *Pennhurst II*, then, was whether an official who acts contrary to state law is protected by that state's sovereign immunity. Under the majority's position, protection depends on whether the action was within the official's authority.[332] What seems a clear distinction is blurred, however, because the majority considers only positive grants of power to the official, and not independent limitations on that power.[333] The dissent unifies the issue by considering whether the official is protected by the state "shield" of sovereign immunity, considering the official's actions in a broader context.[334]

Both the majority and dissent approach sovereign immunity as a broad, abstract notion. As a result, neither considers the aspects of government that the doctrine protects. First, immunity protects government decisionmaking ability by allowing governmental decisions to be made through specified channels, and by leaving to the govern-

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[325] 465 U.S. at 109 n.19 (citing Larson v. Domestic & Foreign Commerce Corp., 357 U.S. 682 (1949)).

[326] *Id.* at 106–17; *id.* at 140–59 (Stevens, J., dissenting).

[327] *Id.* at 101 n.11.

[328] *Id.* at 102, 112 n.22.

[329] *Id.* at 147 (Stevens, J., dissenting).

[330] *Id.* at 150–51 (Stevens, J., dissenting).

[331] *Id.*

[332] *Id.* at 112 n.22.

[333] *Id.*

[334] *Id.* at 158–59 (Stevens, J., dissenting).

ment the fiscal consequences of its acts.[335] The role this doctrine plays may change over time as notions of governmental accountability change. In this respect, state sovereign immunity is like federal sovereign immunity. Second, state sovereign immunity plays a special role in the federal system as a method of protecting the decisionmaking autonomy of the states from the federal government. In this respect, state sovereign immunity is a unique doctrine, governed by considerations more akin to tenth amendment federalism issues.[336]

As a result of its failure to identify the purpose served by state sovereign immunity, the Court's discussion of whether a suit is against an individual official or the state is an abstract exercise which fails to clarify when a suit may be brought. The majority gives the *Young* doctrine limited effect, but is not able to reconcile suits allowed against officials for actions beyond their authority or torts.[337] As the dissent correctly points out, these all fit under the broad heading of the ultra vires doctrine.[338] The dissent does not,

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[335] *See generally* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1749 (1962).

[336] The close relationship with considerations of tenth amendment federalism is reflected in the history of applying the minimum wage requirement of the federal Fair Labor Standards Act (FLSA) to state employees. In Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), the Court held that the doctrine of implied waiver would not be applied to require state operated hospitals to comply with FLSA.

> It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

Id. at 285. The Court also emphasized the distinction between proprietary and governmental functions in distinguishing *Parden*. *Id.* at 284 (distinguishing Parden v. Terminal Ry., 377 U.S. 184 (1964)). *See also supra* note 121 and accompanying text.

In response to the Court's holding, Congress amended the FLSA to extend the minimum wage provisions explicitly to state employees. The Court held the extension unconstitutional in *National League of Cities v. Usery*, reasoning that Congress could not exercise the commerce power in a fashion which would "displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. 833, 852 (1976). The Court overruled *National League of Cities* and abandoned its analysis of tenth amendment federalism in Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985). Justice Blackmun, the author of the Court's opinion in *Garcia*, later noted the similarity between the Court's analysis under the tenth amendment in *National League of Cities* and under the eleventh amendment:

> Indeed, though of more mature vintage, the Court's Eleventh Amendment cases spring from the same soil as the Tenth Amendment jurisprudence recently abandoned . . . [in which] the Court, in derogation of otherwise unquestioned congressional power, gave broad scope to circumscribed language by reference to principles of federalism said to inform that language.

Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3179 (1985) (Blackmun, J., dissenting) (citations omitted).

In *Edelman v. Jordan*, the Court applied an analysis similar to that of *Employees* in holding that state participation in a federal welfare program did not constitute waiver of state immunity without clear expression of congressional intent to abrogate state immunity. 415 U.S. at 673. When federal imposition of suits on states approaches essential governmental functions of the states, the Court has required clearer expression of congressional intent to subject the states to suit. *See id.* at 673. Professors Fletcher, Nowak, and Tribe have examined the relationship of state immunity to more general issues of federalism. *See supra* notes 297–310 and accompanying text.

