The Eleventh Amendment's Lengthening Shadow over Federal Subject Matter Jurisdiction: Pennhurst State School & Hospital v. Halderman

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NOTES

THE ELEVENTH AMENDMENT'S LENGTHENING SHADOW OVER FEDERAL SUBJECT MATTER JURISDICTION:

PENNHURST STATE SCHOOL & HOSPITAL v. HALDERMAN

The eleventh amendment immunizes states from suits commenced by private individual citizens in federal court. While this immunity may be lifted for certain suits based on federal statutory or constitutional law, the Supreme Court decided in Pennhurst State School & Hospital v. Halderman that eleventh amendment immunity precludes a private individual from seeking injunctive relief in federal court against state officials based on state law claims. By denying litigants access to federal court for state law claims, the Supreme Court has succeeded in shifting private suits against states from federal to state courts. The Pennhurst decision purportedly allocated only state law claims to state courts, but the inconvenience to plaintiffs of mounting two suits for separate federal and state claims will lead many plaintiffs to bring all of their claims together in state court, thereby losing the benefits of the federal forum. In addition, by artfully combining Pennhurst's reading of the eleventh amendment with the federal doctrine of

1. "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 States." U.S. Const. amend. XI.


abstention, state defendants\(^3\) will have a tool for shifting many federal law claims from federal to state courts.

3. The term "state defendant" shall be used in this Note to describe defendants that are states or commonwealths of the United States. Territories are states for the purposes of the eleventh amendment. See, e.g., Camacho v. Public Serv. Comm'n, 450 F. Supp. 231 (D.P.R. 1978) (eleventh amendment applied to Puerto Rico).

The eleventh amendment definition of a "state" may extend to state officials and state agencies. See, e.g., Pennhurst State School & Hospital v. Halderman 104 S. Ct. 900 (1984) (state officials and state school included in eleventh amendment protection). For an agency to enjoy the state's eleventh amendment immunity, the federal court must determine that the state is a real party in interest by virtue of the agency's presence on the record. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). This determination is made on the basis of two considerations: (1) whether the agency is an "alter ego" of the state, and (2) whether the state has a fiscal stake in the judgment.

Before applying the eleventh amendment to bar a suit, the federal court should find, after weighing all the applicable factors, that an agency is an "arm" or "alter ego" of the state. The principal case illustrating this weighing process is Krisel v. Duran, 258 F. Supp. 845 (S.D.N.Y. 1966), aff'd, 386 F.2d 179 (2d Cir. 1967), cert. denied, 390 U.S. 1042 (1968). The Krisel court determined that the Economic Development Administration of Puerto Rico was an alter ego of Puerto Rico because the state would pay any judgment against it and because it served a "governmental" function; thus, a private suit against the Administration was barred in federal court. 258 F. Supp. at 855; see also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977) (Court examined Ohio state law to determine that Board of Education was not an "arm of the state," and therefore not immune under eleventh amendment); Hall v. Medical College, 742 F.2d 299, 307 (6th Cir. 1984) (court examined Ohio state law to determine that medical school was an "arm of the state" and therefore immune from suit); DeLong Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 16 (D. Or. 1964) (identified various factors relevant to determining whether an agency is an "arm of the state"); aff'd, 343 F.2d 911 (9th Cir.), cert. denied, 382 U.S. 877 (1965).

These cases suggest several factors for determining whether an agency is an alter ego of a state: (1) whether the defendant performs a government function, compare Adden v. Middlebrooks, 688 F.2d 1147, 1153-54 (7th Cir. 1982) (prison administration was immune from suit because operating a state prison is a state function) with Gerr v. Emrick, 283 F.2d 293, 296-97 (3d Cir. 1960) (because Pennsylvania Turnpike Commission does not perform a government function, Commission did not share in state's eleventh amendment immunity), cert. denied, 365 U.S. 817 (1961); (2) whether state law describes the agency as an arm of the state, compare Fouche v. Jekyll Island State Park Auth., 713 F.2d 1518, 1520 (11th Cir. 1983) (Georgia statute described Authority as a state agency) with Hander v. San Jacinto Junior College, 519 F.2d 273, 279 (5th Cir. 1975) (Texas statute and case law revealed that public junior colleges were independent from state and not immune under the eleventh amendment); and (3) whether the agency functions autonomously from the state, see Moor v. County of Alameda, 411 U.S. 693, 718-21 (1973) (state corporate body, with capacity to sue and be sued, did not share state's eleventh amendment immunity).

The state must also have a fiscal stake in the judgment before the eleventh amendment will be applied to bar the action. See Quern v. Jordan, 440 U.S. 332, 337 (1979). If a state will contribute to a defendant in a judgment for damages, then the suit is considered "against the state," and barred by the eleventh amendment. See, e.g., Edelman v. Jordan, 415 U.S. 651, 668-672 (1974) (rejected theories for imposing money damages on state defendants). This fiscal consideration, however, is not independent of the first requirement that an agency be an arm of the state. A bare indemnification agreement between a state and a defendant does not by itself immunize the defendant. See McAdoo v. Lane, 564 F. Supp. 1215, 1219 (N.D. Ill. 1983) (discussing eleventh amendment analysis of state indemnity statutes).
Consideration of *Pennhurst*'s effect on federal jurisdiction over state defendants raises doubts about the correctness of the *Pennhurst* decision. In *Pennhurst*, the Court succeeded in diminishing the federal judicial role in the regulation of state governmental affairs. The same result could have been attained by resorting to the federal equitable rules of comity. First, the Supreme Court could have utilized the law of pendent jurisdiction to defer to sensitive state policies. Second, the Court could have abstained from hearing the case in order to avoid a conflict with state administration of state law. Both of these discretionary doctrines have the advantage of flexibility. In contrast, *Pennhurst* functions clumsily and needlessly biases the law of federal jurisdiction against private plaintiffs with state and federal law claims against states.

I. THE BACKGROUND OF THE ELEVENTH AMENDMENT

A. Federal Jurisdiction and the Eleventh Amendment

The United States Constitution authorizes a dual court system. Article III creates the federal courts; 4 article I, section 10 5 and the tenth amendment, 6 by implication, reserve to the states the power to administer their own courts. 7 In most cases, state and federal courts have concurrent jurisdiction over claims based on federal law. 8 Conversely, federal courts may decide...
state law claims if federal subject-matter jurisdiction is satisfied between the parties, which is generally achieved through diversity jurisdiction. Questions concerning the allocation of authority between federal and state courts to hear cases falling under both courts' jurisdiction have resulted in sharp controversies between the two systems.

The friction between state and federal courts is relieved to some extent by the fact that federal courts are forums of limited jurisdiction. Federal courts are empowered to hear only those cases within the judicial power of the United States, as limited by article III and as framed by jurisdictional grants from Congress. Most state courts, on the other hand, are courts of general jurisdiction, which may hear any type of action, unless specifically was enunciated in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (state courts may exercise subject matter jurisdiction over federal causes of action “absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication”).

Federal courts are compelled in most instances to apply substantive state law in diversity cases, that is, in those cases in which the judicial power of the United States extends “to controversies . . . between Citizens of different States.” U.S. Const. art. III, § 2. This rule compelling federal courts to follow state law was formulated in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See generally Note, The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine, 85 Yale L.J. 678, 701-05 (1976) (discussing the development of the Erie doctrine).

See, e.g., NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301-02 (1964) (right of association controversy reached Supreme Court for third time due to Alabama state courts' unwillingness to conform with Supreme Court's prior opinions); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816) (Court's second decree correcting Virginia Supreme Court's judgment definitively asserted Supreme Court's appellate jurisdiction over controversies arising under federal law). See generally Blaustein & Ferguson, Avoidance, Evasion, and Delay, in The Impact of Supreme Court Decisions 96 (T. Becker ed. 1969) (discussion of legal attempts to avoid desegregation); Beatty, State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court, 6 Val. U.L. Rev. 260, 283 (1972) (state court evasion of Supreme Court mandates significantly increased in 1960's); Schneider, State Court Evasion of United States Supreme Court Mandates: A Reconsideration of the Evidence, 7 Val. U.L. Rev. 191, 192 (1973) (state courts often ignore, repudiate, or narrowly construe Supreme Court decisions).

“Limited jurisdiction” is jurisdiction which can be exercised only under circumstances outlined by statute or constitution. BLACK'S LAW DICTIONARY 836 (5th ed. 1979). For a general discussion of the principles of federal limited jurisdiction, see C. WRIGHT, LAW OF FEDERAL COURTS 22-26 (4th ed. 1983).

The pertinent portion of article III reads as follows:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to Controversies to which the United States shall be a party;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2.

Aside from constitutional limitations, federal jurisdiction is exercised “with such Ex-
prohibited by constitution or statute.\footnote{14} Because a federal court would unconstitutionally invade authority reserved to state courts by entertaining cases beyond its jurisdiction,\footnote{15} parties cannot confer authority on a federal court to hear a state law case that does not satisfy federal subject matter jurisdiction.\footnote{16}

Beyond federal subject matter jurisdiction, however, there are two federal equitable doctrines that influence federal judicial discretion to hear cases involving state law claims. The first of these doctrines is pendent jurisdiction, under which a federal court may hear state law claims between parties invoking federal jurisdiction,\footnote{17} if the state and federal claims are closely related.\footnote{18} Pendent jurisdiction facilitates the use of federal courts by allowing litigants to bring all of their state and federal claims together in one federal suit. The leading Supreme Court decision on the law of pendent jurisdiction is United Mine Workers v. Gibbs.\footnote{19} Gibbs overruled a prior decision which had permitted federal courts to hear pendent state claims only when they

\begin{itemize}
\item\footnote{14} For example, Illinois circuit courts are courts of general jurisdiction. See Ill. Const. art. 6, § 9 ("Circuit Courts shall have original jurisdiction of all justicable matters except when the Supreme Court has original and exclusive jurisdiction . . . ."). Illinois juvenile courts, however, are courts of limited jurisdiction. See Juvenile Court Act, Ill. Rev. Stat. ch. 37, § 702-1 (1983 & Supp. 1984).
\item\footnote{15} See, e.g., C. Wright, supra note 11, at 22 (federal courts are empowered to hear only those cases within the jurisdictional grant defined by the United States Constitution and statutes).
\item\footnote{16} Id. at 23. But see Dobbs, The Decline of Jurisdiction by Consent, 40 N.C.L. Rev. 49 (1961) (seminal article that criticizes the subject matter jurisdictional bar as inconsistent with common law).
\item\footnote{17} A federal question is an issue involving some form of federal law. See 28 U.S.C. § 1331 (1982) ("The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."); see also supra note 12 (similar jurisdictional language found in article III).
\item\footnote{18} It is anomalous that while federal courts are forums of limited jurisdiction, see C. Wright, supra note 11, at 22-26, the doctrine of pendent jurisdiction allows federal courts to entertain claims not expressly within their jurisdiction. See, e.g., Comment, Aldinger v. Howard and Pendent Jurisdiction, 77 Colum. L. Rev. 127, 134-35 (1977) (discussion of decisions permitting expansion of federal statutory jurisdiction). The conundrum is resolved by an expansive interpretation of article III’s jurisdictional grant, which can be read to include state claims as part of the federal "case or controversy" to which the claims are pendent. U.S. Const. art. III, § 2.
\item\footnote{19} 383 U.S. 715 (1966). Gibbs, the plaintiff, alleged that United Mine Workers organized a strike at his coal mine which caused him to lose both his job and the income he received from hauling contracts. Gibbs claimed that the actions violated the Labor-Management Relations Act, 29 U.S.C. § 187 (1982) (the federal bar on secondary boycotts), as well as the Tennessee common law tort of conspiracy. The Supreme Court permitted Gibbs to proceed with both of these claims together in federal court. 383 U.S. at 725.
\end{itemize}
arose from the same discrete set of events as the federal claims. This “cause of action” standard was dismissed by the Gibbs Court as “unnecessarily grudging,” suggesting that the stringency of the test belied the policies of judicial economy and convenience that pendent jurisdiction was intended to promote.

Gibbs introduced a liberal standard, permitting the exercise of pendent jurisdiction whenever the state claim shares a “common nucleus of operative facts” with a substantial federal claim, if the plaintiff would “ordinarily be expected” to bring the claims in one suit. Gibbs also furnished federal district courts with considerable discretion in deciding when to employ the doctrine. Courts are to be guided by the policies that underlie pendent jurisdiction: judicial economy, convenience, and fairness to the litigants. Federal courts should dismiss pendent claims if the state issues substantially predominate in a suit, if the state law is uncertain, or if comity otherwise warrants dismissal.

