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*Pennhurst State School & (and) Hospital v. Halderman*: Federal Equity Jurisdiction Restricted by Eleventh Amendment Immunity

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INTRODUCTION

The eleventh amendment is traditionally viewed as embodying the common law doctrine of sovereign immunity. One reason for the amendment's ratification was to shield states from suit in federal courts. The amendment was also intended to guarantee the principles of federalism, a concept that encompasses the preservation of state autonomy within the federal system.

Although the amendment immunizes states from suit in federal court, it has not provided state officials with the same degree of immunity. Plaintiffs have been able to avoid a state's eleventh amendment immunity by suing the state official rather than the state itself. The Supreme Court upheld the validity of such a suit.
in \textit{Ex parte Young}. In \textit{Young}, the Court acknowledged that a suit challenging the constitutionality of a state official's conduct is not one against the state, because the state is not the real party in interest. As a result of this decision, the eleventh amendment has not been viewed as a shield against suits alleging constitutional violations by state officials.

The Supreme Court's most recent examination of the application of eleventh amendment immunity to state officials was in \textit{Pennhurst State School \\& Hospital v. Halderman (Pennhurst II)}. In this decision, the Court addressed the issue of whether federal injunctive relief could be granted against state officials based upon violation of state law. This was a significant area of inquiry because suits in which eleventh amendment immunity has been asserted as a defense generally have sought to enjoin on the basis of federal, rather than state, law grounds. In \textit{Pennhurst II}, a divided Court held that the eleventh amendment limits injunctive relief by prohibiting a federal court from ordering state officials to comply with state law. In so holding, the \textit{Pennhurst II} Court expanded the concept of state immunity by prohibiting federal courts from commanding state officials to conform their conduct to state law. Furthermore, the Court significantly restricted the judicial doctrine of pendent jurisdiction, which allows a federal court to adjudicate related claims over which it would otherwise not have jurisdiction.

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7. \textit{Young}, 209 U.S. at 159.
12. \textit{Id}.
This note examines the constitutional and jurisdictional dimensions of *Pennhurst State School & Hospital v. Halderman*. It first briefly reviews the history of the eleventh amendment and the Supreme Court’s various interpretations of it. Next, the note discusses the *Pennhurst II* majority and dissenting opinions, addressing the critical distinctions between the majority and dissent analyses. Further, it examines whether the Court’s holding actually fulfills the goal of promoting federalism, which was an underlying concern of the majority opinion. Finally, this note will explore the effects of the decision upon future litigation, emphasizing the choices plaintiffs will face in pursuing lawsuits against state officials.

**BACKGROUND**

*The Eleventh Amendment*

The doctrine of state sovereign immunity provides that a sovereign may not be sued without its consent. Sovereign immunity is a limit upon the judicial authority conferred by Article III of the Constitution. In *Chisholm v. Georgia*, decided under Article 14, sovereign immunity was fully developed in England before the American Revolution. See supra note 2. Sovereign immunity was based upon the nature of kingship under English law. Although the ruler was under the law, he was not subject to the processes of the courts that he had created. Therefore, the king could not be prosecuted unless he consented. See JACOBS, supra note 5, at 151-52; Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 211-14 (1968).

The independent American states adopted the sovereign immunity principle, along with the remainder of English law. See Mathis, *supra*, at 210. The American states exercised sovereignty and were immune from suit in their own courts, which were the only courts in existence in the United States prior to the adoption of the Constitution. But see Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1896-99 (1983).

In *Chisholm v. Georgia*, decided under Article 14, the Court quoted Ex parte State of New York No. 1, 256 U.S. 490, 497 (1921) for the proposition that the “judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . . .”

U.S. CONST. art. III, § 2, cl. 1 provides 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 all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—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.

15. *See Pennhurst II*, 104 S. Ct. at 907. The Court quoted Ex parte State of New York No. 1, 256 U.S. 490, 497 (1921) for the proposition that the “judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . . .”

16. 2 U.S. (2 Dall.) 419 (1793).
III, the Supreme Court answered for the first time the question of whether a state could be sued by an individual in federal court. The *Chisholm* Court held that a federal suit could be brought against the state of Georgia by two residents of South Carolina who were seeking to collect a debt owed to them by that state. In response to the *Chisholm* decision, Congress proposed the eleventh amendment. The eleventh amendment provides that a state may not be sued in federal court by a citizen of another state or by a foreign citizen. The states ratified the amendment in order to prevent the collection of state debts and to uphold the principle of sovereign immunity.

Whether sovereign immunity is a constitutional doctrine or merely a judge-made doctrine has been the subject of academic and judicial debate. Although legal scholars agree that a common law sovereign immunity existed prior to the ratification of the Constitution, there are various interpretations concerning the effect of the eleventh amendment on sovereign immunity. One view is that the

17. *Id.* at 465-66.
18. See *Jacobs*, *supra* note 5, at 65.

An eleventh amendment immunity defense may be raised at any level of judicial proceedings. As indicated by the Court in *Ford Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945), "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."

20. The states feared that federal courts would force them to pay their Revolutionary War debts, leading to financial ruin. See *Baker*, *supra* note 2, at 140; *Mathis*, *supra* note 14, at 212; *Tribe*, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 683 (1975).

For a general discussion of the political context in which the eleventh amendment was ratified, see *Jacobs*, *supra* note 5, at 41-75; *Gibbons*, *supra* note 14, at 1895-1914.

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eleventh amendment did not impose any immunity of constitutional dimension, but merely reversed the Chisholm Court's holding that Article III, section 2 abrogated existing common law immunity. A second interpretation is that the amendment merely affirmed the inherent sovereign immunity of the states, by reversing the Court's incorrect interpretation set forth in Chisholm and restoring the "original understanding" that the Constitution did not authorize suits against states to be brought in federal forums. Under a third view, the amendment restored and constitutionally mandated the states' immunity, which had been nullified by Article III, section 2.

Early Supreme Court decisions grappled with the various interpretations of the eleventh amendment. The Court limited the scope of the amendment in Cohens v. Virginia, where it held that the amendment did not bar Supreme Court review of state court judgments in suits against states involving federal questions. Three years later, in Osborn v. Bank of the United States, Chief Justice Marshall placed two further limitations on the amendment's protection. The Osborn Court determined that unless the state was a party of record, the suit was not one against a state. Furthermore, when a state officer is acting under a law that is unconstitutional, the state's immunity from suit does not protect an official when he is executing provisions of that state law. Thus, the Osborn decision offered potential for establishing federal judicial control over state officers, which would result in federal control over state action allegedly violative of individual rights. Nonetheless, the Osborn doctrine remained undisturbed and unused for half a

22. See Comment, Eleventh Amendment Immunity and State-Owned Vessels, 57 Tul. L. Rev. 1523, 1524 n.2 (1983). One theory is that because the amendment restored the notion that the Constitution neither incorporated nor abrogated the states' immunity, common law immunity remained as a judicial doctrine which could be abrogated or modified by either statute or judicial decision. See generally Field, supra note 19, at 545.

23. In Hans v. Louisiana, 134 U.S. 1, 10 (1890), the Court stated that the Chisholm decision created a "shock of surprise throughout the country" by departing from an original understanding that the states would be immune from suit without their consent.


25. See Comment, supra note 22, at 1525-26 n.2.


27. 22 U.S. (9 Wheat.) 738 (1824).

