

# State Sovereignty and Federal Court Power: The Eleventh Amendment after *Pennhurst v. Halderman*

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The persistent problem of federalism is how to preserve state sovereignty while assuring the supremacy of federal law. Nowhere is this tension more apparent than in the Supreme Court's interpretations of the Eleventh Amendment. The Court has interpreted the Eleventh Amendment to preclude suits against state governments in federal court, whether brought by their own citizens or citizens of other states, regardless of whether the suit is in law or equity.<sup>1</sup> Such an expansive reading of the Eleventh Amendment effectively immunizes the actions of state government from federal court review, even when a state violates the most fundamental constitutional rights. Unwilling, however, to trust state courts completely to uphold and enforce the Constitution and federal laws, the Supreme Court has devised a number of ways to circumvent the broad prohibition of the Eleventh Amendment and assure federal court review of certain allegedly illegal state actions.<sup>2</sup> The case law concerning

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1. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (suits against a state are barred regardless of the citizenship of the plaintiff). In *Hans*, a Louisiana resident sued Louisiana to compel state officials to pay money owed under state issued bonds and coupons. The Court held that a suit against an unconsenting state, even when brought by a citizen of that state, was "unknown to the law . . . [and] not contemplated by the Constitution when establishing the judicial power of the United States." *Id.* at 15. See *infra* discussion accompanying notes 27-29. Since *Hans*, federal court suits by citizens against their own states have been disallowed. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984); *Allegheny County Sanitary Auth. v. United States Env'tl. Protection Agency*, 732 F.2d 1167 (3d Cir. 1984); *Wallace v. Oklahoma*, 721 F.2d 301 (10th Cir. 1983). See also *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) (bar to suit exists regardless of the nature of the relief sought).

2. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908) (holding that suits against state officers are permissible if state officers are alleged to violate federal law). See *infra* discussion accompanying notes 59-80. For a discussion of the background surrounding the decision in *Ex parte Young*, see Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 239-45 (1968). In addition, a state can be sued notwithstanding the Eleventh Amendment

the Eleventh Amendment often has been conflicting and inconsistent as the Court has struggled to articulate a standard that protects state autonomy yet still assures state compliance with federal law.<sup>3</sup>

At first glance, the Supreme Court's recent decision concerning the Eleventh Amendment, *Pennhurst v. Halderman*,<sup>4</sup> seems to have little to do with resolving the inherent tension between state sovereignty and federal supremacy. In *Pennhurst*, the Supreme Court held that federal courts are barred by the Eleventh Amendment from enjoining state officers from violating state law. The Court further ruled that although federal courts may hear federal claims against state officers, they may not hear pendent state-law claims. Justice Powell, writing for the majority, stated: "[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. We [also] . . . hold that this principle applies as well to state law claims brought into federal court under pendent jurisdiction."<sup>5</sup>

Because this decision only affects the ability of federal courts to give relief against state officers based on state-law claims, the case might appear to be a relatively narrow and unimportant modification of Eleventh Amendment principles. Close examination of the Court's reasoning and

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if it waives its immunity to suits in federal court. *See, e.g., Parden v. Terminal Ry.*, 377 U.S. 184 (1964). However, the United States Supreme Court has limited the doctrine of waiver in a number of ways. *See, e.g., Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). For a discussion of a state's waiver of its Eleventh Amendment immunity, see *infra* text accompanying notes 33-35.

3. Compare *In re Ayers*, 123 U.S. 443, 507 (1887) (Eleventh Amendment is a jurisdictional bar) with *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (Eleventh Amendment is a reflection of common law sovereign immunity). Compare *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (a state can constructively waive its Eleventh Amendment immunity) with *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142, 3147 (1985) (a state must declare its intention to subject itself to suit specifically in *federal court* for doctrine of waiver to apply). *See also Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973).

4. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). For an excellent discussion of the importance of *Pennhurst*, focusing on *Pennhurst's* departure from precedent and critiquing it on grounds different than those presented in this article, see Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). *See also Brown, Beyond Pennhurst: Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985) (focusing on congressional ability to protect federal interests by expanding federal court jurisdiction beyond that authorized in the Constitution); Rudenstine, *Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71 (1984) (focusing on the impact of *Pennhurst* in terms of federal court injunctions against state officers).

5. 465 U.S. at 121.

especially its rhetoric, however, reveals the potentially broad implications of *Pennhurst* for the interpretation of the Eleventh Amendment, federalism, and federal court powers. *Pennhurst* threatens to undermine the ability of the federal courts to remedy state and local government violations of the United States Constitution as well as the continued viability of pendent jurisdiction.

Part I of this Article briefly summarizes the history of the *Pennhurst* litigation. Part II examines the three very different theories that have been developed to explain the Eleventh Amendment. The adoption by the *Pennhurst* Court of one of those theories—that the Eleventh Amendment is a constitutional limit on the subject matter jurisdiction of the federal courts—has potentially sweeping implications, not only for the availability of a federal forum, but for our very system of federalism as well. Finally, Part III considers ways in which the effects of *Pennhurst* can be limited to insure that federal courts remain available to halt unconstitutional state and local actions.

### I. *Pennhurst v. Halderman*: History of the Litigation

The facts of the *Pennhurst* case are complex.<sup>6</sup> In 1974, Terri Lee Halderman was a resident of the Pennhurst State School and Hospital, an institution operated by the State of Pennsylvania for the care of the mentally retarded. Ms. Halderman initiated a class action suit in federal court on behalf of all persons who are or might become residents of Pennhurst, seeking to improve dramatically the conditions that were alleged to be inhumane and grossly inadequate. Defendants to the suit included the hospital and various hospital officials, the Pennsylvania Department of Public Welfare and several of its officials, and various county commissioners and county mental retardation officials. The suit claimed the conditions at Pennhurst violated the class members' rights under the Eighth and Fourteenth Amendments to the United States Constitution, as well as federal statutes<sup>7</sup> and state laws.<sup>8</sup> Both injunctive relief and damages were sought.

After a lengthy trial, the district court, in 1977, rendered its deci-

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6. The Supreme Court provides a detailed description of the factual history of the *Pennhurst* litigation. *Id.* at 92-97. The United States Court of Appeals for the Third Circuit also provides a detailed description of the history of the litigation. *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647 (3d Cir. 1982) (en banc).

7. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1983). Assistance and Bill of Rights Act, 89 Stat. 496, 42 U.S.C. §§ 6000-6083 (Supp. 1985).

8. Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 PA. CONS. STAT. ANN., §§ 4101-4704 (Purdon 1985).

sion in favor of the plaintiffs.<sup>9</sup> The trial court based its decision on undisputed findings that “[c]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the ‘habilitation’ of the retarded.”<sup>10</sup> Finding further that “the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst,”<sup>11</sup> the court concluded that conditions at Pennhurst violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution in addition to federal statutes, and state law.<sup>12</sup> According to the district court, these authorities require that “if a state undertakes the habilitation of a retarded person, it must do so in the least restrictive setting consistent with that individual’s habilitative needs.”<sup>13</sup> The court ordered, in part, that “immediate steps be taken to remove the retarded residents from Pennhurst.”<sup>14</sup>

The United States Court of Appeals for the Third Circuit affirmed the district court’s finding of liability.<sup>15</sup> The court of appeals agreed that residents of the hospital have a right to habilitation in the least restrictive environment.<sup>16</sup> The court based its decision, however, entirely on its conclusion that the state was violating the “bill of rights” included in the Developmentally Disabled Assistance and Bill of Rights Act.<sup>17</sup> The appeals court found it unnecessary to determine whether there were also violations of the United States Constitution or other federal or state laws.