The second jurisdictional doctrine of importance in understanding Pennhurst is federal abstention. Under abstention, a federal court may decline to proceed in a case otherwise within its subject-matter jurisdiction if it concludes that a state forum would be especially appropriate for that case. This doctrine, created in the 1941 Supreme Court case of Railroad Commission v. Pullman Co., has spawned several subspecies; two of these subspecies bear a special relationship to the Pennhurst case.

20. See Hurn v. Oursler, 289 U.S. 238, 246 (1933) (authorized pendent jurisdiction only in situations where state and federal claims arose from same “cause of action”).
21. 383 U.S. at 725.
22. Id.; see also Hagans v. Lavine, 415 U.S. 528, 537-43 (1974) (substantial federal claim is any claim not devoid of merit).
23. 383 U.S. at 725. Commentators ordinarily view these two requirements as coterminous: to satisfy one is generally to satisfy both. See, e.g., Schenker, Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction, 75 Nw. U.L. Rev. 245, 263 (1980) (suggests that Hurn Court did not consider absence of common facts to be dispositive of pendent power issue).
24. 383 U.S. at 726.
25. Gibbs counsels that, as a matter of comity, pendent jurisdiction should not be exercised when state issues predominate a case or if a comprehensive remedy is sought on the basis of state law. 383 U.S. at 726; see infra notes 143-45 and accompanying text.
Comity is the principle by which courts of one jurisdiction will defer to the authority of another, not as a matter of obligation but out of respect. BLACK'S LAW DICTIONARY 242 (5th ed. 1979). In the course of this Note, comity will refer to the deference federal courts give to state judicial authority. See generally Wells, The Role of Comity in the Law of Federal Courts, 60 N.C.L. Rev. 59, 61-64 (1981) (outlining context in which abstention doctrine evolved).
26. 312 U.S. 496 (1941).
27. Commentators differ as to the number of separate categories of abstention. This Note will refer to the four categories identified by Professor Charles Wright. See C. Wright, supra note 11, at 302-19. These categories are based upon different policy considerations. First, Pullman abstention is ordered to avoid decision of a federal constitutional question if the case can be decided on the basis of state law. Second, Burford abstention, based upon Burford v. Sun Oil Co., 319 U.S. 315 (1943), see infra notes 28-35 and accompanying text, is ordered to prevent unwarranted federal interference in state public policy. Third, Thibodaux abstention,
The first subspecies of abstention, announced by the Supreme Court in *Burford v. Sun Oil Co.*, authorizes federal courts to dismiss claims when federal adjudication of the state law questions in the case would disrupt state efforts to establish and enforce important public policies. The policy behind *Burford* abstention is widely accepted as a form of federal comity, leaving to the states the uncontested power to administer and review their own policies. The scope of *Burford* abstention in practice is elastic. The Supreme Court's decision to abstain in the original *Burford* case was based upon several factors: (1) the suit originated as a challenge to an administrative order; (2) the subject matter was of peculiarly local interest; (3) the state had an intricate review procedure governing the local policy; and (4) federal intervention would interfere with that local policy. In a subsequent *Burford* type case, however, the Court ordered the district court to abstain without discussing all of the elements that provided the basis for abstention in *Burford*. Most commentators favor a narrowly-drawn *Burford* doctrine, to
be invoked by the courts only in cases where the federal interest is minimal, or where the court’s intervention into the controversy threatens to seriously disrupt local policy.\textsuperscript{33} Most lower courts have adopted the same cautious stance,\textsuperscript{34} but a substantial number of lower court opinions reflect a less rigorous analysis.\textsuperscript{35}

The Supreme Court recognized a second subspecies of abstention in \textit{Colorado River Water District v. United States.}\textsuperscript{36} The \textit{Colorado River} doctrine allows a federal court to dismiss or stay\textsuperscript{37} federal actions that are identical

Subsequently, the railroad challenged the order in federal court. \textit{Id.} at 343. The Supreme Court, in dismissing the claims, emphasized the local importance of railroad regulation. \textit{Id.} at 347. While there was a state administrative review agency, as in \textit{Burford}, the Court apparently placed no significance on that fact. Nor did the case present the regulatory intricacies posed in \textit{Burford}.

\textsuperscript{33} See, e.g., M. Redish, supra note 1, at 246 (\textit{Burford} abstention only appropriate in limited situations when substantial federal interest present); Comment, Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the \textit{Burford} Doctrine, 46 U. Chi. L. Rev. 971, 1005 (1979) [hereinafter cited as Comment, The Scope of \textit{Burford}] (\textit{Burford} abstention justified only where federal intervention threatens to substantially disrupt state policies).

\textsuperscript{34} \textit{Burford} abstention has been generally limited to cases in which the subject matter is highly complex and of local concern, see, e.g., Santa Fe Land Improvement v. City of Chula Vista, 596 F.2d 838, 842 (9th Cir. 1979) (complicated land use ordinance), and in which the state or municipality has a specialized forum for review for the controversy, see, e.g., Beck v. California, 479 F. Supp. 392, 400 (C.D. Cal. 1979) (staying federal question case in deference to a complex regulatory review program governing coastline ownership). Usually courts refuse to grant \textit{Burford} abstention unless both of these conditions are satisfied. See, e.g., ADA-Cascade Watch Co. v. Cascade Resource Recovery, 720 F.2d 897, 903-06 (6th Cir. 1983) (\textit{Burford} not applicable unless complete state regulatory scheme would be disrupted by federal adjudication of controversy and state has a specialized forum for reviewing controversy); Educational Serv., Inc., v. Maryland State Bd. for Higher Educ., 710 F.2d 170, 173 (4th Cir. 1983) (mere local importance and regulation of education does not warrant abstention from case stemming from teacher certification process); Pari Mutuel Clerks Union, Local 328 v. Fair Grounds Corp., 703 F.2d 913, 919 (5th Cir. 1983) (\textit{Burford} not applicable where state does not “extensively” regulate racetrack workers’ collective bargaining).

\textsuperscript{35} See, e.g., DiPerri v. FAA, 671 F.2d 54, 59 n.5 (1st Cir. 1982) (local interest in airport noise regulation takes precedence over federal interest in adjudicating state claims; \textit{Burford} abstention appropriate); Moos v. Wells, 585 F. Supp. 1348, 1350 (S.D.N.Y. 1984) (federal court abstained from adjudicating claim, which rested on state and municipal housing laws, in view of local interest in housing); Saint Joseph Hosp. v. Electronic Data Sys. Corp., 573 F. Supp. 443, 451 (S.D. Tex. 1983) (\textit{Burford} abstention proper because state had an administrative agency which managed state end of Medicaid program); Reynolds v. State Bar, 524 F. Supp. 1003, 1007 (D. Mont. 1981) (court abstained from considering state claims touching on activities of state bar); see Comment, The Scope of \textit{Burford}, supra note 33, at 980 n.53, 981 n.54 and cases cited therein.

\textsuperscript{36} 424 U.S. 800 (1976). The lower federal courts, especially in the Second Circuit, recognized the \textit{Colorado River} doctrine before the case was decided. See, e.g., P. Beiersdorf & Co. v. McGohey, 187 F.2d 14, 15 (2d Cir. 1951) (trademark infringement action stayed pending termination of a prior state action); Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949) (shareholders’ derivative suit properly stayed on basis of state autonomy or the convenience of the parties).

\textsuperscript{37} A succeeding case, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460
to proceedings that are simultaneously pending in state court. Unlike Burford abstention, Colorado River abstention is not invoked to promote comity between state and federal courts. Instead, it provides for judicial economy and convenience to the litigants by centralizing the litigation in the state forum. Owing to the “unflagging obligation of the federal courts to exercise the jurisdiction given them,” federal courts may invoke this particular doctrine only under “exceptional circumstances,” such as those the Court found in the Colorado River case. A subsequent Supreme Court decision, Moses H. Cone Hospital v. Mercury Construction Corp., explained some of the circumstances that favor Colorado River abstention: (1) when state law provides the principle rule of decision; (2) when the state forum acquired

U.S. 1 (1983), specifically declined to chart a preferred course between a dismissal and a stay in Colorado River abstention cases. Id. at 28.

Justice Brennan, who authored the Colorado River opinion, expressly maintained that dismissal in such cases was not abstention. 424 U.S. at 820. Abstention, according to Justice Brennan, is governed by principles of comity. Id. at 814-15. Colorado River, in contrast, is governed by the convenience of the courts and the litigants. Id. at 817-20. Justice Brennan drew this distinction to emphasize that dismissals will rarely be permissible under Colorado River. Id. at 817-19. Whether it is a doctrine of comity or convenience, a federal court following Colorado River stays or dismisses a case in favor of state adjudication. Hence, for simplicity’s sake, Colorado River shall be handled in this Note as an abstention doctrine.

Id. at 818.

Id. at 817.

Id. at 818 (circumstances for Colorado River abstention, “though exceptional, do nevertheless exist”).

In Colorado River, the United States sued 1000 water users in Colorado in federal court, under federal and Colorado law, to adjudicate the reserved water rights claimed on behalf of itself and certain Indian tribes. The federal government invoked the district court’s jurisdiction under 28 U.S.C. § 1345 (1982). 424 U.S. at 805. One of the 22 federal suit defendants subsequently sought to join the United States in state court proceedings to adjudicate all of the federal and state claims together. Id. at 806. Joiner was achieved under the McCarran Amendment, 43 U.S.C. § 666 (1982), which provides for United States consent to joiner in state proceedings to adjudicate water rights. 424 U.S. at 802-03. The federal district court dismissed the United States suit, in deference to the state proceeding. The Supreme Court upheld the dismissal, based on the following considerations: (1) the McCarran Amendment supports a federal policy of centralizing litigation of water rights in a single state forum, id. at 819-20; (2) the absence of prior federal proceedings in the district court, id. at 820; (3) the intensive local interest in water rights, id.; (4) the remoteness of the federal and state courthouses, id.; and (5) the current participation of the United States in the parallel state proceedings, id.

43. 460 U.S. 1 (1983). In Moses H. Cone, the hospital filed an action in North Carolina state court seeking a judgment declaring that it had no liability under a contract it had made with Mercury. Id. at 7. Mercury subsequently filed a federal action seeking an order to compel arbitration with the hospital under the Arbitration Act, 9 U.S.C. § 4 (1982). The federal district court stayed Mercury's suit, since the federal and state suits involved the identical issue of the arbitrability of the contract. 460 U.S. at 7.

The Supreme Court reversed the stay. Id. at 29. After holding that the stay was an appealable order, the Court held that the “exceptional circumstances” test of Colorado River controlled, and that the case did not rise to the circumstances appropriate for dismissal. Id. at 10-11; see infra notes 44-48 and accompanying text.

44. 460 U.S. at 23-26. The controlling law in Moses H. Cone was the Arbitration Act, 9 U.S.C. § 4 (1982), which supported federal jurisdiction in this case.
jurisdiction in the suit first;\textsuperscript{45} (3) when the state court acquired jurisdiction
over the res or property upon which the suit is based;\textsuperscript{46} (4) when state
adjudication will adequately protect the litigants' rights;\textsuperscript{47} (5) when a single
state proceeding is substantially more convenient than two suits;\textsuperscript{48} and (6)
when a single state proceeding would avoid piecemeal litigation.\textsuperscript{49} Since the
Court decided Moses H. Cone, most lower federal courts have applied the
Colorado River doctrine very conservatively.\textsuperscript{50}

In contrast to the abstention doctrine, the eleventh amendment\textsuperscript{51} is a manda-
tory bar precluding federal courts from entertaining suits between private indi-
vidual plaintiffs and state defendants. It resembles the common law rule of
sovereign immunity,\textsuperscript{52} which dictates that a sovereign may not be sued without

\textsuperscript{45} 460 U.S. at 21-22. The case was filed in state court first, which ordinarily would support
state jurisdiction, but more progress had been made in the federal proceedings, which weighed
on the side of continued federal jurisdiction.

\textsuperscript{46} Id. at 19. Jurisdiction over a res was not relevant in Moses H. Cone.

\textsuperscript{47} Id. at 26-27. The Moses H. Cone opinion expressed doubt about the North Carolina
court’s willingness to compel arbitration, even under the federal law, and considered the federal
forum less likely to prejudice the plaintiff’s rights. Id.

\textsuperscript{48} Id. at 19. Convenience was not considered to be a factor in Moses H. Cone.

\textsuperscript{49} Id. at 19-21. Since the arbitration sought by Mercury constituted a separate proceeding,
the choice of a federal rather than a state forum did not itself cause piecemeal adjudication.