28. Id. at 857; 836-37. Osborn is also noted for the proposition that when a federal question forms part of a cause of action, the circuit courts have jurisdiction over that cause, even if other questions of fact or of law may be involved in it. See C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS § 19 (4th ed. 1983).

29. See Jacobs, supra note 5, at 106.
The late nineteenth and early twentieth centuries witnessed a revival of judicial interest in the eleventh amendment. The Court established the principle that a state may waive its immunity and submit to suit in federal court. The Court also held states to be amenable to suit by sister states and by the United States, based on the theory that the states acquiesced to the constitutional plan when they joined the Union. The amendment was given a broader reach in Hans v. Louisiana, where the Court held that a state cannot be sued by one of its own citizens in federal court, even though the amendment does not expressly provide this. The amendment's scope was further expanded by the Court's prohibition of suits by foreign nations against states. However, the amendment was held to be inapplicable to suits instituted against political subdivisions of a state.

30. Id.
31. Id. Jacobs offers several reasons for the reawakened interest in the eleventh amendment. Pressures for expeditious federal judicial remedies resulted from grievances arising from post-Reconstruction repudiation of debts by some southern states, and from beginning attempts by the states to regulate business enterprise. See also Gibbons, supra note 14, at 1971 (a major factor leading to reconsideration of the eleventh amendment was the southern governments' repudiation of bonds issued by their predecessors).

Although most of the Court's eleventh amendment decisions during this period involved suits against state officers, the Court also interpreted other aspects of the amendment. See infra notes 32-38 and accompanying text.


See generally Note, Express Waiver of Eleventh Amendment Immunity, 17 GA. L. REV. 513 (1983) for a discussion of waiver. See also infra notes 74-80 and accompanying text.


34. See, e.g., United States v. Texas, 143 U.S. 621 (1892).


36. 134 U.S. 1 (1890). In Hans, the Court rejected the position that a state could be sued in federal court by its own citizens under the federal question clause of Article III.

37. See Monaco v. Mississippi, 292 U.S. 313 (1934). The Monaco Court reached this result even though the amendment does not expressly prohibit such suits and Article III, section 2 of the Constitution explicitly grants the Supreme Court jurisdiction over suits between a state and foreign states.

38. See Lincoln County v. Luning, 133 U.S. 529 (1890). The Luning Court determined that while a county is territorially part of a state, politically it is a corporation created by the state. In this respect, it is part of the state "only in that remote sense in which any city, town or other municipal corporation may be said to be part of the [s]tate." Id. at 530.

For discussion of immunity of county officials in modern times, see infra note 144 and accompanying text.
Suits Against Officers

During this period of revived interest in the eleventh amendment, the Court decided a number of suits against state and federal officials. In some cases, the Court narrowly interpreted the eleventh amendment and allowed a remedy against public officers who acted as agents of the state. However, in a series of decisions involving efforts by individuals to force states either to pay interest on state bonds or to accept bond coupons in lieu of payment of state taxes, the Court found that the eleventh amendment barred recovery. For example, in *In re Ayers*, the Court concluded that a suit by coupon holders against state officers for breach of a state's contract should be deemed a suit against the state itself.

The principle that state officials can be enjoined by a federal...
court from enforcing an unconstitutional state statute was reaffirmed in the seminal eleventh amendment decision of \textit{Ex parte Young}.\textsuperscript{45} In \textit{Young}, railroad company stockholders sought to enjoin the Minnesota Attorney General from enforcing a state statute lowering railroad rates. The plaintiffs alleged that the regulation violated the fourteenth amendment.\textsuperscript{46} The Court ruled that a state official could be sued for injunctive relief when he has acted in an unconstitutional manner. This decision was based upon the rationale that such conduct strips the officer of his authority to act for the state and thus eliminates the sovereign's immunity.\textsuperscript{47} In deciding \textit{Young}, the Court regarded the officer's action as state action in order to invoke the fourteenth amendment, yet simultaneously considered such conduct to be individual action in order to avoid eleventh amendment immunity.\textsuperscript{48} Despite this inconsistency, \textit{Young} established a retreat from an expansive interpretation of the eleventh amendment.\textsuperscript{49}

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\textsuperscript{45} 209 U.S. 123 (1908). \textit{Ex parte Young} has been referred to as one of the Supreme Court's three most important decisions. 17 C. \textsc{Wright} \& A. \textsc{Miller}, \textsc{Federal Practice and Procedure} § 4231 (1978). For a discussion of \textit{Young}, see generally \textsc{Jacobs}, supra note 5, at 138-42, 144-47; Duker, \textit{Mr. Justice Rufus W. Peckham and the Case of Ex Parte Young: Lochnerizing Munn v. Illinois}, 1980 B.Y.U. L. Rev. 539.
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\textit{Young} built on the constitutional doctrine which had been established in \textit{Reagan v. Farmers' Loan & Trust Co.}, 154 U.S. 362 (1894). \textit{See supra} note 40 for discussion of \textit{Reagan}.
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\textsuperscript{46} \textit{Young}, 209 U.S. at 130.
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\textsuperscript{47} \textit{Id.} at 159-60.
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\textsuperscript{48} \textit{See} Florida Dep't of State \textit{v. Treasure Salvors, Inc.}, 458 U.S. 670, 685 (1982). According to Professor Jacobs:
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\begin{quote}
The doctrinal development wrought by \textit{Young} reflected the sympathetic preoccupation of the federal judiciary with the substantive rights secured by the Fourteenth Amendment. Although the Court never quite sanctioned the theory that the Fourteenth Amendment superceded [sic] the Eleventh Amendment insofar as the two might conflict, it liberalized the principles governing suits against state officers in such a way that the substantive rights guaranteed by the Fourteenth Amendment were accorded much broader federal judicial protection than were those asserted under the contract clause . . . .
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\textsc{Jacobs}, supra note 5, at 142-43.
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\textsuperscript{49} \textit{See} \textsc{Jacobs}, \textit{supra} note 5, at 142-46. Professor Jacobs notes that suits against state officers increased significantly after the \textit{Young} decision. After \textit{Young}, many federal judges began to grant interlocutory injunctions on the strength of affidavits alone, or to grant temporary restraining orders ex parte. Congress responded by enacting the Three-Judge Court Act, Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557, which prohibited a single federal judge from issuing interlocutory injunctions restraining the enforcement of allegedly unconstitutional state statutes. The statute instead required that these cases be heard by a district court composed of three judges. The statute's rationale was that these judges would be less likely to exercise federal injunctive power imprudently. The Three-Judge Court Act was modified by Act of Aug. 12, 1976, P.L. 94-381, 90 Stat. 1119 (1976). Sections 2281 and 2282 of the United States Code, which required that an application for such an injunction be heard and determined by three judges, was repealed in
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The question of whether a suit against an officer is in fact one against the state was also addressed by the Court within the context of lawsuits involving torts. Several decisions upheld suits against state officers on the grounds that such suits compelled the performance of a plain ministerial, rather than a discretionary, duty, or that they redressed personal wrongs committed by officers with official but legally deficient authorization. Years later, in *Larson v. Domestic & Foreign Commerce Corp.*, the Court held that if the actions of an officer do not conflict with his statutory authority, they should be regarded as the actions of the sovereign under the rules of agency. At the same time, the *Larson* Court acknowledged the principle that if an official has engaged in conduct which the sovereign has not authorized, or in behavior which the sovereign has forbidden, his actions are ultra vires and he is precluded from using an eleventh amendment defense.