The United States Supreme Court reversed the decision of the Third Circuit.<sup>18</sup> The Court held that states were not required to comply with the “bill of rights” in the Developmentally Disabled Assistance and Bill of Rights Act.<sup>19</sup> Although the bill of rights contained in the Act appeared to be binding upon all states receiving federal grants under the Act, the Court held that Congress may require state compliance with conditions in federal grants only if the conditions are clear and unequivocal.

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9. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977).

10. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981).

11. *Id.*

12. *Id.* at 7.

13. 446 F. Supp. at 1319.

14. *Id.* at 1325.

15. 612 F.2d 84 (3d Cir. 1979) (en banc). The Third Circuit reversed and remanded, however, on the issue of appropriate relief.

16. *Id.* at 107.

17. Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6083 (1985) (§ 6010 omitted in 1984. Currently appears as § 6009). The Bill of Rights provision is section 6010.

18. 451 U.S. 1 (1981).

19. *Id.* at 15-18.

cal.<sup>20</sup> Concluding that the Act did not explicitly create any such substantive rights,<sup>21</sup> the Court remanded the case to the court of appeals to determine if the district court's result could be supported on the basis of state law, the United States Constitution, or Section 504 of the Rehabilitation Act.<sup>22</sup>

On remand, the court of appeals affirmed its earlier decision, concluding that the plaintiffs were entitled to relief because of violations of Pennsylvania law.<sup>23</sup> Specifically, the Third Circuit held that recent decisions by the Supreme Court of Pennsylvania established that under state law the state was obligated to adopt the least restrictive environment approach for the care of the mentally retarded. The court concluded that the violations of state law were sufficient to justify the relief imposed, and therefore did not consider whether the result also could be justified based on the United States Constitution or other federal statutes.

The case again went to the United States Supreme Court and again the Court reversed the Third Circuit's decision. The Court held that the Eleventh Amendment bars injunctive relief against state officers on the basis of state law,<sup>24</sup> and remanded the case once more to the Third Circuit to determine if the district court's remedy could be based on violations of the Constitution or federal laws.

## II. Why *Pennhurst* Matters: The Threat to Federal Court Jurisdiction

### A. Theories of Eleventh Amendment Interpretation

Although the Eleventh Amendment is almost two hundred years old, there still is no agreement as to what it means or what it prohibits. In fact, three very different theories have developed to interpret it. The Court in *Pennhurst* makes clear that it interprets the Eleventh Amendment as a constitutional bar to suits against a state by its own citizens.<sup>25</sup>

The language of the Eleventh Amendment prohibits only suits against a state by citizens of other states. It states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Nonetheless, in 1890, the Supreme Court held in *Hans v. Louisi-*

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20. *Id.* at 17.

21. *Id.* at 18.

22. *Id.* at 30-31.

23. 673 F.2d 647 (3d Cir. 1982) (en banc).

24. 465 U.S. at 120-21.

25. *Id.* at 99-103.

*ana*<sup>26</sup> that it would be “anomalous” to allow states to be sued by their own citizens.<sup>27</sup> Since *Hans*, states have been immune to suits both by their own citizens and citizens of other states,<sup>28</sup> although the Court in *Hans* did not explicitly create a constitutional barrier to suit. Whether the Eleventh Amendment erects that barrier depends upon the theory of interpretation adopted. There are three different ways of viewing the Eleventh Amendment: as a restriction on federal court subject matter jurisdiction; as a reinstatement of common law immunity; and as a limit only on diversity suits against state governments.

In *Pennhurst*, the Court chooses an interpretation of the Eleventh Amendment that gives constitutional status to a state’s immunity from federal suits brought by its own citizens. Under this theory, the Eleventh Amendment is viewed as creating a constitutional restriction on subject matter jurisdiction, precluding federal courts from hearing any suits against state governments.<sup>29</sup> By this view, *Hans* interprets the Eleventh Amendment as a constitutional bar to suits against a state by its own citizens as well as by citizens of other states.

Two major problems have always plagued advocates of this theory. First, the language of the Eleventh Amendment simply states that it only applies to suits against a state by citizens of other states. Principles of construction require that literal language be followed where clear.<sup>30</sup> Furthermore, traditional theories of interpretation look to the legislative history of a provision.<sup>31</sup> The Eleventh Amendment was added to the

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26. 134 U.S. 1 (1890).

27. *Id.* at 18.

28. *See, e.g.,* *Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973) (“[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”); *Ex parte State of New York No. 1*, 256 U.S. 490, 497 (1921) (federal courts may not hear suits “brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification”).

29. *See, e.g., Pennhurst*, 465 U.S. at 98. (“[T]he principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III. . . .”); *Missouri v. Fiske*, 290 U.S. 18, 25 (1933) (“The Eleventh Amendment is an explicit limitation of the judicial power of the United States.”).

30. *See, e.g.,* Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 828 (1982) (language of Constitution provides starting place in analysis and a boundary of permissible constitutional interpretation). Constitutional commentators have assumed that the text of the Constitution is to be followed where it is clear. *See, e.g.,* M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* ix (1982).

31. There is a major debate over how much weight, if any, should be given to the “framers’ intent” in constitutional interpretation. The literature on the subject is voluminous. For citations to some of this literature and a review of the debate, see Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984).

Constitution to reverse the Supreme Court's decision in *Chisholm v. Georgia*,<sup>32</sup> which had upheld the right of a South Carolina resident to sue the State of Georgia. The focus was on protecting a state from suits by citizens of other states. Thus, the language and history of the Eleventh Amendment do not justify reading it as creating a constitutional bar to suits against states by their own citizens. I am not arguing that this view of the Eleventh Amendment should be rejected because of the Framers' intent. Rather, if the framers' intent and legislative history are given great weight, they do not support the Court's current view of the Eleventh Amendment and that, as such, this theory must be justified by something other than arguments from the text on the drafters' intent.

A second problem with viewing the Eleventh Amendment as a constitutional restriction on subject matter jurisdiction is that the Supreme Court repeatedly and consistently has held that a state may waive its Eleventh Amendment immunity.<sup>33</sup> In *Hans*, for example, the Court observed that a state is immune "unless the state consents to be sued . . . ."<sup>34</sup> However, waiver should not be possible if the Eleventh Amendment creates a restriction on subject matter jurisdiction. A fundamental principle of federal court jurisdiction is that subject matter jurisdiction may not be gained in federal court through consent or waiver.<sup>35</sup> As courts of limited jurisdiction, federal courts are empowered to hear only those matters explicitly provided for both in the Constitution and federal law.<sup>36</sup> Agreement of the parties is never sufficient to create federal court jurisdiction when it otherwise would not be al-

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32. 2 U.S. (2 Dall.) 419 (1793). For especially helpful discussions of the background of this case, see C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 46-57 (1972); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. ILL. L.F. 423.

33. "A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court." 465 U.S. at 99. See, e.g., *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531 (1936) ("Like any sovereignty, a state may voluntarily consent to be sued."); *Clark v. Barnard*, 108 U.S. 436 (1883).