[337] 465 U.S. at 109 n.19, 112 n.22.

[338] *Id.* at 146 (Stevens, J., dissenting).

however, consider the application of this doctrine in relation to the goals served by sovereign immunity.

Rather than concentrate on abstract doctrines, the issues of sovereign immunity involved when a state official is sued in federal court are better addressed by a two-part inquiry. First, the Court must determine whether the state did in fact extend its immunity to shield the official in this action. If the state did intend to extend its immunity, the Court must still inquire whether the state may permissibly extend its immunity in this fashion. The first question concentrates on whether the official's action was in fact directed and protected by the state. The second question focuses on whether such an extension of the state's immunity serves the purposes of that immunity, and whether immunity can be extended to cover actions where federal law is involved.

C. *Pendent Jurisdiction: A Prism for Unaddressed Underlying Issues*

The Court in *Pennhurst II* held that broad state sovereign immunity was explicitly required by the Constitution, and that pendent jurisdiction was a judge-made rule of convenience.[339] Therefore, the Court held that the exercise of pendent jurisdiction in a suit against a state official was impermissible.[340] The flaw in this holding is not in the conclusion, but in the initial steps of the Court's analysis. The result in *Pennhurst II* was forced by the Court's first steps of rooting broad state sovereign immunity in the Constitution, and narrowly construing permissible suits against state officials.

As a result, this forced conclusion precludes consideration of the important policies behind pendent jurisdiction. The Court in *Pennhurst II* applied an absolute bar, thus supplanting the discretionary application of pendent jurisdiction. This is an unfortunate result, because this discretionary device can serve important functions in some cases while not doing violence to the important policies behind state sovereign immunity.

Pendent jurisdiction has several justifications. Some exercise of broader jurisdiction is inferred from the "case or controversy" language of article III.[341] In other cases, pendent jurisdiction is employed to avoid unnecessary decision of constitutional issues.[342] Finally, where the state and federal claims have a "common nucleus of operative fact," pendent jurisdiction enables the entire litigation to be resolved in one trial.[343]

The Court in *Pennhurst II* held that the bar of the eleventh amendment was not limited to establishing article III jurisdiction in the first instance.[344] Rejecting the argument that once article III jurisdiction is established the eleventh amendment bar is raised, the Court held that each issue must independently satisfy the requirements of the eleventh amendment.[345] In application, the Court's requirement that each issue satisfy the eleventh amendment bar forecloses all application of pendent jurisdiction in suits implicating the eleventh amendment. Pitting a constitutional "explicit limitation" against a "judge-made" rule of convenience yields an inexorable denial of the exercise of pendent jurisdiction.

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[339] *Id.* at 119–20.

[340] *Id.* at 121.

[341] *See* Osborn v. Bank of the United States, 22 U.S (9 Wheat.) 738, 823 (1824).

[342] *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909).

[343] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[344] 465 U.S. at 119–21.

[345] *Id.* at 121.

The Court's categorical denial of pendent jurisdiction is the result of its merger of governmental immunity with the limits federalism places on federal court power over the states, and its constitutionalization of this broad state sovereign immunity.[346] In addition to deflecting consideration of the different bases for state immunity, the broad bar imposed in *Pennhurst II* precludes consideration of the different kinds of cases in which pendent jurisdiction arises and the different policies supporting the exercise of pendent jurisdiction in a particular case. In certain cases, it may well be that exercise of pendent jurisdiction might violate principles of federalism.[347] An absolute bar, however, fails to address the underlying issues of federalism and the degrees involved in deciding whether a suit is against a state or an individual official. The limitations on remedy[348] reflect that the line between permissible and impermissible suits is not bright, but rather one of degree, requiring further adjustment by tailoring remedies. An absolute bar precludes consideration of those cases in which the pendent claim does not further impinge on the state's autonomy.[349]

The *Pennhurst II* Court's inflexible eleventh amendment holding precludes confronting that the problems presented by cases such as *Pennhurst* go beyond the issue of state sovereign immunity under the eleventh amendment, and exemplify many of the problems inherent in public law litigation.[350] In the past thirty years, the federal courts have

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[346] *See supra* notes 263–311 and accompanying text.

[347] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726–27 (1966) (state claims should be dismissed without prejudice if state issues substantially predominate).

