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Pennhurst v. Halderman: The Eleventh Amendment, Erie and Pendent State Law Claims

ROBERT H. SMITH*

INTRODUCTION

Claims under both state and federal law often arise out of a single transaction or series of events. Modern procedural rules and jurisdictional provisions usually allow joinder of related claims in a single proceeding in either federal or state court. Although federal courts have limited subject matter jurisdiction, the doctrine of pendent jurisdiction permits them to adjudicate state law claims which arise out of the "same nucleus of operative fact" as a claim falling within federal statutory jurisdiction. A state court authorized to hear the state law claim will commonly have concurrent jurisdiction over the federal claim as well.

This Article examines the effect which state sovereign immunity has on this scheme of concurrent and pendent jurisdiction when the federal and state claims are against a state or its officials.

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1. The Federal Rules of Civil Procedure, and comparable provisions in numerous state systems patterned after the federal rules, permit joinder of all parties against whom relief is sought arising out of the same transaction, occurrence, or series of transactions or occurrences when there are common questions of law or fact. Fed. R. Civ. P. 20(a). A party asserting a claim for relief may join any other claims against the same defendant. Id. 18(a).


3. A state court of general jurisdiction may, and possibly must, hear claims based on federal law. Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980). State courts of specialized, or limited, jurisdiction may not be able to adjudicate federal law claims. See infra note 233. Also, a few federal statutory claims are within the exclusive jurisdiction of the federal courts and may not be determined in state proceedings. See infra note 210.
In *Pennhurst State School and Hospital v. Halderman*\(^4\) (*Pennhurst II*), the Supreme Court addressed federalism concerns which arise when a federal court provides extensive and costly relief, on the basis of its interpretation of state law, against a state or its officials.\(^5\) A closely divided Court chose to rely on the eleventh amendment\(^6\) to justify its decision reversing the lower court orders. It held that the amendment acts as a bar to federal litigation of state law claims against state officials. In so doing, the Court created a novel jurisdictional limitation on the federal courts.

The thesis of this Article is that the Supreme Court erred in treating the federalism tension between federal court pendent jurisdiction and state sovereign immunity as a jurisdictional issue answered by the eleventh amendment. The Court extended the amendment beyond its language, legislative history, and prior construction. It presented an erroneous and unnecessary characterization of the eleventh amendment as having "constitutionalized" state sovereign immunity in an absolute form which compels dismissal of all pendent state law claims against a state or its officials.

The Court should instead have resolved the issue in *Pennhurst II* on the basis of the federalism principles of *Erie Railroad Co. v. Tompkins*.\(^7\) Under the Rules of Decision Act\(^8\) and the *Erie* doc-

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5. "Federalism" refers to the relationship between state and federal governments in the American constitutional system. It has particular significance in questions of federal jurisdiction because state courts share with federal courts the power to decide most of the issues which are raised in federal court. The Supreme Court has described the federalism principle as "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." Matthews v. Rodgers, 284 U.S. 521, 525 (1932).
6. The eleventh amendment provides that "[t]he 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.
7. 304 U.S. 64 (1938). *Erie* is one of the most important federalism statements by the United States Supreme Court. As one commentator observed:
   
   It is impossible to overstate the importance of the Erie decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government.

8. "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28
trine, a federal court adjudicating pendent state law claims is governed by the immunities and defenses provided by state law. This permits a court to apply the doctrine of sovereign immunity as it has evolved in a particular state. It also adequately protects the state's sovereignty and autonomy by allowing state statutes and court decisions to determine the scope of immunity.

The approach advocated by this Article, based on *Erie*, views state sovereign immunity as a state law defense on the merits. There was neither need nor justification for the Court to fashion a jurisdictional restriction in *Pennhurst II* to protect state sovereignty. In exercising its discretion to hear pendent claims, a federal court considers such factors as judicial economy, convenience, fairness and avoidance of needless determinations of state law. In addition, a court can, and should, exercise this discretion in a manner that is consistent with the sovereign immunity principles of the state affected. Thus, the federalism concern for protecting state sovereignty is adequately provided for under the existing doctrine of pendent jurisdiction.