\textsuperscript{50} The Moses H. Cone opinion reiterated the Court’s and, particularly, Justice Brennan’s
view that only the clearest of justifications warrants federal surrender of jurisdiction in deference
to state proceedings. Id. at 25. The lower courts have shifted from a relatively liberal application
of Colorado River in cases involving parallel state proceedings to a highly restrictive approach.

\textsuperscript{51} U.S. CONST. amend XI.

\textsuperscript{52} The doctrine of sovereign immunity, which underlies the history of the eleventh amendment,
was part of the English common law as early as the thirteenth century. See Borchard,
Government Responsibility in Tort, 36 YALE L.J. 1, 26-27 (1926). Under this doctrine, the King
was not amenable to the jurisdiction of his own courts unless he assented to that jurisdiction.
Id. at 19-20. The doctrine did not relieve the King of his legal liabilities; the King was bound
by traditional duty to consent to such suits. C. Jacobs, The Eleventh Amendment and State
Sovereign Immunity 7-8 (1972).

In the United States, the doctrine of sovereign immunity was well-established before the
Constitution was ratified. Id. at 74. It had been invoked successfully by one state in Nathan
v. Virginia (Ct. of Common Pleas, Philadelphia 1781), reprinted in M’Carty v. Nixon, 1 U.S.
(1 Dall.) 77 (1781). See Fletcher, supra note 1, at 1074-75 (commentary on Nathan).

The Supreme Court declined to interpret the eleventh amendment as a generalized constitu-
its consent. Yet, the eleventh amendment is an anomaly among the rules that

[1985]  

PENNHURST v. HALDERMAN 525

tional rule of state sovereign immunity in Nevada v. Hall, 440 U.S. 410, 421 (1979). In Hall, a California court rendered a civil judgment in favor of a California resident against the State of Nevada. Id. at 413. The California Supreme Court held that Nevada was amenable to suit in California courts. Id. at 412. The Supreme Court rejected Nevada's argument that the eleventh amendment, in conjunction with other constitutional clauses, implied interstate sovereign immunity as part of the federal system. Id. at 421.

Notwithstanding the Hall case, the Court has yet to develop a doctrine drawing a connection between sovereign immunity and the eleventh amendment, even though the Court regularly assumes some vague relationship between them. See, e.g., Pennhurst, 104 S. Ct. at 906 (notes Supreme Court recognition of the eleventh amendment's significance in affirming the principle that sovereign immunity limits article III judicial authority). Three commentators have attempted to reconcile these two areas comprehensively—Justice Brennan, Justice Marshall, and Professor Field—although none of their theories have attracted the Court's support.

Justice Brennan articulates a bifurcated view of the doctrine of state sovereign immunity in connection with the eleventh amendment. The amendment, Justice Brennan declares, commands expressly that states are immune from federal suits by out-of-state persons. See Yeomans v. Kentucky, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting). In contrast, federal suits by persons against their own states of residence are not barred by the Constitution, although they may be barred by federal common law sovereign immunity. See Employees of the Dep't. of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 285 (Brennan, J., dissenting). Justice Brennan refutes the historical assumption that Hans v. Louisiana, 134 U.S. 1 (1890), extended the eleventh amendment bar to the latter category of suit. He views Hans as a case governed by common law sovereign immunity and therefore squarely in the former category. See Employees 411 U.S. at 320 (Brennan, J., dissenting). Also, according to Justice Brennan, when the Constitution was ratified the states surrendered their sovereign immunity to the extent that Congress can legislate over the states under article I and the fourteenth amendment. Id. at 300-01 (Brennan, J., dissenting); see also Parden v. Terminal Ry., 377 U.S. 184, 192 (1964) (Court opinion by Brennan, J.) (by codifying the commerce clause, states empowered Congress to create causes of action against interstate railroads, including railroads owned by states). Under Justice Brennan's theory, therefore, Congress may subject states to suit under any of its plenary powers without running afoul of the eleventh amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976) (Brennan, J., concurring). Justice Brennan's view on sovereign immunity was expressly adopted by M. REDISH, supra note 1, at 152, and Gibbons, supra note 1, at 1893.

Justice Marshall's approach, in contrast to Justice Brennan's, extends immunity under the eleventh amendment to states from suits by their own citizens, despite the limited language of the amendment. Employees, 411 U.S. at 291-92 (Marshall, J., dissenting). Justice Marshall contends that article III, § 2 of the Constitution, which provides for federal jurisdiction in "controversies... between a State and Citizens from another State," was not intended to abolish the state's common law sovereign immunity. Id. at 291-92 (Marshall, J., dissenting). Justice Marshall asserts that the Supreme Court misinterpreted the clause in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 430-31 (1793), to allow states to be sued in federal court on the basis of the article III grant of jurisdiction. 411 U.S. at 291-92 (Marshall, J., dissenting). The eleventh amendment thus served to restore state sovereign immunity in federal courts. Id. at 291-92. In Justice Marshall's view, however, sovereign immunity under article III does not prevent Congress from subjecting states to private suits in state court. 411 U.S. at 298 (Marshall, J., dissenting).

Finally, Professor Field has suggested that the Constitution is neutral toward common law state sovereign immunity. Field, Part One, supra note 1, at 539. According to Professor Field, the framers of the Constitution intended to preserve common law sovereign immunity but not to constitutionalize it. Id. at 541. The eleventh amendment was intended only to correct the Chisholm Court's reading of article III as abrogating common law immunity. Thus, current common law sovereign immunity, notwithstanding the eleventh amendment, is fungible. It may be modified or abolished by congressional enactment. Id. at 545.
govern federal jurisdiction. Unlike the operation of common law immunities and personal jurisdiction, a state's eleventh amendment privilege against suits is not necessarily waived by the state's appearance in an action. Rather, a state defendant in federal court may raise the eleventh amendment defense at any stage of the proceedings, and a federal court must dismiss a case if proceeding would violate the amendment. The eleventh amendment is not, however, an absolute limit to federal subject-matter jurisdiction over state defendants.


A related area is the federal common law immunity of state officers. This is the non-constitutional doctrine that accords individual state officers limited or absolute immunity for torts committed in the course of their official duties. See PROSSER & KEETON, supra, at 1059-61.

Personal jurisdiction (jurisdiction in personam) is the power of a court over a defendant's person, which is required for the court to enter a personal judgment against the defendant. BLACK'S LAW DICTIONARY 766 (5th ed. 1979).

The right to object to a defect in personal jurisdiction or to assert a personal immunity is waived by a general appearance in a suit. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 646-7 (2d ed. 1977). The state's general appearance in a suit, however, does not waive the eleventh amendment. See Dagnall v. Gegenheimer, 631 F.2d 1195, 1196 (5th Cir. 1980), aff'd on rehearing, 645 F.2d 2, 3-4 (5th Cir. 1981) (en banc) (per curiam); Mills Music Inc. v. Arizona, 591 F.2d 1278, 1282 (9th Cir. 1979); Roberts v. United States, 470 F. Supp. 257 (W.D. La. 1979). But see Delaware Valley Citizen's Council for Clean Air v. Pennsylvania, 678 F.2d 470, 475 (3d Cir. 1982) (state participation in consent decree waives eleventh amendment); Vargus v. Trainor, 508 F.2d 485, 492 (7th Cir.) (state stipulation that state will honor federal court order waives eleventh amendment), cert. denied, 420 U.S. 1008 (1975).

Professor Fletcher disputes the validity of an absolute eleventh amendment jurisdictional bar. Fletcher, supra note 1, at 1091-93. He believes it instead to represent a narrow construction of the article III jurisdictional clause, which bars federal jurisdiction over private suits against states only when there is no other constitutional basis for jurisdiction in the case (i.e., federal question). Id.

56. See, e.g., Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

57. See, e.g., Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945). The Supreme Court in Ford Motor said that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power... ." 323 U.S. at 467. The Court then proceeded to dismiss a suit against the Indiana State treasury. Id. at 483.

58. See, e.g., Kansas v. Colorado, 206 U.S. 46, 83 (1907) (eleventh amendment leaves undisturbed jurisdiction over suits by one state against another). The eleventh amendment bars parens patriae suits undertaken by one state against another on behalf of individual state citizens. See, e.g., New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883) (one state may not sue another in federal court to enforce bonds sold by the foreign state to its citizens).
The eleventh amendment does not prevent federal courts from hearing federal suits against states brought by sister states or by the United States. Furthermore, states may waive the eleventh amendment, expressly by statute or constructively by conducting interstate commerce under a federal regulatory scheme. In addition, Congress can abrogate the states' eleventh amendment immunity through legislation enacted pursuant to section five of the fourteenth amendment and aimed specifically at regulating state conduct. In other words, the eleventh amendment resembles neither a federal rule of personal jurisdiction, nor an absolute limitation on federal subject matter jurisdiction, nor a common law immunity. It is a doctrine unique unto itself.

60. See Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362 (1894). A state waiver statute must indicate by express language or "overwhelming implication" that a state is amenable to suit in federal court. Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). The Supreme Court may be moving to a stiffer standing: that a state's waiver to be sued in federal court must be express. See Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3147 (1985) (state statutory on constitutional waiver of immunity "must specify the state's intention to subject itself to suit in federal court") (emphasis in original).


In Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976), the Court found that Congress passed Title VII under the authority granted by section five of the fourteenth amendment. Other courts have applied the congressional abrogation doctrine to suits arising under federal laws enacted pursuant to Congress's other delegated powers. See Oneida Indian Nation v. County of Oneida, New York, 719 F.2d 525, 530 (2d Cir. 1983), cert. granted, 104 S. Ct. 1590 (1984) (foreign
B. The Evolution of the Eleventh Amendment Doctrine

Over the course of the Supreme Court’s eleventh amendment decisions, the Court has veered radically and frequently while supplying the eleventh amendment with substantive content. In some cases, the Court has been sensitive to the federalism interest of protecting state sovereignty from federal intrusion, which is inherent in the eleventh amendment. On these occasions, the Court has taken a state-protective stance in interpreting the amendment, shielding the states from federal jurisdiction. In other cases, the Court has sought to protect individual federal rights from infringement relations); Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1284-85 (9th Cir. 1979) (copyright and patent clause); Jennings v. Illinois Office of Educ., 589 F.2d 935, 937-38 (7th Cir. 1979) (war powers); Cribb v. Pelham, 552 F. Supp. 1217, 1220 (D.S.C. 1982) (dicta) (thirteenth and fifteenth amendments). The current test for assessing whether Congress waived state immunity by legislation is that Congress’s “intention to abrogate the Eleventh Amendment [be expressed] in unmistakable language in the statute itself.” Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3148 (1985).

Also, a hybrid of abrogation and constructive waiver may result from a state’s acceptance of federal money under a federal grant program. Congress may impose conditions or affirmative duties on states that participate in federal grant programs. See, e.g., Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17-18 (1981) (explains contours of spending clause). If the states fail to honor these conditions, to the detriment of private individuals intended to benefit from the grants, then the federal courts sometimes are willing to imply a cause of action for those individuals under the grant program that overrides the state’s eleventh amendment immunity. See, e.g., Department of Educ. v. Katherine D., 727 F.2d 809, 818 (9th Cir. 1983) (state participation in grants under Education of the Handicapped Act, 20 U.S.C. §1412 (1982), waives eleventh amendment), cert. denied, 105 S.Ct. 2360 (1985). The Supreme Court has said that in order for federal courts to imply an eleventh amendment waiver, Congress must have clearly expressed an intention to impose conditions on the grant in the statute itself. See, e.g., Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3148 (1985). A mere expression by Congress of preferred uses of grant money will not lift the eleventh amendment bar. See, e.g., Florida Dep’t of Health v. Florida Nursing Home Ass’n, 450 U.S. 147, 150 (1981) (state agreement to abide by federal law in administering Medicaid program held not a waiver of eleventh amendment); Edelman v. Jordan, 415 U.S. 651, 675-77 (1974) (state participation in aid to the aged, blind, or disabled under Social Security Act, 42 U.S.C. §§1382-1383c (1982), held not a waiver); cf. Pennhurst, 451 U.S. 1, 124-25 (1981) (Congress did not intend to impose duty on states to provide habilitation to the mentally handicapped in the least restrictive setting under Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000-6018 (1982)).

63. “Federalism,” in this Note, refers to the doctrine in federal jurisprudence by which “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” Younger v. Harris, 401 U.S. 37, 44 (1971). In contrast with comity, see supra note 25, federalism is influenced less by a general deference to state courts and more by an affirmative interest in maintaining the benefits of a dual federal-state governmental system. See generally Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 SUP. CT. REV. 81, 98-99 (1981) (“the main elements of the opinion are protective of the purposes that the framers intended the states to serve in the federal system”).

