HB 120

(7)
Date Referred to Committee: February 7, 1997 FURTHER REFERRALS:

Date of Committee Action: 2/11/97

The JUDICIARY Committee considered: HB 120

HOUSE BILL NO. 120 STATE IMMUNITY FROM SUIT IN FED COURT

"An Act relating to the power of the attorney general to waive immunity from suit in federal court; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB 120 (JUD) [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [ ] fiscal note(s) _____

[/] zero fiscal note(s) DEPT. OF LAW [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
	CROFT	✓			
	PORTER	✓			
	BERKOWITZ	✓			
	GREEN	✓			

CHAIR'S SIGNATURE _____

CS FOR HOUSE BILL NO. 120(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HUDSON, Green

A BILL

FOR AN ACT ENTITLED

"An Act relating to the power of the attorney general to waive immunity from suit in federal court; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 44.23.020 is amended by adding a new subsection to read:

(c) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 120

Revision Date:
Dept. Affected: Department of Law
Title: ...power of attorney general to waive immunity from suit in federal court...effective date
BRU: Civil Division
Component: General Legal Services
Sponsor: Representative Hudson
Requester: House Judiciary
COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill will have no fiscal impact for the Department of Law.

Prepared by: Fred Fisher
Phone: 465-3672
Division: Administrative Services Division
Date: 2/7/97

Approved by Commissioner: Bruce M. Botelho, Attorney General
Date: 2/7/97
Agency: Department of Law

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0-LS0519\B
Cook
2/10/97

Start #0 210
2/11/97

CS FOR HOUSE BILL NO. 120( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HUDSON, Green

A BILL

FOR AN ACT ENTITLED

"An Act relating to the power of the attorney general to waive immunity from suit in federal court; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 44.23.020 is amended by adding a new subsection to read:

(c) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

New Text Underlined [DELETED TEXT BRACKETED]

AMENDMENT

Page 1, line 8&9, replace with the following:

"The expiration on January 1, 1999 of the Attorney General's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases."

Alaska State Legislature

House of Representatives

House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Chairman: Representative Joe Green
Vice-Chairman: Representative Con Bunde

Representative Ethan Berkowitz
Representative Eric Croft
Representative Jeannette James
Representative Brian Porter
Representative Norman Rokeberg

AGENDA

Tuesday, February 11, 1997
12:00 Noon

HB 120 Attorney General's Waiver of State's Immunity from Suit in Federal Court

Please note that there is a proposed Committee Substitute submitted by Representative Hudson.
Dated 2/10/97--LS 0519\B.

Copies are available in the Committee Room.

Alaska State Legislature

House of Representatives

House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Date: February 11, 1997

To: House Judiciary Committee Members

From: Lisa Kirsch
House Judiciary Committee Aide

Subject: **Proposed CS for HB 120 Waiver of Sovereign Immunity for today's Noon hearing**

I have attached two pages. The first is an amendment with new language for the sunset clause of HB 120. The second page is a proposed CS which includes the new sunset clause from the first page, and the amendment we adopted as amendment #1 on Monday's meeting at Rep. Hudson's request.

0-LS0519\E.1
Cook
2/8/97

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE HUDSON

TO: HB 120

Page 1, line 6. following "lands,":

Insert "or in any case in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080,"

Adopted
2/10/97

MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Bill Hudson
Alaska House of Representatives

DATE: February 7, 1997

FILE NO.:

TEL. NO.: 465-2133

SUBJECT: House Bill 120

FROM: Bruce M. Botelho
Attorney General

I support House Bill 120, which authorizes the Attorney General to waive the state's Eleventh Amendment immunity and thereby consent to suit in federal court in very limited cases. The Eleventh Amendment to the United States Constitution provides that a state generally may not be sued in federal court without its consent. This bill would permit the Attorney General to consent to suit in federal court in cases involving the state's title to submerged lands, which will benefit the state in ongoing litigation.

I also support a proposed amendment which would allow the Attorney General to consent to suit in federal court in tort cases in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080. The state needs to be able to litigate, in federal court, tort cases in which federal entities are potentially liable, because the federal government and its employees cannot be sued in state court.

If you have any questions about either of these issues, please do not hesitate to contact my office.

BMB:SDC:kh

Background on the Need for
the Proposed Amendment to House Bill 120

As a "deep pocket," the State of Alaska is frequently named as the only defendant in cases where other nonparties are clearly at fault, and ordinarily the state can receive a fair allocation of potential liability by joining those parties as third-party defendants for apportionment of fault under AS 09.17.080. However, a problem exists when the federal government is involved.

By federal law the federal government (agencies, officials, employees, etc.) can only be sued in federal court. Thus, fault can only be apportioned to the federal government in federal court. However, the Eleventh Amendment of the United States Constitution deprives federal courts of jurisdiction over tort actions brought by private parties against unconsenting states. Thus, the state cannot appear in federal court as a defendant (or third-party plaintiff) in a tort action brought by a private party unless it waives its Eleventh Amendment immunity.

While it clearly would not be in the state's interest to waive its Eleventh Amendment immunity in all cases, in the occasional case where the state could reduce its liability in a tort action by joining the federal government as a third-party defendant for apportionment of fault under AS 09.17.080 it would be in the state's interest to waive its Eleventh Amendment immunity, since federal court is the only forum where a third-party claim against the federal government can be brought.

In fact, the state faces such a situation now. The state has been sued by approximately one hundred and fifty residents of Hooper Bay in two civil actions in Superior Court in Bethel. The cases are Smith v. State and Melba Joseph, et al. v. State, and they arise out of one wrongful death (Smith case) and many illnesses (Joseph case) which were caused by excess fluoride in Hooper Bay's public water system. (The liability issues in the two cases are identical, and the Joseph case has been stayed pending a determination of liability in the Smith case.)

Hooper Bay is responsible under state law to prevent the distribution of contaminated water, but Hooper Bay had no insurance. Consequently, Smith originally filed suit against the Yukon Kuskokwim Health Corporation (YKHC), alleging that YKHC failed to properly supervise Hooper Bay's water system. However, YKHC was acting under a contract with the federal government, and the action was removed to federal court.[1] After the case against YKHC was removed to federal court Smith essentially abandoned the action, and initiated a new action against the State of Alaska in Bethel Superior Court. Smith now claims that the state should have assured the safety of Hooper Bay's water system. And more specifically, Smith seeks

---

[1] The state and federal governments are engaged directly and indirectly in several programs to improve drinking water and sanitation facilities in the bush communities, and both were aware of problems in Hooper Bay and both had been providing direct and indirect assistance to Hooper Bay.

to hold the state vicariously liable for the negligence of Steve Weaver, a federal (Public Health Service) employee detailed to the State of Alaska (Village Safe Water) who was working to rehabilitate Hooper Bay's public water system.

It obviously would be in the state's best interest to have fault allocated to any negligent federal entities in the Smith and Joseph actions (and in any similar action in the future) pursuant to AS 09.17.080. Indeed, the federal government intended to join the state as a third-party defendant in the original action against YKHC if that action had gone forward.

Some federal courts have held that only the Alaska Legislature can waive the state's Eleventh Amendment immunity, and only by giving an unequivocal indication of its intent to do so. Thus the purpose of the proposed bill is to unequivocally authorize the Attorney General to waive the state's Eleventh Amendment immunity on a case by case basis in any case in which the state seeks to allocate fault to the federal government or a federal employee pursuant to AS 09.17.080.

Alaska State Legislature

House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Date: February 10, 1997

To: House Judiciary Committee Members

From: Lisa Kirsch
House Judiciary Committee Aide

Subject: HB 120 Amendment
Barbara Brink--additional information

I just received the enclosed documents this morning.

HB 120
First we have a proposed amendment, supported by the AG's office, that allows the AG to waive immunity in appropriate tort cases. There is an explanatory memo attached, as well as the AG's statement in support. Susan Cox, from the Office of Special Litigation, will be present at the hearing today to answer any questions about the amendment.

Appointment of Barbara Brink:
Enclosed are some of the results from the survey of the Bar Association. I provided you with an excerpt. If you would like to see the entire pamphlet I have it here in the committee room (120). I also enclosed the evaluations from some of the prosecutors who recently had trials with Barbara Brink as defense counsel.

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907) 465-3744
Fax (907) 465-2273

COMMITTEES

CO-CHAIR
Resources Committee

MEMBER
Transportation Committee
Labor & Commerce Committee

HB 120
Sponsor Statement

"An Act relating to the power of the attorney general to waive immunity from suit in federal court; and providing for an effective date."

The State of Alaska is presented with a rare opportunity to determine its title to certain submerged lands. The ability to move forward in a precedent setting case can only be determined by the Legislature, which may waive the State's 11th Amendment immunity and allow the state to enter into a lawsuit with the federal government.

A decision must be reached by this body by the 14th of February or the court will dismiss the case.

The United States is currently being sued by private citizens in Alaska who seek a judgment that the US owns the tidelands in the Tongass National Forest. The State has not been named as a defendant, however, it would like to intervene to determine its title to the lands in dispute.

This rare opportunity is afforded to the state because only by joining as a defendant in this lawsuit can the state litigate this title. The Quiet Title Act requires that the United States "claim an interest" in the disputed property. In this case, the United States has carefully avoided taking any formal position as to whether it believes it or the State has title to the tidelands in question. Therefore, by joining as a defendant, the State would secure the opportunity to establish title to lands it owns by virtue of the equal footing doctrine, as an essential attribute of its sovereignty.

The purpose of this bill is to ask the Alaska State Legislature to allow the Attorney General to give the State's consent to appear in Federal Court as a defendant in a case that involves the state's title to submerged lands.

MEMORANDUM

State of Alaska
Department of Law

TO: Ron Somerville
Special Assistant

DATE: February 5, 1997

FILE NO.:

TEL. NO.: 269-5100

SUBJECT: 11th Amendment Bill

FROM: Joanne Grace
Assistant Attorney General
Federal Relations, Anchorage

CONFIDENTIAL

This memorandum explains the need of the Department of Law for passage of the draft bill attached.

A group of plaintiffs has sued the United States, claiming that the federal government rather than the State owns the tidelands and territorial sea within the Tongass National Forest (*Peratrovich v. United States*). They seek this judgment because if the United States owns these submerged lands, they constitute "public lands" under the Alaska National Interest Lands Conservation Act ("ANILCA") and are subject to the jurisdiction of the Federal Subsistence Board. The plaintiffs want their purchase of herring roe on kelp from rural residents and resale to other markets to constitute "customary trade" subject to a priority under title VIII of ANILCA.

The plaintiffs have not named the State as a defendant, however. They want title to the submerged lands litigated without the State's involvement. The United States has not answered the complaint, and therefore has not stated whether it believes it owns the submerged lands, but has moved for judgment. One of its bases for judgment is that the plaintiffs have failed to join an indispensable party, the State. The United States argues that the Court cannot decide the issue of title to the submerged lands without the State's participation because of the State's strong interest in them. We agree with this argument and believe the Court will dismiss the case unless the State intervenes.

The State would like to intervene because it wants to litigate title to these lands against the United States. The State would have problems simply filing suit against the United States to quiet title to them, however, because the Quiet Title Act requires as a prerequisite to federal court jurisdiction that the United States "claim an interest" in the property in dispute. The United States has carefully avoided taking any formal position as to whether it

believes it or the State has title to the submerged lands within the boundaries of the Tongass, although Forest Service employees certainly have taken the position that they are federally-owned in dealings with the state. Therefore, this litigation affords the State an opportunity to litigate title to these lands that the State otherwise may not have for many years.

The attorney for the United States has notified the State's attorneys that if the State tries to intervene as a defendant, he will assert a violation of the 11th Amendment. The 11th Amendment provides that federal courts do not have jurisdiction over suits against unconsenting states. A state may waive its 11th amendment immunity, but only by giving an "unequivocal indication" that it consents to suit in a federal court. This authority is held by the legislature, however, which may delegate it to the Attorney General. The federal district court in Alaska twice has found that Alaska has no statute expressly waiving 11th amendment immunity, and that the Attorney General's power to expressly consent to federal jurisdiction "in the context of litigation"[1] does not grant him or her the authority to consent to federal jurisdiction for the trial of a single case. Although the Department of Law thinks it has good arguments that the legislature has delegated this authority, these cases carry some weight as precedent, and we want to eliminate the issue in the *Peratrovich* case and other submerged lands cases.

This is the purpose of the drafted bill. Judge Holland has indicated that he will withhold decision on the United States' attempt to have the case dismissed until February 14 to give the State an opportunity to intervene. The State must have some level of assurance by that date that the bill will pass and the State will be able to intervene.

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[1] AS 44.23.020(b) provides in part that the Attorney General shall "represent the State in all actions in which the State is a party" and "perform all other duties required by law or which usually pertain to the office of Attorney General in a state."

FILED

JUN 29 1995

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Susan Cox
Special Litig.
FAX: 465-6735
FROM - Kirsch
House Jud
465-4316

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

DENISE OLSON, Personal Representative of the Estate of GORDON OLSON,	)	
Plaintiff,	)	Case No. A95-092 CV
vs.	)	ORDER FROM CHAMBERS
CITY OF DILLINGHAM and the STATE OF ALASKA,	)	(Motion to Remand - Docket 6)
Defendants.	)	

I. MOTIONS PENDING

Plaintiff Denise Olson ("Olson") moves at Docket 6 to remand this action to the Alaska Superior Court on the ground that this court has no jurisdiction over a controversy between her and the State of Alaska ("State"). Alternatively, Olson requests that the court abstain, because the claims against the City of Dillingham ("Dillingham") involve important state interests in areas of unsettled law. The issues have been fully briefed. Oral argument was heard on June 28, 1995.

20

II. FACTS

On September 27, 1993, Olson filed a wrongful death action in the Superior Court for the State of Alaska, alleging that defendants negligently failed to employ reasonable rescue efforts and negligently prevented others from performing a rescue when her husband was in imminent danger of serious injury or death (Docket 1). The complaint alleges that on September 30, 1991, decedent Gordon Olson ("Mr. Olson") was in a skiff on the Wood River/Nushagak River drainage, within the City of Dillingham. The skiff ran aground, and Mr. Olson was forced to disembark and wade to an exposed gravel bar. The bar became submerged by the tide, and Mr. Olson drowned (Docket 1). The complaint further alleges that the Dillingham Police Department and the Alaska State Troopers were advised of the emergency and:

> negligently failed to respond in a reasonable fashion by wasting valuable time, by advising other individuals that additional rescue efforts were not necessary, by preventing other individuals from engaging in rescue efforts, by trying to employ unreasonable and improper procedures and methods for engaging in the rescue, and by not employing manpower and equipment readily available to engage in the rescue.

(Docket 1, pp. 3-4).

After conducting some discovery, Olson moved to amend the complaint to add a claim under 42 U.S.C. § 1983 against Dillingham for "inadequacy of police training that amounted to deliberate indifference to the rights of persons with whom the police come into contact." She simultaneously moved for an order establishing Dillingham as the place of trial. The superior court granted both

motions (Docket 2; Docket 6, pp. 3-4). Dillingham then petitioned for removal to this court under 28 U.S.C. §§ 1441(a) and (b), and the State concurred and joined (Docket 1).

III. DISCUSSION

The parties do not dispute that this court has jurisdiction to hear Olson's 42 U.S.C. § 1983 claim and, consequently, Olson's pendant state claim against Dillingham. Olson argues that this court does not have jurisdiction to hear her claims against the State because the Attorney General has not effectively waived immunity under the Eleventh Amendment to the United States Constitution. Defendants assert that the Attorney General has broad powers, including the implicit power to consent to federal jurisdiction for the trial of a single case.[1]

The removal statute, 28 U.S.C. § 1441, provides that a defendant may remove an action to federal court on the basis of federal question or diversity jurisdiction. Under the unanimity requirement for removal of an action in which there is more than one defendant, all defendants must unanimously agree to join in removal. Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986); Ford v. New United Motors Mfg., Inc., 857 F. Supp. 707 (N.D.Cal. 1994). In multiple defendant cases, any defendant can dictate that the action remain in

[1]AS 44.23.020(b) provides in pertinent part that the Attorney General shall "represent the State in all actions in which the State is a party" and "perform all other duties required by law or which usually pertain to the office of Attorney General in a state."

state court by refusing to join in another defendant's notice of removal. Ford, 857 F. Supp. at 709; 28 U.S.C. § 1446(a). Defendants have the burden of establishing that removal was proper, and federal jurisdiction must be rejected if there is any doubt as to the right of removal. Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992).

Defendants unanimously have attempted to remove this case to federal court on federal question grounds, because Olson raised a Section 1983 claim against Dillingham. Under the Eleventh Amendment, however, this court is barred from entertaining a suit between a state and a citizen of that state, unless that state has consented to be sued. Charley's Taxi Radio Dispatch v. SIDA of Hawaii, 810 F.2d 869, 873 (9th Cir. 1987).

The Eleventh Amendment may be described as either creating an immunity for states or establishing a jurisdictional limitation on federal courts. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 907 (1984). "A state may waive its Eleventh Amendment immunity only by giving an 'unequivocal indication' that it consents to suit in a federal court." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 3145 n.1, reh'g denied, 473 U.S. 926, 106 S. Ct. 18 (1985); Collins v. State of Alaska, 823 F.2d 329 (9th Cir. 1987). The court may find such an indication where:

> (1) the state expressly consents to federal jurisdiction in the context of the litigation, see Actmedia, Inc. v. Stroh, 789 F.2d 766, 772 (9th Cir. 1986) [republished, 830 F.2d 957 (9th Cir. 1986)]; (2) a state statute or constitutional provision expressly provides for suit in a federal court, Atascadero, 105 S. Ct. 3142 at n. 1; or (3) Congress clearly intends to condition the

state's participation in a program or activity on the state's waiver of its immunity. Id. at 3150; Doe v. Maher, 793 F.2d 1470, 1474 (9th Cir. 1986).

Charley's Taxi Radio Dispatch, 810 F.2d at 873 (footnote omitted). There is no Alaska statute expressly waiving Eleventh Amendment immunity. Therefore, the first issue is whether the Attorney General's power to expressly consent to federal jurisdiction "in the context of the litigation," grants him or her the authority to consent to federal jurisdiction for the trial of a single case. This court concludes that it does not.

The United States Supreme Court has held that a state's consent to claims in the federal courts must be "stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Atascadero, 473 U.S. at 238, 105 S. Ct. at 3145 (quoting Edelman v. Jordan, 415 U.S. 651, 673, 94 S. Ct. 1347, 1360 (1974)). Many courts, including this one, have held that the Attorney General may not waive Eleventh Amendment immunity on the state's behalf, unless the legislature has expressly authorized the Attorney General to do so. State of Alaska v. O/S Lynn Kendall, 310 F. Supp. 433 (D. Alaska 1970). See also Frances J. v. Wright, 19 F.3d 337, 343 (7th Cir. 1994), cert. denied, Wright v. Frances, __ U.S. __, 115 S. Ct. 204 (1994) (Attorney General may not waive sovereign immunity, even by removing case to federal court); Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) (state official may not waive sovereign immunity on behalf of state unless "explicitly authorized in state's constitution, statutes, or decisions");

Gwinn Area Community Sch. v. State of Michigan, 741 F.2d 840, 846 (6th Cir. 1984) (where Michigan joined federal defendants in removal to federal court, claims against state defendants were remanded because Michigan law had no unequivocal expression of waiver).

In O/S Lynn Kendall, 310 F. Supp. at 433, the State appeared in federal court as plaintiff in a maritime tort case, seeking reimbursement for salvage services in abating a public nuisance. The State requested a ruling that it had not waived its Eleventh Amendment immunity with respect to defendants' counterclaims. Defendants argued that immunity from suit in federal court may be waived either by specific declaration or by act, such as filing a general appearance, or by the State becoming an actor, by being a plaintiff, or by intervening, in a suit brought in the federal courts. The court responded as follows:

> The State of Alaska cannot be sued without its consent being expressly granted by legislative authority. The Legislature has not expressly or otherwise consented to suits against the State in federal court. Under the laws of the State, the Attorney General is without authority to waive the State's Eleventh Amendment immunity.

(Citations omitted). Id., 310 F. Supp. at 434. In the absence of express statutory authority for the waiver, this court concludes that the Attorney General cannot effectively consent to this court's jurisdiction by joining in Dillingham's removal petition.

Dillingham argues that, because the amended complaint essentially alleges a negligent rescue at sea, and because the State's rescue efforts are specifically

authorized by Alaska statutes (AS 18.60.120 designates the State as the civil authority responsible for search and rescue in Alaska), this court has maritime jurisdiction over the State due to its deliberate involvement in maritime rescue. In support, Dillingham cites Parden v. Terminal Railway of the Alabama State Docs Dep't, 377 U.S. 184, 196, 84 S. Ct. 1207, reh'g denied, 377 U.S. 1010, 84 S. Ct. 1903 (1964), in which the Supreme Court held that Congress had abrogated the State's sovereign immunity pursuant to its powers under the Commerce Clause by passing the Federal Employers' Liability Act ("FELA"), a regulatory scheme applicable to every common carrier in interstate commerce, under which the State constructively consented to suit because it owned and operated an interstate railroad. However, Parden was overruled by Welch v. Texas Dep't of Highways and Public Transp., 483 U.S. 468, 107 S. Ct. 2941 (1987), when the Court held that the Eleventh Amendment prohibits admiralty suits against a state, unless the state expressly waives its immunity and consents to suit in federal court.

The second question thus becomes whether Olson's claim against Dillingham should be heard in this court or remanded back to the state court with Olson's action against the State. The consent to removal by the State not having been effective, the original removal was defective and this case must be remanded. Even if this court could somehow retain jurisdiction to hear the claims against Dillingham, doing so would be inappropriate. Remand avoids having two different trials in two different courts over essentially the same issues.

IV. CONCLUSION

The motion at Docket 6 is GRANTED. This action is hereby REMANDED to the Superior Court for the State of Alaska, Third Judicial District at Anchorage.

DATED this 28 day of June 1995 at Anchorage, Alaska.

JOHN W. SEDWICK
UNITED STATES DISTRICT COURT

A95-0092--CV (JWS)

D. POPE
J. BENDELL
V. VERMONT, JR. (AG-SIE-200)

AO 72A

STATE OF ALASKA
Department of Law
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501-1994

Phone No. (907) 269-5100
Fax No. (907) 279-2834/278-4607

FAX TRANSMITTAL SHEET

Please deliver the following pages:

DATE: February 6, 1997 TIME: ____ TOTAL PAGES: 8
(including cover sheet)

TO: Lisa Kirsch Fax No. 465-4316
House Judiciary Committee

RE:

FR: Joanne Grace
Ann Berwick
Assistant Attorneys General

* * * * * * * * * * * * * * * * * *

IF YOU DO NOT RECEIVE ALL THE PAGES OR HAVE ANY PROBLEMS, PLEASE CALL **MARGARET** AT (907) 269-5232.

REMARKS:

HB-120

Susan Cox

2/10/97

Because of tort reform have to have all nec parties

Fed CA only place to sue Feds

State Δ

Want to include Feds in allocation of fault comparative % for ea party resp. case

MEMORANDUM

Date: February 10, 1997

To: Joe Green

From: Lisa Kirsch

Re: **HB 120 Tort Amendment to Sovereign Immunity Waiver**

After our staff meeting this morning I received an amendment to HB 120 which will allow the AG to waive State immunity in tort cases as well as the submerged lands cases.

I hand delivered the amendments and the backup memos to the members' offices. I called Susan Cox who is the AAG at Special Litigation who will be here to defend the tort amendment this afternoon. She tells me that this amendment is needed in cases where the State has been sued and the federal government is also partially liable. Because of tort reform, all of the parties who may be liable must be included in the suit if you want the jury to apportion fault between them. Currently, the State can neither compel the feds into the State case, nor move the case to federal court. With the amendment, the State **may** waive their immunity in federal court and move the case to federal court where the federal government may be sued.

Susan Cox assures me that the removal to federal court is at the AG's discretion and under this amendment a plaintiff could not compel the State into federal court against the AG's wishes. In other words, the AG could pick and choose which cases they wanted to take to federal court. Susan estimated that there would probably be few cases where the State would want to go to federal court because it would only be to the State's advantage under certain circumstances. For example, when a Federal employee partly caused the injury and the State wanted part or all of the fault to be apportioned to the feds.

She also noted that most defendants would prefer to stay in State court since it was less complicated. As a result, she thought there

would be few instances when a tort plaintiff would even want to force the State to appear in federal court.

You might want to ask Joanne Grace, the AAG from Anchorage who is the attorney behind waiver for the submerged lands case, whether she sees any potential problems with plaintiffs trying to compel the State into federal court when the State does **not** want to be there.

What I imagine is a plaintiff who sees additional remedies in federal court and tries to argue that the State waived its immunity in a similar case and therefore has waived its immunity in the plaintiff's case as well. It doesn't matter that they don't prevail--even if the plaintiff is found to be in the wrong, forcing the State to defend in both venues could get expensive.

I am inclined to defer to the AAG's assessment of the chances that this legislation will cause more problems than it solves since they will be the very same attorneys who must address those problems. Susan Cox seemed confident that the bill would not subject the State to greater liability. If Joanne Grace shares that confidence, I would be satisfied that the bill is a benefit to the State.

Excellent!

Darn it, we can't expect Bill to defend his bill on the floor soon. Can you confirm AG assessment so these points won't go unaddressed to the Senate? Thanks G

identically.[19] Therefore, since a private corporation would be entitled to challenge Arizona's vehicle taxes in a section 1983 action, the Tribe acting as a business corporation is entitled to bring such an action as well.

I also conclude that the Tribe's action is not barred by section 1341, because it qualifies for the "Indian tribes" exception to that provision. The Supreme Court ruled in *Moe* that if an action challenging the imposition of state taxes can be brought under the "Indian tribes" jurisdictional provision, 28 U.S.C. § 1362 (1982), it automatically qualifies for the "Indian tribes" exception to section 1341. *See Moe*, 425 U.S. at 472–75, 96 S.Ct. at 1640–42. Based upon the plain language and legislative history of section 1362, and our prior cases interpreting that provision, I conclude that the Tribe is entitled to bring its action under section 1362, and therefore is not barred by section 1341 from bringing it in federal court.

The plain language of section 1362 authorizes actions *"brought by any Indian tribe or band* with a governing body duly recognized by the Secretary of the Interior":[20] it does not distinguish between the "governmental" tribe provided for in IRA section 16 and the "incorporated tribe" provided for in section 17. 28 U.S.C. § 1362 (emphasis added); 25 U.S.C. §§ 476–477. Moreover, nothing in section 1362's legislative history indicates that it was intended to apply only to tribes acting in a sovereign or governmental capacity. *See* H.R.Rep. No. 2040, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.Code Cong. & Ad.News 3145, 3146–47. When Congress passed section 1362 in 1966, it was fully aware that Indian tribes could act in both sovereign and proprietary capacities. Therefore, its failure to limit explicitly the scope of section 1362 to actions brought by tribes in their governmental capacity suggests that it intended the provision to encompass actions brought by tribes in their corporate capacity as well. Furthermore, this court has held that "statutes passed for the benefit of Indian tribes, *such as section* 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor." *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 712 (9th Cir.1980) (citations omitted and emphasis added), *cert. denied*, 451 U.S. 911 (1981).

This circuit's decision in *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228 (9th Cir.1979), also indicates that the Tribe's action is not barred under section 1341. In that case, we held that a utility company that was loosely affiliated with the Navajo Tribe could not bring an action as an "Indian tribe or band" under section 1362, since the utility company was semi-autonomous, three of its seven directors were not members of the Tribe, and the Tribe itself was "not a party" to the action. *Id.* at 1231–32. Although we held that Congress had not intended section 1362 to "provide access to federal courts for subordinate, semi-autonomous entities of Indian Tribes and bands," we concluded that:

> *If the leadership of a tribe or band decides that litigation is necessary to protect the rights of the tribe or band, then section 1362 will provide federal court access to the tribe or band when the other jurisdictional requirements of that section are also met.*

Id. at 1232 (emphasis added). We also indicated that "[t]o the extent that [the utility's] interests are identified with the Tribe's, the Tribe itself will be able to protect those interests, should *its* leadership decide to do so." *Id.* at 1233 (citing *Mescalero Apache Tribe*, 411 U.S. at 157 n. 13, 93 S.Ct. at 1275 n. 13 (emphasis in original)).[21]

In the present action, the Tribe has followed the precise guidelines suggested in *Navajo Tribal Utility*. The Tribe has brought the action in its own name on behalf of a tribal enterprise that it totally controls. There is nothing in the record to suggest that FATCO is semi-autonomous, or that its interests diverge from the Tribe's in any way. Thus, the Tribe's action can be brought in federal court under section 1362 and qualifies under the "Indian tribes" exception to section 1341.

Since I conclude that the Tribe was entitled to bring its present section 1983 action in federal court, that its claims based on the Indian reservation timber laws are meritorious, and that its due process and equal protection claims are not "frivolous" under the definition provided in *Hagans v. Lavine*, I would affirm the district court's award of attorney's fees to the Tribe.

19. For example, Congress intended that tribal business corporations would be able to enter into contracts waiving any possible sovereign immunity from unconsented suits. *Parker Drilling*, 451 F.Supp. at 1131; *Atkinson*, 569 P.2d at 174–75. If tribal corporations did not have such a capacity, they would be at a distinct disadvantage vis-a-vis other corporations, because private parties would be discouraged from entering into contractual agreements with them.

20. The reference to a "duly recognized" governing body in section 1362 merely indicates that the Tribe must have an IRA government organized under IRA section 16. Since tribes can become incorporated under IRA section 17 only if they already have a section 16 government, this reference to section 16 does not mean that Congress intended section 1362 to apply only to tribes acting in a sovereign or governmental capacity.

21. *Navajo Tribal Utility* contains dictum stating that "[s]uits brought by tribal corporations have also been found to fall outside the scope of section 1362." 608 F.2d at 1231. The court cites *Cape Fox Corp. v. United States*, 456 F.Supp. 784, 798 (D.Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir.1981), and two other cases for that proposition. However, *Cape Fox* is inapposite. It involved "a Native corporation organized under the Alaska Native Claims Settlement Act," *id.* at 797, and thus did not even involve a tribe or band eligible to bring an action under section 1362. *See id.* at 797–98. The other cases are conclusory in their analysis, and do not provide any basis for deciding that the Tribe was not eligible to bring a section 1362 action in this case. *See United States v. State Tax Commission*, 505 F.2d 633, 638 (5th Cir.1974); *Dodge v. First Wisconsin Trust Co.*, 394 F.Supp. 1124, 1127 (E.D.Wis.1975).

CHARLEY'S TAXI RADIO DISPATCH CORPORATION, a Hawaii Corporation, Plaintiff-Appellant,

v.

SIDA OF HAWAII, INC., a Hawaii Corporation; State of Hawaii; Department of Transportation; and Wayne J. Yamasaki,* in his capacity as Director of Transportation, Defendants-Appellees.

No. 85–1828.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 25, 1986.

Decided Feb. 12, 1987.

Taxi fleet operator brought antitrust action against association of individual taxi owner-operators, state of Hawaii, Hawaii Department of Transportation, and director of transportation, alleging Sherman Act was violated by exclusive contract granted association to provide taxi service from Hawaii international airport, association's unlawful monopoly, and association's refusal to accept taxi fleet operator as member. On cross motions for partial summary judgment, the United States District Court for the District of Hawaii, James M. Burns, J., dismissed the action, and fleet operator appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) Eleventh Amendment protection of states from suit in federal courts barred action against Hawaii and Hawaii DOT; (2) DOT, which was acting pursuant to its constitutional and statutory authority in entering into exclusive service contract with taxi association, did not violate Sherman Act by entering

* Wayne J. Yamasaki has been substituted for Dr. Ryokichi Higashionna pursuant to Fed.R.App.P. 43(c)(1).

into exclusive contract, and director of transportation thus could not be enjoined from enforcing contract; and (3) exclusion of fleet operator from membership in association did not constitute group boycott that was per se unlawful restraint of trade in violation of Sherman Act.

Affirmed in part; vacated in part; and remanded.

1. Federal Courts ⇐776

Court of Appeals reviews de novo findings of subject matter jurisdiction.

2. Federal Courts ⇐269

Eleventh Amendment barred taxi fleet operator's federal action against Hawaii and Hawaii Department of Transportation alleging exclusive contract between association of individual taxi owner-operators and DOT with respect to taxi service from international airport restrained trade in violation of Sherman Act. U.S.C.A. Const. Amend. 11; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Federal Courts ⇐265

Under Eleventh Amendment, unconsenting state is immune from suits brought in federal court by citizens of another state or citizens of the state itself. U.S.C.A. Const.Amend. 11.

4. Federal Courts ⇐266

Protective immunity from federal suit afforded states by Eleventh Amendment may be waived. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⇐30

Immunity to states provided by Eleventh Amendment must be considered sua sponte by federal courts. U.S.C.A. Const. Amend. 11.

6. Federal Courts ⇐269

Eleventh Amendment immunity from federal suit provided states extends to suits brought in federal court against state agencies and departments. U.S.C.A. Const.Amend. 11.

7. Federal Courts ⇐266

State may waive its Eleventh Amendment immunity from suit in federal court only by giving unequivocal indication that state consents to suit in federal court. U.S.C.A. Const.Amend. 11.

8. Federal Courts ⇐266

Federal court may find indication state has waived its Eleventh Amendment immunity from suit in federal court where state expressly consents to federal jurisdiction in context of litigation, state statute or constitutional provision expressly provides for suit in federal court, or Congress clearly intends to condition state's participation in program or activity on state's waiver of its immunity. U.S.C.A. Const.Amend. 11.

9. Federal Courts ⇐265

Even absent waiver or consent, state may be sued in federal court when Congress, acting pursuant to Fourteenth Amendment section, has so provided. U.S.C.A. Const.Amends. 11, 14, § 5.

10. Federal Courts ⇐266

Hawaii statutes providing state waives immunity for liability for torts of its employees and circuit courts of state and state district courts shall have original jurisdiction of all tort actions on claims against state were not unequivocal indication of state's consent to suit in federal court on antitrust claims constituting waiver of state's Eleventh Amendment immunity from suit in federal courts. U.S.C.A. Const.Amend. 11; HRS §§ 662-2, 662-3.

11. Federal Courts ⇐266

Congress had not manifested clear intention to condition Hawaii's operation of international airport or Hawaii Department of Transportation's entering into exclusive contracts with respect to taxi service from airport on waiver of Eleventh Amendment immunity of state from federal court suit, so as to require finding state was subject to suit in federal court. U.S.C.A. Const. Amends. 11, 14, § 5.

12. Federal Courts ⇐269

State officials acting in their official capacity enjoy only limited immunity under

Eleventh Amendment immunity of states from suit in federal court. U.S.C.A. Const. Amend. 11.

13. Federal Courts ⇐272

Although suits against state officials alleging violation of federal law may be brought in federal court, only prospective injunctive relief may be awarded. U.S.C.A. Const.Amend. 11.

14. Federal Courts ⇐272

Federal district court properly entertained taxi fleet operator's action to enjoin Hawaii director of transportation from enforcing exclusive contract with association of individual taxi owner-operators for provision of taxi service from international airport. U.S.C.A. Const.Amend. 11.

15. Federal Courts ⇐762

Court of Appeals may affirm district court on any ground supported by record, even if the ground is not relied on by district court.

16. Monopolies ⇐16(1)

Hawaii Department of Transportation was acting pursuant to its constitutional and statutory authority by entering into exclusive franchise contract for taxi service from Hawaii international airport with association of individual taxi owner-operators, and director of transportation thus could not be enjoined from enforcing that exclusive contract on claim contract violated Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

17. Monopolies ⇐12(15.5)

State executives and executive agencies are entitled to immunity from Sherman Act liability for actions taken pursuant to constitutional or statutory authority, regardless of whether particular actions or their anticompetitive effects were contemplated by legislature; requirement of specific authorization imposed on cities to qualify for immunity is not appropriate for executive branch of state government, which acts in capacity of sovereign when state executive or executive agencies act within their lawful authority. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

18. Federal Courts ⇐270

Cities are entitled to no Eleventh Amendment protections from suit in federal court. U.S.C.A. Const.Amend. 11.

19. Monopolies ⇐12(1.16)

Based on proven anticompetitive effect of group boycotts, group boycotts are considered unreasonable per se, for purposes of Sherman Act prohibitions of restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

20. Monopolies ⇐12(1.12)

Intentional anticompetitive behavior, such as suppressing rivals or coercing suppliers, cannot be justified for purposes of Sherman Act on basis of benign ultimate objective, such as eliminating industry pirating or furthering economic growth; anticompetitive intent is touchstone of inquiry, and ultimate objective is immaterial. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

21. Monopolies ⇐16(1)

Exclusion of taxi fleet operator from membership in association of individual taxi owner-operators did not constitute group boycott that was per se unlawful restraint of trade for Sherman Act purposes, given purpose and effect of association's membership policies and limits of its market power, notwithstanding exclusive franchise association had to provide taxi service from state international airport. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

22. Monopolies ⇐16(1)

Association of individual taxi owner-operators could not be held liable for possessing exclusive franchise to provide taxi service from international airport under Sherman Act monopoly proscription, where state Department of Transportation had immunity to grant association such an exclusive franchise; immunity exempted state action, not merely state actors. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

23. Monopolies ⇐16(1)

Contract granting association of individual taxi owner-operators exclusive right

to provide taxi service from international airport was not restraint of trade prohibited by Sherman Act, where state Department of Transportation had immunity to grant association such an exclusive contract. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Joel Linzer and Daniel J. Furniss, San Francisco, Cal., for plaintiff-appellant.

Gerald Y.Y. Chang, Honolulu, Hawaii, for State of Hawaii and Dep't of Transportation.

Torkildson, Katz, Jossem & Loden, Robert S. Katz, Honolulu, Hawaii, for SIDA.

Appeal from the United States District Court for the District of Hawaii.

Before FERGUSON, CANBY and HALL, Circuit Judges.

CANBY, Circuit Judge:

Charley's Taxi Radio Dispatch Corporation ("Charley's") appeals the district court's dismissal of its antitrust action. The defendants in this action are the State Independent Drivers Association of Hawaii, Inc. ("SIDA"), the State of Hawaii, the State of Hawaii's Department of Transportation ("DOT"), and Wayne J. Yamasaki, Director of Transportation. After a six-day bench trial, the district court found that Charley's had failed to establish that either SIDA or the state defendants had violated either section 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). We hold that (1) the Eleventh Amendment bars Charley's action against Hawaii and the DOT; (2) under the *Parker* state action doctrine Director Yamasaki may not be enjoined from enforcing the challenged contract; and (3) SIDA did not engage in a group boycott in violation of the section 1 of the Sherman Act, or engage in other conduct prohibited by the Sherman Act. Accordingly, we vacate in part, affirm in part, and remand.

1. Charley's originally named as defendants Hawaii's Department of Transportation and Department of Land and Natural Resources, Dr. Higashionna, and the members of the Board of Land and Natural Resources. On March 25, 1983, the parties stipulated to the dismissal of the Department of Land and Natural Resources, the members of its Board, and Dr. Higashionna. Dr. Higashionna was later reinstated as a defendant.

FACTS

SIDA, the State Independent Drivers Association, Inc., is the largest taxi company on Oahu, Hawaii. It was formed in 1963 by a group of individual taxi owner-operators for the purpose of gaining access to airport and hotel taxi stands that were contracted out on an exclusive basis to individual taxi companies. SIDA's membership is limited to independent taxi operators; it does not admit fleet operators.

In 1963, Hawaii's Department of Transportation awarded a contract granting SIDA the exclusive right, subject to minor exceptions, to provide taxi service from Honolulu International Airport. No restrictions were placed on taxi service to the Airport. The DOT's decision to award an exclusive contract was unilateral and not based upon negotiations with SIDA.

From 1963 to 1971, SIDA's contract with the DOT was renewed every two years. In 1973 SIDA's contract was renewed for five years. In 1978, SIDA's contract was renewed for 15 years.

Charley's Taxi Radio Dispatch Corporation is the largest fleet operator on Oahu, Hawaii. In 1979, Charley's brought this action in the United States District Court for the District of Hawaii against SIDA, the State of Hawaii, and various state agencies and officials [1] alleging that (1) the exclusive contract between SIDA and the DOT restrained trade in violation of section 1 of the Sherman Act; (2) SIDA unlawfully monopolized in violation of section 2 of the Sherman Act; and (3) SIDA's refusal to accept it as a member was a *per se* unlawful group boycott in violation of section 1 of the Sherman Act.

On June 22, 1982, Charley's moved for partial summary judgment, arguing that *Parker* state action immunity was not available to the state defendants. The state defendants filed a countermotion asserting that it was available. On April 1, 1983, the district court ruled that *Parker* immunity was unavailable under the *Midcal* two-prong test. *Charley's Radio Dispatch, Inc. v. SIDA*, 562 F.Supp. 712 (D.Hawaii 1983). On September 13, 1983, the district court denied the state defendants' motion to dismiss based on the Eleventh Amendment.

On November 5, 1984, following a bench trial, the district court ruled in favor of SIDA and Hawaii. It found that neither defendant had violated the Sherman Act. Judgment was entered on February 22, 1985. Charley's filed a timely appeal.

DISCUSSION

I. *JURISDICTION AND THE ELEVENTH AMENDMENT*

[1, 2] The first issue we must consider is whether the district court correctly asserted jurisdiction over the state defendants. We review de novo findings of subject matter jurisdiction. *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir.1986). We conclude that the Eleventh Amendment deprived the district court of jurisdiction over Charley's action against Hawaii and the DOT.

[3–6] The Eleventh Amendment provides that:

> 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.

Under this amendment, an unconsenting state is immune [2] from suits brought in a federal court by citizens of another state or, as in this case, citizens of her own. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). The Eleventh Amendment's jurisdictional bar also extends to suits brought in federal court against state agencies and departments *Id.; Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1034 (9th Cir.1985).

[7–9] Charley's contends that Hawaii and the DOT waived their immunity to suit in the district court. A state may waive its Eleventh Amendment immunity only by giving an "unequivocal indication" that it consents to suit in a federal court. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 3145 n. 1, 87 L.Ed.2d 171 (1985). We may find such an indication where (1) the state expressly consents to federal jurisdiction in the context of the litigation, *see Actmedia, Inc., v. Stroh*, 789 F.2d 766, 772 (9th Cir.1986); (2) a state statute or constitutional provision expressly provides for suit in a federal court, *Atascadero*, 105 S.Ct. 3142 at n. 1; or (3) Congress clearly intends to condition the state's participation in a program or activity on the state's waiver of its immunity. *Id.* at 3150; *Doe v. Maher*, 793 F.2d 1470, 1477 (9th Cir.1986).[3]

[10] None of these conditions are present here. Hawaii and the DOT have asserted their constitutional immunity throughout the course of this action. The statutes relied on by Charley's, Haw.Rev.

2. The Eleventh Amendment may be described as either creating an immunity for states or establishing a jurisdictional limitation on federal courts. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984) (employing both descriptions). Like a traditional immunity and unlike a jurisdictional bar, the protection afforded by the Eleventh Amendment may be waived. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). Like a jurisdictional bar and unlike a traditional immunity, however, the effect of the Eleventh Amendment must be considered *sua sponte* by federal courts. *See Demery v. Kupperman*, 735 F.2d 1139, 1149 n. 8. (9th Cir. 1984), *cert. denied*, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985). Because the operation of the Eleventh Amendment has aspects of both an immunity and a jurisdictional bar, we apply the terms interchangeably.

3. Even in the absence of waiver or consent, a state may be sued in federal court when Congress, acting pursuant to § 5 of the Fourteenth Amendment, has so provided. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976).

Stat. §§ 662-2 and 662-3 (1976 & Supp. 1984), are waivers of immunity from tort liability.[4] They cannot even remotely be considered an "unequivocal indication" of consent to suit in federal court on antitrust claims.

[11] Nor has Congress manifested a clear intent to condition either Hawaii's operation of the Airport or the DOT's entering into exclusive contracts on a waiver of Eleventh Amendment immunity. To the contrary, "in enacting the Sherman Act, [Congress] did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 1726, 85 L.Ed.2d 36 (1985); *see also Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state"). The Eleventh Amendment thus barred Charley's action against Hawaii and the DOT.

[12-14] In contrast with states and their agencies, state officials acting in their official capacity enjoy only limited immunity under the Eleventh Amendment. Although suits against state officials allegedly violating federal law may be brought in federal court, *see Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Ex parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908), only prospective injunctive relief may be awarded, *Pennhurst*, 465 U.S. at 102-03, 104 S.Ct. at 909; *Edelman*, 415 U.S. at 666-67, 94 S.Ct. at 1357. Charley's alleged that the Airport's exclusive taxi service contract violates the Sherman Act. The district court thus properly entertained Charley's action to enjoin Director of Transportation Yamasaki from enforcing the contract.

The district court's jurisdiction over Charley's action against SIDA was, of course, unaffected by the Eleventh Amendment.

II. *DIRECTOR YAMASAKI AND THE PARKER STATE-ACTION DOCTRINE*

[15] Charley's contends that the district court erred in dismissing its injunctive action against Director of Transportation Yakasaki. We may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court. *Big Spring v. Bureau of Indian Affairs*, 767 F.2d 614, 615 (9th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2914, 91 L.Ed.2d 543 (1986). In this case we affirm on a ground in fact rejected by the district court: the *Parker* state-action doctrine.

[16] In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court held that an anticompetitive marketing program instituted under the California Agricultural Act was exempt from the Sherman Act. The Court stated, "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." *Id.* at 351, 63 S.Ct. at 313. Over the years, the scope of the exemption for "state action" under *Parker* has been tested and delineated. *See, e.g., Southern Motor Carriers Rate Conference*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985) (state authorized rate bureaus composed of private common carriers found immune); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52-54, 102 S.Ct. 835, 841-42, 70 L.Ed.2d 810 (1982) (cities exempt when acting pursuant to clearly articulated and affirmatively expressed state policy); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778-92, 95 S.Ct. 2004, 2008-15, 44 L.Ed.2d 572 (1975) (state bar acting alone could not immunize anticompetitive conduct).

In *Deak-Perera Hawaii, Inc. v. Department of Transporation*, 745 F.2d 1281 (9th Cir.1984), *cert. denied*, 470 U.S. 1053, 105 S.Ct. 1756, 84 L.Ed.2d 820 (1985), we applied the *Parker* doctrine in a factual setting nearly identical with the one before us. A business that had lost its exclusive contract to provide services at the Honolulu Airport brought an action against the DOT and its officials alleging violations of the Sherman Act. In *Deak-Perera*, the exclusive contract was a lease for the operation of a currency exchange concession at the Airport. Regarding the availability of *Parker* immunity, we stated:

> [The Department of Transportation's] grant of the lease was an action of the State of Hawaii 'acting as sovereign' and thus entitled to immunity from the antitrust laws....
>
> ... [T]he rationale of *Parker* rests on 'principles of federalism and state sovereignty.' These principles entitle the executive branch of the State of Hawaii to state action immunity. The Hawaii Constitution creates the executive as a coequal branch of the state government and provides for the establishment of departments [such as] the Department of Transportation.... In granting ... the challenged lease, the Department of Transportation ... was fulfilling its constitutional duty to execute Haw.Rev.Stat. § 261-4, which permits the Department of Transportation to establish and operate airports....
>
> *We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism.*

Id. at 1282-1283 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984) (emphasis added)).

Deak-Perera controls the *Parker* question before us. When it entered into an exclusive franchise contract with SIDA, the DOT was "operating within its constitutional and statutory authority." The Hawaii legislature, as authorized by Hawaii Const. Art. V, § 6, created the DOT to "establish, maintain, and operate transportation facilities of the state, including ... airports." Hawaii Rev.Stat. §§ 26-19. Under the Aeronautics Act of 1947, Hawaii Stat. Ch. 261, the DOT is broadly authorized to "enter into contracts, leases, licences, and other arrangements ... [c]onferring the privilege of supplying goods, commodities, things, services or facilities at the airport." *Id.* at § 267-7(a) (Supp.1984). The DOT "may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals, or fees." *Id.* Finally, Section 261-10, "Exclusive rights prohibited," cautions that "[t]his section shall not prevent the making of contracts, leases or other arrangements pursuant to § 261-7." The constitutional and statutory authority to enter into the challenged contract with SIDA is thus well established.

We noted in *Deak-Perera* that the legislature "contemplated an exclusive lease [to the currency exchange concession]." 745 F.2d at 1282. We do not view this statement, however, as establishing an additional requirement of legislative contemplation for a state executive agency or state official seeking *Parker* immunity.[5] Evidence that the legislature contemplated the alleged anticompetitive activities is an element of *Parker* immunity for cities, *see Golden State Transit Corp. v. Los Angeles*, 726 F.2d 1430, 1433 (9th Cir.1984), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985), and for private parties seeking *Parker* immunity when they have acted as representatives of a state government, *see Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984). In contrast, the Supreme Court required no such evidence of legislative contemplation when it ruled that a state supreme court was entitled to *Parker* immunity for its

4. Hawaii Rev.Stat. § 662-2 provides: "The state hereby waives its immunity for liability for the torts of its employees...." Section 662-3 provides: "The circuit courts of the State and ... the state district courts shall have original jurisdiction of all tort actions on claims against the State...."

5. The Supreme Court has not decided the question whether the executive branch "stands in the same position as the state legislature and [state] supreme court for the purposes of the [*Parker*] state action doctrine." *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 1995 n. 17, 80 L.Ed.2d 590 (1984).

actions in adopting and enforcing disciplinary rules to govern the state bar. *Bates v. State Bar of Arizona*, 433 U.S. 350, 359–60, 97 S.Ct. 2691, 2696–97, 53 L.Ed.2d 810 (1977); *see also Hoover v. Ronwin*, 104 S.Ct. at 1995–96 (discussing *Bates*).

[17, 18] We conclude that state executives and executive agencies, like the state supreme court, are entitled to *Parker* immunity for actions taken pursuant to their constitutional or statutory authority, regardless of whether these particular actions or their anticompetitive effects were contemplated by the legislature. The requirement of specific authorization that we impose on cities to qualify for *Parker* immunity is not appropriate for the executive branch of the state government. When the state executive or executive agencies act within their lawful authority, their acts are those of the sovereign.[6]

Because the DOT was acting pursuant to its constitutional and statutory authority, the DOT did not violate the Sherman Act by entering into the exclusive franchise contract with SIDA. Director of Transportation Yamasaki therefore could not be enjoined from enforcing that contract.

III. *CHARLEY'S CLAIMS AGAINST SIDA*

The district court found that Charley's antitrust claims against SIDA were without merit. On appeal, Charley's challenges this finding on three grounds: (1) SIDA's refusal to admit Charley's to membership is a *per se* violation of section 1 of the Sherman Act; (2) SIDA's exclusive right to provide taxi service at the Airport is prohibited by section 2 of the Sherman Act; and (3) SIDA's exclusive contract is a restraint of trade in violation of section 1 of the Sherman Act. We reject Charley's challenge.

A. *Refusal to Grant Membership*

Charley's contends that by refusing to admit Charley's to membership, SIDA engaged in a group boycott in violation of section 1 of the Sherman Act.

[19] Section 1 of the Sherman Act prohibits "Every contract, combination ... or conspiracy, in restraint of trade" 15 U.S.C. § 1. Because every contract falls within the literal terms of this prohibition, section 1 has been prudently construed to prohibit only restraints of trade that are unreasonable. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). On the basis of their proven anticompetitive effect, group boycotts are considered unreasonable *per se*. *See Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Consequently, once properly identified, group boycotts may be judged unlawful without further inquiry. Yet as we have observed, "The term 'group boycott' can be applied to divergent types of concerted activity, not all of which necessarily have a pernicious effect on competition or lack any redeeming virtue." *Ron Tonkin Gran Turismo Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1383 (9th Cir.), *cert. denied*, 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981).

Charley's argues that by excluding it from SIDA, the members of SIDA have engaged in a group boycott that prevented it from competing in the ground-transportation market outbound from the Airport ("Airport-outbound market").[7] Initially we note that members of SIDA did not engage in a group boycott of the classic type. The type of group boycott that has classically been held unlawful *per se* is one in which either (1) two or more firms agree not to deal with a competing firm in an industry that requires horizontal dealing, *see, e.g. Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (exchange brokers agree not to trade with nonexchange brokers), or (2) two or more firms agree not to deal with a firm with which they are in a vertical relationship in an industry that requires vertical dealing, *see, e.g., Klor's* (national household appliance distributors refuse to sell to department store); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (textile retailers agree not to sell to wholesalers who continue to deal with "style-pirates"). The taxi industry is not an industry that requires dealing among horizontal competitors, nor are the members of SIDA in a vertical relationship with Charley's.

In order to bring its allegations within the ambit of the *per se* rule, Charley's relies on *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) ("*Northwest Wholesale*"). In both of these cases, defendant firms had acted in concert to acquire a product sought by the plaintiff competitor firm and refused to make that product available to the competitor. In the former case, the defendant firms had joined to produce "AP news" and agreed to by-laws restricting access to this news. In the latter case, defendant firms had formed a buying cooperative that sold stationery supplies to its members at discount rates and then expelled the plaintiff from the cooperative for failure to abide by its disclosure rules. These cases, however, fail to support Charley's claim of *per se* violation.

[20] In *Associated Press*, the Supreme Court summarized its holding as follows: "We merely hold that arrangements or combinations *designed to stifle competition* cannot be immunized by adopting a membership device accomplishing that purpose." 326 U.S. at 19, 65 S.Ct. at 1424. (emphasis added). The Court thus identified anti-competitive purpose or effect as a central characteristic of a group boycott. *Accord White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963) (group boycotts unlawful *per se* because they are "naked restraints of trade with no purpose except stifling competition"); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76–78 (9th Cir.1969) (anticompetitive intent required), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970); *see also Northwest Wholesale*, 105 S.Ct. at 2620 (no *per se* violation because, "[t]he act of expulsion does not necessarily imply anticompetitive animus ... [where] purchasing cooperatives must establish and enforce reasonable rules").[8]

6. By analogy, cities are treated differently from branches of the state governments for purposes of the eleventh amendment, one of the Constitution's most concrete expressions of federalism. Cities are entitled to no eleventh amendment protections, *see Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 1177, 59 L.Ed.2d 401 (1979), but state agencies and departments are protected in some circumstances from suit in federal court by the eleventh amendment's bar against "one of the United States." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (1984).

7. In order to have a group boycott, there must be more than one boycotter. For this reason, Charley's must frame its argument in terms of a violation by the *members* of SIDA. We assume for purposes of decision that this change of focus is legitimate. A corporate shell cannot shield a horizontal restraint among the members of the corporation or association. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596, 608–12, 92 S.Ct. 1126, 1133–35, 31 L.Ed.2d 515 (1972).

8. The cases cited by Charley's do not support its contention that motive or intent is immaterial in group boycott cases. In *Fashion Originators' Guild*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949, the Supreme Court held a group boycott intended to supress style pirates could not avoid *per se* condemnation on the ground that style piracy was an industry evil which should be suppressed. *Id.* at 467–68, 61 S.Ct. at 707–08. In *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir.1972), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed.2d 256 (1973), we held that a group of hotels could not justify the economic coercion of their suppliers on the ground that it would help finance their effort to attract conventions. *Id.* at 1002-03.

These cases stand for the proposition that intentional anticompetitive behavior—supressing rivals or coercing suppliers—cannot be justified on the basis of a benign ultimate objective—eliminating industry pirating or furthering economic growth. *See Hilton Hotels* ("Defendants 'intended' to impose these restraints upon competition in the only relevant sense here. The ultimate objective defendants sought to achieve is immaterial.") (citations omitted). Thus, while ultimate objective is immaterial, anticompetitive intent is the touchstone of the inquiry.

In *Northwest Wholesale*, the Court also looked to the anticompetitive effect of the allegedly unlawful expulsion to gauge the appropriateness of *per se* treatment. *Id.* at 2620–21. The Court stated,

> Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always certain to have an anticompetitive effect is not warranted.

Id. at 2621. Finding no evidence of such "structural characteristics," the Court concluded that challenged conduct was not *per se* unreasonable. *Id.*

[21] We find the characteristics of a *per se* unlawful boycott identified in the above cases to be lacking in the activities of the members of SIDA. The district court found that "SIDA was organized to gain access to a major market for independents, and not to deny it to Charley's or any other taxi fleet." Charley's does not challenge the district court's finding. Although SIDA does not permit fleet owners to become members, its membership remains open to additional independent owner-operators. SIDA does not prevent its members from competing with each other.

SIDA does not possess "market power or exclusive access to an element essential to effective competition." *Id.* Although SIDA currently has an exclusive franchise to provide service to the Airport-outbound market, this fact is no more probative of market power than the fact that the cooperative in *Northwest Wholesalers* had exclusive access to discount goods. In each case there are other markets that a would-be competitor may take advantage of. The Airport-outbound market, though important, is not essential to effective competition. The district court found, and Charley's does not contest, that competition among taxis on Oahu is alive and well. Even within the Airport-outbound market, SIDA members compete with each other.

In light of the purpose and effect of SIDA's membership policies, and the limits of its market power, we conclude that SIDA's exclusion of Charley's from membership does not constitute a *per se* unlawful group boycott.[9]

B. *Monopolization*

[22] Charley's contends that SIDA monopolized in violation of section 2 of the Sherman Act. Charley's argues that SIDA's monopoly over the Airport market arose from SIDA's exclusive franchise contract with Hawaii.

Charley's section 2 claim is simply another attempt by Charley's to attack the validity of the SIDA contract. We earlier determined that the DOT had *Parker* immunity to grant SIDA an exclusive franchise to provide outbound taxi service from the Airport. *Parker* immunity exempts state action, not merely state actors. Because the monopoly granted to SIDA was shielded by the *Parker* doctrine, SIDA cannot be held liable for possessing that monopoly. To hold otherwise, would allow the *Parker* doctrine to be circumvented by artful pleading: "A plaintiff could frustrate any [*Parker* protected state plan] merely by filing suit against the regulated private parties, rather than the state officials who implement the plan." *Southern Motor Carriers Rate Conference*, 105 S.Ct. at 1727. Charley's section 2 claim is meritless.

C. *The Exclusive Contract as a Restraint of Trade*

[23] Finally, Charley's contends that the contract granting SIDA the exclusive right to pick up passengers at the Airport is a restraint of trade prohibited by section 1 of the Sherman Act. Our analysis of Charley's monopolization claim applies with equal force here. Our earlier conclusion that the DOT had *Parker* immunity to grant SIDA the exclusive contract establishes that the contract does not violate section 1 of the Sherman act.

9. Charley's offers no argument that SIDA's exclusion of Charley's from membership fails a "rule of reason" test.

CONCLUSION

We AFFIRM the district court's dismissal of Charley's Sherman Act claims against SIDA and Director Yamasaki. The district court erred in asserting jurisdiction over Hawaii and the DOT. We VACATE the district court's dismissal of Charley's claims against Hawaii and the DOT and REMAND the case so the district court may dismiss these claims for lack of jurisdiction. Costs are to be awarded to appellees.

AFFIRMED in part; VACATED in part; and REMANDED.

1. Arrest ⇐68.5(1)

Warrantless arrest in nonpublic place is presumptively unreasonable and violative of Fourth Amendment. U.S.C.A. Const. Amend. 4.

2. Criminal Law ⇐1139

District court's conclusion that exigent circumstances justified warrantless arrest is reviewed de novo. U.S.C.A. Const. Amend. 4.

3. Arrest ⇐63.1

Exigent circumstances did not justify government agents' warrantless arrest of defendant where between 90 minutes and two hours elapsed from time agents learned where defendant was waiting until time they actually arrested him and where, although agents had time to contact United States Attorney's office and await approval for arrest operation, agents made no effort to obtain warrant by telephone. Fed.Rules Cr.Proc.Rule 41(c)(2), 18 U.S.C.A.; U.S.C.A. Const.Amend. 4.

4. Arrest ⇐63.1

In order to justify warrantless arrest under exigent circumstances exception to warrant requirement, Government should make good faith attempt to secure telephone warrant or should present evidence to explain why telephone warrant was unavailable or impractical. Fed.Rules Cr. Proc.Rule 41(c)(2), 18 U.S.C.A.; U.S.C.A. Const.Amend. 4.

UNITED STATES of America, Plaintiff-Appellee,

v.

Hector ALVAREZ, Defendant-Appellant.

No. 83–5208.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 7, 1986.

Decided Feb. 17, 1987.

As Amended Feb. 17, 1987.

Defendant was convicted in the United States District Court for the Central District of California, Malcolm M. Lucas, J., of possession of cocaine with intent to distribute and conspiracy, and he appealed. The Court of Appeals, Canby, Circuit Judge, held that exigent circumstances did not justify government agents' warrantless arrest.

Reversed and remanded.

Noonan, Circuit Judge, dissented and filed opinion.

Allan Ides, Los Angeles, Cal., for defendant-appellant.

Jimmy Gurule, Asst. U.S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before CANBY, REINHARDT and NOONAN, Circuit Judges.

CANBY, Circuit Judge:

Hector Alvarez appeals his conviction for possession of cocaine with intent to distrib-

of unconstitutional discrimination by the prosecutor in the exercise of his peremptory challenges in the defendant's case, the prosecutor should be required by the trial court to offer a neutral explanation for the allegedly discriminatory challenges that is related to the particular case to be tried. The Supreme Court stated that a defendant could establish a prima facie case of purposeful discrimination as follows:

> [T]he defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, [430 U.S. 482, 494, 97 S.Ct. 1272, 1275, 51 L.Ed.2d 498 (1977)], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, [345 U.S. 559, 562, 73 S.Ct. 891 (1953)]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson v. Kentucky, — U.S. at —, 106 S.Ct. at 1723. In determining whether the defendant has made out a prima facie case of purposeful discrimination, courts are to consider "all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Id.*

[1] In this case, we find it clear that defendants failed to make out a prima facie case of purposeful discrimination.[22] As an initial matter, the relevant "cognizable racial group," for the purposes of our analysis, is the group of blacks generally and not just black males, as appellants urge. The test we apply to determine whether appellants are members of a cognizable racial group under *Batson* is the test applied in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, *cited in Batson*, — U.S. at —, 106 S.Ct. at 1723. Such a group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda*, 430 U.S. at 494, 97 S.Ct. at 1274. The group of blacks generally clearly qualifies under this definition; appellants have failed to show, however, that black males constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws not simply as blacks, but as black males. It would therefore be inappropriate for us to narrow the "cognizable racial group," for present purposes, to include only black males and exclude black females.

[2] The government utilized only three of the six peremptory challenges it was allowed during the selection of the twelve jurors who decided the case, and one of the two challenges to alternates that it was allowed. The government exercised two of the three challenges it exercised when selecting regular members to strike potential jurors who were black, and used the one challenge it chose to exercise when selecting alternate jurors to strike an alternate who was black, but eventually accepted a jury that included among its regular members two blacks. It is thus obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors and alternates. Appellants' case is not bolstered by the fact that two of the stricken black venirepersons had previously been victims of burglaries or that one of those two had also testified for the government in the past. We thus conclude that all of the relevant facts and circumstances do not raise an inference of purposeful discrimination on the basis of race, and that appellants were not entitled to any inquiry into the prosecutor's reasons for exercising his peremptory challenges as he did.

Vacated and remanded with instructions.

should not be retroactively applied when a conviction has been entered and direct appeals have been exhausted. *Allen v. Hardy*, — U.S. —, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (per curiam). The Court has yet to determine whether *Batson* is to be applied retroactively to cases pending on direct appeal. *See e.g., Brown v. United States*, — U.S. —, 106 S.Ct. 2275, 90 L.Ed.2d 718 (1986) (granting certiorari). The petitioner's appeal in the case at bar falls into that latter category of cases pending on direct appeal at the time *Batson* was rendered. For the reasons set forth in this opinion, we may dispose of appellants' *Batson* claim without awaiting the Supreme Court's further resolution of the retroactivity of *Batson*.

22. The Supreme Court in *Batson* clearly contemplated that the determination of whether a prima facie case under *Batson* has been made out will ordinarily, if not always, be made in the first instance by the trial court. A remand to the trial court to make such a determination in this case, however, is unnecessary, as a finding by the trial court on this record that appellant has presented evidence sufficient to raise an inference of purposeful discrimination would constitute reversible error despite the "great deference" that we must accord the trial court's findings in that regard. *Batson*, — U.S. at — n. 21, 106 S.Ct. at 1724 n. 21.

Dr. Morgan SILVER, on his own behalf and on behalf of all other similarly situated podiatrists in the State of Alabama, Plaintiff-Appellee,

v.

Faye BAGGIANO, Commissioner of the Department of Medicaid, State of Alabama, Defendant-Appellant.

No. 85-7402.

United States Court of Appeals, Eleventh Circuit.

Nov. 24, 1986.

Podiatrist brought action against Commissioner of Alabama Medicaid Agency and Alabama Attorney General, challenging Alabama's policy of denying medicaid reimbursement to licensed podiatrists while at the same time reimbursing medical doctors for identical services. The United States District Court for the Middle District of Alabama, No. 84-V-1375-N, Robert E. Varner, J., granted podiatrist relief, and Commissioner appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) district court was barred by Eleventh Amendment from entertaining podiatrist's claims against Commissioner based on contention that policy violated laws and Constitution of Alabama; (2) podiatrist did not have express or implied right of action under "freedom of choice" provision of Social Security Act to challenge policy; (3) issue of whether "freedom of choice" provision of Social Security Act created rights enforceable by health care providers in civil rights action would be remanded; and (4) policy did not violate equal protection or substantive due process.

1. Federal Courts ⇐269

District court was barred by Eleventh Amendment from entertaining podiatrist's claims against Commissioner of Alabama Medicaid Agency, based on contention that Agency's policy of denying medicaid reimbursement to podiatrists while reimbursing medical doctors for podiatric services violated laws and Constitution of Alabama, where Alabama was real, substantial party in interest, Commissioner was acting within scope of her authority in deciding not to reimburse podiatrists, and violations of state medicaid plan or regulations were not alleged. Ala.Code 1975, § 27-1-15; U.S.C.A. Const.Amend. 11.

2. Federal Courts ⇐266

Removal by state officials of suit containing state law claims to federal court does not amount to waiver of Eleventh

Amendment immunity unless those state officials are authorized to waive such immunity. U.S.C.A. Const.Amend. 11.