Although courts have engaged in various analyses to avoid the restrictions of the eleventh amendment, recent cases demonstrate that the basic underlying premise of sovereign immunity remains a powerful force. In *Edelman v. Jordan*, for example, the Court held that when a plaintiff alleging a violation of federal law seeks order to relieve the burden of the three-judge court cases, to remove procedural uncertainties existing under the three-judge courts, and because case law had provided safeguards against imprudent injunctive action by federal judges. See S. REP. No. 204, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 1988; see also C. WRIGHT & A. MILLER, supra note 45, at § 4234.

See, e.g., Rolston v. Missouri Fund Comm’rs, 120 U.S. 390, 411 (1887) (Court held that the suit was brought to compel a state officer to do what a state statute required him to do, and thus was not a suit against the state but against the officer).

See, e.g., Tindal v. Wesley, 167 U.S. 204 (1897) (suit to recover possession of real property held not to be a suit against the state); Pennoyer v. McConnaughy, 140 U.S. 1 (1891) (suit brought against a state board of land commissioners, in order to restrain the defendants from doing acts allegedly violative of plaintiff’s contract with the state, was not a suit against the state within the meaning of the eleventh amendment). Cf. Hopkins v. Clemson Agricultural College, 221 U.S. 636, 643 (1911) (eleventh amendment immunity does not protect a state officer who, under color of his office, has injured a citizen).

337 U.S. 682 (1949).

Id. at 695. *Larson* thus established that an error of law by state officers acting in their official capacity did not override state immunity.

The phrase “ultra vires” refers to acts which are in excess of powers granted. See BLACK’S LAW DICTIONARY 1365 (5th ed. 1979). For further discussion of the ultra vires principle, see infra notes 132-35 and 156-61 and accompanying text.

$Larson$, 337 U.S. at 689.


relief against a state official, the federal court may enjoin the officer's future conduct, but cannot award retroactive monetary relief. The Court declined to extend the Young principle to retroactive damage awards, reasoning that to do so would eliminate the states' constitutional immunity.

The Court has recently interpreted the eleventh amendment as not barring an in rem action in admiralty against state officials for possession of artifacts salvaged from a shipwreck. In another case decided the same term, the Court held that an attempt by the administrator of an estate to bring an interpleader action against officials of California and Texas was barred by the amendment's prohibition of federal suits "against one of the United States by Citizens of another State."

The Eleventh Amendment and Federalism

The concept of federalism plays an important role in any litigation involving eleventh amendment immunity. Federalism is a constitutional concept signifying a system of government which balances both federal power and state autonomy concerns. One of the objectives in the states' ratification of the eleventh amendment was to guarantee federalism principles. The amendment was designed to prevent the federal government, through its courts, from interfering in state governmental functions. The major values of federalism implicated by the eleventh amendment include federal recognition of state immunity and the protection of

58. Id. at 677.
59. Id. at 666. The Court reasoned that an award of restitution would have to be paid from state funds, rather than from the pockets of the officers named as defendants. Id. at 677.
60. Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 699 (1982). Justice White, concurring and dissenting in part, maintained that the suit was one against the state, since it was to determine the title of the State of Florida to the artifacts. 458 U.S. at 706 (White, J., concurring and dissenting in part, joined by Justices Powell, Rehnquist, and O'Connor). However, in the opinion, Justice White also recognized the principle that where an officer's actions are limited by statute, actions which go beyond those limitations should be considered individual, and not sovereign, actions. Id. at 714 (White, J., concurring and dissenting in part).
62. Id. at 91. The Court reaffirmed that the eleventh amendment does not bar suits against state officers when they are "alleged to be acting against federal or state law." Id.
63. See Note, supra note 32, at 520-37 and supra note 4 and accompanying text.
65. See supra note 21 and accompanying text.
66. See Missouri v. Fiske, 290 U.S. 18, 25 (1933); Ex parte New York, 256 U.S. 490, 497-98 (1921).
a state’s treasury. Federalism principles typify the eleventh amendment concern with preventing undue tension between state autonomy and national authority.

The *Young* doctrine established a new view of the federal courts as principal protectors of federal rights. Subsequent to *Young*, various statutes and judicial doctrines have been created which serve to protect state autonomy from federal court intervention. For example, federal courts may enjoin the collection of state taxes only if the state court remedies are not “plain, speedy, and efficient.” Additionally, the abstention doctrine expressly promotes federalism values by establishing circumstances under which a federal court may decline to exercise its jurisdiction.

In a relatively recent series of cases dealing with questions of

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67. See Note, supra note 35, at 866 n.4; see generally, Baker, supra note 2.
68. See Baker, supra note 2, at 173.
69. See supra notes 45-49 and accompanying text.
70. See Baker, supra note 2, at 158.
71. Id. at 173. See also infra notes 72-73 and accompanying text.

   The district courts shall not enjoin, suspend, or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
   
   (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and
   
   (2) The order does not interfere with interstate commerce; and,
   
   (3) The order has been made after reasonable notice and hearing; and
   
   (4) A plain, speedy and efficient remedy may be had in the courts of such State.

73. See Baker, supra note 2, at 174.

Abstention is a response to the problems caused by the existence of two sets of courts, federal and state, which have authority to adjudicate questions of federal and state law. See G. Gunther, Cases and Materials on Constitutional Law 1676 (10th ed. 1980). The best-established of the abstention doctrines is Pullman-type abstention, named after the case of Railroad Comm’n of Tex. v. Pullman Co., 312 U.S. 496 (1941). In *Pullman*, the Court established the doctrine that a federal court may, and ordinarily should, refrain from deciding a case which challenges state action as contrary to the federal Constitution, if unsettled questions of state law might be dispositive of the case and avoid decision of the constitutional question. C. Wright & A. Miller, supra note 45, at § 4242. See also Burford v. Sun Oil Co., 319 U.S. 315 (1943) (district court should refuse jurisdiction when a case presents complex questions of state law, especially when the state law reflects an important state policy); Younger v. Harris, 401 U.S. 37 (1971) (a federal injunction can run against a pending state criminal prosecution only on a “showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief,” and that an injunction is proper only to prevent immediate irreparable injury which cannot be alleviated by defense to a single criminal prosecution).

federalism, the Court has addressed attempts to sue a state based on the theory that the state has waived its immunity from suit in federal court. In *Parden v. Terminal Railway*, the Court concluded that in the absence of express language to the contrary, Congress intended that a state-owned railroad could be sued in federal court under the Federal Employers’ Liability Act. However, in *Employees v. Missouri Public Health and Welfare Department* the Court determined that the Fair Labor Standards Act lacked a precise expression of congressional intent to override the states’ immunity, and held that the suit was barred by the eleventh amendment. Moreover, in *Edelman v. Jordan*, the Court was unable to find congressional intent to authorize suit against the state, because the Social Security Act that established the program did not provide for a private cause of action. These cases suggest that the Court will permit an eleventh amendment defense against private damage suits when it is not satisfied that Congress has carefully considered the states’ interests. Therefore, concepts of federalism apparently will continue to be important elements of judicial analysis in these situations.

**Pendent Jurisdiction**

The doctrine of pendent jurisdiction provides that when a federal court has jurisdiction over a federal claim, it may adjudicate a related state law claim over which it would not otherwise have had jurisdiction. Pendent jurisdiction is a judicially created doctrine, derived from the general “cases and controversies” language of Ar-

1071 (1974); L. Tribe, *supra* note 64, at § 3-40; C. Wright, *supra* note 28, at §§ 52, 52A.