64. See, e.g., Edelman v. Jordan, 415 U.S. 651, 657-59 (1974) (eleventh amendment bars retroactive monetary recovery against state officers in federal court); Hans v. Louisiana, 134 U.S. 1, 15-21 (1890) (eleventh amendment bars federal suit by private individual citizen against his own state of residence).
by states and to provide a federal forum to guarantee those rights. On these occasions, the Court has adopted a plaintiff-protective stance, opening avenues through which the states could be sued by private individuals in federal court. The net result of the Court’s decisions interpreting the eleventh amendment is a doctrine which successfully, though inelegantly, reconciles the constitutional immunity of the states with the federal interest in hearing federal claims against the states. This compromise has been accomplished by the strategic use of fiction under the heading of the Young doctrine.

States were immune from suit under the common law before the advent of the federal union. During the ratification of the Constitution, some antifederalist critics maintained that the states would lose their sovereign immunity in the new national court. They raised the specter of states being dragged into financially ruinous lawsuits by Revolutionary War creditors and other antagonists. Some state ratifying conventions even recommended changes in article III to protect states from suit. According to tradition, in the give-and-take of the ratification process an “original understanding” was reached between the proponents of the Constitution and the ratifying state delegates that federal courts would not entertain suits against nonconsenting states.

65. See, e.g., Ex parte Young 209 U.S. 123, 160 (1908) (eleventh amendment does not bar private individual from seeking a federal injunction against state officials); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 856-59 (1824) (eleventh amendment bars only cases in which state is a party of record; state officials are not immune under eleventh amendment). amendment.

66. See Baker, supra note 1, at 139-40 (“[T]he courts are trying to construct an eleventh amendment doctrine that will allow them to balance federal and state interests in an appropriate fashion.”).

67. See Ex parte Young, 209 U.S. 123 (1908); see also infra notes 81-86 and accompanying text (discussion of Young).


69. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 542-43 (J. Elliot ed. 1866 & photo. reprint 1941) [hereinafter cited as DEBATES] (Patrick Henry predicted that article III would leave Virginia open to suit by its creditors, thus inviting financial ruin); id. at 527 (George Mason argued that Virginia’s confiscation of British lands could be deemed illegal by a federal court). But see C. Jacobs, supra note 52, at 69-70 (declaring that the national government had already satisfied most of the states’ pre-war obligations).

70. See 2 DEBATES, supra note 69, at 409 (New York proposed an amendment to article III, § 2 to constitutionalize state sovereign immunity); 3 DEBATES, supra note 69, at 660 (Virginia convention proposed amendment to article III, § 2 to restrict original jurisdiction of federal courts over states to cases arising under treaties); 4 DEBATES, supra note 69, at 246 (North Carolina convention proposed an amendment to article III, § 2 that was identical to Virginia’s proposal).

71. Belief in the “original understanding” between the states and the national government concerning the jurisdictional clause is an article of faith in eleventh amendment jurisprudence. See Pennhurst, 104 S. Ct. at 906; Edelman v. Jordan, 415 U.S. 651, 660-62 n.9 (1974); Monaco v. Mississippi, 292 U.S. 313, 325 (1934); Hans v. Louisiana, 134 U.S. 1, 10-11 (1890).

The wellspring of this traditional understanding is a litany of three quotes from famous
If ever such an "understanding" existed, it was quickly upset by the 1793 decision in *Chisholm v. Georgia*. In *Chisholm*, the Supreme Court accepted original jurisdiction in a suit originally brought by two citizens of South Carolina against the State of Georgia. In so doing, the Court interpreted article III to permit suits by private individuals against states in federal court. This decision is said to have created such a "shock of surprise" among the states that the eleventh amendment was adopted and quickly ratified, the immediate effect of which was to overturn *Chisholm*’s result.

Over the course of the nineteenth century, the eleventh amendment began as a highly plaintiff-protective law and developed into a strongly state-protective law. In an early decision, *Osborn v. Bank of the United States*, Chief Justice Marshall construed the eleventh amendment as barring a lawsuit only where the state was formally a party of record. A private individual deciding to sue a state after *Osborn* could do so through the expedient of suing a state official. This plaintiff-protective interpretation remained in effect until shortly after the Civil War. During Reconstruction, the Supreme

contemporaries of the ratification process. See 2 *Debates*, *supra* note 69, at 533 (James Madison: "It is not in the power of individuals to call any state into [federal] court."); 3 *Debates*, *supra* note 69, at 555 (John Marshall: "I hope that no gentlemen will think that a state will be called at the bar of the federal court."); *The Federalist* No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961) (Alexander Hamilton: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent"). All of the above statesmen are quoted together in *Monaco v. Mississippi*, 292 U.S. 313, 323-25 (1934); *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890); *Dawkins v. Craig*, 483 F.2d 1191, 1193 n.1 (4th Cir. 1973); see also 1 C. *Warren*, *supra* note 68, at 91 (furnishes a scholarly imprimatur for original understanding theory).

The actual existence of such an original understanding has been vigorously challenged in recent works about the eleventh amendment. See C. *Jacobs*, *supra* note 52, at 27-43, 67-70; *Fletcher*, *supra* note 1, at 1045-63; *Gibbons*, *supra* note 1, at 1895-1914. See also Atascadero State Hosp. v. *Scanlon*, 105 S.Ct. 3142, 3157-77 (1985) (Brennan, J., dissenting) (comprehensive review of eleventh amendment history and scholarship). These commentators each evaluate the historical evidence and conclude that the Framers intended article III to abolish state sovereign immunity. For theories linking the eleventh amendment with sovereign immunity, see *supra* note 52.

72. 2 U.S. (2 Dall.) 419 (1793).

73. The second section in article III, which gives federal courts jurisdiction over "Cases and Controversies . . . between a state and a citizen of another state," was interpreted by a majority of the four justices in *Chisholm* as conferring jurisdiction upon federal courts over private suits against states. See 2 U.S. (2 Dall.) at 465 (opinion of Wilson, J.) (clause unambiguously creates jurisdiction). The traditional history of the eleventh amendment indicates that the *Chisholm* result was not in accord with the framers' constitutional plan. Some support for this view appears in the state constitutional ratification debates. See 2 *Debates*, *supra* note 69, at 491 (James Wilson advocating that abrogation of states' sovereign immunity under article III allows citizens to "stand on a just and equal footing" with state in federal court); 3 *Debates*, *supra* note 69, at 207 (Edmund Randolph extolling the virtues of abolishing sovereign immunity under article III). *But see* *Hans v. Louisiana*, 134 U.S. 1, 19 (1890) (some framers apparently concurred with *Chisholm* Court's interpretation of Supreme Court's original jurisdiction).

74. See *Hans v. Louisiana*, 134 U.S. 1, 5 (1890).

75. 22 U.S. (9 Wheat.) 738, 842 (1824).

76. In one post-Civil War case, the Court favorably restated and applied the *Osborn* rule: "Making a state officer a party does not make the state a party, although her law may have
Court shifted sharply to a state-protective stance. In a succession of cases beginning with *Louisiana ex. rel. Elliot v. Jumel,* the Court held that an out-of-state creditor could not sue a state official to recover on defaulted state loans. Disregarding the Marshall-era precedent, the Court declared that a suit against a state treasurer for payment of state debts is effectively a suit against the state and thus precluded by the eleventh amendment.

In the crucible of the Reconstruction creditor cases, the Supreme Court formed its most provocative state-protective rule. In the 1890 decision of *Hans v. Louisiana,* the Court held that private plaintiffs could not sue their own states of residence in federal court, even when such suits were predicated on federal question jurisdiction. The decision extended well beyond the language of the eleventh amendment, which by its own terms applied only to citizens and aliens who resided out of state. The *Hans* Court determined that the eleventh amendment was a constitutional mandate of state sovereign immunity, and that the framers of the amendment, therefore, could not possibly have intended for private individuals to have license to sue states in federal court purely by accident of their in-state residence.

prompted his action and the state may stand behind him as a real party in interest.*'' Davis v. Gray, 83 U.S. (16 Wall.) 203, 220 (1872); see also United States v. Lee, 106 U.S. 196, 207-08 (1882); Board of Liquidation v. McComb, 92 U.S. 531, 541 (1875) (both restating the *Osborn* rule with approval).

77. 107 U.S. 711 (1882); see also *Louisiana ex rel. New York Guar. & Indem. Co. v. Steele,* 134 U.S. 230, 232 (1890) (suit to compel state auditor to raise taxes was barred); *Hagood v. Southern Ry.,* 117 U.S. 52, 70 (1886) (suit against official seeking to compel official to perform state's obligation was a suit against the state); *Cunningham v. Macon & Brunswick R.R.,* 109 U.S. 446, 457 (1883) (suit barred because state was indispensable party to foreclosure); *Antoni v. Greenhow,* 107 U.S. 769, 783 (1882) (mandamus action barred). *But see* Virginia Coupon Cases, 114 U.S. 269 (1885) (repudiation of specially drafted debt instruments by Virginia violates the contract clause). Two commentators, placing the Reconstruction-era cases in their historical context, concluded that the Supreme Court shifted ground on the eleventh amendment to avoid confrontation with the repudiating states. See Gibbons, supra note 1, at 1973-2003; Orth, supra note 1, 431-50.

78. In fact, the *Jumel* Court did draw a feeble distinction between *Osborn* and *Jumel.* In *Osborn,* the state treasurer, sued by the Bank of the United States, allegedly confiscated the Bank's notes under the color of an arguably unconstitutional state tax. 22 U.S. (9 Wheat.) at 740-41. The treasurer still held the notes at the time of the suit, not yet having deposited them into the state treasury. *Id.* at 742. In *Jumel,* by contrast, the state originally had incurred the disputed debt in its own name. 107 U.S. at 714. The *Jumel* court asserted that in *Jumel* the suit was against the state treasury, while in *Osborne* the suit was against the treasurer. *Id.* at 724-25.

79. 134 U.S. 1 (1890).

80. *Id.* at 15. Professor Thornton contends that *Hans* has been modified by *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), in so far as the Court recognized Congress's power to lift the states' eleventh amendment immunity under its delegated powers. Thornton, supra note 1, at 346-47.

Since *Hans,* the Supreme Court has viewed the eleventh amendment as a complete bar to all private suits against states in federal court. See, e.g., *Pennhurst,* 104 S. Ct. at 907 ("the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in article III."). Some commentators, however, view the Court's eleventh amendment immunity doctrine as a departure from the historical purpose of the amendment. See Field,
Within two decades of the *Hans* decision, the Court once again changed direction, shifting back to a plaintiff-protective stance. In 1908, the Court decided the landmark case of *Ex parte Young.* A federal district court held the attorney general of Minnesota in contempt for violating an injunction that prohibited him from enforcing an allegedly unconstitutional rail regu-

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*Part One, supra note 1, at 543; Fletcher, supra note 1, at 1087-90; Gibbons, supra note 1, at 1893-94. In their view, the amendment was crafted merely to correct the *Chisholm* Court’s interpretation of article III as completely abolishing state sovereign immunity in federal courts. See Fletcher, supra note 1, at 1063. The Framers intended to preserve federal question jurisdiction as a basis for private suits against states. See, e.g., Fletcher, supra note 1, at 1045-63 (framers of amendment did not intend to abolish federal causes of action against states); Gibbons, supra note 1, at 1926-39 (amendment was passed as a political compromise between Federalists and Republicans in Congress; amendment intended merely to eliminate federal jurisdiction over suits against states in which jurisdiction was based purely on parties status under article III).

Except for Baker, supra note 1, all of the commentators view with unalloyed hostility the extent to which the eleventh amendment shields states from accountability in federal court for violations of federal law. While the Court has notched out practical exceptions to the amendment to mitigate the harsh affects of sovereign immunity on private persons, several commentators have urged the Supreme Court to reconsider eleventh amendment doctrine and to make states directly suable in federal court for violation of federal law.

Professors Field and Fletcher each suggest that the only tenable view of the eleventh amendment is as a limited exception to the clause in article III which creates federal jurisdiction over cases between a state and a citizen of another state. See Field, *Part One, supra note 1, at 538-40; Fletcher, supra note 1, at 1063. Both commentators call for complete elimination of constitutional sovereign immunity and recommend other sources for limitations on federal power over state governments. Field, *Part Two, supra note 1, at 549 (common law sovereign immunity should replace eleventh amendment); Fletcher, supra note 1, at 1109-13 (tenth amendment protects states from extinction); see also Gibbons, supra note 1, at 2004 (suggesting that if *Hans* were overruled, debate over federal doctrine of sovereign immunity "could move to the practical policy level").