34. 134 U.S. at 20 (emphasis added).

35. See, e.g., *Sonsa v. Iowa*, 419 U.S. 393, 398 (1975); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884). The rule that federal subject matter jurisdiction may not be waived arises from the fact that federal courts are courts of limited jurisdiction, a principle that can be traced back, in part, to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally 13 WRIGHT, MILLER & COOPER, *JURISDICTION, FEDERAL PRACTICE AND PROCEDURE* § 3552.

36. See, e.g., *Durousseau v. United States*, 10 U.S. (6 Cranch.) 307 (1810); *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803).

lowed.<sup>37</sup> Therefore, courts holding that the Eleventh Amendment's bar may be waived cannot view the Amendment as creating a constitutional restriction on subject matter jurisdiction.

The second major theory of the Eleventh Amendment views it as a reinstatement of the common law immunity from suit,<sup>38</sup> which the states had prior to *Chisholm v. Georgia*.<sup>39</sup> In *Chisholm*, the Court held that Article III of the Constitution permits states to be sued by citizens of other states. Thus, some view the purpose of the Eleventh Amendment as reversing *Chisholm* and reinstating the previously existing immunity.<sup>40</sup> Under this theory, the Eleventh Amendment does not create a constitutional bar to suits against a state by its own citizens. The Eleventh Amendment by its terms and history has nothing to do with such suits. *Chisholm* and the Eleventh Amendment left untouched a state's common law immunity to suits by citizens against their own state. Therefore, by holding that a state may not be sued by its own citizens, the Court in *Hans*, according to this view, was not interpreting the Eleventh Amendment, but was only stating the unchanged principle of common law immunity.<sup>41</sup> Since the sovereign traditionally could waive its immunity,<sup>42</sup> a state, like any sovereign, can waive its immunity and consent to be sued by its citizens.<sup>43</sup> Furthermore, because common law rules can be over-

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37. See *Sonsa v. Iowa*, 419 U.S. at 398; *Mitchell v. Maurer*, 293 U.S. at 244; *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. at 382.

38. *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring in the result) ("Sovereign immunity is a common law doctrine that long predates our Constitution and the Eleventh Amendment. . . ."); *Hans v. Louisiana*, 134 U.S. at 16 ("The suability of a State without its consent was a thing unknown to the law.").

39. 2 U.S. (2 Dall.) 419 (1793).

40. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: (pts. I & 2)*, 126 U. PA. L. REV. 515, 538-49; *Pt. II*, 1261-78 (1977).

41. Justice Brennan has repeatedly articulated the view that the Eleventh Amendment does not bar a state from being sued by its own citizens. See, e.g., *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142, 3156 (1985) (Brennan, J., dissenting) ("There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court."); *County of Oneida, New York v. Oneida Indian Nation*, 105 S. Ct. 1245, 1262 (1985) (Brennan, J., dissenting in part); *Edelman v. Jordan*, 415 U.S. 651, 687-88 (1974) (Brennan, J., dissenting); *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 309-22 (1973) (Brennan, J., dissenting). See also *Atascadero*, 105 S. Ct. at 3178-79 (Blackmun, J., dissenting) ("[I]f *Hans v. Louisiana* . . . is a constitutional holding, it then reads into the Amendment words that are not there and that cannot be reconciled with any principled view of constitutional power . . .").

42. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 560-69 (2d ed. 1984).

43. See, e.g., *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531 (1936) ("Like any sovereignty, a state may voluntarily consent to be sued. . . ."). See generally P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

ridden by statute, a valid Congressional statute can authorize suits against state governments by their own citizens.

One commentator, Professor Martha Field, has extended this second theory further and argued that because the Eleventh Amendment's prohibition of suits against states by citizens of other states is just a reinstatement of the common law immunity that existed prior to *Chisholm*, states may consent to be sued in federal court regardless of the citizenship of the plaintiff, and Congress may authorize any suits against state governments.<sup>44</sup> Professors Laurence Tribe and John Nowak have argued similarly that Congress should be able to override the Eleventh Amendment.<sup>45</sup> Both scholars contend that the Amendment by its language and history is directed at the federal courts and not Congress.<sup>46</sup> They maintain that Congress is uniquely sensitive to both federal and state needs, justifying judicial deference to Congressional laws affecting the states.

The major problem with treating the Eleventh Amendment as only reinstating common law immunity is that the Amendment does not state such a limited purpose. It is a constitutional provision that creates a restriction on the judicial power and as a constitutional limitation, under traditional principles, it cannot be overridden by Congress or waived.

A third view of the Eleventh Amendment treats it as merely restricting the diversity jurisdiction of federal courts.<sup>47</sup> Article III of the Constitution permits subject matter jurisdiction based on either the content of the litigation—for example, federal question jurisdiction—or on the identity of the parties—for example, diversity jurisdiction. Article III, section 2, identifies nine categories of cases and controversies which might be heard in federal court. One of these is “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.”<sup>48</sup> This is the provision which authorizes federal question jurisdiction. A different, later passage of Article III, section 2, allows for “Controversies . . . between a State and Citizens of another State.” This obviously is an authorization for suits based on diversity of citizenship.

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44. Field, *supra* note 40, at 538-49, 1261-78.

45. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-99 (1976); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1441-45 (1975).

46. Tribe, *supra* note 45, at 693-94; Nowak, *supra* note 45, at 1442.

47. See Fletcher, *supra* note 32; Gibbons, *supra* note 32.

48. U.S. CONST. art. III, § 2.

The language of the Eleventh Amendment clearly is directed at modifying this latter provision. In fact, it simply states: "The Judicial Power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another state. . . ." Because *Chisholm* only involved this latter part of Article III and did not implicate federal question jurisdiction in any way, it makes sense to view the Eleventh Amendment as restricting only diversity jurisdiction. In short, according to this view, persuasively developed by Professor William Fletcher in a recent article,<sup>49</sup> the Eleventh Amendment does not bar suits against states based on other parts of Article III; most notably, it does not preclude suits based on federal question jurisdiction.<sup>50</sup>

However, this approach is inconsistent with *Hans v. Louisiana*.<sup>51</sup> In *Hans*, in which a resident of Louisiana sued the State of Louisiana, a federal question was presented: whether Louisiana had impaired the obligations of contracts by refusing to pay interest owed on bonds it had issued. If the Eleventh Amendment only restricts diversity suits and does not affect federal question litigation, then *Hans* was wrongly decided and the suit should not have been dismissed.

## B. The Troubling Implications of *Pennhurst*

### 1. Restricting Federal Court Jurisdiction

The Supreme Court's decision in *Pennhurst* is one of the clearest statements yet that a majority of the Supreme Court adopts the first of these three theories and treats the Eleventh Amendment as a constitutional limit on subject matter jurisdiction. The Court in *Pennhurst* concluded: "The Amendment thus is a specific *constitutional* bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts."<sup>52</sup> Furthermore, the Court went out of its way to make clear that it rejects the third theory, that the Eleventh Amend-

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49. Fletcher, *supra* note 32.