74. 377 U.S. 184 (1964).
75. *Id.* at 190. The *Parden* Court rejected Alabama’s eleventh amendment defense, finding that the states had surrendered a portion of their sovereignty by granting Congress the power to regulate commerce, and that the FELA was a legitimate exercise of that power. *Id.* at 191-92. *Parden* established that Congress may condition state involvement in a federally regulated activity upon the state’s waiver of its eleventh amendment immunity.
81. *See Note, supra* note 35, at 873.
The Supreme Court laid the groundwork for the principle of pendent jurisdiction in an early decision, *Osborn v. Bank of the United States.* In *Osborn,* Chief Justice Marshall observed that a circuit court had jurisdiction over a question arising under the Constitution, even though other questions of fact or law may have been involved in its determination.

This concept was expanded in *Siler v. Louisville & Nashville Railroad Co.* In *Siler,* a state order regulating rates was attacked as unauthorized by state law and as unconstitutional under federal law. Avoiding the constitutional issue, the Court held the state regulation invalid on state grounds, rather than on federal constitutional grounds. In so ruling, the Court declared that a decision based on state law was preferable to an unnecessary determination of federal constitutional issues.

Judicial debate over the extent to which jurisdiction of a federal element in a case carried with it pendent jurisdiction over other elements was resolved by the Supreme Court in *United Mine Workers of America v. Gibbs.* In *Gibbs,* the plaintiff brought suit in federal court, seeking recovery under section 303 of the Labor Management Relations Act and the common law of Tennessee. The *Gibbs* Court concluded that the district court had properly entertained jurisdiction of the state law claim. The Court formulated a two-step approach for pendent jurisdiction. First, consideration must be given to the power of the court to hear the pendent claim. Then, if the court has that power, there must be consider-

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85. *Id.* at 823.
86. *Id.* at 175 (1909).
87. *Id.* at 194.
88. *Id.* at 193.
89. 383 U.S. 715 (1966). The Court's initial attempt at clarification had measured the scope of federal jurisdiction in terms of the concept of "cause of action." *Hurn v. Ousler,* 289 U.S. 238, 245-46 (1933). According to this view, if a plaintiff presented two distinct grounds in support of a single cause of action, the federal court had jurisdiction of the entire claim, yet if the assertions amounted to two separate and distinct causes of action, there was jurisdiction only over the federal cause of action. See C. Wright & A. Miller, supra note 82, at § 3567.
92. *Id.* at 725-26. The Court indicated that:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in
ation of whether the court in its discretion ought to exercise that power.\textsuperscript{93}

The Gibbs test has resulted in an expansive use of pendent jurisdiction.\textsuperscript{94} Considerable debate has developed over the extent to which the pendent jurisdiction doctrine should be utilized. One view is that pendent jurisdiction enables a plaintiff with state and federal claims to use the federal courts, thus providing a true choice of forums.\textsuperscript{95} Other commentators have called for a less active judicial policy, recommending that pendent jurisdiction be restricted.\textsuperscript{96} The subject of pendent jurisdiction was one of the issues addressed by the Court in \textit{Pennhurst II}.

\textbf{DISCUSSION}

\textbf{Pennhurst I}

In 1974, respondent Terri Lee Halderman was a minor resident of Pennhurst State School and Hospital.\textsuperscript{97} Pennhurst was a large institution owned and operated by the Commonwealth of Pennsylvania. At the time the suit was filed, the institution housed approximately 1,200 residents, of whom seventy-five percent were either severely or profoundly retarded; many of the residents were also physically handicapped.\textsuperscript{98}

Halderman filed suit in 1974 alleging violations of federal constitutional and statutory law, as well as state law.\textsuperscript{99} The defendants

\textsuperscript{93} Id. at 725.

\textsuperscript{94} Id. at 725-26. In terms of the exercise of judicial discretion, the Court determined that trial courts should consider factors such as judicial economy, convenience, and fairness to litigants, and should avoid unnecessary decisions of state law. \textit{Id.} at 726.

\textsuperscript{95} See \textit{C. Wright & A. Miller, supra} note 82, at § 3567.

\textsuperscript{96} See \textit{Schenkier, Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction, 75 NW. U.L. REV. 245, 256 (1980)}. Schenkier maintains that compelling a plaintiff to use the state courts when he seeks to join state and federal claims frustrates the congressional goal of providing plaintiffs with a true choice of forums. By allowing joinder of such claims within a court's Article III power, pendent jurisdiction removes the barriers that discourage plaintiffs from bringing their federal claims to federal court.

\textsuperscript{97} \textit{Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 6 (1981).}

\textsuperscript{98} \textit{Id.}

were Pennhurst and various Pennhurst officials, the Pennsylvania Department of Public Welfare and several of its officials, and various county officials.100

The district court held that the dangerous and inadequate conditions at Pennhurst violated each resident's rights under the eighth and fourteenth amendments, section 504 of the Rehabilitation Act of 1973, and the Pennsylvania Mental Health and Mental Retardation Act (the MH/MR Act).101 The court found that when a state undertakes the habilitation of a retarded person, it must do so in the least restrictive setting consistent with that person's needs.102 After concluding that Pennhurst's large size prevented it from doing so, the court ordered that "immediate steps be taken to remove the retarded residents from Pennhurst."103 The defendants were ordered to provide suitable living arrangements for the class members.104

On appeal, the Third Circuit affirmed, in large part, the judgment of the trial court.105 The court found that the federal Developmentally Disabled Assistance and Bill of Rights Act contained a clear expression requiring rehabilitation in the least restrictive setting.106 Furthermore, the court rejected the appellants' assertion


Ultimately, the plaintiffs included a class consisting of all persons who were or who might become residents of Pennhurst, the Pennsylvania Association for Retarded Citizens, and the United States. Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 903-04 (1984).

100. Pennhurst, 446 F. Supp. at 1301-02.


102. Id. at 1319.

103. Id. at 1325.

104. Id. at 1326. The court also appointed a special master to plan and supervise the implementation of the order. Id. The court further determined that the individual defendants had acted in good faith and therefore were immune from the damage claims. Id. at 1324.


106. Id. at 95-100, 104-07. The court did not consider the eighth or fourteenth amendment issues or section 504 of the Rehabilitation Act, cited supra at note 99. The court affirmed the district court's holding that the MH/MR Act provides a right to adequate habilitation. 612 F.2d at 100-03.
that the eleventh amendment barred the trial court’s decree.\textsuperscript{107}

In its first \textit{Pennhurst} opinion, the Supreme Court reversed the decision of the Court of Appeals and concluded that the Developmentally Disabled Assistance and Bill of Rights Act did not create any substantive rights.\textsuperscript{108} The Court then remanded the case for a determination of whether a remedial order could be supported on the basis of state law, the Constitution, or the federal Rehabilitation Act.\textsuperscript{109}

On remand, the Court of Appeals affirmed its prior judgment in its entirety, basing its decision on state law.\textsuperscript{110} The court unanimously rejected the petitioners’ argument that the eleventh amendment barred federal court adjudication of the state law claim.\textsuperscript{111} Noting that the \textit{Siler} case had involved state officials as defendants,\textsuperscript{112} the Third Circuit held that there was no eleventh amendment exception to the rule of pendent jurisdiction.\textsuperscript{113} Subsequently, the Supreme Court again granted certiorari\textsuperscript{114} to consider the question whether a federal court may award injunctive relief on state law grounds against state officials.\textsuperscript{115}

\textbf{The Supreme Court Decision in \textit{Pennhurst II}}

In a five-four decision,\textsuperscript{116} the Court again reversed the Third Cir-
cuit, this time holding that the eleventh amendment prohibited the federal district court from ordering the state officials to conform their conduct to state law, since the state was the real party in interest. The Court further held that the amendment barred the state law claims from being brought into court under pendent jurisdiction.

