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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.

Excellent!

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.

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.