50. *Id.*

51. 134 U.S. 1 (1890). Of course, all this might suggest is that *Hans* was wrongly decided—that federal question suits should not be viewed as barred by the Eleventh Amendment. This is a position which several commentators have persuasively made. See, e.g., Fletcher, *supra* note 32, at 1087-91; Shapiro, *supra* note 4, at 70 ("the rationale of *Hans v. Louisiana*, if not the result, should be regarded as an unforced error. . . ."). In fact, Professor Shapiro concludes that "momentum for the reconsideration of *Hans* is gathering." *Id.* at 80.

In *Atascadero v. Scanlon*, 105 S. Ct. 3142 (1985), the four dissenting Justices argued that the Eleventh Amendment should be viewed only as a restriction of diversity suits against state governments. *Id.* at 3158, 3171-72 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting).

52. 465 U.S. at 120 (emphasis added).

ment only restricts diversity suits against states by citizens of other states. As the Court observed:

[T]he implicit view of these cases seems to have been that once jurisdiction is established on the basis of a federal question, no further Eleventh Amendment inquiry is necessary with respect to other claims raised in the case. This is an erroneous view and contrary to the principles established in our Eleventh Amendment decisions. 'The Eleventh Amendment is an explicit limitation on the judicial power of the United States. . . .' It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction.<sup>53</sup>

The Court's view of the Eleventh Amendment in *Pennhurst* is troublesome in several respects. First, it is the most restrictive of federal court jurisdiction and offers the states the greatest degree of immunity from federal court review. As was observed above,<sup>54</sup> the doctrine of waiver and consent is completely inconsistent with treating the Eleventh Amendment as a constitutional bar on subject matter jurisdiction. The Supreme Court's earlier waiver decisions were possible because the Court never explicitly held the Eleventh Amendment to be a constitutional barrier to suit. After *Pennhurst*, it is unclear how any waiver can be allowed. Furthermore, if the Eleventh Amendment is treated as a constitutional restriction, Congress may not override it and authorize suits against the states.<sup>55</sup>

More importantly, it is unclear why the Court prefers the first theory to the other two. The Court's approach certainly finds no more support than the others in the language or history of the Eleventh Amendment, and arguably it has much less. The first theory seems least flexible because it creates a constitutional preclusion of litigation and seems least able to assure state compliance with the United States Constitution. *Pennhurst's* conclusion that the Eleventh Amendment is a constitutional bar reflects an arbitrary preference for state sovereignty over federal supremacy. This choice is at odds with the very purpose of a national constitution and a federal court system—the establishment and

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53. 465 U.S. at 119-20 [citations omitted]. The Court reiterated this view in its most recent Eleventh Amendment decision, *Atascadero v. Scanlon*, 105 S. Ct. 3142, 3146.

54. *See supra* notes 33-45 and accompanying text.

55. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), established that Congress cannot create federal court jurisdiction greater than that allowed by the Constitution.

There is one area in which the Supreme Court has allowed Congress to create liability of states in federal courts notwithstanding the Eleventh Amendment. The Court held that when Congress acts pursuant to section five of the Fourteenth Amendment it may create state liability because the Fourteenth Amendment was intended to limit state sovereignty. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

protection of basic rights and the limitation of government power to infringe upon those rights.

The Supreme Court in the recent decision of *Atascadero State Hospital v. Scanlon*<sup>56</sup> reiterated the view that the Eleventh Amendment is a constitutional limit on the subject matter jurisdiction of the federal courts.<sup>57</sup> In doing so, the Court emphasized the importance of protecting state sovereignty.<sup>58</sup> Implicitly, the Court is saying that protecting state sovereignty is more important than assuring state compliance with the Constitution; that is, a state's sovereignty entitles it to violate the Constitution. This premise is blatantly inconsistent with the Supremacy Clause of the Constitution and the fundamental notion that all government action, at every level, must comply with the constitution.

## 2. *Subverting Constitutional Protection: The Implications of Pennhurst for Suits Against State Government Officers*

The second major implication of the *Pennhurst* decision is that it undermines the rationale of *Ex parte Young*,<sup>59</sup> the decision which provides the most important way of gaining state compliance with the Constitution. Edward Young, the Attorney General of Minnesota, was sued in federal court for an injunction to prevent him from enforcing a recently adopted statute regulating railroad rates. The Supreme Court held that the Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law.<sup>60</sup> In reaching this holding, the Court concluded that state officers have no authority to violate the Constitution and laws of the United States. Hence, their illegal acts are stripped of state authority and such suits are not precluded by the Eleventh Amendment.<sup>61</sup> The Court in *Ex parte Young* wrote:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one 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. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in

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56. 105 S. Ct. 3142.

57. *Id.* at 3145-46.

58. *Id.* at 3146 n.2.

59. 209 U.S. 123 (1907). For a discussion of the background of this case, see C. JACOBS, *supra* note 32, at 138-47.

60. 209 U.S. at 159-60.

61. *Id.*

proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>62</sup>

The decision in *Ex parte Young* long has been recognized as the primary way of circumventing the Eleventh Amendment and of assuring state compliance with federal law. As Professor Charles Alan Wright has noted, "the doctrine of *Ex parte Young* seems 'indispensable to the establishment of constitutional government and the rule of law.'"<sup>63</sup> Similarly, Professor Kenneth Culp Davis has remarked: "From that day to this, . . . *Young* has been the mainstay in challenging [state] governmental action."<sup>64</sup>

The decision in *Ex parte Young* is based on simple principles. It distinguishes between the state and its officers, much as the common law always has distinguished between a principal and its agent.<sup>65</sup> The decision states that the agent, the officer who acts illegally, is powerless to try to protect such actions by invoking the immunity of the principal, the state. The conclusion is that an officer acting illegally is stripped of state authority such that the Eleventh Amendment does not bar suits against officers.

Because state authority protects only lawful actions of state officers, it follows directly that a state officer who violates state law also is stripped of state authority for purposes of the Eleventh Amendment. This is exactly what the Third Circuit held on remand in *Pennhurst*, concluding that it could give relief against state officers based on their viola-

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62. *Id.* For an excellent discussion of the doctrine of *Ex parte Young*, see M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 154-59 (1980).

63. C. WRIGHT, LAW OF FEDERAL COURTS 292 (4th ed. 1983). Professor Wright also states: "The effect of *Ex parte Young* is to bring within the scope of federal judicial review actions that otherwise might escape such review, and to subject the states to the restrictions of the United States Constitution that they might otherwise be able safely to ignore." *Id.* at 290. Professor Wright, however, does regard *Ex parte Young* as resting on a fiction. *Id.* at 292.

64. Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. LAW REV. 435, 437 (1962).

65. See, e.g., *Restatement (Second) of Agency Authority* §§ 7, 228, 383 (1958); A. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 13 (1979); *Van Arsdale v. Metropolitan Title Guarantee Co.*, 103 Misc. 2d 104, 425 N.Y.S.2d 482 (1980); *Webb v. Webb*, 602 S.W.2d 127 (Tex. Civ. App. 1980); *Forgeron, Inc. v. Hansen*, 149 Cal. App. 2d 352, 358, 308 P.2d 406, 410 (1957); *Grasslands Water Ass'n v. Lucky Leven Land & Cattle Co.*, 112 Cal. App. 2d 776, 247 P.2d 380 (1952) (distinguishing between authority of agent and principal).

tion of state statutes.<sup>66</sup> In fact, the case for federal relief is even stronger in *Pennhurst* than in *Ex parte Young*. In *Ex parte Young*, the state officer, the Attorney General, was enforcing a statute adopted by the Minnesota Legislature, while in *Pennhurst*, the officers were violating a statute adopted by the legislature. In *Ex parte Young*, the state authorized the officer's conduct, while in *Pennhurst* it proscribed it. Thus, if there was no finding of state authority in *Ex parte Young*, then none exists in *Pennhurst*.