The Court began its analysis by observing that the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III of the Constitution. The Court recognized the general rule that relief sought against a state official is, in effect, a suit against the state if the state is the real party in interest. Referring to the important exception established in Ex parte Young, the Court also noted that a suit challenging the constitutionality of a state officer’s conduct is not one against the state, because an official who acts unconstitutionally is “stripped of his official or representative character.” The Court cautioned, however, that the Young exception has not been liberally applied. It pointed to its earlier decision in Edelman v. Jor-
which had emphasized that the need to insure the supremacy of federal law must be reconciled with the constitutional immunity of the states.

A major theme underlying the Court's opinion was that a federal court order to a state official, which is based on state law, directly conflicts with the principles of federalism underlying the eleventh amendment. The Court emphasized that it had previously refused to award retroactive damages against a state, because this would effectively eliminate the state's constitutional immunity. This refusal to award retroactive damages, while still allowing the possibility of prospective relief, strikes a balance between the Young principle and the concept of state sovereignty.

In the present case, according to the Court, the fundamental federal interests at stake in Young were absent, since the plaintiffs had only alleged that state officials had violated state law. Therefore, the Pennhurst II majority refused to apply the Young principle to violations of state, as well as federal, law. As Justice Powell noted, it was "difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." The majority also challenged the continued validity of the ultra vires doctrine in the eleventh amendment context, as set forth in the dissenting opinion. The Court read Larson to mean that an error of law by state officers acting in their official capacities will not suffice to override the state's eleventh amendment immunity. Even assuming the continued validity of the ultra vires doctrine, the ma-

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126. See Pennhurst II, 104 S. Ct. at 911.
127. Id. The Court relied on Edelman v. Jordan, 415 U.S. 651, 668 (1974), in which the Court determined that the district court's retroactive award of monetary relief was, in practical effect, indistinguishable from an award of damages against the state, and would be paid from state funds rather than from the pockets of the individual state officials who were the defendants.
128. Pennhurst II, 104 S. Ct. at 911.
129. Id.
130. Id.
131. Id.
132. Id. at 914 & n.22. The majority maintained that Justice Stevens' view that an allegation of a violation of a state statute suffices to override the state's eleventh amendment immunity "rests on fiction, is wrong on the law, and, most important, would emasculate the Eleventh Amendment." Id. at 911.
134. Pennhurst II, 104 S. Ct. at 915. The Court stressed that policy reasons pre-
majority maintained that the MH/MR Act gave the petitioners broad discretion to provide "adequate" mental health services, and their conduct, therefore, was within their delegated authority.\textsuperscript{135}

The Court next addressed the relationship between pendent jurisdiction and the eleventh amendment. The Court indicated that it had long recognized and applied the principles of pendent jurisdiction.\textsuperscript{136} Noting that pendent jurisdiction is a judge-made doctrine, the Court then examined the issue of whether the concepts of pendent jurisdiction prevailed over the explicit limitations on federal jurisdiction contained in the eleventh amendment.\textsuperscript{137} While acknowledging that cases such as Siler v. Louisville & Nashville Railroad Co.\textsuperscript{138} granted relief against state officers on the basis of pendent state law claims, the Court minimized their precedential value by maintaining that in none of those cases had the Court even mentioned the eleventh amendment in connection with the state law claim.\textsuperscript{139}

The Court concluded that the eleventh amendment is a specific constitutional bar against hearing pendent claims that otherwise would be within the jurisdiction of the federal courts.\textsuperscript{140} By ruling that the judicially-created doctrine of pendent jurisdiction does not override eleventh amendment immunity, the Court summarily disposed of the respondents' contentions that the application of the eleventh amendment to pendent claims would result in bifurcated claims against state officials and the adjudication of federal claims in state courts.\textsuperscript{141} The majority insisted that such policy considerations must give way to the constitutional limitations on the federal judiciary's authority to hear suits against a state.\textsuperscript{142}

The \textit{Pennhurst II} majority also rejected the respondents' assertion that the judgment could be upheld against the petitioner county officials.\textsuperscript{143} The Court determined that, even assuming that the county officials were not immune from suit challenging their

\textsuperscript{135} \textit{Id.} at 909 n.11, 914.
\textsuperscript{136} \textit{Id.} at 917.
\textsuperscript{137} \textit{Id.} at 917-18.
\textsuperscript{138} 213 U.S. 175 (1909). \textit{See supra} notes 86-88 and accompanying text.
\textsuperscript{139} \textit{Pennhurst II}, 104 S. Ct. at 917. The Court further diminished the significance of those cases by asserting that they had proceeded on the erroneous assumption that once jurisdiction was established on the basis of a federal question, no further eleventh amendment inquiry was necessary in regard to the other claims in the case. \textit{Id.}
\textsuperscript{140} \textit{Id.} at 918-19.
\textsuperscript{141} \textit{Id.} at 919-20.
\textsuperscript{142} \textit{Id.} at 920.
\textsuperscript{143} \textit{Id.}
actions under the MH/MR Act, the present judgment could not be sustained on the basis of state law obligations of the county officials. Finally, the Court remanded the case to the Court of Appeals for consideration of whether the judgment could be sustained on federal constitutional or statutory grounds.

The Dissenting Opinions

Justice Stevens, writing in dissent, vigorously challenged each aspect of the majority's analysis. He first noted that in the Court's 1982 Term, it had reaffirmed the principle that the eleventh amendment does not bar an action against a state official based on the theory that the officer acted in violation of a state statute. He then proceeded to discuss earlier Court precedent which allowed injunctive relief grounded in state law against state officers. Justice Stevens maintained that by the early twentieth century, it was settled that the tortious conduct of state officers did not fall under the protective scope of the eleventh amendment, and that the principles underlying the cases based on common law were also held applicable to claims that state officers had violated state statutes.

The dissent also challenged the majority's position that the ra-

144. *Id.*. The Court referred to earlier decisions which held that the eleventh amendment does not apply to counties and similar municipal entities. See, e.g., Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890). However, the majority also noted that the Court has applied the amendment to bar relief against county officials in order to protect the state treasury from liability that would be tantamount to a judgment against the state itself. *Pennhurst II*, 104 S. Ct. at 900, 920 n.34, quoting Lake County Estates Inc., v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979). See also *supra* note 38 and accompanying text.