3. Federal Courts ⇐266

Removal of podiatrist's action against Commissioner of Alabama Medicaid Agency and Alabama Attorney General from state court to federal court did not amount to waiver of Alabama's Eleventh Amendment sovereign immunity, where neither Commissioner nor Attorney General was authorized to waive such immunity. U.S. C.A. Const.Amend. 11.

4. Social Security and Public Welfare ⇐241.115

Podiatrist did not have express or implied right of action under "freedom of choice" provision of Social Security Act to challenge Alabama's policy of denying medicaid reimbursement to podiatrists for podiatric services while at the same time reimbursing medical doctors for identical services. Social Security Act § 1902(a)(23), as amended, 42 U.S.C.A. § 1396a(a)(23).

5. Civil Rights ⇐12.3

Federal civil rights statute is exclusive statutory cause of action available to plaintiff seeking compliance with Social Security Act on part of a participating state. Social Security Act § 1 et seq., as amended, 42 U.S.C.A. § 301 et seq.; 42 U.S.C.A. § 1983.

6. Federal Courts ⇐939

Issue of whether "freedom of choice" provision of Social Security Act created rights enforceable by health care providers in civil rights action would be remanded to district court, where district court had not considered the issue in the first instance, and issue was potentially rendered moot by motion to intervene. Social Security Act, § 1902(a)(23), as amended, 42 U.S.C.A. § 1396a(a)(23); 42 U.S.C.A. § 1983.

7. Constitutional Law ⇐242.3(1), 278.7(1)

Alabama's policy of denying medicaid reimbursement to podiatrists while reimbursing medical doctors for podiatric services did not violate equal protection or substantive due process, in view of legitimate state interests in encouraging patients to visit one health care provider and in cutting down administrative costs. U.S. C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. Federal Courts ⇐939

Remand was required to determine whether patient eligible for medicaid assistance, who was being treated by a podiatrist without reimbursement by medicaid pursuant to policy of Alabama Medicaid Agency, was entitled to intervene in podiatrist's action challenging that policy. Social Security Act, § 1902(a)(23), as amended, 42 U.S. C.A. § 1396a(a)(23).

Henry C. Barnett, Jr., Capell, Howard, Knabe & Cobbs, Montgomery, Ala., for defendant-appellant.

Copeland, Franco, Screws & Gill, E. Terry Brown, Montgomery, Ala., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT and ANDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

CORRECTED OPINION

ANDERSON, Circuit Judge:

In this action, the plaintiff seeks to have the federal courts determine whether the Commissioner of the Alabama Medicaid Agency has violated state or federal law by denying Medicaid reimbursement to podiatrists for podiatric services while at the same time reimbursing medical doctors for the identical podiatric services. Because the plaintiff cannot bring his claims in federal court, we must vacate the judgment of the district court. However, we remand to the district court to consider a Medicaid recipient's motion to intervene in the action.

I. FACTS AND PROCEEDINGS

The plaintiff, Dr. Morgan Silver, is a podiatrist licensed to practice in the state of Alabama. In Alabama, podiatrists are permitted to treat the human foot to the same extent as medical doctors can. Suing both individually and on the behalf of all other similarly situated podiatrists, Silver alleged that defendant Baggiano, Commissioner of the Alabama Medicaid Agency, and Attorney General Charles Graddick had established, in violation of federal and state law, a policy of denying Medicaid reimbursements to licensed podiatrists while at the same time reimbursing medical doctors for podiatric services. Silver's complaint sought a declaratory ruling that podiatrists are entitled to participate in Alabama's Medicaid program and injunctive relief directing the Alabama Medicaid Agency to reimburse podiatrists for podiatric services in the same manner as physicians are reimbursed under the state Medicaid plan.

Dr. Silver originally filed this action in the Circuit Court for Montgomery County, Alabama. The defendants removed the case from Alabama state court to the United States District Court for the Middle District of Alabama. The Attorney General was dismissed from the case, leaving Commissioner Baggiano as the only remaining defendant. On cross-motions for summary judgment,[1] the district court found that Baggiano had not violated a state statute, but was in violation of the federal statute. Therefore, the district judge granted the relief which Silver sought. This appeal followed. We first discuss the state law claims, then the federal claims, and finally a motion to intervene which the district court did not rule upon.

II. STATE LAW CLAIMS

[1] Silver contends that the policy of the Alabama Medicaid Agency not to reimburse podiatrists violates the laws and constitution of the state of Alabama. The district court ruled that the policy was not violative of Ala.Code § 27-1-15. It did not consider Silver's claims based on the Alabama Constitution.

On appeal, Baggiano argues that Silver cannot bring his claims based on the Alabama Constitution or statutes in federal court. Baggiano did not present the Eleventh Amendment issue to the district court nor did the district court consider this issue. However, since this is a jurisdictional issue, we must rule on it.

The Eleventh Amendment bars suits in federal court against a state by its own citizens as well as by citizens of othe states. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984) ("*Pennhurst II*"). "[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." *Id.* "[T]his principle applies as well to state-law claims brought into federal court under pendent jurisdiction." *Id.*

In the instant case, Silver has charged the Commissioner of the Alabama Medicaid Agency with violating the state constitution and at least one state statute, and he has asserted that the federal courts have pendent jurisdiction over these claims. On its face, each of these claims appears to be precisely the type of claim barred by *Pennhurst II*. However, Silver advances three arguments that his state claims are not barred by the Eleventh Amendment.

Silver states that Alabama is not the "real party in interest." He contends that Baggiano has not "shown ... any effect upon the State itself, and ... she cannot." Supp.Brief of Appellee at 8. Thus, Silver is arguing that the "'general rule ... that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter,'" *Pennhurst II*, 465 U.S. at 101, 104 S.Ct. at 908 (citation omitted), is not applicable.

"'The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the

1. A motion for class certification had been made but was not ruled on by the district court.

public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." " *Id.* at 101, 104 S.Ct. at 908–09 n. 11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963)) (citations omitted). A declaratory judgment or injunction against Baggiano would clearly compel the government of Alabama to act, i.e., to reimburse podiatrists, and "expend itself on the public treasury" since the money to reimburse podiatrists would in some part come from the Alabama treasury. Thus, although the claims are nominally brought against Baggiano, Alabama is the real, substantial party in interest.

Silver also contends that Baggiano was acting *ultra vires* her authority and that the suit should not be considered to be against Alabama for the purposes of the Eleventh Amendment. However, in *Pennhurst II*, the Supreme Court pointed out that recent cases have made "clear that a state officer may be said to act *ultra vires* only when he acts 'without any authority whatever.' " *Id.* (citations omitted). "[A]n *ultra vires* claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.' " *Id.* (citation omitted). The Supreme Court specifically rejected any broader interpretation of the *ultra vires* doctrine. *Id.* at 105–18, 104 S.Ct. at 911–17. Under the *Pennhurst II* standard, Commissioner Baggiano was clearly acting within the scope of her authority in deciding not to reimburse podiatrists.

Finally, citing *Barnes v. Cohen*, 749 F.2d 1009 (3d Cir.1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126, 85 L.Ed.2d 490 (1985), Silver argues that the Third Circuit has recognized an exception to *Pennhurst II* which is applicable in this case and which this court should adopt. In *Barnes*, the Third Circuit found that state officials were not adhering to their own regulations regarding their Aid to Families with Dependent Children ("AFDC") program. As a result, the court found that the state officials were violating the state AFDC plan. Moreover, since the federal AFDC statute requires that state AFDC plans "be in effect in all political subdivisions of the State, and if administered by them, be mandatory upon them," 42 U.S.C. § 602(a)(1), the Third Circuit held that state officials, by not adhering to their own regulations, had violated the state plan and thus had violated the federal law which makes the state plan mandatory. Therefore, because state officials were alleged to have violated federal law by not complying with state law, the Third Circuit decided that *Pennhurst II* was inapplicable. *Id.* at 1019.

Assuming *arguendo* that *Pennhurst II* is not applicable to a case such as that described in *Barnes v. Cohen*, we hold that we are not faced with such a situation. Silver has not alleged that Baggiano has violated the state Medicaid plan or regulations promulgated pursuant to the state Medicaid plan. Instead he argues that Baggiano has not complied with the state constitution and with state statutes which are not part of the Medicaid plan. Thus, the principles announced in *Barnes* are not relevant here.

[2, 3] It might be argued that the Eleventh Amendment immunity was waived by the removal of this case from state court to federal court. However, a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state "in its Constitution, statutes and decisions." *Ford Motor Co. v. Department of Transportation*, 323 U.S. 459, 467, 65 S.Ct. 347, 352, 89 L.Ed. 389 (1945). Thus, removal by state officials of a suit containing state law claims to federal court does not amount to waiver of Eleventh Amendment immunity unless those state officials are authorized to waive such immunity. *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, 846–47 (6th Cir.1984); *David Nursing Home v. Michigan Department of Social Services*, 579 F.Supp. 285, 287–88 (E.D.Mich.1984). Silver has conceded that neither Baggiano nor Attorney General Gruddick could waive Alabama's Eleventh Amendment immunity. Supp.Brief of Appellee at 12. *See Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). Thus, there has been no waiver of Alabama's Eleventh Amendment sovereign immunity.

In summary, the district court was barred by the Eleventh Amendment from entertaining the claims against Baggiano based on violations of the Alabama Constitution and the Alabama statute. The decision of the district court regarding Baggiano's alleged violation of Ala.Code § 27–1–15 must be vacated. Silver's claims against Baggiano for alleged violations of this or any other independent state statute and for alleged violations of the Alabama Constitution must be remanded to the state court from which this case was removed. *See Gwinn Area Community Schools v. State of Michigan*, 741 F.2d at 847; *David Nursing Home v. Michigan Department of Social Services*, 579 F.Supp. at 285.

III. CLAIMS UNDER FEDERAL LAW

A. *Statutory Claims*

Medicaid is a cooperative venture of the state and federal governments. A state which chooses to participate in Medicaid submits a state plan for the funding of medical services for the needy which is approved by the federal government. The federal government then subsidizes a certain portion of the financial obligations which the state has agreed to bear. A state participating in Medicaid must comply with the applicable statute, Title XIX of the Social Security Act of 1965, as amended, 42 U.S.C. § 1396, *et seq.*, and the applicable regulations.

[4] The district court held that Silver was entitled to relief under 42 U.S.C. § 1396a(a)(23). That section provides in relevant part:

> A State plan for medical assistance must—
>
> ....
>
> (23) ... provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services.

42 U.S.C. § 1396a(a)(23). The above-quoted provision is sometimes referred to as the "freedom of choice" provision. The district court ruled that Silver was qualified to perform podiatric services and that by "adopting a policy that systematically refuses to compensate podiatrists for those services that they are licensed to provide while simultaneously compensating physicians for these same podiatry services, Defendant Commissioner has violated the aforestated freedom of choice provision." Record on Appeal at 134.

However, the district court failed to recognize that the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1, 6, 100 S.Ct. 2502, 2505, 65 L.Ed.2d 555 (1980), has held that the Social Security Act affords no private right of action. *See also Edelman v. Jordan*, 415 U.S. 651, 674–75, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974); *id.* at 690, 94 S.Ct. at 1369 (Marshall, J., dissenting). Thus, Silver had no express or implied right of action under the Social Security Act to challenge Alabama's policy.

[5] Even though there is no express or implied cause of action under the Social Security Act, Silver's complaint could be deemed an action under 42 U.S.C. § 1983. Supreme Court precedent establishes that, subject to certain exceptions discussed below, violations of the Social Security Act can be remedied in a § 1983 action. In *Maine v. Thiboutot*, 448 U.S. at 4–6, 100 S.Ct. at 2504–05, the Court construed § 1983 as authorizing suits to redress violations by state officials of rights created by federal statutes. *Accord Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 19, 101 S.Ct. 2615, 2625–26, 69 L.Ed.2d 435 (1981) ("*Sea Clammers*"). Section 1983 is the exclusive statutory cause of action available to a plaintiff seeking compliance with the Social Security Act on the part of a participating state. *Thiboutot*, 448 U.S. at 5–6, 100 S.Ct. at

2504–05; *see also Taylor v. St. Clair*, 685 F.2d 982, 988 (5th Cir.1982).

"The Court, however, has recognized two exceptions to the application of § 1983 to statutory violations." *See Clammers*, 453 U.S. at 19, 101 S.Ct. at 2626. First, if Congress has foreclosed private enforcement of the statute in question in the enactment of the statute itself, then § 1983 is unavailable to enforce federal rights under that statute. *Sea Clammers*, 453 U.S. at 19, 101 S.Ct. at 2625–26; *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545, 67 L.Ed.2d 694 (1981) (*"Pennhurst I"*). For example, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20, 101 S.Ct. at 2626. Second, if Congress has not created enforceable rights in the relevant statutory provision, there is no cause of action available under § 1983. *Sea Clammers*, 453 U.S. at 19, 101 S.Ct. at 2625–26; *Pennhurst I*, 451 U.S. at 28, 101 S.Ct. at 2630. By its terms, § 1983 does not create substantive rights;[2] it provides a remedy against state officials for deprivations of rights established elsewhere under federal law. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 278, 105 S.Ct. 1938, 1948, 85 L.Ed.2d 254 (1985).

[6] If there were no exceptions to the *Maine v. Thiboutot* rule that § 1983 may be used to redress violations by state officials of federal statutes, we would deem Silver's claim to have been brought under § 1983 and consider the merits. However, with regard to the second exception to enforcement of federal statutory rights through § 1983, Baggiano argues that § 1396a(a)(23) does not create rights enforceable by health care providers.

For purposes of this analysis, it is clear that the statute in question must create rights enforceable by the plaintiff in the case at hand—not rights enforceable by *some* potential plaintiff. *See, e.g., Alexander v. Polk* 750 F.2d 250, 259 (3d Cir.1984) ("It is clear that 7 C.F.R. § 246.24 (1978) created an enforceable right on behalf of WIC recipients to be informed of the availability of fair hearings."); *Boatowners & Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, 673–74 (9th Cir.1983) ("There is no evidence whatsoever of an intent to provide [in the River and Harbor Improvements Act] economical moorage or to create any special benefit for the class of pleasure craft owners [who have brought this suit]."); and *Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1217 (4th Cir.1981) ("The plaintiffs have not pointed to any substantive provisions of the various housing acts [the United States Housing Act of 1937, the Housing Act of 1949, and the Housing and Urban Development Act of 1968] which give them a tangible right, privilege, or immunity.").

As with the Medicaid statute as a whole,[3] § 1396a(a)(23) was intended to benefit Medicaid recipients. Baggiano argues that there is no indication that it creates rights enforceable by health care providers. First, the language of this provision is clearly drawn to give Medicaid recipients the right to receive care from the Medicaid provider of their choice, rather than the government's choice. However, there is no indication in the language that health care practitioners are given any rights by this provision.

Second, the legislative history is relevant in determining whether or not health care providers are given enforceable rights with respect to the freedom of choice provision. The Senate Report on the Act of Jan. 2, 1968, Pub.L. 90–248, pursuant to which the freedom of choice provision became part of the statute, stated that "the bill would— ... (4) Allow recipients free choice of qualified providers of health services." S.Rep. No. 744, 90th Cong., 1st Sess., *reprinted in* 1967 U.S.Code Cong. & Ad. News 2834, 2838 ("USCCAN"). Later, the Senate Report stated that the new subsection would provide that "people covered under the medicaid program would have free choice of qualified medical facilities and practitioners." *Id., reprinted in* 1967 USCCAN at 2868. The Senate Report also stated:

> (i) Free choice of medical services
>
> Under the current provisions of law, there is no requirement on the States that recipients of medical assistance under a State title XIX program shall have freedom in their choice of medical institution or medical practitioner. In order to provide this freedom, a new provision is included in the law to require the States to offer this choice.... Under this provision, an individual is to have a choice from among qualified providers of service. Inasmuch as States may, under title XIX, set certain standards for the provision of care, and may establish rates for payment, it is possible that some providers of service may still not be willing or considered qualified to provide the services included in the State plan.

Id., reprinted in 1967 USCCAN at 3021. Baggiano argues that the legislative history unambiguously indicates that the provision was intended to benefit Medicaid recipients, and that there is no suggestion that health care providers were intended beneficiaries.

Finally, the Supreme Court has stated that § 1396a(a)(23) creates rights in Medicaid recipients:

> Title 42 U.S.C. § 1396a(a)(23) ... gives recipients the right to choose among a range of *qualified* providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a [nursing] home that continues to be qualified.

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 785, 100 S.Ct. 2467, 2475, 65 L.Ed.2d 506 (1980) (emphasis in original). Thus, although it is clear that recipients have enforceable rights under § 1396a(a)(23), Baggiano argues that there is no indication in the language of the statute, the legislative history, or the Supreme Court's interpretation of this provision that Congress intended to create rights enforceable by health care providers.

On the other hand, although the Medicaid statute as a whole was enacted for the benefit of the recipients, Silver argues that Medicaid providers have been allowed to bring § 1983 actions under other subsections for adjustments of the states' methods of reimbursement. *See, e.g., Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 385 (5th Cir.1980); *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 388 (5th Cir.1980); *Nebraska Health Care Ass'n v. Dunning*, 778 F.2d 1291, 1296 (8th Cir. 1985); *Yapalater v. Bates*, 494 F.Supp. 1349, 1356–59 (S.D.N.Y.1980), *aff'd*, 644 F.2d 131 (2d Cir.1981), *cert. denied*, 455 U.S. 908, 102 S.Ct. 1255, 71 L.Ed.2d 447 (1982).

For several reasons we decline at this time to resolve the issue of whether this provision of the Social Security Act creates a right enforceable by Silver. There is no precedent in this circuit or in any other circuit on this question. Since the issue was not presented to the district court, we are without the benefit of that court's con-

2. Section 1983 provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

3. Congress authorized the appropriation of funds for Medicaid "[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance ... and (2) rehabilitation and other services [to the needy]." 42 U.S.C. § 1396. The health care practitioner "is not the intended beneficiary of the Medicaid program. Instead, the purpose underlying the funding program is to extend financial benefits to the patients eligible to receive their care at government expense." *Geriatrics, Inc. v. Harris*, 640 F.2d 262, 265 (10th Cir.), *cert. denied*, 454 U.S. 832, 102 S.Ct. 129, 70 L.Ed.2d 109 (1981); *see also, Green v. Cashman*, 605 F.2d 945, 946 (6th Cir. 1979) ("We do not find in the statute authorizing ... Medicaid any legislative intention to provide financial assistance to providers of care for their own benefit. Rather, the statute is designed to aid the patients and clients of such facilities.").

sideration of the question. Finally, as discussed above, Medicaid recipients do have enforceable rights under § 1396a(a)(23), and an actual recipient has made a motion to intervene in this case. *See* Section IV, *infra*. Therefore, on remand, the district court may not have to reach this issue. If the district court finds that the patient has a § 1983 cause of action and permits the intervention, a decision on the merits of the patient's statutory claim will moot the issue of jurisdiction over the identical claim brought by the podiatrist. If intervention is not allowed, the district court must consider this issue in the first instance.

In summary, because there is no express or implied cause of action under § 1396a(a)(23), the judgment of the district court with respect to Silver's federal statutory claim must be vacated. We express no opinion on the question of whether Silver may maintain an action under § 1983. This issue is remanded to the district court, although that court, too, may find it unnecessary to resolve the question in light of the motion to intervene.[4]

B. *Constitutional Claims*

[7] Having decided that Silver was entitled to relief on his federal statutory claim, the district court did not address the federal constitutional claims. Since we have declined to determine whether or not Silver can bring an action to enforce the statute, his constitutional claims remain to be decided. Silver alleges that Alabama's policy of denying reimbursement to podiatrists while reimbursing medical doctors for podiatric services violates the equal protection and the substantive due process guarantees of the Fourteenth Amendment. Of course, such constitutional claims can be remedied in a § 1983 action. However, we conclude that Silver's constitutional claims are so clearly without merit that it would be futile to remand these claims for the district court to entertain them in the first instance. Thus the constitutional claims are dismissed.

"Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana*, 452 U.S. 314, 331, 101 S.Ct. 2376, 2387, 69 L.Ed.2d 40 (1981) (citations omitted). Similarly, in order to satisfy substantive due process requirements, the legislation must be rationally related to its purpose and must not be arbitrary or discriminatory. *United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127–28 (5th Cir. Unit A 1981), *cert. denied*, 454 U.S. 835, 102 S.Ct. 136, 70 L.Ed.2d 114 (1981).[5] Silver has not alleged that this policy involves any suspect classification or fundamental right. Without specifically stating its reason for this policy, Alabama has asserted that the decision not to reimburse podiatrists has a rational basis. "Where ... there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, ... because [the Supreme Court] has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 178–79, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980) (citation omitted). In this case, there are several legitimate state interests to which this policy is rationally related. For example, this policy encourages patients to visit one health care provider for all of their examinations, diagnoses and treatments, rather than visiting a podiatrist for foot problems and a medical doctor for other problems. In addition, this policy might cut down administrative costs—monitoring and reimbursing multiple health care providers might require greater resources than monitoring and reimbursing physicians alone. Thus, Silver's constitutional claims are without merit and must be dismissed.

IV. MOTION TO INTERVENE

[8] Before the district court's decision regarding the federal statutory issue became final, a patient eligible for Medicaid assistance who was being treated by a podiatrist without reimbursement by Medicaid filed a motion to intervene in the instant case. The district court did not rule on this motion. It was unnecessary for the district court to rule on this motion because it had already granted the relief under the Medicaid Act which the intervenor sought. In light of our disposition of this case, the motion is no longer moot. We remand this case to the district court in order to give the patient an opportunity to move the district court to rule on his motion to intervene. If the district court does not allow intervention, then it will be necessary for the district court to address whether or not the freedom of choice provision may be enforced by Dr. Silver, *supra* at 1217 and it may be necessary for the district court to address whether or not Dr. Silver has standing to assert the right of his patients to enforce that statute. *Supra* at n. 4. The movant may appeal any denial of the motion to intervene by filing a timely notice of appeal, and Dr. Silver and/or Baggiano may appeal from any adverse disposition of their claim by filing a timely notice of appeal.

If the district court permits the patient to intervene, it shall rule on the merits of the intervenor's federal statutory claim. The losing party shall have the opportunity to appeal the district court's order to us by filing a timely notice of appeal.

V. CONCLUSION

Silver's claims based on state law may not be considered in federal court in light of the Eleventh Amendment, and the judgment of the district court with respect to the state claims is vacated, and the district court is instructed to remand those claims to the state court from which this action was removed. Silver's federal constitutional claims must also be dismissed since they lack merit. Finally, the judgment of the district court with respect to federal statutory claims asserted by Silver must be vacated for the reasons discussed above. However, the case is remanded to the district court for consideration of the patient's motion to intervene and, if same is granted, for consideration of the merits of the intervenor's federal statutory claim, or, if not granted, for consideration of Silver's claim under 42 U.S.C. § 1983.

Accordingly, the judgment of the district court is VACATED and the case is REMANDED with instructions.

4. After oral argument, this court requested the parties to submit briefs on several jurisdictional issues. In addition to the issues discussed above, we asked the parties to consider whether, assuming a Medicaid recipient could bring an action under § 1983 to redress the violations of the Social Security Act alleged in this complaint, Dr. Silver would have standing to bring such an action on his patient's behalf. We decline to reach this question for two reasons. First, such a cause of action was not considered by the district court—Dr. Silver clearly brought suit "on his own behalf and on behalf of all similarly situated podiatrists in the State of Alabama." Second, the standing question is a difficult one which we need not resolve because an actual recipient has made a motion to intervene. See Section IV, *infra*. Should the district court on remand deny the motion to intervene, then it may find it necessary to address whether or not Dr. Silver would have standing to bring an action on behalf of his patient.

5. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

In re A.G. LIVINGSTON, Debtor.

Philip A. GEDDES, Trustee for the Bankruptcy Estate of A.G. Livingston, Plaintiff-Appellant,

v.

A.G. LIVINGSTON and Stella Livingston, Defendants-Appellees.

No. 85-7797.

United States Court of Appeals, Eleventh Circuit.

Nov. 25, 1986.

Trustee appealed from order of the United States District Court for the North-

consin is committed to the majority, or "benefit of the bargain" rule (Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 67 N.W.2d 853 (1955)), and even though the court regards these as essentially rescission actions, the court will allow $200 to each. In any event, no great profits were expected or promised until after the fifth year and such are remote, contingent and speculative. See 13 A.L.R.3rd 875 for an exhaustive annotation on the general subject of the majority and minority rules.

[17] Defendant sought at the trial to introduce a Federal Trade Commission consent decree entered in a civil proceeding whereby defendant agreed to cease and desist from certain claims, representations and advertising. This consent decree was entered into by defendant after the occurrence of the fraudulent activities involved in the present suit. The court did not and does not now allow the consent agreement nor the accompanying order to go into evidence, analogizing the situation to one in which courts have consistently disallowed the introduction of Federal Trade Commission consent decrees in civil antitrust suits. Perhaps a better basis for its non admission however is that since the Federal Trade Commission order was entered after the fraudulent activities complained of in these lawsuits, the actions of the defendant in relation to each of the plaintiffs did not go towards showing bad faith in violating this decree, nor was any reference in the consent agreement made to the events involved in this case. Thus the findings of the court herein expressed in no way reflect or are influenced by the findings of the Federal Trade Commission in said order. The court's findings are based entirely upon the evidence presented before the court.

[18] The following schedule represents the amount of damage allowed to plaintiffs in each case. Since plaintiffs' claims were unliquidated, plaintiffs are entitled to interest only from date of entry of judgment herein.

1.	ADOLPH FISCHER:	
	Payments on Contract	$1,405.00
	Supplies	340.71
	Food	239.58
	Car costs	300.00
	TOTAL	$2,285.29
2.	GLEN CHRISTENSEN:	
	Payments on Contract	$1,564.00
	Supplies	93.94
	Feed	61.06
	Car costs	179.00
	Loss of bargain	200.00
	TOTAL	$2,098.59
3.	JOHN SYMICZEK:	
	Payments on Contract	$1,675.31
	Supplies	134.15
	Food	195.52
	Cages and other supplies	95.00
	Car costs	150.00
	TOTAL	$2,249.98
4.	IDA MAE DAYTON:	
	Payments on Contract	$2,659.60
	Feed	175.62
	Pens	53.40
	Veterinarian	10.00
	Car expenses	150.00
	TOTAL	$3,048.62
5.	JANICE BAUMAN:	
	Payments on Contract	$1,037.00
	Feed	100.00
	Supplies	190.00
	Car Expense	150.00
	Loss of bargain	200.00
	TOTAL	$1,677.00
6.	BRUCE N. GRUPER:	
	Payments on Contract	$2,175.00
	Supplies	137.00
	Feed	35.00
	Loss of bargain	200.00
	TOTAL	$2,547.00
7.	GENE R. BAUERS:	
	Payments on Contract	$1,075.00
	Feed and hay	139.10
	Supplies	75.17
	Car expenses	74.30
	TOTAL	$1,363.57

It is ordered that each plaintiff have judgment for the amount of money set after his or her name and be released from any further liability to defendant.

It is further ordered that contemporaneously with and at the time of payment of the judgments, defendant may take possession of and title to, at its own expense and at and from the respective plaintiffs' homes or locations of the chinchilla, all animals, cages and supplies on hand and in possession of each plaintiff. This opinion shall be in lieu of findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure. Plaintiffs may tax costs.

Let judgment be entered accordingly.

The STATE OF ALASKA, a sovereign state of the United States, Plaintiff,

v.

The O/S LYNN KENDALL, Official No. 500160, her Engines, Tackle, Furniture, Equipment, Etc., and William A. Stanley, Defendants,

and

United States of America, Plaintiff-Intervener.

Civ. No. A-18-69.

United States District Court, D. Alaska.

Feb 19, 1970.

Proceeding on motion of plaintiff for an order requiring that counterclaims arise out of same transaction alleged in complaint and that recovery on counterclaims be limited to amount, if any, recovered by plaintiff. The District Court, Plummer, Chief Judge, held that fact that state of Alaska had brought a suit against one of its own citizens in federal court did not establish that state had waived its sovereign immunity with respect to defendant's counterclaims, even though there may have been such a waiver with regard to a suit in state court.

Motion granted.

1. Courts ⇐303(1)

A waiver of immunity from suit in a court of state does not constitute a waiver of immunity of a suit brought by state in a federal court. U.S.C.A.Const. Amend. 11.

2. Courts ⇐303(1)

Fact that state of Alaska had brought a suit against one of its own citizens in federal court did not establish that state had waived its sovereign immunity with respect to defendant's counterclaims, even though there may have been such a waiver with regard to a suit in state court. AS 09.05.250-09.05.300, 09.06.050; Const.Alaska art. 2, § 21; U.S.C.A.Const. Amend. 11.

3. States ⇐199

Although a counterclaim may be asserted against a sovereign by way of setoff or recoupment to defeat or diminish sovereign's recovery, no affirmative relief may be given against sovereign in absence of consent. Fed.Rules Civ.Proc. rule 13(d), 28 U.S.C.A.

4. Courts ⇐303(1)

State of Alaska cannot be sued without its consent being expressly granted by legislative authority, and since legislature has not expressly or otherwise consented to suits against state in federal court, Attorney General is without authority to waive state's Eleventh Amendment immunity. AS 09.05.250-09.05.300, 09.06.050; Const. Alaska art. 2, § 21; U.S.C.A.Const. Amend. 11.

W. C. Arnold, Special Counsel, Anchorage, Alaska, G. Kent Edwards, Atty. Gen., State of Alaska, Juneau, Alaska, Douglas B. Baily, U. S. Atty., Anchorage, Alaska, for plaintiff-intervener.

Edgar Paul Boyko, of Boyko & Walton, Anchorage, Alaska, for defendants.

OPINION

PLUMMER, Chief Judge.

Plaintiff, the State of Alaska, on April 25, 1969 commenced this action in the United States District Court for the District of Alaska. The complaint filed by plaintiff seeks to recover (1) for salvage services and (2) two claims for reimbursement for sums expended in abating a public nuisance resulting from maritime torts committed by defendants.

Defendants' answer asserts four separate counterclaims seeking recovery from plaintiff for damages proximately resulting from plaintiff's negligence for (1) damage to and loss of property, and monetary loss in the sum of $750,000.00, (2) wrongful taking and destruction of property, and the loss of use thereof in the sum of $600,000.00, (3) unlawful taking and conversion of property in the sum of $750,000.00, and (4) exemplary damages from plaintiff and its agents in the sum of $250,000.00.

Plaintiff has moved for an order directing that defendants' recovery must arise out of the same transaction alleged in plaintiff's complaint and that the recovery must be limited to the amount, if any, recovered by plaintiff.

Defendants assert that plaintiff waived its sovereign immunity by virtue of the provisions of Article 2, Section 21, of the Constitution of the State of Alaska; by the enactment of Alaska Statutes, Section. 09.05.250 through 09.05.300, inclusive, as amended; and Section 09.05.050; and by having commenced the above entitled action in this court against one of its own citizens.

The question presented is whether plaintiff has waived its immunity as to the claims asserted in defendants' counterclaims.

I. THE STATE'S SOVEREIGN IMMUNITY.

The Constitution of the State of Alaska grants to the Legislature the sole and exclusive power to enact laws establishing the terms and conditions upon which the State may be sued. Article II, Section 21, provides:

> "Section 21. *Suits Against the State.* The legislature shall establish procedures for suits against the State."

The Legislature of the State has exercised this constitutional grant of power by enacting certain statutes which provide in pertinent part that, with exceptions therein stated, a person or corporation having a contract, a quasi-contract, or tort claim against the State may bring an action against the State in the Superior Court of the State.

[1, 2] A waiver of immunity from suit in a court of the State does not constitute a waiver of immunity of a suit brought by the State in a federal court. Smith v. Reeves, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900); Chandler v. Dix, 194 U.S. 590, 24 S.Ct. 766, 48 L.Ed. 1129 (1904); Burrill v. Locomobile Company, 258 U.S. 34, 42 S.Ct. 256, 66 L.Ed 450 (1922); State Highway Commission of Wyoming v. Utah Const. Co., 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1928); and Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).

II. THE STATE'S ELEVENTH AMENDMENT IMMUNITY.

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign state."

Defendants, citing City of Newark v. United States, 254 F.2d 93 (3d Cir. 1958); Gardner v. New Jersey, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947); Missouri v. Fiske, 290 U.S. 18, 54 S.Ct. 18, 78 L.Ed. 145 (1933); Clark v. Barnard, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1882); and Gunter v. Atlantic Coastline, 200 U.S. 273, 26 S.Ct. 252, 50 L.Ed. 477 (1905), assert that immunity from suit in federal court may be waived either by specific declaration or by act, such as filing a general appearance, or by the State becoming an actor, by being a plaintiff, or by intervening, in a suit brought in the federal courts.

The facts in the cases cited by defendants are entirely different than in the present case. Some involve factual situations where the State came into federal court asserting a claim to a fund or res, or where ancillary proceedings were involved. In some, the statements relied on by defendants were mere dicta. None granted an affirmative judgment for money damages on a counterclaim against a State. The statement appearing in 254 F.2d, footnote 1, page 95, in City of Newark, *supra*, to the effect that when the United States brings an action as plaintiff, it waives its sovereignty and assumes the status of a private individual for the purpose of counterclaim or defenses is plainly far too broad.

[3] Although a counterclaim may be asserted against a sovereign by way of setoff or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against the sovereign in the absence of consent. United States v. U. S. Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1939); United States v. Finn, 239 F.2d 679 (9th Cir.1956); In re Greenstreet, Inc., 209 F.2d 660 (7th Cir. 1954); Rule 13(d), Federal Rules of Civil Procedure.

Article 4, Section 15, of the Alaska Constitution, provides:

> "The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house."

Rule 13(d) of the Rules of Civil Procedure for the State of Alaska provides:

> "(d) *Counterclaim against the State.* These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State or an officer or agency thereof."

The crucial question presented is one involving the special position accorded States from immunity from suit by the explicit command of the Eleventh Amendment. If the United States by virtue of the judicially created doctrine of sovereign immunity does not waive its immunity from counterclaims by commencing an action, then a far more compelling reason exists for reaching the same results under identical circumstances where the State's immunity is derived from the Constitution of the United States.

[4] The State of Alaska cannot be sued without its consent being expressly granted by legislative authority. The Legislature has not expressly or otherwise consented to suits against the State in federal court. Under the laws of the State, the Attorney General is without authority to waive the State's Eleventh Amendment immunity. See Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1944); O'Connor v. Slaker, 22 F.2d 147 (8th Cir.1927); Deseret Water, Oil & Irrigation Co. v. California, 202 F. 498 (9th Cir.1913); Dunnuck v. Kansas State Highway Commission, 21 F.Supp. 882 (D.Kan.1937); Title Guaranty & Surety Co. of Scranton, Pa. v. Guernsey, 205 F. 91 (W.D.Wash.1913); Title Guaranty & Surety Co. of Scranton, Pa. v. Guernsey, 205 F. 94 (W.D.Wash.1913).

Plaintiff's motion for order limiting recovery is granted.

viewing the record of this case, this assertion cannot be substantiated.

This claim is based on his counsel eliciting on direct examination the fact that Charles had taken mescaline, acid and other drugs, and had watched stag movies. Additionally, counsel elicited from Charles the fact that he had been denied parole and escaped from prison. The appellant asserts that the cumulative effect of these disclosures allowed the prosecutor to argue that he was a man with a bad background.

The standard for effective assistance of counsel in this Circuit was enunciated in *Beasley v. United States*, 491 F.2d 687 (6th Cir.1974). The court held that effective assistance of counsel required under the Sixth Amendment was that "reasonable likely to render ... effective assistance of counsel." 491 F.2d at 696. In the instant case, as the district court noted, the elicitation of this information is consistent with and not unreasonable trial strategy. Evidence of such drug use by the appellant and two companions who were key prosecution witnesses may well have been a foundation for attacking the credibility of these two witnesses. Moreover, the appellant's extensive account of his activities was consistent with a trial strategy of bolstering the appellant's credibility. Additionally, the record evinces that defense counsel performed "at least as well as a lawyer with ordinary training and skill in the criminal law ... and conscientiously protected his client's interest." *Beasley*, 491 F.2d at 696. Based on these factors, the district court properly found that there was no denial of effective assistance of counsel.

Accordingly, we affirm the decision of the Honorable James P. Churchill denying the writ of habeas corpus.

GWINN AREA COMMUNITY SCHOOLS, et al., Plaintiffs-Appellants,

v.

STATE OF MICHIGAN, et al., Defendants-Appellees.

No. 83-1720.

United States Court of Appeals, Sixth Circuit.

Argued May 4, 1984.

Decided Aug. 10, 1984.

School district, a taxpayer of the school district and a student enrolled in one of the schools in the district brought action against state and federal defendants alleging inter alia, that the state defendants were violating various constitutional provisions by the manner in which they administered state aid laws in conjunction with federal impact aid and that the federal defendants breached their congressionally imposed obligations. The United States District Court for the Western District of Michigan, 574 F.Supp. 736, Douglas W. Hillman, J., granted summary judgment in favor of the state defendants and dismissed all claims against the federal defendants, and plaintiffs appealed. The Court of Appeals, Lively, Chief Judge, held that: (1) school district, as a political subdivision of State, lacked standing to challenge state action as violative of State Constitution; however, individual plaintiff taxpayer of school district and a student enrolled in one of the schools of the district, had standing to challenge state aid formula as administered by state superintendent of instruction, and (2) Michigan State School Aid Act, which provided for a reduction in state funding to school districts which was receiving federal impact aid, did not deny equal protection to students in those districts.

Affirmed in part and reversed in part and remanded.

1. Schools ⇐19(1)

Claims that federal defendants breached congressionally imposed obligations by allowing State to reduce its payments to school district for school years 1980–81 and 1981–82 by a percentage of federal impact aid which the district received was properly dismissed for failure to exhaust administrative remedies.

2. Constitutional Law ⇐12.3(1)
Federal Civil Procedure ⇐103

School district, as a political subdivision of State, lacked standing to challenge state action as violative of State Constitution; however, individual plaintiff taxpayer of school district and a student enrolled in one of the schools of the district, had standing to challenge state aid formula as administered by state superintendent of instruction.

3. Constitutional Law ⇐242.2(2)
Schools ⇐10

Michigan State School Aid Act, which provided for reduction in state funding to school districts which received federal impact aid, did not deny equal protection to students in those districts. U.S.C.A. Const. Amend. 14; M.C.L.A. §§ 388.1601–388.1772.

4. Constitutional Law ⇐278.5(1)
Schools ⇐10

Michigan State School Aid Act, which provided for a reduction in state funding to school districts which received federal impact aid, did not deny such districts, its taxpayers and students due process of the law. U.S.C.A. Const.Amend. 14; M.C.L.A. §§ 388.1601–388.1772; Educational Agencies Financial Aid Act, § 5(d)(2)(A), as amended, 20 U.S.C.A. § 240(d)(2)(A).

5. Constitutional Law ⇐281.5

State has wide discretion in allocation of tax burdens among its inhabitants and due process considerations come into play only when state action is so arbitrary as to render a taxation program confiscatory. U.S.C.A. Const.Amend. 14.

6. Federal Courts ⇐265
Removal of Cases ⇐11

District court was barred by Eleventh Amendment from entertaining pendent claims against state defendants based on alleged violations of State Constitution; thus, such claims would be remanded to the state court from which they were removed hence the federal basis of jurisdiction no longer existed. U.S.C.A. Const.Amend. 11.

7. Federal Courts ⇐265, 266

Eleventh Amendment preserves to the states one aspect of sovereign immunity by protecting them from suits in the courts of a different sovereign but a state may waive an immunity by consenting to suit against it in federal court, but such consent must be unequivocally expressed. U.S.C.A. Const.Amend. 11.

Thomas L. Butch (Lead Counsel), Peter W. Strom (argued), Butch, Quinn, Rosemurgy, Jardis, Valkanoff, Escanaba, Mich., for plaintiffs-appellants.

John A. Smietanka, U.S. Atty., Grand Rapids, Mich., Edward R. Cohen (argued), Dept. of Justice, Civil Division, Robert S. Greenspan, Washington, D.C., Frank J. Kelley, Atty. Gen. of Mich., Louis J. Caruso, Paul J. Zimmer (argued), Asst. Attys. Gen., Lansing, Mich., for defendants-appellees.

Before LIVELY, Chief Judge, JONES, Circuit Judge, and TIMBERS, Senior Circuit Judge.*

LIVELY, Chief Judge.

The questions which the plaintiffs raised in this case are whether the Michigan State School Aid Act of 1979, Mich. Comp. Laws Ann. (MCLA) §§ 388.1601–.1772 (Michigan Act) meets the requirements of 20 U.S.C. §§ 236–240 (1980) (Impact Aid Act) and whether the Michigan Act is unconstitu-

* The Honorable William Timbers, Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, sitting by designation.

tional under both federal and Michigan law. The plaintiffs-appellants are a school district, a taxpayer of the school district and a student enrolled in one of the schools of the district. The defendants-appellees are the State of Michigan, the State Board of Education of Michigan and the state superintendent of instruction, and the United States Department of Education and its Secretary. The district court denied the plaintiffs' motion for a preliminary injunction as moot after granting summary judgment in favor of the state defendants and dismissing all claims against the federal defendants.

I.

A.

Gwinn Area Community Schools (the district) is a school district in sparsely inhabited Marquette County, Michigan. A large U.S. Air Force base is located within its boundaries and 63% of the students in the district schools are children of military and civilian personnel assigned to the base. The United States makes payments to the district under the Impact Aid Act to compensate for the fact that the land occupied by the Air Force base has been removed from local tax rolls and the district is required to furnish educational facilities and opportunities to dependents of persons assigned to the base. In addition the State of Michigan makes payments to the district under the Michigan Act. Since 1980 the state has reduced its payments to the district each year by applying a formula which reduces state aid by a percentage of federal impact aid which a district receives. This deduction is authorized by a provision of the Impact Aid Act which was added by a 1974 amendment. Prior to 1974 the states were not permitted to make a deduction for federal impact aid. The 1974 amendment provided in part:

> [I]f a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter for any fiscal year may be taken into consideration by such State in determining the relative—
>
> (i) financial resources available to local educational agencies in that State; and
>
> (ii) financial need of such agencies for the provision of free public education for children served by such agency, provided that a State may consider as local resources funds received under this subchapter only in proportion to the share that local revenues covered under a State equalization program are of total local revenues.
>
> Whenever a State educational agency or local educational agency will be adversely affected by the operation of this subsection, such agency shall be afforded notice and an opportunity for a hearing prior to the reduction or termination of payments pursuant to this subsection.

20 U.S.C. § 240(d)(2)(A) (1982).

In their complaint the plaintiffs charged that the Michigan Act does not provide an "equalized formula" as contemplated by § 240(d)(2)(A)[1] and that the Michigan Department of Education had no right to deduct federal impact aid in calculating state aid. The complaint also charged the state defendants with failing to comply with the requirement of the Michigan Constitution that the state provide a meaningful system of free public education, and with violating the equal protection and due process guarantees of the Constitution of the United States and the Michigan Constitution. In addition to an injunction the plaintiffs sought a declaratory judgment that the state defendants were violating the various constitutional provisions by the manner in which they administer state aid laws in conjunction with federal impact aid and that the federal defendants have breached congressionally imposed obligations by allowing the State of Michigan to deduct from the plaintiff district "the very benefaction that the federal impact aid statutes were intended to bestow ...."

1. Since we agree with the district court that plaintiffs failed to exhaust available administrative remedies we do not reach the question of whether the Michigan Act satisfies the requirements of the Impact Aid Act for deductions in state aid based on impact aid received and do not consider the language of the Michigan Act.

This action was filed in a Michigan circuit court and removed to the federal district court on petition of both the federal and state defendants. Thereafter the federal defendants filed a motion to dismiss and the state defendants filed a motion for summary judgment. The motion for summary judgment was supported by the affidavit of a supervisor within the Michigan Department of Education and exhibits including transcripts of proceedings before the Department concerning the deduction of federal impact aid funds from state equalization allocations.

B.

The district court filed an opinion with its judgment. See *Gwinn Area Community Schools v. State of Michigan*, 574 F.Supp. 736 (W.D.Mich.1983). The district court summarized the plaintiffs' position as being that the formula used by the state "unduly shifts a tax burden to them." *Id.* at 741. In a footnote the court pointed out that the argument concerning the relationship between the Michigan Act and the Impact Aid Act was somewhat unclear. Nevertheless, the district court concluded that no judicial attack could be mounted on the state aid formula without first submitting the controversy to the Secretary of Education through administrative procedures provided by federal regulations. *Id.* n. 1. The court found that there had been no exhaustion of administrative remedies with respect to school years 1980–81, 1981–82 and 1982–83, and found that the plaintiffs were involved in administrative procedures for the school year 1983–84 at the time of its decision. Insofar as it challenged the formula for 1983–84 the complaint was dismissed without prejudice. All other claims were dismissed with prejudice.

The district court determined that the school district lacked standing to assert claims against the State of Michigan for violation of the United States Constitution, but that the individual plaintiffs did have standing to make such claims. Considering these claims of the individual plaintiffs, the court found that the Michigan Act does not create a "suspect classification" and that it places no burden on a "fundamental interest." The court then concluded that the state aid formula survived a "rational relationship" analysis and did not violate equal protection. *Id.* at 748–54. The district court also found that the substantive due process claims of the individual plaintiffs lacked merit. The court found no confiscation in the allowance of a deduction from state aid for federal impact aid and noted that the Fourteenth Amendment does not require absolute equality in state schemes of taxation. The district court did not address the plaintiffs' claims that action of the state defendants violated the Michigan Constitution.

II.

We have carefully considered each argument made by the plaintiffs-appellants, but will not treat with all of them in detail. The plaintiffs' arguments were fully considered and answered in the district court's published opinion and we agree with the conclusions of the district court on most of the issues.

[1] The district court was clearly correct in dismissing the claims against the federal defendants for failure of the plaintiffs to exhaust administrative remedies. The Department of Education is given responsibility for administering federal impact aid. That department's regulations provide specific standards by which the Secretary of Education is to determine each school year whether a state aid program meets the statutory requirement of a program "designed to equalize expenditures for free public education among the local educational agencies of that State ...." 34 C.F.R. §§ 222.60–222.68. Further, § 222.69 provides for notice and an opportunity for hearing to any local educational agency adversely affected by a determina-

tion, and it provides specific procedural rules. While representatives of the plaintiff district took some of the procedural steps, it is clear that they did not exhaust administrative remedies with respect to school years 1980–81 and 1981–82. The district court treated the exhaustion issue fully in its opinion and we agree with its conclusions. See *Gwinn Area Community Schools*, 574 F.Supp. at 743–48. One finding of fact with respect to exhaustion is clearly erroneous. The district court found that the plaintiffs had failed to exhaust their administrative remedies for the school year 1982–83. The record discloses, and the defendants concede, that administrative remedies related to that year are still in progress. Therefore, on remand the district court will amend its judgment to dismiss claims against the federal defendants based on allocation of state aid for the school year 1982–83 without prejudice.

III.

A.

[2] We agree with the district court's treatment of the standing question. The school district, as a political subdivision of the State of Michigan, was in no position to attack state action as violative of the United States Constitution. In *Lansing School District v. State Board of Education*, 367 Mich. 591, 116 N.W.2d 866 (1962), a local school district charged the state board with equal protection violations of the federal and state constitutions in altering school district boundaries. The Michigan Supreme Court wrote, "Plaintiff school district is an agency of the State government and is not in a position to attack its parent." *Id.* at 600, 116 N.W.2d 866.

The individual plaintiffs, however, do have standing to challenge the state aid formula as administered by the defendant Phillip E. Runkel, state superintendent of instruction.[2] As the district court pointed out "municipal taxpayer standing" is different from "federal taxpayer standing." Both the district taxpayer and the district student are in positions to suffer direct and tangible injuries from the deduction of federal impact aid from state aid payments.

B.

[3] The district court relied primarily on *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), in concluding that the Michigan Act does not violate the right to equal protection of the laws guaranteed by the Fourteenth Amendment. We believe Judge Hillman correctly construed *Rodriguez* and properly applied a test of rational relationship between the legislative classification and a legitimate state interest. *Gwinn Area Community Schools*, 574 F.Supp. at 748–54. On appeal the plaintiffs argue that the district court applied the wrong law in holding that the federal equal protection claims presented no genuine issues of material fact. They argue that this case is more like *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), than *Rodriguez*. In *Plyler*, the state aid program had the effect of totally denying children of illegal aliens a public school education. While affirming that education is not a fundamental right, the Court considered the enduring disabling effect on children which flowed from this denial and concluded it could "appropriately take into account its costs to the Nation and to the innocent children who are its victims." *Id.* at 224, 102 S.Ct. at 2398. The Court found

2. We discuss the Eleventh Amendment to the United States Constitution in Part IV of this opinion. The district court lacked jurisdiction over the claims against the State of Michigan and the State Board of Education because of the immunity from suit in federal courts granted by the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, — U.S. —, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). The district court did have jurisdiction over the federal claims against the defendant Runkel under the holding of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Since the application of the Eleventh Amendment to these claims does not require a result different from that reached by the district court, we have deferred fuller discussion of Eleventh Amendment principles to Part IV, where application of those principles to the state law claims does require a different result.

that the statute which so classified school children could not be considered rational because it furthered no substantial goal of the state. *Id.* This requirement was repeated in Justice Brennan's summary statement of the *Plyler* holding:

> If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.

Id. at 230, 102 S.Ct. at 2402.

Though the Court used "rational" test language in its opinion the requirement of a substantial state interest indicates that it subjected the Texas statute in *Plyler* to a standard of scrutiny somewhat stricter than "rational relationship." The concurring and dissenting Justices read the majority opinion in this way. See 457 U.S. at 235 & n. 3, 102 S.Ct. at 2404 & n. 3 (Blackmun, J., concurring); *id.* at 238–39 & n. 3, 102 S.Ct. at 2406–07 & n. 3 (Powell, J., concurring); *id.* at 248, 102 S.Ct. at 2411 (Burger, C.J., dissenting). It appears to be accepted that the majority applied a middle-level "heightened" scrutiny in *Plyler*. See *The Supreme Court, 1981 Term*, 96 Harv. L.Rev. 62, 130–33 (1982). *Plyler* does not fit neatly into previous structures of equal protection analysis. Nevertheless, we do not believe it controls the present case. The two cases are distinguishable primarily on the fact that in *Plyler* the Texas statute permitted a class of children to be excluded totally from the public schools.

The plaintiffs in the present case charged in their complaint that the formula which permitted the state to deduct federal impact aid would lead to the closing of all schools in the district. However, the motion for summary judgment and the affidavit of the state board supervisor contained exact figures with respect to the state aid received by the district and the deductions for federal impact aid in each of the years in suit. The affidavit established that the state deducted only a small percentage of the federal impact aid each year in calculating the state aid payable to the district. This affidavit disclosed that the deduction of a portion of federal impact aid from state aid payable to the district was but a minor ingredient of the deficit problem of the district. Nothing in the record supports a contrary view. As the district court pointed out, the plaintiffs did not allege that bankruptcy would be averted by requiring the state to discontinue the practice of making the deduction. 574 F.Supp. at 754. There was no genuine issue of material fact with respect to the unsupported claim that continuation of the state's practice would ultimately result in an "absolute denial of educational opportunities" to children of the district. The federal equal protection claim is controlled by *Rodriguez* rather than *Plyler* and the district court correctly ruled that the state defendants were entitled to judgment thereon as a matter of law. Rule 56(c), Fed.R.Civ.P.

C.

[4] The due process claim of the plaintiffs was not as clearly articulated as their equal protection claim. As we understand their position, the plaintiffs contend that the state arbitrarily denied the district, its taxpayers and students the benefits of compensation which Congress has allocated to the district to offset its loss of tax revenue and the cost of educating federal dependents. This argument overlooks the fact that Congress specifically provided for deductions of federal impact aid in computing state aid in § 2[illegible]d)(2)(A). The plaintiffs rely on language from a single district court opinion to support their claim. See *Shepheard v. Godwin*, 230 F.Supp. 869, 874 (E.D.Va.1968). That case was decided before passage of the 1974 amendment to the Impact Aid Act and held that a state formula which deducted impact aid in calculating state aid was unconstitutional as violative of the supremacy clause of the Constitution. The 1974 amendment deprives the *Shepheard* decision of any force today.

[5] The district court correctly held that the state has wide discretion in the alloca-

tion of tax burdens among its inhabitants and that due process considerations come into play only when state action is so arbitrary as to render a taxation program confiscatory. *Gwinn Area Community Schools*, 574 F.Supp. at 754–55.

Thus we conclude, in agreement with the district court, that the plaintiffs failed to establish the existence of any genuine issue of material fact with respect to their claims under the United States Constitution.

IV.

[6] The district court did not address the claims that the state defendants had violated the Michigan Constitution. Nevertheless, these claims were dismissed with prejudice along with the other claims. The basis of the district court's dismissal is not clear. It appears most likely that the district court treated these claims as pendent state claims, subject to dismissal at the court's discretion after the federal claims had been found wanting. In this court the state defendants argue that the equal protection and due process clauses of the federal and Michigan constitutions are indistinguishable. If a claim is insufficient under these provisions of the United States Constitution the same result is required under the Michigan Constitution, they contend. The district court made no such determination, however.

A.

The Eleventh Amendment was not considered by the district court and has been referred to obliquely at best in this court. That amendment withholds from courts of the United States the power to entertain suits against a state by its own citizens as well as by citizens of other states. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). The Supreme Court has recently written that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State School & Hospital v. Halderman*, — U.S. —, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984). *Pennhurst* holds that a claim against state officials for violating state law in carrying out their official responsibilites is a claim against the state which comes under the ban of the Eleventh Amendment. In the present case the plaintiffs have charged the State of Michigan, the state department of education and the state superintendent of public instruction with violating the Michigan Constitution. Unless some feature of the case removes these cluims from its operation, the Eleventh Amendment appears on its face to prohibit a federal court from considering them.

B.

[7] This case does have some unusual features. Not only did the state defendants not object to the district court's hearing this case, they acted affirmatively to bring this about by joining in the federal defendants' petition to remove the case from the state circuit court. The Eleventh Amendment preserves to the states one aspect of sovereign immunity by protecting them from suit in the courts of a different sovereign. A state may waive this immunity by consenting to suit against it in federal court, but this consent must be "unequivocally expressed." *Id.* 104 S.Ct. at 907; see also *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 577, 66 S.Ct. 745, 747, 90 L.Ed. 862 (1946) ("clear declaration of a State's consent to suit against itself in the federal court on fiscal claims is required."). In *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 462, 65 S.Ct. 347, 349, 89 L.Ed. 389 (1945), the Supreme Court held that where an action is brought against a state officer under a statute, if the action constitutes one against the state, the Eleventh Amendment precludes suit in a federal court unless immunity from suit is waived in the statute itself. In *Ford Motor Co.* the Court also interpreted a section in the state statute authorizing an action "in any court of competent jurisdiction" as consent to be sued in state courts only. *Id.* at 465, 65 S.Ct. at 351. The only consent

language in the Michigan Act provides that the state board of education may be sued "in all the courts in this state." M.C.L.A. § 388.1007. We find no clear indication in the Michigan Act that the state has consented to suit in the federal courts and conclude that the actions of attorneys representing the state defendants in this case in joining the removal petition cannot be treated as supplying a consent which the legislature withheld.

The claims in question are covered by the Eleventh Amendment. The fact that they are pendent to federal claims over which the district court had original jurisdiction is not significant. The Supreme Court held in *Pennhurst* that the doctrine of pendent jurisdiction does not displace "the explicit limitation on federal jurisdiction contained in the Eleventh Amendment." 104 S.Ct. at 917. Thus, we must reverse that portion of the district court judgment which dismissed these claims with prejudice.

C.

Having concluded that the federal court was barred by the Eleventh Amendment from entertaining the claims against the state defendants based on alleged violations of the state constitution, the court must determine the proper disposition of those claims. The choices are dismissal without prejudice and remand to the state circuit court from which this case was removed. After due consideration we have determined that the proper course is to direct the district court to remand these claims to the state court. In doing so we adopt the procedure most often followed when only pendent state claims remain in removed cases which originally had both federal and state claims.

This court has approved remand by the district court of pendent state claims after the sole basis of federal jurisdiction has been eliminated by an amendment to the complaint. See In re *Romulus Community Schools*, 729 F.2d 431 (6th Cir.1984). In a case where the only federal basis of jurisdiction was removed by summary judgment on the sole federal claim, the court in *Hofbauer v. Northwestern National Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir.1983), found remand of a pendent state law claim to be the "prudent course." When the district court has failed to address the question of how to dispose of a pendent state claim which has lost its supporting federal base the court of appeals may exercise its discretion in favor of remand. *Brough v. United Steelworkers of America*, 437 F.2d 748, 750 (1st Cir. 1971).

Remand to the state court is an equitable treatment of the claims in this case. The plaintiffs originally chose a state forum for all their claims. There is no prejudice to the state defendants in having these cases considered by a state court. In fact, at oral argument counsel for the state defendants observed that *Pennhurst* may require remand of the state constitutional claims to the state courts.

The judgment of the district court is affirmed in part and reversed in part and the case is remanded to the district court. The claims against the federal defendants based on allocation of state aid for the school year 1982–83 are to be dismissed without prejudice. The claims against the state defendants for alleged violations of the Michigan Constitution are to be remanded to the state circuit court from which this case was removed.

No costs are allowed on appeal.

R.B. WILLIAMS, Petitioner-Appellant,

v.

Al C. PARKE, Warden, et al., Respondents-Appellees.

No. 82-5586.

United States Court of Appeals, Sixth Circuit.

Argued Nov. 10, 1983.

Decided Aug. 16, 1984.

Rehearing and Rehearing En Banc Denied Nov. 6, 1984.

Petitioner sought review of a supplemental charge given to the jury in his state

for child or spousal support in the SSI statute precludes a state from creating an exclusion in Medicaid. In *Grunfeder v. Heckler*, 748 F.2d 503 (9th Cir.1984), the Secretary argued that only those items specifically listed as income exclusions in 42 U.S.C. § 1382a(b) may be disregarded when determining SSI eligibility. We disagreed and concluded that the list of income exclusions enumerated in section 1382a(b) was not exclusive. Accordingly, we held that German reparations paid to survivors of the Holocaust were not countable as available income despite the absence of an express exclusion in section 1382a(b). *Grunfeder*, 748 F.2d at 508. Thus, an income exclusion may exist in SSI and, congruously, Medicaid even though Congress has not explicitly provided for an exclusion in either the SSI or Medicaid statutes.

We also conclude that our holding in *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir.1981), requires the reversal of the Secretary's decision. In *Whaley* we held that pension benefits paid to a disabled veteran for the support of his minor children under the Veterans' Act should not be deemed available to the veteran for the purpose of determining his SSI eligibility. *Whaley*, 663 F.2d at 874. The Secretary argued that the dependents' portion of the veteran's pension should be included as available income because the veteran received the dependent's share in one unapportioned check, which he was free to spend as he pleased. We rejected the Secretary's claim that the mode of payment conclusively determined the availability of income. *Id.* Instead, we noted that "the Veterans' Act children's benefits of $51.11 were clearly intended by Congress to be used for the children" and we held that the income earmarked for the dependents could not be used to reduce the veteran's entitlement to cash assistance. *Id.* Similarly, income that a Medicaid recipient uses to pay court-ordered child support or alimony cannot be used to reduce the recipient's Medicaid benefits.[4]

Finally, we observe that the SSI statute and its regulations, which the Secretary relies on at length, undermine rather than support the Secretary's position. A person who receives alimony or child support may in many cases also receive cash assistance under SSI or AFDC. When such a person applies for cash assistance, federal law requires that child support and alimony be treated as the unearned income of the *recipient* of the support payment. *See* 42 U.S.C. § 1328a(a)(2)(E); 20 C.F.R. § 416.-1121(b). Curiously, the Secretary asserts that the income should be treated as also available to the payor. Thus, the Secretary seeks to count the income twice. Clearly, the income is available to only one person, either the payor or the payee. Congress has determined that the income should be attributed to the payee. The Secretary has not advised us why we should ignore relevant federal law and we refuse to do so.

C. *Attorneys Fees*

[3] Intervenors seek attorneys fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The EAJA provides for awards of fees and expenses to parties prevailing against the United States, unless the government's position was substantially justified. "The standard to be applied in determining whether the government's position was substantially justified is one of 'reasonableness.'" *Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir.1984). An adverse decision on the merits does not bar a finding of reasonableness. *Wolverton v. Heckler*, 726 F.2d 580, 583 (9th Cir.1984).

This case presented novel and difficult issues. Many of the issues in this case were decided on the basis of our holding in *Washington v. Bowen*. However, the Secretary did not have access to our decision in *Washington v. Bowen* until after he had already submitted his brief in this case. Accordingly, although we hold that the Secretary's decision must be reversed, we conclude that the Secretary's position was substantially justified. *Cf. Zarr v. Barlow*, 800 F.2d 1484, 1493 (9th Cir.1986) (Attorneys fees inappropriate under EAJA even though BIA regulation concerning eligibility for Indian higher education grant exceeded authority conferred by Congress). The intervenor's request for fees is, therefore, denied.

REVERSED.

4. In *Whaley* the Secretary contended that the dependents' share of Whaley's check should be considered available to Whaley because he could not be compelled to spend the income on behalf of his children. 663 F.2d at 873. Unlike the situation in *Whaley*, a court has several sanctions it may impose if a person defaults on support payments. *See* Cal.Civ.Code §§ 4701, 4702, 4801.6, 4801.7; *see also* Cal.Code of Civ. Pro. §§ 1209, 1218. Thus, an even stronger argument can be made that income earmarked for support payments is truly unavailable.

Timothy J. COLLINS,
Plaintiff-Appellant,

v.

STATE OF ALASKA And Division of Marine Highway Systems,
Defendants-Appellees.

Nos. 85-3874, 85-3915.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 9, 1986.
Submission Withdrawn Feb. 21, 1986.
Resubmitted June 26, 1987.
Decided July 28, 1987.

Injured seaman brought claim for damages for negligence under Jones Act and for unseaworthiness of vessel, as well as for payment of maintenance and cure. On Alaska's motion for summary judgment, the United States District Court for the Western District of Washington, Donald S. Voorhees, J., 621 F.Supp. 722, granted motion. Seaman appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that Eleventh Amendment barred seaman's common law and Jones Act claims against State of Alaska.

Affirmed.

1. Federal Courts ⇐265

Eleventh Amendment bar against citizens of State bringing suits against State applies in admiralty cases. U.S.C.A. Const. Amend. 11.

2. Federal Courts ⇐266, 267

State may waive Eleventh Amendment immunity and consent to be sued in federal court. U.S.C.A. Const.Amend. 11.

3. Federal Courts ⇐266, 267

State waiving Eleventh Amendment immunity must give unequivocal indication that it consents to be sued in federal court; such an indication may be found where State expressly consents, state statute or Constitution so provides, or Congress clearly intended to condition State's participation in program or activity on State's waiver of immunity. U.S.C.A. Const. Amend. 11.

4. Federal Courts ⇐265

Even in the absence of waiver or consent, a State may be sued in federal court when Congress abrogates State's sovereign immunity pursuant to its powers under the Fourteenth Amendment. U.S.C.A. Const. Amends. 11, 14.

5. Federal Courts ⇐265, 266, 267

Eleventh Amendment barred seaman's common law and Jones Act claims against State of Alaska; Alaska did not expressly waive its Eleventh Amendment immunity, and Alaska Tort Claims Act contained a consent to be sued only in state court. U.S.C.A. Const.Amend. 11; AS 23.30.005 et seq.; Jones Act, 46 U.S.C.A. § 688.

Howard P. Pruzan, Seattle, Wash., for plaintiff-appellant.

James P. Moynihan and John H. Bradbury, Seattle, Wash., for defendants-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, CANBY and WIGGINS, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

Collins presents us with two interesting questions. The first is whether the Eleventh Amendment bars a seaman's suit against a state employer in federal court. The second is whether a seamen's union can trade its members' traditional maritime remedies for remedies under a workers' compensation system. Because of our answer to the first question, we do not answer the second.

BACKGROUND

In December 1983, Collins was injured working as a seaman aboard the Columbia, an ocean-going ferry owned and operated by the State of Alaska and its Division of Marine Highway Systems (collectively "Alaska"). The Columbia formed part of Alaska's ferry fleet operated between Alaska and Washington, passing through both interstate and international waters.

Collins was a member of the Inlandboatmen's Union of the Pacific, Alaska Region. When Collins was injured, there was a comprehensive collective bargaining agreement between the union and Alaska. The agreement included a provision purporting to waive all of the union members' rights as seamen in exchange for benefits under the Alaska Workers' Compensation Act, Alaska Stat. Ch. 23.30. The applicable section of the CBA provided:

> "[i]n lieu of wages, maintenance and cure, remedies for unseaworthiness and other seamen's remedies including Jones Act remedies, employees shall be entitled to Alaska Worker's [sic] Compensation benefits."

After his injury, Collins applied for and received almost $20,000 of workers' compensation benefits. He then sued Alaska for negligence under the Jones Act,[1] and for the seaman's common-law remedies of maintenance and cure and unseaworthiness. Alaska contended that Collins had waived these remedies through his union contract.

PROCEDURAL POSTURE

The district court granted Alaska's motion for summary judgment, holding that national labor policy allowed seamen's unions to determine when it was in their members' best interests to waive statutory and common-law rights in return for contractual rights. 621 F.Supp. 722. The district court did not reach the Eleventh Amendment issue.[2]

1. 46 U.S.C. § 688 (1982), which provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, ... *and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The reference to "statutes of the United States modifying or extending the ... right[s] ... [of] railway employees" incorporates the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51–60 (1982), which provides in relevant part:

> Every common carrier by railroad while engaging in commerce between any of the several States ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the ... employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in any of its ... engines, appliances, machinery, ... boats, wharves, or other equipment.
>
> ....
>
> Under this chapter an action may be brought in a district court of the United States.... The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Id. at §§ 55, 56.

2. Because of our disposition of the Eleventh Amendment issue, we do not reach the issue whether a union may waive statutory and common-law rights. We note, however, that a recent decision of this court, *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 331, 93 L.Ed.2d 303 (1986), would support the district court's ruling as to the waiver of common-law rights. *Gardiner* was decided after the district court's ruling in our case.