The initial section of this Article will review the *Pennhurst* litigation to illustrate the problem under consideration and to summarize the conflicting views expressed by members of the Court. The conceptual and practical problems of the *Pennhurst II* approach will then be developed in subsequent sections discussing *Erie*, state sovereign immunity and the eleventh amendment, pendent jurisdiction doctrine, and the consequence of *Pennhurst II* for the litigation of concurrent state and federal claims. This analysis will demonstrate that in *Pennhurst II* the Court misapplied the eleventh amendment, overlooked the adequate protection for state sovereignty provided by state law immunity, and seriously undervalued the constitutional stature, policy and practical benefits of pendent jurisdiction.

*Pennhurst II*’s ultimate effect is to further complicate what is already an unduly complex matrix of judicially created limitations on federal court jurisdiction. It is yet another example in which the Supreme Court fashions a doctrine of restraint limiting access to federal courts. The present interplay of doctrines leads to

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9. See infra text accompanying notes 55-63.
protracted and tangential litigation regarding the threshold question of a court's competence to adjudicate the merits. This complexity defeats what should be a prime purpose of a court system—to efficiently resolve disputes on the merits.\textsuperscript{11}

The \textit{Pennhurst II} decision also increases the pressure on litigants to bring federal claims in state, rather than federal court. As the concluding portion of this Article develops, it is likely that the only way a party can obtain rulings on the merits of state and federal claims is to file both in state court. This diversion of federal claims away from the federal courts conflicts with congressional purposes in providing a federal forum for federal question and civil rights litigation.

I. \textit{Pennhurst State School and Hospital v. Halderman}

The \textit{Pennhurst} litigation, regarding conditions at a Pennsylvania institution for the mentally retarded, has a lengthy history which includes previous consideration by the Supreme Court. The suit was filed in 1974 on behalf of persons who were, or might become, residents of the Pennhurst State School and Hospital. The complaint alleged that conditions at that institution violated class members' rights under the United States Constitution,\textsuperscript{12} two federal statutes,\textsuperscript{13} and the Pennsylvania Mental Health and Mental


\textsuperscript{12} Plaintiffs alleged that conditions at Pennhurst constituted cruel and unusual punishment in violation of the eighth amendment and violated their rights to treatment and habilitation under the due process and equal protection clauses of the fourteenth amendment. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 6, (1981) [hereinafter referred to as \textit{Pennhurst I}].

Retardation Act of 1966 (MH/MR Act).\textsuperscript{14} Plaintiffs sought damages and injunctive relief pursuant to 42 U.S.C. § 1983,\textsuperscript{15} against the hospital and its administrators, the State Department of Public Welfare, several of its officials, and various county officials responsible for mental retardation services in five Pennsylvania counties surrounding Pennhurst. Federal jurisdiction over the federal law claims was premised on the federal question\textsuperscript{16} and civil rights statutes,\textsuperscript{17} with pendent jurisdiction authorizing the federal court to determine the claim based on the state MH/MR Act.

After a lengthy trial, the federal district court judge found that conditions at Pennhurst were dangerous and were inadequate for the habilitation of its residents. He concluded that such conditions violated plaintiffs' rights to "minimally adequate habilita-
tion" under the fourteenth amendment and the state MH/MR Act, to "freedom from harm" under the eighth and fourteenth amendments and to "nondiscriminatory habilitation" under the equal protection clause and the federal Rehabilitation Act. Because he found that Pennhurst could not provide the necessary habilitation in the least restrictive environment, the trial judge ordered defendant officials to close the institution and to provide suitable community living arrangements for class members. He appointed a special master to supervise and monitor the implementation of his orders. The trial judge found that defendants were entitled to immunity on the claim for damages because they had acted in good faith within the sphere of their official responsibilities.

The Court of Appeals for the Third Circuit affirmed the lower court, finding that conditions at Pennhurst violated the plaintiffs' right to habilitation in the least restrictive setting. However, it narrowed the grounds for liability and the scope of relief, basing liability solely on the "Bill of Rights" provision of the federal Developmentally Disabled Assistance and Bill of Rights Act. The court also modified the district court's remedial order by permitting Pennhurst to remain open for those class members unable to adjust to life outside of the institution.