145. *Pennhurst II*, 104 S. Ct. at 921. The Court reasoned that any relief granted against the county officials would be "partial and incomplete at best," because funding for the county mental retardation programs was derived almost entirely from the state. *Id.*

146. *Id.*


149. *Pennhurst II*, 104 S. Ct. at 926-28 (Stevens, J., dissenting). See, e.g., Johnson v. Lankford, 245 U.S. 541, 545 (1918) (action not barred because it alleged conduct in violation of state law); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917) (eleventh amendment did not bar injunctive relief on the basis of state law); Scully v. Bird, 209 U.S. 481, 490 (1908) (suit to restrain a state officer from improperly enforcing a state statute was not an action against the state); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390, 411 (1887) (Court rejected the argument that a suit to enjoin a state officer to comply
tionale of *Ex parte Young* is limited to cases in which relief is provided on the basis of federal law. Justice Stevens believed instead that the critical element in *Young* was that the conduct at issue was not the conduct of the sovereign. In the dissent's view, unconstitutional conduct such as that in *Young* renders the state officer's activity "simply an illegal act" and thus not deserving of the sovereign's immunity. Justice Stevens concluded that it is the distinction between the state and its officers, rather than any notion of federal supremacy, which is embodied in both the doctrine of sovereign immunity and in the eleventh amendment.

In Justice Stevens' view, *Larson v. Domestic & Foreign Commerce Corp.* further demonstrated that the sovereign immunity doctrine did not apply here. Justice Stevens read *Larson* as standing for the proposition that a violation of the law by a state officer renders his conduct ultra vires, making him liable under the law of agency. He believed that when a state has set specific limitations on the manner in which state officials are to carry out their duties, it must be determined whether the officials acted in a manner that is forbidden by state law. Since a sovereign would not authorize its officers to violate its own law, Justice Stevens reasoned that an official who does so is acting ultra vires under *Larson*, and therefore loses the protection of sovereign immunity. In contrast to the majority, Justice Stevens agreed with the district court and with the Third Circuit, and concluded that the petitioners operated Pennhurst in a manner forbidden by the state.

Justice Stevens concluded that the eleventh amendment did not prohibit suits against state officers based on conduct not allowed under the state's own law. Such a suit is one against the officer,

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with state law violated the eleventh amendment). *See supra* notes 40, 50-51 and accompanying text.

150. 209 U.S. 123 (1908).
151. *Pennhurst II*, 104 S. Ct. at 939 (Stevens, J., dissenting).
152. Id. at 933 (Stevens, J., dissenting).
153. *Young*, 209 U.S. at 159.
155. Id. at 935 (Stevens, J., dissenting).
156. 337 U.S. 682 (1949). *See supra* notes 52-55 and accompanying text for discussion of *Larson*.
158. Id. at 937 (Stevens, J., dissenting).
159. Id. (Stevens, J., dissenting).
160. Id. (Stevens, J., dissenting).
161. Id. at 938 (Stevens, J., dissenting).
162. Id. at 939 (Stevens, J., dissenting).
Justice Stevens believed the controlling principle was that the eleventh amendment is inapplicable in the absence of a state law shield.\textsuperscript{164}

Justice Stevens also sharply disagreed with the Court’s rejection of the pendent jurisdiction doctrine.\textsuperscript{165} He maintained that the Court had upheld injunctive relief on state law grounds in suits against state officers where both federal constitutional questions and issues of state law were presented.\textsuperscript{166} According to Justice Stevens, applying the rule of \textit{Siler v. Louisville & Nashville Railroad Co.}\textsuperscript{167} would actually enhance state sovereignty, since the federal court would first address state law, which can be later modified or repealed by the state.\textsuperscript{168} He believed that the majority’s position “prevented federal courts from implementing State policies through the equitable enforcement of State law.”\textsuperscript{169}

Justice Brennan dissented separately.\textsuperscript{170} He fully agreed with Justice Stevens’ position that the petitioners’ conduct was prohibited by state law.\textsuperscript{171} However, Justice Brennan expressed his long-held belief that the eleventh amendment only bars federal suits brought by citizens of other states.\textsuperscript{172} Since all of the parties in

\textsuperscript{163} Id. (Stevens, J., dissenting).
\textsuperscript{164} Id. (Stevens, J., dissenting).
\textsuperscript{165} Id. at 939 (Stevens, J., dissenting). Justice Stevens noted that the \textit{Pennhurst II} decision overruled \textit{Siler} and its progeny. Id. at 943 n.52. See \textit{supra} notes 82-96 and accompanying text for a discussion of pendent jurisdiction.
\textsuperscript{167} 213 U.S. 175 (1909).
\textsuperscript{168} \textit{Pennhurst II}, 104 S. Ct. at 942 (Stevens, J., dissenting).

The dissent’s view that \textit{Siler} enhances state interests was shared by the federal government. The Civil Rights Division of the United States Department of Justice filed a brief in support of the Third Circuit’s decision. Brief for the United States, \textit{Pennhurst State School & Hosp. v. Halderman}, 104 S. Ct. 900 (1984). The government’s position was that neither the eleventh amendment nor the doctrines of sovereign immunity, comity, or federalism warranted repudiation of the \textit{Siler} doctrine.
\textsuperscript{169} Id. (Stevens, J., dissenting).
\textsuperscript{170} Id. at 922 (Brennan, J., dissenting).
\textsuperscript{171} Id. (Brennan, J., dissenting).
Pennhurst II were citizens of Pennsylvania, Justice Brennan concluded that the petitioners were not entitled to invoke the amendment’s protection.\(^{173}\)

**Analysis of Pennhurst II**

In reaching its decision in the *Pennhurst II* case, the Court discussed several important jurisdictional doctrines that have been used in the area of sovereign immunity and federal jurisdiction. The Court addressed the pendent jurisdiction doctrine and the concept of ultra vires action. The Court also placed significant reliance upon the principle of federalism, recognizing the need to accommodate federal power to the states’ constitutional immunity.\(^{174}\)

Despite the Court’s recognition of the need to balance federal and state concerns, it is questionable whether the *Pennhurst II* holding actually promotes federalism. For example, where injunctive relief is sought on both federal constitutional and state grounds, under *Pennhurst II* a federal court will have to adjudicate the federal issue without reaching the state claim. This process may result in numerous constitutionally based decisions, which would be a departure from the established practice of basing most such decisions on state law grounds.\(^{175}\) Moreover, a district court order based on federal law renders state authorities powerless to alter the ground of the decision.\(^{176}\) A state court or legislature dissatisfied with a district court’s interpretation of state law can change that law through judicial decree or legislation; state judges and lawmakers, however, are not similarly free to modify a decision based on federal constitutional law.

Justice Stevens’ position reflected a more accurate view of federalism concerns. He contended that Court precedent favored the doctrine of sovereign immunity, rather than the text of the amend-

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\(^{173}\) *Pennhurst II*, 104 S. Ct. at 921 (Brennan, J., dissenting).

\(^{174}\) *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900, 910 (1984). The Court indicated that “Edelman’s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States.” *Id.* at 911.

\(^{175}\) See supra text accompanying notes 86-88. There is also the possibility, however, that some decisions will be based on federal statutory, rather than constitutional, grounds.

\(^{176}\) *Pennhurst II*, 104 S. Ct. at 942 (Stevens, J., dissenting).
ment itself, in interpreting the scope of eleventh amendment immunity. 177 This emphasis upon immunity principles promotes respect for the sovereign, yet, at the same time, correctly denies a sovereign immunity defense to an official who violates the sovereign’s law. Accordingly, leaving state law violations unredressed is arguably incompatible with the concept of sovereign immunity. 178 A federal court’s equitable enforcement of state law acknowledges the state’s sovereignty and the need to comply with state law.