Some authors have suggested that the Court should overrule the *Hans* holding that states cannot be sued by their own citizens. M. Redish, *supra* note 1, at 151-53; Thornton, *supra* note 1, at 336-37. Such a ruling would have changed the outcome in suits such as Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam), in which inmates of an Alabama prison sued the state for damages under 42 U.S.C. § 1983. The Court dismissed the suit against Alabama, finding that the eleventh amendment barred the suit in spite of the fact that the prisoners were residents of Alabama and therefore were not precluded from suing the state by the literal terms of the amendment. 438 U.S. at 782. If the Court overruled *Hans,* federal courts would be able to exercise jurisdiction over such cases as *Pugh,* while retaining the bar to suits against states by non-citizens. See M. Redish, *supra* note 1, at 152 (constitutional amendment necessary to lift eleventh amendment bar to suits by out-of-state persons); Thornton, *supra* note 1, at 336-37.

One commentator has suggested that the Court take an explicit balancing approach to eleventh amendment controversies, basing the jurisdiction of federal courts over state defendants upon the exigencies of the federal system. See Baker, *supra* note 1, at 88. Under this analysis, states would lose their immunity in suits based upon congressional statutes that place reasonably specific obligations on states, or upon the Constitution. Id. Two other commentators have recommended a special federal question exception to the eleventh amendment. L. Tribe, *supra* note 1, at 139-43. The exception would be limited to causes of action created expressly by Congress. This exception recognizes the importance of federal courts in enforcing federal rights, but precludes judicial decision-making about the appropriate balance of state and federal powers. See Nowak, *supra* note 1, at 1468-69.

Young, the attorney general, challenged the contempt finding by filing a petition for a writ of habeous corpus. The Supreme Court declined to issue the writ, affirming the district court’s jurisdiction to issue the injunction. Following the reasoning announced by the *Young* Court, a state official may be sued by private individuals in federal court to enjoin state conduct that violates federal law.

The *Young* decision created a legal fiction—the Supreme Court characterized the injunction against Young as an order issued to Young personally to conform his conduct to his legal duties under federal law. The force of the injunction extended only to the officer, not to the state. The Court said that a state could not authorize conduct by its officers that violated the Constitution. Since Minnesota could not have authorized Young to enforce unconstitutional railroad regulations, the Court concluded that Young enforced the regulations in his personal capacity and, therefore, could not share in Minnesota’s eleventh amendment immunity.

The fiction of *Young* is easily understood in light of the fact that states can only function through their officials, and that therefore an injunction against a state official in his official capacity is a de facto injunction against a state. The effect of *Young* is to allow, through the back door, suits against states which would otherwise be barred by the eleventh amendment. In spite of the fictional content of the *Young* doctrine, all commentators agree that *Young* is an important and necessary exception to the eleventh amendment.

82. *Id.* at 134. The injunction restrained Edward T. Young, the attorney general of Minnesota, from taking any steps to enforce either the railroad rate regulation laws enacted by the state legislature or various rate and tariff orders prescribed by the Railroad and Warehouse Commission. Young refused to observe the injunction, believing it to be invalid under the eleventh amendment. *Id.* at 132, 134.

83. *Id.* at 145.

84. The central fiction of *Young* is that “the state has no power to impart to [its officers] any immunity from responsibility to the supreme authority of the United States,” and therefore a state is incapable of participating in the unconstitutional conduct of its officers for the purposes of the eleventh amendment. *Id.* at 160.

85. *Id.* at 159.

[T]he use of the name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of and . . . which does not affect the State in its sovereign or governmental capacity. 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.

A similar argument appears in some pre-*Young* sovereign immunity suits. See, e.g., Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 283-84 (1906) (attorney general made defendant in suit to enjoin unconstitutional tax); Prout v. Starr, 188 U.S. 537, 533-34 (1903); Smyth v. Ames, 169 U.S. 466, 518-19 (1898) (in both *Prout* and *Smyth*, the attorney general made defendant in suit to enjoin unconstitutional railroad regulations).

86. Professor Wright has stated that “in perspective the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law.” *C. Wright, supra* note 11, at 292; accord *Nowak, Rotunda & Young, Constitutional Law* 52 (2d ed. 1983); L. Tribe, *supra* note 1, at 146. This is true because the *Young* doctrine permits federal courts to adjudicate the constitutionality of state laws. As Oliver Wendell Holmes once said, “I do not think the United States would come to an end if [the Court] lost [its] power to
The *Young* doctrine has endured to the present day, but it was qualified by the Supreme Court's 1974 decision, *Edelman v. Jordan*. In *Edelman*, a federal district court ordered Illinois welfare officials to "release and remit" federally subsidized payments formally withheld from qualified applicants under the federal-state cooperative programs of Aid to the Aged, Blind, and Disabled. The Supreme Court reversed the district court's order; in so doing, the Court refused to extend *Young* to cover retroactive monetary awards against state officials. The Court concluded that to allow a monetary award against state officials in this case would in reality place state treasuries within the reach of private individual plaintiffs. This result, the Court implied, passed beyond the hazy frontiers of the *Young* fiction and constituted a suit against the state itself. Such a suit, the Court reasoned, is barred by the eleventh amendment.

*Edelman* did not go so far, however, as to bar all fiscal claims by individual citizens against states and state officials. The *Edelman* Court conceded that state expenditures might be "the necessary result of compliance with decrees which . . . are prospective in nature." In subsequent cases, the Court has distinguished *Edelman* when a federal court has ordered a state to expend funds to satisfy the requirements of a prospective injunction. For example, when the *Edelman* case returned to the Supreme Court in 1979, the Court unanimously affirmed a federal district court order that Illinois state officials notify plaintiff class members, at state expense, that they had been wrongly denied public assistance.

II. THE *Pennhurst* CASE

Before *Pennhurst*, the Supreme Court had never directly confronted the issue of whether the *Young* doctrine authorized private suits in federal court declare an act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states." O.W. Holmes, *Collected Legal Papers* 295-96 (1920).


89. The *Edelman* Court considered the source of plaintiff's award in this case to be "in practical effect indistinguishable in many aspects from an award of damages against the State. It [would] to a virtual certainty be paid from state funds . . . ." 415 U.S. at 668.

90. "The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the state itself . . . than it does the prospective injunctive relief awarded in *Ex parte Young*." Id. at 665.

91. Id. at 668.

92. See *Quern v. Jordan*, 440 U.S. 332 (1979); see also *Hutto v. Finney*, 437 U.S. 678, 699-700 (1978) (Court affirmed award of attorney's fees, to be paid by state, because of the state's bad faith in failing to comply with a federal court order); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (Court affirmed desegregation order, with express recognition of the consequent expense to the state in implementing it). But see *Banas v. Dempsey*, 742 F.2d 277, 285-89 (6th Cir. 1984) (eleventh amendment bars notice order, when notice is not ancillary to another prospective court order).
against state officials based on state law claims. The peculiar procedural history of *Pennhurst*, however, placed the question squarely before the Court. *Pennhurst* was an appeal from a federal court of appeals order granting class action injunctive relief against state officials.\(^9\) The injunction satisfied the requirements of *Young* by naming a state officer, and *Edelman* by seeking only prospective relief. It was, however, based solely on state law. The action commenced in 1974 when Terri Lee Halderman, a developmentally disabled minor resident of Pennhurst State School & Hospital (Pennhurst), filed a complaint in the United States District Court for the Eastern District of Pennsylvania for herself and all other Pennhurst residents against Pennhurst, its superintendent, various Pennsylvania state officials, and officials from the five counties whose populations were served by Pennhurst. The complaint alleged that Pennhurst residents were subjected to dangerous living conditions and inadequate health care and education programs.\(^4\) The district court made findings of fact and conclusions of law that the defendants violated various constitutional and statutory rights of the plaintiff class. The rights violated included the right to "minimally adequate habilitation"\(^5\) under the due process clause of the fourteenth amendment\(^6\) and the Pennsylvania Mental Health and Mental Retardation Act of 1966 (MH/MR Act),\(^7\) and the right to the "least restrictive setting"\(^8\) for treatment of the mentally

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\(^4\) Conditions at Pennhurst were hazardous to the patients; patients were often physically abused, bound in restraints, or drugged by staff members. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1306-11 (E.D. Pa. 1977), modified, 612 F.2d 84 (3d Cir. 1979), rev’d, 451 U.S. 1 (1981). Also, health care and educational programs at Pennhurst were found inadequate or non-existent. 446 F. Supp. at 1308-10. The facility was unsanitary and understaffed. Id. at 1306-08.

\(^5\) 446 F. Supp. at 1318. Habilitation is:

the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment, and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.


\(^6\) U.S. CONST. amend XIV, § 1.


\(^8\) "Least restrictive environment" means, that to the maximum extent appropriate, handicapped children are educated with children who are not handicapped, and that removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

handicapped under the due process clause. The district court ordered the defendants to close Pennhurst and to transfer its residents to community-based treatment alternatives. The court appointed a special master to administer the order. 99

The United States Court of Appeals for the Third Circuit affirmed the district court’s judgment. 100 The court modified the remedy by reversing the order to close the school, but affirmed the order to transfer most of Pennhurst’s residents to the community. 101 The two pertinent issues before the Third Circuit were whether the various statutory and constitutional provisions considered by the district court contained a right to habilitation in the least restrictive setting for the mentally handicapped, and whether the eleventh amendment barred the class action because of the financial impact of the judgment on the state. With respect to the former issue, the court affirmed the district court’s determination that the mentally handicapped have a right to habilitation in the least restrictive setting. 102 Seeking to avoid the constitutional issues, however, the court of appeals held that this right was based on the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the Bill of Rights Act), 103 a federal-state grant program under which the federal government financed improvements in state education of the mentally handicapped. The court of appeals determined that affirmative statutory duties, as outlined in the Bill of Rights section of the Act, were imposed upon Pennhurst as a condition of receiving funds under the Bill of Rights Act. The court also concluded that mentally retarded persons had an implied cause of action to enforce that right. 104 Finally, the court of appeals dispensed with the eleventh amendment defense by stating that the amendment did not preclude a federal injunction against state officials, per the Young doctrine, even if that injunction had ancillary fiscal consequences for the state. 105

The Supreme Court, on its first review of Pennhurst, reversed the court of appeals. 106 The Court determined that the Bill of Rights Act placed no duty on state grant recipients to provide habilitation for the mentally hand-
capped in the least restrictive setting. The Court remanded the case to the court of appeals with instructions to reconsider the plaintiff class’s claims based on Pennsylvania’s MH/MR Act and other federal law. The opinion did not mention the eleventh amendment defense raised in the court of appeals.

On remand, the court of appeals affirmed its prior judgment, this time basing its decision solely on Pennsylvania’s MH/MR Act. The court of appeals exercised jurisdiction over the state law claim by virtue of its pendency with the federal statutory and constitutional claims originally adjudicated by the district court. The Third Circuit noted that a recent Pennsylvania Supreme Court decision, In re Joseph Schmidt, had definitely interpreted the MH/MR Act to require habilitation of the mentally handicapped in the least restrictive setting. Applying the Pennsylvania decision to the Pennhurst facts, the court determined that the MH/MR Act fully supported its prior judgment.

The court of appeals also rejected the eleventh amendment defense raised by the Pennhurst defendants. The defendants argued that the amendment applied in a “particular and different” way to state law claims than to federal law claims. While the Young doctrine lifts the eleventh amendment to allow federal courts to adjudicate federal claims, the defendants claimed that there was no similar federal interest in federal courts hearing state claims against state officials. In response, the court of appeals observed that federal courts were supposed to avoid making constitutional decisions and that in a case such as this, where the state law was unambiguous, the principles of judicial restraint called for the court to adjudicate the state claims first.

The court noted that in a 1909 Supreme Court decision, Siler v. Louisville & Nashville Railroad Co., a lawsuit against state officials was based solely upon pendent state claims. Finally, the court regarded the Supreme Court’s remand as “an express mandate... [to] reconsider the state law issue.”