The Supreme Court, however, rejected this reasoning in *Pennhurst* and held that federal courts can enjoin state officers from violating federal law, but not state law.<sup>67</sup> The Court stated that although the reasoning of *Ex parte Young* would seemingly direct a contrary result, *Ex parte Young* must be regarded as a "fiction" and an "irony" created entirely to assure state compliance with the federal Constitution.<sup>68</sup> The notion that state officials are stripped of authority when they act illegally was treated by the *Pennhurst* Court as applicable only when the vindication of federal rights is at stake. In other words, the Court in *Pennhurst* admitted it does not believe that *Ex parte Young* rests on a defensible distinction between the acts of the officer and the acts of the state. The Court explicitly stated that it does not believe that officers who act illegally are stripped of their authority. Rather, the Court said that these fictions were created and are applied just as a way to achieve the outcome of allowing federal courts to halt unconstitutional state conduct.<sup>69</sup>

This holding is troubling in several respects. First, why should *Ex parte Young*'s holding be dismissed as a result-oriented fiction?<sup>70</sup> Why not preserve the principle that has existed throughout this century that

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66. *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647 (3d Cir. 1982) (en banc).

67. 465 U.S. at 119-20.

68. *Id.* at 105-06.

69. *Id.* at 105.

70. The principle that an agent may not claim immunities of a principal is established at common law and embodied in decisions in other contexts. See RESTATEMENT (SECOND) OF AGENCY § 347 (1958) ("An agent does not have the immunities of the principal although acting at the direction of his principal."); *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549, 568 (1922) (immunity of United States from liability on its own contracts does not extend to its agents); *Aungst v. Roberts Constr. Co.*, 95 Wash.2d 439, 442, 625 P.2d 167, 168 (1981) ("an agent . . . may not avail itself of the immunities of its principal although it may have been acting at the direction of the principal"); *Mullins v. Pine Manor College*, 389 Mass. 47, 59, 449 N.E.2d 331, 341 (1983) ("The general rule, however, is that an agent is not entitled to the protection of his principal's immunity even if the agent is acting on behalf of his principal"); *Salt River Valley Water Users' Ass'n v. Giglio*, 113 Ariz. 190, 197, 549 P.2d 162, 169 (1976) (immunity of United States does not extend to its agents); *Florio v. Mayor and Aldermen of Jersey City*, 101 N.J.L. 535, 542, 129 A. 470, 473 (N.J. 1925) (immunity of city is not possessed by its agents).

state officers who act illegally are not cloaked with the authority of the state? The only answer the Court gives is that liability ultimately would undermine the entire Eleventh Amendment.<sup>71</sup> It is unclear, however, why allowing federal courts to give relief based on violations of state law when pendent claims are presented would significantly reduce a state's protection under the Eleventh Amendment. Because state officers can be enjoined from violating federal laws, it adds little in the way of an infringement of state sovereignty to also allow injunctions against violations of state law. To the contrary, injunctions against violations of state law are less of an infringement of state sovereignty than injunctions based on federal law. A state can protect itself from the former simply by changing its law. If Pennsylvania did not like the Third Circuit's interpretation of its statute, it could simply revise the statute to make its meaning clearer. However, a state has no recourse when a federal court injunction is based on federal law.

Second, the Court's reasoning casts serious doubt on the continued viability of *Ex parte Young*. As discussed above,<sup>72</sup> the Court in *Ex parte Young* held that illegal acts of a state officer are "ultra vires"—without authority—and therefore not protected by the Eleventh Amendment. In refusing to extend *Ex parte Young* to violations of state law by state officers, the Court in *Pennhurst* described the ultra vires doctrine relied upon by the Court in *Ex parte Young* as creating "a narrow and *questionable*" exception to the Eleventh Amendment.<sup>73</sup> Furthermore, the Court held that the Eleventh Amendment applies if the relief "runs" against the state.<sup>74</sup> Clearly the relief "ran against the state" in *Ex parte Young*, in which the Court permitted issuance of an injunction against the Attorney General to keep him from enforcing a state statute.<sup>75</sup> Inevitably, suits to stop officers from applying state law "run against the state."

Moreover, once the Supreme Court recognizes that *Ex parte Young* rests on no "principle" and is only a result-oriented "fiction," the case will survive only so long as the Supreme Court believes that the fiction produces a desirable result. The *Pennhurst* majority said that the fiction of *Ex parte Young* exists to allow federal court review of state conduct alleged to violate the Constitution and laws of the United States.<sup>76</sup> In

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71. *Pennhurst*, 465 U.S. at 106. The Court states that the view that would allow an action against a state when a state official allegedly violates state law "rests on a fiction, is wrong on the law, and, most important, would emasculate the Eleventh Amendment." *Id.*

72. *See supra* notes 59-64 and accompanying text.

73. 465 U.S. at 116 (emphasis added).

74. *Id.*

75. 209 U.S. 123, 159-60 (1908).

76. 465 U.S. at 105-06.

other words, the holding in *Ex parte Young* will be followed only so long as the Court believes that it is necessary to have federal courts available to assure state compliance with the Constitution.

This observation is troubling since the Supreme Court often has declared that state courts are just as good as federal courts at upholding the Constitution and laws of the United States. For example, in *Stone v. Powell*,<sup>77</sup> the Supreme Court announced that state courts are equal to federal courts at upholding the Constitution: “[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.”<sup>78</sup> Similarly, in the recent case of *Atascadero State Hospital v. Scanlon*, the Court declared that “[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.”<sup>79</sup>

If state courts are as competent as federal courts in upholding the Constitution, then it is unnecessary to create a fiction to facilitate federal court review. When the Court in *Pennhurst* declared that there is no principled basis for separating the acts of the officer from the acts of the state and thus characterized the holding in *Ex parte Young* as a mere fiction, it may have taken a large step towards overruling *Ex parte Young*. The effect of such a holding would be to almost completely immunize state governments from federal court accountability such that states could violate the Constitution with impunity.<sup>80</sup>

### 3. *Undermining the Availability of the Federal Forum: Pennhurst's Effect on Litigants' Choice of Forums*

A third major implication of *Pennhurst* is that it might force many cases entirely out of federal court. After *Pennhurst*, how should a litigant with both federal and state claims against the state proceed? There are two possible choices. One approach would be to bring both the federal claims and the state claims in state court, in which case the federal forum would be completely lost. Alternatively, a litigant could bring the federal claims in federal court and the state claims in state court. This approach, however, risks having the federal claims completely barred by

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77. 428 U.S. 465 (1976).

78. *Id.* at 494 n.35 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-44 (1816)).

79. 105 S. Ct. at 3146 n.2.

80. *See, e.g.,* C. WRIGHT, *supra* note 63, at 291-92 (without the doctrine of *Ex parte Young* it would be difficult to secure state compliance with the Constitution).

res judicata should the state court decide its case first.<sup>81</sup> If a state court decides in favor of the defendant on the state law claims, the defendant could then go to federal court and assert res judicata or collateral estoppel as a bar to a federal court decision on the federal law claims.<sup>82</sup> Because the claims arise from the same subject matter, and since all of the federal claims could have been raised in state court, all litigants who split their claims after *Pennhurst* risk the res judicata bar.