We note also that a serious question remains whether the *Gardiner* analysis may be extended to the contractual waiver of Jones Act rights. *See* Section 5 of the FELA, 45 U.S.C. § 55 (1982) ("any contract ... the purpose or intent of which shall be to enable any common carrier to except itself from any liability created by this chapter, shall to that extent be void"); *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357, 91 S.Ct. 409, 412, 27 L.Ed.2d 456 (1971) "Since the history of [the labor laws] is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them."

Collins appealed. After oral argument, we submitted the case for decision but later withdrew submission to allow supplemental briefing of the effect of *Welch v. State Dep't of Highways and Public Transp.*, 780 F.2d 1268 (5th Cir.) (en banc), *cert. granted*, — U.S. —, 107 S.Ct. 58, 93 L.Ed.2d 18 (1986), and withheld submission pending decision by the Supreme Court in *Welch*. Pursuant to *Welch v. State Dep't of Highways and Public Transp.*, — U.S. —, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), this case is resubmitted.

STANDARD OF REVIEW

We review summary judgments *de novo*. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir.1983). We need decide only whether any genuine issues of material fact remain and whether the substantive law was applied correctly. *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir.1984). We may affirm on any basis in the record. *Smith v. Block*, 784 F.2d 993, 996 n. 4 (9th Cir.1986).

ANALYSIS

[1] As a threshold matter, we must decide whether the Eleventh Amendment[3] bars Collins' claims. *See Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 89 L.Ed.2d 662 (1974) ("defense ... partakes of the nature of a jurisdictional bar"). The Eleventh Amendment "bars suits against a State by citizens of that same State." *Papasan v. Allain*, — U.S. —, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209 (1986); *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985); *Edelman*, 415 U.S. at 663, 94 S.Ct. at 1355; *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Shaw v. California Dept. of Alcoholic Beverages*, 788 F.2d 600, 603 (9th Cir.1986). "This bar exists whether the relief sought is legal or equitable." *Papasan*, 106 S.Ct. at 2939 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100–01, 104 S.Ct. 900, 907–08, 79 L.Ed.2d 67 (1984) (*Pennhurst II*)); *accord Shaw*, 788 F.2d at 603. The bar applies also to admiralty cases. *Welch*, — U.S. at —, 107 S.Ct. at 2945.

The amendment maintains a crucial balance of power between state and federal interests that is central to our system of federalism. *See, e.g., Atascadero*, 473 U.S. at 242–43, 105 S.Ct. at 3147–48; *Pennhurst II*, 465 U.S. at 99, 104 S.Ct. at 907; *Granados v. Reivitz*, 776 F.2d 180, 182 (7th Cir.1985).

[2] The Supreme Court has recognized exceptions to Eleventh Amendment immunity. *Welch*, — U.S. —, 107 S.Ct. at 2945. A state may waive the immunity and consent to be sued in federal court. *Welch*, — U.S. at —, 107 S.Ct. at 2945; *Atascadero*, 473 U.S. at 238, 105 S.Ct. at 3145; *Clark v. Barnard*, 108 U.S. 436, 437, 2 S.Ct. 878, 878, 27 L.Ed. 780 (1883). *See also Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 873 (9th Cir.1987); *Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 2484, 96 L.Ed.2d 376 (1987); *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1494 (9th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 1284, 94 L.Ed.2d 142 (1987).

[3] The state must, however, give an "unequivocal indication" that it consents to be sued in a federal court. *Charley's Taxi Radio Dispatch*, 810 F.2d at 873. Such an indication may be found where (1) the state expressly consents; (2) a state statute or constitution so provides; or (3) Congress

3. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity. *Id.* at 873.

[4] Even in the absence of a waiver or consent, a state may be sued in federal court when Congress abrogates a state's sovereign immunity pursuant to its powers under section five of the Fourteenth Amendment. *Welch*, — U.S. at —, 107 S.Ct. at 2946; *Atascadero*, 473 U.S. at 238, 105 S.Ct. at 3145; *Charley's Taxi Radio Dispatch*, 810 F.2d at 873; *Maher*, 793 F.2d at 1494. "[C]ongressional exercise of that power should be inferred only when such an intention is expressed 'in unmistakable language in the statute itself.'" *Maher*, 793 F.2d at 1493 (quoting *Atascadero*, 473 U.S. at 243, 105 S.Ct. at 3148).

Here, Alaska did not expressly waive[4] its Eleventh Amendment immunity, but maintained that the amendment barred the action in federal court. Collins argued that, under the express provisions of the Alaska Tort Claims Act,[5] Alaska consented to be sued. But Alaska consented under the Alaska Tort Claims Act only to suit "in superior court." "[F]or a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." *Atascadero*, 473 U.S. at 241, 105 S.Ct. at 3147 (quoted in *Maher*, 793 F.2d at 1493); *see also Welch*, — U.S. at —, 107 S.Ct. at 2945.

The more troublesome question is whether Congress has abrogated, or compelled a constructive waiver of, Alaska's immunity. It is beyond peradventure that, whatever power the Eleventh Amendment withdrew from the federal courts, Congress has the authority under section five of the Fourteenth Amendment to restore it. *See, e.g., Welch*, — U.S. at —, 107 S.Ct. at 2946.

Congress may also have the power to condition the states' enjoyment of Congress's spending power largess on waiver of the states' sovereign immunity in federal courts. *See Atascadero*, 473 U.S. at 246–47, 105 S.Ct. at 3149–50 (discussing constructive waiver of immunity through receipt of federal funds without stating a clear holding as to its validity); *see also Maher*, 793 F.2d at 1494 (iterating a three-part test for resolving immunity questions; the third part testing for constructive waiver by acceptance of federal benefits).

[5] Neither the Fourteenth Amendment nor the Spending Clause is implicated here. Indeed, Congress had no hand in fashioning the common-law seamen's remedies invoked by Collins. Absent state waiver, which we have not found, his common-law claims against Alaska are barred in federal court.

Originally, Collins' Jones Act claims presented a more difficult issue. Congress enacted the Jones Act, and the FELA, to which the Jones Act refers, under its Commerce Clause powers. Because this case does not present the question, we need not decide whether Congress has authority under the Commerce Clause to effect a straightforward abrogation of a state's Eleventh Amendment immunity. *Cf. Atascadero*, 473 U.S. at 253, 105 S.Ct. at 3153 (Brennan, J., dissenting) (abrogation may "perhaps [occur] pursuant to other congressional powers" than the Civil War amendments). Rather, we are asked to decide whether Congress may accomplish the same end circuitously, that is, whether it may require a state to waive constructively its Eleventh Amendment immunity in order to enter a sphere of activity regulated by federal statute.

The Supreme Court, however, has addressed in *Welch* the issue whether by operation of the Eleventh Amendment a state is immune from a Jones Act suit in federal court by a state employee/seaman. It held that the Jones Act did not authorize suits by a state employee/seaman against a state in federal court. *Welch*, — U.S. at —, 107 S.Ct. at 2947. It follows that Collins, a state employee/seaman, is also barred by the Eleventh Amendment from suing Alaska in federal district court for claims brought under the Jones Act.

AFFIRMED.

4. Collins argues that Alaska is collaterally estopped from raising an Eleventh Amendment immunity defense by its unsuccessful litigation in *Cole v. Alaska*, 621 F.Supp. 3 (D. Alaska 1984). Collins did not raise this estoppel argument below and may not raise it now. Even were we to reach the merits of this argument, collateral estoppel is appropriate only if no special circumstance warrants an exception to its application. *Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979). One recognized exception concerns "unmixed questions of law" arising in successive actions involving substantially unrelated claims. *Montana*, 440 U.S. at 163, 99 S.Ct. at 978.

Unreflected invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine on areas of the law where responsiveness to changing patterns of conduct or social mores is critical.

Id.; see also United States v. Mendoza, 464 U.S. 154, 162–64, 104 S.Ct. 568, 573–74, 78 L.Ed.2d 379 (1984) (disapproving the use of collateral estoppel against the federal government).

5. The Act reads, in part:

Actionable claims against the state. A person or corporation having a ... tort claim against the state may bring an action against the state in superior court.

Alaska Stat. § 09.50.250.

Egon L. BADART and Patra L. Badart, Plaintiffs-Appellees,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; Steven Kerstein; and Jack Queen, Defendants-Appellants.

No. 85-6144.

United States Court of Appeals, Ninth Circuit.

July 28, 1987.

Sandra L. Malek, Los Angeles, Cal., for plaintiffs-appellees.

Maren E. Nelson, Los Angeles, Cal., for defendants-appellants.

On Remand from the United States Supreme Court.

Before CANBY, REINHARDT and NOONAN, Circuit Judges.

PER CURIAM:

In our earlier decision in this case, we held that the district court properly refused to submit claims under sections 10(b), 15 and 20(a) of the Securities Exchange Act of 1934 to arbitration. *Badart v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 775 (9th Cir.1986). That was the only issue presented to us on appeal.

The Supreme Court has now granted certiorari, vacated our earlier decision, and remanded the case to us for reconsideration in light of *Shearson/American Express, Inc. v. McMahon*, — U.S. —, 107 S.Ct. 3204, 96 L.Ed.2d 691 (1987). In that case, the Supreme Court held that claims under section 10(b) of the Securities Exchange Act must be sent to arbitration pursuant to the terms of an arbitration agreement.

Shearson/American Express clearly compels us to hold, contrary to our previous decision, that section 10(b) claims are arbitrable. As we stated in our previous decision, "[t]he parties point to, and we can perceive, no reason why claims under sections 15 and 20(a) of the 1934 Act should be treated differently [from claims under section 10(b)] for purposes of arbitrability." *Badart*, 797 F.2d 777 (9th Cir.1986). Those claims therefore must now be treated as arbitrable.

The decision of the district court refusing to submit the Badarts' claims under section 10(b), 15 and 20(a) of the Securities Exchange Act of 1934 is reversed, and the case is remanded to the district court.

REVERSED AND REMANDED.

Bratenahl, 64 Ohio St 2d 98, 413 NE2d 1184 (1980).

In reading the opinion of the District Court in the present litigation, we are unable to determine whether that court was applying what it thought was the Ohio law of preclusion. The opinion cites a Sixth Circuit opinion that purported to enunciate Ohio law, Coogan v Cincinnati Bar Assn., 431 F2d 1209 (1970), and also relied on precedents from other Federal Courts of Appeals applying both federal and state law. Our holding today makes clear that Ohio state preclusion law is to be applied to this case. Prudence also dictates that it is the District Court, in the first instance, not this Court, that should interpret Ohio preclusion law and apply it.

The judgment of the Court of Appeals, accordingly, is vacated, and the case is remanded to that court so that it may instruct the District Court to conduct such further proceedings as are required by, and are consistent with, this opinion.

It is so ordered.

SEPARATE OPINION

[465 US 88]

Justice White, with whom The Chief Justice and Justice Powell join, concurring.

In Union & Planters' Bank v Memphis, 189 US 71, 75, 47 L Ed 712, 23 S Ct 604 (1903), this Court held that a federal court "can accord [a state judgment] no greater efficacy" than would the judgment-rendering State. That holding has been adhered to on at least three occasions since that time. Oklahoma Packing Co. v Oklahoma Gas & Electric Co. 309 US 4, 7–8, 84 L Ed 537, 60 S Ct 215 (1940); Wright v Georgia Railroad & Banking Co. 216 US 420, 429, 54 L Ed 544, 30 S Ct 242 (1910); City of Covington v First National Bank, 198 US 100, 107–109, 49 L Ed 963, 25 S Ct 562 (1905). The Court has also indicated that the States are bound by a similar rule under the Full Faith and Credit Clause. Public Works v Columbia College, 17 Wall 521, 529, 21 L Ed 687 (1873). The Court is thus justified in this case to rule that preclusion must be determined under state law, even if there would be preclusion under federal standards.

This construction of 28 USC § 1738 [28 USCS § 1738] and its predecessors is unfortunate. In terms of the purpose of that section, which is to require federal courts to give effect to state-court judgments, there is no reason to hold that a federal court may not give preclusive effect to a state judgment simply because the judgment would not bar relitigation in the state courts. If the federal courts have developed rules of res judicata and collateral estoppel that prevent relitigation in circumstances that would not be preclusive in state courts, the federal courts should be free to apply them, the parties then being free to relitigate in the state courts. The contrary construction of § 1738 is nevertheless one of long standing, and Congress has not seen fit to disturb it, however justified such an action might have been.

Accordingly, I join the opinion of the Court.

[465 US 89]

PENNHURST STATE SCHOOL & HOSPITAL et al., Petitioners

v

TERRI LEE HALDERMAN et al.

465 US 89, 79 L Ed 2d 67, 104 S Ct 900

[No. 81-2101]

Argued February 22, 1983. Reargued October 3, 1983. Decided January 23, 1984.

Decision: Eleventh Amendment held to bar federal-court jurisdiction of state-law injunctive suit against officials.

SUMMARY

In a class action by a resident of a Pennsylvania state institution for the care of the mentally retarded against state and county officials, alleging that conditions at the institution violated the class members' federal constitutional and statutory rights and a Pennsylvania statute, the United States District Court for the Eastern District of Pennsylvania granted injunctive relief on the ground that the conditions violated the residents' federal constitutional rights, the federal Rehabilitation Act, and a state statute (446 F Supp 1295). The United States Court of Appeals for the Third Circuit affirmed most of the District Court's judgment, grounding its decision on 42 USCS § 6010 (612 F2d 84). After the Supreme Court reversed on the ground that 42 USCS § 6010 does not create any substantive rights (451 US 1, 67 L Ed 2d 694, 101 S Ct 1531), the Court of Appeals affirmed its prior judgment in its entirety, relying solely on the state statute (673 F2d 647).

On certiorari, the United States Supreme Court reversed and remanded for consideration of the extent, if any, that the judgment could be sustained on federal constitutional or statutory grounds. In an opinion by POWELL, J., expressing the views of BURGER, Ch. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., it was held that a federal court lacks jurisdiction of a suit for injunctive relief against state officials on the basis of state law, because such an action contravenes the Eleventh Amendment.

BRENNAN, J., dissenting, declared that the Eleventh Amendment bars federal court suits against states only by citizens of other states.

Briefs of Counsel, p 915, infra.

STEVENS, J., joined by BRENNAN, MARSHALL, and BLACKMUN, JJ., dissented on the ground that a state's sovereign immunity does not prevent a federal court from enjoining conduct that the state itself has prohibited.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

States, Territories, and Possessions § 93 — suit — immunity

1a–1c. A federal court lacks jurisdiction of a suit for injunctive relief against state officials on the basis of state law, because such an action contravenes the Eleventh Amendment. (Brennan, Stevens, Marshall, and Blackmun, JJ., dissented from this holding.)

States, Territories, and Possessions § 88 — immunity — federal jurisdiction

2. By virtue of the Eleventh Amendment, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III of the Constitution.

States, Territories, and Possessions § 91 — immunity — assertion

3a, 3b. The Eleventh Amendment's embodiment of the principle of sovereign immunity as a constitutional limitation deprives federal courts of any jurisdiction to entertain claims by private parties against states, and thus may be raised at any point in a proceeding.

States, Territories, and Possessions § 89 — consent to be sued

4. A sovereign's immunity from suit may be waived, and a state may consent to suit against it in federal court, but the state's consent must be unequivocally expressed.

States, Territories, and Possessions § 88 — immunity — waiver

5. Although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, an unequivocal expression of congressional intent is required to overturn the constitutionally guaranteed immunity of the several states.

States, Territories, and Possessions § 89 — consent to suit — court

6. A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.

States, Territories, and Possessions § 89 — consent to suit — federal court

7a, 7b. A state's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.

States, Territories, and Possessions § 87 — immunity from suit

8. An unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. (Brennan J., dissented from this holding.)

States, Territories, and Possessions § 88 — immunity — department — relief

9. In the absence of consent, a suit in which a state or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment, regardless of the nature of the relief sought.

States, Territories, and Possessions § 93 — suit against officer

10. The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest.

States, Territories, and Possessions § 93; United States § 107.5 — suit against officer

11. Relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.

States, Territories, and Possessions § 93; United States § 99 — suit against sovereign — test

12a, 12b. A suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or compel it to act.

States, Territories, and Possessions § 93 — suit against officer — ultra vires acts

13a, 13b. A state officer may be said to act ultra vires, for the purpose of determining whether a suit against the officer is against the state, only when he acts without any authority whatever; an ultra vires claim thus rests on the officer's lack of delegated power, a claim of error in the exercise of that power being insufficient.

States, Territories, and Possessions §§ 88, 93 — immunity — relief sought

14. As when the state itself is named as the defendant, a suit against state officials that is in fact a suit against a state is barred regardless of whether it seeks damages or injunctive relief.

States, Territories, and Possessions § 93 — immunity — suit against official

15. A suit challenging the constitutionality of a state official's action is not one against the state within the meaning of the Eleventh Amendment immunity of a state from suit.

States, Territories, and Possessions § 89 — immunity from suit — waiver

16a, 16b. A state does not waive its immunity from suit in federal court where at the time suit is filed, suits against the state are permitted only when expressly authorized by the legislature and there is no statutory provision expressly waiving the state's Eleventh Amendment immunity, and at the time of decision a state statute expressly states that nothing in its subchapter governing sovereign immunity shall be construed to waive the state's immunity from suit in federal courts guaranteed by the Eleventh Amendment.

States, Territories, and Possessions § 93 — immunity — United States plaintiff

17a, 17b. The presence of the United States as a plaintiff in a suit against a state official does not remove the Eleventh Amendment's applicability to private plaintiffs' claims against the state official.

States, Territories, and Possessions § 87 — immunity — United States plaintiff

18a, 18b. The Eleventh Amendment does not bar the United States from suing a state in federal court.

States, Territories, and Possessions § 87 — immunity — United States presence

19a, 19b. The United States' presence in a suit against a state for any purpose does not eliminate the state's immunity for all purposes.

States, Territories, and Possessions § 87 — immunity — relief

20a, 20b. That a federal court can award injunctive relief to the United States on federal constitutional claims against a state does not mean that the court can order the state to pay damages to other plaintiffs.

Parties § 26 — representative suits — standing — United States

21a, 21b. The United States does not have standing to assert the state-law claim of third parties in a suit against a state.

States, Territories, and Possessions § 92 — suits against officers — injunction

22a, 22b. A finding that state officials have acted in good faith and therefore are immune from damages does not affect whether an injunction might be issued against them by a court possessed of jurisdiction.

Supreme Court of the United States § 14 — jurisdiction — constitutional amendments

23a, 23b. Article III of the Constitution confers no jurisdiction on the Supreme Court to strip an explicit constitutional amendment of its substantive meaning.

Supreme Court of the United States § 3 — state law — enforcement

24a, 24b. Although the Supreme Court is vested with the constitutional duty to vindicate the supreme authority of the United States, there is no corresponding mandate to enforce state law.

States, Territories, and Possessions § 93 — state officials — immunity

25. A federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when the relief sought and ordered has an impact directly on the state itself.

Courts § 240 — federal courts — pendent jurisdiction

26. When a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction.

Courts § 240 — pendent claims — decision

27. A federal court may resolve a case solely on the basis of a pendent state-law claim, and in fact usually should do so in order to avoid federal constitutional questions.

Courts § 774 — precedent — jurisdiction — sub silentio

28. When questions of jurisdiction have been passed on in prior decisions sub silentio, the Supreme Court is not bound when a subsequent case finally brings the jurisdictional issue before it.

States, Territories, and Possessions § 88 — Eleventh Amendment — jurisdiction

29. The Eleventh Amendment is an explicit limitation on the judicial power of the United States, and deprives a federal court of power to decide certain claims against states that otherwise are within the scope of Article III's grant of jurisdiction.

Civil Rights § 34; States, Territories, and Possessions § 93 — jurisdiction

30. If a lawsuit against state officials under 42 USCS § 1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution.

Civil Rights § 33; States, Territories, and Possessions § 88 — jurisdiction

31. If an action under 42 USCS § 1983 alleging a constitutional claim is brought directly against a state, the Eleventh Amendment bars a federal court from granting any relief on that claim.

States, Territories, and Possessions § 88 — Eleventh Amendment — jurisdiction

32. The Eleventh Amendment is a specific constitutional bar against hearing even federal claims that otherwise are within the jurisdiction of federal courts.

States, Territories, and Possessions § 88 — pendent claims

33. The Eleventh Amendment's bar of suits against states applies to state-law pendent claims as well as federal claims.

States, Territories, and Possessions § 88 — Eleventh Amendment — jurisdiction

34. Neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.

States, Territories, and Possessions § 92 — state officers — jurisdiction

35. A suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court.

Civil Rights § 33 — tax challenge

36. Challenges to the validity of state tax systems under 42 USCS § 1983 must be brought in state court.

States, Territories, and Possessions § 93 — county officials

37. The Eleventh Amendment bars a claim against county officials where the judgment cannot be sustained on the basis of the state-law obligations of the county officials and any relief granted against the county officials on the basis of the state statute would be partial and incomplete at best.

SYLLABUS BY REPORTER OF DECISIONS

Respondent Halderman, a resident of petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded, brought a class action in Federal District Court against Pennhurst and various state and county officials (also petitioners). It was alleged that conditions at Pennhurst violated various federal constitutional and statutory rights of the class members as well as their rights under the Pennsylvania Mentla Health and Mental Retardation Act of 1966 (MH/MR Act). Ultimately, the District Court awarded injunctive relief based in part on the MH/MR Act, which was held to provide a right to adequate habilitation. The Court of Appeals affirmed, holding that the MH/MR Act required the State to adopt the "least restrictive environment" approach for the care of the mentally retarded, and rejecting petitioners' argument that the Eleventh Amendment barred a federal court from considering this pendent state-law claim. The court reasoned that since that Amendment did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims, citing Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441, the same result obtained with respect to a pendent state-law claim.

Held: The Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law.

(a) The principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art.

III of the Constitution. The Eleventh Amendment bars a suit against state officials when the State is the real, substantial party in interest, regardless of whether the suit seeks damages or injunctive relief. The Court in Ex parte Young, supra, recognized an important exception to this general rule: a suit challenging the federal constitutionality of a state official's action is not one against the State.

(b) In Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347, this Court recognized that the need to promote the supremacy of federal law that is the basis of Young must be accommodated to the constitutional immunity of the States. Thus, the Court declined to extend the Young doctrine to encompass retroactive relief, for to do so would effectively eliminate the States' constitutional immunity. Edelman's distinction between prospective and retroactive relief fulfilled Young's underlying purpose of vindicating the supreme authority of federal law while at the same time preserving to an important degree the States' constitutional immunity. But this need to reconcile competing interests is wholly absent when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of Young and Edelman disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. When a federal court instructs state officials on how to conform their conduct to state law, this conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

(c) The dissenters' view is that an allegation that official conduct is contrary to a state statute would suffice to override the State's protection from injunctive relief under the Eleventh Amendment because such conduct is ultra vires the official's authority. This view rests on a fiction, is wrong on the law, and would emasculate the Eleventh Amendment. At least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacity will not suffice to override the sovereign immunity of the State where the relief effectively is against it. Larson v Domestic & Foreign Commerce Corp., 337 US 682, 93 L Ed 1628, 69 S Ct 1457. Under the dissenters' view, the ultra vires doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it.

(d) The principle that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment applies as well to state-law claims brought into federal court under pendent jurisdiction.

(e) While it may be that applying the Eleventh Amendment to pendent state-law claims results in federal claims being brought in state court or in bifurcation of claims, such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State.

(f) The judgment below cannot be sustained on the basis of the state-law obligation of petitioner county officials, since any relief granted against these officials on the basis of the MH/MR Act would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction.

673 F2d 647, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and White, Rehnquist, and O'Connor, JJ., joined. Brennan, J., filed a dissenting opinion. Stevens, J., filed a dissenting opinion, in which Brennan, Marshall, and Blackmun, JJ., joined.

APPEARANCES OF COUNSEL

H. Bartow Farr, III, and **Allen C. Warshaw** argued the cause for petitioners.

Thomas K. Gilhool, and **David Ferleger** argued the cause for respondents.

Briefs of Counsel, p 915, infra.

OPINION OF THE COURT

Justice **Powell** delivered the opinion of the Court.

[1a] This case presents the question whether a federal court may award injunctive relief against state officials on the basis of state law.

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I

This litigation, here for the second time, concerns the conditions of care at petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded. See Pennhurst State School & Hospital v Halderman, 451 US 1, 67 L Ed 2d 694, 101 S Ct 1531 (1981). Although the litigation's history is set forth in detail in our prior opinion, see id., at 5–10, 67 L Ed 2d 694, 101 S Ct 1531, it is necessary for purposes of this decision to review that history.

This suit originally was brought in 1974 by respondent Terri Lee Halderman, a resident of Pennhurst, in the District Court for the Eastern District of Pennsylvania. Ultimately, plaintiffs included a class consisting of all persons who were or might become residents of Pennhurst; the Pennsylvania Association for Retarded Citizens (PARC); and the United States. Defendants were Pennhurst and various Pennhurst officials; the Pennsylvania Department of Public Welfare and several of its officials; and various county commissioners, county mental retardation administrators, and other officials of five Pennsylvania counties surrounding Pennhurst. Respondents' amended complaint charged that conditions at Pennhurst violated the class members' rights under the Eighth and Fourteenth Amendments; § 504 of the Rehabilitation Act of 1973, 87 Stat 394, 29 USC § 794 [29 USCS § 794]; the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat 496, 42 USC § 6001 et seq. (1976 ed and Supp V) [42 USCS §§ 6001 et seq.]; and the Pennsylvania Mental Health and Mental Retardation Act of 1966 (MH/MR Act), Pa Stat Ann, Tit 50, §§ 4101–4704 (Purdon 1969 and Supp 1983-1984). Both damages and injunctive relief were sought.

In 1977, following a lengthy trial, the District Court rendered its decision. Halderman v Pennhurst State School & Hospital, 446 F Supp 1295. As noted in our prior opinion, the court's findings were undisputed: "Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also

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inadequate for the habilitation' of the retarded. Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst." 451 US, at 7, 67 L Ed 2d 694, 101 S Ct 1531 (footnote omitted). The District Court held that these conditions violated each resident's right to "minimally adequate habilitation"

under the Due Process Clause and the MH/MR Act, see 446 F Supp, at 1314–1318, 1322–1323; "freedom from harm" under the Eighth and Fourteenth Amendments, see id., at 1320–1321; and "nondiscriminatory habilitation" under the Equal Protection Clause and § 504 of the Rehabilitation Act, see id., at 1321–1324. Furthermore, the court found that "due process demands 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." Id., at 1319 (emphasis added). After concluding that the large size of Pennhurst prevented it from providing the necessary habilitation in the least restrictive environment, the court ordered that" immediate steps be taken to remove the retarded residents from Pennhurst." Id., at 1325. Petitioners were ordered "to provide suitable community living arrangements" for the class members, id., at 1326, and the court appointed a Special Master "with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court." Ibid.[1]

The Court of Appeals for the Third Circuit affirmed most of the District Court's judgment. Halderman v Pennhurst State School & Hospital, 612 F2d 84 (1979) (en banc). It agreed that respondents had a right to habilitation in the least restrictive environment, but it grounded this right solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 USC § 6010 [42 USCS § 6010]. See 612 F2d, at 95–100, 104–107. The court did

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not consider the constitutional issues or § 504 of the Rehabilitation Act, and while it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation, see id., at 100–103, the court did not decide whether that state right encompassed a right to treatment in the least restrictive setting.

On the question of remedy, the Court of Appeals affirmed except as to the District Court's order that Pennhurst be closed. The court observed that some patients would be unable to adjust to life outside an institution, and it determined that none of the legal provisions relied on by respondents precluded institutionalization. Id., at 114–115. It therefore remanded for "individual determinations by the [District Court], or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient," guided by "a presumption in favor of placing individuals in [community living arrangements]." Ibid.[2]

On remand the District Court established detailed procedures for determining the proper residential placement for each patient. A team consisting of the patient, his parents or guardian, and his case manager must establish an individual habilitation plan providing for habilitation of the patient in a designated community living arrangement. The

1. The District Court determined that the individual defendants had acted in good faith and therefore were immune from the damages claims. 446 F Supp, at 1324.

2. In a companion case, the Court of Appeals affirmed the District Court's denial of the Pennhurst Parents-Staff Association's motion to intervene for purposes of appeal, finding the denial harmless error. See Halderman v Pennhurst State School & Hospital, 612 F2d 131 (1979) (en banc). The Association subsequently was granted leave to intervene and is a petitioner in this Court.

plan is subject to review by the Special Master. A second master, called the Hearing Master, is available to conduct hearings, upon request by the resident, his parents, or his advocate, on the question whether the services of Pennhurst would be more beneficial to the resident than the community living arrangement provided in the resident's plan. The Hearing Master then determines where the patient should reside,

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subject to possible review by the District Court. See App 123a–134a (Order of Apr. 24, 1980).[3]

This Court reversed the judgment of the Court of Appeals, finding that 42 USC § 6010 [42 USCS § 6010] did not create any substantive rights. Pennhurst State School & Hospital v Halderman, 451 US 1, 67 L Ed 2d 694, 101 S Ct 1531 (1981). We remanded the case to the Court of Appeals to determine if the remedial order could be supported on the basis of state law, the Constitution, or § 504 of the Rehabilitation Act. See id., at 31, 67 L Ed 2d 694, 101 S Ct 1531.[4] We also remanded for consideration of whether any relief was available under other provisions of the Developmentally Disabled Assistance and Bill of Rights Act. See id., at 27–30, 67 L Ed 2d 694, 101 S Ct 1531 (discussing 42 USC §§ 6011(a), 6063(b)(5) (1976 ed, Supp V) [42 USCS §§ 6011(a), 6063(b)(5)]).

On remand the Court of Appeals affirmed its prior judgment in its entirety. 673 F2d 647 (1982) (en banc). It determined that in a recent decision the Supreme Court of Pennsylvania had "spoken definitively" in holding that the MH/MR Act required the State to adopt the "least restrictive environment" approach for the care of the mentally retarded. Id., at 651 (citing In re Schmidt, 494 Pa 86, 429 A2d 631 (1981)). The Court of Appeals concluded that this state statute fully supported its prior judgment, and therefore did not

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reach the remaining issues of federal law. It also rejected petitioners' argument that the Eleventh Amendment barred a federal court from considering this pendent state-law claim. The court noted that the Amendment did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims, see 673 F2d, at 656 (citing Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908)), and concluded that the same result obtained with respect to a pendent state-law claim. It reasoned that because Siler v Louisville & Nashville R. Co. 213 US 175, 53 L Ed 753, 29 S Ct 451 (1909), an important case in the development of the doctrine of pendent jurisdiction, also involved state officials, "there cannot be . . . an Eleventh Amendment exception to that

3. On July 1, 1981, Pennsylvania enacted an appropriations bill providing that only $35,000 would be paid for the Masters' expenses for the fiscal year July 1981 to June 1982. The District Court held the Pennsylvania Department of Public Welfare and its Secretary in contempt, and imposed a fine of $10,000 per day. Pennsylvania paid the fines, and the contempt was purged on January 8, 1982. On appeal the Court of Appeals affirmed the contempt order. Halderman v Pennhurst State School & Hospital, 673 F2d 628 (1982), cert pending, No. 81-2363.

4. Three Justices dissented from the Court's construction of the Act, but concluded that the District Court should not have adopted the "far-reaching remedy" of appointing "a Special Master to decide which of the Pennhurst inmates should remain and which should be moved to community-based facilities. . . . [T]he court should not have assumed the task of managing Pennhurst . . . ." 451 US, at 54, 67 L Ed 2d 694, 101 S Ct 1531 (White, J., joined by Brennan and Marshall, JJ., dissenting in part).

rule." 673 F2d, at 658.[5] Finally, the court rejected petitioners' argument that it should have abstained from deciding the state-law claim under principles of comity, see id., at 659–660, and refused to consider petitioners' objections to the District Court's use of a Special Master, see id., at 651, and n 10. Three judges dissented in part, arguing that under principles of federalism and comity the establishment of a Special Master to supervise compliance was an abuse of discretion. See id., at 662 (Seitz, C. J., joined by Hunter, J., dissenting in part); ibid. (Garth, J., concurring in part and dissenting as to relief). See also id., at 661 (Aldisert, J., concurring) (seriously questioning the propriety of the order appointing the Special

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Master, but concluding that a retroactive reversal of that order would be meaningless).[6]

We granted certiorari, 457 US 1131, 73 L Ed 2d 1348, 102 S Ct 2956 (1982), and now reverse and remand.

II

Petitioners raise three challenges to the judgment of the Court of Appeals: (i) the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law; (ii) the doctrine of comity prohibited the District Court from issuing its injunctive relief; and (iii) the District Court abused its discretion in appointing two Masters to supervise the decisions of state officials in implementing state law. We need not reach the latter two issues, for we find the Eleventh Amendment challenge dispositive.

A

Article III, § 2 of the Constitution provides that the federal judicial power extends, inter alia, to controversies "between a State and Citizens of another State." Relying on this language, this Court in 1793 assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. Chisholm v Georgia, 2 Dall 419, 1 L Ed 440 (1793). The decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." Monaco v Mississippi, 292 US 313, 325, 78 L Ed 1282, 54 S Ct 745 (1934). The Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

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[2, 3a] The Amendment's language overruled the particular result in

5. The Court of Appeals also noted that "the United States is an intervening plaintiff . . . against which even the state itself cannot successfully plead the Eleventh Amendment as a bar to jurisdiction," and that "the counties, even as juridical entities, do not fall within the coverage of the Eleventh Amendment. Against those defendants even money damages may be awarded." 673 F2d, at 656 (citation omitted).

As Justice Brennan notes in his dissent, post, at 126, 79 L Ed 2d, at 95, Judge Gibbons has expanded on his views of the Eleventh Amendment in a recent law review article. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum L Rev 1889 (1983). Judge Gibbons was the author of both the first and second opinions by the Court of Appeals in this case.

6. The Office of the Special Master was abolished in December 1982. See App 220a (Order of Aug. 12, 1982). The Hearing Master remains in operation

Chisholm, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III. Thus, in Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the Court held that, despite the limited terms of the Eleventh Amendment, a federal court could not entertain a suit brought by a citizen against his own State. After reviewing the constitutional debates concerning the scope of Art III, the Court determined that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." Id., at 15, 33 L Ed 842, 10 S Ct 504. See Monaco v Mississippi, supra, at 322–323, 78 L Ed 1282, 54 S Ct 745.[7] In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art III:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one 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

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> an exemplification." Ex parte State of New York, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921) (emphasis added).[8]

[4–6, 7a] 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. See, e. g., Clark v Barnard, 108 US 436, 447, 27 L Ed 780, 2 S Ct 878 (1883). We have insisted, however, that the State's consent be unequivocally expressed. See, e.g., Edelman v Jordan, 415 US 651, 673, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see Fitzpatrick v Bitzer, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976), we have required an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States." Quern

7. See Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 291–292, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Marshall, J., concurring in result (The Eleventh Amendment "clarif[ied] the intent of the Framers concerning the reach of the federal judicial power" and "restore[d] the original understanding" that States could not be made unwilling defendants in federal court). See also Nevada v Hall, 440 US 410, 430–431, 59 L Ed 2d 416, 99 S Ct 1182 (1979) (Blackmun, J., dissenting); id., at 437, 59 L Ed 2d 416, 99 S Ct 1182 (Rehnquist, J., dissenting).

8. The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding. "The 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 . . . even though urged for the first time in this Court." Ford Motor Co. v Department of Treasury of Indiana, 323 US 459, 467, 89 L Ed 389, 65 S Ct 347 (1945).

v Jordan, 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979) (holding that 42 USC § 1983 [42 USCS § 1983] does not override States' Eleventh Amendment immunity). Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.[9] As Justice Marshall well has noted, "[b]ecause

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of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this." Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 294, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Marshall, J., concurring in result).[10] Accordingly, in deciding this case we must be guided by "[t]he principles of federalism that inform Eleventh Amendment doctrine." Hutto v Finney, 437 US 678, 691, 57 L Ed 2d 522, 98 S Ct 2565 (1978).

B

[8, 9] This Court's decisions thus establish that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." Employees, supra, at 280, 36 L Ed 2d 251, 93 S Ct 1614. There may be a question, however, whether a particular suit in fact is a suit against a State. It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. See, e.g., Florida Dept. of Health and Rehabilitative Services v Florida Nursing Home Assn., 450 US 147, 67 L Ed 2d 132, 101 S Ct 1032 (1981) (per curiam); Alabama v Pugh, 438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057 (1978) (per curiam). This jurisdictional bar applies regardless of the nature of the relief sought. See, e.g., Missouri v Fiske, 290 US 18, 27, 78 L Ed 145, 54 S Ct 18 (1933) ("Expressly applying

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to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

9. **[7b]** For this reason, the Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts. See, e.g., Florida Dept. of Health and Rehabilitative Services v Florida Nursing Home Assn., 450 US 147, 150, 67 L Ed 2d 147, 101 S Ct 1032 (1981) (per curiam). "[I]t is not consonant with our dual system for the federal courts . . . to read the consent to embrace federal as well as state courts. . . . [A] clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." Great Northern Life Insurance Co. v Read, 322 US 47, 54, 88 L Ed 1121, 64 S Ct 873 (1944).

10. See Nevada v Hall, 440 US, at 418–419, 59 L Ed 2d 416, 99 S Ct 1182 (States were "vitally interested" in whether they would be subject to suit in the federal courts, and the debates about state immunity focused on the question of federal judicial power). Cf. id., at 430–431, 59 L Ed 2d 416, 99 S Ct 1182 (Blackmun, J., dissenting) (sovereign immunity is "a guarantee that is implied as an essential component of federalism" and is "sufficiently fundamental to our federal structure to have implicit constitutional dimension"); id., at 437, 59 L Ed 2d 416, 99 S Ct 1182 (Rehnquist, J., dissenting) ("[T]he States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions").

[10, 11, 12a, 13a, 14] When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." Ford Motor Co. v Department of Treasury of Indiana, 323 US 459, 464, 89 L Ed 389, 65 S Ct 347 (1945). See, e.g., In re Ayers, 123 US 443, 487–492, 31 L Ed 216, 8 S Ct 164 (1887); Louisiana v Jumel, 107 US 711, 720–723, 727–728, 27 L Ed 448, 2 S Ct 128 (1883). Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v Gordon, 373 US 57, 58, 10 L Ed 2d 191, 83 S Ct 1052 (1963) (per curiam).[11] And, as when the State itself is named as the

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defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. See Cory v White, 457 US 85, 91, 72 L Ed 2d 694, 102 S Ct 2325 (1982).

[15] The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908), in which a federal court enjoined the Attorney General of the State of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. This Court held that the Eleventh Amendment did not prohibit issuance of this injunction. The theory of the case was that an unconstitutional enactment is "void"

11. **[12b]** The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Dugan v Rank, 372 US 609, 620, 10 L Ed 2d 15, 83 S Ct 999 (1963) (citations omitted).

[13b] Respondents do not dispute that the relief sought and awarded below operated against the State in each of the foregoing respects. They suggest, however, that the suit here should not be considered to be against the State for the purposes of the Eleventh Amendment because, they say, petitioners were acting ultra vires their authority. Respondents rely largely on Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982), which in turn was founded upon Larson v Domestic & Foreign Commerce Corp., 337 US 682, 93 L Ed 1628, 69 S Ct 1457 (1949). These cases provide no support for this argument. These and other modern cases make clear that a state officer may be said to act ultra vires only when he acts "without any authority whatever." Treasure Salvors, 458 US, at 697, 73 L Ed 2d 1057, 102 S Ct 3304 (opinion of Stevens, J.); accord, id., at 716, 73 L Ed 2d 1057, 102 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part) (test is whether there was no "colorable basis for the exercise of authority by state officials"). As the Court in Larson explained, an ultra vires claim rests on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." Larson, supra, at 690, 93 L Ed 1628, 69 S Ct 1457. Petitioners' actions in operating this mental health institution plainly were not beyond their delegated authority in this sense. The MH/MR Act gave them broad discretion to provide "adequate" mental health services. Pa Stat Ann, Tit 50, § 4201(1) (Purdon 1969). The essence of respondents' claim is that petitioners have not provided such services adequately.

In his dissent, Justice Stevens advances a far broader—and unprecedented—version of the ultra vires doctrine, which we discuss infra, at 106-117, 79 L Ed 2d, at 82-89.

and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." Id., at 160, 52 L Ed 714, 28 S Ct 441. Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." Ibid.

While the rule permitting suits alleging conduct contrary to "the supreme authority of the United States" has survived, the theory of Young has not been provided an expansive interpretation. Thus, in Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), the Court emphasized that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law. Id., at 666–667, 39 L Ed 2d 662, 94 S Ct 1347. In particular, Edelman held that when a plaintiff sues a state official alleging a violation of federal law, the federal court

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may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of Young, such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment.

III

[16a, 17a, 18a, 19a, 20a, 21a] With these principles in mind, we now turn to the question whether the claim that petitioners violated *state law* in carrying out their official duties at Pennhurst is one against the State and therefore barred by the Eleventh Amendment. Respondents advance two principal arguments in support of the judgment below.[12] First, they contend that under the doctrine of Edelman v Jordan, supra, the suit is not against

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the State because the courts below ordered only prospective injunctive relief. Second, they assert that the state-law claim properly was decided under the doctrine of pendent jurisdiction. Respondents rely on decisions of this Court awarding relief

12. **[16b]** We reject respondents' additional contention that Pennsylvania has waived its immunity from suit in federal court. At the time the suit was filed, suits against Pennsylvania were permitted only where expressly authorized by the legislature, see, e.g., French v Commonwealth, 471 Pa 558, 370 A2d 1163 (1977), and respondents have not referred us to any provision expressly waiving Pennsylvania's Eleventh Amendment immunity. The State now has a statute governing sovereign immunity, including an express preservation of its immunity from suit in federal court: "Federal courts.—Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 42 Pa Cons Stat § 8521(b) (1980).

[17b, 18b, 19b, 20b, 21b] We also do not agree with respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, see, e.g., Monaco v Mississippi, 292 US 313, 329, 78 L Ed 1282, 54 S Ct 745 (1934), the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs. In any case, we think it clear that the United States does not have standing to assert the state-law claims of third parties. For these reasons, the applicability of the Eleventh Amendment to respondents' state-law claim is unaffected by the United States' participation in the case.

against state officials on the basis of a pendent state-law claim. See, e.g., Siler v Louisville & Nashville R. Co., 213 US, at 193, 53 L Ed 753, 29 S Ct 451.

A

We first address the contention that respondents' state-law claim is not barred by the Eleventh Amendment because it seeks only prospective relief as defined in Edelman v Jordan, supra. The Court of Appeals held that if the judgment below rested on federal law, it could be entered against petitioner state officials under the doctrine established in Edelman and Young even though the prospective financial burden was substantial and ongoing.[13] See 673 F2d, at 656. The court assumed, and respondents assert, that this reasoning applies as well when the official acts in violation of state law. This argument misconstrues the basis of the doctrine established in Young and Edelman.

As discussed above, the injunction in Young was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," Young, 209 US, at 160, 52 L Ed 714, 28 S Ct 441. This

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rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 685, 73 L Ed 2d 1057, 102 S Ct 3304 (1982) (opinion of Stevens, J.). Nonetheless, the Young doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." Young, supra, at 160, 52 L Ed 714, 28 S Ct 441. As Justice Brennan has observed, "Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." Perez v Ledesma, 401 US 82, 106, 27 L Ed 2d 701, 91 S Ct 674 (1971) concurring in part and dissenting in part). Our decisions repeatedly have emphasized that the Young doctrine rests on the need to promote the vindication of federal rights. See, e.g., Quern v Jordan, 440 US, at 337, 59 L Ed 2d 358, 99 S Ct 1139; Scheuer v Rhodes, 416 US 232, 237, 40 L Ed 2d 90, 94 S Ct 1683 (1974); Georgia Railroad & Banking Co. v Redwine, 342 US 299, 304, 96 L Ed 335, 72 S Ct 321 (1952).

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This

13. We do not decide whether the District Court would have jurisdiction under this reasoning to grant prospective relief on the basis of federal law, but we note that the scope of any such relief would be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" Rizzo v Goode, 423 US 362, 378, 46 L Ed 2d 561, 96 S Ct 598 (1976) (quoting Stefanelli v Minard, 342 US 117, 120, 96 L Ed 138, 72 S Ct 118 (1951)).

is the significance of Edelman v Jordan, supra. We recognized that the prospective relief authorized by Young "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect." 415 US, at 664, 39 L Ed 2d 662, 94 S Ct 1347. But we declined to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, we concluded that although the difference between permissible and impermissible relief "will not in many instances be that between day and night," 415 US, at 667, 39 L Ed 2d 662, 94 S Ct 1347, an award of retroactive relief necessarily "'fall[s] afoul of the Eleventh Amendment

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if that basic constitutional provision is to be conceived of as having any present force.'" Id., at 665, 39 L Ed 2d 662, 94 S Ct 1347 (quoting Rothstein v Wyman, 467 F2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert denied, 411 US 921, 36 L Ed 2d 315, 93 S Ct 1552 (1973)). In sum, 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.

[1b] This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of Young and Edelman disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is 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. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that Young and Edelman are inapplicable in a suit against state officials on the basis of state law.

B

The contrary view of Justice Stevens' dissent rests on fiction, is wrong on the law, and, most important, would emasculate the Eleventh Amendment.[14] Under his view, an allegation that official conduct is contrary to a state statute would suffice to override the State's protection under that Amendment. The theory is that such conduct is contrary to the official's "instructions," and thus ultra vires his authority.

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Accordingly, official action based on a reasonable interpretation of any statute might, if the interpretation turned out to be erroneous,[15] provide the basis for injunctive relief against the actors in their official capacities. In this case, where officials of a major state department, clearly acting within the scope of their authority,

14. We are prompted to respond at some length to Justice Stevens' 41-page dissent in part by his broad charge that "the Court repudiates at least 28 cases," post, at 127, 79 L Ed 2d, at 96. The decisions the dissent relies upon simply do not support this sweeping characterization. See nn 19, 20, and 21, infra.

15. In this case, for example, the court below rested its finding that state law required habilitation in the least restrictive environment on dicta in In re Schmidt, 494 Pa 86, 429 A2d 631 (1981). That decision was not issued until seven years after this suit was filed, and four years after trial ended.

were found not to have improved conditions in a state institution adequately under state law, the dissent's result would be that the State itself has forfeited its constitutionally provided immunity.

[22a, 23a, 24a] The theory is out of touch with reality. The dissent does not dispute that the general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought. See supra, at 101, 79 L Ed 2d, at 79; post, at 146, n 29, 79 L Ed 2d 108-109. According to the dissent, the relief sought and ordered here—which in effect was that a major state institution be closed and smaller state institutions be created and expansively funded—did not operate against the State. This view would make the law a pretense. No other court or judge in the 10-year history of this litigation has advanced this theory. And the dissent's underlying view that the named defendants here were acting beyond and contrary to their authority cannot be reconciled with reality—or with the record. The District Court in this case held that the individual defendants "acted in the utmost good faith . . . *within the sphere of their official responsibilities,*" and therefore were entitled to immunity from damages. 446 F Supp, at 1324 (emphasis added). The named defendants had nothing to gain personally from their conduct; they were not found to have acted willfully or even negligently. See ibid. The court expressly noted that the individual defendants "apparently took every means available to them to reduce the incidents of abuse and injury, but were

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constantly faced with staff shortages." Ibid. It also found "that the individual defendants are dedicated professionals in the field of retardation who were given very little with which to accomplish the habilitation of the retarded at Pennhurst." Ibid.[16]

16. This part of the court's findings and judgment was not appealed. See Halderman v Pennhurst State School & Hospital, 612 F2d, at 90, n 4. See also 446 F Supp, at 1303 ("On the whole, the staff at Pennhurst appears to be dedicated and trying hard to cope with the inadequacies of the institution").

The parties defendant in this suit were not all individuals. They included as well the Pennsylvania Department of Public Welfare, a major department of the State itself; and the Pennhurst State School and Hospital, a state institution. The dissent apparently is arguing that the defendants as a group—including both the state institutions, and state and county officials—were acting ultra vires. Since the institutions were only said to have violated the law through the individual defendants, the District Court's findings, never since questioned by any court, plainly exonerate all the defendants from the dissent's claim that they acted beyond the scope of their authority.

A truth of which the dissent's theoretical argument seems unaware is the plight of many if not most of the mental institutions in our country. As the District Court in this case found: "History is replete with misunderstanding and mistreatment of the retarded." Id., at 1299. Accord, Message from President Kennedy Relative to Mental Illness and Mental Retardation, HR Doc No. 58, 88th Cong, 1st Sess, 13 (1963) ("We as a Nation have long neglected the mentally ill and the mentally retarded"). It is common knowledge that "insane asylums," as they were known until the middle of this century, usually were underfunded and understaffed. It is not easy to persuade competent people to work in these institutions, particularly well-trained professionals. Physical facilities, due to consistent underfunding by state legislatures, have been grossly inadequate—especially in light of advanced knowledge and techniques for the treatment of the mentally ill. See generally id., at 2, 4; The President's Committee on Mental Retardation, MR 68: The Edge of Change 11-13 (1968); President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded 1-57 (R. Kugel & W. Wolfensberger eds 1969); R. Scheerenberger, A History of Mental Retardation 240-243 (1983). Only recently have States commenced to move to correct widespread deplorable conditions. The responsibility, as the District Court recognized

As a result, all the relief ordered by the courts below was institutional and official in character. To the extent

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there was a violation of state law in this case, it is a case of the State itself not fulfilling its legislative promises.[17]

The dissent bases its view on numerous cases from the turn of the century and earlier. These cases do not provide the support the dissent claims to find. Many are simply miscited. For example, with perhaps one exception,[18] none of its Eleventh Amendment cases can be said to hold that injunctive relief could be ordered against state officials for failing to carry out their duties under state statutes.[19] And

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the federal

after a protracted trial, has rested on the *State itself.*

17. **[22b, 23b]** The dissent appears to be confused about our argument here. See post, at 138-139, 79 L Ed 2d, at 103-104. It is of course true, as the dissent says, that the finding below that petitioners acted in good faith and therefore were immune from damages does not affect whether an injunction might be issued against them by a court possessed of jurisdiction. The point is that the courts below did not have jurisdiction because the relief ordered so plainly ran against the State. No one questions that the petitioners in operating Pennhurst were acting in their official capacity. Nor can it be questioned that the judgments under review commanded action that could be taken by petitioners only in their official capacity—and, of course, *only* if the State provided the necessary funding. It is evident that the dissent would vest in federal courts authority, acting solely under *state law*, to ignore the sovereignty of the States that the Eleventh Amendment was adopted to protect. Article III confers no jurisdiction on this Court to strip an explicit Amendment of the Constitution of its substantive meaning.

[24b] Contrary to the dissent's view, see post, at 150, 79 L Ed 2d, at 111, an injunction based on federal law stands on very different footing, particularly in light of the Civil War Amendments. As we have explained, in such cases this Court is vested with the constitutional duty to vindicate "the supreme authority of the United States," Ex parte Young, 209 US, at 123, 160, 52 L Ed 714, 28 S Ct 441 (1908). There is no corresponding mandate to enforce state law.

18. See Rolston v Missouri Fund Commissioners, 120 US 390, 30 L Ed 721, 7 S Ct 599 (1887). In Rolston, however, the state officials were ordered to comply with "a plain ministerial duty," see Great Northern Life Insurance Co. v Read, 322 US, at 51, 88 L Ed 1121, 64 S Ct 873, a far cry from this case, see n 20, infra.

19. The cases are collected in n 50 of the dissent, post, at 165-166, 79 L Ed 2d, at 121. Several of the cases do not rest on an Eleventh Amendment holding at all. For example, federal jurisdiction in fact was held to be *lacking* in Martin v Lankford, 245 US 547, 62 L Ed 464, 38 S Ct 205 (1918), because of lack of diversity. A fair reading of South Carolina v Wesley, 155 US 542, 39 L Ed 254, 15 S Ct 230 (1895), and the cases it cites, makes clear that the ruling there was on the purely procedural point that the party pressing the appeal was not a party to the proceeding. In two other cases the allegation was that a state officer or agency had acted *unconstitutionally*, rather than merely contrary to state law. Atchison, T. & S. F. R. Co. v O'Connor, 223 US 280, 56 L Ed 436, 32 S Ct 216 (1912); Hopkins v Clemson Agricultural College, 221 US 636, 55 L Ed 890, 31 S Ct 654 (1911). In Johnson v Lankford, 245 US 541, 62 L Ed 460, 38 S Ct 203 (1918), the relief sought was not injunctive relief but money damages against the individual officer. See n 21, infra. None of these cases can be said to be overruled by our holding today. As noted infra, at 118, 79 L Ed 2d, at 90, the Greene cases do not discuss the Eleventh Amendment in connection with the state-law claim.

Tindal v Wesley, 167 US 204, 42 L Ed 137, 17 S Ct 770 (1897), and Scully v Bird, 209 US 481, 52 L Ed 899, 28 S Ct 597 (1908), are more closely analogous cases. In both of these old cases, however, the allegation was that the defendants had committed common-law torts, not, as here, that they had failed to carry out affirmative duties assigned to them by statute. See Tindal, supra, at 221, 42 L Ed 137, 17 S Ct 770 (distinguishing suits brought "to enforce the discharge by the defendants of any specific duty enjoined by the State"); Tr of Record in Tindal v Wesley, OT 1896, no. 231, p 3 (complaint alleged that defendants had "wrongfully entered into said premises and ousted the plaintiff . . . to the damage of the plaintiff ten thousand dollars"); Scully, supra, at 483, 52 L Ed 899, 28 S Ct 597 (allegation was that defendant had "injuriously affect[ed] the reputation and sale of [plaintiff's] products"). Tort cases such as these were explicitly overruled in Larson v Domestic & Foreign Commerce Corp. 337 US 682, 93 L Ed 1628, 69 S Ct 1457 (1949). See infra, at 111-114, 79 L Ed 2d, at 86-87.

sovereign immunity cases the dissent relies on as analogy, while far from uniform, make clear that suit may not be predicated on violations of state statutes that command purely discretionary duties.[20] Since it cannot be doubted

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that the statutes at issue here gave petitioners broad discretion in operating Pennhurst, see n 11, supra; see also 446 F Supp, at 1324, the conduct alleged in this case would not be ultra vires even under the standards of the dissent's cases.[21]

20. See, e.g., Philadelphia Co. v Stimson, 223 US 605, 620, 56 L Ed 570, 32 S Ct 340 (1912) ("The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made"); Santa Fe Pacific R. Co. v Fall, 259 US 197, 198–199, 66 L Ed 896, 42 S Ct 466 (1922) (same); see also Kendall v Stokes, 3 How 87, 98, 11 L Ed 506 (1845) ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake"); Noble v Union River Logging R. Co., 147 US 165, 171–172, 37 L Ed 123, 13 S Ct 271 (1893); Belknap v Schild, 161 US 10, 18, 40 L Ed 599, 16 S Ct 443 (1896) (under Eleventh Amendment, injunctive relief is permitted where officer commits a tort that is "contrary to a plain official duty requiring no exercise of discretion"); Wells v Roper, 246 US 335, 338, 62 L Ed 755, 38 S Ct 317 (1918); Larson v Domestic & Foreign Commerce Corp., 337 US, at 695, 93 L Ed 1628, 69 S Ct 1457 (suit challenging "incorrect decision as to law or fact" is barred "if the officer making the decision was empowered to do so"); id., at 715, 93 L Ed 1628, 69 S Ct 1457 (Frankfurter, J., dissenting) (noting that cases involve orders to comply with nondiscretionary duties). The opinions make clear that the question of discretion went to sovereign immunity, and not to the court's mandamus powers generally. See, e. g., Philadelphia Co., supra, at 618–620, 56 L Ed 570, 32 S Ct 340. The rationale appears to be that discretionary duties have a greater impact on the sovereign because they "brin[g] the operation of governmental machinery into play." Larson, supra, at 715, 93 L Ed 1628, 69 S Ct 1457 (Frankfurter, J., dissenting).

21. In any event, as with the Eleventh Amendment cases, see n 19, supra, the dissent also is wrong to say that the federal sovereign immunity cases it cites post, at 166, n 50, 79 L Ed 2d, at 121, are today overruled. Many of them were actions for damages in tort against the individual officer. Little v Barreme, 2 Cranch 170, 2 L Ed 243 (1804); Wise v Withers, 3 Cranch 331, 2 L Ed 457 (1806); Mitchell v Harmony, 13 How 115, 14 L Ed 75 (1852); Bates v Clark, 95 US 204, 24 L Ed 471 (1877); Belknap v Schild, 161 US 10, 40 L Ed 599, 16 S Ct 443 (1896). In Belknap the Court drew a careful distinction between such actions and suits in which the relief would run more directly against the State. Id., at 18, 40 L Ed 599, 16 S Ct 443. The Court disallowed injunctive relief against the officers on this basis. Id., at 23-25, 40 L Ed 599, 16 S Ct 443. Contrary to the view of the dissent, post, at 135, n 10, 79 L Ed 2d, at 101, nothing in our opinion touches these cases. The Court in Larson similarly distinguished between cases seeking money damages against the individual officer in tort, and those seeking injunctive relief against the officer in his official capacity. It held that the latter sought relief against the sovereign, while the former might not. 337 US, at 687–688, and nn 7, 8, 93 L Ed 1628, 69 S Ct 1457.

There is language in other cases that suggests they were actions alleging torts, not statutory violations. See Philadelphia Co. v Stimson, supra, at 623, 56 L Ed 570, 32 S Ct 340; Sloan Shipyards Corp. v United States Shipping Bd. Emergency Fleet Corp., 258 US 549, 568, 66 L Ed 762, 42 S Ct 386 (1922); Land v Dollar, 330 US 731, 736, 91 L Ed 1209, 67 S Ct 1009 (1947). The remainder clearly distinguish cases (like the present one) involving statutes that command discretionary duties. See n 20, supra. In any case, the Court in Larson explicitly limited the precedential value of all of these cases. See Malone v Bowdoin, 369 US 643, 646, and n 6, 8 L Ed 2d 168, 82 S Ct 980 (1962).

Thus, while there is language in the early cases that advances the authority-stripping theory advocated by the dissent, this theory had never been pressed as far as Justice Stevens would do in this case. And when the expansive approach

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of the dissent was advanced, this Court plainly and explicitly rejected it. In Larson v Domestic & Foreign Commerce Corp. 337 US 682, 93 L Ed 1628, 69 S Ct 1457 (1949), the Court was faced with the argument that an allegation that a Government official committed a tort sufficed to distinguish the official from the sovereign. Therefore, the argument went, a suit for an injunction to remedy the injury would not be against the sovereign. The Court rejected the argument, noting that it would make the doctrine of sovereign immunity superfluous. A plaintiff would need only to "claim an invasion of his legal rights" in order to override sovereign immunity. Id., at 693, 93 L Ed 1628, 69 S Ct 1457. In the Court's view, the argument "confuse[d] the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." Id., at 692–693, 93 L Ed 1628, 69 S Ct 1457. The dissent's theory suffers a like confusion.[22] Under the dissent's view, a plaintiff would need only to claim a denial of rights protected or provided by statute in order to override sovereign immunity. Except in rare cases it would make the constitutional doctrine of sovereign immunity a nullity.

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The crucial element of the dissent's theory was also the plaintiff's central contention in Larson. It is that "[a] sovereign, like any other principal, cannot authorize its agent to violate the law," so that when the agent does so he cannot be acting for the sovereign. Post, at 153, 79 L Ed 2d, at 113; see also post, at 142, 148-149, 158, 79 L Ed 2d, at, 105-106, 110, 116; cf. Larson, supra, at 693–694, 93 L Ed 1628, 69 S Ct 1457 ("It is argued . . . that the commission of a tort cannot be authorized by the sovereign. . . . It is on this contention that the respondent's position fundamentally rests . . ."). It is a view of agency law that the Court in Larson explicitly rejected.[23] Larson thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it. 337 US, at 690, 695, 93 L Ed 1628, 69 S Ct 1457.[24] Any resulting disadvantage to the plaintiff was "outweigh[ed]" by "the necessity

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of permitting the Government to carry out its functions unhampered by direct judicial intervention." Id., at 704, 93 L Ed 1628, 69 S Ct 1457. If anything, this public need is even greater when questions of federalism are involved. See supra, at 99-100, 79 L Ed 2d, at 78.[25]

22. In fact, as the dissent itself states, the argument in Larson that an allegation of tortious activity overrides sovereign immunity is essentially the same as the dissent's argument that an allegation of conduct contrary to statute overrides sovereign immunity. See post, at 158, 79 L Ed 2d, at 116. The result in each case—as the Court in Larson recognizes—turns on whether the defendant state official was empowered to do what he did, i. e., whether, even if he acted erroneously, it was action within the scope of his authority. See Larson, 337 US, at 685, 93 L Ed 1628, 69 S Ct 1457 (controversy on merits concerned whether officer had interpreted Government contract correctly); id., at 695, 93 L Ed 1628, 69 S Ct 1457; id., at 716–717, 93 L Ed 1628, 69 S Ct 1457 (Frankfurter, J., dissenting) (in cases alleging a tort, the "official seeks to screen himself behind the sovereign"); id., at 721–722, 93 L Ed 1628, 69 S Ct 1457. What the dissent fails to note is that the Court in Larson explicitly rejected the view that the dissent here also advances, which is "that an officer given the power to make decisions is only given the power to make correct decisions." Id., at 695, 93 L Ed 1628, 69 S Ct 1457. The Court in Larson made crystal clear that an officer might make errors and still be acting within the scope of his authority. Ibid. (There can be no question that the defendants here were "given the power to make decisions" about the operation of Pennhurst. See n 11, supra.) The dissent's view that state officers "have no discretion to commit a tort," post, at 132, n 7, 79 L Ed 2d, at 99, cannot be reconciled with the plain holding of Larson.

23. "It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal." 337 US, at 694, 93 L Ed 1628, 69 S Ct 1457 (footnote omitted).

24. The Larson Court noted that a similar argument "was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected." Ibid. See 10 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4877, p 350 (rev ed 1978) (a corporation is liable for torts committed by its agent within the scope of his authority even though the "act was contrary to or in violation of the instructions or orders given by it to the offending agent"); id., § 4959 (same as to crimes).

The dissent's strained interpretation of Larson, post, at 153-155, 79 L Ed 2d, at 113–114, simply ignores the language that the dissent itself quotes: "It is important to note that in [ultra vires] cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." 337 US, at 689-690, 93 L Ed 1628, 69 S Ct 1457.

25. As we have discussed supra, at 102-103, 79 L Ed 2d, at 80, Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), also shows that the broad ultra vires theory enunciated in Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908), and in some of the cases quoted by the dissent has been discarded. In Edelman, although the state officers were alleged to be acting contrary to law, and therefore should have been "stripped of their authority" under the theory of the dissent, we held the action to be barred by the Eleventh Amendment. The dissent attempts to distinguish Edelman on the ground that the retroactive relief there, unlike injunctive relief, does not run only against the agent. Post, at 146, n 29, 79 L Ed 2d, at 108-109. To say that injunctive relief against state officials acting in their official capacity does not run against the State is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign perhaps, an American State can act only through its officials. It is true that the Court in Edelman recognized that retroactive relief often, or at least sometimes, has a greater impact on the state treasury than does injunctive relief, see 415 US, at 666, n 11, 39 L Ed 2d 662, 94 S Ct 1347, but there was no suggestion that damages alone were thought to run against the State while injunctive relief did not.

We have noted that the authority-stripping theory of Young is a fiction that has been narrowly construed. In this light, it may well be wondered what principled basis there is to the ultra vires doctrine as it was set forth in Larson and Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982). That doctrine excepts from the Eleventh Amendment bar suits against officers acting in their official capacities but without any statutory authority, even though the relief would operate against the State. At bottom, the doctrine is based on the fiction of the Young opinion. The dissent's method is merely to take this fiction to its extreme. While the dissent's result may be logical, in the sense that it is difficult to draw principled lines short of that end, its view would virtually eliminate the constitutional doctrine of sovereign immunity. It is a result from which the Court in Larson wisely recoiled. We do so again today. For present purposes, however, we do no more than question the continued vitality of the ultra vires doctrine in the Eleventh Amendment context. We hold only that to the extent the doctrine is consistent with the analysis of this opinion, it is a very narrow exception that will allow suit only under the standards set forth in n 11, supra.

The dissent in Larson made many of the arguments advanced by Justice Stevens' dissent today, and asserted that many of the same cases were being overruled or ignored.

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See 337 US, at 723–728, 93 L Ed 1628, 69 S Ct 1457 (Frankfurter, J., dissenting). Those arguments were rejected, and the cases supporting them are moribund. Since Larson was decided in 1949,[26] no opinion by any Member of this Court has cited the cases on which the dissent primarily relies for a proposition as broad as the language the dissent quotes. Many if not most of these cases have not been relied upon in an Eleventh Amendment context at all. Those that have been so cited have been relied upon only for propositions with which no one today quarrels.[27] The plain fact is that the dissent's broad theory,

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if it ever was accepted to the full extent to which it is now pressed, has not been the law for at least a generation.

The reason is obvious. Under the dissent's view of the ultra vires doctrine, the Eleventh Amendment would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name, or where he cannot produce some state statute that has been violated to his asserted injury. Thus, the ultra vires doctrine, a narrow and questionable exception, would

26. The dissent appears to believe that Larson is consistent with all prior law. See post, at 153, 79 L Ed 2d, at 113. This view ignores the fact that the Larson Court itself understood that it was required to "resolve [a] conflict in doctrine." 337 US, at 701, 93 L Ed 1628, 69 S Ct 1457. The Court since has recognized that Larson represented a watershed in the law of sovereign immunity. In Malone v Bowdoin, 369 US 643, 8 L Ed 2d 168, 82 S Ct 980 (1962), Justice Stewart's opinion for the Court observed that "to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task." Id., at 646, 8 L Ed 2d 168, 82 S Ct 980. His opinion continued:

"The Court's 1949 Larson decision makes it unnecessary, however, to undertake that task here. For in Larson the Court, aware that it was called upon to 'resolve the conflict in doctrine' . . ., thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents." Ibid.