The Supreme Court reversed the judgment of the court of appeals and concluded that the federal Developmentally Disabled Assistance and Bill of Rights Act did not create any enforceable, substantive rights. The Court found that the provisions in the

19. Id. at 1325-26.
20. Id. at 1324. Executive level officials, like the defendants in Pennhurst, are entitled to qualified immunity in an action for damages under section 1983. See O'Connor v. Donaldson, 422 U.S. 563 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court summarized the standard for this qualified immunity stating, "[w]e therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.
22. Id. at 95-100.
23. Id. at 114.
Act relied upon by the court of appeals were not intended by Congress to be conditions binding on states which receive federal grants for care of the retarded. The case was remanded to the court of appeals to determine whether the remedial order could be supported on the basis of state law, the federal Constitution, or other federal statutes.

The court of appeals, on remand, affirmed its prior decision, this time basing relief solely on the Pennsylvania MH/MR Act. At this point the eleventh amendment was raised, for the first time, by defendants as a barrier to consideration of the pendent state law claim. The court of appeals rejected the defendant's argument, noting that a federal court may grant prospective injunctive relief against state officials on the basis of federal claims. Judge Gibbons, writing for the majority en banc concluded that there was no basis for treating the eleventh amendment restriction on federal jurisdiction any differently for pendent state law claims than for federal claims: "Since the pendent jurisdiction rule originated in a case involving state officers, there cannot be, as the Commonwealth suggests, an eleventh amendment exception to that rule."

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25. Id. at 22-23.
26. Id. at 31.
27. The defendants had raised an eleventh amendment objection in the initial proceedings before the district court, but that court only addressed the propriety of the federal claims against certain defendants. The specific objection to the state law claim was raised for the first time when the action was remanded to the court of appeals after Penhurst I. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647, 656 n.17, rev'd, 104 S. Ct. 900 (1984) [hereinafter referred to as Pennhurst II]. An eleventh amendment objection may be raised by the parties, or by the court on its own initiative, at any time. See Edelman v. Jordan, 415 U.S. 651, 678 (1974).
28. Pennhurst, 673 F.2d 647, 657. See Ex parte Young, 209 U.S. 123 (1908); see also infra text accompanying notes 109-18.
29. All eight judges in the en banc consideration agreed with Judge Gibbons' conclusion that the eleventh amendment applies equally to state and federal claims. Pennhurst II, 673 F.2d at 662-63. Chief Judge Seitz and Judge Garth disagreed with the extent of the relief on federal-state comity grounds. Id. at 662 (Seitz, C.J., dissenting); id. at 663 (Garth, J., dissenting).
30. Id. at 658. Judge Gibbons noted that the "seminal" case establishing pendent jurisdiction, Siler v. Louisville & N.R.R., 213 U.S. 175 (1909), was decided just one year after Ex parte Young and had authorized injunctive relief against state officials on the basis of a state law claim pendent to federal question jurisdiction. Pennhurst, 673 F.2d at 658.
A. *Pennhurst II*

In *Pennhurst II*, a divided Supreme Court again reversed the court of appeals. A five-Justice majority held that the eleventh amendment does indeed have very different application to state law claims than it does to federal claims. Justice Powell's opinion for the majority concluded that pendent state law claims against state officials in their official capacities are to be treated as suits against the state and are barred by the eleventh amendment.

His starting point was to read the eleventh amendment broadly as incorporating state sovereign immunity doctrine and federalism principles. The express language of the amendment did not prohibit the plaintiffs' claim:

> The [j]udicial 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.

As residents of Pennsylvania, plaintiffs were not "citizens of another state," and the parties sued were state officials, not the state itself. However, the opinion reflected the view that application of the amendment should not be limited by its specific wording, since its "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art[icle] III." Justice Powell noted the "vital role of the doctrine of sovereign immunity in our federal system" and concluded that "in deciding this case we must be guided by [t]he principles of federalism that inform Eleventh Amendment doctrine."

Justice Powell concluded that the lower court's order would effectively "restrain the Government from acting, or compel it to

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32. Id. at 906 (quoting U.S. Const. amend. XI).
33. Id. at 906. Justice Powell briefly reviewed decisions of the Court which had expanded construction of the amendment beyond its explicit terms on the basis of this rationale. In *Hans v. Louisiana*, 134 U.S. 1 (1890), for example, a federal claim against the State of Louisiana by a citizen of Louisiana was barred by state sovereign immunity as protected by the eleventh amendment. Prior decisions also had extended the amendment's restriction to suits against state officials, as well as suits against the state itself, when the relief sought would in fact operate against the state. *Pennhurst II*, 104 S. Ct. at 908.
34. *Pennhurst II*, 104 S. Ct. at 907.
35. Id. at 908 (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)).
act" by operating against the defendants in their official capacities and therefore was contrary to the sovereign immunity principles embodied in the eleventh amendment. As presented by the majority, the state sovereign immunity incorporated in the eleventh amendment is absolute. No state law claims may be maintained against an unconsenting state or against its officials when relief runs against the state.37