Thus, to assure that both the federal and state law claims are decided, a litigant must go to state court and completely forego the federal forum. Paradoxically, while the Supreme Court in *Pennhurst* recognized that the purpose of allowing suits against state officers in federal court is to provide a federal forum to assure state compliance with federal law,<sup>83</sup> by forcing litigants to split their claims, the Court undermines this goal. The majority in *Pennhurst* considered this claim-splitting effect, but was untroubled by it: “[S]uch considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. . . . That a litigant’s choice of forum is reduced ‘has long been understood to be a part of the tension inherent in our system of federalism.’ ”<sup>84</sup>

This passage indicates how little the Supreme Court values the availability of a federal forum. At the very least, it will mean that litigants with both state and federal claims must make difficult guesses about optimal strategy. Is the perceived difference between state and federal courts so large as to justify going to federal court, even at the expense of giving up state law claims? Or are the state law claims so important, perhaps because of uncertainty about the strength of the federal law claims or the nature of the relief available, that it is better to go to state court and give up the federal forum?

#### 4. *The Constitutional Status of Pendent Jurisdiction After Pennhurst*

*Pennhurst* casts serious doubts on the constitutional status of pendent jurisdiction. The Supreme Court has long held that a federal court deciding federal law claims also may decide state law claims that “derive

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81. Professor Shapiro also notes this possible effect, *supra* note 4, at 80-82.

82. *See, e.g.*, *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980) (state court decisions are accorded collateral estoppel and res judicata effects in federal court).

83. 465 U.S. at 105.

84. *Id.* at 123 (quoting *Employees of Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring)).

from a common nucleus of operative fact.”<sup>85</sup> Permitting pendent jurisdiction maximizes judicial efficiency since litigants are able to try a case in only one court, and only one court system expends judicial resources on the matter. The effect of the decision in *Pennhurst*, where litigants with federal and state causes of action must split their claims and try the case in two forums, is exactly what the doctrine of pendent jurisdiction is designed to avoid.<sup>86</sup> Furthermore, by allowing the federal court to decide a matter on state law grounds, pendent jurisdiction reduces the number of situations in which federal courts must decide cases on the basis of federal constitutional law.<sup>87</sup> Also, as explained above, pendent jurisdiction reinforces state sovereignty because decisions on state law grounds are least commanding of states, since states can modify their law to overcome undesirable federal court decisions.

The major problem with pendent jurisdiction is that it appears inconsistent with the language of Article III<sup>88</sup> and 28 U.S.C. section 1331,<sup>89</sup> which provide federal court jurisdiction for all cases arising under the Constitution or laws of the United States. It is unclear why state law claims heard via pendent jurisdiction “arise under federal law.” A literalist would say that the federal law claims arise under federal law and the state law claims arise under state law. No matter how great the efficiency justifications for pendent jurisdiction, it cannot be allowed if not authorized by the Constitution and the federal question jurisdiction statute.

The traditional answer to this problem has been to interpret the word “case” to include all legal claims arising from a common nucleus of operative facts. That is, a case arises under federal law if a federal claim is apparent on the face of the complaint. The whole case, all matters arising from the common nucleus of operative facts, arise under federal law.<sup>90</sup> Thus, even state law claims may be considered when presented in this context. As such, state law claims against state officers are within

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85. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (articulating the test for pendent jurisdiction). *See also* *Hagans v. Lavine*, 415 U.S. 528, 545-46 (1974) (“[I]t is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims.”).

86. C. WRIGHT, *LAW OF THE FEDERAL COURTS* 103-05 (4th ed. 1983).

87. There is a long-standing policy that federal courts should avoid deciding cases based on constitutional grounds, if nonconstitutional bases for decision are available. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

88. *See supra* note 29 and accompanying text.

89. Section 1331 provides: “The district courts shall have original jurisdiction of all civil actions . . . [arising] under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (1985).

90. *See Gibbs*, 383 U.S. at 725 (1966); C. WRIGHT, *supra* note 63, at 103-09.

the judicial power of the United States when pendent to claims properly within federal court. If a federal claim against the state is not barred by the Eleventh Amendment, then the case is within the judicial power of the United States and the federal court also may give relief on pendent state claims.

The Supreme Court explicitly rejected this reasoning in *Pennhurst*. The Court concluded that pendent jurisdiction is just a “judge-made doctrine . . . inferred from the general language of Article III.”<sup>91</sup> It held that such a “judge-made doctrine of expediency and efficiency”<sup>92</sup> cannot “be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.”<sup>93</sup> Therefore, although the Eleventh Amendment did not bar the federal court from giving relief against state officers on the federal claims, it could not hear pendent state-law claims against the state officers.

Again, the Court’s reasoning is troubling, because it undermines the constitutional legitimacy of pendent jurisdiction. First, if pendent jurisdiction is just a “judge-made doctrine of expediency and efficiency” it is unclear how it can continue to exist constitutionally. It is firmly established that federal courts can exercise no jurisdiction except that provided for both in statute and in Article III.<sup>94</sup> If pendent jurisdiction is “judge-made” and not inherent in the definition of a “case,” then federal courts have given themselves a power contained in neither the jurisdictional statutes nor the Constitution. The Court offers no explanation for how a judge-made doctrine can confer jurisdiction. In fact, if pendent jurisdiction is not implicit in Article III, then Congress could not authorize it, even if it wanted to, since it is firmly established that Article III imposes a ceiling on federal judicial power.<sup>95</sup>

On the other hand, the Court might be saying that pendent jurisdiction is judge-made because it arises from judicial interpretation of the language of Article III and 28 U.S.C. section 1331. If so, then the Eleventh Amendment does not bar federal court review of pendent state law claims. The Eleventh Amendment says that the judicial power of the federal courts shall not extend to “suits” against a state by citizens of other states. Under *Ex parte Young*, suits against state officers are not

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91. 465 U.S. at 117.

92. *Id.* at 120.

93. *Id.* at 117-18.

94. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

95. *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (a majority of the Justices held that Congress may not allocate functions to Article III courts other than those enumerated in Article III); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

barred from the federal courts by the Eleventh Amendment. There is no reason why federal courts may decide only part of such suits, because the Eleventh Amendment either precludes the *suit* or it does not. In other words, the Court errs when it says that the question is whether pendent jurisdiction displaces the Eleventh Amendment. It is the doctrine of *Ex parte Young* that displaces the Eleventh Amendment by allowing suits against the state officer, and it is the language of Article III that allows a federal court to decide all of a case.

### 5. *Suits Against Local Governments After Pennhurst*

A final implication of *Pennhurst* is that it represents a potentially significant expansion of the immunity of local governments under the Eleventh Amendment. The Supreme Court has repeatedly refused to extend the Eleventh Amendment to protect cities or counties from suit.<sup>96</sup> Yet in *Pennhurst*, the Court held that relief against county as well as state officers was barred by the Eleventh Amendment. The Court stated:

Respondents contend that regardless of the applicability of the Eleventh Amendment to their state claims against petitioner state officials, the judgment may still be upheld against petitioner *county* officials. We are not persuaded. . . . [F]unding for the county mental retardation programs comes almost entirely from the State . . . and the costs of the masters have been borne by the State. . . . Finally the MH/MR Act contemplates that the state and county officials will cooperate in operating mental retardation programs.<sup>97</sup>

The state's funding of a county program and state cooperation thus were deemed sufficient to create an Eleventh Amendment barrier to suits against the county.