The Court included many of the cases upon which the dissent relies in its list of cases that were rejected by Larson. See 369 US, at 646, n 6, 8 L Ed 2d 168, 82 S Ct 980.

27. E.g., Rolston v Missouri Fund Commissioners, 120 US 390, 30 L Ed 721, 7 S Ct 599 (1887) (never cited); Scully v Bird, 209 US 481, 52 L Ed 899, 28 S Ct 597 (1908) (never cited); Hopkins v Clemson Agricultural College, 221 US 636, 55 L Ed 890, 31 S Ct 654 (1911) (never cited); Johnson v Lankford, 245 US 541, 62 L Ed 460, 38 S Ct 203 (1918) (never cited); Land v Dollar, 330 US 731, 91 L Ed 1209, 67 S Ct 1009 (1947) (cited only for proposition that judgment that would expend itself on public treasury or interfere with public administration is a suit against the United States); Cunningham v Macon & Brunswick R. Co. 109 US 446, 27 L Ed 992, 3 S Ct 292 (1883) (cited only for proposition that a suit alleging unconstitutional conduct is not barred by the Eleventh Amendment, and that State cannot be sued without its consent); Poindexter v Greenhow, 114 US 270, 29 L Ed 185, 5 S Ct 903 (1885) (unconstitutional-conduct suit is not suit against State); Reagan v Farmers' Loan & Trust Co., 154 US 362, 38 L Ed 1014, 14 S Ct 1047 (1894) (same). Prior to Florida Dept. of State v Treasure Salvors, Inc. supra, Tindal v Wesley, 167 US 204, 42 L Ed 137, 17 S Ct 770 (1897), had been cited only for the proposition that a suit alleging unconstitutional conduct is not barred by the Eleventh Amendment. The plurality opinion in Treasure Salvors discussed Tindal at some length, 458 US, at 685–688, 73 L Ed 2d 1057, 102 S Ct 3304, but noted that the rule of Tindal "was clarified in Larson." 458 US, at 688, 73 L Ed 2d 1057, 102 S Ct 3304; see also id., at 715, n 13, 73 L Ed 2d 1057, 103 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part).

As noted, n 26, supra, some of these cases were also cited—and rejected—in Malone v Bowdoin, supra, at 646, n 6, 8 L Ed 2d 168, 82 S Ct 980.

swallow the general rule that a suit is against the State if the relief will run against it. That result gives the dissent no pause presumably because of its view that the Eleventh Amendment and sovereign immunity "'undoubtedly ru[n] counter to modern democratic notions of the moral responsibility of the State.'" Post, at 164, n 48, 79 L Ed 2d, at 120 (quoting Great Northern Life Insurance Co. v Read, 322 US 47, 59, 88 L Ed 1121, 64 S Ct 873 (1944) (Frankfurter, J., dissenting)). This argument has not been adopted by this Court. See Great Northern Life Insurance Co. v Read, supra, at 51, 88 L Ed 1121, 64 S Ct 873 ("Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution"); Larson, 337 US, at 704, 93 L Ed 1628, 69 S Ct 1457 ("The Government, as representative of the community as a whole, cannot be stopped in its tracks . . ."). Moreover, the argument substantially misses the point with respect to Eleventh Amendment sovereign immunity. As Justice Marshall has observed, the Eleventh Amendment's restriction on the federal judicial power is based in large part on "the problems of federalism inherent in making

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one sovereign appear against its will in the courts of the other." Employees v Missouri Dept. of Public Health and Welfare, 411 US, at 294, 36 L Ed 2d 251, 93 S Ct 1614 (concurring in result). The dissent totally rejects the Eleventh Amendment's basis in federalism.

C

[25] The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself. In reaching a contrary conclusion, the Court of Appeals relied principally on a separate line of cases dealing with pendent jurisdiction. The crucial point for the Court of Appeals was that this Court has granted relief against state officials on the basis of a pendent state-law claim. See 673 F2d, at 657–658. We therefore must consider the relationship between pendent jurisdiction and the Eleventh Amendment.

[26, 27] This Court long has held generally that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. See, e. g., Mine Workers v Gibbs, 383 US 715, 726, 16 L Ed 2d 218, 86 S Ct 1130 (1966); Osborn v Bank of United States, 9 Wheat 738, 819–823, 6 L Ed 204 (1824). The Court also has held that a federal court may resolve a case solely on the basis of a pendent state-law claim, see Siler, 213 US, at 192–193, 53 L Ed 753, 29 S Ct 451 and that in fact the court usually should do so in order to avoid federal constitutional questions, see id., at 193, 53 L Ed 753, 29 S Ct 451; Ashwander v TVA, 297 US 288, 347, 80 L Ed 688, 56 S Ct 466 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the

Court will decide only the latter"). But pendent jurisdiction is a judge-made doctrine inferred from the general language of Art. III. The question presented is whether this doctrine

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may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.

As the Court of Appeals noted, in Siler and subsequent cases concerning pendent jurisdiction, relief was granted against state officials on the basis of state-law claims that were pendent to federal constitutional claims. In none of these cases, however, did the Court so much as mention the Eleventh Amendment in connection with the state-law claim. Rather, the Court appears to have assumed that once jurisdiction was established over the federal-law claim, the doctrine of pendent jurisdiction would establish power to hear the state-law claims as well. The Court has not addressed whether that doctrine has a different scope when applied to suits against the State. This is illustrated by Greene v Louisville & Interurban R. Co. 244 US 499, 61 L Ed 1280, 37 S Ct 673 (1917), in which the plaintiff railroads sued state officials, alleging that certain tax assessments were excessive under the Fourteenth Amendment. The Court first rejected the officials' argument that the Eleventh Amendment barred the federal constitutional claim. It held that Ex parte Young applied to all allegations challenging the constitutionality of official action, regardless of whether the state statute under which the officials purported to act was constitutional or unconstitutional. See 244 US, at 507, 61 L Ed 1280, 37 S Ct 673. Having determined that the Eleventh Amendment did not deprive the federal court of jurisdiction over the Fourteenth Amendment question, the Court declared that the court's jurisdiction extended "to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." Id., at 508, 61 L Ed 1280, 37 S Ct 673. The case then was decided solely on state-law grounds. Accord, Louisville & Nashville R. Co. v Greene, 244 US 522, 61 L Ed 1291, 37 S Ct 683 (1917).[28]

28. The case was argued in the same way. The Eleventh Amendment argument in the briefs is confined to the federal constitutional claims. See, e. g., Brief for Louisville & Nashville R. Co., OT 1916, Nos. 778, 779, pp 15–38 (jurisdiction over federal claims); id., at 38–39 (pendent jurisdiction over state claims). Indeed the State's brief somewhat curiously closes with a concession that the federal courts had jurisdiction. Brief for State Board and Officers, OT, 1916, Nos. 778, 779, p 139; see Reply Brief, OT 1916, Nos. 778, 779, p 2 (pointing out concession). Thus, while the State's position on the Court's jurisdiction over the federal claims is somewhat unclear, the State never argued that there might not be jurisdiction over the local-law claims if the Court found jurisdiction over the federal question in the case.

Nor do any of the other pendent-jurisdiction cases cited in Justice Stevens' dissent, post, at 166, n 52, 79 L Ed 2d, at 121, discuss the Eleventh Amendment in connection with the state-law claims. Moreover, since Larson was decided in 1949, making clear that mere violations of state law would not override the Eleventh Amendment, these cases have been cited only for the proposition that, as a general matter, a federal court should decide a case on state-law grounds where possible to avoid a federal constitutional question. Nothing in our decision is meant to cast doubt on the desirability of applying the Siler principle in cases where the federal court has jurisdiction to decide the state-law issues.

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[28] These cases thus did not directly confront the question before us. "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." Hagans v Lavine, 415 US 528, 533, n 5, 39 L Ed 577, 94 S Ct 1372 (1974).[29] We therefore view the question as an open one.

[29–32] As noted, the 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 of the judicial power of the United States." Missouri v Fiske, 290 US, at 25, 78 L Ed 145, 54 S Ct 18. It deprives a federal court of power to decide certain claims against States that otherwise would be within the

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scope of Art III's grant of jurisdiction. For example, if a lawsuit against state officials under 42 USC § 1983 [42 USCS § 1983] alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution. See Quern v Jordan, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979). Similarly, if a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting any relief on that claim. See Alabama v Pugh, 438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057 (1978) (per curiam). The Amendment thus is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts.[30]

[33] This constitutional bar applies to pendent claims as well. As noted above, pendent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Art III language conferring power to hear all "cases" arising under federal law or between diverse parties. See Mine Workers v Gibbs, 383 US, at 725, 16 L Ed 2d 218, 86 S Ct 1130. See also Hagans v Lavine, supra, at 545, 39 L Ed 2d 577, 94 S Ct 1372 (terming pendent jurisdiction "a doctrine of discretion"). The Eleventh Amendment should not be construed to apply with less force to this implied form of jurisdiction than it does to the explicitly granted power to hear federal claims. The history of the adoption and development of the Amendment, see supra, at 94-100, 79 L Ed 2d, at 76-78, confirms that it is an independent limitation on all exercises of Art III power: "the entire judicial power

29. See Edelman v Jordan, 415 US, at 671, 39 L Ed 2d 662, 94 S Ct 1347 ("Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of [certain prior] cases to the extent that they are inconsistent with our holding today").

30. See, e. g., Monaco v Mississippi, 292 US, at 322, 78 L Ed 1282, 54 S Ct 745 ("[A]lthough a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens"); Missouri v Fiske, 290 US 18, 25–26, 78 L Ed 145, 54 S Ct 18 (1933).

granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given," Ex parte State of New York, 256 US, at 497, 65 L Ed 1057, 41 S Ct 588. If we were to hold otherwise, a federal court could award damages against a State on the basis of a pendent claim. Our decision in

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Edelman v Jordan, makes clear that pendent jurisdiction does not permit such an evasion of the immunity guaranteed by the Eleventh Amendment. We there held that "the District Court was correct in exercising pendent jurisdiction over [plaintiffs'] statutory claim," 415 US, at 653, n 1, 39 L Ed 2d 662, 94 S Ct 1347, but then concluded that the Eleventh Amendment barred an award of retroactive relief on the basis of that pendent claim. Id., at 678, 39 L Ed 2d 662, 94 S Ct 1347.

[34] In sum, contrary to the view implicit in decisions such as Greene v Louisville & Interurban, R. Co., 244 US 499, 61 L Ed 1280, 37 S Ct 673 (1917), neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.[31] A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See supra, at 106, 79 L Ed 2d, at 82. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

D

Respondents urge that application of the Eleventh Amendment to pendent state-law claims will have a disruptive effect on litigation against state officials. They argue that the "considerations of judicial economy, convenience, and fairness to litigants" that underlie pendent jurisdiction, see Gibbs, supra, at 726, 16 L Ed 2d 218, 86 S Ct 1130, counsel against a result that may cause litigants to split causes of action between state and federal courts. They also contend that the policy of avoiding unnecessary constitutional decisions will be contravened if plaintiffs choose to forgo their state-law claims and sue only in federal court or, alternatively, that the policy of Ex parte Young

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will be hindered if plaintiffs choose to forgo their right to a federal forum and bring all of their claims in state court.

[35, 36] It may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims. That is not uncommon in this area. Under Edelman v Jordan, supra, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court. Challenges to the validity of state tax systems under 42 USC § 1983 [42 USCS § 1983] also must be brought in state court. Fair Assessment in Real Estate Assn., Inc. v McNary, 454 US 100, 70 L Ed 2d 271, 102 S Ct 177 (1981). Under the abstention doctrine, unclear issues of state law commonly are split

31. See Missouri v Fiske, supra, at 27, 78 L Ed 145, 54 S Ct 18 ("This is not less a suit against the State because the bill is ancillary and supplemental").

off and referred to the state courts.[32]

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In any case, the answer to respondents' assertions is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. See Missouri v Fiske, 290 US, at 25–26, 78 L Ed 145, 54 S Ct 18 ("Considerations of convenience open no avenue of escape from the [Amendment's] restriction").[33] 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." Employees v Missouri Dept. of Public Health and Welfare, 411 US, at 298, 36 L Ed 2d 251, 93 S Ct 1614 (Marshall, J., concurring in result).

IV

[37] 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. Even assuming that these officials are not immune from suit challenging their actions under the MH/MR Act,[34] it

32. Moreover, allowing claims against state officials based on state law to be brought in the federal courts does not necessarily foster the policies of "judicial economy, convenience and fairness to litigants." Mine Workers v Gibbs, 383 US 715, 726, 16 L Ed 2d 218, 86 S Ct 1130 (1966), on which pendent jurisdiction is founded. For example, when a federal decision on state law is obtained, the federal court's construction often is uncertain and ephemeral. In cases of ongoing oversight of a state program that may extend over years, as in this case, the federal intrusion is likely to be extensive. Duplication of effort, inconvenience, and uncertainty may well result. See, e.g., Burford v Sun Oil Co. 319 US 315, 327, 87 L Ed 1424, 63 S Ct 1098 (1943) ("Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double [i. e., federal-state] system of review"). This case is an example. Here, the federal courts effectively have been undertaking to operate a major state institution based on inferences drawn from dicta in a state-court opinion not decided until four years after the suit was begun. The state court has had no opportunity to review the federal courts' construction of its opinion, or their choice of remedies. The only sure escape from an erroneous interpretation of state law is presumably the rather cumbersome route of legislation.

Waste and delay may also result from abstention, which often is called for when state law is unclear, see Baggett v Bullitt, 377 US 360, 378–379, 12 L Ed 2d 377, 84 S Ct 1316 (1964) ("abstention operates to require piecemeal adjudication in many courts, thereby delaying ultimate adjudication on the merits for an undue length of time") (citations omitted), or from dismissals on the basis of comity, which has special force when relief is sought on state-law grounds, see Gibbs, supra, at 726, 16 L Ed 2d 218, 86 S Ct 1130; Hawks v Hamill, 288 US 52, 61, 77 L Ed 610, 53 S Ct 240 (1933).

33. Cf. Aldinger v Howard, 427 US 1, 14–15, 49 L Ed 2d 276, 96 S Ct 2413 (1976) (Although "considerations of judicial economy" would be served by permitting pendent-party jurisdiction, "the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress").

34. We have held that the Eleventh Amendment does not apply to "counties and similar municipal corporations." Mt. Healthy City Bd. of Ed. v Doyle, 429 US 274, 280, 50 L Ed 2d 471, 97 S Ct 568 (1977); see Lincoln County v Luning, 133 US 529, 530, 33 L Ed 766, 10 S Ct 363 (1890). At the same time, we have applied the Amendment to bar relief against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." Lake Country Estates, Inc. v Tahoe Regional Planning Agency, 440 US 391, 401, 59 L Ed 2d 401, 99 S Ct 1171 (1979). See, e.g., Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974) (Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits). The Courts of Appeals are in general agreement that a suit against officials of a county or other governmental entity is barred if the relief obtained

is clear

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that without the injunction against the state institutions and officials in this case, an order entered on state-law grounds necessarily would be limited. The relief substantially concerns Pennhurst, an arm of the State that is operated by state officials. Moreover, funding for the county mental retardation programs comes almost entirely from the State, see Pa Stat Ann, Tit 50, §§ 4507–4509 (Purdon 1969 and Supp 1983-1984), and the costs of the Masters have been borne by the State, see 446 F Supp, at 1327. Finally, the MH/MR Act contemplates that the state and county officials will cooperate in operating mental retardation programs. See In re Schmidt, 494 Pa, at 95–96, 429 A2d, at 635–636. In short, the present judgment could not be sustained on the basis of the state-law obligations of petitioner county officials. Indeed, any relief granted against the county officials on the basis of the state statute would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction.

V

[1c] The Court of Appeals upheld the judgment of the District Court solely on the basis of Pennsylvania's MH/MR Act. We hold that these federal courts lacked jurisdiction to enjoin petitioner state institutions and state officials on the basis of

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this state law. The District Court also rested its decision on the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973. See supra, at 93, 79 L Ed 2d, at 73-74. On remand the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases.[35] The court also may consider whether relief may be granted to respondents under the Developmentally Disabled Assistance and Bill of Rights Act, 42 USC §§ 6011, 6063 (1976 ed and Supp V) [42 USCS §§ 6011, 6063]. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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runs against the State. See, e.g., Moore v Tangipahoa Parish School Board, 594 F2d 489, 493 (CA5 1979); Carey v Quern, 588 F2d 230, 233–234 (CA7 1978); Incarcerated Men of Allen County Jail v Fair, 507 F2d 281, 287–288 (CA6 1974); Harris v Tooele County School District, 471 F2d 218, 220 (CA10 1973). Given that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials, when exercising their functions under the MH MR Act, effectively runs against the State. Cf. Farr v Chesney, 441 F Supp 127, 130–132 (MD Pa 1978) (holding that Pennsylvania county commissioners, acting as members of the board of the county office of mental health and retardation, may not be sued for backpay under the Eleventh Amendment). We need not decide this issue in light of our disposition above.

35. On the Fourteenth Amendment issue, the court should consider Youngberg v Romeo, 457 US 307, 73 L Ed 2d 28, 102 S Ct 2452 (1982), a decision that was not available when the District Court issued its decision.

Justice **Brennan**, dissenting.

I fully agree with Justice Stevens' dissent. Nevertheless, I write separately to explain that in view of my continued belief that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," Yeomans v Kentucky, 423 US 983, 984, 46 L Ed 2d 309, 96 S Ct 404 (1975) (Brennan, J., dissenting), I would hold that petitioners are not entitled to invoke the protections of that Amendment in this federal-court suit by citizens of Pennsylvania. See Employees v Missouri Dept. of of Public Health and Welfare, 411 US 279, 298, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Brennan, J., dissenting); Edelman v Jordan, 415 US 651, 687, 39 L Ed 2d 662, 94 S Ct 1347 (1974) (Brennan, J., dissenting). In my view, Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), upon which the Court today relies, ante, at 98, 79 L Ed 2d, at 76-77, recognized that the Eleventh Amendment, by its terms, erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a *nonconstitutional* immunity from suit by its own citizens." Employees v Missouri Dept. of Public

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Health and Welfare, supra, at 313, 36 L Ed 2d 251, 93 S Ct 1614 (Brennan, J., dissenting) (emphasis added). For scholarly discussions supporting this view, see Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum L Rev 1889, 1893–1894 (1983); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U Pa L Rev 515, 538–540, and n 88 (1978). To the extent that such nonconstitutional sovereign immunity may apply to petitioners, I agree with Justice Stevens that since petitioners' conduct was prohibited by state law, the protections of sovereign immunity do not extend to them.

Justice **Stevens**, with whom Justice **Brennan**, Justice **Marshall**, and Justice **Blackmun** join, dissenting.

This case has illuminated the character of an institution. The record demonstrates that the Pennhurst State School and Hospital has been operated in violation of state law. In 1977, after three years of litigation, the District Court entered detailed findings of fact that abundantly support that conclusion. In 1981, after four more years of litigation, this Court ordered the United States Court of Appeals for the Third Circuit to decide whether the law of Pennsylvania provides an independent and adequate ground which can support the District Court's remedial order. The Court of Appeals, sitting en banc, unanimously concluded that it did. This Court does not disagree with that conclusion. Rather, it reverses the Court of Appeals because it did precisely what this Court ordered it to do; the only error committed by the Court of Appeals was its faithful obedience to this Court's command.

This remarkable result is the product of an equally remarkable misapplication of the ancient doctrine of sovereign immunity. In a completely unprecedented holding, today the Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania

itself has prohibited. No rational view of the sovereign immunity of the States supports this result. To the

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contrary, the question whether a federal court may award injunctive relief on the basis of state law has been answered affirmatively by this Court many times in the past. Yet the Court repudiates at least 28 cases, spanning well over a century of this Court's jurisprudence, proclaiming instead that federal courts have no power to enforce the will of the States by enjoining conduct because it violates state law. This new pronouncement will require the federal courts to decide federal constitutional questions despite the availability of state-law grounds for decision, a result inimical to sound principles of judicial restraint. Nothing in the Eleventh Amendment, the conception of state sovereignty it embodies, or the history of this institution, requires or justifies such a perverse result.

I

The conduct of petitioners that the Court attributes to the State of Pennsylvania in order to find it protected by the Eleventh Amendment is described in detail in the District Court's findings. As noted in our prior opinion, Pennhurst State School & Hospital v Halderman, 451 US 1, 67 L Ed 2d 694, 101 S Ct 1531 (1981), and by the majority today, ante, at 92-93, 79 L Ed 2d, at 73 those findings were undisputed: "Conditions 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. Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst." 451 US, at 7, 67 L Ed 2d 694, 101 S Ct 1531 (footnote omitted). The court concluded that Pennhurst was actually hazardous to its residents.[1] Organized programs of training or education

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were inadequate or entirely unavailable, and programs of treatment or training were not developed for residents. When they visited Pennhurst, shocked parents of residents would find their children bruised, drugged, and unattended. These conditions often led to a deterioration in the condition of the residents after being placed in Pennhurst. Terri Lee Halderman, for example, was learning to talk when she entered Pennhurst; after residing there she lost her verbal skills. At every stage of this litigation, petitioners have conceded that Pennhurst fails to provide even minimally adequate habilitation for its residents. See Halderman v Pennhurst State School & Hospital, 612 F2d 84, 92-94 (CA3 1979) (en banc); 446 F Supp 1295, 1304 (ED Pa 1977).

The District Court held that these conditions violated each resident's rights under the Due Process and Equal Protection Clauses of the

1. Infectious diseases were common and minimally adequate health care was unavailable. Residents of Pennhurst were inadequately supervised, and as a consequence were often injured by other residents or as a result of self-abuse. Assaults on residents by staff members, including sexual assaults, were frequent. Physical restraints were employed in lieu of adequate staffing, often causing injury to residents, and on one occasion leading to a death. Dangerous psychotropic drugs were indiscriminately used for purposes of behavior control and staff convenience. Staff supervision during meals was minimal, and residents often stole food from each other—leaving some without enough to eat. The unsafe conditions led to aggressive behavior on the part of residents which was punished by solitary confinement. There was often urine and excrement on the walls.

Fourteenth Amendment, § 504 of the Rehabilitation Act of 1973, 87 Stat 394, 29 USC § 794 [29 USCS § 794], and the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa Stat Ann, Tit 50, §§ 4101–4704 (Purdon 1969 and Supp 1983-1984) (MH/MR Act). The en banc Court of Appeals for the Third Circuit affirmed most of the District Court's judgment, but it grounded its decision solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 USC § 6010 [42 USCS § 6010]. The court did not consider the constitutional issues or § 504 of the Rehabilitation Act. While it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation, the court did not decide whether that state right justified all of the relief granted by the District Court.

Petitioners sought review by this Court, asserting that the Court of Appeals had erred in its construction of both federal and state statutes. This Court granted certiorari and reversed,

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451 US 1, 67 L Ed 2d 694, 101 S Ct 1531 (1981), holding that 42 USC § 6010 [42 USCS § 6010] created no substantive rights. We did not accept respondents' state-law contention, because there was a possibility that the Court of Appeals' analysis of the state statute had been influenced by its erroneous reading of federal law. Concluding that it was "unclear whether state law provides an independent and adequate ground which can support the court's remedial order," 451 US, at 31, 67 L Ed 2d 694, 101 S Ct 1531, we "remand[ed] the state-law issue for reconsideration in light of our decision here." Ibid. In a footnote we declined to consider the effect of the Pennsylvania Supreme Court's then recent decision, In re Schmidt, 494 Pa 86, 429 A2d 631 (1981), on the state-law issues in the case, expressly stating that on remand the Court of Appeals could "consider the state-law issues in light of the Pennsylvania Supreme Court's recent decision." 451 US, at 31, n 24, 67 L Ed 2d 694, 101 S Ct 1531.

On remand, 673 F2d 647 (CA3 1982) (en banc), the Court of Appeals, noting that this Court had remanded for reconsideration of the state-law issue, examined the impact of Schmidt.[2] According to the Court of Appeals, which was unanimous on this point, the State Supreme Court had "spoken definitively" on the duties of the State under the MH/MR Act, holding that the State was required to provide care to the mentally retarded in the "least restrictive environment." 673 F2d, at 651. Since the MH/MR Act fully justified the relief issued in the Court of Appeals' prior judgment, the court reinstated its prior judgment on the basis of petitioner's violation of state law.[3]

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Thus, the District Court found

2. In the questions raised in their petition for certiorari, petitioners do not ask this Court to reexamine the Court of Appeals' conclusion that respondents are clearly entitled to relief under state law. Nor would it be appropriate for this Court to reexamine the unanimous conclusion of the en banc Court of Appeals on a question of state law. See, e.g., Bishop v Wood, 426 US 341, 345-346, 48 L Ed 2d 684, 96 S Ct 2074 (1976).

3. The court therefore found it unnecessary to decide if respondents were also entitled to relief under the federal statutory and constitutional provisions which had been raised in the District Court.

that petitioners have been operating the Pennhurst facility in a way that is forbidden by state law, by federal statute, and by the Federal Constitution. The en banc Court of Appeals for the Third Circuit unanimously concluded that state law provided a clear and adequate basis for upholding the District Court and that it was not necessary to address the federal questions decided by that court. That action conformed precisely to the directive issued by this Court when the case was here before. Petitioners urge this Court to make an unprecedented about-face, and to hold that the Eleventh Amendment prohibited the Court of Appeals from doing what this Court ordered it to do when we instructed it to decide whether respondents were entitled to relief under state law. Of course, if petitioners are correct, then error was committed not by the Court of Appeals, which after all merely obeyed the instruction of this Court, but rather by this Court in 1981 when we ordered the Court of Appeals to consider the state-law issues in the case.

Petitioners' position is utterly without support. The Eleventh Amendment and the doctrine of sovereign immunity it embodies have never been interpreted to deprive a court of jurisdiction to grant relief against government officials who are engaged in conduct that is forbidden by their sovereign. On the contrary, this Court has repeatedly and consistently exercised the power to enjoin state officials from violating state law.[4]

II

The majority proceeds as if this Court has not had previous occasion to consider the Eleventh Amendment argument made by petitioners, and contends that Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908), has no application to a suit seeking injunctive relief on the basis of state law. That is simply not the case. The Court rejected the argument that the Eleventh

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Amendment precludes injunctive relief on the basis of state law twice only two Terms ago. In Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982), four Justices concluded that a suit for possession of property in the hands of state officials was not barred by the Eleventh Amendment inasmuch as the State did not have even a colorable claim to the property under state law. See id, at 696–697, 73 L Ed 2d 1057, 102 S Ct 3304 (opinion of Stevens, J, joined by Burger, C. J., and Marshall and Blackmun, JJ.). Four additional Justices accepted the proposition that if the state officers' conduct had been in violation of a state statute, the Eleventh Amendment would not bar the action. Id, at 714, 73 L Ed 2d 1057, 102 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part, joined by Powell, Rehnquist, and O'Connor, JJ.).[5] And in just one short paragraph in Cory v White, 457 US 85, 72 L Ed 2d 694, 102 S Ct 2325 (1982), the Court thrice restated the settled rule that the Eleventh Amendment does not bar suits against state officers when they are "alleged to be acting against federal or state law."[6] These

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are only the two most recent in an extraordinarily long line of cases.

By 1908, it was firmly established that conduct of state officials under color of office that is tortious as a matter of state law is not protected by the Eleventh Amendment. See Reagan v Farmers' Loan & Trust Co., 154 US 362, 390–391, 38 L Ed 1014, 14 S Ct 1047 (1894); Poindexter v Greenhow, 114 US 270, 287, 29 L Ed 185, 5 S Ct 903 (1885); Cunningham v Macon & Brunswick R. Co., 109 US 446, 452, 27 L Ed 992, 3 S Ct 292 (1883).[7] Cf. Belknap v Schild, 161 US 10, 18, 40 L Ed 599, 16 S Ct 443 (1896) (same rule adopted for sovereign immunity of the United States); Stanley v Schwalby, 147 US 508, 518–519, 37 L Ed 259, 13 S Ct 418 (1893) (same).[8] In Hopkins v Clemson

4. Although the Court struggles mightily to distinguish some of the cases that foreclose its holding today, see ante, at 106-116, 79 L Ed 2d, at 83-88, this vain effort merely brings into stark relief the total absence of any affirmative support for its holding.

5. "Larson v Domestic & Foreign Commerce Corp., 337 US 682, 93 L Ed 1628, 69 S Ct 1457 (1949), established that where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions." 458 US, at 714, 73 L Ed 2d 1057, 102 S Ct 3304.

6. "Neither did Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), deal with a suit naming a state officer as defendant, but not *alleging a violation of either federal or state law*. Thus, there was no occasion in the opinion to cite or discuss the unanimous opinion in Worcester County Trust Co. v Riley, 302 US 292, 82 L Ed 268, 58 S Ct 185 (1937), that the Eleventh Amendment bars suits against state officers unless they are alleged to be acting contrary to federal law or against the authority of state law. Edelman did not hold that suits against state officers who are *not alleged to be acting against federal or state law* are permissible under the Eleventh Amendment if only prospective relief is sought." 457 US, at 91, 72 L Ed 2d 694, 102 S Ct 2325 (emphasis supplied).

See also Worcester County Trust Co. v Riley, 302 US 292, 297, 82 L Ed 268, 58 S Ct 185 (1937) (citations omitted) ("[G]enerally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States. The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer"). In Worcester the Court held a suit barred by the Eleventh Amendment only after stating: "Hence, it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States." Id, at 299, 82 L Ed 268, 58 S Ct 185.

7. The Court explained that the state officer sued in tort "is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." Cunningham, 109 US, at 452, 27 L Ed 992, 3 S Ct 292 quoted in Poindexter, 114 US, at 287, 29 L Ed 185, 5 S Ct 903. Today's majority notes that these cases involve nondiscretionary duties of governmental officers, ante, at 109-110, 79 L Ed 2d, at 84-85, but overlooks the reason for this characterization—officers have no discretion to commit a tort. The same is true of the Court's treatment of the federal sovereign immunity cases I discuss below.

8. See also Butz v Economou, 438 US 478, 489–490, 57 L Ed 2d 895, 98 S Ct 2894 (1978) (officers of the United States are liable for their torts unless the torts are authorized by federal law); Philadelphia Co. v Stimson, 223 US 605, 619–620, 56 L Ed 570, 32 S Ct 340 (1912) (officers of the United States may be enjoined where they wrongfully interfere with property rights). Justice Holmes had occasion to state that sovereign immunity does not generally extend to the acts of an officer of the sovereign. "In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name." Sloan Shipyards Corp. v United States Shipping Bd. Emergency Fleet Corp., 258 US 549, 568, 66 L Ed 762, 42 S Ct 386 (1922). He characterized petitioner's argument in that case—that sovereign immunity should extend to the unlawful acts of agents of the United States acting within the scope of their authority—as "a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. . . . An instrumentality of

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US 636, 55 L Ed 890, 31 S Ct 654 (1911), the Court explained the relationship of these cases to the doctrine of sovereign immunity.

"[I]mmunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. . . .

". . . Besides, neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury." Id, at 642–643, 55 L Ed 890, 31 S Ct 654.[9]

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The principles that were decisive in these cases are not confined to actions under state tort law. They also apply to claims that state officers have violated state statutes. In Johnson v Lankford, 245 US 541, 62 L Ed 460, 38 S Ct 203 (1918), the Court reversed the dismissal of an action against the bank commissioner of Oklahoma and his surety to recover damages for the loss of plaintiff's bank deposit, allegedly caused by the commissioner's failure to safeguard the business and assets of the bank in negligent or willful disregard of his duties under applicable state statutes. The Court explained that the action was not one against the State.

"To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment. Surely an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both." Id, at 545, 62 L Ed 460, 38 S Ct 203.

Similarly, in Rolston v Missouri Fund Commissioners, 120 US 390, 30 L Ed 721, 7 S Ct 599 (1887), the Court rejected the argument that a suit to enjoin a state officer to comply with state law violated the Eleventh Amendment. The Court wrote: "Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state." Id, at 411, 30 L Ed 721, 7 S Ct 599.[10]

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Significantly, this rule was expressly reaffirmed in a case decided by this Court in the same Term as Ex parte Young and published in the same volume of the United States Reports.

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The appellant in Scully v Bird, 209 US 481, 52 L Ed 899, 28 S Ct 597 (1908), brought a diversity suit seeking injunctive relief against the dairy and food commissioner of the State of Michigan, on the ground that "under cover of his office" he had maliciously engaged in a course of conduct designed to ruin plaintiff's business in the State. The Circuit Court dis-

government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." Id, at 566–567, 66 L Ed 762, 42 S Ct 386. See also Brady v Roosevelt S.S. Co., 317 US 575, 87 L Ed 471, 63 S Ct 425 (1943) (following Sloan).

9. The Court also stated:

"Corporate agents or individual officers of the State stand in no better position than officers of the General Government, and as to them it has often been held that: 'The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded or injured, *even by authority of the United States.*' Belknap v Schild, 161 US 10, 18, 40 L Ed 599, 16 S Ct 443." 221 US, at 645, 55 L Ed 890, 31 S Ct 654 (emphasis supplied).

The language I have quoted in the text makes it clear that the Court is incorrect to suggest ante, at 109-110, n 19, 79 L Ed 2d, at 84-85, that Clemson dealt only with unconstitutional conduct and not with conduct in violation of state tort law. See also Old Colony Trust Co. v Seattle, 271 US 426, 431, 70 L Ed 1019, 46 S Ct 552 (1926) (reaffirming the rationale of Clemson in an action against city and county officials).

10. In Reagan v Farmers' Loan & Trust Co., 154 US 362, 38 L Ed 1015, 14 S Ct 1047 (1894), the Court held that the Eleventh Amendment does not bar a suit alleging that a state officer has wrongfully administered a state statute. The Court awarded injunctive relief against state officers on the basis of both state and federal law. In Atchison, T. & S. F. R. Co. v O'Connor, 223 US 280, 56 L Ed 436, 32 S Ct 216 (1912), the Court held that a suit against state officers seeking recovery of taxes paid under duress was not against the State since a state statute required the recovery of wrongfully paid taxes. See id, at 287, 56 L Ed 436, 32 S Ct 216. In Lankford v Platte Iron Works Co., 235 US 461, 59 L Ed 316, 35 S Ct 173 (1915), the Court assumed that the Eleventh Amendment would not bar a suit "to compel submission by the officers of the State to the laws of the State, accomplishing at once the policy of the law and its specific purpose," id, at 471, 59 L Ed 316, 35 S Ct 173, but rejected the appellees' construction of the state statute. See also Farish v State Banking Board of Okla., 235 US 498, 59 L Ed 330, 35 S Ct 185 (1915); American Water Softener Co. v Lankford, 235 US 496, 59 L Ed 329, 35 S Ct 184 (1915). In Martin v Lankford, 245 US 547, 62 L Ed 464, 38 S Ct 205 (1918), the Court stated that the case was not barred by the Eleventh Amendment since the claim "is based, as we have seen, upon the tortious conduct of Lankford, not in exertion of the state law but in violation of it. The reasoning of [Johnson v Lankford, 245 US 541, 62 L Ed 460, 38 S Ct 203 (1918)] is therefore applicable and the conclusion must be the same, that is, the action is not one against the State, and the District Court erred in dismissing it for want of jurisdiction on that ground." Id, at 551, 62 L Ed 464, 38 S Ct 205. While it is true, as the Court points out ante, at 109, n 19, 79 L Ed 2d, at 84 that the Martin Court went on to hold that there was no federal diversity jurisdiction over the case, it cannot be denied that the majority today repudiates the reasoning of Martin. As for the Court's treatment of Johnson v Lankford and O'Connor, ante, 109-110, n 19, 79 L Ed 2d, at 84-85, it is true that Johnson sought only damages, but the holding of that case, that the action was not barred by the Constitution since it alleged conduct in violation of state law, is utterly at odds with the Court's decision today. Surely the Court cannot mean to rely on a distinction between damages and injunctive relief, for it states: "A federal court's grant of relief against state officers on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. . . . We conclude that Young and Edelman are inapplicable in a suit against state officials on the basis of state law." Ante, at 106, 79 L Ed 2d at 82. Awarding damages for a violation of state law by state officers acting within their authority is inconsistent with the majority's position that only a need to vindicate federal law justifies the lifting of the Eleventh Amendment bar. If an order to pay damages for wrongful conduct against a state officer is not against the State for purposes of the Eleventh Amendment, an additional order in the form of an injunction telling the officer not to do it again is no more against the State. It cannot be doubted that today's decision overrules Johnson. Finally, as for O'Connor, while it involved an allegation of unconstitutional action, that allegation was insufficient to lift the bar of the Eleventh Amendment because the complaint sought retroactive relief. It was the fact that relief was authorized by state law that defeated the Eleventh Amendment claim in O'Connor. See 223 US, at 297, 56 L Ed 436, 32 S Ct 216.

missed the complaint on Eleventh Amendment grounds. On appeal, the plaintiff contended that the Eleventh Amendment "does not apply where a suit is brought against defendants who, claiming to act as officers of the State, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, acts of wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff." Ibid. This Court agreed. It noted that the complaint alleged action "in dereliction of duties enjoined by the statutes of the State," and concluded that it was "manifest from this summary of the allegations of the bill that this is not a suit against the State." Id, at 490, 52 L Ed 899, 28 S Ct 597.[11]

Finally, in Greene v Louisville & Interurban R. Co., 244 US 499, 61 L Ed 1280, 37 S Ct 673 (1917), and its companion cases, Louisville & Nashville R. Co. v Greene, 244 US 522, 61 L Ed 1291, 37 S Ct 683 (1917); Illinois Central R. Co. v Greene, 244 US 555, 61 L Ed 1309, 37 S Ct 697 (1917), the plaintiffs challenged the conduct of state officials under both federal and state law. The Court, citing, inter alia, Young and Clemson, held that the Eleventh Amendment did not bar injunctive relief on the basis of state law, noting that the plaintiffs' federal claim was sufficiently substantial to justify the exercise

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of pendent jurisdiction over plaintiffs' state-law claims,[12] and that since violations of federal and state law had been alleged, it was appropriate for the federal court to issue injunctive relief on the basis of state law without reaching the federal claims, despite the strictures of the Eleventh Amendment. In short, the Greene Court approved of precisely the methodology employed by the Court of Appeals in this case.[13]

11. Cases construing the sovereign immunity of the Federal Government also hold that conduct by federal officers forbidden by statute is not shielded by sovereign immunity even though the officer is not acting completely beyond his authority. See Land v Dollar, 330 US 731, 91 L Ed 1209, 67 S Ct 1009 (1947); Ickes v Fox, 300 US 82, 81 L Ed 525, 57 S Ct 412 (1937); Work v Louisiana, 269 US 250, 70 L Ed 259, 46 S Ct 92 (1925); Santa Fe Pacific R. Co. v Fall, 259 US 197, 66 L Ed 896, 42 S Ct 466 (1922); Payne v Central Pacific R. Co., 255 US 228, 65 L Ed 598, 41 S Ct 314 (1921); Waite v Macy, 246 US 606, 62 L Ed 892, 38 S Ct 395 (1918).

12. The Court cited Siler v Louisville & Nashville R. Co., 213 US 175, 53 L Ed 753, 29 S Ct 451 (1909), which will be discussed in Part IV, infra, in support of this proposition.

13. The unanimous rejection of the argument that the Eleventh Amendment bars claims based on state officers' violations of federal statutes in Ray v Atlantic Richfield Co., 435 US 151, 156, n 6, 55 L Ed 2d 179, 98 S Ct 988 (1978), is entirely consistent with my analysis of our cases. But under the majority's view, it represented a rather dramatic extension of Ex parte Young to encompass federal statutory claims as well as constitutional claims. Ray demonstrates that it cannot be maintained that Young and the other cases of this Court permit injunctive relief only when the constitutionality of state officers' conduct is at issue. If that were so Ray would be wrongly decided—an argument that a state officer has violated a federal statute does not constitute a challenge to the constitutionality of the officer's conduct. Chapman v Houston Welfare Rights Org., 441 US 600, 612–615, 60 L Ed 2d 508, 99 S Ct 1905 (1979); Swift & Co. v Wickham, 382 US 111, 15 L Ed 2d 194, 86 S Ct 258 (1965). In my view, the Eleventh Amendment claim in Ray deserved no more than the cursory footnote it received, since the state officials had engaged in conduct forbidden by statute. If the Court were willing to adhere to settled rules of law today, the Eleventh Amendment claim could be rejected just as summarily.

None of these cases contain only "implicit" or sub silentio holdings; all of them explicitly consider and reject the claim that the Eleventh Amendment prohibits federal courts from issuing injunctive relief based on state law. There is therefore no basis for the majority's assertion that the issue presented by this case is an open one, ante, at 119, 79 L Ed 2d, at 91.[14]

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The Court tries to explain away these cases by arguing that the applicable state statutes gave petitioners such "broad discretion" over Pennhurst that their actions were not ultra vires, ante, at 110-111, 79 L Ed 2d, at 85. The Court, however, does not dispute the Court of Appeals' conclusion that these state statutes gave petitioners *no discretion whatsoever* to disregard their duties with respect to institutionalization of the retarded as they did. Petitioners acted outside of their lawful discretion every bit as much as did the government officials in the cases I have discussed, which hold that when an official commits an act prohibited by law, he acts beyond his authority and is not protected by sovereign immunity.[15] After all, it is only common sense to conclude that States do not authorize their officers to violate their legal duties.

The Court also relies heavily on the fact that the District Court found petitioners immune from damages liability because they "'acted in the utmost good faith . . . *within the sphere of their official responsibilities,*'" ante, at 107, 79 L Ed 2d, at 83 (emphasis in original) (quoting 446 F Supp, at 1324). This confuses two distinct concepts. An official can act in good faith and therefore be immune from damages liability despite the

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fact that he has done that which the law prohibits, a point recognized as recently as Harlow v Fitzgerald, 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727 (1982). Nevertheless, good-faith immunity from damages liability is irrelevant to the availability of injunctive relief. See Wood v Strickland, 420 US 308, 314–315, n 6, 43 L Ed 2d 214, 95 S Ct 992 (1975). The state officials acted in nothing less than good faith and within the

14. The majority incredibly claims that Greene contains only an implicit holding on the Eleventh Amendment question the Court decides today. Ante, at 117-119, 79 L Ed 2d, at 89-91. In plain words, the Greene Court held that the Eleventh Amendment did not bar consideration of the pendent state-law claims advanced in that case. The Court then considered and sustained those claims on their merits.

15. Contrary to the Court's treatment of them, the cases discussed above rely on the doctrine embraced in the quotation from Clemson I have set out—officials have no discretion to violate the law. The same is true of the federal sovereign immunity cases. See, e.g., Land v Dollar, 330 US 731, 736, 91 L Ed 1209, 67 S Ct 1009 (1947) ("the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action [and] a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.'"); Payne v Central Pacific R. Co., 255 US 228, 236, 65 L Ed 598, 41 S Ct 314 (1928) ("But of course [the Secretary of the Interior's statutory authority] does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act"); Waite v Macy, 246 US 606, 610, 62 L Ed 892, 38 S Ct 395 (1918) ("The Secretary [of the Treasury] and the board must keep within the statute . . . and we see no reason why restriction should not be enforced by injunction . . ."); Philadelphia Co. v Stimson, 223 US 605, 620, 56 L Ed 570, 32 S Ct 340 (1912) ("And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process").

sphere of their official responsibilities in asserting Florida's claim to the treasure in Treasure Salvors; the same can be said for the bank commissioner's actions in safeguarding bank deposits challenged in Johnson v Lankford, the fund commissioner's decision to sell property mortgaged to the State challenged in Rolston, and the state food and dairy commissioner's decision to prosecute the appellant for violating the state food impurity Act challenged in Scully, to give just a few examples. Yet in each of these cases the state officers' conduct was enjoined. Greene makes this point perfectly clear. There state officers did nothing more than carry out responsibilities clearly assigned to them by a statute. Their conduct was nevertheless enjoined because this Court held that their conduct violated the State Constitution, despite the fact that their reliance on a statute made it perfectly clear that their conduct was not only in good faith but reasonable. See Michigan v DeFillippo, 443 US 31, 61 L Ed 2d 343, 99 S Ct 2627 (1979). Until today the rule has been simple: conduct that exceeds the scope of an official's lawful discretion is not conduct the sovereign has authorized and hence is subject to injunction.[16] Whether that conduct also gives rise to damages liability is an entirely separate question.

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III

On its face, the Eleventh Amendment applies only to suits against a State brought by citizens of other States and foreign nations.[17] This textual limitation upon the scope of the States' immunity from suit in federal court was set aside in Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890). Hans was a suit against the State of Louisiana, brought by a citizen of Louisiana seeking to recover interest on the

16. In a rather desperate attempt to explain these cases, amici suggest that the Court simply did not realize that it was deciding questions of state law, since in the era before Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817 (1938), and Mine Workers v Gibbs, 383 US 715, 16 L Ed 2d 218, 86 S Ct 1130 (1966), it was not clear that diversity cases or pendent claims were governed by state rather than federal law. That suggestion is refuted by the cases discussed above in which it was held that relief could issue against state officers who had violated state statutes. Even under the construction of the Rules of Decision Act, 28 USC § 1652 [28 USCS § 1652], adopted in Swift v Tyson, 16 Pet 1, 10 L Ed 865 (1842), and repudiated in Erie, federal courts were bound to apply state statutes. See, e.g., Black & White Taxicab & Transfer Co. v Brown & Yellow Taxicab & Transfer Co., 276 US 518, 529–531, 72 L Ed 681, 48 S Ct 404 (1928); Swift, 16 Pet, at 18–19, 10 L Ed 865. Thus, in these cases the Court was indisputably issuing relief under state law. The Court was explicit about the state-law basis for the relief it granted in Greene, to use just one example. It stated that federal jurisdiction "extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." 244 US, at 508, 61 L Ed 1280, 37 S Ct 673. It then granted plaintiffs relief under state law, and concluded by declining to decide any question of federal law. "It is obvious, however, in view of the result reached upon the question of state law, just discussed, that the disposition of the cases would not be affected by whatever result we might reach upon the federal question . . . . Therefore, we find it unnecessary to express any opinion upon the question raised under the Fourteenth Amendment." Id., at 519, 61 L Ed 1280, 37 S Ct 673.

17. "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."

State's bonds. The Court stated that some of the arguments favoring sovereign immunity for the States made during the process of the Amendment's ratification had become a part of the judicial scheme created by the Constitution. As a result, the Court concluded that the Constitution prohibited a suit by a citizen against his or her own State. When called upon to elaborate in Monaco v Mississippi, 292 US 313, 78 L Ed 1282, 54 S Ct 745 (1934), the Court explained that the Eleventh Amendment did more than simply prohibit suits brought by citizens of one State against another State. Rather, it exemplified the broader and more ancient doctrine of sovereign immunity, which operates to

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bar a suit brought by a citizen against his own State without its consent.[18]

The Court has subsequently adhered to this interpretation of the Eleventh Amendment. For example, in Quern v Jordan, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979), the Court referred to the Eleventh Amendment as incorporating "the traditional sovereign immunity of the States." Id, at 341, 59 L Ed 2d 358, 99 S Ct 1139. Similarly, in Fitzpatrick v Bitzer, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976), the Court referred to "the Eleventh Amendment, and the principle of state soverignty which it embodies . . . ." Id, at 456, 49 L Ed 2d 614, 96 S Ct 2666. See also Nevada v Hall, 440 US 410, 438–441, 59 L Ed 2d 416, 99 S Ct 1182 (1979) (Rehnquist, J., dissenting).[19] Thus, under our cases it is the doctrine of sovereign immunity, rather than the text of the Amendment

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itself, which is critical to the analysis of any Eleventh Amendment problem.[20]

The doctrine of sovereign immunity developed in England, where it was thought that the King could not be sued. However, common lawcourts, in applying the doctrine, traditionally distinguished between the King and his agents, on the

18. "Manifestly, we cannot rest with a mere literal application of the words of § 2 or Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" 292 US, at 322–323, 78 L Ed 1282, 54 S Ct 745 (footnote omitted). See also Ex parte State of New York, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921); Hans v Louisiana, 134 US 1, 15–18, 33 L Ed 842, 10 S Ct 504 (1890). Most commentators have understood this Court's Eleventh Amendment cases as taking the position that the Constitution incorporates the common-law doctrine of sovereign immunity. See, e.g., Baker, Federalism and the Eleventh Amendment, 48 U Colo L Rev 139, 153–158 (1977); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U Pa L Rev 515, 538–546 (1978); Thornton, The Eleventh Amendment: An Endangered Species, 55 Ind L J 293, 305–310 (1980); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv L Rev 682, 684–688 (1976); Comment, Private Suits Against States in the Federal Courts, 33 U Chi L Rev 331, 334–336 (1966).

19. Petitioners themselves treat the Eleventh Amendment as equivalent to the doctrine of sovereign immunity. See Brief for Petitioners 12, n 10. The Court appears to agree. Ante, at 98, 79 L Ed 2d, at 76-77.

20. Of course, if the Court were to apply the text of the Amendment, it would not bar an action against Pennsylvania by one of its own citizens. See n 17, supra.

theory that the King would never authorize unlawful conduct, and that therefore the unlawful acts of the King's officers ought not to be treated as acts of the sovereign. See 1 W. Blackstone, Commentaries *244. As early as the 15th century, Holdsworth writes, servants of the King were held liable for their unlawful acts. See 3 W. Holdsworth, A History of English Law 388 (1903). During the 17th century, this rule of law was used extensively to curb the King's authority. The King's officers

> "could do wrong, and if they committed wrongs, whether in the course of their employment or not, they could be made legally liable. The command or instruction of the king could not protect them. If the king really had given such commands or instructions, he must have been deceived." 6 id, at 101 (footnote omitted).

In one famous case, it was held that although process would not issue against the sovereign himself, it could issue against his officers. "[F]or the warrant of no man, not even of the King himself, can excuse the doing of an illegal act." Sands v Child, 3 Lev 351, 352, 83 Eng Rep 725, 726 (K B 1693).[21] By the 18th century, this rule of law was unquestioned.

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See 10 Holdsworth, supra, at 650–652. And in the 19th century this view was taken by the court to be so well settled as to not require the citation of authority, see Feather v Queen, 6 B & S 257, 295-297, 122 Eng Rep 1191, 1205–1206 (Q B 1865).[22]

It was only natural, then, that this Court, in applying the principles of sovereign immunity, recognized the distinction between a suit against a State and one against its officer.[23] For example, while the Court did inquire as to whether a suit was "in essence" against the sovereign, it soon became settled law that the Eleventh Amendment did not bar suits against state officials in their official capacities challenging unconstitutional conduct. See Smyth v Ames, 169 US 466, 518–519, 42 L Ed 819, 18 S Ct 418 (1898); Pennoyer v McConnaughy, 140 US 1, 10–12, 35 L Ed 363, 11 S Ct 699 (1891); Poindexter v Greenhow, 114 US 270, 288,

21. The rationale for this principle was compelling. Courts did not wish to confront the King's immunity from suit directly: nevertheless they found the threat to liberty posed by permitting the sovereign's abuses to go unremedied to be intolerable. Since in reality the King could act only through his officers, the rule which permitted suits against those officers formally preserved the sovereign's immunity while operating as one of the means by which courts curbed the abuses of the monarch. See 10 Holdsworth, at 262–268.

22. Commentators have noted the influence of these English doctrines on the American conception of sovereign immunity. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv L Rev 1, 19–29 (1963); Note, Express Waiver of Eleventh Amendment Immunity, 17 Ga L Rev 513, 517–518 (1983); Note, Developments in the Law—Remedies Against the United States and its Officials, 70 Harv L Rev 827, 831–833 (1957). In fact, in Belknap v Schild, 161 US 10, 40 L Ed 599, 16 S Ct 443 (1896), the Court, in holding that officers of the United States were liable for injuries caused by their unlawful conduct even if they did so acting pursuant to official duties, cited the passage from Feather v Queen. See 161 US, at 18, 40 L Ed 599, 16 S Ct 443.

23. Chief Justice Marshall, writing for the Court, recognized this distinction in the very first case to reach the Court concerning the application of the Eleventh Amendment to the conduct of a state official, Osborn v Bank of United States, 9 Wheat 738, 6 L Ed 204 (1824).

29 L Ed 185, 5 S Ct 903 (1885).[24] This rule was reconciled with sovereign immunity

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principles by use of the traditional rule that an action against an agent of the sovereign who had acted unlawfully was not considered to be against the sovereign. When an official acts pursuant to an unconstitutional statute, the Court reasoned, the absence of valid authority leaves the official ultra vires his authority, and thus a private actor stripped of his status as a representative of the sovereign.[25] In Ex parte Young, 209 US 123, 52 L Ed 2d 714, 28 S Ct 441 (1908), the Court was merely restating a settled principle when it 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 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." Id, at 159–160, 52 L Ed 714, 28 S Ct 441.[26]

24. See also McNeill v Southern R. Co., 202 US 543, 559, 50 L Ed 1142, 26 S Ct 722 (1906); Gunter v Atlantic Coast Line R. Co., 200 US 273, 283–284, 50 L Ed 477, 26 S Ct 252 (1906); Prout v Starr, 188 US 537, 47 L Ed 584, 23 S Ct 398 (1903); Scott v Donald, 165 US 58, 67–70, 41 L Ed 632, 17 S Ct 265 (1897); Reagan v Farmers' Loan & Trust Co., 154 US, at 388–391, 38 L Ed 1014, 14 S Ct 1047; In re Tyler, 149 US 164, 190–191, 37 L Ed 689, 13 S Ct 785 (1893); In re Ayers, 123 US 443, 506–507, 31 L Ed 216, 8 S Ct 164 (1887); Hagood v Southern, 117 US 52, 70, 29 L Ed 805, 6 S Ct 608 (1886); Allen v Baltimore & Ohio R. Co., 114 US 311, 315–316, 29 L Ed 200, 5 S Ct 925 (1885); Board of Liquidation v McComb, 92 US 531, 541, 23 L Ed 623 (1876). Cf. United States v Lee, 106 US 196, 219–222, 27 L Ed 171, 1 S Ct 240 (1882) (sovereign immunity of the United States not a defense against suit charging officers of the United States with unconstitutional conduct).

25. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence." Poindexter v Greenhow, 114 US, at 288, 29 L Ed 185, 5 S Ct 903.

26. See generally Orth, The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power, 1983 U Ill L Rev 423. The Court has adhered to this formulation to the present day. See Florida Dept. of State v Treasure Salvors, Inc. 458 US 670, 684–690, 73 L Ed 2d 1057, 102 S Ct 3304 (1982) (opinion of Stevens, J.); id., at 714-715, 73 L Ed 2d 1057, 102 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part); Ray v Atlantic Richfield Co., 435 US, at 156, n 6, 55 L Ed 2d 179, 98 S Ct 988 Scheuer v Rhodes, 416 US 232, 237, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474 (1974); Georgia Railroad & Banking Co. v Redwine, 342 US 299, 96 L Ed 335, 72 S Ct 321 (1952); Sterling v Constantin, 287 US 378, 393, 77 L Ed 375, 53 S Ct 190 (1932). Of course, the fragment from Young quoted by the Court, ante, 109, n 17, 79 L Ed 2d, at 84, does not convey the same meaning when considered in the context of the paragraph quoted above.

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The majority states that the holding of Ex parte Young is limited to cases in which relief is provided on the basis of federal law, and that it rests entirely on the need to protect the supremacy of federal law. That position overlooks the foundation of the rule of Young as well Pennoyer v McConnaughy and Young's other predecessors.

The Young Court distinguished between the State and its Attorney General because the latter, in violating the Constitution, had engaged in conduct the sovereign could not authorize. The pivotal consideration was not that the conduct violated federal law, since nothing in the jurisprudence of the Eleventh Amendment permits a suit against a sovereign merely because federal law is at issue.[27] Indeed, at least since Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the law has been settled that the Eleventh Amendment applies even though the State is accused of violating the Federal Constitution. In Hans the Court held that the Eleventh Amendment applies to all cases within the jurisdiction of the federal courts including those brought to require compliance with federal law, and bars any suit where the State is the proper defendant under sovereign immunity principles. A long line of cases has endorsed that proposition, holding that irrespective

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of the need to vindicate federal law a suit is barred by the Eleventh Amendment if the State is the proper defendant.[28] It was clear until today that "the State [is not] divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" Parden v Terminal Railway of Ala. Docks Dept., 377 US 184, 186, 12 L Ed 2d 233, 84 S Ct 1207 (1964) (quoting Hans, 134 US, at 10, 33 L Ed 842, 10 S Ct 504.

The pivotal consideration in Young was that it was not conduct of the sovereign that was at issue.[29]

27. As the Solicitor General correctly notes in his brief, "this Court has no power to create any exception to a constitutional bar to federal court jurisdiction. Ex parte Young rests instead on recognition that the Eleventh Amendment simply does not apply to suits seeking to restrain illegal acts by state officials—whether those acts are illegal because they violate the Constitution, as in Young, or federal or state law." Brief for United States 23 (citations omitted).

28. See Quern v Jordan, 440 US 332, 345, n 17, 59 L Ed 2d 358, 99 S Ct 1139 (1979); Alabama v Pugh, 438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057 (1978) (per curiam); Edelman v Jordan, 415 US 651, 668–669, 39 L Ed 2d 662, 94 S Ct 1347 (1974); Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 280, n 1, 36 L Ed 2d 251, 93 S Ct 1614 (1973); Smith v Reeves, 178 US 436, 444–449, 44 L Ed 1140, 20 S Ct 919 (1900); Fitts v McGhee, 172 US 516, 43 L Ed 535, 19 S Ct 269 (1899); In re Ayers, 123 US 443, 31 L Ed 216, 8 S Ct 164 (1887); Hagood v Southern, 117 US 52, 29 L Ed 805, 6 S Ct 608 (1886); Louisiana v Jumel, 107 US 711, 27 L Ed 448, 2 S Ct 128 (1883). See generally C. Jacobs, The Eleventh Amendment and Sovereign Immunity 88–91, 109–110 (1972).

29. The distinction between the sovereign and its agents not only explains why the rationale of Ex parte Young and its predecessors is consistent with established sovereign immunity doctrine, but it also explains the critical difference between actions for injunctive relief and actions for damages recognized in Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1973). Since the damages remedy sought in that case would have required payment by the State, it could not be said that the action ran only against the agents of the State. Therefore, while the agents' unlawful conduct was considered ultra vires and hence could be enjoined, a remedy which did run against the sovereign and not merely its agent could not fit within the ultra vires doctrine and hence was impermissible. If damages are not sought from the State and the relief will run only against the state official, damages are a permissible remedy

The rule that unlawful acts of an officer should not be attributed to the sovereign has deep roots in the history of sovereign immunity and makes Young reconcilable with the principles of sovereign immunity found in the Eleventh Amendment,[30] rather

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than merely an unprincipled accommodation between federal and state interests that ignores the principles contained in the Eleventh Amendment.

This rule plainly applies to conduct of state officers in violation of state law. Young states that the significance of the charge of unconstitutional conduct is that it renders the state official's conduct "simply an illegal act," and hence the officer is not entitled to the sovereign's immunity. Since a state officer's conduct in violation of state law is certainly no less illegal than his violation of federal law, in either case the official, by committing an illegal act, is "stripped of his official or representative character." For example, one of Young's predecessors held that a suit challenging an unconstitutional attempt by the Virginia Legislature to disavow a state contract was not barred by the Eleventh Amendment, reasoning that "inasmuch as, by the Constitution of the United States, *which is also the supreme law of Virginia*, that contract, when made, became thereby unchangeable, irrepealable by the State, the subsequent act of January 26, 1882, and all other like acts, which deny the obligation of that contract and forbid its performance, are not the acts of the State of Virginia. The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of *its* fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been. . . . The State of Virginia has done none of

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these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without *her* authority, but contrary to *her* express commands." Poindexter v Greenhow, 114 US, at 292-293, 29 L Ed 185, 5 S Ct 903 (emphasis supplied).[31]

under the Eleventh Amendment. See Scheuer v Rhodes, 416 US 232, 237–238, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474 (1974).

30. "While in England personification of sovereignty in the person of the King may have been possible, attempts to adopt this reasoning in the United States resulted in the postulation of the abstract State as sovereign. Since the ideal State could only act by law, whatever the State did must be lawful. On this ground a distinction was drawn between the State and its government, which consisted of its officers, and since the State could not commit an illegal act, any such act was imputed to government officers. It logically followed that a suit against state officers was not necessarily a suit against the State." Note, The Sovereign Immunity of the States: The Doctrine and Some of its Recent Developments, 40 Minn L Rev 234, 244–245 (1956) (footnotes omitted). Curiously, the majority appears to acknowledge that it has created a sovereign immunity broader than had ever been enjoyed by the King of England. Ante, at 114, n 25, 79 L Ed 2d, at 87.

31. See also Barney v City of New York, 193 US 430, 439–441, 48 L Ed 737, 24 S Ct 502 (1904).

It is clear that the Court in Poindexter attached no significance to the fact that Virginia had been accused of violating federal and not its own law.[32] To the contrary, the Court treated the Federal Constitution as part of Virginia's law, and concluded that the challenged action was not that of Virginia precisely because it violated Virginia's law. The majority's position turns the Young doctrine on its head—sovereign immunity did not bar actions challenging unconstitutional conduct by state officers since the Federal Constitution was also to be considered part of the State's law—and since the State could not and would not authorize a violation of its own law, the officers' conduct was considered individual

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and not sovereign. No doubt the Courts that produced Poindexter and Young would be shocked to discover that conduct authorized by state law but prohibited by federal law is not considered conduct attributable to the State for sovereign immunity purposes, but conduct prohibited by state law is considered conduct attributable to the very State which prohibited that conduct. Indeed, in Tindal v Wesley, 167 US 204, 42 L Ed 137, 17 S Ct 770 (1899), the Court specifically found that it was impossible to distinguish between a suit challenging unconstitutional conduct of state officers and a suit challenging any other type of unlawful behavior:

> "If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute . . . be not one against the State, it is impossible to see how a suit against the individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State." Id, at 222, 42 L Ed 137, 17 S Ct 770.[33]

These cases are based on the simple idea that an illegal act strips the official of his state-law shield,

32. This approach began long before Poindexter. The earliest cases in which this Court rejected sovereign immunity defenses raised by officers of the sovereign accused of unlawful conduct did not involved charges of unconstitutional conduct, but rather simple trespass actions. In rejecting the defense, the Court simply noted that although the officers were acting pursuant to their duties, they were engaged in unlawful conduct which therefore could not be the conduct of the sovereign. See Bates v Clark, 95 US 204, 209, 24 L Ed 471 (1877); Mitchell v Harmony, 13 How 115, 137, 14 L Ed 75 (1852); Wise v Withers, 3 Cranch 331, 2 L Ed 457 (1806); Little v Barreme, 2 Cranch 170, 2 L Ed 243 (1804). In the landmark case of Osborn v Bank of United States, 9 Wheat 738, 6 L Ed 204 (1824), the Court took it as beyond argument that if a state officer unlawfully seized property in an attempt to collect taxes he believed to be owed the State, the Eleventh Amendment would not bar a simple trespass action against the officer. The majority strangely takes comfort in the fact that the former cases allowed damages actions against federal officers. Ante, at 111, n 21, 79 L Ed 2d, at 85. The allowance of a damages remedy is no more consistent with the Court's approach than the allowance of an injunction, see n 10, supra.

33. To the same effect as Tindal is South Carolina v Wesley, 155 US 542, 39 L Ed 254, 15 S Ct 230 (1895). The majority argues that the case notes that South Carolina was not a party to the proceeding and suggests the ruling was "purely procedural," ante, at 109, n 19, 79 L Ed 2d, at 84, but that misses the whole purpose of the "procedural" point made in the opinion—Eleventh Amendment immunity may only be claimed by the State; it does not extend to state officers accused of violating state law. See also Florida Dept. of State v Treasure Salvors, Inc., 458 US, at 697, 73 L Ed 2d 1057, 102 S Ct 3304 (opinion of Stevens, J.) ("If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity").

thereby depriving the official of the sovereign's immunity. The majority criticizes this approach as being "out of touch with reality" because it ignores the practical impact of an injunction on the

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State though directed at its officers. Ante, at 106-108, 79 L Ed 2d, at 82-83. Yet that criticism cannot account for Young, since an injunction has the same effect on the State whether it is based on federal or state law. Indeed, the majority recognizes that injunctions approved by Young have an "obvious impact on the State itself," ante, at 104, 79 L Ed 2d, at 81. In the final analysis the distinction between the State and its officers, realistic or not, is one firmly embedded in the doctrine of sovereign immunity. It is that doctrine and not any theory of federal supremacy which the Framers placed in the Eleventh Amendment and which this Court therefore has a duty to respect.

It follows that the basis for the Young rule is present when the officer sued has violated the law of the sovereign; in all such cases the conduct is of a type that would not be permitted by the sovereign and hence is not attributable to the sovereign under traditional sovereign immunity principles. In such a case, the sovereign's interest lies with those who seek to enforce its laws, rather than those who have violated them.

> "[P]ublic officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity . . . [t]he dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." Land v Dollar, 330 US 731, 738, 91 L Ed 1209, 67 S Ct 1009 (1947).[34]

The majority's position that the Eleventh Amendment does not permit federal courts to enjoin conduct that the sovereign State itself seeks to prohibit thus is inconsistent with both

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the doctrine of sovereign immunity and the underlying respect for the integrity of state policy which the Eleventh Amendment protects. The issuance of injunctive relief which enforces state laws and policies, if anything, enhances federal courts' respect for the sovereign prerogatives of the States.[35] The majority's approach, which requires federal courts to ignore questions of state law and to rest their decisions on federal bases, will create more rather than less friction between the States and the federal judiciary.

34. While Land v Dollar is a case dealing with the sovereign immunity of the Federal Government, it is pertinent to the Eleventh Amendment, which after all for present purposes is no more than an embodiment of sovereign immunity principles.

35. For example, in cases barring suits against individual officers as suits against the State, the Court has also acknowledged the importance of state-law authority for the challenged conduct of the officer. In such cases the Court has frequently noted that the relief sought would be unauthorized by state law and would therefore adversely affect the State itself. See, e. g., Hagood v Southern, 117 US 52, 68, 29 L Ed 805, 6 S Ct 608 (1886); Louisiana v Jumel, 107 US 711, 721, 27 L Ed 448, 2 S Ct 128 (1883). In contrast, in cases of official actions contrary to state law, a federal court's remedy would not adversely affect any state policy.