[348] *See supra* notes 124–31 and accompanying text.

[349] Another concern with the exercise of pendent jurisdiction in suits against state officials is having federal courts deciding on the basis of unclear state law. The Court's holding in *Pennhurst II*, however, only partially avoids this problem, and not by confronting the issue directly. The Court must examine state law to decide whether an official acted within his authority. *Pennhurst II*, 465 U.S. at 112 n.22. Furthermore, the problem of unclear state law is presented in all cases involving state law issues, and is not limited to suits against state officials. The Court's concern about deciding unclear state law is better addressed in a systematic way, rather than piecemeal. *See* Brown, *Beyond* Pennhurst *— Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 360 (1985) (questioning Justice Powell's failure in *Pennhurst II* to examine whether, given the requirements of *Erie*, federal court directives based on state law issued to state officials are necessarily intrusive). The inflexibility of the *Pennhurst II* Court's formulation of the state's interests is clear in Rogers v. Okin, 738 F.2d 1 (1st Cir. 1984), in which the court of appeals certified questions of unclear state law to the Massachusetts Supreme Judicial Court. *Id.* at 3. Despite the detailed answers provided by the highest state court, the court of appeals held that *Pennhurst II* barred federal courts from ordering state officials to comply with state law. *Id.* The court of appeals noted the "irony" that the Supreme Court had previously remanded the case, explicitly directing the court of appeals to consider state law grounds to avoid reaching constitutional issues. *Id.* at 4. *See also Pennhurst II*, 465 U.S. at 126 (Stevens, J., dissenting) ("the only error committed by the Court of Appeals was its faithful obedience to this Court's command."). *See infra* notes 373–74 and accompanying text.

[350] *See generally* Chayes, *The Supreme Court 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) [hereinafter cited as Chayes, *Public Law Litigation*]; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes, *The Role of the Judge*]; Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) [hereinafter cited as Fletcher, *Discretionary Constitution*]; Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). *Cf.* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

become increasingly involved in litigation of great complexity concerning individuals asserting rights over public institutions.[351] Fueled by the development of affirmative injunctions[352] and class action suits,[353] and permitted in federal courts under the fiction of *Ex parte Young*,[354] public law litigation has thrust the federal courts into an expanded role in disputes over social policy and allocation of governmental resources.[355] In recent years, the Supreme Court has restricted the role of the federal courts in public law litigation.[356] The Court has limited the availability and effectiveness of federal courts in public law litigation by expanding and rigorously applying doctrines such as standing and federalism.[357] This trend restricting the role of federal courts has included the limits imposed by the eleventh amendment.[358]

The litigation over Pennhurst State School starkly exemplifies the complexity and difficulties of public law litigation. Critics of public law litigation have used the *Pennhurst* litigation as an example of the problems inherent in public law litigation.[359] The suit in *Pennhurst* was a class action against a wide variety of public officials alleging violations of individual rights.[360] The rights of mental patients have only recently been recognized in the law, and resolution of the claims required the district court to construct a broad remedial order and appoint a Special Master.[361] Finally, the care of the retarded was traditionally a state function,[362] and the district court remedy was intrusive and costly. In *Pennhurst II*, three grounds for review were briefed and presented to the Court, two

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[351] *See* Chayes, *Public Law Litigation*, *supra* note 350, at 5–6; Fletcher, *Discretionary Constitution*, *supra* note 350, at 635; Frug, *supra* note 350, at 715.

[352] *See* O. Fiss, The Civil Rights Injunction 1–5 (1978); Weinberg, *supra* note 350, at 1201–02.

[353] Fed. R. Civ. P. 23(b)(2), 23(b)(3) (1966).

[354] *See* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 228 (1964).

[355] The growth of public law litigation has engendered a debate over the proper role of the federal courts. Supporters of the role of the federal courts in public law litigation have emphasized the growth and complexity of the government and the need for the courts to expand their role accordingly. *See* Chayes, *Public Law Litigation*, *supra* note 350, at 60; Johnson, *supra* note 350, at 272. Pointing to the important role federal courts play in protecting individual rights, and the failure of public officials to resolve the issues raised by institutional lawsuits, these commentators support an active federal role. *See* Chayes, *Public Law Litigation*, *supra* note 350, at 60; Johnson, *supra* note 350, at 279.