This holding is a marked expansion of local government immunity, which the Court supports by citation to only one Supreme Court precedent, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*.<sup>98</sup> In that case, however, the Supreme Court reached exactly the opposite result, holding that state funding of an interstate agency did not confer the protection of the Eleventh Amendment upon the agency.<sup>99</sup> The Court stated that it "has consistently refused to construe the Amend-

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96. See, e.g., *Monnell v. Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978); *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); See also *Tuveson v. Florida Governor's Council on Indian Affairs*, 734 F.2d 730, 732 (11th Cir. 1984); *Fouche v. Jekyll Island State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir. 1983).

97. 465 U.S. at 123-24.

98. 440 U.S. 391 (1979).

99. *Id.* at 400-02.

ment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"<sup>100</sup> Only if a money judgment has to be paid directly by the state treasury does the Eleventh Amendment apply. In *Pennhurst*, the state was not obligated to pay any money judgment issued against the county.

Furthermore, the factors the Court considers in *Pennhurst* to justify the conclusion that a county is immune to suit can be used by states to immunize their cities and counties from litigation. Under *Pennhurst*, a voluntary financial grant from the state means that the county cannot be sued. Therefore, any time a local government is sued, if the state had granted funds to the entity, the entity could be protected from suit because a money judgment would be paid, at least partially, from state revenues. In fact, theoretically, states could immunize their localities just by enacting statutes promising to indemnify them from any costs incurred as a result of federal court litigation because that indemnification would mean the whole of the damages would be paid by the state treasury. The fact that the state is acting voluntarily would not constitute a waiver of its Eleventh Amendment immunity, since in *Pennhurst* Pennsylvania's contributions to the challenged county programs were completely voluntary.

Thus, if state "cooperation" is enough to create Eleventh Amendment immunity for local governments, a state can immunize its political subdivisions at absolutely no cost. All it needs to do is enact general statutes declaring a policy of cooperation in major areas of policy. Apparently, after *Pennhurst*, this is enough to create immunity.

It is especially troubling that the Court offers no justification for this potentially major extension of immunity; moreover, it offers no consideration of what the effects might be on the judiciary's ability to assure local governments' compliance with the Constitution. In fact, the Court does not even admit that it is creating immunity for local governments in situations in which it has never before applied the Eleventh Amendment.

### III. Preserving Federal Court Jurisdiction: Limiting the Effect of *Pennhurst*

It is essential that *Pennhurst* be limited so that it does not undermine the availability of the federal courts as a forum for the protection of constitutional rights from state infringement. The premise of this Article is that one core role of the federal courts is to uphold the United States

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100. *Id.* at 401.

Constitution by hearing complaints of unconstitutional actions by governments and government officers at all levels.<sup>101</sup> History shows that state courts often are inhospitable to suits against state governments and state officers for violating the federal Constitution.<sup>102</sup> Federal courts are more likely to perceive their role as upholding constitutional rights, and the independence assured by Article III produces a judiciary more likely to protect fundamental rights from legislative majorities.<sup>103</sup>

It is unlikely that the Court will overrule *Pennhurst* in the near future and abandon its recent interpretation of the Eleventh Amendment as a restriction on subject matter jurisdiction in the federal courts.<sup>104</sup> Therefore, the problem is how to limit the effects of *Pennhurst*.

First, it is essential that the Court unequivocally reaffirm its holding in *Ex parte Young* that the Eleventh Amendment does not bar claims against state officers who are alleged to have acted in violation of the Constitution and laws of the United States. The Court should explain that the role of the federal courts is to uphold federal law. Just as state courts have primary responsibility for interpreting and applying state law,<sup>105</sup> so it is the responsibility of the federal courts to hear federal constitutional claims. The doctrine of *Ex parte Young* should be recognized as essential to assure the supremacy of federal law. Because states cannot be sued directly under the Court's interpretation of the Eleventh Amendment, the only mechanism for federal courts to ensure state compliance with the Constitution is the authority to enjoin unconstitutional conduct by state officers.<sup>106</sup>

The Court in *Pennhurst* recognized that "the *Young* doctrine rests on the need to promote the vindication of federal rights."<sup>107</sup> The Court must now explicitly declare the importance of the availability of a federal

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101. See M. REDISH, *supra* note 62, at 1-3.

102. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) for an excellent discussion of this history.

103. This Article does not attempt to develop a full explanation or theory to support its underlying assumption that federal courts provide a unique and important forum for the vindication of constitutional rights. For one argument supporting this assumption, see Redish, *supra* note 62, at 1-5.

104. Indeed, the Court recently declared that state sovereign immunity is constitutionally required because of federalism considerations. *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142, 3146 (1985). In light of the composition of the Court and the possibility of future appointments being made by a conservative President, it is difficult to be optimistic that there soon will be a court committed to an interpretation of the Eleventh Amendment that will provide a federal forum for the protection of constitutional rights.

105. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (state law provides the rule of decision in a diversity suit).

106. See *supra* notes 63-64 and accompanying text.

107. 465 U.S. at 105.

forum to achieve this crucial objective. In short, *Pennhurst* must not become the first step in overruling *Ex parte Young*: *Ex parte Young* should not be dismissed as a “fiction”,<sup>108</sup> but recognized as an essential vehicle for the supremacy of the Constitution so long as the Eleventh Amendment prevents suits against States.

Second, if the federal forum is to remain attractive for litigants challenging the constitutionality of state actions, plaintiffs must find some way to bring pendent state law claims in federal court. As previously explained,<sup>109</sup> after *Pennhurst*, a litigant who wishes to pursue both federal and state claims against a state officer must either file both claims in state court or split the claims, thus risking the possibility that the state claim, if decided first, will be a *res judicata* bar to the federal court deciding the federal claim.

One way to prevent this effect is for the Court to interpret *Pennhurst* as not precluding pendent claims in federal court against state officers acting in excess of their authority. The Court in *Pennhurst* interprets sovereign immunity law as precluding injunctive relief “against State officials for failing to carry out their duties under State statutes” or “on violations of state statutes that command purely discretionary duties.”<sup>110</sup> The Court stated: “Since it cannot be doubted that the statutes at issue here gave petitioners broad discretion in operating *Pennhurst*, the conduct alleged in this case would not be *ultra vires* even under the standards of the dissent’s cases.”<sup>111</sup> Therefore, the Court in *Pennhurst* does not address the situation in which the state officer violates state law or acts in excess of lawful authority. Accordingly, *Pennhurst* should not be construed to preclude pendent state-law claims against state officers in those circumstances.

A distinction has been drawn between federal court review of discretionary and ministerial acts of state officers at least since the time of *Marbury v. Madison*.<sup>112</sup> Furthermore, common law principles of agency long have held that an agent who acts in excess of his authority is stripped of

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108. In one sense, *Ex parte Young* obviously is a fiction because restraining state officers serves to limit the state’s power. An injunction against the officer is indistinguishable, at least in effect, from an injunction against the state because the state always acts through officers. In another sense, *Ex parte Young* is defensible because it adopts a well-established distinction between principal and agent. See *supra* note 65. As such, *Ex parte Young* merely reflects the law of agency which provides that an agent may not claim the immunities of the principal. See *supra* note 70. Although the distinction between principal and agent is itself a fiction, it is a well accepted part of American law.