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107. "[W]e find nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens." Id. at 18.
108. Id. at 31 & n.24.
110. Id. at 650-51.
112. 673 F.2d at 656-59.
113. Id. at 657.
114. Id. at 658-59.
115. 213 U.S. 175 (1909). In Siler, the railroad challenged a state order regulating its rates as unauthorized by state law and as violative of due process. Id. at 190-91. The Supreme Court determined that the federal district court had pendent jurisdiction over the state law claims. Id. at 191-92. The Court then declared that the lower court should proceed on the state claims first to moot, if possible, the federal constitutional question. Id. at 193. Professor Shapiro indicates that this latter aspect of the Siler decision has been overruled by Pennhurst. Shapiro, supra note 1, at 65 n.29.
116. 673 F.2d at 659.
In light of all of these factors, the court of appeals retained jurisdiction over the state law claims and entered a judgment for the plaintiff class.

Pennhurst again went to the Supreme Court, and the Supreme Court again reversed the Third Circuit. Justice Powell, writing for the Court, seized upon Pennhurst as an opportunity to clarify the Young doctrine. The Court framed the issue in Pennhurst as whether the Young doctrine lifted the eleventh amendment bar to private federal suits against state officials when the claim for injunctive relief was based on state law. The Court concluded that Young did not extend to such suits and as a consequence such suits were barred by the eleventh amendment.

The Young doctrine is, from the Court's perspective, a necessary exception to the eleventh amendment that allows the federal courts to vindicate federal rights and to enforce federal law against state officials. The eleventh amendment embodies a rule of state sovereign immunity; as a general proposition, it bars all suits by private individuals against states in federal courts. When the federal judiciary has an interest in enforcing federal rights over state prerogative, however, the federal system cannot tolerate the eleventh amendment bar. The Young doctrine, therefore, allowed individ-

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117. Pennhurst, 104 S. Ct. 900 (1984). Justice Powell wrote the Court's opinion, which was joined by Chief Justice Burger and Justices White, Rehnquist, and O'Connor.

118. Id. at 906. The claim in Pennhurst was for injunctive relief since the Court in Edelman v. Jordan, 415 U.S. 651 (1974), barred the use of the Young doctrine by private parties to extract money damages from state defendants. The Court has not yet considered the effect of Young on a private party seeking declaratory relief against a state. See Shapiro, supra note 1, at 82 (suggesting that Young doctrine could accommodate declaratory relief). It thus appears that the type of relief sought affects the applicability of the eleventh amendment immunity.

119. 104 S. Ct. at 909-11. The Court passed over two lesser issues which might have resolved the Pennhurst case without resort to the eleventh amendment: whether the doctrine of comity prohibited the district court from issuing injunctive relief, and whether the district court abused its equitable discretion in appointing special masters to supervise the administration of state law. Id. at 906.

The Court also rejected two alternative bases for jurisdiction in Pennhurst which would have avoided the eleventh amendment. First, the United States intervention as a plaintiff caused the suit to become one between the United States and Pennsylvania, permissible under article III. Id. at 909-10 n.12. The Court determined, however, that the United States had no standing to assert the state-law claims on behalf of the third-party plaintiffs, and that therefore the United States' presence had no affect on the state law claims. Second, Pennsylvania abolished its sovereign immunity and thereby waived the eleventh amendment bar. Id. The Court concluded briefly that at the time Pennhurst was first filed, suits against Pennsylvania were permitted only when the state legislature expressly authorized them, and that the legislature had never waived the state's eleventh amendment immunity. Id.; see Shapiro, supra note 1, at 76-79 (eleventh amendment and sovereign immunity were inappropriately used in Pennhurst).

120. 104 S. Ct. at 910. Justice Stevens's dissent criticized the Court's federal supremacy view of the Young doctrine as "unprincipled." Id. at 933 (Stevens, J., dissenting). But see Shapiro, supra note 1, at 67 n.35, 83-34 (Court's federal supremacy approach to Young may in some instances limit eleventh amendment and is, therefore, beneficial).

121. See, e.g., Pennhurst, 104 S. Ct. at 907 (reciting principle of sovereign immunity).
uals to enforce their federal rights against state officials whose conduct violates federal law.122

The Court concluded, however, that when private suits against state officials do not present federal issues, the Young doctrine does not apply. Since a federal court’s grant of relief based on state law would not vindicate federal rights, the Court stated that the “entire basis for the doctrine of Young . . . disappears.”123 The Court further concluded that “a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment.”124

Thus, the Court determined that the eleventh amendment barred pendent state claims by private parties against state officials in federal court. Yet, the Court acknowledged that Siler, the case cited by the court of appeals, and cases following Siler implied a different rule: that the eleventh amendment did not bar pendent state claims once the federal basis for jurisdiction was established.125 Noting, however, that those cases did not expressly consider the eleventh amendment in connection with pendent state law claims, the Court decided that it was not bound by those cases.126 After declaring that the eleventh amendment barred a federal court from hearing state claims against state officers generally, the Court held specifically that the bar applied particularly to pendent claims.127

The principal dissent, written by Justice Stevens and joined by three Justices, staked out a view of the Young doctrine that was radically different from the Court’s. While Justice Stevens agreed with the Court that the eleventh amendment represents a federal constitutional rule of sovereign immunity,128 he vigorously disputed the Court’s characterization of Young as a doctrine of federal supremacy.129 Instead, Justice Stevens viewed the Young doctrine as an explication of the common law rule of ultra vires. Ultra vires conduct, in the context of sovereign immunity, is activity by a state officer that, although ostensibly undertaken in the course of official business, is not authorized by the law of the sovereign. Authorized official activity is protected from judicial review under sovereign immunity

122. Id. at 910.
123. Id. at 911.
124. Id. at 919.
125. Id. at 917-18.
126. Id. at 918 (referring to prior decisions as passing on jurisdictional issues sub silentio).
127. Id. at 922.
128. Id. at 932-33 (Stevens, J., dissenting) (discussing Hans v. Louisiana, as rule of sovereign immunity); Justices Brennan, Marshall, and Blackmun joined Justice Stevens’s dissent.
129. Id. at 933 (Stevens, J., dissenting). Justice Stevens cited a long list of cases in which suit was held to be barred by the eleventh amendment, despite the presence of a federal statute as a possible rule of decision. Id. at 933 n.28.
doctrine; unauthorized activity is not. The dissent traced the history of sovereign immunity and found that, since the fifteenth century in England, the common law distinguished between the King and his officers. While the King was immune from prosecution, the King's officers were not considered immune when they violated the King's law. According to Justice Stevens, the distinction between officers and the sovereign, which lies at the heart of the doctrine of ultra vires, is imbedded in the eleventh amendment. Young, according to Justice Stevens, merely restated this old law in a constitutional setting. Because a state cannot authorize unlawful conduct, state officers who have allegedly violated state or federal law are stripped of their sovereign identity and may not enjoy the state's sovereign immunity under the eleventh amendment. Under this view of the Young doctrine, the dissent considered

130. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). While Larson deals with the sovereign immunity of the United States, the Supreme Court has treated state and federal sovereign immunity as interchangeable doctrines. In Larson, the Court ordered dismissal of an action by the Commerce Corporation against a War Assets Administrator seeking to enjoin the sale of coal under one contract which the plaintiff allegedly purchased under another contract. 337 U.S. at 705. The Court stated that the action was against the United States, since the Administrator was performing as an agent for the United States in each contract. In dicta, the Court said that if the official did something which the government had neither authorized nor affirmatively proscribed, then the actions are ultra vires and thus not shielded by sovereign immunity. Id. at 689.

131. See, e.g., Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (plurality opinion). The decision in Treasure Salvors, in relevant part, turned upon the presence or absence of legal authority in Florida state officials to retain treasure discovered by private persons in extraterritorial waters. 458 U.S. at 692-97. Treasure Salvors filed an admiralty in rem action in federal district court to claim title of ownership to a sunken galleon and the treasure that was discovered within it. The state officials retained some of the treasure pursuant to certain contracts drawn between the state and Treasure Salvors. To bring the case within its jurisdiction, the district court ordered the United States Marshall to arrest the artifacts. Id. at 678. The state officials challenged the order, citing the eleventh amendment. A four-Justice plurality of the Supreme Court determined that the eleventh amendment did not bar process to secure possession of the artifacts because the state officials named in the warrant had no legal authority to refuse to surrender the artifacts. Id. at 700.

132. 104 S. Ct. at 930 (Stevens, J., dissenting).

133. Id. at 935 (Stevens, J., dissenting). The cases cited by Justice Stevens in support of his ultimate position, that a state official's violation of state law divests the official of eleventh amendment immunity, are uncertain authority. In Johnson v. Lankford, 245 U.S. 541 (1918), the judgment against the state official was based more on the official's personal torts than on his violations of state law. Id. at 546. The same may be said of Scully v. Bird, 209 U.S. 481 (1908), in which a state officer tortiously interfered with a corporation's business activities. Justice Stevens's view is apparently supported by Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887). In Rolston, the Court affirmed a federal decree restraining state officers from violating a state statute involving the state bond sinking fund. 120 U.S. at 412. Rolston's precedential authority, however, is dimmed by the fact that it preceded Young by 20 years, and also by the fact that the Court addressed the eleventh amendment only in a brief paragraph at the end of the opinion. 120 U.S. at 411.

The Court treated Justice Stevens's discourse on the ultra vires doctrine with brutal contempt. See, e.g., Pennhurst, 104 S. Ct. at 911 ("Justice Stevens' dissent rests on fiction, is wrong on the law, and . . . is out of touch with reality."). The Court described the ultra vires doctrine
the court of appeals’ order to be proper. The defendants operated Pennhurst in a manner not authorized by the state under the MH/MR Act; hence they did not enjoy the sovereign immunity of the state. The eleventh amendment, therefore, should not have barred the federal injunction against the Pennhurst defendants.135

Justice Brennan submitted a brief dissent reflecting his idiosyncratic views on the eleventh amendment.136 Since 1973137 Justice Brennan has advocated a literal interpretation of the eleventh amendment, which forbids only those federal suits between an out-of-state plaintiff and a state defendant.138 A federal suit between a plaintiff and a plaintiff’s home state, by contrast, is constitutionally acceptable according to the literal terms of the amendment.139 Therefore, since Pennhurst was a case from the latter category, the consti-

as a narrow exception to the eleventh amendment, applicable to an official only when the official’s conduct is “without any authority whatsoever,” and where the ultra vires claim rests on the “official’s lack of delegated power.” Id. at 908-09 n.11 (citing Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)). The Court also contemplated the impending demise of the ultra vires doctrine in the eleventh amendment context. Id. at 915-16 n.25.

135. 104 S. Ct. at 939 (Stevens, J., dissenting).
136. Id. at 921-22 (Brennan, J., dissenting).
137. Justice Brennan’s manifesto on the eleventh amendment appears in Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting). The plaintiffs in Employees filed an action in federal court to recover past overtime compensation under the Fair Labor Standards Act (FLSA). Id. at 281. The Court affirmed the district court’s dismissal of the complaint. Id. at 287. Six Justices, interpreting the FLSA, determined that Congress did not intend to create a private cause of action against state employers. Id. at 285. Justices Stewart and Marshall concurred in the result and declared that the federal judicial power never extends to suits by private parties against unconsenting states. Id. at 287 (Marshall, J., concurring).

Justice Brennan, the lone dissenter, argued that the eleventh amendment did not apply to the case since the plaintiffs were suing their own state. Id. at 298-324 (Brennan, J., dissenting). The literal terms of the amendment bar only suits against states by out-of-state persons. Justice Brennan argued that history provided no evidence that the drafters of the eleventh amendment intended to constitutionalize state sovereign immunity. Id. at 310-11, 318-21 (Brennan, J., dissenting). He also argued that, in so far as federal courts observe some common law state sovereign immunity, the power of Congress to regulate commerce, as under FLSA, supercedes that immunity. Id. at 299-300 (Brennan, J., dissenting); see supra notes 52, 71 (further discussion of Justice Brennan’s views).