Critics of the federal court role in public law litigation have noted the antimajoritarian nature of the courts, *see* Frug, *supra* note 350, at 734–43; Mishkin, *supra* note 350, at 964–66; the institutional incompetence of the courts in gathering all relevant data and reconciling competing claims, *see* Fletcher, *Discretionary Constitution*, *supra* note 350, at 648–49; Mishkin, *supra* note 350, at 964–66; the courts' insensitivity to the constraints of federalism, *see* Mishkin, *supra* note 350, at 967–71; Frug, *supra* note 350, at 743–49; and the problems public law litigation poses to the legitimacy of judicial power, *see* Fletcher, *Discretionary Constitution*, *supra* note 350, at 635; Frug, *supra* note 350, at 733; Mishkin, *supra* note 350, at 950. *See generally* Note, *Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of* Lyons, 25 B.C.L. Rev. 765 (1984).

[356] *See* Brown, *supra* note 349, at 359–62; Weinberg, *supra* note 350, at 1203–05. *See also supra* note 123.

[357] *See supra* note 123 and cases cited therein.

[358] *See supra* note 123 and cases cited therein.

[359] *See* Fletcher, *Discretionary Constitution*, *supra* note 350, at 690–91; Frug, *supra* note 350, at 718 n.15.

[360] *See supra* notes 136–48 and accompanying text.

[361] *See supra* notes 149–50 and accompanying text.

[362] *See* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 284–85 (1973) (noting care of the retarded is a traditional state function).

of which directly concerned the propriety of the district court's remedial orders.[363] In *Pennhurst I*, the Supreme Court did not reach the remedial issue, holding only that the federal statute conferred no substantive rights.[364] In *Pennhurst II*, the Court reached only the eleventh amendment challenge.[365]

The Court's eleventh amendment holding permits federal courts to hear only federal claims against state officials, within the narrow boundaries it has drawn for the fiction of *Ex parte Young*. Plaintiffs are left, therefore, with the option of splitting their claims between federal and state courts, or bringing suit in state court.[366] Plaintiffs are thus denied a federal forum for their entire case, and cannot use the fact-finding capabilities of the federal courts.[367]

The Court's holding in *Pennhurst II* adopts an inflexible doctrine against which even critics of public law litigation have cautioned.[368] The problems raised by public law litigation require a more flexible analysis, especially where issues of federalism raised by the interplay of state and federal law and the effective enforcement of constitutional rights predominate.[369] Rather than address the problems of public law litigation directly, the Court in *Pennhurst II* adopted the procrustean solution of forcing the litigation to fit into a simpler form more in keeping with the Court's perception of a proper lawsuit.[370]

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[363] *Pennhurst II*, 465 U.S. at 97. In addition to the eleventh amendment challenge, petitioners argued that the doctrine of comity prohibited the federal court from issuing injunctive relief, and that the district court abused its discretion in appointing special masters to supervise state officials. *Id.*

[364] 451 U.S. at 11.

[365] 465 U.S. at 97.

[366] If plaintiffs choose to bring their entire suit in state court, they may rely only upon a writ of error to the Supreme Court, which can hear only a certain number of cases, to have federal claims protected by the federal courts. *See supra* note 263–311 and accompanying text. Professor Brown stated, "[t]he net result may be effectively to bar [multi-claim plaintiffs'] entire case from federal court by creating strong inducements to bring it in state court." Brown, *supra* note 349, at 365.

[367] If plaintiffs are forced to wait to appeal to the Supreme Court on a writ of error to a state court judgment, plaintiffs would come to the Supreme Court "with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found." Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 228 (1908) (per Holmes, J.). *See also* C. WRIGHT, *supra* note 110, at 209 n.23.

[368] *See* Fletcher, *Discretionary Constitution*, *supra* note 350, at 692–97; Frug, *supra* note 350, at 755–56.

> 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. Such rigidity is a hindrance to adjusting the balance of federal-state power in constitutional cases. . . . It would be more sensible to distinguish permissible orders by the extent of their financial burden or otherwise intrusive nature rather than on the basis of their form, but eleventh amendment analysis does not permit the courts to do so.