Both the majority and dissenting opinions considered the impact of federal injunctive relief upon the states. In the majority’s view, a federal injunction directed at state officials and based on state law was a tremendous infringement upon state sovereignty. 179 However, the Court failed to acknowledge that federal courts have routinely enjoined state officials on federal grounds. 180 One such category of cases is the school desegregation litigation of the past three decades. Such suits have had a highly significant impact on state officials, even though based upon the fourteenth amendment. 181

Justice Stevens’ dissenting position was that a federally based injunction affects a state in the same way as an injunction grounded in state law. 182 This view is arguably the more accurate one, since the Pennhurst II Court artificially distinguished between state and federally based injunctions. For example, a state’s compliance with any injunction, whether based on state or federal grounds, may require substantial expenditures. 183 The reality is

177. Id. at 930 (Stevens, J., dissenting). See also supra note 22 and accompanying text, and note 36 and accompanying text.
178. 104 S. Ct. at 942 (Stevens, J., dissenting).
179. Id. at 911.
180. See C. Wright & A. Miller, supra note 45, at § 4231. According to Professors Wright and Miller, in earlier years Young was the foundation from which state utility regulation and welfare legislation were attacked. More recently, the Young doctrine has provided the basis for forcing schools to desegregate. See infra note 181 and accompanying text.
181. Id. See, e.g., Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964) (Court rejected defendants’ eleventh amendment defense and concluded that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the amendment); Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1954) (cases in school desegregation litigation remanded so that district courts could enter such orders and decrees as were necessary and proper to admit the parties to public schools on a racially nondiscriminatory basis).
182. Pennhurst II, 104 S. Ct. at 935 (Stevens, J., dissenting). Justice Stevens contended that the Pennhurst II majority recognized that injunctions sanctioned by Young had an “obvious impact on the State itself.” Id. See also id. at 910.
that either type of injunction intrudes equally upon state authority because state officials are ordered to act in a particular manner.

The majority and dissenting opinions engaged in markedly different analyses of the Ex parte Young decision, which had permitted a federal court to enjoin a state official from enforcing an unconstitutional state statute. In the majority's view, Young's significance was that it enabled the federal judiciary to vindicate federally created rights and to hold state officers accountable to federal law. However, Justice Stevens maintained that the vindication of federal rights was not the critical element in Young. He believed that Young established that unconstitutional conduct by state officers is not state action "because the federal Constitution strikes down the state law shield." Thus, Justice Stevens reasoned that when a state officer violates a state law, the officer loses the protective state law shield.

In concluding that Young did not apply to the present case, the majority adopted the widely accepted view that the Young doctrine protects federal constitutional rights. Justice Stevens, however, concluded that the suit was not barred by the eleventh amendment, since it alleged conduct violative of state law. Although Justice Stevens offered a less traditional interpretation of Young, the analysis is consistent with his emphasis upon the distinction between the sovereign and its officers.

In refusing to uphold the court of appeals' decision based on state law, the Pennhurst II Court rejected as an independent ground of decision the pendent jurisdiction doctrine, which allows a court to decide related claims over which it would not otherwise

185. Id. at 159-60.
186. Pennhurst II, 104 S. Ct. at 910.
187. Id. at 932 (Stevens, J., dissenting). Justice Stevens maintained that some of Young's predecessors supported his view. Id. at 933-34. For example, in Poindexter v. Greenhow, 114 U.S. 270 (1884), the Court held that a suit challenging an unconstitutional attempt by the Virginia legislature to disavow a state contract was not barred by the eleventh amendment. The Poindexter Court treated the federal Constitution as part of the law of Virginia and determined that the challenged action was not that of Virginia because it violated Virginia's law. 114 U.S. at 292-93.
188. Pennhurst II, 104 S. Ct. at 939 (Stevens, J., dissenting).
189. Id. (Stevens, J., dissenting). As further support for this view, Justice Stevens indicated that in tort cases, there is no state-law defense to protect a defendant state official against a successful plaintiff.
190. Id. at 911. See also infra text accompanying note 210.
191. Id. at 939 (Stevens, J., dissenting).
192. See supra text accompanying notes 155, 162-64.
have jurisdiction. The majority reasoned that since *Siler v. Louisville & Nashville Railroad Co.* and its progeny had not addressed the eleventh amendment in connection with the state law claims, those cases were not dispositive of the case at bar. The majority determined that the eleventh amendment was a specific constitutional bar applicable to pendent claims against state officials. Arguably, however, Justice Stevens was correct in his position that the *Siler* principle, which emphasizes the avoidance of unnecessary federal constitutional decisions, was controlling.

The majority did not adequately address the fact that its prior decision in *Pennhurst I* had remanded the case to the Court of Appeals to determine if the district court’s remedial order could be supported on the basis of state law, the Constitution, or the Federal Rehabilitation Act. The majority failed to acknowledge that, in reaching a decision based upon state law, the court of appeals did exactly what the *Pennhurst I* Court had instructed it to do. The *Pennhurst II* Court was certainly entitled to address the eleventh amendment and pendent jurisdiction issues, but it should have at least acknowledged the apparent contradiction of its current decision with its prior remand order.

The majority rejected the respondents’ ultra vires argument in concluding that the petitioners’ actions in operating Pennhurst were within the scope of their delegated authority. One fundamental problem with the majority’s opinion was that the Court’s ultra vires inquiry does not necessarily provide firm guidance for future courts. No distinction is drawn between action which is an error of law, but within the scope of authority, and conduct which is beyond that scope, and therefore forbidden. The Court’s empha-

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193. *See supra* notes 82-96 and accompanying text.
196. *Id.* at 919.
197. *Id.* at 940-41 (Stevens, J., dissenting).

The court of appeals made the following observations about *Siler*:

*Siler* is generally regarded as the seminal case on pendent jurisdiction. For our purposes its greatest significance is that it presented the identical problem before us: a case against state officers over which the federal court had federal question jurisdiction, despite the Eleventh Amendment, because of the holding in *Ex Parte Young*. Since the pendent jurisdiction rule originated in a case involving state officers, there cannot be, as the Commonwealth suggests, an Eleventh Amendment exception to that rule.

*Pennhurst*, 673 F.2d 647, 658 (3d Cir. 1982) (en banc).
sis of the concept of action undertaken "without any authority whatever," as opposed to conduct which is an error in the exercise of delegated power, does not help to clarify the appropriate legal guidelines. This lack of definition could be particularly problematic in situations, unlike Pennhurst II, where detailed statutory or administrative guidelines are lacking.

Conceivably, the majority's rationale allows a district court to circumvent Pennhurst II by finding that a particular official acted totally without authority and was therefore not shielded by the state's sovereign immunity. The Sixth Circuit, for example, recently recognized this possibility in Miami University Associated Student Government v. Shriver. In that case, the plaintiff argued that the defendant Board of Trustees lacked the authority to enforce a campus policy. The court concluded that if, on remand, the judge accepted the proposition that the defendant had acted without any authority whatever, then Pennhurst II would not prevent the judge from ordering the defendant to conform its conduct to Ohio law. As evidenced by Shriver, federal courts may undoubtedly interpret the ultra vires concept in varying fashions. A suit may be considered not to be against the state, and therefore not barred by the eleventh amendment, if a plaintiff can establish that the defendant state official acted totally without statutory authority.