139. See, e.g., Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 700 (1982) (Brennan, J., concurring in part and dissenting in part); Yeomans v. Kentucky, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting); Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting). While Justice Brennan’s view of the eleventh amendment has received no support on the Court, it has earned praise from legal scholars. See, e.g., M. Redish, supra note 1, at 152 (arguing that express language of amendment should be used to introduce flexibility into eleventh amendment doctrine); Gibbons, supra note 1, at 1893-94 (“Justice Brennan’s interpretation of the amendment is the only one consistent with its plain language, with the history of its adoption, and with the earliest interpretations of its terms”); Thornton, supra note 1, at 336-37 (endorsing Brennan’s dissent in Employees).
tutional inquiry on the federal court’s jurisdiction in *Pennhurst* should have been resolved in the plaintiff’s favor.\(^{140}\)

### III. Analysis of the *Pennhurst* Decision

*Pennhurst*, like *Edelman*, qualified the *Young* doctrine. Through *Pennhurst*, the Supreme Court has barred federal jurisdiction over state law claims seeking injunctive relief in private suits against state officers. The *Young* opinion and subsequent eleventh amendment decisions were silent on the relationship of the eleventh amendment to state law claims." Operating on a clean slate, therefore, the Court refused to extend the *Young* doctrine to allow state officers to be sued on state claims in federal court. The *Pennhurst* Court said that a contrary result would place an unnecessary strain on the federal system by allowing federal courts to interfere with state efforts to implement local policy. "Such a result," the Court reasoned, "conflicts directly with the principles of federalism which underlie the eleventh amendment."\(^{142}\)

The *Pennhurst* Court’s decision to relegate state claims to state courts did not have to rest on a constitutional basis. The Court could have narrowed the scope of federal pendent jurisdiction to preclude state law claims against state officers. The Court could also have directed the federal courts to abstain completely from cases such as *Pennhurst* in which a remedy will foreseeably require extensive federal supervision of state agencies based on state law. Both of these alternatives share the virtue of leaving the decision of whether to hear the state claims to the discretion of the federal district court.

With respect to the first of these two alternatives, the *Pennhurst* Court could have ordered the court of appeals to dismiss the pendent state claims against the *Pennhurst* officials by deciding that the exercise of pendent jurisdiction in this case violated notions of federalism and comity. When the Supreme Court set out the modern law of pendent jurisdiction in *Gibbs*,\(^{143}\) it also established that federal courts have broad discretion to refuse to hear pendent claims. According to the *Gibbs* Court, a district court is supposed to weigh "considerations of judicial economy, convenience, and fairness to litigants" in determining whether to extend jurisdiction to pendent state claims.\(^{144}\) The *Gibbs* Court also said that the district court’s decision must

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\(^{140}\) Justice Brennan joined Justice Stevens’s dissent "[t]o the extent that such nonconstitutional sovereign immunity may apply . . . ." *Id.* at 922 (Brennan, J., dissenting).

\(^{141}\) Justice Stevens disputed this representation of the precedent. *Id.* at 924-29 (Stevens, J., dissenting). *But see supra* note 134 (precedent related to state-law ultra vires doctrine sketchy at best).

\(^{142}\) 104 S. Ct. at 911.

\(^{143}\) *See supra* notes 19-25 and accompanying text.

take into account the federal interest of comity between the state and federal government. District courts should not hear pendent state claims if "state issues substantially predominate" or if it would avoid unnecessary decisions of state law.\(^{145}\)

Had the lower courts initially declined pendent jurisdiction over the MH/MR Act claims, it would have promoted comity without resort to the eleventh amendment. The *Pennhurst* Court supported its decision to bar all state claims under the eleventh amendment by citing the federal interest in avoiding the strain on federalism that results from a federal court instructing state officials on how to conform their conduct to state law.\(^{146}\) The Court could have promoted this interest by limiting the district court's exercise of pendent jurisdiction over state law claims when such jurisdiction would result in substantial federal interference in state sovereignty.

With respect to the second alternative, the Court could have dismissed the entire *Pennhurst* case under the *Burford* abstention doctrine.\(^{147}\) The *Burford* doctrine is designed to prevent needless federal interference with sensitive state policy.\(^{148}\) The court of appeals' second decision in the *Pennhurst* case illustrates just such interference, indicating that *Burford* abstention would have been an appropriate course in this instance.

First, by the court of appeals own reasoning, the federal judiciary retained scant interest in the *Pennhurst* case after the Supreme Court's initial review of the relevant federal law. The Supreme Court all but eliminated the federal statutory basis for enjoining the *Pennhurst* defendants by interpreting the federal Bill of Rights Act narrowly.\(^{149}\) To avoid nettlesome constitutional

over state claims, because to hear them would require the court to engage in needless, detailed inquiries); Whalen v. Heinmann, 373 F. Supp. 353 (D. Conn. 1974) (federal court declined pendent jurisdiction over a claim which had been asserted in mandamus action in state court and which was presently on appeal).


146. 104 S. Ct. at 911.

147. See supra notes 28-35 and accompanying text.

148. See, e.g., Comment, *The Scope of Burford*, supra note 33, at 996 (*Burford* abstention crafted to avert "danger that adjudication of a particular issue in federal court will cause undue harm to legitimate state policies and federal-state relations")).

adjudication, the court of appeals resorted to Pennsylvania's MH/MR Act on remand. Because there was no diversity between the parties, and because the federal law related to the case had been set aside, the court of appeals second proceeding in *Pennhurst* was supported by neither of the traditional bases for federal jurisdiction: vindicating federal rights\(^{150}\) or deciding cases between diverse parties in a neutral forum.\(^{151}\)

Second, the district court injunction substantially disrupted state administration of the Pennhurst facility. The district court's original order called for closing Pennhurst and directed the transfer of the patients; a special master was empowered to supervise the transfer decisions.\(^{152}\) Even though the court of appeals reversed the order closing the school, it still ordered comprehensive procedures for screening patients and determining which patients should be released to community treatment.\(^{153}\) In short, the lower federal courts assumed virtually complete control over Pennhurst, even though the institution had never been adjudged to have violated federal law. Considering the limited federal interest in deciding the *Pennhurst* case and the high level of state interest in administering its own law, the Supreme Court could have appropriately applied the *Burford* abstention doctrine to the *Pennhurst* case.

The Supreme Court arguably pursued a sensible result in *Pennhurst*, putting a stop to federal enforcement of the MH/MR Act in the interest of federal-state comity. The Court was not, however, obliged to turn *Pennhurst* into a federal constitutional case to do so. The discretionary doctrines of pendent jurisdiction and abstention might have been applied in this case, and the eleventh amendment issues could have been avoided. According to a long standing doctrine of judicial restraint, the Supreme Court ordinarily avoids deciding cases on constitutional grounds whenever a non-constitutional ground for decision presents itself.\(^{154}\) In this case, a decision based on pendent

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\(^{150}\) Federal courts may, according to article III, be given jurisdiction over "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their Authority." U.S. CONST. art. III, § 2. Congress authorized original jurisdiction over federal question cases in 1875. 28 U.S.C. § 1331 (1982); see C. Wright, *supra* note 11, at 90-98 (discussed constitutional power of federal courts to hear federal question cases).

\(^{151}\) C. Wright, *supra* note 11, at 127-43 (discusses policies underlying diversity jurisdiction of federal courts).

\(^{152}\) 446 F. Supp. at 1325-26.

\(^{153}\) 612 F.2d at 115.

\(^{154}\) Justice Brandeis observed:

The Court will not pass upon a constitutional question although properly presented by the record if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.


The Court has followed this principle on numerous occasions. See, e.g., Mills v. Rodgers, 457 U.S. 291, 306 (1982) (Court vacated and remanded court of appeals judgment on federal due process claims for consideration of state law on right of mental patient to refuse drug
jurisdiction or on Burford abstention would have been more in line with this doctrine than the eleventh amendment rationale actually adopted by the Court. Either of these courses of action would have satisfied the federal interest in avoiding interference with state administration of state policy. Had either of these bases been the Court's rule of decision in *Pennhurst*, the decision would have left the lower federal courts the discretion to hear state law claims against state officers when it would serve a federal interest to do so. For example, a case could conceivably arise in which a state violated its own statutory procedure in administering a federal-state cooperative welfare program. In such a case, if there were also substantial federal claims, the federal courts would have an interest in hearing all of the claims together because they all relate to the administration of a federally regulated program. By basing the *Pennhurst* decision on one of the two discretionary rules of jurisdiction considered above, the Supreme Court could have reserved to the federal courts the power to hear state law claims for injunctive relief against state officers when it would advance federal interests to do so. In contrast, under *Pennhurst* the federal court can never hear state law claims in private suits against state officials because the eleventh amendment has been construed to pose an absolute barrier to federal jurisdiction over such claims.

**IV. IMPACT OF THE PENNHURST DECISION**

The *Pennhurst* decision bars private individuals from raising state law claims for injunctive relief against state officers in federal court regardless of the federal court's original basis for subject matter jurisdiction. The Court expressly disapproved of pendent jurisdiction as a basis for extending federal jurisdiction over state law claims against state officials. Nor can diversity jurisdiction overcome the restrictions imposed by *Pennhurst*. At one time there appeared to be no restriction on a private individual plaintiff from one state suing a state official of another state on state law claims. The Department of Health, Education, and Welfare [now the Department of Health and Human Services] administered federal payments for the program and issued regulations prescribing maximum time standards within which participating states had to process applications. States paid benefits to qualified recipients pursuant to their own regulations. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court heard claims in such a case against Illinois state administrators; the plaintiff alleged that the state officials violated the state's own regulations under AABD as well as the federal statutory scheme. *Id.* at 655-56.

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155. One example of such a law is the federal-state Aid to the Aged, Blind, and Disabled (AABD), 42 U.S.C. §§ 1302-1385 (1982). The Department of Health, Education, and Welfare [now the Department of Health and Human Services] administered federal payments for the program and issued regulations prescribing maximum time standards within which participating states had to process applications. States paid benefits to qualified recipients pursuant to their own regulations. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court heard claims in such a case against Illinois state administrators; the plaintiff alleged that the state officials violated the state's own regulations under AABD as well as the federal statutory scheme. *Id.* at 655-56.

156. 104 S. Ct. at 917-19.

157. In some early Supreme Court cases involving the eleventh amendment, the Court ruled in favor of private individual plaintiffs suing government officials based on diversity jurisdiction.
As the *Pennhurst* decision declared repeatedly, however, the eleventh amendment directly limits the exercise of any form of subject-matter jurisdiction contemplated under article III; by implication, therefore, diversity jurisdiction based on state claims against state officials is barred.

Since the Supreme Court decided *Pennhurst*, the lower federal courts have cited the case principally for its main holding that state law claims for injunctive relief may not be raised against state officers in private federal suits. The federal courts have apparently been sloughing through the backlog of cases that were filed before *Pennhurst* and that included state claims. To dismiss the state claims, the courts have merely recited the *Pennhurst* holding without elaboration. In suits that raise state claims against state officials that had been removed from state court, the federal courts have remanded the state claims rather than dismiss them.

The *Pennhurst* decision has not only quickly drawn criticism, but also has prompted some courts to find exceptions to the *Pennhurst* holding. The

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The Court has not recently reconsidered this issue.

158. 104 S. Ct. at 907, 917.
159. Id. at 919.
160. For cases in which the court dismissed state law pendent claims citing *Pennhurst*, see Almendral v. New York State Office of Mental Health, 743 F.2d 963, 968-69 (2d Cir. 1984); Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 846-47 (6th Cir. 1984); Allegheny County Sanitary Auth. v. United States EPA, 732 F.2d 1167, 1173-76 (3d Cir. 1984); Woe v. Cuomo, 729 F.2d 96, 102 (2d Cir. 1984), cert. denied, 105 S.Ct. 339 (1985); Hayward v. Thompson, 593 F. Supp. 57, 58-59 (N.D. Ill. 1984); Wylie v. Kitchin, 589 F. Supp. 505, 511 (N.D.N.Y. 1984); Everett v. Schramm, 587 F. Supp. 228, 234-35 (D. Del. 1984); Gelber v. Rozas, 584 F. Supp. 902, 904 (S.D. Fla. 1984); Diotte v. Blum, 585 F. Supp. 887, 897 (N.D.N.Y. 1984); Jones v. Singer Career Sys., 584 F. Supp. 1253, 1258 (E.D. Ark. 1984); David Nursing Home v. Michigan Dep't of Social Services, 579 F. Supp. 285, 288 (E.D. Mich. 1984). Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), is typical of these decisions. The district court action in *Cuomo* preceeded the *Pennhurst* decision. The case was factually similar to *Pennhurst*. A class of developmentally disabled children sued a New York state school and other state officials, seeking an injunction against institutional conditions that allegedly violated constitutional and statutory standards. The district court approved an extensive injunctive remedy against the school, but the injunction did not specify which federal and state laws supported the various components of the injunction. Id. at 1252. The court of appeals vacated and remanded the injunctive order because it had reason to believe that some parts of the injunction were shaped by state statutory standards in violation of *Pennhurst*. Id. at 1248.