Frug, *supra* note 350, at 755–56.

[369] "But the eleventh amendment and sovereign immunity are inappropriately blunt instruments for dealing with these delicate matters." Shapiro, *supra* note 29, at 79.

[370] *See* Brown, *supra* note 349, at 361.

> In sum, the short shrift that the majority gave to the doctrines of pendent jurisdiction is one of the puzzles of *Pennhurst II*. Perhaps the answer is to be found in the larger context of the current Court's reservations about institutional litigation . . . *Pennhurst II* might thus be rationalized as another step in an overall process of making it harder to bring such suits in federal courts.

Id. (citations omitted).

The Court's haste to withdraw federal courts from involvement in public law litigation is evident in its peremptory refusal to uphold relief against the defendant county officials, to whom the eleventh amendment's protection does not extend.[371] By drastically reducing the issues a federal court may hear and sharply limiting the remedies it may impose under the fiction of *Ex parte Young*, the Court may have succeeded in removing the federal courts from the realm of public law litigation.[372]

To achieve this result, the Court in *Pennhurst II* sacrificed an important precept of constitutional adjudication — avoiding unnecessary constitutional decisions. This absolute bar over hearing pendent state claims forces the federal courts to decide cases brought before them on constitutional grounds, where that decision might otherwise be unnecessary. The Court in *Pennhurst II* found this policy insufficiently compelling when compared with its formulation of state sovereign immunity.[373] However, when state sovereign immunity is considered with reference to what it protects rather than as an abstract and absolute requirement, the discretionary exercise of pendent jurisdiction may serve all of these goals. The exercise of pendent jurisdiction is, as the Court correctly points out,[374] decided with reference to the principles of state immunity on each issue. Those principles of state sovereign immunity ought not, however, amount to an absolute, unconditional bar. Decided with reference to whether the state *did* extend its immunity to cover the official's actions, and whether the state *may* so extend its immunity, the discretionary exercise of pendent jurisdiction may avoid unnecessary constitutional decisions, and serve the goals of efficiency and fairness to litigants.

Conclusion

The interpretation of the eleventh amendment has drifted far from its language and historical purpose. The states' amenability to suit in the federal courts was debated and not resolved as the Constitution was ratified. The history of eleventh amendment interpretation, characterized by periods of dormancy followed by periods of renewed interest, reflects the history of the relationships between the states and the federal government. Applied within narrow confines for the first eighty years of its existence, the eleventh amendment was extended in the post-Reconstruction era to grant states immunity from suits on federal questions brought by their own citizens. Soon thereafter, the doctrine was again modified in an exertion of federal judicial power over state regulation of national industry. In recent years, the Court has shown renewed interest in the eleventh amendment, and has increased the immunity granted to states.

In *Pennhurst II*, the Court held that the eleventh amendment prohibits a federal court from ordering a state official to conform his conduct to state law.[375] Holding that the eleventh amendment constitutionalized a broad state sovereign immunity, the Court restricted the few instances in which suits were allowed against state officials in federal court. The Court's analysis of the eleventh amendment is not supported by the historical

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[371] *See supra* notes 215–18 and accompanying text. *But see* Shapiro, *supra* note 29, at 81 ("[T]he Court may be planning to rethink the whole question of the status of local government agencies.").

[372] *But see* Brown, *supra* note 349, at 361 ("Yet it is unclear how much of a gain the decision represents for those who oppose institutional litigation." Court failed to take "opportunity to cut back on institutional litigation by providing remedial guidelines for the lower courts.").

[373] *See supra* notes 207–14 and accompanying text.

[374] 465 U.S. at 121.

[375] *Id.* at 125.

record, and indiscriminately blends distinct doctrines of governmental immunity and federalism. The result is an abstract and inflexible doctrine which drastically restricts the availability and effectiveness of a federal forum in public law litigation. The constant adjustments and evolution of federalism and the demand for protection of individual rights which has been the hallmark of modern constitutional law are not so easily cabined. By stepping further from the foundation of state immunity in federalism, the Court treats as immutable the dynamic principles of federal judicial power and individual rights. Reconciling these vital principles is difficult, requiring close evaluation and adjustment by the courts. The Court in *Pennhurst II* instead closed the door to the federal courts.

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