Moreover, the majority's rule has nothing to do with the basic reason the Eleventh Amendment was added to the Constitution. There is general agreement that the Amendment was passed because the States were fearful that federal courts would force them to pay their Revoluntionary War debts, leading to their financial ruin.[36] Entertaining a suit for injunctive relief based on state law implicates none of the concerns of the Framers. Since only injunctive relief is sought there is no threat to the state treasury of the type that concerned the Framers, see Milliken v Bradley, 433 US 267, 288–290, 53 L Ed 2d 745, 97 S Ct 2749 (1977); Edelman v Jordan, 415 US 651, 667–668, 39 L Ed 2d 662, 94 S Ct 1347 (1974); and if the State wishes to avoid the federal injunction, it can easily do so simply by changing its law. The possibility of States left helpless in the face of disruptive federal decrees which led to the passage of the Eleventh

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Amendment simply is not presented by this case. Indeed, the Framers no doubt would have preferred federal courts to base their decisions on state law, which the State is then free to reexamine, rather than forcing courts to decide cases on federal grounds, leaving the litigation beyond state control.

In light of the preceding, it should come as no surprise that there is absolutely no authority for the majority's position that the rule of Young is inapplicable to violations of state law. The only cases the majority cites, ante, at 105-106, 79 L Ed 2d, at 81–82, for the proposition that Young is limited to the vindication of federal law do not consider the question whether Young permits injunctive relief on the basis of state law—in each of the cases the question was neither presented, briefed, argued, nor decided.[37] It is curious, to say the least, that the majority disapproves of reliance on cases in which the issue we face today was decided sub silentio, see ante, at 119, 79 L Ed 2d, at 91, yet it is willing to rely on cases in which the issue was not decided at all. In fact, not only is there no precedent for the majority's position, but, as I have demonstrated in Part II, supra, there is an avalanche of precedent squarely to the contrary.[38]

36. See, e.g., Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 276, n 1, 3 L Ed 2d 804, 79 S Ct 785 (1959); Missouri v Fiske, 290 US 18, 27, 78 L Ed 145, 54 S Ct 18 (1933); Cohens v Virginia, 6 Wheat 264, 406–407, 5 L Ed 257 (1821).

37. The majority cites Quern v Jordan, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979); Scheuer v Rhodes, 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474 (1974); Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974); Georgia Railroad & Banking Co. v Redwine, 342 US 299, 96 L Ed 335, 72 S Ct 321 (1952). In each of these cases, the only question presented or decided was whether *monetary* relief could be obtained against state officials on the basis of *federal* law, except for Redwine, where the Court decided that a suit to enjoin collection of a state tax on the basis of *federal* law was *not* barred by the Eleventh Amendment. In none of these cases was any question concerning the availability of injunctive relief under *state* law considered even in dicta.

38. In addition to overruling the cases discussed in Part II, supra, the majority's view that Young exists simply to ensure the supremacy of federal law indicates that a number of our prior cases, which held that the Eleventh Amendment may bar an action for injunctive relief even where the State has violated the Federal Constitution, see, e.g., Alabama v Pugh, 438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057 (1978) (per curiam), were incorrectly decided. The Court can have no satisfactory explanation for Pugh, which held that even as to a federal constitutional claim, a suit may not be brought directly against a State even where it may be brought against its officials. On the majority's view, there is no basis for distinguishing between the State and its officials—as to both there is a need to vindicate the supremacy of federal law through the issuance of injunctive relief, and unless the officials are acting completely outside of their authority, they must be treated as is the State. However, Pugh can be explained simply by reference to Young's use of the ultra vires doctrine with respect to unconstitutional conduct by state officers—such conduct is not conduct by the sovereign because it could not be authorized by the sovereign, hence the officers are not entitled to the sovereign's immunity. A suit directly against the State cannot succeed because the ultra vires doctrine is unavailable without a state officer to which it can be applied. Pugh makes it clear that Young rests not on a need to vindicate federal law, but on the traditional distinction between the sovereign and its agents.

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That the doctrine of sovereign immunity does not protect conduct which has been prohibited by the sovereign is clearly demonstrated by the case on which petitioners chiefly rely, Larson v Domestic & Foreign Commerce Corp. 337 US 682, 93 L Ed 1628, 69 S Ct 1457 (1949). The Larson opinion teaches that the actions of state officials are not attributable to the State—are ultra vires—in two different types of situations: (1) when the official is engaged in conduct that the sovereign has forbidden. A sovereign, like any other principal, cannot authorize its agent to violate the law. When an agent does so, his actions are considered ultra vires and he is liable for his own conduct under the law of agency. Both types of ultra vires conduct are clearly identified in Larson.

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, *where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.* The officer is not doing

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the business which the sovereign has empowered him to do *or he is doing it in a way which the sovereign has forbidden.* His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." Id., at 689–690, 93 L Ed 1628, 69 S Ct 1457 (emphasis supplied).

Larson thus clearly indicates that the immunity determination depends upon the merits of the plaintiff's claim. The same approach is employed by Young—the plaintiff can overcome the state official's immunity only by succeeding on the merits of its claim of unconstitutional conduct.

Following the two-track analysis of Larson, the cases considering the question whether the state official is entitled to the sovereign's immunity can be grouped into two categories. In cases like Larson, Malone v Bowdoin, 369 US 643, 8 L Ed 2d 168, 82 S Ct 980 (1962), and Florida Dept. of State v Treasure Salvors, Inc. 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982), which usually involve the State functioning in its proprietary capacity, the ultra vires issue can be resolved solely by reference to the law of agency. Since there is no specific limitation on the powers of the officers other than the general limitations on their authority, the only question that need be asked is whether they have acted completely beyond their authority. But when the State has placed specific limitations on the manner in which state officials may perform their duties, as it often does in regulatory or other administrative contexts such as were considered in Scully v Bird, 209 US 481, 52 L Ed 899, 28 S Ct 597 (1908), and Johnson v

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Lankford, 245 US 541, 62 L Ed 460, 38 S Ct 203 (1918), the ultra vires inquiry also involves the question whether the officials acted in a way that state law forbids. No sovereign would authorize its officials to violate its own law, and if the official does so, then Larson indicates that his conduct is ultra vires and not protected by sovereign immunity.

Larson confirms that the Court's disposition of this case in 1981—ordering the Court of Appeals to consider respondents' state-law claims—was fully harmonious with established sovereign immunity principles. The jurisdiction of the federal court was established by a federal claim;[39] the Court of Appeals therefore had jurisdiction to resolve the case and to grant injunctive relief on either federal or state grounds. Respondents pleaded a specific statutory limitation on the way in which petitioners were entitled to run Pennhurst. The District Court and the Court of Appeals have both found that petitioners operated Pennhurst in a way that the sovereign has forbidden. Specifically, both courts concluded that petitioners placed residents in Pennhurst without any consideration at all of the limitations on institutional confinement that are found in state law, and that they failed to create community living programs that are mandated by state law. In short, there can be no dispute that petitioners ran Pennhurst in a way that the sovereign had

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forbidden. Under the second track of the Larson analysis, petitioners were acting ultra vires because they were acting in a way that the sovereign, by statute, had forbidden.[40]

39. There can be no doubt that respondents' federal claims were sufficiently substantial to justify federal jurisdiction in this case. In another case brought by a resident of Pennhurst, we held that the Due Process Clause of the Fourteenth Amendment requires, at a minimum, that petitioners provide the residents with reasonable care and safety. See Youngberg v Romeo, 457 US 307, 324, 73 L Ed 2d 28, 102 S Ct 2452 (1982). The uncontested findings of the District Court in this case establish that Pennhurst neither was safe nor was it providing reasonable care to its residents. Therefore, respondents' federal claims not only were sufficiently substantial to support the exercise of federal jurisdiction in this case, but also would almost certainly have justified the issuance of at least some injunctive relief had a state-law basis for the relief been unavailable.

40. In Larson, the Administrator of the War Assets Administration was in possession of coal that the plaintiff claimed the Administrator was contractually obligated to deliver to it. Instead of seeking damages for breach of contract in the Court of Claims, the plaintiff sought an injunction in the District Court. The Court held that the Administrator had acted properly in refusing to deliver the coal and instead insisting that the plaintiff seek its remedy in the Court of Claims.

"There was, it is true, an allegation that the Administrator was acting 'illegally,' and that the refusal to deliver was 'unauthorized.' But these allegations were not based and did not purport to be based upon any lack of delegated power. Nor could they be, since the Administrator was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." 337 US, at 691–692, 93 L Ed 1628, 69 S Ct 1457 (footnotes omitted).

Thus, the Administrator had acted properly. He was doing what any agent would do—holding on to property he believed was his principal's and insisting that the claimant sue the principal if it wanted the property. He was merely exercising the "normal" duties of a sales agent. Congress envisioned that he do exactly that; the remedy it had provided required the claimant to sue for damages in the Court of Claims rather than obtaining the property directly from the Administrator, and no one had questioned the constitutional sufficiency of that alternative remedy. See McCord, Fault Without Liability: Immunity of Federal Employees, 1966 U Ill Law Forum 849, 862–867. "Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States." Malone v Bowdoin, 369 US 643, 647, 8 L Ed 2d 168, 82 S Ct 980 (1962). Malone can be explained similarly. These cases hold that Congress had empowered the governmental official to make necessary decisions about whether to hold on to property the official believes is the Government's, at least pending the aggrieved party's remedy in the Claims Court (formerly Court of Claims) under the Tucker Act, 28 USC §§ 1491–1507 (1982 ed), [28 USCS §§ 1491–1507]. See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv L Rev 1479, 1490–1491 (1962); Jaffe, The Right to Judicial Review I, 71 Harv L Rev 401, 436–437 (1958). Thus, where the official acts as the sovereign intends, he is entitled to the sovereign's immunity under the principles discussed above. Where that is not the case, Larson permits injunctive relief. In this case, respondents did plead a specific limitation on petitioners' powers, and the holding of the Court of Appeals on the merits of respondents' state-law claims indicates that petitioners were not exercising the "normal" duties that the sovereign had envisioned for them, unlike the Administrator in Larson. Instead, petitioners were running Pennhurst "in a way which the sovereign has forbidden." 337 US, at 689, 93 L Ed 1628, 69 S Ct 1457.

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Petitioners readily concede, both in their brief and at oral argument, that the Eleventh Amendment does not bar a suit against state officers who have acted ultra vires. The majority makes a similar concession, ante, at 101-102, n 11, 79 L Ed 2d, at 79. Yet both ignore the fact that the cases, and most especially Larson, set out a two-step analysis for ultra vires conduct—conduct that is completely beyond the scope of the officer's authority, or conduct that the sovereign has forbidden. In fact, the majority goes so far as to quote the passage from Larson indicating that a state official acts ultra vires when he completely lacks power delegated from the State, ante, at 101, n 11, 79 L Ed 2d, at 79. That quotation ignores sentences immediately preceding and following the quoted passage stating in terms that where an official violates a statutory prohibition, he acts ultra vires and is not protected by sovereign immunity. This omission is understandable, since petitioners' conduct in this case clearly falls into the category of conduct the sovereign has specifically forbidden by statute. Petitioners were told by Pennsylvania how to run Pennhurst, and there is no dispute that they disobeyed their instructions. Yet with-

out explanation, the Court repudiates the two-track analysis of Larson and holds that sovereign immunity extends to conduct the sovereign has statutorily prohibited.[41] Thus, contrary

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to the Court's assertion, Larson is in conflict with the result reached today.[42]

In sum, a century and a half of this Court's Eleventh Amendment jurisprudence has established the following. A suit alleging that the official had acted within his authority but in a manner contrary to state statutes was not barred because the Eleventh Amendment prohibits suits against States; it does not bar suits against state officials for actions not permitted by the State under its own law. The sovereign could not and would not authorize its officers to violate its own law; hence an action against a state officer seeking redress for conduct not permitted by state law is a suit against the officer, not the sovereign. Ex parte Young concluded in as explicit a fashion as possible that unconstitutional action by state officials is not action by the State even if it purports to be authorized by state law, *because the Federal Constitution strikes down the state-law shield.* In the tort cases, if the plaintiff proves his case, there is by definition no state-law defense to shield the defendant. Similarly, *when the state officer violates a state statute, the sovereign has by definition erected no shield against liability.* These precedents make clear that there is no foundation for the contention that the majority embraces —that Ex parte Young authorizes injunctive relief against state officials only on the basis of federal law. To the contrary, Young is as clear as a

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bell: the Eleventh Amendment does not apply where there is no state-law shield. That simple principle should control this case.

IV

The majority's decision in this case is especially unwise in that it overrules a long line of cases in order to reach a result that is at odds with the usual practices of this Court. In one of the most respected opinions ever written by a Member of this Court, Justice Brandeis wrote:

> "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
>
> . . . . . .
>
> ". . . The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v Louisville & Nashville R. Co. 213 US 175, 191 [53 L Ed 753, 29 S Ct 451]." Ashwander v TVA, 297 US 288, 346–347, 80 L Ed 688, 56 S Ct 466 (1936) (concurring opinion).

The Siler case, cited with approval by Justice Brandeis in Ashwander, employed a remarkably similar approach to that used by the Court of Appeals in this case. A privately owned railroad corporation brought suit against the members of the railroad commission of Kentucky to enjoin the enforcement of a rate schedule promulgated by the commission. The Federal Circuit Court found that the schedule violated the plaintiff's federal constitutional rights and granted relief.

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This Court affirmed but it refused to decide the constitutional question because injunctive relief against the state officials was adequately supported by state law. The Court held that the plaintiff's claim that the schedule violated the Federal Constitution was sufficient to justify the assertion of federal jurisdiction over the case, but then declined to reach the federal question, deciding the case on the basis of state law instead:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." Siler v Louisville & Nashville R. Co. 213 US 175, 193, 53 L Ed 753, 29 S Ct 451 (1909).[43]

The Siler principle has been applied on numerous occasions; when a suit against state officials has presented both federal constitutional questions and issues of state law, the Court has upheld injunctive relief on state-law grounds. See, e.g., Lee v Bickell, 292 US 415, 425, 78 L Ed 1337, 54 S Ct 727 (1934); Glenn v Field Packing Co. 290 US 177, 178, 78 L Ed 252, 54 S Ct 138 (1933); Davis v Wallace, 257 US 478, 482–485, 66 L Ed 325, 42 S Ct 164 (1922); Louisville & Nashville R. Co. v Greene, 244 US, at 527, 61 L Ed 1291, 37 S Ct 683; Greene v Louisville & Interurban R. Co. 244

41. The majority also repudiates Justice White's recent statement in Treasure Salvors: "where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions." 458 US, at 714, 73 L Ed 2d 1057, 102 S Ct 3304. Four Members of today's majority subscribed to that statement only two Terms ago.

42. Indeed, the majority senses as much, by admitting that it cannot reconcile the ultra vires doctrine endorsed by Larson with its approach. See ante, at 114, n 25, 79 L Ed 2d, at 87. The majority is also incorrect in suggesting that Larson overruled most if not all of the cases contrary to its position. In fact, Larson cited most of those cases with approval, including Hopkins v Clemson Agricultural College, 221 US 636, 55 L Ed 890, 31 S Ct 654 (1911), Tindal v Wesley, 167 US 204, 42 L Ed 137, 17 S Ct 770 (1896), Poindexter v Greenhow, and Land v Dollar, 330 US 731, 91 L Ed 1209, 67 S Ct 1009 (1947); the Larson opinion stated that it was overruling only a single case, Goltra v Weeks, 271 US 536, 70 L Ed 1074, 46 S Ct 613 (1926). See 337 US, at 698–702, 93 L Ed 1628, 69 S Ct 1457. Larson simply did not wreak the kind of havoc on this Court's precedents that the majority does today.

43. In Siler the Court decided the case on state-law grounds, even though it acknowledged that "[i]n this case we are without the benefit of a construction of the statute by the highest state court of Kentucky, and we must proceed in the absence of state adjudication upon the subject." 213 US, at 194, 53 L Ed 753, 29 S Ct 451.

US, at 508, 512–514, 61 L Ed 1280, 37 S Ct 673.[44]

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In Hagans v Lavine, 415 US 528, 39 L Ed 2d 577, 94 S Ct 1372 (1974), the Court quoted from the Siler opinion and noted that the "Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims." 415 US, at 546, 39 L Ed 2d 577, 94 S Ct 1372. It added:

"Numerous decisions of this Court have stated the general proposition endorsed in Siler—that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose

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of the case solely on the nonfederal ground. See, e.g., Hillsborough v Cromwell, 326 US 620, 629–630, 90 L Ed 358, 66 S Ct 445 (1946); Waggoner Estate v Wichita County, 273 US 113, 116–119, 71 L Ed 566, 47 S Ct 271 (1927); Chicago G. W. R. Co. v Kendall, 266 US 94, 69 L Ed 183, 45 S Ct 55 (1924); United Gas Co. v Railroad Comm'n, 278 US 300, 308, 73 L Ed 390, 49 S Ct 150 (1929); Risty v Chicago, R. I. & P. R. Co. 270 US 378, 387, 70 L Ed 641, 46 S Ct 236 (1926). These and other cases illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." Id., at 547, n 12, 39 L Ed 2d 577, 94 S Ct 1372.

44. Justice Peckham's opinion in Siler rested on a long line of cases, dating back to Chief Justice Marshall's decision in Osborn v Bank of United States, 9 Wheat 738, 822, 6 L Ed 204 (1824), holding that a federal court has jurisdiction over all the issues—state as well as federal—presented by a case that properly falls within its jurisdiction. Nor was Siler breaking new ground in avoiding a federal constitutional question by deciding on state-law grounds. In Santa Clara County v Southern Pacific R. Co. 118 US 394, 30 L Ed 118, 6 S Ct 1132 (1886), the Court noted the importance of the federal constitutional questions. Even though these had been treated as dispositive by the lower court, and though they were the "main—almost the only—questions discussed by counsel," id., at 395, 30 L Ed 118, 6 S Ct 1132, the Court stated: "These questions belong, to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise." Id., at 410, 30 L Ed 118, 6 S Ct 1132. It then determined that the challenged tax assessments were not authorized by state law and affirmed the judgment solely on that ground. In addition, the Court has routinely applied the Siler rule in cases upholding injunctive relief on the basis of state law against municipal officials, see, e.g., Hillsborough v Cromwell, 326 US 620, 629, 90 L Ed 358, 66 S Ct 445 (1946); Cincinnati v Vester, 281 US 439, 448–449, 74 L Ed 950, 50 S Ct 360 (1930); Risty v Chicago, R. I. & P. R. Co. 270 US 378, 70 L Ed 641, 46 S Ct 236 (1926); Bohler v Callaway, 267 US 479, 489, 69 L Ed 745, 45 S Ct 431 (1925); Lincoln Gas & Electric Light Co. v City of Lincoln, 250 US 256, 268–269, 63 L Ed 968, 39 S Ct 454 (1919); and in cases in which the plaintiffs were not held to be entitled to the relief they sought, see Schmidt v Oakland Unified School Dist. 457 US 594, 73 L Ed 2d 245, 102 S Ct 2612 (1982) (per curiam); Railroad Comm'n of California v Pacific Gas & Electric Co. 302 US 388, 391, 82 L Ed 319, 58 S Ct 334 (1938); United Fuel Gas Co. v Railroad Comm'n of Ky., 278 US 300, 307, 73 L Ed 390, 49 S Ct 150 (1929); Waggoner Estate v Wichita County, 273 US 113, 116, 71 L Ed 566, 47 S Ct 271 (1927); Chicago-Great Western R. Co. v Kendall, 266 US 94, 97–98, 69 L Ed 183, 45 S Ct 55 (1924); Ohio Tax Cases, 232 US 576, 586–587, 58 L Ed 737, 34 S Ct 372 (1914); Louisville & Nashville R. Co. v Garrett, 231 US 298, 303–304, 58 L Ed 229, 34 S Ct 48 (1913). Numerous other cases decided by this Court have cited Siler as an accurate statement of the law regarding pendent jurisdiction. See, e. g., Aldinger v Howard, 427 US 1, 7, 49 L Ed 2d 276, 96 S Ct 2413 (1976); Florida Lime Growers v Jacobsen, 362 US 73, 81, n 7, 4 L Ed 2d 568, 80 S Ct 568 (1960); Hurn v Oursler, 289 US 238, 243–245, 77 L Ed 1148, 53 S Ct 586 (1933).

In fact, in this very case we applied the Siler rule by remanding the case to the Court of Appeals with explicit instructions to consider whether respondents were entitled to relief under state law.

Not only does the Siler rule have an impressive historical pedigree, but it is also strongly supported by the interest in avoiding duplicative litigation and the unnecessary decision of federal constitutional questions.

"The policy's ultimate foundations . . . lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our

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system." Rescue Army v Municipal Court, 331 US 549, 571, 91 L Ed 1666, 67 S Ct 1409 (1947).[45]

In addition, application of the Siler rule enhances the decisionmaking autonomy of the States. Siler directs the federal court to turn first to state law, which the State is free to modify or repeal.[46] By leaving the policy determinations underlying injunctive relief in the hands of the State, the Court of Appeals' approach gives appropriate deference to established state policies.

In contrast, the rule the majority creates today serves none of the interests of the State. The majority prevents federal courts from implementing state policies through equitable enforcement of state law. Instead, federal courts are required to resolve cases on federal grounds that no state authority can undo. Leaving violations of state law unredressed and ensuring that the decisions of federal courts may never be reexamined by the States hardly comports with the respect for States as sovereign entities commanded by the Eleventh Amendment.

V

One basic fact underlies this case: far from immunizing petitioners' conduct, the State of Pennsylvania prohibited it. Respondents do not complain about the conduct of the State of Pennsylvania—it is Pennsylvania's commands which they seek

45. Cf. H. L. v Matheson, 450 US 398, 407, 67 L Ed 2d 388, 101 S Ct 1164 (1981) (citing Justice Brandeis' opinion in Ashwander v TVA, 297 US 288, 80 L Ed 688, 56 S Ct 466 (1936)); Hutchinson v Proxmire, 443 US 111, 122, 61 L Ed 2d 411, 99 S Ct 2675 (1979) (citing the Court's opinion in Siler).

46. In some of the cases following Siler, this Court has required that the decree include a provision expressly authorizing its reopening in the event that a state court later decided the question of state law differently. See Lee v Bickell, 292 US 415, 426, 78 L Ed 1337, 54 S Ct 727 (1934); Wald Transfer & Storage Co. v Smith, 290 US 602, 78 L Ed 528, 54 S Ct 227 (1933); Glenn v Field Packing Co. 290 US 177, 178–179, 78 L Ed 252, 54 S Ct 138 (1933).

to enforce. Respondents seek only to have Pennhurst

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run the way Pennsylvania envisioned that it be run. Until today, the Court understood that the Eleventh Amendment does not shield the conduct of state officers which has been prohibited by their sovereign.

Throughout its history this Court has derived strength from institutional self-discipline. Adherence to settled doctrine is presumptively the correct course.[47] Departures are, of course, occasionally required by changes in the fabric of our society.[48] When a court, rather than a legislature, initiates

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such a departure, it has a special obligation to explain and to justify the new course on which it has embarked. Today, however, the Court casts aside well-settled respected doctrine that plainly commands affirmance of the Court of Appeals—the doctrine of the law of

47. "I agree with what the Court stated only days ago, that 'the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.' Akron v Akron Center for Reproductive Health, Inc., 462 US 416, 419-420, 76 L Ed 2d 687, 103 S Ct 2481 (1983). While the doctrine of stare decisis does not absolutely bind the Court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that directly controlling cases be either followed or candidly overruled." Solem v Helm, 463 US 277, 311-312, 77 L Ed 2d 637, 103 S Ct 3001 (1983) (Burger, C. J., dissenting) (footnote omitted).

This statement was joined by four Members of today's majority. The fifth was the author of the opinion of the Court in City of Akron.

48. This is an especially odd context in which to repudiate settled law because changes in our social fabric favor limitation rather than expansion of sovereign immunity. The concept that the sovereign can do no wrong and that citizens should be remediless in the face of its abuses is more a relic of medieval thought than anything else.

"Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago that, 'it is a wholesome sight to see "the Crown" sued and answering for its torts.'" Great Northern Life Ins. Co. v Read, 322 US 47, 59, 88 L Ed 1121, 64 S Ct 873 (1944) (Frankfurter, J., dissenting) (citation omitted).

In the even older decision of Poindexter v Greenhow, 114 US 270, 29 L Ed 185, 5 S Ct 903 (1885), the Court, after observing that "the distinction between the government of a State and the State itself is important, and should be observed," id., at 290, 29 L Ed 185, 5 S Ct 903, wrote:

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say *'L'Etat c'est moi.'* Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked . . . ." Id., at 291, 29 L Ed 185, 5 S Ct 903. See also Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum L Rev 1889 (1983).

the case,[49] the doctrine of stare decisis (the Court repudiates at least 28 cases),[50] the

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doctrine of sovereign immunity,[51] the doctrine of pendent jurisdiction,[52] and the doctrine of judicial restraint. No sound reason justifies the further prolongation of this litigation or this Court's voyage into the sea of undisciplined lawmaking.

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As I said at the outset, this case has illuminated the character of an institution.

I respectfully dissent.

49. The heart of today's holding is that this Court had no power to act as it did in 1981 when it ordered the Court of Appeals to consider and decide the state-law issues in this very case.

50. In the following cases the Court held injunctive relief may issue against state officers on the basis of state law after *explicitly* rejecting their Eleventh Amendment defense: Rolston v Missouri Fund Commissioners, 120 US 390, 30 L Ed 721, 7 S Ct 599 (1887); South Carolina v Wesley, 155 US 542, 39 L Ed 254, 15 S Ct 230 (1895); Tindal v Wesley, 167 US 204, 42 L Ed 137, 17 S Ct 770 (1897); Scully v Bird, 209 US 481, 52 L Ed 899, 28 S Ct 597 (1908); Hopkins v Clemson Agricultural College, 221 US 636, (1911); Atchison T. & S. F. R. Co. v O'Connor, 223 US 280, 56 L Ed 436, 32 S Ct 216 (1912); Johnson v Lankford, 245 US 541, 62 L Ed 460, 38 S Ct 203 (1918); Martin v Lankford, 245 US 547, 62 L Ed 464, 38 S Ct 205 (1918); Greene v Louisville & Interurban R. Co. 244 US 499, 61 L Ed 1280, 37 S Ct 673 (1917); Louisville & Nashville R. Co. v Greene, 244 US 522, 61 L Ed 1291, 37 S Ct 683 (1917); Illinois Central R. Co. v Greene, 244 US 555, 61 L Ed 1309, 37 S Ct 697 (1917).

Since petitioners' position applies also to federal sovereign immunity (indeed the principal case on which they rely, Larson, is a federal sovereign immunity case), the following additional cases which refused to apply sovereign immunity to suits against federal officers acting within the scope of their authority because the plaintiff had alleged that the officers had engaged in unlawful conduct are rejected: Little v Barreme, 2 Cranch 170, 2 L Ed 243 (1804); Wise v Withers, 3 Cranch 331, 2 L Ed 457 (1806); Mitchell v Harmony, 13 How 115, 14 L Ed 75 (1852); Bates v Clark, 95 US 204, 24 L Ed 471 (1877); Belknap v Schild, 161 US 10, 40 L Ed 599, 16 S Ct 443 (1896); Sloan Shipyards Corp. v United States Shipping Bd. Emergency Fleet Corp., 258 US 549, 66 L Ed 762, 42 S Ct 386 (1922); Santa Fe Pac. R. Co. v Fall, 259 US 197, 66 L Ed 896, 42 S Ct 466 (1922); Philadelphia Co. v Stimson, 223 US 605, 56 L Ed 570, 32 S Ct 340 (1912); Land v Dollar, 330 US. at 738, 91 L Ed 1209, 67 S Ct 1009. Larson itself cites most of these cases with approval, and disapproves of none of them. All are overruled today. In fact, today the Court repudiates the two-track analysis of Larson, since in Larson the Court stated that conduct which has been specifically prohibited by statute is not protected by sovereign immunity even if it is performed within the scope of the official's duties, yet today the Court holds that even if an officer violates a statute, his conduct is protected by sovereign immunity. The Court also overrules the cases cited in n 52, infra. If some of these cases have been rarely cited, see ante, at 115-116, n 27, 79 L Ed 2d, at 88, this is because until today the law was thought to be well settled on this point.

51. From the 15th century English common law to Larson and beyond, courts have never held that prohibited conduct can be shielded by sovereign immunity. That rule makes good sense—since a principal cannot authorize unlawful conduct, such conduct is of necessity ultra vires. There is no reason to abandon such a well-settled and sensible rule.

52. The majority also overrules Siler v Louisville & Nashville R. Co. 213 US 175, 53 L Ed 753, 29 S Ct 451 (1909), and its progeny, including Louisville & Nashville R. Co. v Garrett, 231 US 298, 58 L Ed 229, 34 S Ct 48 (1913); Davis v Wallace, 257 US 478, 66 L Ed 325, 42 S Ct 164 (1922); Chicago Great Western R. Co. v Kendall, 266 US 94, 69 L Ed 183, 45 S Ct 55 (1924); United Fuel Gas Co. v Railroad Comm'n of Ky., 278 US 300, 73 L Ed 390, 49 S Ct 150 (1929); Glenn v Field Packing Co. 290 US 177, 78 L Ed 252, 54 S Ct 138 (1933); Lee v Bickell, 292 US 415, 78 L Ed 1337, 54 S Ct 727 (1934); Railroad Comm'n of California v Pacific Gas & Electric Co. 302 US 388, 82 L Ed 319, 58 S Ct 334 (1938).

consistent with due process, or wholly lacking, as in the Dick case.[5] No deficiency of that order is present here. As Mr. Justice Black, dissenting, said when this case was here before:

"Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in States far away from the place where the contract is made. In this very case the policy was sold to Clay with knowledge that he could take his property anywhere in the world he saw fit without losing the protection of his insurance. In fact, his contract was described on its face as a 'Personal Property Floater Policy (World Wide).' The contract did not even attempt to provide that the law of Illinois would govern when suits were filed anywhere else in the country. Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The company knew this fact. Particularly since the company was licensed to do business in Florida, it must have known it might be sued there . . . ." 363 US, at 221, 4 L ed 2d at 1181.

*[377 US 183]

*Order of United Commercial Travelers v Wolfe, 331 US 586, 91 L ed 1687, 67 S Ct 1355, 173 ALR 1107, involved a six-month-suit clause; but it is a highly specialized decision dealing with unique facts—a suit on an insurance policy issued by an Ohio fraternal society, incorporating its constitution and by-laws, and involving what the Court called the "indivisible unity" of the fraternal society. Id. 331 US at 606, 91 L ed at 1699. In that case the additional time afforded by the statute of limitations of South Dakota, where the case was tried, was not allowed to be applied to the contract. We do not extend that rule nor apply it here, for Florida has ample contacts with the present transaction and the parties to satisfy any conceivable requirement of full faith and credit or of due process.

Reversed.[6]

5. ". . . [N]othing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico." 281 US, at 68, 74 L ed at 933.

6. A motion to strike a brief amicus filed by Florida is denied.

*[377 US 184]

*R. B. PARDEN et al., Petitioners,

v

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT et al.

377 US 184, 12 L ed 2d 233, 84 S Ct 1207, reh den 377 US 1010, 12 L ed 2d 1057, 84 S Ct 1903

[No. 157]

Argued February 26 and 27, 1964. Decided May 18, 1964.

SUMMARY

Alabama citizens sued an Alabama state-owned railway in the United States District Court for the Southern District of Alabama to recover damages under the Federal Employers' Liability Act for personal injuries sustained while employed by the railway. The District Court dismissed the action, and the Court of Appeals for the Fifth Circuit affirmed on the ground that the State of Alabama was constitutionally immune from suit under the statute and had not waived such immunity. (311 F2d 727.)

On certiorari, the Supreme Court of the United States reversed. In an opinion by BRENNAN, J., expressing the views of five members of the Court, it was held that while an unconsenting state is immune from federal-court suits brought by its own citizens, Alabama consented to the suit by engaging in interstate commerce by rail after the enactment of the Federal Employers' Liability Act, which authorizes suits against state-owned as well as privately-owned common carriers by rail in interstate commerce.

WHITE, J., joined by DOUGLAS, HARLAN, and STEWART, JJ., dissented on the ground that, absent an express provision therefor, the statute should not be construed to be applicable to state-owned railroads.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Carriers § 2.4; Commerce § 49 — state-owned terminal railway

1. A terminal railway wholly owned and operated by a state is a common carrier by rail engaging in interstate commerce where it consists of about 50 miles of railroad tracks adjacent to state docks at a gulf port, serves those docks and several industries in the vicinity, operates an interchange railroad with several privately owned railroad companies, performs services for profit under statutory authority to operate "as though it were an ordinary common carrier," conducts substantial operations in interstate

ANNOTATION REFERENCES

1. Terminal railroads as common carriers. 62 L ed 1230.

2. Consent to suit against state. 42 ALR 1464, 50 ALR 1408.

commerce, has contracts with various railroad brotherhoods in accordance with the Railway Labor Act (45 USC § 151 et seq.), maintains its equipment in conformity with the Federal Safety Appliance Act (45 USC § 1 et seq.), and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission.

[*See annotation reference* 1]

States § 88 — immunity from suit — Eleventh Amendment

2. The Eleventh Amendment is in terms inapplicable to a suit brought against a state by its own citizens.

States § 87 — immunity from suit

3. An unconsenting state is immune from federal-court suits brought by its own citizens as well as by citizens of another state.

States § 87 — immunity from suit — federal question jurisdiction

4. A state is not divested of its immunity from federal-court suits brought by its own citizens or by citizens of another state on the mere ground that the case is one arising under the Constitution or laws of the United States.

States § 89 — immunity from suit — waiver — consent

5. A state's immunity from suit may be waived; a state's freedom from suit without its consent does not protect it from a suit to which it has consented.

[*See annotation reference* 2]

States §§ 87, 88 — immunity from suit — Eleventh Amendment

6. An action in federal court against a state on state debt obligations without its consent, and in which an attempt is made to invoke federal question jurisdiction by alleging an impairment of the obligation of contract, is precisely the evil against which both the Eleventh Amendment and the sovereign immunity doctrine are directed.

Master and Servant § 48 — FELA — carriers covered

7. The Federal Employers' Liability Act (45 USC § 51 et seq.), which in terms applies to "every common carrier by railroad" while engaging in interstate commerce, is intended to cover all rail carriers that constitutionally can be covered.

Master and Servant § 48; States § 87 — FELA — carriers within act — state-owned railroads

8. Notwithstanding the doctrine of sovereign immunity from suit, the Federal Employers' Liability Act (45 USC § 51 et seq.) authorizes suit in Federal District Court against state-owned as well as privately owned common carriers by railroad in interstate commerce.

Courts § 732.5 — federal courts — jurisdiction — FELA cases

9. The provision of § 6 of the Federal Employers' Liability Act (45 USC § 56) that the jurisdiction of the federal courts thereunder "shall be concurrent with that of the courts of the several States" is not intended to limit the jurisdiction of the federal courts, but merely to provide an alternative forum in the state courts.

Commerce § 90 — FELA — constitutional basis

10. Congress enacted the Federal Employers' Liability Act (45 USC § 51 et seq.) in the exercise of its constitutional power to regulate interstate commerce.

States § 5 — sovereignty — federal commerce power

11. The states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

Commerce § 62 — commerce power — nature

12. Congressional power to regulate commerce is plenary and complete in itself, and has no limitations other than those prescribed in the Constitution.

Commerce § 96 — state-owned railroad — federal regulation

13. A state's operation of a railroad in interstate commerce must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.

States § 18 — subordination of state to national powers

14. The sovereign powers of the states are necessarily diminished to the extent of grants of power to the federal government in the Constitution.

States § 89 — operation of interstate railroad — consent to FELA suit

15. By beginning operation of an interstate railroad about 20 years after the enactment of the Federal Employers' Liability Act (45 USC § 51 et seq.), a state necessarily consented to such suit against it as was authorized by the statute.

[*See annotation reference* 2]

States § 87 — immunity from suit — federal statutes

16. Congress cannot directly subject the states to suit in matters falling outside the power granted to Congress by the Constitution.

Courts § 909 — state's immunity from suit — law applicable

17. Where a state's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the federal government, the question whether the state's act constitutes the alleged consent is one of federal law.

[*See annotation reference* 2]

States § 16 — congressional regulation

18. When a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.

APPEARANCES OF COUNSEL

Al G. Rives argued the cause for petitioners.

Willis C. Darby, Jr., argued the cause for respondents.

Briefs of Counsel, p 1102, infra.

OPINION OF THE COURT

Mr. Justice Brennan delivered the opinion of the Court.

The question in this case is whether a State that owns and operates a railroad in interstate commerce may successfully plead sovereign immunity in a federal-court suit brought against the railroad by its employee under the Federal Employers' Liability Act.

Petitioners, citizens of the State of Alabama, brought suit in the Federal District Court for the Southern District of Alabama against respondent Terminal Railway of the Alabama State Docks Department. They alleged that the Railway was a "common carrier by railroad . . . engaging in commerce between any of the several States" within the terms of the Federal Employers' Liability Act, 45 USC §§ 51–60, and sought damages under that Act for personal injuries sustained while em-

*[377 US 185]

ployed by the *Railway. Respondent State of Alabama, appearing specially, moved to dismiss the action on the ground that the Railway was an agency of the State and the State had not waived its sovereign immunity from suit. The District Court granted the motion, and the Court of Appeals for the Fifth Circuit affirmed, 311 F2d 727. We granted certiorari, 375 US 810, 11 L ed 2d 47, 84 S Ct 50. We reverse.

Headnote 1

The Terminal Railway is wholly owned and operated by the State of Alabama through its State Docks Department, and has been since 1927. Consisting of about 50 miles of railroad tracks in the area adjacent to

the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit under statutory authority authorizing it to operate "as though it were an ordinary common carrier." 1940 Code of Alabama (recompiled 1958), Tit 38, § 17.[1] It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods in accordance with the Railway Labor Act, 45 USC § 151 et seq.; maintains its equipment in conformity with the Federal Safety Appliance Act, 45 USC § 1 et seq.; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. It is thus indisputably a common carrier by railroad engaging in interstate commerce.

Petitioners contend that it is consequently subject to this suit under the Federal Employers' Liability Act. That statute provides that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is

*[377 US 186]

employed by such carrier *in such commerce," and that "under this chapter an action may be brought in a district court of the United States . . . ." 45 USC §§ 51, 56. Respondents rely, as did the lower courts in dismissing the action, on sovereign immunity—the principle that a State may not be sued by an individual without its consent. Although the

Headnote 2

Headnote 3

Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama,[2] this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. Hans v Louisiana, 134 US 1, 33 L ed 842, 10 S Ct 504; Duhne v New Jersey, 251 US 311, 64 L ed 280, 40 S Ct 154; Great Northern Life Ins. Co. v Read, 322 US 47, 51, 88 L ed 1121, 1124, 64 S Ct 873; Fitts v McGhee, 172 US 516, 524, 43 L ed 535, 539, 19 S Ct 269. See also Monaco v Mississippi, 292 US 313, 78 L ed 1282,

Headnote 4

54 S Ct 745. Nor is the State divested of its immunity "on the mere ground that the case is one arising under the Constitution or laws of the United States." Hans v Louisiana, supra, 134 US at 10, 33 L ed at 845; see Duhne v New Jersey, supra, 251 US 311, 64 L ed 280, 40 S Ct 154; Smith v Reeves, 178 US 436, 447–449, 44 L ed 1140, 1145, 20 S Ct 919; Ex parte New York, 256 US 490, 497–498, 65 L ed 1057, 1060, 41 S Ct 588. But the immunity

Headnote 5

may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented. Clark v Barnard, 108 US 436, 447, 27 L ed 780, 784, 2 S Ct 878; Gunter v Atlantic Coast Line R. Co., 200 US 273, 284, 50 L ed 477, 483, 26 S Ct 252; Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 3 L ed 2d 804, 79 S Ct 785. We think Alabama consented to the present suit.

1. See also Ala Const of 1901, amendment 110; 1940 Code of Ala (recompiled 1958), Tit 38, §§ 45(14), (16).

2. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This case is distinctly unlike Hans v Louisiana, supra, where the action was a contractual one based on state bond coupons, and the plaintiff

*[377 US 187]

sought to invoke the *federal-question jurisdiction by alleging an impairment of the obligation of contract.[3] Such a suit on

Headnote 6

state debt obligations without the State's consent was precisely the "evil" against which both the Eleventh Amendment and the expanded immunity doctrine of the Hans case were directed.[4] Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented: (1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity?

We think that Congress, in making the FELA applicable to "every"

Headnote 7

common carrier by railroad in interstate commerce, meant what it

*[377 US 188]

said.[5] That congressional *statutes regulating railroads in interstate commerce apply to such railroads whether they are state owned or privately owned is hardly a novel proposition; it has twice been clearly affirmed by this Court. In United States v California, 297 US 175, 80 L ed 567, 56 S Ct 421, the question was whether the federal Safety Appliance Act, 45 USC §§ 2, 6 applicable by its terms to "any common carrier engaged in interstate commerce by railroad," applied to California's state-owned railroad. The Court unanimously held that it did.[6] In rejecting the argument that "the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them," the Court said, in terms equally pertinent here:

"No convincing reason is advanced why interstate commerce and persons and property concerned

3. Of the other cases cited in which federal-question jurisdiction was asserted, Smith v Reeves, 178 US 436, 44 L ed 1140, 20 S Ct 919, and Ex parte New York, 256 US 490, 65 L ed 1057, 41 S Ct 588, were also commonplace suits in which the federal question did not itself give rise to the alleged cause of action against the State but merely lurked in the background. The former case was a tax-refund suit brought by receivers of a corporation created by Congress, and the latter was an admiralty suit for property damage due to negligence. Duhne v New Jersey, 251 US 311, 64 L ed 280, 40 S Ct 154, was a suit against the State to restrain it from enforcing the Eighteenth Amendment to the Federal Constitution, on the ground that the Amendment was invalid.

4. See Cohens v Virginia, 6 Wheat 264, 406–407, 5 L ed 257, 291, 292; Hans v Louisiana, 134 US 1, 12–13, 16, 33 L ed 842, 846, 847, 10 S Ct 504; The Federalist, No. 81 (Hamilton) (Cooke ed 1961), at 548–549; Irish and Prothro, The Politics of American Democracy, at 123 (1959) quoted in Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 276, note 1, 3 L ed 2d 804, 807, 79 S Ct 785; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv L Rev 1, 19 (1963).

5. Although the language of the Act itself is clear enough, further indication of the congressional desire to cover all rail carriers that constitutionally could be covered is found in the legislative history, where the House Report states that "This bill relates to common carriers by railroad engaged in interstate . . . commerce . . . . It is intended in its scope to cover all commerce to which the regulative power of Congress extends." HR Rep No. 1386, To Accompany HR 20310, 60th Cong, 1st Sess (1908).

6. The suit had been brought against the State not by an individual but by the United States, to recover the statutory penalty for violation of the Act.

in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection." 297 US at 185.

In California v Taylor, 353 US 553, 1 L ed 2d 1034, 77 S Ct 1037, the question was whether the Railway Labor Act, 45 USC § 151 et seq., applicable by its terms to "any . . . carrier by railroad, subject to the Interstate Commerce Act," applied to the same California state railroad. The Court, again unanimous, held that it did.[7] After not-

*[377 US 189]

ing that "federal *statutes regulating interstate railroads, or their employees, have consistently been held to apply to publicly owned or operated railroads," although "none of these statutes referred specifically to public railroads as being within their coverage," 353 US at 562, the Court stated:

"The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included." 353 US at 564.

As support for this proposition, the Court relied on three decisions involving the precise question presented by the instant case, in all of which it had been held that the FELA did authorize suit against a publicly owned railroad despite a claim of sovereign immunity. Mathewes v Port Utilities Comm'n, 32 F2d 913 (D. C. E. D. S. C. 1929); Higginbotham v Public Belt R. Comm'n, 192 La 525, 188 So 395 (1938); Maurice v State, 43 Cal App 2d 270, 110 P2d 706 (Cal Dist CA 1941). Thus we could not read the FELA differently here without undermining the basis of our decision in Taylor.

Nor do we perceive any reason for reading it differently. The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act or the Railway Labor Act, and its purpose is no less applicable to state railroads and their employees. If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal

*[377 US 190]

*injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.

7. The suit was not against the State, but against members of the National Railroad Adjustment Board to compel them to take jurisdiction over the railroad under the Act. The Court left open, 353 US, at 568, note 16, the question whether the Eleventh Amendment would bar an employee of the railroad from enforcing an award by the Board in a suit against the State in a Federal District Court.

We therefore read the FELA as authorizing suit in a Fed-
Headnote 8 eral District Court against state-owned as well as privately owned common carriers by railroad in interstate commerce.[8]

Respondents contend that Congress is without power, in view of the immunity doctrine,
Headnote 10 thus to subject a State
Headnote 11 to suit. We disagree.
Headnote 12 Congress enacted the FELA in the exercise of its constitutional power to regulate

*[377 US 191]

*interstate commerce. Second Employers' Liability Cases, 223 US 1, 56 L ed 327, 32 S Ct 169, 38 LRA NS 44, 1 NCCA 875. While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," Great Northern Life Ins. Co. v Read, supra, 322 US 47, 51, 88 L ed 1121, 1125, 64 S Ct 873,[9] the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

"This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." Gibbons v Ogden, 9 Wheat 1, 196–197, 6 L ed 23, 70.

Thus, as the Court said in United States v California, supra, 297 US at 184–185, 80 L ed at
Headnote 13 572, 573, a State's
Headnote 14 operation of a railroad in interstate commerce "must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is

*[377 US 192]

upon the federal power to tax *state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

By empowering Congress to reg-

8. Respondents make an argument based on the provision in 45 USC § 56 that the jurisdiction of the federal courts under the FELA "shall be concurrent with that of the courts of the several States." The contention is that since Alabama's courts would not have taken jurisdiction over this suit, the "concurrent" jurisdiction of the federal courts must be similarly limited. See Hans v Louisiana, supra, 134 US, at 18-19, 33 L ed at 848, 849; but see Chisholm v Georgia, 2 Dall. 419, 1 L ed 440; South Dakota v North
Headnote 9 Carolina, 192 US 286, 318, 48 L ed 448, 460, 24 S Ct 269. It is clear, however, that Congress did not intend this language to limit the jurisdiction of the federal courts, but merely to provide an alternative forum in the state courts. See O'Donnell v Elgin, J. & E. R. Co. 193 F2d 348, 352-353 (CA7th Cir 1951), cert denied, 343 US 956, 96 L ed 1356, 72 S Ct 1051; Trapp v Baltimore & O. R. Co. 283 F 655 (DC ND Ohio 1922); Waltz v Chesapeake & O. R. Co. 65 F Supp 913 (DC ND Ill 1946).

9. See also The Federalist, No. 81 (Hamilton) (Cooke ed 1961), at 548, quoted in Hans v Louisiana, supra, 134 US, at 13, 33 L ed at 846. Compare Jaffe, note 4, supra, 77 Harv L Rev, at 3, 18.

ulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign community.[10]

Headnote 8
Headnote 11

Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the Hans case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit. "[B]y engaging in interstate commerce by rail, [the State] has subjected itself to the commerce power, and is liable for a violation of the . . . Act, as are

Headnote 3
Headnote 15
Headnote 8

*[377 US 193]

other *carriers . . . ." United States v California, supra, 297 US at 185; California v Taylor, supra, 353 US at 568, 1 L ed 2d at 1044. We thus agree that "[T]he state is liable, upon the theory that, by engaging in interstate commerce by rail, it has subjected itself to the commerce power of the federal government.

. . . . . .

"It would be a strange situation, indeed, if the state could be held subject to the [Federal Safety Appliance Act] and liable for a violation thereof, and yet could not be sued without its express consent. The state, by engaging in interstate commerce, and thereby subjecting itself to the act, must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent." Maurice v State, supra, 43 Cal App2d, at 275, 277, 110 P2d at 710–711.

Accord, Higginbotham v Public Belt R. Comm'n, supra, 192 La 525, 550, 551, 188 So 395, 403; Mathewes v Port Utilities Comm'n, supra.[11]

*[377 US 194]

*Respondents deny that Alabama's operation of the railroad constituted consent to suit. They argue that it had no such effect under state law, and that the State did not intend to waive its immunity or know that such a waiver would result. Reliance is placed on the Alabama Constitution of 1901, Art I, Section 14 of which provides that "the State of Alabama shall never be made a defendant in any court of law or equity"; on state cases holding that neither the legislature nor a state officer has the power to waive the State's immunity;[12] and on cases in this Court to the effect that whether a State has waived its immunity depends upon its intention and is a

*[377 US 195]

question of state law *only. Chandler v Dix, 194 US 590, 48 L ed 1129, 24 S Ct 766; Palmer v Ohio, 248 US 32, 63 L ed 108, 39 S Ct 16; Ford Motor Co. v Department of Treasury, 323 US 459, 466–470, 89 L ed 389, 395–398, 65 S Ct 347. We think those cases are inapposite to the present situation, where the waiver is asserted to arise from the State's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, has attached the condition of amenability to suit. More pertinent to such a situation is our decision in Petty v Tennessee-Missouri Bridge Comm'n, supra. That was a suit against a bi-state authority created with the consent of Congress pursuant to the Compact Clause of the Constitution. We assumed arguendo that the suit must be considered as being against the States themselves, but held nevertheless that by the terms of the compact and of a proviso that Congress had attached in approving it,[13] the States had waived any immunity

10. "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." New York v United States, 326 US 572, 582, 90 L ed 326, 333, 66 S Ct 310 (opinion of Frankfurter, J.).

11. Respondents argue that Congress could not "directly strip a state of its sovereign immunity from suit by a citizen," and hence cannot constitutionally impose a condition of amenability to suit upon the State's right to operate a railroad in interstate commerce. Reliance is placed on such cases as Howard v Illinois Central R. Co., 207 US 463, 502–503, 52 L ed 297, 310, 311, 28 S Ct 141, and Frost & Frost Trucking Co. v Railroad Comm'n of California, 271 US 583, 70 L ed 1101, 46 S Ct 605, 47 ALR 457. In Howard, the Court held the first Federal Employers' Liability Act unconstitutional because it applied to intrastate as well as interstate commerce, rejecting the argument that "the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress." 207 US, at 502, 52 L ed at 310. In Frost & Frost, the Court held that since a private carrier could not constitutionally be converted against its will into a common carrier by mere legislative command, such a condition could not be attached to the carrier's right to use the highways. Both cases are clearly distinguishable because the condition sought to be imposed was deemed by the Court to fall outside the scope of valid regulation. Thus in Howard the statute's application to intrastate commerce was described as an attempt by Congress to exercise "power not delegated to it by the Constitution, in other words, . . . the right to legislate concerning matters of purely state concern," 207 US, at 502, 52 L ed at 311, and in Frost & Frost the Court stated that "the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them." 271 US, at 591, 70 L ed at 1104. Here, in contrast, Congress does have authority, within its power to regulate commerce, to subject interstate railroads to suit under the FELA; by imposing a condition requiring state-owned interstate railroads to submit to such suit, Congress is not attempting to extend its regulatory power to objects that would not otherwise be subject to it, but rather to prevent objects otherwise subject to the power from being unjustifiably excepted. That Congress could not make a State suable upon all causes of action does not mean that it cannot do so with respect to this particular cause of action, where imposition of such liability is within its power to regulate commerce and where the State, by operating a railroad in interstate commerce, has voluntarily submitted itself to that power.

12. Dunn Construction Co. v State Board of Adjustment, 234 Ala 372, 376, 175 So 383, 386 (1937); State Tax Comm'n v Commercial Realty Co., 236 Ala 358, 361, 182 So 31, 35 (1938).

13. This proviso was that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of . . . any court . . . of the United States over or in regard to any navigable waters or any commerce between the States . . . ." The Court read this as reserving the juris-

they might otherwise have had. In reaching this conclusion we rejected arguments, like the one made here, based on the proposition that neither *of the States under its own law would have considered the language in the compact to constitute a waiver of its immunity. The question of waiver was, we held, one of federal law. It is true that this holding was based on the inclusion of the language in an interstate compact sanctioned by Congress under the Constitution. But such compacts do not present the only instance in which the question whether a State has waived its immunity is one of federal law. This must be true whenever the waiver is asserted to arise from an act done by the State within the realm of congressional regulation; for the congressional power to condition such an act upon amenability to suit would be meaningless if the State, on the basis of its own law or intention, could conclusively deny the waiver and shake off the condition. The broad principle of the Petty case is thus applicable here:

*[377 US 196]

Headnote 17

Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. Here, as in Petty, the States by venturing into the congressional realm "assume the conditions that Congress under the Constitution attached." 359 US, at 281–282.

Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court.

Headnote 18

But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. Cf. South Carolina v United States, 199 US 437, 463, 50 L ed 261, 270, 271, 26 S Ct 110; New York v *United States, 326 US 572, 90 L ed 326, 66 S Ct 310. It would surprise our citizens, we think, to learn that petitioners, who in terms of the language and purposes of the FELA are on precisely the same footing as other railroad workers,[14] must be denied the benefit of the Act simply because the railroad for

*[377 US 197]

diction of the federal courts in suits brought against the bi-state authority under the Jones Act or any other applicable congressional regulation of navigation or commerce. 359 US, at 281, 3 L ed 2d at 809. The Court's reliance on this congressionally imposed condition in Petty is itself sufficient to refute respondents' argument here that since Congress has no power to "directly strip a State of its sovereign immunity," it could not impose such suability as a condition to the State's operation of a railroad in interstate commerce. See note 11, supra. It was presumably just as true in Petty as it is here that Congress could not directly subject the States to suit in matters falling outside the power granted to Congress by the Constitution. Yet Petty held that Congress could impose such suability as a condition to allowing the States to enter into the compact. Similarly, Congress can do so here as a condition to allowing the State to operate an interstate railroad.

Headnote 16

14. An employee regulation of respondent Terminal Railway explicitly recognizes that its employees may have causes of action under the FELA, providing as follows:

"Employees must not make any statement, either oral or written, concerning any accident, claim or suit in which the company is, or may be involved, to any person other than [an] authorized representative of the railway, without permission, [e]xcept in cases arising under the Federal Employers' Liability Act, otherwise known as 'an act relating to the liability of common carriers by railroad to their employees in certain cases.'"

The exception for cases arising under the FELA is required by 45 USC § 60. Asked about this regulation, respondents' counsel said on oral argument that it did not indicate an intention to be subject to the Act, and could not do so in the face of the Alabama Constitution, see p. 241, supra, but had been included inadvertently when the Railway was adopting a number of regulations based upon those used by a private railroad carrier. Nevertheless, the presence of this regulation on the Terminal Railway's books illustrates, we think, the incongruity of considering this railroad to be immune from a statutory obligation imposed on privately owned railroads that are similar in every material respect.

*[377 US 198]

which they work happens to be owned and operated by a State rather than a private corporation. It would be even more surprising to learn that the FELA does make the Terminal Railway "liable" to petitioners, but, unfortunately, provides no means by which that liability may be enforced. Moreover, such a result would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. See South Carolina v United States, supra, 199 US, at 454–455, 50 L ed at 266, 267. In a significant and *increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will.

Reversed.

SEPARATE OPINION

Mr. Justice White, with whom Mr. Justice Douglas, Mr. Justice Harlan, and Mr. Justice Stewart join, dissenting.

I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.

However, the decision to impose such conditions is for Congress and not for the courts. The majority today follows the Court's consistent holdings that an unconsenting State is constitutionally immune from federal court suits brought by its own citizens as well as by citizens of other States. It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an

automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and *expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense. Particular deference should be accorded that "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect," United States v Mine Workers, 330 US 258, 272, 91 L ed 884, 902, 67 S Ct 677, where the rights and privileges find their origin in the Constitution. Far from manifesting such an unequivocal determination, the legislative history of the Federal Employers' Liability Act indicates that Congress did not even consider the possible impact of its legislation upon state immunity from suits. The expressed purpose of the Act was "to change the common-law liability of employers."[1] Certain specific defenses available to a railroad employer in an employee's personal injury suit were removed, but sovereign immunity was not one of them. To require Alabama's immunity defense to yield because of a claimed inconsistency with language of the Act making its provisions applicable to "every common carrier by railroad while engaging in commerce" relegates the States' constitutional immunity, not even mentioned in the Act, to the level of state statutory or common-law defenses, four of which the statute expressly proscribed. A decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with unmistakable clarity.

*[377 US 199]

In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by "the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction." Murray v Wilson Distilling Co. 213 US 151, 171, 53 L ed 742, 751, 29 S Ct 458. See Ford Motor Co. v Department of Treasury, 323 US 459, 468–470, 89 L ed 389, 396–398, 65 S Ct 347. If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the "intentional relinquishment or abandonment of a known right or privilege" which must be shown before constitutional rights may be taken to have been waived. Johnson v Zerbst, 304 US 458, 464, 82 L ed 1461, 1466, 58 S Ct 1019, 146 ALR 357; Fay v Noia, 372 US 391, 9 L ed 2d 837, 83 S Ct 822. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent.[2]

*[377 US 200]

1. HR Rep No. 1386, 60th Cong, 1st Sess, 1 (1908). In debate on the House floor Representative Henry also summarized the Act as having "changed four rules of the common law." 42 Cong Rec 4427.

2. Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 3 L ed 2d 804, 79 S Ct 785; California v Taylor, 353 US 553, 1 L ed 2d 1034, 77 S Ct 1037, and United States v California, 297 US 175, 80 L ed 567, 56 S Ct 421, are all inapposite. In Petty there was an express waiver, the compact itself expressly declaring that the bi-state authority could "sue and be sued." Taylor was not a suit against a State but against the members of the National Railroad Adjustment Board requiring them to take action on the plaintiffs' claims under the Railway Labor Act. Though the Court held the Act applicable to the State Belt Railroad it expressly disclaimed deciding any sovereign immunity issue. Footnote 16 of that opinion states: "The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Railroad Adjustment Board in a suit against the State in a United States District Court under § 3, First (p), of the Act is not before us under the facts of this case." 353 US, at 568, 1 L ed 2d at 1044. And the suit to recover the statutory penalty for violation of the Federal Safety Appliance Act in United States v California was brought by the United States, against whom it has long been recognized there is no state sovereign immunity. United States v Texas, 143 US 621, 36 L ed 285, 12 S Ct 488.

Preferring to leave the limiting of constitutional defenses to that body empowered to impose such conditions, I respectfully dissent.

that such determinations may at times be difficult or time consuming or require the drawing of narrow distinctions. The trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution. Denial of these protections is a very serious matter. The Framers declined to draw an easy line, like that established by the Court today, which would sweep an entire class of Americans beyond the reach of the Bill of Rights. Instead, they required that the protections of the Fifth and Sixth Amendments be applied in any case not "arising in" the Armed Forces. This requirement must not be discarded simply because it may be less expeditious than the majority deems appropriate.

III

O'Callahan v Parker remains correct and workable today. The Court nonetheless insists on reopening a question which was finally and properly resolved in 1969. In doing so, it shows a blatant disregard for principles of stare decisis, and makes more dubious the presumption "that bedrock principles are founded in the law rather than in the proclivities of individuals." Vasquez v Hillery, 474 US 254, 265, 88 L Ed 2d 598, 106 S Ct 617 (1986). This in turn undermines "the integrity of our constitutional system of government, both in appearance and in fact."

[483 US 467]

Ibid; see also Pollock v Farmers' Loan & Trust Co. 158 US 601, 663, 39 L Ed 1108, 15 S Ct 912 (1895) (Harlan, J., dissenting).

The Court's willingness to overturn precedent may reflect in part its conviction, frequently expressed this Term, that members of the Armed Forces may be subjected virtually without limit to the vagaries of military control. See United States v Stanley, post, p 669, 97 L Ed 2d 550, 107 S Ct 3054; United States v Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct 2063 (1987). But the Court's decision today has, potentially, the broadest reach of any of these cases. Unless Congress acts to avoid the consequences of this case, every member of our Armed Forces, whose active duty members number in the millions, can now be subjected to court-martial jurisdiction—without grand jury indictment or trial by jury—for *any* offense, from tax fraud to passing a bad check, regardless of its lack of relation to "military discipline, morale and fitness." Schlesinger v Councilman, 420 US 738, 761, n 34, 43 L Ed 2d 591, 95 S Ct 1300 (1975). Today's decision deprives our military personnel of procedural protections that are constitutionally mandated in trials for purely civilian offenses. The Court's action today reflects contempt, both for the members of our Armed Forces and for the constitutional safeguards intended to protect us all. I dissent.

[483 US 468]

JEAN E. WELCH, Petitioner

v

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION et al.

483 US 468, 97 L Ed 2d 389, 107 S Ct 2941

[No. 85-1716]

Argued March 4, 1987. Decided June 25, 1987.

Decision: Jones Act (46 USCS Appx § 688) held not to authorize state-employed seaman to sue state in federal court for personal injuries suffered in course of his or her employment.

SUMMARY

An employee of the Texas state highway and public transportation department was injured while working on a state-operated ferry dock. She filed suit in the United States District Court for the Southern District of Texas against the department and the state under § 33 of the Jones Act (46 USCS Appx § 688), which applies the remedial provisions of the Federal Employers' Liability Act (FELA) (45 USCS §§ 51 et seq.) to seamen and provides that any seaman who suffers personal injury in the course of his or her employment may maintain an action for damages at law, with jurisdiction to be under the court of the district in which the employer resides or in which its principal office is located. The District Court dismissed the action as barred by the Eleventh Amendment (553 F Supp 403). A panel of the United States Court of Appeals for the Fifth Circuit reversed (739 F2d 1034), but on rehearing en banc, the Court of Appeals affirmed the District Court's judgment, finding that (1) there was no unmistakable expression in the Jones Act of an intention to abrogate the states' Eleventh Amendment immunity from suit in federal court, and (2) Texas had not consented to suit (780 F2d 1268).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, five members of the court agreed that the Jones Act does not authorize a seaman who is a state employee to sue the state in federal court.

Briefs of Counsel, p 929, infra.

POWELL, J., announced the judgment of the court and, in an opinion joined by REHNQUIST, Ch. J., and WHITE and O'CONNOR, JJ., expressed the view that (1) a general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the states' Eleventh Amendment immunity from federal suit, (2) thus, the general language of the Jones Act does not authorize suits against the states in federal court, (3) similarly, the FELA does not authorize suits against the states in federal court, (4) the Eleventh Amendment prevents a state from being sued in federal court by one of its own citizens, unless the state itself consents to be sued, and (5) unconsenting states are immune under the Eleventh Amendment from in personam suits in admiralty brought by private citizens.

WHITE, J., concurring in the opinion and judgment, expressed the view that the Supreme Court did not purport to disturb its previous construction of the Jones Act, in Petty v Tennessee-Missouri Bridge Commission (1959) 359 US 275, 3 L Ed 2d 804, 79 S Ct 785, as affording a remedy to seamen employed by the states.

SCALIA, J., concurring in part and concurring in the judgment, expressed the view that regardless of whether states are immune under the Federal Constitution from federal suits by individuals, such an understanding underlay the Jones Act and the FELA, and therefore neither of those statutes applies to the states.

BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissenting, expressed the view that (1) the Eleventh Amendment does not limit federal jurisdiction over suits in admiralty, (2) the Amendment bars only actions against a state by citizens of another state or of a foreign nation, (3) the Amendment applies only to diversity suits, not to federal question suits, and (4) even assuming the Amendment's applicability to the particular case, Congress abrogated state immunity from suit under the Jones Act and the FELA.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

32 Am Jur 2d, Federal Employers' Liability and Compensation Acts §§ 14, 43; 72 Am Jur 2d, States, Territories, and Dependencies § 103

1 Federal Procedure, L Ed, Access to District Courts § 1:448; 11 Federal Procedure, L Ed, Employers' Liability Acts §§ 30:87 et seq.

9 Federal Procedural Forms, L Ed, Employers' Liability Acts § 27:111

11 Am Jur Pl & Pr Forms (Rev), Federal Employers' Liability and Compensation Acts, Form 151

8 Am Jur Legal Forms 2d, Federal Employers' Liability and Compensation Acts § 110:45

9 Am Jur Trials 665, Seamen's Injuries; 11 Am Jur Trials 397, Litigation Under the Federal Employers' Liability Act

USCS, Constitution, Amendment 11; 46 USCS Appx § 688

US L Ed Digest, Federal Employers' Liability and Compensation Acts §§ 1, 4, 54, 55; States, Territories, and Possessions § 87

Index to Annotations, Eleventh Amendment; Federal Employers' Liability and Compensation Acts; Jones Act

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ANNOTATION REFERENCES

Supreme Court's construction of Eleventh Amendment restricting federal judicial power to entertain suits against a state. 50 L Ed 2d 928.

Shipowner's liability for injury or death of seaman resulting from failure to furnish him adequate assistance for work on or connected with vessel. 18 L Ed 2d 1497.

Applicability of state practice and procedure in Federal Employers' Liability Act actions brought in state courts. 79 ALR2d 553.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Federal Employers' Liability and Compensation Acts §§ 54, 55; States, Territories, and Possessions § 87 — Jones Act — federal suit by state employee

1a, 1b. A seaman who is a state employee will be held by the United States Supreme Court to be barred from suing the state in federal court under the Jones Act (46 USCS Appx § 688) for personal injuries suffered in the course of his or her employment, where (1) four Justices of the Supreme Court are of the view that such a suit is barred by the Federal Constitution's Eleventh Amendment, since the language of the Jones Act does not unequivocally abrogate the states' immunity from federal suit under the Eleventh Amendment, and (2) a fifth Justice is of the view that regardless of whether states are immune under the Federal Constitution from federal suits by individuals, the Jones Act does not apply to the states. [Per Powell, J., Rehnquist, Ch. J., and White, O'Connor, and Scalia, JJ. Dissenting: Brennan, Marshall, Blackmun, and Stevens, JJ.]