109. See *supra* notes 81-82 and accompanying text.

110. 465 U.S. at 109-10.

111. *Id.* at 110-11 [citations omitted].

112. 5 U.S. (1 Cranch) 137 (1803). See also *Dalehite v. United States*, 346 U.S. 15 (1953).

the principal's authority.<sup>113</sup> The Court in *Pennhurst* should be viewed as simply holding that when a state officer has discretion, federal courts are unwilling to review the exercise of that discretion. Also, the states' own policies are furthered by allowing federal courts to enjoin state officers who act illegally. Although a state has a strong interest in the manner in which its officers exercise discretion, and therefore may resent federal oversight, a state has less basis for objecting to review of state officers who are clearly violating state law. Thus, the Court should hold that even after *Pennhurst*, federal courts may hear pendent state claims against state officers who are alleged to have violated their ministerial duties under state law. In this way, *Pennhurst's* effect of forcing federal claims out of federal court can be minimized.

An alternative way for litigants to bring state law claims into federal court after *Pennhurst* is to argue that the state law in question gives rise to a liberty or property interest protected by the Due Process Clause of the Fourteenth Amendment. Under the Burger Court's procedural due process doctrines, state law can create both liberty and property rights, either explicitly or by creating an expectation that gives rise to a vested right.<sup>114</sup> For example, in *Pennhurst*, the Court of Appeals found that state law required the state "to adopt the 'least restrictive environment' approach for the care of the mentally retarded."<sup>115</sup> This state law creates a legitimate expectation on the part of patients and their guardians that care will be provided in the least restrictive environment.<sup>116</sup> That is, under the Burger Court's approach to procedural due process, the state has created a liberty interest, and thus the state's violation of its own law constitutes a denial of liberty without due process.<sup>117</sup> In this manner, the state law claims can be brought into federal court along with the federal claim, avoiding the need for litigants to split their suits.<sup>118</sup>

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113. See, e.g., *A. B. Leach Co. v. Pearson*, 275 U.S. 120 (1927); *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549 (1922); see also *supra* notes 65 & 70.

114. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976) (state law defines the existence of property and liberty for the purposes of procedural due process); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

115. 612 F.2d 84, 95-107 (3d Cir. 1979) (en banc). See also *In re Schmidt*, 494 Pa. 86, 92, 429 A.2d 631, 636-37 (1981) (holding that under Pennsylvania law the least restrictive environment should be used for the care of the mentally retarded).

116. The specific Pennsylvania statute which creates this expectation is the state's Mental Health and Mental Retardation Act of 1966, 50 PA. CONS. STAT. ANN. §§ 4101-4704 (Purdon 1985).

117. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("state statutes may create liberty interests that are entitled to the procedural protections" of due process); *Wolff v. McDonald*, 418 U.S. 539 (1974) (statute created liberty interest which due process clause protected).

118. However, such suits would be barred from federal court if the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), is extended to apply to claims that liberty has

Finally, the Court should make clear that *Pennhurst* does not change the long-standing doctrine that the Eleventh Amendment does not protect municipal governments or their officers from liability. The Court always has held that the Eleventh Amendment only applies to "states and state officials."<sup>119</sup> For example, in *Mount Healthy City School District Board of Education v. Doyle*<sup>120</sup> the Court stated that the "bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, (citations omitted) but does not extend to counties and similar municipal corporations."<sup>121</sup>

Therefore, the Court should make clear that municipalities are not immunized from suit just because they "cooperate" with or receive funding from a state for the activity giving rise to the lawsuit.<sup>122</sup> A municipality should be treated in the same manner as any other state officer, and a suit against a municipality should be precluded only if the "action is in essence one for the recovery of money from the state [and] the state is the real, substantial party in interest."<sup>123</sup>

The ideal approach to the Eleventh Amendment would be, as several commentators have suggested,<sup>124</sup> to treat the Eleventh Amendment, as its language directs, as a restriction on diversity suits against state governments. As these commentators have demonstrated, such an approach is consistent with the language and history of the Eleventh Amendment. More importantly, by this view, because the Eleventh Amendment would not preclude federal question suits against state governments, federal courts could uphold the Constitution and halt state violations of federal rights. States would be directly liable and accountable for their unconstitutional acts. However, because the Court explicitly rejected this view in *Pennhurst*,<sup>125</sup> and it does not appear likely that the Court will adopt this view in the foreseeable future,<sup>126</sup> attention should

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been deprived. *Parratt* holds that if a person claims that his or her property has been deprived, and the state provides adequate post-deprivation remedies, then there is no basis for a claim that due process has been denied. *Id.* at 543-44. The Supreme Court has not ruled on the question whether *Parratt* applies to claims of denial of liberty. There is a division of opinion among lower courts on this subject. *Compare* *Powe v. City of Chicago*, 664 F.2d 639 (7th Cir. 1981) *with* *Mills v. Smith*, 656 F.2d 337 (8th Cir. 1981).

119. *See supra* note 96 and accompanying text.

120. 429 U.S. 274 (1977).

121. *Id.* at 280 [citations omitted].

122. In *Pennhurst*, the Court rejected the argument that *county* officials were not immunized by the Eleventh Amendment, because the state official had "cooperated" with the county in the operation of the program. 465 U.S. 123-24.

123. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945).

124. *See* *Fletcher*, *supra* note 32; *Gibbons*, *supra* note 32; *Shapiro*, *supra* note 4.

125. 465 U.S. at 119-20. *See supra* text accompanying notes 52-53.

126. *See supra* note 62.

focus on ways to limit the effect of *Pennhurst* to insure that federal courts remain available to vindicate constitutional claims.

### Conclusion

The protection of civil and constitutional liberties over the past thirty years has been achieved through federal court review and enforcement. In almost every major area involving controversial constitutional decisions—from school desegregation to abortion to reapportionment, state governments and state courts have resisted the Supreme Court's holdings.<sup>127</sup> If there is any lesson to be learned from the last quarter-century, it is that the supremacy of federal law is not achieved automatically, but rather through federal court intervention.

The Supreme Court's decision in *Pennhurst v. Halderman* failed to recognize the importance of federal court review of state and local government action. Extension of the Eleventh Amendment in ways hinted at in the decision would bring about a major change not just in the federal court system, but in the principle of supremacy of federal law and ultimately our entire system of government. Imagine if states could have immunized local school systems from federal court desegregation orders just by giving grants or pledging cooperation. Imagine if federal courts were unable to order state election commissioners to reapportion legislatures. Without federal court review to assure state and local compliance with the Constitution and federal laws, "federalism" will no longer accurately describe our system of government. American government will become one of "localism."

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127. Judge John Minor Wisdom recently wrote:

Were it not for federal courts willing to protect federally guaranteed rights at the expense of state rights, freedom riders, peaceful marchers, protesters delivering handbills, demonstrators kneeling in prayer on the steps of segregated churches, and other advocates of civil rights would have languished—who knows how long—in local jails while they pursued their remedies in state courts.

Wisdom, *Foreward: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1077 (1984).