Pennhurst II clearly broadens the scope of state immunity from federal suits seeking injunctive relief by expanding the category of state officials able to claim eleventh amendment protection. This expansion of immunity, however, does not appear to parallel recent developments in the law of state sovereign immunity. Most

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201. 735 F.2d 201, 202 (6th Cir. 1984). At issue in Shriver was Miami University's "no-car" policy for undergraduate students. The rule provided that unless a student fit into one of several exceptions, he or she could not operate an automobile on the university campus or in the surrounding town of Oxford, Ohio.
202. *Id.* at 203. The Association challenged the Board of Trustees' "no-car" policy on the following grounds: (1) it alleged that the policy violated its members' association, travel, and privacy rights under the fourteenth amendment, and (2) it alleged that the Board of Trustees lacked the authority under state law to establish and enforce rules of conduct unrelated to academic performance off of the college campus.
203. *Id.* at 204.
204. One must keep in mind that state sovereign immunity is different than eleventh amendment immunity, since the eleventh amendment only deals with suing the state in a federal court. *Cf.* Florida Dep't. of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981) (per curiam) (waiver of sovereign immunity for state agency did not constitute waiver of eleventh amendment immunity); Edelman v. Jordan, 415 U.S. 651, 677 n.19 (1974) (Court determined that whether the State of Illinois permitted suit to be brought against it in its own courts was not determinative of
states have already abolished complete sovereign immunity in the tort area, and several have abolished the sovereign immunity defense in contract cases. These trends represent a divergence from Pennhurst II's strong affirmation of state sovereignty. The Supreme Court seems quite willing to struggle to preserve a concept that the states themselves are abandoning.

**Litigation After Pennhurst II**

In addition to its theoretical and academic interest, the Pennhurst II decision will undoubtedly have a very significant and practical effect on litigation in the federal courts. The decision severely restricts the doctrine of pendent jurisdiction, since it precludes injunctive relief against state officials on the basis of state law. Plaintiffs seeking injunctive relief against such officials must respond to these new limitations.

Pennhurst II will probably affect both the types of claims alleged and the choice of forums. If a federal forum is desired, plaintiffs suing state officials will have to forego their state law claims and sue in federal court by alleging only a federal constitutional or statutory violation. This is likely to increase the number of decisions based on federal constitutional grounds, an outcome decried by the Court in Siler v. Louisville & Nashville Railroad Co. Alternatively, litigants may choose to bring suits in state courts, in order to allege both state and federal claims. This result is unsatisfactory, since it undercuts Ex parte Young's premise that federal court jurisdiction protects constitutional rights against invasion at the trial court level.

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whether Illinois had relinquished its eleventh amendment immunity from suit in federal courts). However, it is of interest to consider developments in the state sovereign immunity area.


As an example of state courts abrogating the sovereign immunity defense, see Haverlack v. Portage Homes, Inc., 2 Ohio St. 2d 26, 442 N.E.2d 749 (1982) (court in nuisance action ruled that in absence of a specific statute, the defense of sovereign immunity was no longer available to municipalities).


207. See generally English, The Pennhurst II Decision and Its Implications for Foster Care Litigation, 18 Clearinghouse Rev. 33 (1984); Turner, Federal Jurisdiction after Pennhurst, 4 Cal. Law., Sept. 1984, at 10. Turner states that Pennsylvania officials decided to close Pennhurst by July 1, 1986. This decision was made before the court of appeals could act on the Supreme Court remand order. Turner, supra, at 12.


210. See Baker, supra note 2, at 158.

Yet another alternative is for a plaintiff to sue first in state court on the basis of state
The *Pennhurst II* rationale also ignores the fact that judges are elected in many states. Regardless of the basis of an injunction, some judges will be reluctant to take the politically controversial position of enjoining their own state officials. Other consequences are possible at the state court level. For example, state judges may ultimately develop further expertise in certain areas of federal constitutional law. They may also choose to expansively interpret the provisions of their own state's constitution, in order to accommodate the rights and remedies that would otherwise be provided under provisions of the federal Constitution. These positive changes could result in more thorough adjudication of federal and state constitutional issues by the state courts.

Another consideration affecting the states is that if the number of ultra vires challenges against state officials substantially increases, state legislatures may be prompted to statutorily broaden the discretion of state administrative officials, in order to avoid such challenges under *Pennhurst II*'s expansive holding. Some degree of official discretion is necessary and desirable, but lawmakers


In assessing the possible effect of the *Pennhurst II* holding on the abstention doctrine, it appears that *Pennhurst II* will not directly affect the continued viability of *Pullman*-type abstention. The *Pullman* doctrine generally calls for a federal court to postpone decision of a case which presents constitutional issues, if resolution of those constitutional issues might be avoided by a state court decision of an unsettled state law question. See Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377, 396 (1981). In contrast, the *Pennhurst II* plaintiffs did not challenge the MH/MR Act on federal constitutional grounds. In holding that the eleventh amendment barred the state law claims, the *Pennhurst II* Court did not address the issue of the lower federal court retaining jurisdiction over those claims, as a federal court would do under *Pullman* abstention.

It should be noted there is a distinct difference between pendent jurisdiction and abstention, even though both doctrines are based in part on the principle that unsettled state law issues should be decided by state courts. See Gary B. v. Cronin, 542 F. Supp. 102, 115 (N.D. Ill. 1980) (court indicated that "when a federal court abstains, it is declining to decide federal claims because of the state law issues, whereas when the court refuses to exercise pendent jurisdiction, it is merely declining to resolve the state law claims").


will face the troublesome task of making sure that state officials are not given unbridled discretion, since that could raise issues of improper delegation of legislative authority.\textsuperscript{212}

The \textit{Pennhurst II} decision can only add to the debate over the proper balance of power in our dual system of federal and state government. Recent proposals to limit federal jurisdiction over controversial issues,\textsuperscript{213} the proposals to abolish diversity jurisdiction,\textsuperscript{214} and the growing use of state constitutions to protect fundamental constitutional rights\textsuperscript{215} suggest a major shift in federal and state relations.\textsuperscript{216} Clearly, comprehensive eleventh amendment analysis after \textit{Pennhurst II} must continue to take into account the consideration of federalism underlying all aspects of the amendment.

\textbf{CONCLUSION}

In \textit{Pennhurst State School \& Hospital v. Halderman}, the Supreme Court faced the issue of whether a federal court could enjoin state officials on the basis of state law. A bare majority upheld the petitioners' eleventh amendment defense, and placed a significant limitation on the jurisdiction of the federal courts to adjudicate lawsuits seeking injunctions against state officers and agencies. The \textit{Pennhurst II} majority viewed the eleventh amendment as establishing a constitutional sovereign immunity and con-
considered a federal injunction directed against state officials, based on state law, as the ultimate intrusion on state autonomy. In addition, the Court expansively interpreted the ultra vires language from past decisions and provided immunity for state officials who act within their nominal authority, but in violation of state law. Finally, the *Pennhurst II* Court repudiated a well-respected line of cases which had called for cases to be adjudicated upon the narrowest bases possible and for the avoidance of unnecessary decisions of constitutional questions. What the Court failed to do was to realize that its holding does not actually serve the principles of federalism that it allegedly promotes, since it prevents federal courts from equitably enforcing state law.

At a practical level, *Pennhurst II* will interfere with a plaintiff's right to seek injunctive relief against state officials, by forcing a litigant to either pursue a federal remedy and forego allegations of state law violations, or to opt for state court adjudication of both federal and state claims. Although there may be some positive impact upon the state judiciaries in the future, it may have been achieved at too high a price. The *Pennhurst II* decision is a step backward for advocates of federal judicial activism, and for those who maintain that eleventh amendment immunity should not be available to state officials who act in a manner forbidden by their own state governments.

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