Federal Employers' Liability and Compensation Acts §§ 1, 4; States, Territories, and Possessions § 87 — FELA — federal suit by state employee

2a, 2b. An employee of a state-operated railroad company will be held by the United States Supreme Court to be barred from suing the state in federal court under the Federal Employers' Liability Act (FELA) (45 USCS §§ 51 et seq.) for personal injuries suffered in the course of his or her employment, where (1) four Justices of the Supreme Court are of the view that such a suit is barred by the Federal Constitution's Eleventh Amendment, since the language of the FELA does not unequivocally abrogate the states' immunity from federal suit under the Eleventh Amendment, and (2) a fifth Justice is of the view that regardless of whether states are immune under the Federal Constitution from federal suits by individuals, the FELA does not apply to the states. [Per Powell, J., Rehnquist, Ch. J., and White, O'Connor, and Scalia, JJ. Dissenting: Brennan, Marshall, Blackmun, and Stevens, JJ.]

Federal Employers' Liability and Compensation Acts § 55 — Jones Act — action against state

3a-3c. The Jones Act (46 USCS Appx § 688) affords a remedy to seamen employed by the state who suffer personal injury in the course of their employment. [Per White, Brennan, Marshall, Blackmun, and Stevens, JJ.]

SYLLABUS BY REPORTER OF DECISIONS

Petitioner, an employee of the Texas Highways Department, was injured while working on a ferry dock operated by the Department. She filed suit against the Department and the State under § 33 of the Jones Act, which provides that any seaman injured in the course of his employment may maintain an action for damages at law in federal district court, and which, in effect, applies the remedial provisions of the Federal Employer's Liability Act (FELA) to such suits. The District Court dismissed the action as barred by the Eleventh Amendment, and

the Court of Appeals affirmed. Although recognizing that Parden v Terminal Railway of Alabama Docks Dept., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207, held that an employee of a state-operated railroad may bring an FELA action in federal court, the Court of Appeals held that the decision was inapplicable in light of Congress' failure to include in the Jones Act an unmistakably clear expression of its intention to abrogate the States' Eleventh Amendment immunity from suit in federal court. The court also held that Texas had not consented to being sued under the Jones Act.

Held: The judgment is affirmed.

780 F2d 1268, affirmed.

Justice Powell, joined by The Chief Justice, Justice White, and Justice O'Connor, concluded that the Eleventh Amendment bars a state employee from suing the State in federal court under the Jones Act.

(a) Even though the express terms of the Eleventh Amendment's prohibition are limited to federal-court suits "in law or equity" against a State by citizens of another State or a foreign country, the Amendment bars a citizen from suing his own State, Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504, and prohibits admiralty suits against a State, Ex parte New York, No. 1, 256 US 490, 65 L Ed 1057, 41 S Ct 588, unless the State expressly waives its immunity and consents to suit in federal court. Moreover, assuming that Congress can abrogate the Eleventh Amendment when it acts pursuant to the Commerce Clause, it must express its intent to do so in unmistakable language in the statute itself. Atascadero State Hospital v Scanlon, 473 US 234, 87 L Ed 2d 171, 105 S Ct 3142.

(b) Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act. Although the Act extends to *"[a]ny"* injured seaman, this general authorization for federal-court suits is not the kind of unequivocal statutory language that is sufficient to abrogate the Eleventh Amendment, which marks a constitutional distinction between the States and other employers of seamen. Moreover, since both lower courts rejected petitioner's contention that Texas waived its Eleventh Amendment immunity, and since the petition for certiorari does not address this issue, it need not be considered here.

(c) To the extent that Parden is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.

(d) Hans, which firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity, and the long line of subsequent cases that reaffirmed that principle, will not be overruled in the absence of "special justification" for such a departure from the doctrine of stare decisis. The argument that the Amendment does not bar citizens' federal-question actions against the States in federal court is not persuasive for several reasons. The historical records show that, at most, the intentions of the Constitution's Framers and Ratifiers were ambiguous on the subject. Moreover, since federal-question actions unquestionably are "suits in law or equity," the plain language of the Amendment refutes the argument. Nor does the argu-

ment offer any satisfactory explanation for the overwhelming rejection of another amendment that would have allowed citizen suits against States for causes of action arising under treaties. The principle of sovereign immunity has been deeply embedded in our federal system since its inception, and is required because of the sensitive problems inherent in making one sovereign appear against its will in the courts of another. That States may not be sued absent waiver or congressional enactment is a necessary consequence of their role in a system of dual sovereignties.

(e) The argument that the sovereign immunity doctrine has no application to citizens' admiralty suits against unconsenting States in federal courts is directly contrary to long-settled authority, including Ex parte New York, No. 1. The suggestion that the latter case overruled settled law allowing such suits is not supported by the earlier cases cited, which, on balance, indicate that unconsenting States were immune from admiralty suits, and, at the very least, demonstrate that the question was not "settled."

Justice Scalia concluded that, regardless of the correctness of Hans as an original matter, Congress enacted the Jones Act and the FELA provisions which it incorporates on the assumption that, as Hans appears to have held, Article III of the Constitution contains an implicit limitation on suits brought by individuals against States. The statutes cannot now be read to apply to States as though that assumption never existed. Thus, Parden is properly overruled.

Powell, J. announced the judgment of the Court and delivered an opinion in which Rehnquist, C. J. and White and O'Connor, JJ., joined. White, J., filed a concurring opinion. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall, Blackmun, and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Michael D. Cucullu argued the cause for petitioner.

F. Scott McCown argued the cause for respondents.

Briefs of Counsel, p 929, infra.

SEPARATE OPINIONS

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Justice **Powell** announced the judgment of the Court and delivered an opinion in which **The Chief Justice**, Justice White, and Justice **O'Connor** join.

The question in this case is whether the Eleventh Amendment bars a state employee from suing the State in federal court under the Jones Act, ch 250, 41 Stat 1007, 46 USC § 688 [46 USCS Appx § 688].

I

The Texas Department of Highways and Public Transportation operates a free automobile and passenger ferry between

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Point Golivar and Galveston, Texas. Petitioner Jean Welch, an employee of the State Highway Department, was injured while working on the ferry dock at Galveston. Relying on § 33 of the Jones Act, 46 USC § 688 [46 USCS Appx § 688], she filed suit in the Federal District Court for the Southern District of Texas against the

Highway Department and the State of Texas.[1]

The District Court dismissed the action as barred by the Eleventh Amendment. 533 F Supp 403, 407 (1982). A divided panel of the Court of Appeals for the Fifth Circuit reversed, with each judge writing separately. 739 F2d 1034 (1984). On rehearing en banc, the Court of Appeals affirmed the judgment of the District Court. 780 F2d 1268 (1986). The court recognized that Parden v Terminal Railway of Alabama Docks Dept., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964), held that an employee of a state-operated railroad company may bring an action in federal court under the Federal Employer's Liability Act (FELA), 53 Stat 1404, 45 USC §§ 51-60 [45 USCS §§ 51-60]. Parden is relevant to this case because the Jones Act applied the remedial provisions of the FELA to seamen. See 46 USC § 688(a) [46 USCS Appx § 688(a)]. The court nevertheless concluded that "the broad sweep of the Parden decision, although it has not been overruled, has overtly been limited by later decisions as its full implications have surfaced." 780 F2d, at 1270. The court relied on our holding that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Atascadero State Hospital v

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Scanlon, 473 US 234, 242, 87 L Ed 2d 171, 105 S Ct 3142 (1985).[2] The Court of Appeals found no unmistakable expression of such an intention in the Jones Act. The court also held that Texas has not consented to suit under the Jones Act. 780 F2d, at 1273-1274 (citing Lyons v Texas A & M University, 545 SW2d 56 (Tex Civ App 1976), writ refused, n. r. e. We granted certiorari, 479 US 811, 93 L Ed 2d 18, 107 S Ct 58 (1986), and now affirm.

II

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Court has recognized that the significance of the Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority

1. Section 33 of the Jones Act provides in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 USC § 688(a) [46 USCS Appx § 688(a)].

2. The question in Scanlon was whether § 504 of the Rehabilitation Act of 1973, 29 USC § 794 [29 USCS § 794], makes state agencies subject to suits for retroactive monetary relief in federal court. The Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Atascadero State Hospital v Scanlon, 473 US 234, 244-245, n 4, 87 L Ed 2d 171, 105 S Ct 3142 (1985). Congress therefore had the power to subject unconsenting States to suit in federal court. See Fitzpatrick v Bitzer, 427 US [illegible] 49 L Ed 2d 614, 96 S Ct 2666 (1976).

in Art. III" of the Constitution. Pennhurst State School & Hospital v Halderman, 465 US 89, 98, 79 L Ed 2d 67, 104 S Ct 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State. Hans v Louisiana, 134 US 1, 10, 33 L Ed 842, 10 S Ct 504 (1890). See Edelman v Jordan, 415 US 651, 662-663, 39 L Ed 2d 662, 94 S Ct 1347 (1974); Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 280, 36 L Ed 2d 251, 93 S Ct 1614 (1973). For the same reason, the Court has

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held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, "suits in law or equity." Ex parte New York, No. 1, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 US 503, 65 L Ed 1063, 41 S Ct 592 (1921) (Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes). See Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 683, n 17, 73 L Ed 2d 1057, 102 S Ct 3304 (1982) (plurality opinion of Stevens, J.); id., at 706-710, 73 L Ed 2d 1057, 102 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part). See infra, at 488-490, 97 L Ed 2d, at 406-407.[3]

The Court has recognized certain exceptions to the reach of the Eleventh Amendment. If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment. Clark v Barnard, 108 US 436, 447, 27 L Ed 780, 2 S Ct 378 (1883). But, because "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," Edelman v Jordan, supra, at 673, 39 L Ed 2d 662, 94 S Ct 1347, the Court will find a waiver by the State "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Ibid. (quoting Murray v Wilson Distilling Co. 213 US 151, 171, 53 L Ed 742, 29 S Ct 458 (1909)). Moreover, "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." Pennhurst II, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900 (emphasis in original). Thus, a State does not waive Eleventh Amendment immunity in federal

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courts merely by waiving sovereign immunity in its own courts. Id., at 99, n 9, 79 L Ed 2d 67, 104 S Ct 900.

We also have recognized that the Eleventh Amendment "necessarily [is] limited by the enforcement provisions of § 5 of the Fourteenth Amendment." Fitzpatrick v Bitzer, 427 US 445, 456, 49 L Ed 2d 614, 96 S Ct 2666 (1976). Consequently, Congress can abrogate the Eleventh Amendment without the States' consent when it acts pursuant to its power "'to enforce, by appropriate legislation' the substantive provisions of the Fourteenth Amendment." Ibid. (quoting US Const, Amdt 14, § 5). As the Court of Appeals noted in this case, we have required that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Atascadero State Hospital v Scanlon, 473 US 234, 243, 87 L Ed 2d 171, 105 S Ct 3142 (1985). We have been unwilling to infer that Congress intended to negate the States' immunity from suit in federal court, given "the vital role of the doctrine of sovereign immunity in our federal system." Pennhurst II, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900. Moreover, the courts properly are reluctant to infer that Congress has expanded our jurisdiction. See American Fire & Casualty Co. v Finn, 341 US 6, 17, 95 L Ed 702, 71 S Ct 534, 19 ALR2d 738 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .").

3. In Florida Dept. of State v Treasure Salvors, Inc. 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982), eight Members of the Court agreed that the Eleventh Amendment bars suit in admiralty brought to recover damages from the State or its officials. Id., at 698-699, 73 L Ed 2d 1057, 102 S Ct 3304 (plurality opinion of Stevens, J.); id., at 706-710, 73 L Ed 2d 1057, 102 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part). An action under the Jones Act unquestionably is an action to recover damages from the State.

III

We now apply these principles to the Jones Act. We note that the question whether the State of Texas has waived its Eleventh Amendment immunity is not before us. Both the District Court and the Court of Appeals held that the State has not consented to Jones Act suits in federal court. The petition for certiorari does not address this issue, and we do not regard it as fairly included in the questions on which certiorari was granted.[4] Indeed, at oral argument counsel for

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petitioner conceded that the question of express waiver by the State "is not before the Court . . . ." Tr of Oral Arg 18. We therefore have no occasion to consider petitioner's argument in her brief on the merits that the Texas Tort Claims Act, Tex Rev Civ Stat Ann, Art 6252-19 (Vernon, 1970, as amended 1973 Tex Gen Laws ch 50) constitutes an express waiver of the State's Eleventh Amendment immunity. Brief for Petitioner 29-34. We accept the holdings of the Court of Appeals and the District Court that it does not.

[1a] Petitioner's remaining argument is that Congress has abrogated the States' Eleventh Amendment immunity from suit under the Jones Act. We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment. See County of Oneida, New York v Oneida Indian Nation of New York State, 470 US 226, 252, 84 L Ed 2d 169, 105 S Ct 1245 (1985).[5] Petition-

4. The questions presented in the petition for certiorari are:

"1. Whether the State Department of Highways and the State of Texas are immune from a Jones Act suit in US District Court by a state employee/seaman by operation of the Eleventh Amendment to the US Constitution.

"2. Whether the doctrine of implied waiver of sovereign immunity as set forth in Parden v Terminal R. R. Co., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964) is still viable." Pet for Cert i (parallel citations omitted).

5. The argument for such an authority starts from the proposition that the Constitution authorizes Congress to regulate matters within the admiralty and maritime jurisdiction, either under the Commerce Clause or the Necessary and Proper Clause. See D. Robertson, Admiralty and Federalism 142-145 (1970). By ratifying the Constitution, the argument runs, the States necessarily consented to suit in federal court with respect to enactments under either Clause.

er's argument fails in any event because Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act. It is true that the Act extends to "*[a]ny* seaman who shall suffer personal injury in the course of his employment," § 33 (emphasis added). But the Eleventh Amendment marks a constitutional distinction between the States and other employers of

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seamen. Because of the role of the States in our federal system, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Atascadero State Hospital v Scanlon, supra, at 246, 87 L Ed 2d 171, 105 S Ct 3142. See Quern v Jordan, 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979). See also Employees v Missouri Dept. of Public Health and Welfare, 411 US, at 285, 36 L Ed 2d 251, 93 S Ct 1614. In Scanlon the Court held that § 504 of the Rehabilitation Act of 1973, 29 USC § 794 [29 USCS § 794], which provides remedies for "any recipient of Federal assistance," does not contain the unmistakable language necessary to negate the States' Eleventh Amendment immunity. For the same reasons, we hold today that the general language of the Jones Act does not authorize suits against the States in federal court.[6]

IV

[2a] In Parden v Terminal Railway of Alabama Docks Dept., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964), the Court considered whether an employee of a state-owned railroad could sue the State in federal court under the FELA. The Court concluded that the State of Alabama had waived its Eleventh Amendment immunity. Id., at 186, 12 L Ed 2d 233, 84 S Ct 1207. It reasoned that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making the FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States . . . ." § 1, 35 Stat 65, 45 USC § 51 [45 USCS § 51]. The Court mistakenly relied on cases holding that general language in the Safety Appliance Act, §§ 2, 6, and the Railway Labor Act, § 151 et seq., made those statutes applicable to the

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States.[7] It reasoned that it "should not presume to say, in the absence of express provision to the contrary, that [Congress] intended to exclude a particular group of [railroad] workers from the benefits conferred by the Act." Parden v Terminal Railway of Alabama Docks Dept., supra, at 190, 12 L Ed 2d 233, 84 S Ct 1207. But, as discussed above, the constitutional role of the States sets them apart from other employers and defendants. Atascadero State Hospital v Scanlon, 473 US, at 246, 87 L Ed 2d 171, 105 S Ct 3142; Pennhurst II, 465 US, at 99, 79 L Ed 2d 67, 104 S Ct 900; Edelman v Jordan, 415 US, at 673, 39 L Ed 2d 662, 94 S Ct 1347; Quern v Jordan, supra, at 342-343, 59 L Ed 2d 358, 99 S Ct 1139; Employees v Missouri Dept. of Public Health and Welfare, supra. As the dissenting opinion in Parden states:

> "It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense." 377 US, at 198-199, 12 L Ed 2d 233, 84 S Ct 1207 (White, J., dissenting).

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Although our later decisions do not expressly overrule Parden, they leave no doubt that Parden's discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law. In Employees v Missouri Dept. of Public Health and Welfare the Court emphasized that "Parden was premised on the conclusion that [the State] . . . had consented to suit in the federal courts . . . ." 411 US, at 281, n 1, 36 L Ed 2d 251, 93 S Ct 1614. The Court refused to extend the reasoning of Parden to "infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." Id., at 285, 36 L Ed 2d 251, 93 S Ct 1614. In subsequent cases the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity. Atascadero State Hospital v Scanlon, supra, at 242, 87 L Ed 2d 171, 105 S Ct 3142; Pennhurst II, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900; Quern v Jordan, 440 US, at 342-345, 59 L Ed 2d 358, 99 S Ct 1139. Accordingly, to the extent that Parden v Terminal Railway, supra, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.[8]

V

Today, for the fourth time in little more than two years, see Papasan v Allain, 478 US 265, 293, 92 L Ed

6. Because Eleventh Amendment immunity "partakes of the nature of a jurisdictional bar," Edelman v Jordan, 415 US 651, 678, 39 L Ed 2d 662, 94 S Ct 1347 (1974), we have no occasion to consider the State's additional argument that Congress did not intend to afford seamen employed by the States a remedy under the Jones Act.

7. As the dissenting opinion in Parden observed, these cases do not support the Court's holding on the Eleventh Amendment issue. 377 US 184, 200, n 2, 12 L Ed 2d 233, 84 S Ct 1207 (1964) (White, J., dissenting, joined by Douglas, Harlan, and Stewart, JJ.). California v Taylor, 353 US 553, 1 L Ed 2d 1034, 77 S Ct 1037 (1957), was a suit against the National Railroad Adjustment Board that expressly reserved the Eleventh Amendment question. Id., at 562, n 16, 1 L Ed 2d 1034, 77 S Ct 1037 ("The contention of the State that the Eleventh Amendment . . . would bar an employee . . . from enforcing an award . . . in a suit against the State in a United States District Court . . . is not before us under the facts of this case"). United States v California, 297 US 175, 80 L Ed 567, 56 S Ct 421 (1936), was a suit brought by the United States, against which the States are not entitled to assert sovereign immunity. See United States v Mississippi, 380 US 128, 140-141, 13 L Ed 2d 717, 85 S Ct 808 (1965). Finally, Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 280-282, 3 L Ed 2d 804, 79 S Ct 785 (1959), involved an interstate compact that expressly permitted the bistate corporation to sue and be sued.

8. As discussed, supra, at 475, 97 L Ed 2d, at 397-398, and n 5, we have no occasion in this case to consider the validity of the additional holding in Parden, that Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that the States are engaged in interstate commerce.

2d 209, 106 S Ct 2932 (1986) (Brennan, J., concurring in part and dissenting in part); Green v Mansour, 474 US 64, 74, 88 L Ed 2d 371, 106 S Ct 423 (1985) (Brennan, J., dissenting); Atascadero State Hospital v Scanlon, supra, at 247, 87 L Ed 2d 171, 105 S Ct 3142 (Brennan, J., dissenting), four Members of the Court urge that we overrule Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), and the long line of cases that has followed it. The rule of law depends in

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large part on adherence to the doctrine of stare decisis. Indeed, the doctrine is "a natural evolution from the very nature of our institutions." Lile, Some Views on the Rule of Stare Decisis, 4 Va L Rev 95, 97 (1916). It follows that "any departure from the doctrine of stare decisis demands special justification." Arizona v Rumsey, 467 US 203, 212, 81 L Ed 2d 164, 104 S Ct 2305 (1984). Although the doctrine is not rigidly observed in constitutional cases, "[w]e should not be . . . unmindful, even when constitutional questions are involved, of the principle of stare decisis, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us." Green v United States, 355 US 184, 215, 2 L Ed 2d 199, 78 S Ct 221, 77 Ohio L Abs 202, 61 ALR2d 1119 (1957) (Frankfurter, J., dissenting). Despite these time-honored principles, the dissenters—on the basis of ambiguous historical evidence—would flatly overrule a number of major decisions of the Court, and cast doubt on others. See n 27, infra. Once again, the dissenters have placed in issue the fundamental nature of our federal system.[9]

A

The constitutional foundation of state sovereign immunity has been well described by Justice Marshall in his separate opinion in Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973):

"It had been widely understood prior to ratification of the Constitution that the provision in Art III, § 2, concerning 'Controversies . . . between a State and Citizens of another State' would not provide a mechanism for making States unwilling defendants in federal court. The Court in Chisholm, however, considered the plain meaning of the constitutional provision to be controlling.

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The Eleventh Amendment served effectively to reverse the particular holding in Chisholm, and, more generally, to restore the original understanding, see, e.g., Hans v Louisiana . . . . Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and 'it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one 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.'" Id., at 291-292, 36 L Ed 2d 251, 93 S Ct 1614 (Marshall, J., concurring in result) (citations omitted).

Although the dissent rejects the Court's reading of the historical record, there is ample support for the Court's rationale, which has provided the basis for many important decisions.

1

Justice Brennan has argued at length that "[a] close examination of the historical records" demonstrates that "[t]here simply is no constitutional principle of state sovereign immunity." Atascadero State Hospital v Scanlon, 473 US, at 259, 87 L Ed 2d 171, 105 S Ct 3142 (dissenting opinion). In his dissent today, he repeats and expands this historical argument. Post, at 504-516, 97 L Ed 2d, at 416-423. The dissent concedes, as it must, that three of the most prominent supporters of the Constitution—Madison, Hamilton, and Marshall—took the position that unconsenting States would not be subject to suit in federal court.[10]

The

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Court has relied on these state-

9. We address today only two principal arguments raised by the dissent: that citizens may bring federal-question actions against the States in federal court, see infra, at 480-488, 97 L Ed 2d, at 401-406, and that citizens may bring admiralty suits against the States, see infra, at 488-493, 97 L Ed 2d, at 406-409.

10. Madison, Hamilton, and Marshall took this position in response to suggestions that the Clause in Article III, § 2, extended the federal judicial power to controversies "between a State and Citizens of another State." Madison, often described as the "father of the Constitution," addressed the effect of the first Clause during the Virginia Convention:

"[The Supreme Court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation [the Clause] can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

"It appears to me that this [Clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed 1861).

The same day, John Marshall said to the Virginia Convention:

"I hope that no gentleman will think that a state will be called to the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. . . . I see a difficulty in making a state defendant, which does not prevent its being plaintiff." Id., at 555-556.

Later that year, Alexander Hamilton wrote in The Federalist:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." The Federalist No. 81, pp 548-549 (J. Cooke ed 1961) (emphasis in original).

ments in the past. See Edelman v Jordan, 415 US, at 660-662, n 9, 39 L Ed 2d 662, 94 S Ct 1347; Monaco v Mississippi, 292 US 313, 323-325, 78 L Ed 1282, 54 S Ct 745 (1934); Hans v Louisiana, 134

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US, at 12-14, 33 L Ed 842, 10 S Ct 504. Although the dissenters would read these statements to apply only to cases in which no federal question is presented, see post, at 504-509, 97 L Ed 2d, at 416-419; Atascadero State Hospital v Scanlon, supra, at 268, 276-278, 87 L Ed 2d 171, 105 S Ct 3142, the statements themselves do not suggest such a limitation.[11] Moreover, the delicate problem of enforcing judgments against the States, that was raised by both Federalists and anti-Federalists, would have arisen in cases presenting a federal question as well as in other cases.

It is true, as the Court observed in Hans, supra, at 14, 33 L Ed 842, 10 S Ct 504, that opinions on this question differed during the ratification debates. Among those who disagreed with Madison, Hamilton, and Marshall were Edmund Randolph and James Wilson, both of whom supported ratification.[12] Opponents of

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ratification, including Patrick Henry, George Mason, and Richard Henry Lee, feared that the Constitution would make unconsenting States subject to suit in federal court. Despite the strong rhetoric in the dissent, these statements fall far short of demonstrating a consensus that ratification of the Constitution would abrogate the sovereign immunity of the States. Indeed, the representations of Madison, Marshall, and Hamilton that the Constitution did *not* abrogate the States' sovereign immunity may have been essential to ratification.[13] For example, the

11. The dissent relies heavily on later statements in Chief Justice Marshall's opinions for the Court in Cohens v Virginia, 6 Wheat 264, 382-383, 412, 5 L Ed 257 (1821), and Osborn v Bank of the United States, 9 Wheat 738, 857-858, 6 L Ed 204 (1824). Of course the possibility that Marshall changed his views on sovereign immunity after the Constitution was ratified, or espoused a broader view of sovereign immunity only to secure ratification, does not imply that the views he expressed at the Virginia Convention should be disregarded. In any event, the dissent places too much weight on Cohens and Osborn. In Cohens, it was the State that began criminal proceedings against the Cohenses. It had long been understood that sovereign immunity did not prevent persons convicted of crimes from appealing. See D. Currie, The Constitution and the Supreme Court, 1789-1888, p 99 (1985). Accordingly, Chief Justice Marshall's opinion in Cohens distinguished a writ of error, which is but "a continuation of the same suit," from an independent suit against the State. 6 Wheat, at 409, 5 L Ed 257. Thus, as the Court properly noted in both Hans v Louisiana, 134 US 1, 19, 33 L Ed 842, 10 S Ct 504 (1890), and Monaco v Mississippi, 292 US 313, 327, 78 L Ed 1282, 54 S Ct 745 (1934), the statements quoted in today's dissent were unnecessary to the decision in Cohens. In Osborn, the Court held that the Eleventh Amendment did not apply to a suit against a state official, a holding that is not at issue today. Thus, the statement quoted by the dissent, post, at 509, 97 L Ed 2d, at 419, is dictum.

12. Both Wilson and Randolph had served on the Committee of Detail that added the Clause in Article III, § 2, extending the judicial power to controversies between a State and citizens of another State. As a member of the Court, Wilson sided with the majority in Chisholm v Georgia, 2 Dall 419, 1 L Ed 440 (1793). Randolph, while Attorney General of the United States, argued the case for Chisholm.

13. A leading historian has concluded:
"The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." 1 C. Warren, The Supreme Court in United States History 91 (1923).

New York Convention appended to its ratification resolution a declaration of understanding that "the Judicial Power of the United States in cases in which a State may be a party, does not extend to criminal Prosecutions, or to authorize any Suit by any Person against a State." 2 Documentary History of the Constitution of the United States of America 194 (1894).[14] At most,

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then, the historical materials show that—to the extent this question was debated—tne intentions of the Framers and Ratifiers were ambiguous.

2

No one doul that the Eleventh Amendment nullified the Court's decision in Chisholm v Georgia, 2 Dall 419, 1 L Ed 440 (1793). Chisholm was an original action in assumpsit, filed by the South Carolina executor of a South Carolina estate, to recover money owed to the estate by Georgia. The Court held, over a dissent by Justice Iredell, that it had jurisdiction. The reaction to Chisholm was swift and hostile. The Eleventh Amendment passed both houses of Congress by large majorities in 1794. Within two years of the Chisholm decision, the Eleventh Amendment was ratified by the necessary 12 States.[15]

The dissent, observing that jurisdiction in Chisholm itself was based solely on the fact that Chisholm was not a citizen of Georgia, argues that the Eleventh Amendment does not apply to cases presenting a federal question.[16] The text of the Amendment states that "[t]he Judicial power of the

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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,

14. The New York Convention also stated its understanding that "every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same." 2 Documentary History of the Constitution of the United States of America 191 (1894). This view later was embodied in the Tenth Amendment, that reserves to the States, or to the people, powers not delegated to the United States by the Constitution. Of course the Constitution does not expressly abrogate the sovereign immunity of the States. Thus the principle that States cannot be sued without their consent is broadly consistent with the Tenth Amendment.

15. President Adams did not notify Congress that the Amendment had been ratified by the necessary three-fourths of the States until January 1798. 1 J. Richardson, Messages and Papers of the Presidents 260 (1899).

16. The dissent states that Justice Iredell's dissenting opinion in Chisholm v Georgia is "generally regarded as embodying the rationale of the Eleventh Amendment." Post, at 513, 97 L Ed 2d, at 421. As the dissent itself observes, post, at 515-516, 97 L Ed 2d, at 422-423, Justice Iredell's opinion rests primarily on the absence of a *statutory* provision conferring jurisdiction on the Court in cases such as Chisholm's. To the extent that Justice Iredell discussed the constitutional question, his opinion is consistent with the more recent decisions of this Court:

"So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, *under any circumstances*, a compulsive suit against the State for the recovery of money." 2 Dall, at 449, 1 L Ed 440 (emphasis added).

The dissent does not attempt to explain these remarks, except to observe that they were unnecessary to Justice Iredell's decision.

or by Citizens or Subjects of any Foreign State." US Const, Amdt 11 (emphasis added). Federal-question actions unquestionably are suits "in law or equity"; thus the plain language of the Amendment refutes this argument.[17] Nor does the dissenting opinion offer any satisfactory explanation for the rejection, by an overwhelming margin, of an amendment offered by Senator Gallatin that would have allowed citizens to sue the States for causes of action arising under treaties.[18]

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3

The Court's unanimous decision in Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity. Hans, a citizen of Louisiana, brought an action against the State in federal court alleging that its failure to pay interest on certain bonds violated the Contract Clause. The Court considered substantially the same historical materials relied on by the dissent and unanimously held that the action was barred by the doctrine of sovereign immunity. Justice Bradley's opinion for the Court observed:

> "Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face." Id., at 15, 33 L Ed 842, 10 S Ct 504.

In a short concurring opinion, Justice Harlan agreed with the other eight Members of the Court that "a

17. The dissent's principal textual argument rests on the similarity between the language of the Amendment and the language of the State-Citizen Diversity Clauses in Article III. See Atascadero State Hospital v Scanlon, 473 US, at 286-287, 87 L Ed 2d 171, 105 S Ct 3142 (Brennan, J., dissenting). This argument cannot explain why Congress chose to apply the Amendment to "any suit in law or equity" rather than any suit where jurisdiction is predicated solely on diversity of citizenship. Instead, the dissent reads the Amendment to accomplish even less than its plain language suggests. As the Court long has recognized, the speed and vigor of the Nation's response to Chisholm suggests that the Eleventh Amendment should be construed broadly so as to further the federal interests that the Court misapprehended in Chisholm. The dissent also has some difficulty explaining the Clause in Article III, § 2, that extends the federal judicial power "to Controversies to which the United States shall be a Party." Although arguments analogous to those in the dissent would suggest that this Clause abrogated the sovereign immunity of the United States, the dissent stops short of such an extreme conclusion.

18. In an effort to explain the overwhelming rejection of Gallatin's amendment, the dissent suggests that Congress would have enumerated all the Article III heads of jurisdiction if it had intended to bar federal-question actions against the States. Atascadero State Hospital v Scanlon, supra, at 287, n 40, 87 L Ed 2d 171, 105 S Ct 3142. The dissent also speculates, without citing a shred of historical evidence, that the Senate may have rejected the proposed amendment to avoid giving the impression that it was barring federal-question actions *not* based on a treaty. Finally, the dissent observes that federal courts had no general original federal-question jurisdiction under the Judiciary Act of 1789. The dissent thus implies that the question was regarded as unimportant at the time. But the dissent also concedes that Senator Gallatin's proposed amendment was so unpopular that its adoption might have resulted in a constitutional convention. Ibid. This concession hardly is consistent with the dissent's assertion that adoption of the Gallatin amendment would have had no practical significance.

suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued." Id., at 21, 33 L Ed 842, 10 S Ct 504.

Contrary to the suggestion in the dissent, post, at 519, 97 L Ed 2d, at 425, the fundamental principle enunciated in Hans has been among the most stable in our constitutional jurisprudence. Moreover, the dissent is simply wrong in asserting that the doctrine lacks a clear rationale, ibid. Because of the sensitive problems "inherent in making one sovereign appear against its will in the courts of the other," Employees v Missouri Dept. of Public Health and Welfare, 411 US, at 294, 36 L Ed 2d 251, 93 S Ct 1614 (Marshall, J., concurring in result), the doctrine of sovereign immunity

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plays a vital role in our federal system. The contours of state sovereign immunity are determined by the structure and requirements of the federal system. The rationale has been set out most completely in the Court's unanimous opinion, per Chief Justice Hughes, in Monaco v Mississippi, 292 US 313, 78 L Ed 1282, 54 S Ct 745 (1934). First, the United States may sue a State, because that is "inherent in the Constitutional plan." Id., at 329, 78 L Ed 1282, 54 S Ct 745. Absent such a provision, "'the permanence of the Union might be endangered.'" Ibid. (quoting Oklahoma v Texas, 258 US 574, 581, 66 L Ed 771, 42 S Ct 406 (1922)). Second, States may sue other States, because a federal forum for suits between States is "essential to the peace of the Union." Monaco v Mississippi, supra, at 328, 78 L Ed 1282, 54 S Ct 745. Third, States may not be sued by foreign states, because "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative." 292 US, at 331, 78 L Ed 1282, 54 S Ct 745. Fourth, the Eleventh Amendment established "an absolute bar" to suits by citizens of other States or foreign states. Id., at 329, 78 L Ed 1282, 54 S Ct 745. Finally, "[p]rotected by the same fundamental principle [of sovereign immunity], the States, in the absence of consent, are immune from suits brought against them by their own citizens . . . ." Ibid. The Court has never questioned this basic framework set out in Monaco v Mississippi.

The dissenters offer their unsupported view that the principle of sovereign immunity is "'pernicious'" because it assertedly protects States from the consequences of their illegal conduct and prevents Congress from "'tak[ing] steps it deems necessary and proper to achieve national goals within its constitutional authority.'" Post, at 521, 97 L Ed 2d, at 426 (quoting Atascadero State Hospital v Scanlon, 473 US, at 302, 87 L Ed 2d 171, 105 S Ct 3142 (Brennan, J., dissenting)). Of course, the dissent's assertion that our cases construing the Eleventh Amendment deprive Congress of some of its constitutional power is simply question-begging. Moreover, as noted supra, at 475, 97 L Ed 2d, at 397, Congress clearly has authority to limit the Eleventh Amendment when

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it acts to enforce the Fourteenth Amendment. Fitzpatrick v Bitzer, 427 US 445, 456, 49 L Ed 2d 614, 96 S Ct 2666 (1976). The dissent's statement that sovereign immunity "protect[s] the States from the consequences of their illegal con-

duct" erroneously suggests that aggrieved individuals are left with no remedy for harmful state actions. Relief often may be obtained through suits against state officials rather than the State itself, or through injunctive or other prospective remedies. Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Municipalities and other local government agencies may be sued under 42 USC § 1983 [42 USCS § 1983]. Monell v New York City Dept. of Social Services, 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018 (1978). In addition, the States may provide relief by waiving their immunity from suit in state court on state-law claims.[19] That States are not liable in other circumstances is a necessary consequence of their role in a system of dual sovereignties. Although the dissent denies that sovereign immunity is "'required by the structure of the federal system,'" post, at 520, 97 L Ed 2d, at 426 (quoting Atascadero, supra, at 302, 87 L Ed 2d 171, 105 S Ct 3142), the principle has been deeply embedded in our federal system from its inception.

B

As a fall-back position, the dissent argues that the doctrine of sovereign immunity has no application to suits in admiralty against unconsenting States. Post, at 497-504, 97 L Ed 2d, at 412-416. This argument also is directly contrary to long-settled authority, as well as the Court's recognition that the Eleventh Amendment affirms "the fundamental principle of sovereign immunity," Pennhurst II, 465 US, at 98, 79 L Ed 2d 67, 104 S Ct 900; Monaco v Mississippi, supra, at 329, 78 L Ed 1282, 54 S Ct 745.

1

In Ex parte New York, No. 1, 256 US 490, 65 L Ed 1057, 41 S Ct 588 (1921), a unanimous Court held that unconsenting States are immune from

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in personam suits in admiralty brought by private citizens.[20] Today the dissent asserts that the Court's opinion in Ex parte New York, No. 1 "did not attempt to justify its obliteration" of the traditional distinction between admiralty cases and cases in law or equity. Post, at 500, 97 L Ed 2d, at 414. On the contrary, the Court expressly recognized the distinction, see 256 US, at 497, 65 L Ed 1057, 41 S Ct 588, and provided a reasoned basis for its holding:

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one 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

19. In this case, for example, Welch is not without a remedy: She may file a workers' compensation claim against the State under the Texas Tort Claims Act, ch 292, 1969 Tex Gen Laws 874, amended by ch 50, 1973 Tex Gen Laws 77. See Brief for Respondents 34-35.

20. The opinion was written by Justice Pitney for a strong Court that included Justices Holmes and Brandeis. Chief Justice White, who died 13 days before the decision was announced, presumably concurred in the result and the reasoning.

which the Amendment is but an exemplification." Ibid. (citations omitted).

The Court has adhered to this rule in subsequent cases. In re New York, No. 2, 256 US 503, 65 L Ed 1063, 41 S Ct 592 (1921), held that a private citizen may not bring an admiralty action in rem against a vessel owned by a State. The Court concluded that "'[t]o permit a creditor to seize and sell [a government-owned vessel] to collect his debt would be to permit him in some degree to destroy the government itself.'" Id., at 511, 65 L Ed 1063, 41 S Ct 592 (quoting Klein v New Orleans, 99 US 149, 150, 25 L Ed 430 (1879)).[21] More recently,

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in Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304, (1982) eight Members of the Court reaffirmed the settled rule that the Eleventh Amendment bars admiralty actions against the State or its officials seeking damages to be paid from the state treasury. Id., at 698-699, 73 L Ed 2d 1057, 102 S Ct 3304 (opinion of Stevens, J.); id., at 706-710, 73 L Ed 2d 1057, 102 S Ct 3304 (White, J., concurring in judgment in part and dissenting in part). To be sure, Justice Stevens' opinion states that "we need not decide the extent to which a federal district court exercising admiralty in rem jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res." Id., at 697, 73 L Ed 2d 1057, 102 S Ct 3304. Of course, that statement has no application to an action in personam, such as Welch's suit under the Jones Act.[22]

2

The dissent suggests that In re New York, No. 1, decided in 1921, overruled settled law to the effect that the Constitution does not bar private citizens from bringing admiralty

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suits against the States. Post, at 500, 97 L Ed 2d, at 413-414. The dissent concedes that the Court "'did not pass on the applicability of the Eleventh Amendment in admiralty'" prior to 1921. Post, at 499, 97 L Ed 2d, at 413 (citation omitted). It nevertheless asserts that dicta in United States v Peters, 5 Cranch 115, 3 L Ed 53 (1809), and

21. The dissent insists that In re New York, No. 2 does not support our holding. Post, at 500-501, n 5, 97 L Ed 2d, at 414. As noted supra, at 473, n 3, 97 L Ed 2d, at 396, eight members of the Court recently have thought otherwise. In Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982), Justice Stevens' opinion, joined by Chief Justice Burger and Justices Marshall and Blackmun, explains that In re New York, No. 2 holds:

"[A]n action—otherwise barred as an inpersonam action against the State—cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding in rem." 458 US, at 699, 73 L Ed 2d 1057, 102 S Ct 3304. Justice White's opinion in Treasure Salvors, joined by Justices Powell, Rehnquist, and O'Connor, reads In re New York, No. 2 even more broadly, as holding that "sovereign immunity bars process against a res in the hands of state officers." 458 US, at 709, 73 L Ed 2d 1057, 102 S Ct 3304.

22. The dissent suggests that a distinction may exist between admiralty suits based on a statute and other admiralty suits against the States. The only argument the dissent advances in favor of this distinction is that "admiralty is not mentioned in the Eleventh Amendment." Post, at 502, 97 L Ed 2d, at 415. But that observation—as well as the arguments that the Eleventh Amendment embodies a principle of sovereign immunity—applies to all admiralty suits. The perceived distinction is simply unsound.

Governor of Georgia v Madrazo, 1 Pet 110, 7 L Ed 73 (1828), support the "holding" of United States v Bright, 24 Fed Cas 1232 (No. 14,674) (CC Pa 1809), that the Eleventh Amendment does not apply to suits in admiralty. In fact these early cases cast considerable doubt on the dissent's position.

United States v Peters was a suit against the heirs of David Rittenhouse, who had served as treasurer of the State of Pennsylvania during the Revolutionary War. While Rittenhouse was treasurer, the State had seized a British vessel and sold it as a prize of war. Rittenhouse had deposited most of the proceeds in his own account, and had not turned them over to the State at the time of his death. Chief Justice Marshall's opinion for the Court turned on the facts that "the suit was not instituted against the state, or its treasurer, but against the executrixes of David Rittenhouse," and that the State "had neither possession of, nor right to, the property." 5 Cranch, at 139-141, 3 L Ed 53. Indeed, language in the Court's opinion suggests that an action against the State would have been barred by the Eleventh Amendment:

"The [eleventh] amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant." Id., at 139, 3 L Ed 53.

Thus, Peters does not support the dissenters' position.[23]

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The dissent's reliance on Governor of Georgia v Madrazo, supra, also is misplaced. Madrazo, a Spanish subject, sued the Governor of Georgia in admiralty to obtain possession of a cargo of slaves or the proceeds from their sale. Chief Justice Marshall's opinion for the Court held that the Eleventh Amendment applies "where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character." 1 Pet, at 123-124, 7 L Ed 73. Although Madrazo argued that the Eleventh Amendment does not apply to suits in admiralty, the Court carefully avoided the question. Instead, it held that the District Court where the action was filed had no jurisdiction regardless of whether the Eleventh Amendment applied.[24]

23. The trial in United States v Bright, 24 Fed Cas 1232 (No. 14,647) (CC Pa 1809) occurred *after* the Court's decision in Peters. Peters therefore cannot possibly have "supported" the holding of Bright in the sense of approval or endorsement. Bright was an officer of the Pennsylvania state militia who defended the Rittenhouse home against federal soldiers attempting to enforce the judgment in Peters. Circuit Justice Washington's remarks, that the dissent characterizes as the "holding" of the case, post, at 498, 97 L Ed 2d, at 412, actually were part of his charge to the jury. The Court had no opportunity to consider Justice Washington's statements, because it lacked jurisdiction to hear an appeal from Bright's conviction.

24. The Court noted that the action was between a State and a foreign subject, an action within the Court's original jurisdiction under Article III, § 2, of the Constitution and § 13 of the Judiciary Act of 1789, 1 Stat 73, 80. Thus, the Court concluded that, "if the 11th amendment . . . does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court," Governor of Georgia v Madrazo, 1 Pet 110, 124, 7 L Ed 73 (1829), because it was a suit between a State and a foreign subject. This conclusion is surprising in view of the fact that the Judiciary Act of 1789, ch 20, § 13, 1 Stat 73, 80, conferred original, but not exclusive, jurisdiction of such actions on the Court. Congress had conferred admiralty jurisdiction on the district courts in Section 9 of the Judiciary Act, 1 Stat 76-77. Moreover, Chief Justice Marshall's opinion for the Court in Cohens v Virginia, 6 Wheat, at 394-402, 5 L Ed 257, already had indicated that the Court's original jurisdiction under Article III is not exclusive. See D. Currie, The Constitution and the Supreme Court, 1789-1868, p 105, n 98 (1985).

Madrazo then filed an original admiralty proceeding directly against Georgia in this Court. Once again the Court avoided the question whether the Eleventh Amendment applies

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to suits in admiralty. Instead, the Court concluded that the case was not an admiralty action, but was "a mere personal suit against a state, to recover proceeds in its possession." Ex parte Madrazzo, 7 Pet 627, 632, 8 L Ed 808 (1833). This rather strained conclusion was contrary to "the assumption of all concerned" that the action was maritime in nature. D. Currie, The Constitution and the Supreme Court, 1789-1888, p 105, n 98 (1985).

On balance, the early cases in fact indicate that unconsenting States were immune from suits in admiralty.[25] At the very least, they demonstrate that the dissent errs in suggesting that the amenability of States to suits in admiralty was "settled," post, at 499, 97 L Ed 2d, at 413.[26] We therefore decline to overrule precedents that squarely reject the dissenters' position.

C

In deciding yet another Eleventh Amendment case, we do not write on a clean slate. The general principle of state sovereign immunity has been adhered to without exception by

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this Court for almost a century. The dissent nevertheless urges the Court to ignore stare decisis and overrule the long and unbroken series of precedents reaffirming this principle. If the Court were to overrule these precedents, a number of other major decisions also would have to reconsidered.[27] As we have

25. It is of course true, as the dissent observes, that Justice Story's treatise on the Constitution observed that a suit in admiralty is not, strictly speaking, a suit in law or equity. Post, at 499, 97 L Ed 2d, at 413 (quoting 3 J. Story, Commentaries on the Constitution of the United States 560-561 (1833)). Justice Story, however, merely observed that "[i]t has been doubted whether [the eleventh] amendment extends to cases of admiralty and maritime jurisdiction," id., at 560, and cited only the cases discussed above. Moreover, Justice Story was noted for his expansive view of the admiralty jurisdiction of federal courts. See, e.g., De Lovio v Boit, 7 Fed Cas 418 (No. 3,776) (CC Mass 1815); Note, 37 Am L Rev 911, 916 (1903) ("It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it").

26. In addition, the dissent accords little weight to early cases applying the general admiralty principle that maritime property belonging to a sovereign cannot be seized. E.g., The Schooner Exchange v McFaddon, 7 Cranch 116, 3 L Ed 287 (1812); L'Invincible, 1 Wheat 238, 4 L Ed 80 (1816), The Santissima Trinidad, 7 Wheat 283, 5 L Ed 454 (1822). See Florida Dept. of State v Treasure Salvors Inc., 458 US, at 709-710, and n 6, 73 L Ed 2d 1057, 102 S Ct 3304 (opinion of White, J.).

27. The dissent is written as if the slate had been clean since Hans was decided 97 years ago. As noted above, Hans has been reaffirmed in case after case, often unanimously and by exceptionally strong Courts. The two principal holdings of Hans that the dissent challenges are that the federal judicial power does not extend either to suits against States that arise under federal law, or to suits brought against a State by its own citizens.

stated, supra, at 478-479, 97 L Ed 2d, at 400, the doctrine of stare decisis is of fundamental importance to the rule of law. For this

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reason, "any departure from the doctrine . . . demands special justification." Arizona v Rumsey, 467 US, at 212, 81 L Ed 2d 164, 104 S Ct 2305. The arguments made in the dissent fall far short of justifying such a drastic repudiation of this Court's prior decisions.[28]

VI

For the reasons we have stated, the judgment of the Court of Appeals for the Fifth Circuit is affirmed.

It is so ordered.

Justice **White**, concurring.

[3a] The Court expressly stops short of addressing the issue

If these holdings were rejected, the Court would overrule at least 17 cases, in addition to Hans itself. Twelve of these cases relied on *both* of these principles. See Papasan v Allain, 478 US 265, 92 L Ed 2d 209, 106 S Ct 2932 (1986); Green v Mansour, 474 US 64, 88 L Ed 2d 371, 106 S Ct 423 (1985); Atascadero State Hospital v Scanlon, 473 US 234, 87 L Ed 2d 171, 105 S Ct 3142 (1985); Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974); Quern v Jordan, 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979); Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973); Ford Motor Co. v Department of Treasury of Indiana, 323 US 459, 89 L Ed 389, 65 S Ct 347 (1945); Missouri v Fiske, 290 US 18, 78 L Ed 145, 54 S Ct 18 (1933); Ex parte New York, No. 1, 256 US 490, 65 L Ed 1057, 41 S Ct 588 (1921); Ex parte New York, No. 2, 256 US 503, 65 L Ed 1063, 41 S Ct 592 (1921); Duhne v New Jersey, 251 US 311, 64 L Ed 280, 40 S Ct 154 (1920); Fitts v McGhee, 172 US 516, 43 L Ed 535, 19 S Ct 269 (1899). Four of them rested on the principles Hans established for determining when Congress has extended the federal judicial power to include actions against States under federal law. County of Oneida v Oneida Indian Nation, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985); Great Northern Life Insurance Co. v Read, 322 US 47, 88 L Ed 1121, 64 S Ct 873 (1944); Murray v Wilson Distilling Co., 213 US 151, 53 L Ed 742, 29 S Ct 458 (1909); Smith v Reeves, 178 US 436, 44 L Ed 1140, 20 S Ct 919 (1900). Finally, one would be overruled only to the extent the Court rejected the principle that the federal judicial power does not extend to suits against States by their own citizens. Pennhurst State School and Hospital v Halderman, 465 US 89, 79 L Ed 2d 67, 104 S Ct 900 (1984).

Repudiation of these principles also might justify reconsideration of a variety of other cases that were concerned with this Court's traditional treatment of sovereign immunity. E.g., Florida Dept. of Health and Rehabilitative Services v Florida Nursing Home Assn. 450 US 147, 67 L Ed 2d 132, 101 S Ct 1032 (1981); Monell v New York City Dept. of Social Services, 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018 (1978); Monaco v Mississippi, 292 US 313, 78 L Ed 1282, 54 S Ct 745 (1934); Hopkins v Clemson Agricultural College, 221 US 636, 55 L Ed 890, 31 S Ct 654 (1911).

28. Apart from rhetoric, the dissent relies on two arguments: (i) the "historical record," and (ii) the perceived "pernicious[ness]" of the principle of sovereign immunity. As we have noted, the fragments of historical evidence at the time of the adoption of the Constitution are as supportive of Hans v Louisiana as they are of the dissent. In attaching weight to this ambiguous history, it is not immaterial that we are a century further removed from the events at issue than were the Justices who unanimously agreed in Hans. Not one of the 17 cases the dissent would overrule concludes that the historical evidence calls into question the principle of state sovereign immunity or justifies the ignoring of stare decisis. As for the view that it would be "pernicious" to protect States from liability for their "unlawful conduct," we have noted above that an aggrieved citizen such as petitioner in fact has a bundle of possible remedies. See supra, at 488, 97 L Ed 2d, at 405-406, and n 19.

whether the Jones Act affords a remedy to seamen employed by the States. See ante, at 476, n 6, 97 L Ed 2d, at 398. The Court, however, has already construed the Jones Act to extend remedies to such seamen. Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 282-283, 3 L Ed 2d 804, 79 S Ct 785 (1959). Congress has not disturbed this construction, and the Court, as I understand it, does not now purport to do so.

Justice **Scalia**, concurring in part and concurring in the judgment.

Petitioner in this case did not assert as a basis for reversing the judgment that Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890),

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had been wrongly decided. That argument was introduced by an amicus, addressed only briefly in respondent's brief, and touched upon only lightly at oral argument. I find both the correctness of Hans as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.

[1b, 2b] I find it unnecessary to do so in any event. Regardless of what one may think of Hans, it has been assumed to be the law for nearly a century. During that time, Congress has enacted many statutes—including the Jones Act and the provisions of the Federal Employer's Liability Act (FELA) which it incorporates—on the assumption that States were immune from suits by individuals. Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed. Thus, although the terms of the Jones Act (through its incorporation of the FELA) apply to all common carriers by water, I do not read them to apply to States. For the same reason, I do not read the FELA to apply to States, and therefore agree with the Court that Parden v Terminal Railway of Alabama Docks Dept. 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964), should be overruled. Whether or not, as Hans appears to have held, Article III of the Constitution contains an implicit limitation on suits brought by individuals against States by virtue of a nearly universal "understanding" that the federal judicial power could not extend to such suits, such an understanding clearly underlay the Jones Act and the FELA.

Justice **Brennan**, with whom Justice **Marshall**, Justice **Blackmun**, and Justice **Stevens** join, dissenting.

The Court overrules Parden v Terminal Railway of Alabama Docks Dept. 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964), and thereby continues aggressively to expand its doctrine of Eleventh Amendment

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sovereign immunity. I adhere to my belief that the doctrine "rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect." Atascadero State Hospital v Scanlon, 473 US 234, 248, 87 L Ed 2d 171, 105 S Ct 3142 (1985) (Brennan, J., dissenting). In my view, the Eleventh Amendment does not bar the District Court's jurisdiction over the Jones Act suit by Jean Welch against the State of Texas and the Texas Highway Department for four independent reasons. First, the Amendment does not limit federal jurisdiction over suits in admiralty. Second, the Amendment bars only

actions against a State by citizens of another State or of a foreign nation. Third, the Amendment applies only to diversity suits. Fourth, even assuming the Eleventh Amendment were applicable to the present case, Congress abrogated state immunity from suit under the Jones Act, which incorporates the Federal Employers' Liability Act (FELA). I therefore dissent.

I

Article III provides that the "judicial Power" assigned to federal courts extends not only to "Cases in Law and Equity," but also "to all Cases of admiralty and maritime Jurisdiction."[1] In the instant case, the District Court stated that the "plaintiff brought this suit in admiralty." 533 F Supp 403, 404 (SD Tex 1982). The Eleventh Amendment limits the

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"Judicial power" in certain suits "in law or equity."[2] Therefore, even if the Eleventh Amendment does bar federal jurisdiction over cases in which a State is sued by its own citizen, its express language reveals that it does so *only* in "Cases in Law and Equity," and not in "Cases of admiralty and maritime Jurisdiction."

The leading case on the relationship between admiralty jurisdiction and the Eleventh Amendment for over a century was United States v Bright, 24 Fed Cas 1232 (No. 14,647) (CC Pa 1809), which was written by Circuit Justice Bushrod Washington. It held that the Eleventh Amendment does not bar a suit in admiralty against a State. Justice Washington acknowledged that a suit against a State raised sensitive issues, but believed himself bound by the fact that the Amendment does not refer to suits in admiralty. Furthermore, he noted that a court usually possesses the subject matter of the suit (i.e., the ship) in an admiralty in rem proceeding, and thereby avoids the "delicate" issue of confronting a State with a decree commanding it to relinquish certain property. Id., at 1236. This was not a controversial holding in its day. While the Court during Chief Justice Marshall's tenure did not have an opportunity to reach this issue, its dictum in United States v Peters, 5 Cranch 115, 3 L Ed 53 (1809), and Governor of Georgia v Madrazo, 1 Pet 110, 7 L Ed 73 (1828),[3] supported

1. Article III, § 2, provides:
"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."

2. The Eleventh Amendment provides:
"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

3. None of these Marshall Court cases casts any doubt on the correctness of United States v Bright, 24 Fed Cas 1232 (No. 14,647) (CC Pa 1809). The Court, however, asserts that language in United States v Peters, 5 Cranch 115, 139-141, 3 L Ed 53 (1809), supports its viewpoint. The language it cites, ante, at 491, 97 L Ed 2d, at 407-408, is taken out of context. In Peters, the Court found that the suit was not instituted against the State, but against a state official, as an individual party. 5 Cranch, at 139, 3 L Ed 53. Thus, the suit was not barred because "[t]he amendment simply provides, that no suit shall be commenced or prosecuted against a state." Ibid. The Court was focusing only on the identity of the defendant and not on the identity of the plaintiff. Indeed, the suit was brought by the United States Government, and States are not immune from actions brought by the United States. Ante, at 487, 97 L Ed 2d, at 405. Read in context, the quotation from Peters cited by the Court provides no support for the Court's position.

The Court in Peters heavily relied on the Amendment's plain language to justify its view that the Amendment applied only to States and not to state officials. 5 Cranch, at 139, 3 L Ed 53. The Bright case resulted from an attempt to enforce the judgment rendered in Peters. As indicated, supra, at 498, 97 L Ed 2d, at 412, the court in Bright also heavily relied on the plain language of the Amendment in holding that the Amendment did not affect admiralty suits.

4. The universal acceptance of Bright's holding suggests that States were not accorded status equal to foreign sovereigns in the early 19th century. See, e.g., The Schooner Exchange v McFaddon, 7 Cranch 116, 136, 3 L Ed 287 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself"). The early admiralty cases cited today by the Court, ante, at 493, n 25, 97 L Ed 2d, at 409, indicate that foreign countries were accorded sovereign immunity based on the international consequences of a federal court's intervention. See, e.g., The Santissima Trinidad, 7 Wheat 283, 337, 5 L Ed 454 (1822) (Story, J.) ("The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse").

the holding of Bright. See Atascadero

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State Hospital v Scanlon, 473 US, at 292-293, 87 L Ed 2d 171, 105 S Ct 3142 (Brennan, J., dissenting).

"Although the Supreme Court did not pass on the applicability of the Eleventh Amendment in admiralty until more than a century later, it was assumed by bench and bar in the meantime that Bright was correctly reasoned." J. Orth, The Judicial Power of the United States 37 (1987). Justice Joseph Story wrote in 1833 that:

> "[T]he language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in the admiralty is not, correctly speaking, a suit in law or in equity; but is often spoken of in contradistinction to both." 3 J. Story, Commentaries on the Constitution of the United States 560-561 (1833) (emphasis in original), citing United States v Peters, supra; United States v Bright, supra; Governor of Georgia v Madrazo, supra.

Nineteenth-century commentators regarded Bright as having settled the matter. Peter Du Ponceau, in his lectures to the Law Academy of Philadelphia in 1834 simply stated: "It has been held that this restriction [by the Eleventh Amendment] does not extend to cases of admiralty and maritime jurisdiction." P. Du Ponceau, A Brief View of the Constitution of the United States 37-38 (1834). See Fletcher, A Historical

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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, 1080-1081 (1983).[4]

In 1921, Bright was overruled, at least in part, by Ex parte New York, No. 1, 256 US 490, 65 L Ed 1057, 41 S Ct 588 (1921). Ex parte New York, No. 1 involved libel actions against a state official in his official capacity in connection with vessels operated by the State of New York. The Court

held that a State was immune under the Eleventh Amendment from an in personam suit in admiralty brought by a private individual without the State's consent.

The Court did not attempt to justify its obliteration of Bright's distinction between cases in admiralty and cases in law or equity, but simply referred in passing to Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890). 256 US, at 497-498, 65 L Ed 1057, 41 S Ct 588.[5] Merely

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citing to Hans is plainly an inadequate justification. Hans was a suit based on federal-question jurisdiction and, moreover, relied primarily on materials that justified the application of the Eleventh Amendment to cases in diversity jurisdiction. See infra, at 509-516, 97 L Ed 2d, at 419-424. It did not address the effect of the Eleventh Amendment on the extension of judicial power in Article III to admiralty suits. The distinction between admiralty cases and ordinary cases in law or equity was not a casual or technical one from the viewpoint of the Framers of the Constitution. Admiralty was a highly significant, perhaps the most important, subject-matter area for federal jurisdiction at the end of the 18th century. "Maritime commerce was then the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927). Alexander Hamilton noted in the Federalist No. 80: "The most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes." The Federalist No. 80, p 538 (J. Cooke ed 1961). Outside of Ex parte New York, No. 1, the Court has not ignored this legal distinction between admiralty and other cases in any other instance of constitutional and statutory interpretation. See, e.g., Romero v International

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Term. Co. 358 US 354, 368, 3 L Ed 2d 368, 79 S Ct 468 (1959); Atkins v The Disintegrating Co. 18 Wall 272, 302-303, 21 L Ed 841 (1874); Waring v Clarke, 5 How 441, 459-460, 12 L Ed 226 (1847); American Insurance Co. v Canter, 1

5. The Court also cites two other cases that do not support its holding on the Eleventh Amendment issue. In Ex parte New York, No. 2, 256 US 503, 65 L Ed 1063, 41 S Ct 492 (1921), the Court held that an in rem action against a State was barred by the common-law principle that "property and revenue necessary for the exercise of powers [by government] are to be considered as part of the machinery of government exempt from seizure and sale under process against the city . . . ." Id., at 511, 65 L Ed 1063, 41 S Ct 492.

In Florida Dept. of State v Treasure Salvors, Inc. 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304 (1982) (opinion of Stevens, J.), a four-Justice plurality held that the Eleventh Amendment did not bar the process issued by the District Court to secure possession of artifacts held by state officials. The plurality distinguished the Ex parte New York cases because the "action [was not an in personam action brought to recover damages from the State." 458 US, at 699, 73 L Ed 2d 1057, 102 S Ct 3304. The Court carefully emphasized the narrowness of its holding: "In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to which a federal district court exercising admiralty in rem jurisdiction over property before the court may adjudicate the rights of claimants to that property against sovereigns that did not appear and voluntarily assert any claim that they had to the res." Id., at 697, 73 L Ed 2d 1057, 102 S Ct 3304. Four Justices dissented in part from the judgment on the ground that the action was a suit against the State and therefore barred by the Eleventh Amendment. Id., at 705, 706, 73 L Ed 2d 1057, 102 S Ct 3304 (opinion of White, J.).

Pet 511, 545-546, 7 L Ed 242 (1828). Cf. Parsons v Bedford, 3 Pet 433, 446-447, 7 L Ed 732 (1830) (neither admiralty nor equity cases were suits in law within the Seventh Amendment jury provision).

Even if the Court is not prepared to overrule Ex parte New York, No. 1, that case can and should be distinguished here. It involved a suit based on the *common law* of admiralty and state law. In contrast, the present admiralty suit seeks to enforce a *federal statute*, the Jones Act. Although the Jones Act is deemed not to satisfy the Court's requirement that Congress use "unmistakable language" to abrogate a State's sovereign immunity, it does explicitly provide for federal jurisdiction for suits under the statute. Congress specifically indicated in the Jones Act that "any seaman"[6] may maintain an action for personal injury under the Act and that "[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 USC § 688 [46 USCS Appx § 688]. Whatever the merits of the "unmistakable language" requirement in cases of law and equity, it is completely out of place in admiralty cases resting on federal statute, in light of the fact that admiralty is not mentioned in the Eleventh Amendment.[7] Accordingly,

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in admiralty cases involving federal legislation, any bar implied by Ex parte New York, No. 1 against common law suits in admiralty is inapplicable.[8]

6. Welch's "status as a 'seaman' under the Jones Act is assumed and is not at issue." 780 F2d 1268, 1269 (CA5 1986).

7. In my view, there is no reason to depart from normal rules of statutory construction to determine Congress' intent regarding admiralty suits against States in federal court. The Court has applied normal rules of statutory construction when Congress exercises its authority under an Amendment that expressly contemplates limitations on States' authority, see Fitzpatrick v Bitzer, 427 US 445, 452-453, 49 L Ed 2d 614, 96 S Ct 2666 (1976), despite the Eleventh Amendment's *express* jurisdictional bar against certain suits in law or equity. A fortiori, we should apply normal statutory construction when Congress exercises its express authority to extend federal jurisdiction over admiralty cases and the Eleventh Amendment *does not expressly* bar the exercise of that authority.

It seems odd for the Court to impose an "unmistakable language" requirement on the Jones Act, especially based on an interpretation of the Eleventh Amendment that incorporates words that are not there. Departing from normal rules of statutory construction inevitably will frustrate the will of Congress. When the Jones Act was enacted, Bright was the prevailing precedent. Moreover, in my view, Congress expressed its intent in unmistakable language when it extended liability to employers of "any seaman" and explicitly provided for federal jurisdiction over such actions.

8. In addition, as Part IV discusses, infra, at 517-519, 97 L Ed 2d, at 424-425, we should be especially hesitant to incorporate the concept of state sovereign immunity with respect to those subjects over which the Constitution expressly grants authority to the National Government. Foreign and interstate commerce, which necessarily encompasses matters of admiralty, is obviously such a subject area. As we said in United States v California, 297 US 175, 80 L Ed 567, 56 S Ct 421 (1936), in rejecting an argument that a State was not subject in its sovereign capacity to a federal statute regulating interstate commerce:

"We can perceive no reason for extending [the canon of construction that a sovereign is presumptively not intended to be bound by a statute unless named in it] as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial." Id., at 186-187, 80 L Ed 567, 56 S Ct 421.

[3b] Thus, a narrow holding allowing federal jurisdiction over Welch's suit in admiralty under the Jones Act against the State of Texas is consistent with precedent and the will of Congress,[9] and prevents further erosion of a legal distinction

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which is difficult, if not impossible, to rationalize. It is patently improper to extend the Eleventh Amendment doctrine of sovereign immunity any further.[10]

II

The Eleventh Amendment does not bar a suit under the Jones Act by a Texas citizen against the State of Texas. The part of ARticle III, § 2, that was affected by the Amendment provides: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens or Subjects" (emphasis added). The Amendment uses language identical to that in Article III to bar the extension of the judicial power to a suit "against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State" (emphasis added). The congruence of the language suggests that the Amendment specifically limits only the jurisdiction conferred by the above-referenced part of Article III. Thus, the Amendment bars only federal actions brought against a State by citizens of another State or by foreign aliens.

Contrary to the Court's view, ante, at 480-484, 97 L Ed 2d, at 401-403, a proper assessment of the historical record of the Constitutional Convention and the debates surrounding the state ratification conventions confirms this interpretation. See Atascadero State Hospital v Scanlon, 473 US, at 263-280, 87 L Ed 2d 171, 105 S Ct 3142 (Brennan, J., Dissenting). The Court exclusively relies on the remarks of Madison, Hamilton, and Marshall at the Virginia Convention to support its contrary position. Ante, at 480-484, 97 L Ed 2d, at 401-403. But these statements must be considered in context.

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At the Virginia Convention, discussion focused on the question of Virginia's liability for debts that arose under state law, and which could be brought into federal court only through diversity suits by citizens of *another* State. See 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed 1861) (hereinafter Elliot's Debates) (Madison) ("[Federal] jurisdiction in controversies between a state and citizens of *another* state is much objected to, and perhaps without reason. . . .") (emphasis added); The Federalist No. 81, p 548 (J. Cooke ed 1961) (Hamilton) ("It has been suggested that an assignment of the public securities of one State to the citizens of *another*, would enable them to prosecute that state in the federal courts for the amount of those

9. [3c] In Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 282, 3 L Ed 2d 804, 79 S Ct 785 (1959), the Court considered the substantive applicability of the Jones Act to state employees: "'When Congress wished to exclude state employees, it expressly so provided.'. . . The Jones Act . . . has no exceptions from the broad sweep of the words 'Any seaman who shall suffer personal injury in the course of his employment may' etc." (citations omitted). The Court today does not disturb this holding. See ante, at 495, 97 L Ed 2d, at 410-411 (White, J., concurring).

10. Cf. United States v Johnson, 481 US 681, 692, 95 L Ed 2d 648, 107 S Ct 2063 (1987) (Scalia, J., dissenting) (arguing against extension of the Feres doctrine in order to "limit our clearly wrong decision in Feres and confine the unfairness and irrationality that decision has bred").

securities. . . .") (emphasis added); 3 Elliot's Debates 555 (Marshall) ("With respect to disputes between a state and the citizens of *another* state, its jurisdiction has been decried with unusual vehemence. . . .") (emphasis added).