162. See Hayward v. Thompson, 593 F. Supp. 57, 59 n.2 (N.D. Ill. 1984) (district court criticizes *Pennhurst* decision); see generally Shapiro, *supra* note 1 (criticizes decision for contributing to the expansion of sovereign immunity doctrine under heading of eleventh amendment).
first exception is an elaboration of the doctrine of ultra vires. Ultra vires acts are those taken by state officials in the course of their duties without legal authorization. A plaintiff can overcome a state official's profession of sovereign immunity by showing that the official's actions lacked any legal authority. While the Supreme Court cast doubts upon the ultra vires doctrine's continued vitality in *Pennhurst*, the lower courts continue to impose liability for ultra vires conduct.

Second, the lower federal courts have sustained pendent state tort claims against state officials that were filed against the officials in their personal capacity. When an official commits torts privately, not in connection with the duties of his or her office, the official is not immune from liability simply by virtue of holding a government title. The official may be sued as a private individual without confronting the eleventh amendment prohibition. In contrast to ultra vires, where the court investigates the defendant's fidelity to official responsibility, private tort claims are pled directly against the defendants as private persons and, at least ostensibly, seek no damages from the state.

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163. See supra notes 130-34 and accompanying text.
164. See supra note 134.
165. Attempts by plaintiffs to characterize state officials' conduct as ultra vires have met with mixed results. Compare Allegheny County Sanitary Auth. v. United States EPA, 732 F.2d 1167, 1174 (3d Cir. 1984), and Everett v. Schramm, 587 F. Supp. 228, 235 n.11 (D. Del. 1984) (both finding that defendants' activities were not ultra vires) with Miami Univ. Assoc. Student Gov't v. Shriver, 735 F.2d 201, 204 (6th Cir. 1984) (school officers lacked legal authority to enforce "no car" policy on students; *Pennhurst* does not bar relief to plaintiffs). See generally Portnoy v. Pennick, 595 F. Supp. 1000, 1008 (M.D. Pa. 1984) (to prove that officials' conduct is ultra vires, a plaintiff must prove that they willfully and knowingly violated their decision-making authority).
166. One such case is Terry v. Burke, 589 F. Supp. 853 (N.D. Ill. 1984). Ernest Terry filed an action in federal court against a parole officer, Baxter Burke, in connection with an alleged battery. 589 F. Supp. at 854. Terry sought damages against Burke under 42 U.S.C. § 1983 for Burke's alleged violations of Terry's federal constitutional rights. Terry also joined claims against Burke in his individual capacity for the state torts of assault, battery and false imprisonment. Burke sought to have the tort claims dismissed, arguing that *Pennhurst* barred such claims against state officials. The court rejected Burke's arguments, distinguished *Pennhurst*, and sustained jurisdiction over the tort claims. Id. at 856. The court found that the claims were against Burke as a private person; the plaintiff looked for damages only from Burke, and therefore the suit was not one against the state. Id.; see Portnoy v. Pennick, 595 F. Supp. 1000, 1007 (M.D. Pa. 1984) (defamation claims against state employees in their individual capacities sustained); Morrison v. Lefevre, 592 F. Supp. 1052, 1082 (S.D.N.Y. 1984) (state tort claims for conversion against prison officials in their individual capacities sustained); Shapiro, supra note 1, at 82 (predicting that *Pennhurst* would leave intact the individual tort liability of state officials as private citizens). But see Gelber v. Rozas, 584 F. Supp. 902, 904 (S.D. Fla. 1984) (state law tort claims against individual defendants barred, because injunction based upon such claims would operate against the state).
167. See *Pennhurst*, 104 S. Ct. at 914 n.21 (expressly reaffirms liability of officials as individuals for their own torts); see also Prosser & Keeton, supra note 53, at 1059-61 (discussing officer liability under federal common law).
Finally, federal courts may enforce state law against state officials if the state law has been expressly incorporated in a federal law which otherwise waives the state’s immunity. In such cases, the defendant state agencies received federal money as part of a federal grant program to participate in a federal-state cooperative program. In some cases, Congress has imposed conditions upon the use of the money that may require the state to create and enforce state standards upon the grant program. While those standards are part of the state law, for the purposes of the grant program they are also considered part of the federal law. A private plaintiff may therefore sue state officials to require compliance with state standards related to the federal law.

Aside from these exceptions, *Pennhurst* compels private individual plaintiffs to bring whatever state law claims they may have against state officials into state court. *Young* continues to allow private plaintiffs to bring federal claims against state officials in federal court. Assuming, however, that a plaintiff wants to bring federal claims against state officers, and also has state claims to raise, the *Pennhurst* decision leaves the plaintiff with three options: (1) bring both the federal and state claims to state court; (2) split the claims between federal and state court; and (3) forego the state claims and bring the federal claims to federal court. Each of these options illustrates how the *Pennhurst* decision will, in practice, frustrate the private plaintiff’s access to a federal forum for suits against states.

While bringing the claims together in state court may be the most convenient of the three options to the plaintiff, and may be the only way to raise all of the claims in one suit, this procedure is contrary to the plaintiff’s ordinary preference of bringing federal claims to federal court. State courts are not necessarily the institutional equals of federal courts for the purpose of adjudicating federal claims; state courts may lack experience and famil-

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169. For information regarding congressional statutes which waive the eleventh amendment, see *supra* note 62.


The plaintiff class filed an action in federal court seeking an injunction to block the State of California from moving the state school from its current Berkeley location to a Fremont site pending performance of seismic tests on the building which is a standard procedure for all California public school buildings. 736 F.2d at 540-41. The state officials sought to dismiss the claim, arguing that the injunction the plaintiffs sought would compel them to conform to state law standards, and that such federal injunctions were barred by *Pennhurst*. The court of appeals did not dismiss the claim because the court viewed the state standards as part of the federal law. *Id.* at 544-46; see *Everett v. Schramm*, 587 F. Supp. 228, 235-36 (D. Del. 1984) (state may be ordered to follow its own standards to update FDC standards of need, implemented pursuant to the federal grant program).

In contrast, federal courts are attractive to plaintiffs because of their expertise in handling federal law. Pennhurst, however, acts to close federal courthouse doors under this first option, to the detriment of the plaintiff.

The individual plaintiff's second option, splitting federal and state claims between the respective courts, entails the greatest inconvenience and risk to the plaintiff. The expense and burden of trying closely related claims separately may place this alternative beyond the reach of many plaintiffs. Moreover, splitting claims may result in piecemeal litigation and consequently may delay implementation of remedies for the plaintiff.\[173\]

Furthermore, there is a risk to the plaintiff that a federal district court would dismiss the federal claims before them, due to the pendency of a similar state claim in state court. In recent years, federal courts have ordered such dismissals on the basis of Colorado River.\[174\] The Court said in Colorado River that “considerations of [w]ise judicial administration” may justify such dismissal, but only in “exceptional circumstances.”\[175\]

The Court's general reluctance to embrace Colorado River abstention may be diminished in cases involving state defendants. Colorado River is an exceptional doctrine because it requires federal courts to surrender jurisdiction purely on grounds of judicial economy.\[176\] When a state official is a defendant, however, a special federal interest in comity is also implicated. The Burford doctrine instructs federal courts to avoid interference with a state's administration of its domestic affairs.\[177\] An injunction issued by the


173. The problems inherent in claim splitting are illustrated by the experience with federal abstention. When a federal case is stayed in favor of state litigation, the resulting delay between the filing of the suit and a final judgment can be lengthy. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966) (nine-year delay); United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965) (mooted after twelve-year delay); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) (nine-year delay).

174. See supra notes 36-50 and accompanying text.


176. See Colorado River, 424 U.S. at 818 ("the circumstances permitting the dismissal of a federal suit due to presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention").

177. See supra notes 28-35 and accompanying text; cf. Accident Fund v. Baerwaldt, 579 F.
lower federal courts, such as the one ordered in *Pennhurst*, may have a profound impact on state policy. In cases where a federal court can expedite both judicial economy and comity by centralizing litigation in a single state forum, the federal judge will be susceptible to state arguments that federal claims against state agents ought to be dismissed to permit their adjudication in one proceeding in state court.

A merger of *Burford* and *Colorado River* abstention, therefore, may produce a doctrine by which a state defendant can seek dismissal of federal claims against it in federal court. If the facts of the *Pennhurst* case were reproduced in a post-*Pennhurst* case, it is certain that the state law claims would be relegated to the state court. If the plaintiff brought separate federal claims to federal district court, the state defendant would have two points in favor of having the federal claims transferred to state court. First, drawing from *Colorado River*, the state could argue that piecemeal litigation could result in inconsistent judgments. Separate injunctions based upon state and federal law against the same institution might make irreconcilable demands upon the defendant. Second, raising *Burford*, the state would contend that comity obliges the court to permit the state to administer its domestic affairs with only the minimum necessary federal interference.

Aside from these two considerations, other factors raised by *Moses H. Cone* are neutral in a *Pennhurst*-like case with respect to the preferred forum. In *Pennhurst*, for instance, state and federal law were equally important in the litigation; neither predominated. The state courts are presumably competent forums in which to litigate federal claims, as federal courts presumably are competent forums in which to litigate state claims. Finally, in most cases, it would be equally convenient for the whole trial to be conducted in either federal or state court. Considering all of these factors, a federal district court has ample justification to dismiss the federal suit in favor of the state forum.

The third and final option for a private plaintiff after *Pennhurst* is to

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178. See *supra* notes 152-53 and accompanying text.
179. The state claims do not fall under any of the exceptions discussed above. See *supra* notes 163-70 and accompanying text. First, the Supreme Court refused in the first instance to find the state officials' conduct at Pennhurst ultra vires. *Pennhurst*, 104 S. Ct. at 908-09 n.11. Second, the officials could not be sued in their personal capacity in this case, since their supposed neglect of the Pennhurst facility stemmed from their status as state officials. Id. Third, apparently neither of the federal statutes applicable to this case, the Rehabilitation Act and the Bill of Rights Act, incorporate state standards upon state facilities.
forego state law claims against state officers and to bring only the federal claims in federal court. This averts the prospect of the federal court dismissing the federal claims under *Colorado River* because there would be no concurrent state suit pending on which to base dismissal. This alternative, however, forces federal courts to decide cases on federal statutory or constitutional grounds which might have been decided on state law grounds. Such a result is contrary to the doctrine of judicial restraint, which counsels courts to avoid constitutional issues when there exists a non-federal ground on which a decision may be based. The rule created by the *Pennhurst* Court thus precludes federal courts from implementing state policy through the equitable enforcement of state law. Although a federal court formerly could decide pendent state law claims against state defendants, and thereby avoid federal issues, this practice has been eliminated by *Pennhurst*.

None of the complications outlined above would have been necessary had the Supreme Court not drawn the eleventh amendment into *Pennhurst*. The Court might have afforded the lower federal courts discretion, under pendent jurisdiction or abstention, to determine whether to hear state law claims against state officers. This would have left private individual plaintiffs with the option of raising pendent state claims against state officers in federal court, although it might have placed a burden on the plaintiff to justify why the claims should be heard there. By setting a constitutional bar to such jurisdiction, the Court has compromised the individual plaintiff’s right to pursue federal claims in federal court.

V. CONCLUSION

Considered strictly from the private individual plaintiff’s perspective, *Pennhurst* is a barely mitigated disaster. If the plaintiff wants to seek relief against a state in the future, then the plaintiff will probably have no practical alternative to bringing the state and federal claims together in one action in state court. The plaintiff naturally will have reason to doubt that this course will be satisfactory, but the Court has decreed that this is a cost of living in a thriving federal polity.

Considering *Pennhurst* from a loftier jurisprudential perspective, however, it is not at all apparent that policies of federalism are being promoted by the Court’s eleventh amendment approach to forum allocation. Any benefits obtained by withholding federal jurisdiction from state law claims against state officials could just as easily have been satisfied through the rule of

183. The federal courts have often confirmed that pendent state claims should be decided before federal constitutional claims. See, e.g., *Schmidt v. Oakland Unified School Dist.*, 457 U.S. 594 (1982) (federal court of appeals abused discretion by refusing to resolve pendent state claim by affirming on constitutional grounds an affirmative action plan for contractors); *Hagans v. Lavine*, 415 U.S. 528, 556 (1974) (if federal court can base decision on federal preemption grounds, it should do so in preference to determining the constitutional validity of a state law); *Cherry v. Steiner*, 716 F.2d 687, 692 n.3 (9th Cir. 1983) (pendent state claim should be considered ahead of federal constitutional issues to avoid constitutional adjudication).
abstention or pendent jurisdiction. Meanwhile, federal courts after *Pennhurst*
may no longer base their remedies on state law. The full oppressive weight
of federal law must be brought to bear on state defendants before the federal
bench. Surely this is contrary to the counsel of judicial restraint.

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