Thus, the delegates to the Virginia Convention were not objecting to suits initiated by citizens of the same State; what concerned them were suits by citizens of *other* States. The majority of the delegates who spoke at the Virginia Convention, including Mason, Henry, Pendleton, and Randolph, did *not* believe that state sovereign immunity provided protection against suits initiated by citizens of other States. See Atascadero, supra, at 264-280, 87 L Ed 2d 171, 105 S Ct 3142. Moreover, those attending the Virginia Convention evidently were not persuaded by the rhetoric of Madison, Hamilton, and Marshall cited by the Court. The Convention endorsed an amendment that would have explicitly denied the federal judiciary authority over controversies between a State and citizens of other States. 3 Elliot's Debates 660-661. The felt need for this amendment shows that the delegates did not believe that state sovereign immunity barred all suits against States.[11]

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There is little evidence that Madison[12] or Hamilton[13] believed that Article III failed to authorize diversity

11. Similar proposals submitted in New York, North Carolina, and Rhode Island urged amendments depriving federal courts of jurisdiction over cases instituted against a State by a citizen of another State or by an alien. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 64 (1972).

12. Madison's view of this issue is not clear. As legal historian Clyde Jacobs concluded, "[w]hether Madison thought that federal courts should possess any jurisdiction over suits instituted against a state by citizens of another state or by foreigners must remain a matter of some conjecture; indeed there is no direct evidence that he considered the question at all. . . ." Id., at 12. Professor Jacobs also noted:

"Madison and other nationalists believed that the federal judiciary should be armed with powers not only to maintain the supremacy of national law but also to review state judicial decisions that might have interstate or foreign ramifications. Thus one of the principal reasons nationalists advanced for extending the federal judicial power—the maintenance of international peace and domestic harmony—would appear to necessitate national jurisdiction in cases where the good faith of the states vis-a-vis foreigners and citizens of other states had been engaged. If, however, this proposed federal judicial jurisdiction were qualified by the doctrine of state immunity, a broad avenue would have been left open to defeat every claim made upon them by citizens of other states and by aliens. The exception to the jurisdiction would have made the proposed jurisdiction futile or, at least, negligible." Id., at 13-14.

13. Hamilton's writings in The Federalist, No. 80, suggest that he did not believe that Article III barred all suits against States:

"It may be esteemed the basis of the union, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, *the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.* To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." The Federalist No. 80, pp 537-538 (J. Cooke ed 1961) (first emphasis in original; second emphasis added).

or federal-question suits brought by citizens against States. We know
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Marshall's understanding of Article III from his opinions written for the Court. The Chief Justice, in Cohens v Virginia, 6 Wheat 264, 5 L Ed 257 (1821), interpreted the effect of Article III on the Court's jurisdiction to review an appeal involving, as parties, a State and a citizen of the same State. The State of Virginia was sued for a writ of error in the United States Supreme Court. The writ challenged a criminal conviction obtained in a Virginia state court. The Court rejected the State's contention that the Constitution denied federal jurisdiction over the appeal. It concluded that Article III provides federal jurisdiction "to all [federal-question cases] without making in its terms any exception whatever, and without any regard to the condition of party." Id., at 378, 5 L Ed 257. The Chief Justice then considered whether, in the face of Article III's clear language, a general principle of state sovereign immunity could be implied. He concluded:

"From this general grant of jurisdiction [in federal-question cases], no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; *are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not.* We think a case arising under the constitution or laws of the United States,
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is cognizable in the Courts of the Union, whoever may be the parties to that case" (emphasis added). Id., at 382-383, 5 L Ed 257.[14]

The Court in Cohens also clearly revealed its understanding that the Eleventh Amendment was inapplicable to a suit brought by a citizen against his or her own State. After concluding that the petition for a writ of error was not properly understood as a suit commenced or prosecuted against a State, the Chief

14. In Cohens, Chief Justice Marshall explained in detail the effect of the general principle of sovereign immunity on the scope of Article III:
"The Counsel for the [State] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.
"This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides." Cohens v Virginia, 6 Wheat, at 380, 5 L Ed 257.
The Court then found that in agreeing to the Constitution, the States had surrendered a significant measure of their sovereignty. It stated that the Supremacy Clause is evidence of this surrender. Id., at 380-381, 5 L Ed 257. The Court therefore found that Article III extended jurisdiction to all federal-question suits and that "no exception is made of those cases in which a state may be party." Id., at 382-383, 5 L Ed 257.

Justice stated an alternative holding:

"But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' *It is not then within the amendment,* but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial
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power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." Id., at 412, 5 L Ed 257 (emphasis added).

Chief Justice Marshall reaffirmed this view of the Eleventh Amendment when he wrote for the Court in Osborn v Bank of the United States, 9 Wheat 738, 857-858, 6 L Ed 204 (1824):

"The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens."

The Court, however, chooses to ignore the clear meaning of the Constitution text based on speculation that the intentions of a few of the Framers and Ratifiers might have been otherwise. The evidence available reveals that the views of Madison and Hamilton on the issue are at best ambiguous, see nn 12 and 13, supra, and that Marshall's understanding runs directly counter to the Court's position. Thus, the Eleventh Amendment only bars a federal suit initiated by citizens of another State. Moreover, as Part III demonstrates, the Amendment only bars a particular type of federal suit—an action based on diversity jurisdiction.

III

In my view, the Eleventh Amendment applies only to diversity suits and not to federal-question or admiralty suits. The parallel between the language in Article III's grant of diversity jurisdiction ("to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects") and the language in the Eleventh Amendment ("any suit in law or equity . . . by Citizens of another State or by Citizens or Subjects of any Foreign State") supports this view. The Amendment prohibits federal jurisdiction over *all* such suits in law or
[483 US 510]
equity which are based on diversity jurisdiction. Since Congress had not granted federal-question jurisdiction to federal courts prior to the Amendment's ratification, the Amendment was not intended to restrict that type of jurisdiction. Furthermore, the controversy among the Ratifiers cited by the Court today, ante, at 480-484, 97 L Ed 2d, at 401-403, involved only diversity suits. Moreover, the Court recognizes that the immediate impetus for adoption of the Eleventh Amendment was Chisholm v Georgia, 2 Dall 419, 1 L Ed 440 (1793). Ante, at 484, 97 L Ed 2d, at 403. Chisholm was a *diversity* case brought in federal court upon a state cause of action against the State of Georgia by a citizen of South Carolina. The Court relies on Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), to hold that the

Eleventh Amendment bars Welch's suit in admiralty.

Hans, however, was a *federal-question* suit brought by a Louisiana citizen against his own State. Ignoring this fact, the Court in Hans relied on materials that primarily addressed the question of state sovereign immunity in diversity cases, and not on federal-question or admiralty cases.[15] It is plain from the face of the Hans opinion that the Court misunderstood those materials.[16] In particular, the Court in

[483 US 511]

Hans heavily relied on two sources: a statement by Hamilton in The Federalist No. 81 and the views of Justice Iredell, who wrote the dissent in Chisholm. 134 US, at 12, 13-14, 18-19, 33 L Ed 842, 10 S Ct 504. A close examination of both these sources indicates that they cannot serve as support for the holding of Hans or of the Court today.

A

The Court today relies on the same quotation of Hamilton in The Federalist No. 81 cited by the Court in Hans. Compare 134 US, at 12-13, 33 L Ed 842, 10 S Ct 504 with ante, at 480-481, n 10, 97 L Ed 2d, at 401. The Court in Hans used this quotation as proof that all suits brought by individuals against States were barred, absent their consent. 134 US, at 14-15, 33 L Ed 842, 10 S Ct 504. But, in that passage, Hamilton was discussing cases of diversity jurisdiction, not of federal-question jurisdiction:

> "It has been suggested that an assignment of the *public securities of one state to the citizens of another*, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation." The Federalist No. 81, p 548 (J. Cooke ed 1961) (emphasis added).

In the ensuing discussion, Hamilton described the circumstances in which States can claim sovereign immunity. He began with the general principle of sovereign immunity.

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.

[483 US 512]

> This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union." Id., at 548-549.

Hamilton believed that the States surrendered at least part of their sovereign immunity when they agreed to the Constitution. The States, however, retained their sovereign authority over state-created causes of action. "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal." Id., at 549. Thus, the States retained their sovereign authority over diversity suits involving the State assignment of public securities to citizens of other States.

> "A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." Ibid.

Hamilton therefore believed that States could not be sued in federal court by citizens to collect debts in diversity actions.

[483 US 513]

A careful reading of this passage demonstrates that it does not support the general principle of sovereign immunity against all suits brought by individuals against States, contrary to the Court's views in Hans and in the present case.

B

The Court in Hans also heavily relied on the rationale stated by Justice Iredell in Chisholm. The Court in Chisholm held that the case was within the jurisdiction of the Federal District Court. The Eleventh Amendment was thereafter enacted with "vehement speed," displacing the Chisholm ruling. Larson v Domestic & Foreign Commerce Corp. 337 US 682, 708, 93 L Ed 1628, 69 S Ct 1457 (1949). The dissent of Justice Iredell is generally regarded as embodying the rationale of the Eleventh Amendment by those who broadly construe it. See Hans v Louisiana, supra, at 12, 14, 18-19, 33 L Ed 842, 10 S Ct 504; see also Fletcher, 35 Stan L Rev, at 1077; Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 Pa L Rev 515, 541 (1978). Nevertheless, I think it plain that Justice Iredell's conception of state sovereign immunity *supports* the notion that States should not be immune from suit in

15. See generally, Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae 11-23.

16. A legal historian, Professor John Orth, recently described the historical approach taken by the Court in Hans:

"In Hans v Louisiana, . . . Justice Bradley rewrote the history of the Eleventh Amendment. . . . Only half a dozen years before, in [New Hampshire v Louisiana, 108 US 76 [27 L Ed 656, 2 S Ct 176] (1883)] written by Chief Justice Waite and joined by Justice Bradley, the Court had accepted Chisholm as a correct interpretation of the Constitution as it then stood. . . .

"How did Justice Bradley suddenly attain such unhedged certitude about the original understanding and the Eleventh Amendment? No surprising discoveries about the historical record had been made in the decade of the 1880s. The Justice himself merely rehashed the familiar quotations from Madison, Marshall, and Hamilton. With regard to Chisholm Bradley declaimed: 'In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views. . . .' Yet Iredell's dissent was manhandled. . . . Attributing sovereign immunity to the states, Bradley began the confusion that still prevails between federal and state sovereignty.

"Nothing had arisen since the decision of the New Hampshire case to change Bradley's view of the past—except the pressing need for a new rationale to justify a new result. If sovereign immunity had not existed, the Justice would have had to invent it. As it was, all that was required was to rewrite a little history." J. Orth, The Judicial Power of the United States 74-75 (1987) (Orth).

federal court in federal-question or admiralty cases.

Justice Iredell's dissent focused on whether the States delegated part of their sovereignty to the Federal Government upon entering into the Union and agreeing to the Constitution.

"Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." 2 Dall, at 435, 1 L Ed 440.

[483 US 514]

Justice Iredell defined the powers surrendered by the States in terms of the authority that resides in the Congress and the Executive Branch.

"The powers of the general Government, either of a Legislative or executive nature, or which particularly concern Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States. They require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present constitution." Ibid.

He then defined the "judicial power" of Article III. Justice Iredell found that the federal judicial power "is of a peculiar kind" because of its hybrid nature. Ibid. His conception of state sovereign immunity centered on the dual sources of federal judicial authority. First, he delineated the portion of federal jurisdiction that "is indeed commensurate with the ordinary Legislature and Executive powers of the general government, and the Power which concerns treaties." Ibid. This category encompasses matters wholly within the federal sovereignty. Justice Iredell plainly was describing the federal-question and admiralty jurisdiction where federal courts have jurisdiction based on the federal subject matter of the cases.[17]

[483 US 515]

Justice Iredell then stated: "But [the judicial power] also goes further." Ibid. It was in the further extension of judicial power that the sovereign immunity of the States was implicated. In diversity cases, the federal judiciary was not dealing with subject matter within the

17. Justice Story later drew the same distinction between federal subject-matter jurisdiction and federal diversity jurisdiction as did Justice Iredell:

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial powers to be vested in courts ordained and established by the United States. . . . The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls . . . and as to cases of admiralty and maritime jurisdiction. . . . All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty. . . .

"A different policy might well be adopted in reference to the second class of cases. . . ." Martin v Hunter's Lessee, 1 Wheat 304, 334-335, 4 L Ed 97 (1816). See generally Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B UL Rev 205 (1985).

realm of federal sovereignty, but was instead providing a neutral forum for the resolution of state-law issues over which the States had not given up their sovereignty.

"Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires." Id., at 435-436, 1 L Ed 440.

Justice Iredell was concerned with "the limit of our authority" in the diversity case before the Court, since "we can exercise no authority in the present instance consistently with the clear intention of the [Judiciary Act], but such as a proper State Court would have been at least competent to exercise at the time the act was passed." Id., at 436-437, 1 L Ed 440.

[483 US 516]

"If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent [state] laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable. . . ." Id., at 437, 1 L Ed 440.

Thus, Justice Iredell's dissenting opinion rested on a conception of state sovereignty that justified the incorporation of the sovereign-immunity doctrine through the state common law, but *only* in *diversity* suits. His opinion traditionally has been cited as key to the underlying meaning of the Eleventh Amendment. See Hans v Louisiana, 134 US, at 12, 33 L Ed 842, 10 S Ct 504. Yet it provides no more support for the result in Hans than does the plain language of the Eleventh Amendment.[18]

I will not repeat the exhaustive evidence presented in my dissent in Atascadero that further buttresses my view of the Eleventh Amendment sovereign immunity. See Atas-

18. Justice Iredell avoided committing himself on the broader constitutional question concerning whether suits, other than those in diversity, were barred by the Eleventh Amendment. He noted: "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." Chisholm v Georgia 2 Dall 419, 449, 1 L Ed 440 (1793). Nonetheless, he conceded, "[t]his opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial." Id., at 450, 1 L Ed 440.

cadero, 473 US, at 247-304, 87 L Ed 2d 171, 105 S Ct 3142. I adhere to the view that a suit brought under a federal law against a State is not barred.

[483 US 517]

IV

The Court today overrules, in part, Parden v Terminal Railway of Alabama Docks Dept. 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964). It rejects the holding in Parden that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making the FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States. . . ." § 1, 35 Stat 65, 45 USC § 51 [45 USCS § 51]. The Court instead concludes that Congress did not abrogate the sovereign immunity of States, because it did not express this intent in unmistakably clear language.

The Court's departure from normal rules of statutory construction frustrates the will of Congress. The Court's holding in Parden that Congress intended to abrogate the sovereign immunity of States in FELA has not been disturbed by Congress for the past two decades. In FELA, Congress not only indicated that "every common carrier . . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," but also expressed in unequivocal language that the "action may be brought in a district court of the United States." 45 USC §§ 51, 56 [45 USCS §§ 51, 56]. The Court in Parden noted that the legislative history of FELA revealed that Congress meant to extend the scope to apply to "all commerce," without exception for state-owned carriers. 377 US, at 187, n 5, 12 L Ed 2d 233, 84 S Ct 1207.

In Parden, the Court also comprehensively reviewed other federal statutes regulating railroads in interstate commerce, which used similar terminology. It found that we had consistently interpreted those statutes to apply to state-owned railroads. Id., at 188-189, 12 L Ed 2d 233, 84 S Ct 1207, quoting United States v California, 297 US 175, 185, 80 L Ed 567, 56 S Ct 421 (1936) (" 'No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute' "); California v Taylor, 353 US 553, 564, 1 L Ed 2d 1034, 77 S Ct 1037 (1957) ("The fact that Congress

[483 US 518]

chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it"). This conclusion confirmed the Court's determination in Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 3 L Ed 2d 804, 79 S Ct 785 (1959): "In [Taylor] we reviewed at length federal legislation governing employer-employee relationships and said, 'When Congress wished to exclude state employees, it expressly so provided.' " Id., at 282, 3 L Ed 2d 804, 79 S Ct 785 (citation omitted).

The Court today repeatedly relies on a bare assertion that "the constitutional role of the States sets them apart from other employers and defendants." Ante, at 477, 97 L Ed 2d, at 399. This may be true in many contexts, but it is not applicable in the sphere of interstate commerce. Congress has plenary authority in regulating this area. In Gibbons v

Ogden, 9 Wheat 1, 196-197, 6 L Ed 23 (1824), the Court stated:

"If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

Thus, the Court in Parden concluded that the decision to regulate employers of interstate workers, be they private individuals or States, was for Congress to make:

"While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty,' . . . the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

"If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the

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right of action created by the FELA. we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act." 377 US, at 189-190, 12 L Ed 2d 233, 84 S Ct 1207.

Until today, Parden has been repeatedly cited by the Court as an established approach "to the test of waiver of the Eleventh Amendment." County of Oneida v Oneida Indian Nation, 470 US 226, 252, n 26, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Powell, J.); see, e.g., Fitzpatrick v Bitzer, 427 US 445, 452, 49 L Ed 2d 614, 96 S Ct 2666 (1976). I believe that Parden was correctly decided. "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." New York v United States, 326 US 572, 582, 90 L Ed 326, 66 S Ct 310 (1946). In my view, Congress abrogated state immunity to suits under the FELA, a statute incorporated by the Jones Act.

V

Sound precedent should produce progeny whose subsequent application of principle in light of experience confirms the original wisdom. Tested by this standard, Hans has proven to be unsound. The doctrine has been unstable, because it lacks a textual anchor, an established historical foundation, or a clear rationale.[19] We should not forget that the

19. Today only four Members of the Court advocate adherence to Hans. Three factors counsel against continued reliance upon Hans. First, Hans misinterpreted the intent of the Framers and those who ratified the Eleventh Amendment. Cf. Michelin Tire Corp. v Wages, 423 US 276, 297-298, 46 L Ed 2d 495, 96 S Ct 535 (1976) (overruling Low v Austin, 13 Wall 29, 20 L Ed 517 (1872), because it ignored the language and objectives of the Import-Export Clause and misread earlier Court precedent). Second, the progeny of Hans has produced erratic and irrational results. If a general principle of state sovereign immunity is based on the sensitive problems inherent in making one sovereign appear against its will in the courts of other sovereigns, ante, at 486-487, 97 L Ed 2d, at 405, then it is inexplicable why States can be sued in some cases (by other States, by the Federal Government, or when prospective relief is sought) and not in other instances (by foreign

[483 US 520]

irrationality of the doctrine has its costs. It has led to the development of a complex set of rules to avoid unfair results.[20] See, e.g., Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908) (Amendment does not bar suit if plaintiff names state official, rather than State itself, as defendant); Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974) (Amendment does not bar prospective, but only retrospective, relief). The doctrine, based on a notion of kingship, intrudes impermissibly on Congress' lawmaking power. I adhere to my belief that:

"[T]he doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, . . . the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the

[483 US 521]

decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority." Atascadero State Hospital v Scanlon, 473 US, at 302, 87 L Ed 2d 171, 105 S Ct 3142 (dissenting opinion) (citations omitted).

By clinging to Hans, the Court today erases yet another traditional legal distinction and overrules yet another principle that defined the limits of that decision. In my view, we should at minimum confine Hans to its current domain. More fundamentally, however, it is time to begin a fresh examination of Eleventh Amendment jurisprudence without the weight of that mistaken precedent. I therefore dissent.

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countries, by citizens of the same State, or when retrospective relief is sought). The Court's recital of the rules of sovereign immunity in Monaco v Mississippi, 292 US 313, 78 L Ed 1282, 54 S Ct 745 (1934), indicates the crazy-quilt pattern of the Hans doctrine. Ante, at 487, 97 L Ed 2d, at 405. Third, the Eleventh Amendment doctrine creates inconsistencies in constitutional interpretation. For example, under the Seventh Amendment, the Court has stated that a right to a jury trial does not extend to admiralty cases because these suits in admiralty are distinguishable from suits in law. See Parsons v Bedford, 3 Pet 433, 446-447, 7 L Ed 732 (1830). Yet today the Court ignores the distinction between suits in admiralty and in law in arriving at its decision.

20. As Professor Orth concludes:
"By the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity. . . . 'The case law of the eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions.' Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges." Orth 11 (citation omitted).

[483 US 522]

SAN FRANCISCO ARTS & ATHLETICS, INC. and THOMAS F. WADDELL, Petitioners

v

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE

483 US 522, 97 L Ed 2d 427, 107 S Ct 2971

[No. 86-270]

Argued March 24, 1987. Decided June 25, 1987.

Decision: Exclusive rights of U.S. Olympic Committee in word "Olympic" held not to violate freedom of speech; USOC's enforcement of such rights held not to be governmental action for equal protection purposes.

SUMMARY

Section 110 of the Amateur Sports Act of 1978 (36 USCS § 380) provides that, without the consent of the United States Olympic Committee (USOC), certain commercial and promotional uses of the word "Olympic" are subject to a civil action by the USOC for the trademark infringement "remedies" provided in the Lanham Act (15 USCS §§ 1051 et seq.). A nonprofit California corporation—which later claimed that its use of the word "Olympic" was intended to make a political statement about the status of homosexuals in society—began to promote a proposed "Gay Olympic Games." After the USOC requested the corporation to discontinue the word "Olympic" in the corporation's description of the planned games, and the corporation continued to use the word, the USOC brought suit against the corporation and its president in the United States District Court for the Northern District of California, which eventually granted the USOC summary judgment, and a permanent injunction against the corporation's use of the word "Olympic." On appeal, a panel of the United States Court of Appeals for the Ninth Circuit affirmed with respect to the grant of summary judgment and an injunction, expressing the view that (1) § 110 granted the USOC exclusive use of the word "Olympic" (a) without a requirement that the USOC prove that the unauthorized use was confusing, and (b) without regard to the Lanham Act's statutory defenses for unauthorized use of a trademark; (2) the USOC was not a governmental actor bound by the constraints of the

Briefs of Counsel, p 930, infra.

made a crime. See, e. g., United States v Bass, supra; Rewis v United States, 401 US 808, 812, 28 L Ed 2d 493, 91 S Ct 1056 (1971); Bell v United States, 349 US 81, 83, 99 L Ed 905, 75 S Ct 620 (1955). I disagree not with these principles, but with their application to this statute. As I read § 2314, it is not ambiguous, but simply very broad. The statute punishes individuals who transport goods, wares, or merchandise worth $5,000 or more, knowing "the same to have been stolen converted or taken by fraud." 18 USC § 2314 [18 USCS § 2314]. As noted above, this Court has given the terms "stolen" and "converted" broad meaning in the past. The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.[2]

The Court also emphasizes the fact that the copyright laws contain their own penalties for violation of their terms. But the fact that particular conduct may violate more than one federal law does not foreclose the Government from making a choice as to which of the statutes should be the basis for an indictment. "This Court has long recognized that when an act violates more than one criminal statute, the Government

[473 US 233]

may prosecute under either so long as it does not discriminate against any class of defendants." United States v Batchelder, 442 US 114, 123-124, 60 L Ed 2d 755, 90 S Ct 2198 (1979).

Finally, Congress implicitly has approved the Government's use of § 2314 to reach conduct like Dowling's. In adopting the Piracy and Counterfeiting Amendments Act of 1982, Pub L 97-180, 96 Stat 91, Congress provided that the new penalties "shall be in addition to any other provisions of title 17 *or any other law.*" 18 USC § 2319(a) [18 USCS § 2319(a)] (emphasis added). The Senate Judiciary Committee specifically added the italicized language to clarify that the new provision "supplement[s] existing remedies contained in the copyright law *or any other law.*" S Rep No. 97-274, p2 (1981) (emphasis added). Many courts had used § 2314 to reach the shipment of goods containing unauthorized use of copyrighted material prior to the enactment of the Piracy and Counterfeiting Amendments Act. By choosing to make its new felony provisions supplemental, Congress implicitly consented to continued application of § 2314 to these offenses.

Dowling and his partners "could not have doubted the criminal nature of their conduct . . . ." United States v Bottone, supra, at 394. His claim that § 2314 does not reach his clearly unlawful use of copyrighted performances evinces "the sort of sterile formality" properly rejected by the vast majority of courts that have considered the question. United States v Belmont, 715 F2d 459, 462 (CA9 1983), cert denied, 465 US 1022, 79 L Ed 2d 679, 104 S Ct 1275 (1984). Accordingly, I dissent.

2. Indeed, there was stipulated testimony by a former employee of petitioner's, himself an unindicted co-conspirator, that petitioner and his partner "were wary of any unusually large record orders, because they could be charged with an interstate transportation of stolen property if they shipped more than $5,000 worth of records." App A19-A20 (stipulation regarding testimony of Aca "Ace" Anderson).

EDITOR'S NOTE

An annotation on "Supreme Court's construction and application of National Stolen Property Act (18 USCS § 2314)," appears p 768, infra.

[473 US 234]

ATASCADERO STATE HOSPITAL an l CALIFORNIA DEPARTMENT OF MENTAL HEALTH, Petitioners

v

DOUGLAS JAMES SCANLON

473 US 234, 87 L Ed 2d 171, 105 S Ct 3142

[No. 84-351]

Argued March 25, 1985. Decided June 28, 1985.

Decision: Federal suit against state by litigant seeking monetary relief under § 504 of Rehabilitation Act of 1973 (29 USCS § 794) held proscribed by Eleventh Amendment.

SUMMARY

A man suffering from certain physical handicaps brought suit against a state hospital and the California Department of Mental Health in the United States District Court for the Central District of California, alleging that the hospital had denied him employment as a graduate student assistant recreational therapist solely because of his physical handicaps, in violation of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794). The District Court granted the defendants' motion to dismiss the complaint on the ground that the action was barred by the Eleventh Amendment to the United States Constitution, and the United States Court of Appeals for the Ninth Circuit affirmed on grounds that the plaintiff had failed to allege an essential element of a claim under § 504, namely, that a primary objective of the federal funds received by the defendants was to provide employment (677 F2d 1271). The United States Supreme Court vacated the judgment and remanded, after which the Court of Appeals reversed, holding that the Eleventh Amendment did not bar the action since a state's consent to suit in federal court could be inferred from its participation in programs funded by the Rehabilitation Act (735 F2d 359).

On certiorari, the United States Supreme Court reversed. In an opinion by POWELL, J., joined by BURGER, Ch. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., it was held that the suit was proscribed by the Eleventh Amendment, since the provisions of the Rehabilitation Act fell short of expressing the requisite unequivocal congressional intent to abrogate the

Briefs of Counsel, p 777, infra.

states' Eleventh Amendment immunity, since the Act likewise fell short of manifesting a clear intent to condition participation in the programs funded under the Act on a state's consent to waive its constitutional immunity, and since California had not specifically waived its immunity to suit in federal court.

BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissented, expressing disagreement with the court's Eleventh Amendment doctrine and stating that the court should take advantage of the opportunity provided by the instant case to reexamine the doctrine's historical and jurisprudential foundations.

BLACKMUN, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissented, expressing the view (1) that California, as a willing recipient of federal funds under the Rehabilitation Act, consented to suit when it accepted such assistance and (2) that Congress produced the Act in exercise of its enforcement power under § 5 of the Fourteenth Amendment to the United States Constitution and thereby abrogated any claim of immunity the state might otherwise raise.

STEVENS, J., dissented, stating that a fresh examination of the court's Eleventh Amendment jurisprudence will produce benefits that outweigh the consequences of further unraveling the doctrine of stare decisis in this area of the law.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights § 7.5; States, Territories, and Possessions § 87 — employment discrimination against handicapped — states' immunity from suit

1a-1f. The Eleventh Amendment to the United States Constitution proscribes a suit in federal court against a California state hospital that allegedly denied the plaintiff employment solely because of his physical handicap, in violation of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794), since the provisions of the Act fall short of expressing the requisite unequivocal congressional intent to abrogate the states' Eleventh Amendment immunity, since the Act likewise falls short of manifesting a clear intent to condition participation in the programs funded under the Act on a state's consent to waive its constitutional immunity, and since the state has not specifically waived its immunity to suit in federal court. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued

2. The Eleventh Amendment to the United States Constitution does not bar a federal action against a state if the state waives its immunity and consents to suit in federal court.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

15 Am Jur 2d, Civil Rights § 248.5 (Supp); 72 Am Jur 2d, States, Territories, and Dependencies §§ 103, 118 et seq.

USCS, Constitution, 11th Amendment; 29 USCS § 794

US L Ed Digest, Civil Rights § 7.5; States, Territories, and Possessions §§ 87, 88, 89

L Ed Index to Annos, Civil Rights; States

ALR Quick Index, Discrimination; States

Federal Quick Index, Disability; States

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Supreme Court's construction of Eleventh Amendment restricting federal judicial power to entertain suits against a state. 50 L Ed 2d 928.

Construction and effect of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794) prohibiting discrimination against otherwise qualified handicapped individuals in specified programs or activities. 44 ALR Fed 148.

Construction and effect of state legislation forbidding job discrimination on account of physical handicap. 90 ALR3d 393.

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued

3a, 3b. A state may effectuate a waiver of its Eleventh Amendment immunity to suit in federal court by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program; however, there must be an unequivocal indication that the state intends to consent to federal jurisdiction that otherwise would be constitutionally barred.

States, Territories, and Possessions § 88 — Eleventh Amendment — abrogation by Congress

4. When acting pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment to the United States Constitution, Congress can abrogate the Eleventh Amendment without the states' consent.

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued

5. Although a state's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment to the United States Constitution; in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the state's intention to subject itself to suit in federal court.

States, Territories, and Possessions § 88 — Eleventh Amendment — abrogation by Congress

6a-6c. Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court only by making its intention unmistakably clear in the language of a statute; a general authorization for suit in federal court is not sufficient for this purpose.

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued — receipt of federal funds

7. The mere receipt of federal funds cannot establish that a state has waived its Eleventh Amendment immunity and consented to suit in federal court.

SYLLABUS BY REPORTER OF DECISIONS

Respondent, who suffers from diabetes and has no sight in one eye, brought an action in Federal District Court against petitioners, alleging that petitioner California State Hospital denied him employment because of his physical handicap, in violation of § 504 of the Rehabilitation Act of 1973, and seeking compensatory, injunctive, and declaratory relief. Section 504 provides that no handicapped person shall, solely by reason of his handicap, be subjected to discrimination under any program receiving federal financial assistance under the Act. Section 505(a) makes available to any person aggrieved by any act of any recipient of federal assistance under the Act the remedies for employment discrimination set forth in Title VI of the Civil Rights Act of 1964. The District Court granted petitioners' motion to dismiss the complaint on the ground that respondent's claims were barred by the Eleventh Amendment. Ultimately, after initially affirming on other grounds and upon

remand from this Court, the Court of Appeals reversed, holding that the Eleventh Amendment did not bar the action because the State by receiving funds under the Act had implicitly consented to be sued as a recipient under § 504.

Held: Respondent's action is proscribed by the Eleventh Amendment.

(a) Article III, § 5, of the California Constitution, which provides that "[s]uits may be brought against the State in such manner and in such courts as shall be directed by law" does not constitute a waiver of the State's Eleventh Amendment immunity from suit in federal court. In order for a state statute or constitutional provision to constitute such a waiver, it must specify the State's intent to subject itself to suit in *federal court*. Article III, § 5, does not specifically indicate the State's willingness to be sued in federal court but appears simply to authorize the legislature to waive the State's sovereign immunity.

(b) The Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States. Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. Here, the general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.

(c) The State's acceptance of funds and participation in programs funded under the Rehabilitation Act are insufficient to establish that it consented to suit in federal court. The Act falls far short of manifesting a clear intention to condition participation in programs under the Act on a State's consent to waive its constitutional immunity.

735 F2d 359, reversed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and White, Rehnquist, and O'Connor, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, Blackmun and Stevens, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

James E. Ryan argued the cause for petitioners.
Marilyn Holle argued the cause for respondent.
Briefs of Counsel, p 777, infra.

OPINION OF THE COURT

Justice **Powell** delivered the opinion of the Court.

[1a] This case presents the question whether States and state agencies are subject to suit in federal court by litigants seeking retroactive monetary relief under § 504 of the Rehabilitation Act of 1973, 29 USC § 794 [29 USCS § 794], or whether such suits are proscribed by the Eleventh Amendment.

[473 US 236]

I

Respondent, Douglas James Scanlon, suffers from diabetes mellitus and has no sight in one eye. In November 1979, he filed this action against petitioners, Atascadero State Hospital and the California Department of Mental Health, in the United States District Court for the Central District of California, alleging that in 1978 the hospital denied

him employment as a graduate student assistant recreational therapist solely because of his physical handicaps. Respondent charged that the hospital's discriminatory refusal to hire him violated § 504 of the Rehabilitation Act of 1973, 87 Stat 394, as amended, 29 USC § 794 [29 USCS § 794], and certain state fair employment laws. Respondent sought compensatory, injunctive, and declaratory relief.

Petitioners moved for dismissal of the complaint on the ground that the Eleventh Amendment barred the federal court from entertaining respondent's claims. Alternatively, petitioners argued that in a suit for employment discrimination under § 504 of the Rehabilitation Act, a plaintiff must allege that the primary objective of the federal assistance received by the defendants is to provide employment, and that respondent's case should be dismissed because he did not so allege. In January 1980, the District Court granted petitioners' motion to dismiss the complaint on the ground that respondent's claims were barred by the Eleventh Amendment. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. Scanlon v Atascadero State Hospital, 677 F2d 1271 (1982). It did not reach the question whether the Eleventh Amendment proscribed respondent's suit. Rather it affirmed the District Court on the ground that respondent failed to allege an essential element of a claim under § 504, namely, that a primary objective of the federal funds received by the defendants was to provide employment. Id., at 1272.

Respondent then sought review by this Court. We granted certiorari, 465 US 1095, 83 L Ed 2d 395, 105 S Ct 503 (1984), vacated the judgment

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of the Court of Appeals, and remanded the case for further consideration in light of Consolidated Rail Corp. v Darrone, 465 US 624, 79 L Ed 2d 568, 104 S Ct 1248 (1984), in which we held that § 504's bar on employment discrimination is not limited to programs that receive federal aid for the primary purpose of providing employment. Id., at 632-633, 79 L Ed 2d 568, 104 S Ct 1248. On remand, the Court of Appeals reversed the judgment of the District Court. It held that "the Eleventh Amendment does not bar [respondent's] action because the State, if it has participated in and received funds from programs under the Rehabilitation Act, has implicitly consented to be sued as a recipient under 29 USC § 794 [29 USCS § 794]." 735 F2d 359, 362 (1984). Although noting that the Rehabilitation Act did not expressly abrogate the States' Eleventh Amendment immunity, the court reasoned that a State's consent to suit in federal court could be inferred from its participation in programs funded by the Act. The court based its view on the fact that the Act provided remedies, procedures, and rights against "any recipient of Federal assistance" while implementing regulations expressly defined the class of recipients to include the States. Quoting our decision in Edelman v Jordan, 415 US 651, 672, 39 L Ed 2d 662, 94 S Ct 1347 (1974), the court determined that the " 'threshold fact of congressional authorization to sue a class of defendants which literally includes [the] States' " was present in this case. 735 F2d, at 361.

The court's decision in this case is in conflict with those of the Courts of Appeals for the First and Eighth Circuits. See Ciampa v Massachu-

setts Rehabilitation Comm'n, 718 F2d 1 (CA1 1983); Miener v Missouri, 673 F2d 969 (CA8), cert den, 459 US 909, 74 L Ed 2d 171, 103 S Ct 215 (1982). We granted certiorari to resolve this conflict, 469 US 1032, 83 L Ed 2d 395, 105 S Ct 503 (1984), and we now reverse.

II

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens

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or Subjects of any Foreign State." As we have recognized, the significance of this Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III" of the Constitution. Pennhurst State School and Hospital v Halderman, 465 US 89, 98, 79 L Ed 2d 67, 104 S Ct 900 (1984) (Pennhurst II). Thus, in Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide.

[2, 3a, 4] There are, however, certain well-established exceptions to the reach of the Eleventh Amendment. For example, if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action. See, e.g., Clark v Barnard, 108 US 436, 447, 27 L Ed 780, 2 S Ct 878 (1883).[1] Moreover, the Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," that is, by Congress' power "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." Fitzpatrick v Bitzer, 427 US 445, 456, 49 L Ed 2d 614, 96 S Ct 2666 (1976). As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent. Ibid.

But because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States,[2]

1. [3b] A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. As we said in Edelman v Jordan, 415 US 651, 673, 39 L Ed 2d 662, 94 S Ct 1347 (1974), "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

2. Justice Brennan's dissent repeatedly asserts that established Eleventh Amendment doctrine is not "grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people . . . ." Post, at 247-248, 87 L Ed 2d, at 183; see also post, at 258, 302, 87 L Ed 2d, at 190, 217. We believe, however, that our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution. See n 3, infra. The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a "counterpoise" to the power of the Federal Government. See, e.g., The Federalist No. 17, p 107 (J. Cooke ed 1961); The Federalist No. 46, p 316 (J. Cooke ed 1961). The "new evidence," discovered by the dissent in The Federalist and in the records of the state ratifying conventions, has been available to historians and Justices of this Court for almost two centuries. Viewed in isolation, some of it is subject to varying interpretations. But none of the Framers questioned that the Constitution created a federal system with some authority expressly granted the Federal Government and the re-

this Court consistently has held
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that these exceptions apply only when certain specific conditions are met. Thus, we have held that a State will be deemed to have waived its immunity "only where stated 'by
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the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" Edelman v Jordan, supra, at 673, 39 L Ed 2d 662, 94 S Ct 1347, quoting Murray v Wilson Distilling Co. 213 US 151, 171, 53 L Ed 742, 29 S Ct 458 (1909). Likewise, in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" Pennhurst II, 465 US, at 99, 79 L Ed 2d 67, 104 S Ct 900, quoting Quern v Jordan, 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979). Accord, Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973).

In this case, we are asked to decide whether the State of California is subject to suit in federal court for alleged violations of § 504 of the Rehabilitation Act. Respondent makes three arguments in support of his view that the Eleventh Amendment does not bar such a suit: first, that the State has waived its immunity by virtue of Art III, § 5, of the California Constitution; second, that in enacting the Rehabilitation Act, Congress has abrogated the constitutional immunity of the States; third, that by accepting federal funds under the Rehabilitation Act, the State

mainder retained by the several States. See, e. g., The Federalist Nos. 39, 45. The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.

The principle that the jurisdiction of the federal courts is limited by the sovereign immunity of the States "is, without question, a reflection of concern for the sovereignty of the States . . . ." Employees v Missouri Dept of Public Health and Welfare, 411 US 279, 293, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Marshall, J., concurring in result). As the Court explained almost 65 years ago:

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the State without consent given: not one 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." Ex parte New York, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921) (citations omitted).

See also cases cited in n 3, infra.

Justice Brennan's dissent also argues that in the absence of jurisdiction in the federal courts, the States are "exempt[] . . . from compliance with laws that bind every other legal actor in our Nation." Post, at 248, 87 L Ed 2d, at 183. This claim wholly misconceives our federal system. As Justice Marshall has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals." Employees v Missouri Dept. of Public Health and Welfare, supra, at 293-294, 36 L Ed 2d 251, 93 S Ct 1614 (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See Martin v Hunter's Lessee, 1 Wheat 304, 341-344, 4 L Ed 97 (1816). See also Stone v Powell, 428 US 465, 493, n 35, 49 L Ed 2d 1067, 96 S Ct 3037 (1976), and post, at 256, n 8, 87 L Ed 2d, at 188-189.

has consented to suit in federal court. Under the prior decisions of this Court, none of these claims has merit.

[473 US 241]
III

Respondent argues that the State of California has waived its immunity to suit in federal court, and thus the Eleventh Amendment does not bar this suit. See Clark v Barnard, 108 US 436, 27 L Ed 780, 2 S Ct 878 (1883) Respondent relies on Art III, § 5, of the California Constitution, which provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law." In respondent's view, unless the California Legislature affirmatively imposes sovereign immunity, the State is potentially subject to suit in any court, federal as well as state.

[1b, 5] The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. Florida Dept. of Health v Florida Nursing Home Assn., 450 US 147, 150, 67 L Ed 2d 132, 101 S Ct 1032 (1981) (per curiam). As we explained just last Term, "a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." Pennhurst II, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900. Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*. See Smith v Reeves, 178 US 436, 441, 44 L Ed 1140, 20 S Ct 919 (1900); Great Northern Life Insurance Co. v Read, 322 US 47, 54, 88 L Ed 1121, 64 S Ct 873 (1944). In view of these principles, we do not believe that Art III, § 5, of the California Constitution constitutes a waiver of the State's constitutional immunity. This provision does not specifically indicate the State's willingness to be sued in federal court. Indeed, the provision appears simply to authorize the legislature to waive the State's sovereign immunity. In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that California has waived its constitutional immunity.

[473 US 242]
IV

[1c, 6a] Respondent also contends that in enacting the Rehabilitation Act, Congress abrogated the States' constitutional immunity. In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. Pennhurst II, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900; Quern v Jordan, supra, at 342-345, 59 L Ed 2d 358, 99 S Ct 1139. We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.

Only recently the Court reiterated that "the States occupy a special and specific position in our constitutional system . . . ." Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 547, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." Id., at 572, 83 L Ed 2d 1016, 105 S Ct 1005 (Powell, J., dissenting). By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance. "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." Pennhurst II, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900.

Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain. "Congress may, in determining what is 'appropriate

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legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Fitzpatrick, 427 US, at 456, 49 L Ed 2d 614, 96 S Ct 2666. In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

It is also significant that in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded. Although it is of course the duty of this Court "to say what the law is," Marbury v Madison, 1 Cranch 137, 177, 2 L Ed 60 (1803), it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power. See American Fire & Cas. Co. v Finn, 341 US 6, 17, 95 L Ed 702, 71 S Ct 534, 19 ALR2d 738 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .").

[6b] For these reasons, we hold—consistent with Quern, Edelman, and Pennhurst II—that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.[3]

3. In a remarkable view of stare decisis, Justice Brennan's dissent states that our decision today evinces 'lack of respect for precedent." Post, at 258, 87 L Ed 2d, at 190. Not a single authority is cited for this claim. In fact, adoption of the dissent's position would require us to overrule numerous decisions of this Court. However one may view the merits of the dissent's historical argument, the principle of Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III," Pennhurst II, 465 US, at 98, 79 L Ed 2d 67, 104 S Ct 900, has been affirmed time and time again, up to the present day. E.g., North Carolina v Temple, 134 US 22, 30, 33 L Ed 849, 10 S Ct 509 (1890); Fitts v McGhee, 172 US 516, 524, 43 L Ed 535, 19 S Ct 269 (1899); Bell v Mississippi, 177 US 693, 44 L Ed 945, 20 S Ct 1031 (1900); Smith v Reeves, 178 US 436, 446, 44 L Ed 1140, 20 S Ct 919 (1900); Palmer v Ohio, 248 US 32, 34, 63 L Ed 108, 39 S Ct 16 (1918); Duhne v New Jersey, 251 US 311, 313, 64 L Ed 280, 40 S Ct 154 (1920); Ex parte New York, 256 US, at 497, 65 L Ed 1057, 41 S Ct 588; Missouri v Fiske, 290 US 18, 26, 78 L Ed 145, 54 S Ct 18 (1933); Great Northern Life Insurance Co. v Read, 322 US 47, 51, 88 L Ed 1121, 64 S Ct 873 (1944); Ford Motor Co. v Department of Treasury of Indiana, 323 US 459, 464, 89 L Ed 389, 65 S Ct 347 (1945); Georgia Railroad & Banking Co. v Redwine, 342 US 299, 304, n 13, 96 L Ed 335, 72 S Ct 321 (1952); Parden v Terminal Railway of Ala. Docks Dept., 377 US 184, 186, 12 L Ed 2d 233, 84 S Ct 1207 (1964); United States v Mississippi, 380 US 128, 140, 13 L Ed 2d 717, 85 S Ct 808 (1965); Employees v Missouri Public Health and Welfare Dept. 411 US, at 280, 36 L Ed 2d 251, 93 S Ct 1614; Edelman v Jordan, 415 US, at 662-663, 39 L Ed 2d 662, 94 S Ct 1347; Pennhurst II, supra. Justice Brennan long has maintained that the settled view of Hans v Louisiana, as established in the holdings and reasoning of the above cited cases, is wrong. See, e.g., County of Oneida v Oneida Indian Nation, 470 US 226, 254, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Brennan, J., dissenting in part); Pennhurst II, supra, at 125, 79 L Ed 2d 67, 104 S Ct 900 (Brennan, J., dissenting); Employees v Missouri Dept. of Public Health and Welfare, supra, at 298, 36 L Ed 2d 251, 93 S Ct 1614 (Brennan, J., dissenting); Edelman v Jordan, 415 US, at 687, 39 L Ed 2d 662, 94 S Ct 1347 (Brennan, J., dissenting). It is a view, of course, that he is entitled to hold. But the Court has never accepted it, and we see no reason to make a further response to the scholarly, 55-page elaboration of it today.

In a dissent expressing his willingness to overrule Edelman v Jordan, supra, as well as at least 16 other Supreme Court decisions that have followed Hans v Louisiana, see supra, Justice Stevens would "further unrave[l] the doctrine of stare decisis," Florida Dept. of Health v Florida Nursing Home Assn. 450 US 147, 155, 67 L Ed 2d 132, 101 S Ct 1032 (1981), because he views the Court's decision in Pennhurst II as "repudiat[ing] at least 28 cases." Post, at 304, 87 L Ed 2d, at 219, citing Pennhurst II, supra, at 165-166, n 50, 79 L Ed 2d 67, 104 S Ct 900 (Stevens, J., dissenting). We previously have addressed at length his allegation that the decision in Pennhurst II overruled precedents of this Court and decline to do so again here. See Pennhurst II, supra, at 109-111, nn 19, 20, and 21, 79 L Ed 2d 67, 104 S Ct 900 (1984). Justice Stevens would ignore stare decisis in this case because in the view of a minority of the Court two prior decisions of the Court ignored it. This reasoning would indeed "unravel" a doctrine upon which the rule of law depends.

4. Petitioners assert that the Rehabilitation Act of 1973 does not represent an exercise of Congress' Fourteenth Amendment authority, but was enacted pursuant to the Spending Clause, Art I, § 8, cl 1. Petitioners conceded below, however, that the Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Thus, we first analyze § 504 in light of Congress' power under the Fourteenth Amendment to subject unconsenting States to federal court jurisdiction. See Fitzpatrick v Bitzer, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976). In Part V, infra, at 246, 87 L Ed 2d, at 182, we address the reasoning of the Court of Appeals and conclude that by accepting funds under the Act, the State did not "implicitly consen[t] to be sued . . . ." 735 F2d 359, 362 (1984).

[473 US 244]

In light of this principle, we must determine whether Congress, in adopting the Rehabilitation Act, has chosen to override the Eleventh Amendment.[4] Section 504 of the Rehabilitation Act provides in pertinent part:

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"No otherwise qualified handicapped individual in the United States as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 87 Stat 394, as amended and as set forth in 29 USC § 794 [29 USCS § 794].

Section 505, which was added to the Act in 1978, as set forth in 29 USC § 794a [29 USCS § 794a], describes the available remedies under the Act, including the provisions pertinent to this case:

"(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USC 2000d et seq.] [42 USCS §§ 2000d et seq.], shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

"(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[1d, 6c] The statute thus provides remedies for violations of § 504 by "*any* recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal

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aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. Pennhurst II, 465 US, at 99, 79 L Ed 2d 67, 104 S Ct 900, citing Quern v Jordan, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979). Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

V

Finally, we consider the position adopted by the Court of Appeals that the State consented to suit in federal court by accepting funds under the Rehabilitation Act.[5] 735 F2d, at 361-362. In reaching this conclusion, the Court of Appeals relied on "the extensive provisions [of the Act] under which the states are the express intended recipients of federal assistance." Id., at 360. It reasoned that "this is a case in which a 'congressional enactment . . . by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities,' and 'the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity,'" id., at 361, citing Edelman v Jordan, 415 US, at 672, 39 L Ed 2d 662, 94 S Ct 1347. The Court of Appeals thus concluded that if the State "has participated in and received funds from programs under the Rehabilitation Act, [it] has implicitly consented to be sued as a recipient under 29 USC § 794 [29 USCS § 794]." 735 F2d, at 362.

[1e, 7] The court properly recognized that the mere receipt of federal funds cannot establish that a State has consented to suit

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in federal court. Ibid., citing Florida Dept. of Health v Florida Nursing Home Assn., 450 US, at 150, 67 L Ed 2d 132, 101 S Ct 1032; Edelman v Jordan, supra, at 673, 39 L Ed 2d 662, 94 S Ct 1347. The court erred, however, in concluding that because various provisions of the Rehabilitation Act are addressed to the States, a State necessarily consents to suit in federal court by participating in programs funded under the statute. We have decided today that the Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts. The Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity. Thus, were we to view this statute as an enactment pursuant to the Spending Clause, Art I, § 8, see n 4, supra, we would hold that there was no indication that the State of California consented to federal jurisdiction.

VI

[1f] The provisions of the Rehabilitation Act fall far short of expressing an unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity. Nor has the State of California specifically waived its immunity to suit in federal court. In view of these determinations, the judgment of the Court of Appeals must be reversed.

It is so ordered.

SEPARATE OPINIONS

Justice **Brennan**, with whom Justice **Marshall**, Justice **Blackmun**, and Justice **Stevens** join, dissenting.

If the Court's Eleventh Amendment doctrine were grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people, the doctrine might be unobjectionable; the interpretation of the text of the Constitution in light of changed circumstances and unforeseen events—and with full regard for the purposes underlying the text—has always been the unique role of this Court. But the Court's

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Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation. Because I believe that the doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect, I believe that the Court should take advantage of the opportunity provided by this case to reexamine the doctrine's historical and jurisprudential foundations. Such an inquiry would reveal that the Court, in Professor Shapiro's words, has taken a wrong turn.[1] Because the Court today follows this mistaken path, I respectfully dissent.

I

I first address the Court's holding that Congress did not succeed in abrogating the States' sovereign im-

5. Although the Court of Appeals seemed to state that the Rehabilitation Act was adopted pursuant to § 5 of the Fourteenth Amendment, by focusing on whether the State consented to federal jurisdiction it engaged in analysis relevant to Spending Clause enactments.

1. See Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv L Rev 61 (1984).

munity when it enacted § 504 of the Rehabilitation Act, 29 USC § 794 [29 USCS § 794]. If this holding resulted from the Court's examination of the statute and its legislative history to determine whether Congress intended in § 504 to impose an obligation on the States enforceable in federal court, I would confine my dissent to the indisputable evidence to the contrary in the language and history of § 504.

Section 504 imposes an obligation not to discriminate against the handicapped in "any program or activity receiving Federal financial assistance." This language is general and unqualified, and contains no indication whatsoever that an exemption for the States was intended. Moreover, state governmental programs and activities are undoubtedly the recipients of a large percentage of federal funds.[2] Given this

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widespread state dependence on federal funds, it is quite incredible to assume that Congress did not intend that the States should be fully subject to the strictures of § 504.

The legislative history confirms that the States were among the primary targets of § 504. In introducing the predecessor of § 504 as an amendment to Title VI of the Civil Rights Act of 1964, 42 USC § 2000d [42 USCS § 2000d], Representative Vanik clearly indicated that governments would be among the primary targets of the legislation: "Our Governments tax [handicapped] people, their parents and relatives, but fail to provide services for them. . . . The opportunities provided by the Government almost always exclude the handicapped." 117 Cong Rec 45974 (1971). He further referred approvingly to a federal-court suit against the State of Pennsylvania raising the issue of educational opportunities for the handicapped. See id., at 45974-45975 (citing Pennsylvania Assn. for Retarded Children v Pennsylvania, 343 F Supp 279 (ED Pa 1972), and characterizing it as a "suit against the State"). Two months later, Representative Vanik noted the range of state actions that could disadvantage the handicapped. He said that state governments "lack funds and facilities" for medical care for handicapped children and "favor the higher income families" in tuition funding. 118 Cong Rec 4341 (1972). He pointed out that "the States are unable to define and deal with" the illnesses of the handicapped child, and that "[e]xclusion of handicapped children [from public schools] is illegal in some States, but the States plead lack of funds." Ibid. Similarly, Senator Humphrey, the bill's sponsor in the Senate, focused particularly on a suit against a state-operated institution for the mentally retarded as demonstrating the need for the bill. See id., at 9495, 9502.

The language used in the statute ("any program or activity receiving Federal financial assistance") has long been used

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to impose obligations on the States under other statutory schemes. For example, Title VI, enacted in 1964, bans discrimination on the basis of race, color, or national origin by "any program or activity receiving Federal financial assistance." 42 USC § 2000d [42 USCS § 2000d]. Soon after its enactment, seven agencies promulgated regulations that defined a recipient of federal financial assistance to include "any State, political subdivision of any State or instrumentality of any State or political subdivision." See, e.g., 29 Fed Reg 16274, § 15.2(e) (1964). See generally Guardians Assn. v Civil Service Comm'n, 463 US 582, 618, 77 L Ed 2d 866, 103 S Ct 3221 (1983) (Marshall, J., dissenting). Over 40 federal agencies and every Cabinet Department adopted similar regulations. Id., at 619, 77 L Ed 2d 866, 103 S Ct 3221. As Senator Javits remarked in the debate on Title VI, "[w]e are primarily trying to reach units of government, not individuals." 110 Cong Rec 13700 (1964).

Similarly Title IX of the Education Amendments of 1972, 20 USC § 1681(a) [20 USCS § 1681(a)], prohibits discrimination on the basis of sex by "any education program or activity receiving Federal financial assistance." The regulations governing Title IX use the same definition of "recipient"—which explicitly includes the States—as do the Title VI regulations. See 34 CFR § 106.2(h) (1985). The Congress that enacted § 504 had the examples of Titles VI and IX before it, and plainly knew that the language of the statute would include the States.[3]

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Implementing regulations promulgated for § 504 included the same definition of "recipient" that had previously been used to implement Title VI and Title IX. See 45 CFR § 84.3(f) (1984). In 1977, Congress held hearings on the implementation of § 504, and subsequently produced amendments to the statute enacted in 1978. Pub L 95-602, 92 Stat 2982, § 505(a)(2), 29 USC § 794a [29 USCS § 794a]. The Senate Report accompanying the amendments explicitly approved the implementing regulations. S Rep No. 95-890, p 19 (1981). No Member of Congress questioned the reach of the regulations. In describing another section of the 1978 amendments which brought the Federal Government within the reach of § 504, Representative Jeffords noted that the section "applies 504 to the Federal Government as well as State and local recipients of Federal dollars." 124 Cong. Rec. 13901 (1978).[4] Representative Sarasin emphasized that "[n]o one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, and most certainly, not the Federal Government." Id., at 38552.

The 1978 amendments also addressed the remedies for violations of § 504:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USC

2. For instance, in 1972-1973, the year in which Congress was considering § 504, state governments received over $31 billion in revenue from the Federal Government. By 1981-1982, this had grown to $66 billion. Bureau of the Census, Historical Statistics on Governmental Finances and Employment 34 (1982).

3. The Rehabilitation Act was amended in 1974, a year after its original enactment. Pub L 93-516, 88 Stat 1617. The Senate Report that accompanied the amendment acknowledged that "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1974 [sic]." S Rep No. 93-1297, pp 39-40 (1974). These amendments and their history "clarified the scope of § 504" and "shed significant light on the intent with which § 504 was enacted." Alexander v Choate, 469 US 287, 306-307, n 27, 83 L Ed 2d 661, 105 S Ct 712 (1985).

4. Representative Jeffords also noted that "it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves." 124 Cong Rec 38551 (1978).

> 2000d et seq.] [42 USCS 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." 29 USC § 794(a)(2) [29 USCS § 794(a)(2)].

Again, the amendment referred in general and unqualified terms to "any recipient of Federal assistance." An additional

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provision of the 1978 amendments made available attorney's fees to prevailing parties in actions brought to enforce § 504. Discussing these two provisions, Senator Cranston presupposed that States would be subject to suit under this section:

> "[W]ith respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government—regardless of whether such agency or Government is a named party." 124 Cong Rec 30347 (1978)

Given the unequivocal legislative history, the Court's conclusion that Congress did not abrogate the States' sovereign immunity when it enacted § 504 obviously cannot rest on an analysis of what Congress intended to do or on what Congress thought it was doing. Congress intended to impose a legal obligation on the States not to discriminate against the handicapped. In addition, Congress fully intended that whatever remedies were available against *other* entities—including the Federal Government itself after the 1978 amendments—be equally available against the States. There is simply not a shred of evidence to the contrary.

II

Rather than an interpretation of the intent of Congress, the Court's decision rests on the Court's current doctrine of Eleventh Amendment sovereign immunity, which holds that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III" of the Constitution. Pennhurst State School and Hospital v Halderman, 465 US 89, 98, 79 L Ed 2d 67, 104 S Ct 900 (1984). Despite the presence of the most clearly lawless behavior by the state government, the Court's doctrine holds that the judicial authority of the United States

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does not extend to suits by an individual against a State in federal court.

The Court acknowledges that the supposed lack of judicial power may be remedied, either by the State's consent,[5] or by express congressional

5. The "stringent," see ante, at 241, 87 L Ed 2d, at 179, test that the Court applies to purported state waivers of sovereign immunity is a mirror image of the test it applies to congressional abrogation of state sovereign immunity. Just as the Court today decides that Congress, if it desires effectively to abrogate a State's sovereign immunity, must do so expressly in the statutory language, so the Court similarly decides that a State's waiver, to be effective, must be "specifically applicable to federal-court jurisdiction." Ibid. In the Court's words, "[a]lthough a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment." Ibid. Ordinarily, a federal court is expected faithfully to decide state-law questions before it as the courts of a State would. I would think that a federal court deciding the scope of a state waiver of sovereign immunity should attempt to construe the state law of sovereign immunity as a state court would, making use of relevant legislative history and legal precedents. Yet, despite the absence of any identifiable federal interest that would justify a departure from state law, the Court eschews any effort to construe California's constitutional waiver requirement in accordance with California law. See, e.g., Muskopf v Corning Hospital Dist., 55 Cal 2d 211, 216, 359 P2d 457, 460 (1961) (abrogating state sovereign immunity for all tort cases and holding it to be an "anachronism, without rational basis, and exist[ing] only by the force of inertia"). Id., at 216, 359 P2d, at 460. Instead, the Court seems to believe that the Eleventh Amendment justifies the Court in imposing on the state legislatures, as well as Congress, special rules of statutory draftsmanship if they would make a waiver of state sovereign immunity in federal court successful. Apparently, even States that want to make a federal forum available for the fair adjudication of grievances arising under federal law ought to be deterred from doing so.

abrogation pursuant to the Civil War Amendments, see Fitzpatrick v Bitzer, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976); City of Rome v United States, 446 US 156, 64 L Ed 2d 119, 100 S Ct 1548 (1980), or perhaps pursuant to other congressional powers. But the Court has raised formidable obstacles to congressional efforts to abrogate the States' immunity; the Court has put in place a series of special rules of statutory draftsmanship that Congress

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must obey before the Court will accord recognition to its act. Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973), held that Congress must make its intention "clear" if it sought to lift the States' sovereign immunity conditional on their participation in a federal program. Id., at 285, 36 L Ed 2d 251, 93 S Ct 1614. Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), made it still more difficult for Congress to act, stating that "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." Id., at 673, 39 L Ed 2d 662, 94 S Ct 1347. Pennhurst State School and Hospital v Halderman, supra, required "an unequivocal expression of congressional intent." Id., at 99, 79 L Ed 2d 67, 104 S Ct 900. Finally, the Court today tightens the noose by requiring "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language *in the statute itself.*" Ante, at 243, 87 L Ed 2d, at 180 (emphasis added).

These special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress; no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain the intent of Congress. Rather, the special rules are designed as hurdles to keep the disfavored suits out of the federal court. In the Court's words, the test flows from need to maintain "the usual constitutional balance between the States and the Federal Government." Ante, at 242, 87 L Ed 2d, at 180[6] The doctrine is thus based on a fundamental policy decision, vaguely attributed to the Framers of Article III or the Eleventh Amendment, that the federal courts ought not to hear suits brought by individuals against States. This Court executes the policy by making it difficult, but not impossible,

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for Congress to create

6. See also Pennhurst State School and Hospital v Halderman, 465 US 89, 99, 79 L Ed 2d 67, 104 S Ct 900 (1984) ("Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system").

private rights of action against the States.[7]

Reliance on this supposed constitutional policy reverses the ordinary role of the federal courts in federal-question cases. Federal courts are instruments of the National Government, seeing to it that constitutional limitations are obeyed while interpreting the will of Congress in enforcing the federal laws. In the Eleventh Amendment context, however, the Court instead relies on a supposed constitutional policy disfavoring suits against States as justification for ignoring the will of Congress; the goal seems to be to obstruct the ability of Congress to achieve ends that are otherwise constitutionally unexceptionable and well within the reach of its Article I powers.

The Court's sovereign immunity doctrine has other unfortunate results. Because the doctrine is inconsistent with the

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essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land—it has led to the development of a complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur. Under the rule of Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908), a State may be required to obey federal law, so long as the plaintiff remembers to name a state official rather than the State itself as defendant, see Alabama v Pugh, 438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057 (1978), and so long as the relief sought is prospective rather than retrospective. Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974).[8] These

7. In this case, the Court's decision relentlessly to apply its "clear-statement rule" demonstrates how that rule serves no purpose other than obstructing the will of Congress. When Congress enacted § 504, it could have had no idea that it must obey the extreme clear-statement rule adopted by the Court for the first time today. The roots of that rule are found in Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973), which was decided on April 18, 1973. Cf. Parden v Terminal Railway of Ala. Docks Dept., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964). The *Employees* case, of course, did not itself lay down the extreme rule adopted today. In any event, the bill which became § 504 had been first enacted six months previously. See 118 Cong Rec 35841 (Oct. 13, 1972) (enactment of bill by Senate); id., at 36109 (Oct. 14, 1972) (enactment of bill by House). It was then vetoed by the President and reenacted in February 1973. See 119 Cong Rec 5901 (Feb. 28, 1973) (Senate); id., at 7139 (Mar. 8, 1973) (House). Another veto followed, and the legislation was finally signed into law on September 26, 1973. See id., at 29633 (Sept. 13, 1973) (Senate enactment of final bill); id., at 30151 (Sept. 18, 1973) (House enactment of final bill). Given this chronology, for the Court now to hold that Congress did not abrogate the States' immunity because it did not "unequivocally express this intention in the statutory language" is to change the rules for lawmaking after Congress has already acted. Congress, like other officials, "cannot be expected to predict the future course of constitutional law." Procunier v Navarette, 434 US 555, 562, 55 L Ed 2d 24, 98 S Ct 855 (1978).

8. There are other rules created specifically to permit suits that would appear to be barred by any thoroughgoing interpretation of the Eleventh Amendment as a bar to exercise of the federal judicial power in suits against States. For instance, Lincoln County v Luning, 133 US 529, 530, 33 L Ed 766, 10 S Ct 363 (1890), established that the Eleventh Amendment is not a bar to suits against local governmental units. In addition, it seems to have been a longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal appellate jurisdiction over suits from state courts. For instance, in Bacchus Imports, Ltd. v Dias, 468 US 263, 82 L Ed 2d 200, 104 S Ct 3049 (1984), we adjudicated a taxpayer's appeal from an unfavorable judgment in a suit against state officials for refund of taxes. Cf. Edelman v Jordan. Compare Martinez v California, 444 US 277, 62 L Ed 2d 481, 100 S Ct 553 (1980) (adjudicating appeal of § 1983 action brought against State in state court) with Quern v Jordan, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979) (holding that § 1983 does not abrogate state sovereign immunity in federal court). See also Williams v Vermont, 472 US 14, 86 L Ed 2d 11, 105 S Ct 2465 (1985); Summa Corp. v California ex rel. State Lands Comm'n, 466 US 198, 80 L Ed 2d 237, 104 S Ct 1751 (1984); Aloha Airlines, Inc. v Director of Taxation of Hawaii, 464 US 7, 78 L Ed 2d 10, 104 S Ct 291 (1983); Thomas v Review Board of Ind. Employment Security Div., 450 US 707, 67 L Ed 2d 624, 101 S Ct 1425 (1981); Bonelli Cattle Co. v Arizona, 414 US 313, 38 L Ed 2d 526, 94 S Ct 517 (1973).

9. In this case, for instance, damages may well be the only practical relief available for the respondent. He originally brought suit in 1979 alleging that the State had improperly denied him employment as a graduate student assistant recreational therapist. Even if he had brought suit against state officials as well as the State itself, it is reasonable to suppose that now—six years later—he has attained his degree and would obtain no benefit from an injunction ordering the end of discrimination against the handicapped in hiring graduate student assistants. "For people in [Scanlon's] shoes, it is damages or nothing." Bivens v Six Unknown Federal Narcotics Agents, 403 US 388, 410, 29 L Ed 2d 619, 91 S Ct 1999 (1971).

10. Congress, of course, may decide in a given case that a remedial scheme should be limited to either damages or injunctive relief. Cf. 42 USC § 2000a-3(a) [42 USCS § 2000a-3(a)] (statute limiting remedy to "preventive" relief against *all* defendants). Our role in such a case is to interpret the will of Congress with respect to the scope of the permissible relief. In the Eleventh Amendment context, however, the Court seems to have decided that the supposed constitutional policy disfavoring suits against States justifies limiting the scope of relief regardless of the apparent will of Congress.

intricate rules often create manifest injustices, while failing to respond to any legitimate needs of the States. A damages award may often be the only practical remedy available to the plaintiff,[9] and the threat of a damages award may be the only effective

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deterrent to a defendant's willful violation of federal law. Cf. Edelman v Jordan, supra, at 691-692, 39 L Ed 2d 662, 94 S Ct 1347 (Marshall, J., dissenting). While the prohibition of damages awards thus imposes substantial costs on plaintiffs and on members of a class Congress sought to protect, the injunctive relief that is permitted can often be more intrusive—and more expensive—than a simple damages award would be.[10]

The Court's doctrine itself has been unstable. As I shall discuss below, the doctrine lacks a textual anchor, a firm historical foundation, or a clear rationale. As a result, it has been impossible to determine to what extent the principle of state accountability to the rule of law can or should be accommodated within the competing framework of state nonaccountability put into place by the Court's sovereign immunity doctrine. For this reason, we have been unable to agree on the content of the special "rules" we have applied to Acts of Congress to determine whether they abrogate state sovereign immunity. Compare Parden v Terminal Railway of Ala. Docks Dept., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964), with Employees v Missouri Dept. of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973). Whatever rule is decided upon at a given time is then applied *retroactively* to actions taken by Congress. See n 7, supra. Finally, in the absence of any plausible

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limiting principles, the Court has overruled and ignored past cases that seemed to stand in the way of vindication of the doubtful States' right the Court has created. See

Pennhurst State School and Hospital v Halderman, 465 US, at 165-166, n 50, 79 L Ed 2d 67, 104 S Ct 900.

I might tolerate all of these results—the unprecedented intrusion on Congress' lawmaking power and consequent increase in the power of the courts, the development of a complex set of rules to circumvent the obviously untenable results that would otherwise ensue, the lack of respect for precedent and the lessons of the past evident in Pennhurst—if the Court's sovereign immunity doctrine derived from essential constitutional values protecting the freedom of our people or the structure of our federal system. But that is sadly not the case. Instead, the paradoxical effect of the Court's doctrine is to require the federal courts to protect States that violate federal law from the legal consequences of their conduct.

III

Since the Court began over a decade ago aggressively to expand its doctrine of Eleventh Amendment sovereign immunity, see Employees v Missouri Dept. of Public Health and Welfare, supra, modern scholars and legal historians have taken a critical look at the historical record that is said to support the Court's result.[11] Recent research has discovered

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and collated substantial evidence that the Court's constitutional doctrine of state sovereign immunity has rested on a mistaken historical premise. The flawed underpinning is the premise that either the Constitution or the Eleventh Amendment embodied a principle of state sovereign immunity as a limit on the federal judicial power. New evidence concerning the drafting and ratification of the original Constitution indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity. Consequently, the Eleventh Amendment could not have been, as the Court has occasionally suggested, an effort to reestablish a limitation on the federal judicial power granted in Article III. Nor, given the limited terms in which it was written, could the Amendment's narrow and technical language be understood to have instituted a sweeping new limitation on the federal judicial power whenever an individual attempts to sue a State. A close examination of the historical records reveals a rather different status for the doctrine of state sovereign immunity in federal court. There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court.

11. See, e. g., Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan L Rev 1033 (1983) (hereinafter Fletcher); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum L Rev 1889 (1983) (hereinafter Gibbons); C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972) (hereinafter Jacobs); Field, The Eleventh Amendment and Other Immunity Doctrines, 126 U Pa L Rev 515, 1203 (1978) (hereinafter Field); 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 (1975); Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U Ill L Rev 423; Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv L Rev 61 (1984); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U Colo L Rev 1 (1972).

A

In Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the Court stated that to permit a citizen to bring a suit against a State in federal court would be "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." Id., at 15, 33 L Ed 842, 10 S Ct 504. The text of the Constitution, of course, contains no explicit adoption of a principle of state sovereign immunity. The passage from Hans thus implies that everyone involved in the framing or ratification of the Constitution believed

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that Article III included a tacit prohibition on the exercise of the judicial power when a State was being sued in federal court. The early history of the Constitution reveals, however, that the Court in Hans was mistaken. The unamended Article III was often read to the contrary to prohibit not the exercise of the judicial power, but the assertion of state sovereign immunity as a defense, even in cases arising solely under state law.

It is useful to begin with the text of Article III. Section 2 provides:

> "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."

The judicial power of the federal courts thus extends only to certain types of cases, identified either by subject matter or parties. The subject-matter heads of jurisdiction include federal questions ("all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made") and admiralty ("all Cases of admiralty and maritime Jurisdiction"). The party-based heads of jurisdiction include what might be called ordinary diversity ("Controversies . . . between Citizens of different States"), state-citizen diversity ("between a State and Citizens of another State"), and state-alien diversity ("between a State . . . and foreign . . . Citizens"). It is the latter two clauses, providing for state-citizen and state-alien diversity, that were

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at the focus of the Court's decision in Chisholm v Georgia, 2 Dall. 419, 1 L Ed 440 (1793), and the subsequent ratification of the Eleventh Amendment.

To understand the dispute concerning the state-citizen and state-alien diversity clauses, it is crucial to understand the relationship between the party-based and subject-matter heads of jurisdiction. The grants of jurisdiction in Article III are to be read disjunctively. The federal judicial power may extend to a case if it falls within *any* of the enumerated jurisdictional heads. Thus, a federal court can hear a federal-question case even if the

parties are citizens of the same state; it can exercise jurisdiction over cases between citizens of different states even where the case does not arise under federal law. Most important for present purposes, the language of the unamended Article III alone would permit the federal courts to exercise jurisdiction over suits in which a noncitizen or alien is suing a State on a claim of a violation of state law.

This standard interpretation of Article III gave a special importance to the interpretation of the state-citizen and state-alien diversity clauses. The clauses by their terms permitted federal jurisdiction over any suit between a State and a noncitizen or a State and an alien, and in particular over suits in which the plaintiff was the noncitizen or alien and the defendant was the State. Yet in most of the States in 1789, the doctrine of sovereign immunity formally forbade the maintenance of suits against States in state courts, although the actual effect of this bar in frustrating legal claims against the State was unclear.[12] Thus, the question left open by the terms of the two clauses was whether the State law of

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sovereign immunity barred the exercise of the federal judicial power.

A plaintiff seeking federal jurisdiction against a State under the state-citizen or state-alien diversity clauses would be asserting a cause of action based on state law, since a federal question or admiralty claim would provide an independent basis for jurisdiction that did not depend on the identity of the parties. To read the two clauses to abrogate the state-law sovereign immunity defense would be to find in Article III a substantive federal limitation on state law. Although a State previously could create a cause of action to which it would not itself be liable, this same cause of action now could be used (at least by citizens of other States or aliens) in federal courts to sue the State itself. This was a particularly troublesome prospect to the States that had incurred debts, some of which dated back to the Revolutionary War. The debts would naturally find their way into the hands of noncitizens and aliens, who at the first sign of default could be expected promptly to sue the State in federal court. The State's effort to retain its sovereign immunity in its own courts would turn out to be futile. Moreover, the resulting abrogation of sovereign immunity would operate retroactively; even debts incurred years before the Constitution was adopted—and before either of the contracting parties expected that a judicial remedy against the State would be available—would become the basis for causes of action brought under the two clauses in federal court.

In short, the danger of the state-citizen and state-alien diversity clauses was that, if read to permit suits against States, they would have the effect of limiting state law in a way not otherwise provided for in the Constitution. The original Constitution prior to the Bill of Rights contained only a few express limitations on state power. Yet the States would now find in Article III itself a further limit on state action: Despite the fact that the State as sovereign had created a given cause of action, Article III would have made it impossible

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for the State effectively to assert a sovereign immunity defense to that action.

The records of the Constitutional Convention do not reveal any substantial controversy concerning the state-citizen and state-alien diversity clauses.[13] The language of Article III,[14] which provides one guide to its meaning, is undoubtedly consistent with suits against States under both subject-matter heads of jurisdiction (for example, a suit arising out of federal law brought by a citizen against a State) and party-based heads of jurisdiction (for example, a suit brought under the state-citizen diversity clause itself). However, a federal-question suit against a State does not threaten to displace a prior state-law defense of sovereign immunity, because state-law defenses would not of their own force be applicable to federal causes of action. On the other hand, a state-citizen suit against a State does, as suggested above, threaten to displace any extant state-law sovereign immunity defense.

An examination of the debates surrounding the state ratification conventions proves more productive. The various

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references to state sovereign immunity all appear in discussions of the state-citizen diversity clause. Virtually all of the comments were addressed to the problem created by state debts that predated the Constitution, when the State's creditors may often have had meager judicial remedies in the case of default. Yet, even in this sensitive context, a number of participants in the debates welcomed the abrogation of sovereign immunity that they thought followed from the state-citizen and state-alien clauses. The debates do not directly address the question of suits against States in admiralty or federal-question cases, where federal law and not state law would govern. Nonetheless, the apparent willingness of many delegates to read the state-citizen clause as abrogating sovereign immunity in state-law causes of action suggests that they would have been even more willing to permit suits against States in federal-question cases, where Congress had authorized such suits in the exercise of its Article I or other powers.

12. Professor Jaffe has explained that the doctrine of sovereign immunity in English practice prior to 1789 rarely was a bar to effective relief for those who had legitimate claims against the government. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv L Rev 1 (1963). Judge Gibbons' recent essay similarly points out that the doctrine of sovereign immunity in the Colonies may also have had a very limited scope. See Gibbons, at 1895-1899.

13. See Fletcher, at 1045-1046; Jacobs, at 14-20.

14. As reported by the Committee on Detail, the original draft provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to *such* other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue[,] in disputes between citizens of different states[,] in disputes between a State a Citizen or Citizens of another State[,] in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned[,] & in Cases of Admiralty Jurisdn." (angle brackets in source omitted). M. Farrand, Records of the Federal Convention of 1787, pp 146-147 (rev ed 1937) (hereinafter Farrand). This jurisdiction was to be appellate only, "except in . . . those instances, in which the legislature shall make it original." Ibid. Interestingly, the Committee's draft of Article III was in James Wilson's handwriting, but the state-citizen diversity clause was written in the margin by another Committee member, John Rutledge of South Carolina. See Putnam, How the Federal Courts were Given Admiralty Jurisdiction, 10 Cornell LQ 460, 467 (1925) (facsimile of original document).

The Virginia debates included the most detailed discussion of the state-citizen diversity clause.[15] The first to mention the clause explicitly was George Mason, an opponent of the new Constitution. After quoting the clause, he referred to a

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disputer about Virginia's confiscation of property belonging to Lord Fairfax.[16] He asserted:

> "Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject farther. What is to be done if a judgment be obtained against a state? Will you issue a fieri facias? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted." 3 Elliot's Debates, at 526-527.

Mason thus believed that the state-citizen diversity clause provided federal jurisdiction for suits against the States and would have the effect of abrogating the State's sovereign immunity defense in state-law causes of action for debt that would be brought in federal court.

Madison responded the next day:

> "[Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." Id., at 533.

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Madison seems to have believed that the Article III judicial power, at least under the state-citizen diversity clause, was limited to cases in which the States were plaintiffs. Although he does deny that "[i]t is in the power of individuals to call any State into court," this remark could be understood as an explication of current State law which he believed would not be displaced by the state-citizen diversity clause. His remarks certainly do not suggest that Congress, acting under its enumerated

15. A number of possible grounds for state liability existed in Virginia on the eve of that State's Ratification Convention. Aside from the problem of debts owed by the State, the Treaty of Paris of 1783, 8 Stat 80, between Britain and the United States included a number of provisions that could subject the States to liability to British creditors. Article V of the Treaty recognized completed state confiscations, or escheats, of British property. Article VI, however, prohibited escheats that had not yet been completed. Virginia, like other States, had provided for the confiscation of debts owed to British creditors or the discharge of such debts by payment into the state treasury. See Gibbons, at 1903. The Treaty thus potentially subjected Virginia to substantial liability to British creditors trying to collect these debts, although enforcement of the Treaty's provisions was largely impossible under the Articles of Confederation. See generally id., at 1899-1902, 1903-1908.

16. See also 3 J. Elliot, Debates on the Federal Constitution 529 (1891) (hereinafter Elliot's Debates) (further discussion of problem of land confiscation).

powers elsewhere in the Constitution, could not "call a state into court," or, again acting within its own granted powers, provide a citizen with the power to sue a State in federal court.

At any rate, the delegates were not wholly satisfied with Madison's explanation. Patrick Henry, an opponent of ratification, was the next speaker. Referring to Mason, he said: "My honorable friend's remarks were right, with respect to incarcerating a state. It would ease my mind, if the honorable gentleman would tell me the manner in which money should be paid, if, in a suit between a state and individuals, the state were cast." Id., at 542. Returning to the attack on Madison, Henry had no doubt concerning the meaning of the state-citizen diversity clause:

> "As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that

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gentlemen may put what construction they please on it. What! is justice to be done to one party, and not to the other?" Id., at 543.

Edmund Pendleton, the President of the Virginia Convention and the next speaker, supported ratification but seems to have agreed with Henry that the state-citizen diversity clause would subject the States to suit in federal court. He said that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party." Id., at 549.

John Marshall next took up the debate:

> "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this contruction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system

on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another

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state, without the establishment of these tribunals?" Id., at 555-556.

Marshall's remarks, like Madison's, appear to suggest that the state-citizen diversity clause could not be used to make an unwilling State a defendant in federal court. The reason seems to be that "it is not rational to suppose that the sovereign power should be dragged before a court." Of course, where the cause of action is based on state law, as it would be in a suit under the state-citizen diversity clause, the "sovereign power" whose law governed would be the State, and Marshall is consequently correct that it would be "irrational" to suppose that the sovereign could be forced to abrogate the sovereign immunity defense that its own law had created. However, where the cause of action is bused on a federal law enacted pursuant to Congress' Article I powers, it would be far less clear that Marshall would have concluded that the State still retained the relevant "sovereignty"; in such a case, there is nothing "irrational" about supposing that the relevant sovereign—in this case, Congress—had subjected the State to suit.[17]

Marshall's observations did not go unanswered. Edmund Randolph, a member of the Committee of Detail at the Constitutional Convention and a proponent of the Constitution, referred back to Mason's remarks:

> "An honorable gentleman has asked, Will you put the body of the state in prison? How is it between independent states? If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred. . . . I think, whatever the law of nations may say, that any douot respecting the construction that a state may be plaintiff, and not
>
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>
> defendant, is taken away by the words *where a state shall be a party.*" Id., at 573.

Randolph was convinced that a State could be made a party defendant. Discussing some disputed land claims, he remarked: "One thing is certain—that . . . the remedy will not be sought against the settlers, but the state of Virginia. The court of equity will direct a compensation to be made by the state." Id., at 574. Finally, he concluded his discussion: "I ask the Convention of the free people of Virginia if there can be honesty in rejecting the government because justice is to be done by it? . . . Are we to say that we shall discard this government because it would make us all honest?" Id., at 575.[18] One of the purposes of Article III was to vest in the federal courts the power to settle disputes that might

17. To interpret Marshall's remarks to endorse a principle of wholesale state immunity from suit on *any* cause of action—state or federal—in federal court would render them inconsistent with the views he later expressed as Chief Justice. See infra, at 292-299, 87 L Ed 2d, at 211-215.

18. Before the discussion of the state-citizen clause initiated by Mason, Randolph had earlier made much the same point while summarizing his views of the Constitution: "I admire that part which forces Virginia to pay her debts." 3 Elliot's Debates, at 207.

threaten the peace and unity of the Nation.[19] Randolph saw the danger of just this kind of internecine strife when a State reneges on debts owed to citizens of another State, and consequently applauded the extension of federal jurisdiction to avoid these consequences.

The Virginia Convention ratified the Constitution. The Madison and Marshall remarks have been cited as evidence of an inherent limitation on Article III jurisdiction. See, e.g., Edelman v Jordan, 415 US, at 660, n 9, 39 L Ed 2d 662, 94 S Ct 1347; Monaco v Mississippi, 292 US 313, 323-325, 78 L Ed 2d 1282, 54 S Ct 745 (1934); Hans v Louisiana, 134 US, at 14, 33 L Ed 842, 10 S Ct 504. Even if this adequately characterized the substance of their views, they were a minority of those given at the Convention. Mason, Henry, Pendleton, and Randolph

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all took an opposing position.[20] Equally important, the entire discussion focused on the question of Virginia's liability for debts and land claims that predated the Constitution and clearly arose under Virginia law. The question that excited such interest was whether the state-citizen diversity clause itself abrogated the sovereign immunity defense that would be available to the State in a suit concerning these issues in state court.[21] The same issue arose in a few other state conventions, but did not receive the detailed attention that it did in Virginia.[22]

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The debate in the press sheds further light on the effect of the Consti-

19. For example the draft of the Constitution referred to the Committee on Detail at the Convention had provided "[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." 2 Farrand, at 39.

20. It has been suggested that the remarks of the opponents of the Constitution should be given less weight. However, the same argument could be made concerning the remarks of Madison and Marshall, especially in light of Marshall's later interpretation of Article III as Chief Justice. See infra, at 295, 87 L Ed 2d, at 212-213. Their fervent desire for ratification could have led them to downplay the features of the new document that were arousing controversy. See Field, at 534.

21. The only element of the debate that suggests a broader concern is the repeated reference to the problem of enforcing a judgment against the State. Of course, even these statements were made in the context of the discussion of the state-citizen diversity clause, and the participants in the debate may well not have had their attention directed to the need, ultimately vindicated by the Civil War, to enforce federal law against the States, regardless of the means necessary for enforcement. In any event, the Court has categorically rejected the difficulty of enforcing judgments against the States as ground for permitting States to avoid their obligations. It has long been established that a State may not claim sovereign immunity when it is sued by another State under the Article III State-State clause, see South Dakota v North Carolina, 192 US 286, 48 L Ed 448, 24 S Ct 269 (1904), or when it is sued by the United States. See United States v Texas, 143 US 621, 642-646, 36 L Ed 285, 12 S Ct 488 (1892). Moreover, the prospective and injunctive relief that is permitted in actions pleaded against a state official, see Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), may raise enforcement problems as difficult as those raised by a judgment for damages in a suit against a State. Cf. Cooper v Aaron, 358 US 1, 3 L Ed 2d 5, 78 S Ct 1401, 79 Ohio L Abs 452 (1958).

22. For discussion of the state-citizen clause in other conventions, see Gibbons, at 1902-1903 (Pennsylvania), 1912-1914 (North Carolina); Fletcher, at 1050-1051; Jacobs, at 27-40 (Pennsylvania). In the Pennsylvania Convention, for instance, James Wilson approved of the state-citizen clause that had been drafted in his own Committee on Detail: "When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing." 2 Elliot's Debates, at 491.

tution on state sovereign immunity. A number of influential anti-Federalist publications sounded the alarm at what they saw as the unwarranted extension of the federal judicial power worked by the state-citizen diversity clause. The "Federal Farmer," commonly identified as Richard Henry Lee of Virginia, was one influential and widely published anti-Federalist. He objected:

"There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, *I mean powers respecting questions arising upon the internal laws of the respective states.* It is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union. By Art 3 Sect 2 the powers of the federal judiciary are extended (among other things) to all cases between a state and citizens of another state—between citizens of different states—between a state or the citizens thereof, and foreign states, citizens of subjects. Actions in all these cases, except against a state government, are now brought and finally determined in the law courts of the states respectively; and as there are no words to exclude these courts of their jurisdiction in these cases, they will have concurrent jurisdiction with the inferior federal courts in them." 14 The Documentary History of the Ratification of the Constitution 40 (Kaminski & Saladino, eds, 1983) (hereinafter Documentary History) (emphasis added).[23]

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Later in the same essay, which was published and circulated in 1787 and 1788, see id., at 14-17, the author becomes even more explicit:

"How far it may be proper to admit a foreigner or the citizen of another state to bring actions against state governments, which have failed in performing so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to bring it to answer to an individual in a court of law is worthy of consideration; the states are now subject to no such actions; and this new jurisdiction will subject the states, and many defendants to actions, and processes, which were not in the contemplation of the parties, when the contract was made; all engagements existing between citizens of different states, citizens and foreigners, states and foreigners; and states and citizens of other states were made the parties contemplating the remedies then existing on the laws of the states—and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever." Id., at 41-42.

This discussion undoubtedly presupposes that States would be parties defendant in suits on state-law causes of action under the state-citizen diversity clause; the author objects to barring sovereign immunity defenses in cases "arising upon the internal laws of the respective states." However, the anti-Federalist author plainly also believes that the powers of the federal courts are to be coextensive with the powers of

23. The essay cited here can also be found at 2 The Complete Anti-Federalist 245 (H. Storing ed 1981). Professor Storing has questioned its attribution to Richard Henry Lee. Id., at 214-216.

Congress. Thus, the deficiency of state-citizen diversity jurisdiction is not that it permits the federal courts to hear suits against States based on federal causes of action, but that it permits the federal courts to exercise jurisdiction beyond the lawmaking powers of Congress: it provides new remedies for state creditors "which were not in the contemplation of the parties, when the contract was made."

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Another noted anti-Federalist writer who published under the pseudonym "Brutus" also attacked what he saw as the untoward implications of the state-citizen diversity clause:

"I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in its exercise, prove most pernicious and destructive.

"It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.

. . . . . .

"Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering.

. . . . . .

"If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress, will crush the states beneath its weight. And if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning." 2 The Complete Anti-Federalist 429-431 (H. Storing ed 1981).

Other materials, from proponents and opponents of ratification, similarly view Article III jurisdiction as extending to suits against States.[24] Timothy Pickering, a Pennsylvania

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landowner who supported ratification and attended the Pennsylvania Convention, wrote:

"The federal farmer, and other objectors, say the causes between

24. See, e. g., J. Main, The Antifederalists 157 (1961) (quoting 1788 letter raising question whether state-citizen diversity clause would not "expose every State to be sued in the New Court, on their public securities holden by Citizens of other States"); 13 Documentary History, at 434 (widely reprinted essay by Federalist Tench Coxe) ("[W]hen a trial is to be had between the citizens of any state and those of another, or the government of another, the private citizen will not be obliged to go into a court *constituted by the state*, with which, or with the citizens of which, *his dispute is. He can appeal to a disinterested federal court*"); 14 Documentary History, at 72 (pro-Federalist pamphlet published in Philadelphia and reprinted elsewhere) ("[States] will indeed have the privilege of oppressing *their own citizens* by bad laws or bad administration; but the moment the mischief extends beyond their own State, and begins to affect the citizens of other States strangers, or the national welfare,—the salutary control of the supreme power will check the evil, and restore *strength and security*, as well as *honesty and right*, to the offending state").

a state and citizens of another state —between citizens of different states—and between a state, or the citizens thereof, and the citizens of subjects of foreign states, should be left, as they now are, to the decision of the particular state courts. The other cases enumerated in the constitution, seem to be admitted as properly cognizable in the *federal* courts. With respect to all the former, it may be said generally, that as the local laws of the several states may differ from each other—as particular states may pass laws unjust in their nature, or partially unjust as they regard foreigners and the citizens of other states, it seems to be a wise provision, which puts it in the power of such foreigners & citizens to resort to a court where they may reasonably expect to obtain *impartial* justice. . . . But there is a particular & very cogent reason for securing to *foreigners* a trial, either in the first instance, or by appeal, in a *federal* court. With respect to *foreigners,* all the states form but *one nation.* This *nation* is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the

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power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war." 14 Documentary History, at 204.

Pickering's comments are particularly revealing because, unlike the previous comments, they do not focus on the problem caused by the abrogation of sovereign immunity in state-law causes of action. In fact, his views seem to be consistent with the view that a federal court adjudicating a state-law claim should apply an applicable state-law sovereign immunity defense. Pickering justifies the existence of state-citizen diversity jurisdiction in part as a remedy for state laws that are unjust or unfair to noncitizens. Such laws would, of course, implicate the interests protected by the Privileges and Immunities Clause of Article IV. His comments, like those of the "Federal Farmer," thus suggest the recognized need for a federal forum to adjudicate cases implicating the guarantees of the Federal Constitution—even those cases in which a State is the defendant.

The Federalist Papers were written to influence the ratification debate in New York. In No. 81, Hamilton discussed the issue of state sovereign immunity in plain terms:

"I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender

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of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." The Federalist No. 81, pp 548-549 (J. Cooke ed 1961) (emphasis in original).

Hamilton believed that the States could not be held to their debts in federal court under the state-citizen diversity clause. The Court has often cited the passage as support for its view that the Constitution, even before the Eleventh Amendment, gave the federal courts no authority to hear any case, under any head of jurisdiction, in which a State was an unconsenting defendant. See, e.g., Edelman v Jordan, 415 US, at 660-662, n 9, 39 L Ed 2d 662, 94 S Ct 1347; Hans v Louisiana, 134 US, at 12-13, 33 L Ed 842, 10 S Ct 504. A careful reading of this passage, however, in the context of Hamilton's views elsewhere in The Federalist, demonstrates precisely the opposite. In the cases arising under state law that would find their way into federal court under the state-citizen

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diversity clause, a defense of state sovereign immunity would be as valid in federal court as it would be in state court. The States retained their full sovereign authority over state-created causes of action, as they did over their traditional sources of revenue. See The Federalist No. 32 (discussing taxation). On the other hand, where the Federal Government, in the "plan of the convention,"[25] had

25. Hamilton used the phrase "plan of the convention" frequently as a synonym for the Constitution. See The Federalist Concordance 403-404 (Engeman, Erler, & Hofeller, eds 1980). In No. 32, the discussion of taxation to which Hamilton adverted in No. 81, Hamilton had said that "as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." The Federalist No. 32, p 200 (J. Cooke ed 1961) (emphasis in original). The Constitution had not delegated to the National Government the general power to define defenses to state-law causes of action; consequently, nothing in Article III abrogated state sovereign immunity in state-law causes of action in federal or state courts. On the other hand, the Constitution *had* delegated to the National Government a series of enumerated powers, and had made federal laws enacted pursuant thereto the supreme law of the land. Therefore, the States had surrendered their immunity from suit on federal causes of action when the Constitution was ratified.

In No. 80, Hamilton discussed the need for the federal-question jurisdiction:

"What for instance would avail restrictions on

substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject to suit in federal court.[26] In these areas, in which the Federal Government

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had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress; as Hamilton had said in discussing the judicial power, "every government *ought to possess the means of executing its own provisions by its own authority,*" The Federalist No. 80, p 537 (J. Cooke ed 1961) (emphasis in original).[27] To interpret Article III to impose an independent limit on the lawmaking power of Congress would be to turn the "plan of the convention" on its head.[28]

A sober assessment of the ratification debates thus shows that there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States. Certain opponents of ratification, like

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Mason, Henry, and the "Federal Farmer," believed that the state-citizen diversity clause abrogated state sovereign immunity on state causes of action and predicted dire consequences as a result. On the other hand, certain proponents of the Constitution, like Pendleton, Randolph, and Pickering, agreed concerning the interpretation of Article III but believed that this constituted an argument in favor of the new Constitution. Finally, Madison, Marshall, and Hamilton believed that a State could not be made a defendant in federal court in a state-citizen diversity suit. The majority of the recorded comments on the question contravene the Court's statement in Hans, see supra, at 259, 87 L Ed 2d, at 191, that suits against States in federal court were inconceivable.[29]

Granted that most of the comments thus expressed a belief that state sovereign immunity would not be a defense to suit in federal court in state-citizen diversity cases, the question remains whether the debates evince a contemporary understanding concerning the amenability of States to suit under federal-question or other subject-matter grants of jurisdiction. Although this question received little direct attention, the debates permit some conclusions to be drawn. First, the belief that the state-citizen diversity clause abrogated state sovereign immunity in federal court implies that the federal question and admiralty clauses would have the same effect. It would be curious indeed if Article III abrogated a State's immunity on causes of action that arose under the State's own laws and over which the Federal Government had no legislative authority, but gave a State an absolute right to a sovereign immunity defense when it was charged with a violation of federal law. Second, even Hamilton, who believed that the state-citizen clause did not abrogate state sovereign immunity in federal court, also left substantial room for suits

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against States when "the plan of the convention" required this result. Given the Supremacy Clause and the enumeration of congressional powers in Article I, "the plan of the convention" requires States to answer in federal courts for violations of duties lawfully imposed on them by Congress in the exercise of its Article I powers. Third, the repeated references by Hamilton and others to the need for the federal courts to be able to exercise jurisdiction that is as extensive as Congress' powers to legislate suggests that, if Congress had the substantive power under Article I to enact legislation providing rights of action against the States, the federal courts under Article III could be given jurisdiction to hear such cases.

B

After the ratification of the Constitution, Congress provided in § 13 of the First Judiciary Act, 1 Stat 73, 80, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." The Act did not provide the federal courts with original federal-question jurisdiction, although it did in § 25 provide the Supreme Court with considerable jurisdiction over appeals in federal-question cases from state courts. Despite the controversy over the suability of the States, the provision of the Act giving the Supreme Court original jurisdiction under the state-citizen and state-alien diversity clauses surprisingly aroused little or no de-

the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, and others with the principles of good government." The Federalist No. 80, p 350 (J. Cooke ed 1961).
The constitutional mode for enforcing the federal laws, according to Hamilton, was the federal judiciary. Ibid. Again, insofar as the States have thus given up powers to the Federal Government in the "plan of the convention," they are no longer full sovereigns and may be subjected to suit.

26. A number of scholars have noted comments by Hamilton elsewhere in The Federalist Papers that strongly suggest that he foresaw the necessity for suits against States in federal court. See Fletcher, at 1048; Gibbons, at 1908-1912; Field, at 534-535.

27. The view that the power of the federal courts under federal-question jurisdiction had to be congruent with the power of Congress to legislate under Article I is strongly supported by other writings of Hamilton, as well as by other comments made in defense of Article III. See, e. g., The Federalist, No. 80, p 535 (J. Cooke ed 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number"); 3 Elliot's Debates, at 532 (remarks of Madison) ("With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to").

28. One final piece of evidence concerning the meaning of the original Article III comes from the amendments proposed by the various state ratification conventions. The New York Convention submitted an amendment to the First Congress that "nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever." 2 Elliot's Debates, at 409. This suggests at least that the New York delegates did not agree with Hamilton's reading of the state-citizen diversity clause. Virginia, North Carolina, Rhode Island, Massachusetts, and New Hampshire also proposed amendments that would have modified or eliminated the state-citizen diversity clause. See Fletcher, at 1051-1052. The felt need for such amendments suggests that the delegates to these conventions did not find such a limitation in Article III itself.

29. Indeed, recent scholarship seems unanimously to agree that the weight of the evidence is against the Court's statement in Hans. See Jacobs, at 40; Field, at 531; Gibbons, at 1913-1914; Fletcher, at 1054.

bate in Congress. See Fletcher, at 1053-1054.[30]

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Those with disputes against States had no doubt that state-citizen diversity jurisdiction gave them a remedy in federal court. The first case docketed in this Court was Vanstophorst v Maryland, 2 Dall 401, 1 L Ed 433 (1791), a suit by Dutch creditors who sought judgments to recover principal and interest on Revolutionary War loans to the State of Maryland. Although a number of other cases were brought against States prior to the passage of the Eleventh Amendment,[31] the most significant of course was Chisholm v Georgia, 2 Dall 419, 1 L Ed 440 (1793). Chisholm was an action in assumpsit by a citizen of South Carolina for the price of military goods sold to Georgia in 1777.[32] The case squarely presented the question whether a State could be sued in federal court.

The Court held that federal jurisdiction extended to suits against States under the state-citizen diversity clause. Each of the five sitting Justices delivered an opinion; only Justice Iredell was in dissent. Several features of Chisholm are

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crucial to an understanding of the meaning of the Eleventh Amendment. First, two members of the Committee on Detail that had drafted Article III at the Convention were involved in the Chisholm case. Both believed that a State could be sued in federal court. Edmund Randolph, Washington's Attorney General who had previously represented the plaintiff in Vanstophorst v Maryland, supra, represented the Chisholm plaintiff and argued strongly that a State must be amenable to suit in federal court as a result of the plain words of Article III, 2 Dall, at 421, 1 L Ed 440, the necessity for enforcing the constitutional prohibitions on the States, id., at 422, 1 L Ed 440, and the implicit consent to suit that occurred on ratification of the Constitution, id., at 423, 1 L Ed 440. Justice James Wilson, another of the drafters of Article III, delivered a lengthy opinion in which he urged that sovereign immunity had no proper application within the new Republic. Id., at 453-466, 1 L Ed 440.

Second, Chisholm was not a federal-question case. Although the case involved a contract, it was brought pursuant to the state-citizen diversity clause and not directly under the Contracts Clause of the Constitution. See id., at 420, 1 L Ed 440 (argument of counsel).[33] The case thus squarely raised the issue whether a suit against a State based on a state-law cause of action that was not maintainable in state court could be brought in federal court pursuant to the state-citizen diversity clause. The case did *not* present the question whether a

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State could be sued in federal court where the cause of action arose under federal law.

Third, even Justice Iredell's dissent did not go so far as to argue that a State could *never* be sued in federal court. He sketched his argument as follows:

> "I have now, I think, established the following particulars.—1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2d. That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy." Id., at 449, 1 L Ed 440.

He thus accurately perceived that the question presented was whether Article III itself created a cause of action in federal court to displace state law where a State was being sued. Because he believed that it did not, and because he found no *other* source of law on which the State could be held liable in the case, he believed that the suit could not be maintained.[34]

The decision in Chisholm was handed down on February 18, 1793. On February 19, a resolution was introduced in the House of Representatives stating:

30. The First Judiciary Act itself may well suggest Congress' understanding that States would be suable in federal court under the state-citizen diversity clause. Although § 13 of the Act did not differentiate between States as plaintiffs and States as defendants, the same section provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors . . . as a court of law can have or exercise consistently with the law of nations." If Congress had thought that States could not, or ought not, be suable in federal court under the state-citizen diversity clause, it easily could have provided that the Supreme Court shall exercise such jurisdiction against a State "as a court can have or exercise consistently with that state's law." In addition, elsewhere in the Act, Congress assigned jurisdiction over cases in which the United States was the *plaintiff*. See § 9, 1 Stat 77 (district court jurisdiction of "all suits at common law where the United States sue" subject to jurisdictional amount); § 11, 1 Stat 78 (circuit court jurisdiction of all civil suits where $500 or more is in dispute "and the United States are plaintiffs, or petitioners"). Congress exercised no such discrimination in assigning jurisdiction in cases "between a state and citizens of another state."

31. See Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga L Rev 207, 215-230 (1968) (discussing cases); Jacobs, at 41-47, 57-64 (same).

32. The precise facts of Chisholm have been the subject of some scholarly dispute. Compare 1 C. Warren, The Supreme Court in United States History 93, n 1 (1922) (plaintiff in Chisholm was executor asserting claim on behalf of estate of British citizen), with Mathis, 2 Ga L Rev, at 217-218 (plaintiff in Chisholm was executor of estate of South Carolina citizen). The traditional account, in which the plaintiff was identified as acting on behalf of a British citizen, may explain why the Eleventh Amendment modified the state-alien diversity clause as well as the state-citizen diversity clause.

33. Most likely, Chisholm could not have been brought directly under the Contracts Clause of the Constitution. Prior to Fletcher v Peck, 6 Cranch 87, 3 L Ed 162 (1810), it was not at all clear that the Contracts Clause applied to contracts to which a State was a party. Moreover, the case involved a simple breach of contract, not a "law impairing the obligation of the contract" to which the Clause would have applied. See Shawnee Sewerage & Drainage Co. v Stearns, 220 US 462, 471, 55 L Ed 544, 31 S Ct 452 (1911); Brown v Colorado, 106 US 95, 98, 27 L Ed 132, 1 S Ct 175 (1882). Finally, it was certainly not clear at the time of Chisholm that the Contracts Clause provided a plaintiff with a private right of action for damages. Chisholm was thus a suit on a state-law cause of action in assumpsit against the State of Georgia pursuant to the state-citizen diversity clause.

34. Justice Iredell added, in what he conceded to be dicta: "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." 2 Dall, at 449, 1 L Ed 440. He emphasized, however, that he need not decide this broader question: "This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial." Id., at 450, 1 L Ed 440.

"[No] State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the
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suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." 1 C. Warren, The Supreme Court in United States History 101 (rev ed 1937).[35]

Another resolution was introduced in the Senate on February 20. That resolution provided:

"The Judicial power of the United States shall not extend to any suits 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." 3 Annals of Cong 651-652 (1793).

Congress then recessed on March 4, 1793, without taking any action on the proposed Amendment.

By the time Congress reconvened in December 1793, a suit had been brought against Massachusetts in the Supreme Court by a British Loyalist whose properties had been confiscated. Vassal v Massachusetts.[36] Georgia had responded angrily to the decision in Chisholm, and the Massachusetts Legislature reacted to the suit against it by enacting a resolution calling for "the most speedy and effectual measures" to obtain a constitutional amendment, including a constitutional convention. Resolves of Massachusetts 28 (1793) (No. 45). Virginia followed with a similar resolution. Acts of Virginia 52 (1793). The issue had thus come to a head, and the Federalists who controlled Congress no doubt felt considerable pressure to act to avoid an open-ended constitutional convention.[37]

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On January 2, 1794, a resolution, was introduced, by a Senator whose identity is not now known, with the text of the Eleventh Amendment as it was ultimately enacted:

"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." 4 Annals of Cong 25 (1794) (emphasis added).

This differed from the original February 20 resolution only in the addition of the three italicized words. Senator Gallatin moved to amend the resolution to add the words "except in cases arising under treaties made under the authority of the United States" after "The Judicial power of the United States." Id., at 30. After rejecting Gallatin's proposal, the Senate then rejected an amendment offered by an unknown Senator that would have forbidden suits against States only "where the

35. The resolution was not reported in the Annals of Congress, but was reported in contemporary newspaper accounts. See Gibbons, at 1926, n 186.

36. The case is unreported, but is discussed in 1 J. Goebel, History of the Supreme Court of the United States 734-735 (1971).

37. For a more detailed explanation of the political situation facing the Washington administration and the Congress at the time, see Gibbons, at 1927-1932.

cause of action shall have arisen before the ratification of this amendment." Ibid.[38] The Senate ultimately voted 23-2 in favor of the Amendment. Ibid.

In the House of Representatives, there was only one attempt to amend the resolution. The amendment would have added at the end of the Senate version the following language: "[w]here such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect." 2d, at 476. This resolution, of course, would have ratified the Chisholm result that States could be sued under the state-citizen diversity clause, but would have given the States an opportunity to shift the litigation into
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their own courts. It was rejected, 77-8, and the House proceeded to ratify the Amendment by a vote of 81-9 on March 4, 1794. 2d, at 476-478. Although the chronology of ratification is somewhat unclear,[39] President Adams certified that it had been ratified four years later on January 8, 1798.

Those who have argued that the Eleventh Amendment was intended to constitutionalize a broad principle of state sovereign immunity have always elided the question of why Congress would have chosen the language of the Amendment as enacted to state such a broad principle. As shown above, there was—to say the least—no consensus at the time of the Constitution's ratification as to whether the doctrine of state sovereign immunity would have any application in federal court. Even if there had been such a consensus, however, the Eleventh Amendment would represent a particularly cryptic way to embody that consensus in the Constitution. Had Congress desired to enshrine state sovereign immunity in federal courts for all cases, for instance, it could easily have adopted the first resolution introduced on February 19, 1793, in the House. Alternatively, a strong sovereign immunity principle could have been derived from an amendment that merely omitted the last 14 words of the enacted resolution. See Gibbons, at 1927. However, it does not take a particularly close reading of the Eleventh Amendment to see that it stops far short of that. Article III had provided: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens or Subjects." The Eleventh Amendment used the identical language in stating that the judicial power did not extend to "any suit in law or equity . . . against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." The congruence of language suggests that the Amendment was
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intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses; henceforth, a State could not be sued in federal court where

38. The Amendment read in full:
"The Judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State, or by citizens of subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment."

39. See Jacobs, at 67, nn 95-99.

the basis of jurisdiction was that the plaintiff was a citizen of another State or an alien.[40]

It may be argued that the true intentions of the Second Congress were revealed by its use of the words "shall not be

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construed" in the text of the Amendment. According to this argument, Congress intended not merely to qualify the state-citizen and state-alien diversity clauses, but also to establish a rule of construction barring exercise of the federal jurisdiction in any case—even one otherwise maintainable under the subject-matter heads of jurisdiction—in which a noncitizen or alien was suing a State. This view at least is consistent with the language of the Amendment, and would lead to the conclusion that suits by noncitizens or aliens against State are never permitted, while suits by a citizen are permissible.[41] Recent scholarship, however, suggests strongly that this view is incorrect. In particular, two other explanations for the use of these terms have been advanced. Some have argued that the words were a natural means for Congress to rebuke the Supreme Court for its construction of the words "between a State and citizens of another State" in Chisholm; no longer should those words be construed to extend federal jurisdiction to suits brought under that clause in which the State was defendant. See, e.g., Fletcher, at 1061-1062. Others have argued that the words were added to assure the retrospective application of the Eleventh Amendment. See, e.g., Jacobs, at 68-69. Of course, if the latter meaning were intended, the words

40. It might be argued that, because Congress rejected Senator Gallatin's proposal, which would have exempted treaty-based causes of action from the operation of the Amendment, Congress intended to leave intact no part of the federal-question jurisdiction that would potentially have left the States open to suit. This argument, however, is untenable. First, it ignores the language of the Amendment. If Congress were generally concerned with suits against States under *all* Article III heads of jurisdiction, it would have had no rational reason to direct the Eleventh Amendment only against suits by noncitizens or foreigners. Second, Congress may well have rejected Gallatin's proposal precisely because to adopt that proposal would have implied some limitation on the ability of the federal courts to hear nontreaty based federal-question claims. Thus, Congress' rejection of the proposal may well have been based on its desire to preserve the full contours of Article III federal-question jurisdiction, rather than on a desire to limit it. Third, the federal courts had no general original federal-question jurisdiction under the First Judiciary Act, although the Supreme Court did have substantial appellate federal question jurisdiction over cases originating in state courts. In refusing in the First Judiciary Act to grant original federal-question jurisdiction to the federal courts, Congress had evidently decided that federal-question cases, even those arising out of the Treaty of Paris, should be heard in the first instance in state court. In deciding to enact the Eleventh Amendment to overrule Chisholm, Congress had decided that the state-citizen and state-alien clauses ought not permit suits against States in federal court. Given these two decisions, Congress had little reason to make an exception to both decisions for suits that arose out of the Treaty. Finally, the case of Vassal v Massachusetts, in which a British Loyalist had brought a challenge under the state-alien clause to the State's confiscation of his property, had triggered a movement for a constitutional convention. See supra, at 284, 87 L Ed 2d, at 206. By rejecting the Gallatin proposal, which would have authorized the Vassal suit, Congress no doubt acted in part to squelch the movement for an open-ended constitutional convention.

41. When the Court is prepared to embark on a defensible interpretation of the Eleventh Amendment consistent with its history and purposes, the question whether the Amendment bars federal-question or admiralty suits by a noncitizen or alien against a State would be open. At the current time, as the text states, the commentators' arguments against this interpretation seem to me quite plausible.

had their intended effect, for the Court dismissed cases pending on its docket under the state-citizen diversity clause when the Amendment was ratified. E.g., Hollingsworth v Virginia, 3 Dall 378, 1 L Ed 644 (1798).[42]

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The language of the Eleventh Amendment, its legislative history, and the attendant historical circumstances all strongly suggest that the Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts. The economy of this explanation, which accounts for the rather legalistic terms in which the Amendment and Article III were written, does not require extravagant assumptions about the unexpressed intent of Congress and the state legislatures, and is itself a strong point in its favor. The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.

The historical record in fact confirms that, far from correcting the error made in Chisholm, the Court's interpretation of the Eleventh Amendment makes a similar mistake. The Chisholm Court had interpreted the state-citizen clause of Article III to work a major substantive change in state law, or at least in those cases arising under state law that found their way to federal court. The Eleventh Amendment corrected that error, and henceforth required that the party-based heads of jurisdiction in Article III be construed not to work this kind of drastic modification of state law. The Court's current interpretation of the Eleventh Amendment makes the opposite mistake, construing the Eleventh Amendment to work a major substantive change in federal law. According to the Court, the Eleventh Amendment imposes a substantive limit on the Necessary and Proper Clause of Article I, limiting the remedies that Congress may authorize for state violations of federal law. This construction suffers from the same defect as that of Chisholm: both construe the enumeration of heads of jurisdiction to impose substantive limits on lawmaking authority.

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Article III grants a federal-question jurisdiction to the federal courts that is as broad as is the lawmaking authority of Congress. If Congress acting within its Article I or other powers creates a legal right and remedy, and if neither the right nor the remedy violates any provision of the Constitution outside Article III, then Congress may entrust adjudication of claims based on the newly created right to the federal courts—even if the defendant is a State. Neither Article III nor the Eleventh Amendment imposes an independent limit on the lawmaking authority of Congress. This view makes sense of the language, history, and purposes of Article III and of the Eleventh Amendment. It is also the view that was adopted inthe earliest interpre-

42. In any event, I find it much more plausible to leave the construction of these words somewhat unclear than to leave the construction of much of the Amendment a superfluity, as the Court's construction would do.

tations of the Amendment by the Marshall Court.

C

After the enactment of the Eleventh Amendment, the number of suits against States in the federal courts was largely curtailed. The Amendment itself had eliminated the constitutional basis for the provisions of the First Judiciary Act granting the Supreme Court original jurisdiction over suits against States by an alien or noncitizen. Because there was no general statutory grant of original federal-question jurisdiction to the federal courts,[43] suits against States would not arise under that head of jurisdiction.[44] Nonetheless, the Marshall Court did have a number of opportunities to confront the issue of state sovereign immunity. The Court's decisions reflect a consistent understanding of the limited effect of the Amendment on the structure of federal jurisdiction outside the state-citizen and state-alien diversity clauses. Because the Justices on the Marshall Court lived through the

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ratification of the Constitution, the decision in Chisholm v Georgia, and the subsequent enactment of the Eleventh Amendment, the Marshall Court's views on the meaning of the Amendment should take on particular importance.

(1)

Admiralty was perhaps the most significant head of federal jurisdiction in the early 19th century. As Hamilton noted in a much-quoted passage from the Federalist Papers: "The most bigoted idolizers of State authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes." The Federalist No. 80, p 538 (Hamilton) (J. Cooke ed 1961). Although few admiralty cases could be expected to arise in which the States were defendants, the Marshall Court in the few instances in which it confronted the issue showed a strong reluctance to construe the Eleventh Amendment to interfere with the admiralty jurisdiction of the federal courts.

In United States v Peters, 5 Cranch 115, 3 L Ed 53 (1809), the Court adjudicated a controversy over whether certain funds, proceeds of an admiralty prize sale dating from the 1770's, belonged to the Commonwealth of Pennsylvania or to a private claimant. Id., at 136-139, 3 L Ed 53. The Commonwealth claimed the money as the result of a state-court judgment in its favor, while the private claimant's claim was based on a judgment received from a national prize court established under the Articles of Confederation. The money claimed by the Commonwealth had been held by the State Treasurer, who had since died. Chief Justice Marshall writing for the Court, held that the Eleventh Amendment did not interfere with the traditional common-law suit against a state official for recovery of funds held with notice of an adverse claim. According to Marshall, the suit could be maintained against the state official, even though the relief

43. The Judiciary Act of 1801, 2 Stat 89, did grant general federal- question jurisdiction to the federal circuit courts, but that grant was repealed one year later. 2 Stat 132, 156 (1802).

44. Nor could a suit against a State be brought under diversity jurisdiction, because a State is not a citizen of itself for such purposes. See Postal Telegraph Cable Co. v Alabama, 155 US 482, 39 L Ed 231, 15 S Ct 192 (1894).

sought was a recovery of funds. Marshall carefully avoided deciding whether the Eleventh Amendment would have barred the action if it had been necessary

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to bring it against the State itself: "If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion." Id., at 139, 3 L Ed 53. Nonetheless, Marshall's construction of the Eleventh Amendment by preserving the essential remedy of a money judgment that, in effect, ran against the state, left federal admiralty jurisdiction intact.

Later that same year, Justice Bushrod Washington, who had sat on the Peters Court, heard a sequel to Peters that arose when the State resisted the execution of the Peters judgment. United States v Bright, 24 F Cas 1232 (No. 14,647). (CC Pa 1809). After agreeing with the Peters Court that the State Treasurer could be sued for the funds in his private capacity, he went on to note that the Eleventh Amendment in terms applies only to suits "in law or equity." Because the Framers of the Amendment did *not* add the words "or to cases of admiralty and maritime jurisdiction," id., at 1236, the Amendment should not be construed to extend to admiralty cases.[45] Washington thus did not read the Amendment to require a broad constitutional prohibition of suits against States in federal court. Moreover, given the importance of admiralty jurisdiction at the time, Congress' failure to include admiralty suits in the express terms of the statute was unlikely to have been an oversight.

The Marshall Court again refused to hold that the Eleventh Amendment barred suits in admiralty against States in Governor of Georgia v Madrazo, 1 Pet 110, 7 L Ed 73 (1828). On appeal

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from a Federal Circuit Court decision, a claimant alleged that he, and not the State of Georgia, was entitled to the proceeds of a prize sale. Chief Justice Marshall, writing for the Court, held that the suit was in reality a suit against the State. Although the Governor was named as defendant, there was no allegation that he had violated any federal or state law, and thus "no case is made which justifies a decree against him personally." Id., at 123, 7 L Ed 73. The Court then dismissed the case because the Circuit Court had no jurisdiction over it: "if the 11th amendment to the Constitution, does not extend to proceedings in admiralty; it was a case for the original jurisdiction of the Supreme Court." Ibid.[46]

45. Justice Washington explained the exclusion of admiralty jurisdiction in part on the ground that admiralty proceedings are often in rem and that a judgment could thus be enforced without implicating the "delicate" question of how to execute a judgment against a State. United States v Bright, 24 F Cas, at 1236. Although this concern echoed some of the difficulties raised in the debate over ratification of the Constitution, the difficulty of executing a judgment against a State was ultimately rejected by the Court as a ground to expand state sovereign immunity in federal court. See supra, at 270, n 21, 87 L Ed 2d, at 197.

46. In 1833, the Court dismissed an original action brought by Madrazo based on the same claim. Ex parte Madrazzo, 7 Pet 627, 8 L Ed 808 (1833). The Court's one-paragraph opinion apparently dismissed the case on Eleventh Amendment grounds because it "is a mere personal suit against a state to recover proceeds in its possession." Id., at 632, 8 L Ed 808. This was the only case dismissed by the Supreme Court on Eleventh Amendment grounds between Hollingsworth v Virginia, 3 Dall 378, 1 L Ed 644 (1798), and the Civil War.

Writing in 1833, Justice Joseph Story noted:

"It has been doubted, whether this amendment extends to cases of admiralty and maritime jurisdiction, where the proceeding is in rem and not in personam. There, the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides the language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both." 3 J. Story, Commentaries on the Constitution of the United States 560-561 (1833).[47]

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As Justice Story pointed out, the result of the early admiralty cases was that the Eleventh Amendment was not seen as an obstacle to the exercise of otherwise legitimate federal admiralty jurisdiction.

(2)

Until 1875, Congress did not endow the federal courts with general federal-question jurisdiction. Nonetheless, the Supreme Court had several opportunities to decide federal-question cases against States. In some of these, suit was brought against a State in state court and an appeal was taken to the Supreme Court. If the Eleventh Amendment had constitutionalized state sovereign immunity as a limit to the Article III federal judicial power, it would have operated as a limit on both original *and* appellate federal-question jurisdiction, for nothing in the text or subsequent interpretations of Article III suggests that the federal judicial power extends more broadly to hear appeals than to decide original cases.[48] Although the Court has largely ignored this consequence of its constitutional sovereign immunity doctrine,[49] it was a consequence that the Marshall Court squarely faced.

In Cohens v Virginia, 6 Wheat 264, 5 L Ed 257 (1821), Chief Justice Marshall addressed the question of the effect of the Eleventh Amendment on the Supreme Court's appellate jurisdiction to review a criminal conviction obtained in a Virginia state court. Counsel for the State argued that either the original

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Constitution or the Eleventh Amendment denied the federal courts the power to hear such an appeal, in which a State was being "sued" for a writ of error in the Supreme Court. Marshall noted at the outset of his opinion for the Court that Article III provides federal jurisdiction "to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party." Id., at 378, 5 L Ed 257. After repeating this principle several times,[50] the Chief Justice stated: "We think, then, that as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party." Id., at 405, 5 L Ed 257.

Marshall then went on to consider the applicability of the Eleventh Amendment. After holding that a criminal defendant's petition for a writ of error is not properly understood to be a suit "commenced" or "prosecuted" by an individual against a State, Marshall stated an alternative holding:

"But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of

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error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." Id., at 412, 5 L Ed 257.[51]

Thus, the Marshall Court in Cohens squarely confronted the issue of the extent to which the Eleventh

47. Justice Story cited Peters, Bright, and Madrazo in support of his statement.

48. See Doremus v Board of Education, 342 US 429, 96 L Ed 475, 72 S Ct 394 (1952) (Article III limits on federal jurisdiction apply to appeal of case from New Jersey state courts).

49. Cf. Smith v Reeves, 178 US 436, 445, 44 L Ed 1140, 20 S Ct 919 (1900) (State may consent to suit in its own courts "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or re-examined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States").

50. The repetitions of this principle make the point unmistakably. He states that the judicial department "is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be party." 6 Wheat, at 382, 5 L Ed 257. "We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." Id., at 383, 5 L Ed 257. "[W]e think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties." Id., at 392, 5 L Ed 257. It is worth noting that the Court has often given a broad reading to Marshall's statements in the Virginia Ratification Convention, interpreting those statements to express Marshall's view that a constitutional doctrine of state sovereign immunity in federal courts was an element of the original understanding of Article III. See, e.g., Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890); Monaco v Mississippi, 292 US 313, 324, 78 L Ed 1282, 54 S Ct 745 (1934). The Chief Justice's discussion in Cohens, however, demonstrates that it may be prudent to give his earlier statements the less expansive interpretation suggested supra, at 267-268, 87 L Ed 2d 195-196.

51. Marshall's statement is of course consistent with the view that the Eleventh Amendment bars federal-question jurisdiction over suits that are prosecuted against States by noncitizens or aliens, but does not bar federal jurisdiction over suits by citizens of the State being sued. But it is flatly inconsistent with the Court's current position that the Amendment, despite its language and history, should be interpreted as constitutionalizing a broad sovereign immunity principle. Like the discussion earlier in Cohens, it evinces the Marshall Court's understanding that the Eleventh Amendment was to be construed narrowly to accomplish the purpose for which it was adopted. It is worth noting that, when the troublesome case hypothesized in Cohens—in which a writ of error was taken by a *noncitizen* of a State—arose 10 years later, the Marshall Court reached the merits of the claim without even discussing any possible Eleventh Amendment bar. See Worcester v Georgia, 6 Pet 515, 8 L Ed 483 (1832). Although the Court in Worcester did not discuss the Eleventh Amendment issue, the issue was raised by the plaintiff in error. See id., at 533-534, 8 L Ed 483.

Amendment encroached on federal-question jurisdiction, and concluded that it made no encroachment at all. This result is not distinguishable on the ground that it concerned only the exercise of appellate, and not original, federal-question jurisdiction. As was made clear three years later in Osborn v Bank of the United States, 9 Wheat 738, 6 L Ed 204 (1824):

> "In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original
>
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>
> or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find in the constitution no prohibition to its exercise, in every case in which the judicial power can be exercised." Id., at 820-821, 6 L Ed 204.

The Court continued, speaking of federal-question jurisdiction: "It would be a very bold construction to say that [the judicial] power could be applied in its appellate form only, to the most important class of cases to which it is applicable." Ibid.

Osborn itself involved several important Eleventh Amendment issues. The State of Ohio had seized bank notes and specie of the Bank of the United States pursuant to a statute imposing a tax on the Bank. The statute was evidently unconstitutional under the Court's holding in McCulloch v Maryland, 4 Wheat 316, 4 L Ed 579 (1819). The Bank, which was treated as a private corporation and not a division of the Federal Government for purposes of the suit, obtained an injunction in federal court prohibiting the State from enforcing the tax and requiring the return of the seized funds. The State of Ohio appealed to the Supreme Court, relying in part on the Eleventh Amendment as a bar to the proceedings.

Chief Justice Marshall's opinion for the Court carefully explains that the sovereign immunity principles of the Eleventh Amendment have no application where the State is not a party of record:

> "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains
>
> [473 US 298]
>
> the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record." 9 Wheat, at 857, 6 L Ed 204.

Technically, this principle does not address the question whether a suit may be brought against a State, but rather the question whether a suit is indeed to be understood as a suit against a State.[52] Nonetheless, it represents a narrow, technical construction of the Eleventh Amendment, and is thus of a piece with the immediately following language:

> "The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens." Id., at 857-858, 6 L Ed 204.

The restatement of the principle of Cohens demonstrates Marshall's understanding that neither Article III nor the Eleventh Amendment limits the ability of the federal courts to hear the full range of cases arising under federal law.

The lack of original federal-question jurisdiction, combined with the paucity of admiralty actions against the States, deprived the Marshall Court of the opportunity to rule often on the effect of the Eleventh Amendment on state sovereign immunity in federal court. Moreover, the Court's rulings demonstrate a certain reluctance squarely to decide the extent to which the States were suable in federal court. This was perhaps a result of the Court's sensitivity to the unpopular decision in Chisholm v Georgia, the lack of effective governmental power to enforce its decisions, and the centripetal forces that were driving the Nation toward civil war. Nonetheless,

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a careful reading of the Marshall Court's precedents indicates that the Marshall Court consistently adopted narrow and technical readings of the Amendment's import and thus carefully retained the full measure of federal-question and admiralty jurisdiction.

IV

The Marshall Court's precedents, and the original understanding of the Eleventh Amendment, survived until near the end of the 19th century. In 1875, Congress gave the federal courts general original federal-question jurisdiction. 18 Stat 470. For the first time, suits could now be brought against States in federal court based on the existence of a federal cause of action. In Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), a citizen of Louisiana sued his State for payment on some bonds that the state government had repudiated. The plaintiff claimed a violation of the Contracts Clause. The Court held in favor of the State and ordered the suit dismissed.

Hans has been taken to stand for the proposition that the Eleventh Amendment, despite its terms, bars the federal courts from hearing federal-question suits by citizens against their own State.[53] As I have argued before, the Court's ambiguous opinion need not be interpreted in this way. See Employees v Missouri Dept. of Public Health and Welfare, 411 US, at 313-315, 36 L Ed 2d 251, 93 S Ct 1614 (Brennan, J., dissenting). The Hans Court relied on Justice Iredell's dissent in Chis-

52. This conclusion is in some tension with the Court's holding in Governor of Georgia v Madrazo, 1 Pet 110, 7 L Ed 73 (1828), discussed supra, at 292-293, 87 L Ed 2d, at 211. But see 1 Pet, at 122-123, 7 L Ed 73. It has been suggested that the distinction between the cases is that there was no cause of action available under federal or admiralty law against the Governor personally in Madrazo, while the contrary was the case here. See Fletcher, at 1086-1087.

53. For example, the Court today states that in Hans, "the Court held that the [Eleventh] Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide." Ante, at 238, 87 L Ed 2d, at 177.

holm, which as noted above, supra, at 283, 87 L Ed 2d, at 205, rested on the absence of a statutory cause of action for Mr. Chisholm against the State of Georgia and reserved the question of the constitutional status of state sovereign immunity. See Hans, 134 US, at 18-19, 33 L Ed 842, 10 S Ct 504. The Court further noted the "presumption that

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no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted." Id., at 18, 33 L Ed 842, 10 S Ct 504. The opinion can thus sensibly be read to have dismissed the suit before it on the ground that no federal cause of action supported the plaintiff's suit and that state-law causes of action would of course be subject to the ancient common-law doctrine of sovereign immunity.

Whether the Court's departure from a sound interpretation of the Eleventh Amendment occurred in Hans or only in later cases that misread Hans, however, is relatively unimportant. If Hans is a constitutional holding, it rests by its own terms on two premises.

First, the opinion cites the comments by Madison, Marshall, and Hamilton in the ratification debates. Id., at 12-14, 33 L Ed 842, 10 S Ct 504. The Court concludes that permitting suits against States would be "startling and unexpected," id., at 11, 33 L Ed 842, 10 S Ct 504, and would "strain the Constitution and the law to a construction never imagined or dreamed of." Id., at 15, 33 L Ed 842, 10 S Ct 504. The historical record outlined above demonstrates that the Court's history was plainly mistaken. Numerous individuals at the time of the Constitution's ratification believed that it would have exactly the effect the Hans Court found unimaginable. Moreover, even the comments of Madison, Marshall, and Hamilton need not be taken to advocate a constitutional doctrine of state sovereign immunity. Read literally and in context, all three were explicitly addressed to the particular problem of the state-citizen diversity clause. All three were vitally concerned with the constitutionally unauthorized displacement of the state law of creditors' rights and remedies that would be worked by an incorrect reading of the state-citizen diversity clause. All three are fully consistent with a recognition that the Constitution neither abrogated nor instituted state sovereign immunity, but rather left the ancient doctrine as it found it: a state-law defense available in state-law causes of action prosecuted in federal court.

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Second, the opinion relies heavily on the supposedly "unomalous" result that, if the Eleventh Amendment were read literally,

> "in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state." Id., at 10, 33 L Ed 842, 10 S Ct 504.

Even if such an "anomaly" existed, it would not justify judicial rewriting of the Eleventh Amendment and Article III and the wholesale disregard of precedents. But in any event a close look at the historical record reveals that the "anomaly" can easily be avoided without a general expansion of a constitutionalized sovereign immunity doctrine. The Eleventh Amendment can and

should be interpreted in accordance with its original purpose to reestablish the ancient doctrine of sovereign immunity in state-law causes of action based on the state-citizen and state-alien diversity clauses; in such a state-law action, the identity of the parties is not alone sufficient to permit federal jurisdiction. If federal jurisdiction is based on the existence of a federal question or some other clause of Article III, however, the Eleventh Amendment has no relevance. There is thus no Article III limitation on otherwise proper suits against States by citizens, non-citizens, or aliens, and no "anomaly" that requires such drastic "correction."

The Court has repeatedly relied on Hans as establishing a broad principle of state immunity from suit in federal court.[54] The historical record demonstrates that, if Hans was a constitutional

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holding, it rested on misconceived history and misguided logic.[55]

The doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, see, e.g., Great Northern Life Ins. Co. v Read, 322 US 47, 57, 88 L Ed 1121, 64 S Ct 873 (1944) (Frankfurter, J., dissenting); Muskopf v Corning Hospital Dist., 55 Cal 2d 211, 359 P2d 457 (1961); W. Prosser, The Law of Torts 984-987 (4th ed 1971), the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

I respectfully dissent.

Justice Blackmun, with whom Justice **Brennan**, Justice **Marshall**, and Justice **Stevens** join, dissenting.

I, too, dissent and join Justice Brennan's opinion. Its exhaustive historical review and analysis demonstrate the Eleventh Amendment error in which the Court today persists. As Justice Brennan shows, if Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), is a constitutional holding, it then reads into the Amendment words that are not there and that cannot

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be reconciled with any principled view of congressional power; Justice Brennan is surely correct when he says, ante, at

54. In Ex parte New York, 256 US 490, 65 L Ed 1057, 41 S Ct 588 (1921), the Court even extended Hans (or its view of Hans) to admiralty jurisdiction, thus overruling Justice Washington's 110-year-old holding that the Eleventh Amendment did not apply to admiralty actions. See United States v Bright, 24 F Cas 1232 (No. 14,647) (CC Pa 1809), discussed supra, at 292, 87 L Ed 2d, at 211.

55. If Hans was not a constitutional holding, however, its use of the Madison, Marshall, and Hamilton comments would be substantially more justifiable; the relevance of this material was simply to show that the common law did not recognize a cause of action on a debt against a sovereign. Since Congress had not created any such action, the Court justifiably refused to do so itself.

302, 87 L Ed 2d, at 217, that the case rests on "misconceived history and misguided logic." Thus, the Court today compounds a longstanding constitutional mistake. The shield against just legal obligations afforded the States by the Court's prevailing construction of the Eleventh Amendment as an "exemplification" of the rule of sovereign immunity, ante, at 239, n 2, 87 L Ed 2d, at 178, quoting Ex parte New York, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921), simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments.

Indeed, though of more mature vintage, the Court's Eleventh Amendment cases spring from the same soil as the Tenth Amendment jurisprudence recently abandoned in Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). Both in its modern reading of Hans, supra, and in National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976), the Court, in derogation of otherwise unquestioned congressional power, gave broad scope to circumscribed language by reference to principles of federalism said to inform that language.* The intuition underlying Hans and its contemporary progeny is no truer to the federal structure or to a proper view of congressional power than was that underlying National League of Cities.

But I would dissent from the Court's spare opinion and predictable result on other grounds as well. There is no

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need to expatiate on them here, where so much already has been written. It suffices to say that I adhere to the views expressed in the dissenting opinion in Edelman v Jordan, 415 US 651, 688, 39 L Ed 2d 662, 94 S Ct 1347 (1974). See also Florida Dept. of Health v Florida Nursing Home Assn., 450 US 147, 151, 67 L Ed 2d 132, 101 S Ct 1032 (1981) (dissenting statement). Thus, I would affirm the judgment here on the ground that California, as a willing recipient of federal funds under the Rehabilitation Act, consented to suit when it accepted such assistance. And a fair reading of the statute and its legislative history indicates for me that Congress produced the Act in exercise of its power under § 5 of the Fourteenth Amendment and thereby abrogated any claim of immunity the State otherwise might raise.

Justice Stevens, dissenting.

Because my decision to join Justice Brennan's dissent is a departure from the opinion I expressed in Florida Dept. of Health v Florida Nursing Home Assn., 450 US 147, 151, 67 L Ed 2d 132, 101 S Ct 1032 (1981), a word of explanation is in order. As I then explained, notwithstanding my belief that Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), was incorrectly

* See Fry v United States, 421 US 542, 557, 44 L Ed 2d 363, 95 S Ct 1792 (1975) (dissenting opinion) ("As it was not the Eleventh Amendment by its terms which justified the result in Hans, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation").

decided, see 450 US, at 151, n 2, 67 L Ed 2d 132, 101 S Ct 1032, I then concluded that the doctrine of stare decisis required that Edelman be followed. Since then, however, the Court has not felt constrained by stare decisis in its expansion of the protective mantle of sovereign immunity—having repudiated at least 28 cases in its decision in Pennhurst State School and Hospital v Halderman, 465 US 89, 165-166, n 50, 79 L Ed 2d 67, 104 S Ct 900 (1984) (Stevens, J., dissenting)—and additional study has made it abundantly clear that not only Edelman, but Hans v Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), as well, can properly be characterized as "egregiously incorrect." 450 US, at 153, 67 L Ed 2d 132, 101 S Ct 1032. I am now persuaded that a fresh examination of the Court's Eleventh Amendment jurisprudence will produce benefits that far outweigh "the consequences of further unraveling the doctrine of stare decisis" in this area of the law. Id., at 155, 67 L Ed 2d 132, 101 S Ct 1032.