Justice Powell considered precedent under the eleventh amendment which established that state sovereignty may yield to the principle of supremacy of federal law embodied in article VI, section 2 of the Constitution.38 He concluded, however, that the rationale behind this rule—the protection of federal rights when they are in conflict with state action—was not applicable to claims asserting a violation of state, rather than federal law:

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.39

The majority's discussion of sovereign immunity and the distinction between suits against state officials and those against the state itself, did not consider Pennsylvania immunity law.40 Al-

36. Id. at 908 n.11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).
37. Id. at 907-09.
38. Article VI provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and All Treaties made, or which shall be made, Under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of Any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court ruled that the eleventh amendment does not bar a suit for injunctive relief against a state official to enforce the provisions of the fourteenth amendment. The legal fiction of Young, that a suit against state officials regarding actions taken within the scope of their offices is not a suit against the state for eleventh amendment purposes, "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.'" Pennhurst II, 104 S. Ct. at 910 (quoting Young, 209 U.S. at 160). See infra notes 109-18 and accompanying text.
though state law would govern determination of the merits of a pendent state law claim, *Pennhurst II* establishes that an *absolute* form of sovereign immunity limits the jurisdiction of federal courts.

Justice Powell recognized that this application of the eleventh amendment to state law claims created a direct clash with pendent jurisdiction doctrine and with a series of decisions in which the Supreme Court had upheld orders against state officials on state law grounds.\(^{41}\) He resolved this conflict on the basis of the relative stature of each doctrine. He concluded that the express constitutional limitation of the eleventh amendment can not be displaced by the prudential, judge-made doctrine of pendent jurisdiction: “[P]endent jurisdiction is a judge-made doctrine inferred from the general language of Art. III. The question presented is whether this doctrine may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.”\(^{42}\)

The majority also recognized that its ruling, denying a federal forum for the pendent claim, would cut against the policies of judicial economy, convenience and fairness to litigants which underlie pendent jurisdiction. *Pennhurst II* will result in the “bifurcation of claims” between state and federal courts or the litigation of federal claims in state court.\(^{43}\) Justice Powell attempted to minimize the significance of these effects, as “not uncommon in this area,” referring to other eleventh amendment and comity-based decisions which have relegated litigants to state court.\(^{44}\) He also noted that concerns for convenience and efficiency must yield to the constitutional principle of state sovereign immunity: “[S]uch considerations of policy cannot override the constitutional limita-

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41. *Pennhurst II*, 104 S. Ct. at 917.
42. Id.
43. Id. at 919-20.
tion on the authority of the federal judiciary to adjudicate suits against a State. . . .8F 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.’”45

In his dissenting opinion, Justice Stevens agreed with the majority that the eleventh amendment embodies the common law doctrine of sovereign immunity.46 He disagreed, however, with the majority’s application of sovereign immunity principles to suits against state officials. By tracing the development of sovereign immunity doctrine both in England and in America, Justice Stevens concluded that at the time the eleventh amendment was ratified, it was well established that suits were permitted against officials acting ultra vires. In such cases, the action was deemed to be against the agent who was acting unlawfully, not against the state itself.47

Justice Stevens disputed the majority’s contention that sovereign immunity principles only yield when they are in conflict with federal law. In his opinion, state officials who act contrary to state law cannot avail themselves of sovereign immunity. He concluded that the failure of the defendants in Pennhurst II to comply with the Pennsylvania MH/MR Act established the ultra vires nature of their actions and thus their accountability under state law.48

Justice Stevens was particularly caustic in stating his disagreement with the majority’s treatment of pendent jurisdiction precedent. He accused the majority of repudiating at least twenty-eight of its prior decisions in a “voyage into the sea of undisciplined lawmaking.”49 He asserted that the Court’s earlier pendent jurisdiction decisions, granting prospective relief against state officials on state law grounds, had expressly settled the issue which the majority chose to treat as open:

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

46. Pennhurst II, 104 S. Ct. at 924, 930 (Stevens, J., dissenting).
47. Id. at 922-44 (Stevens, J., dissenting).
48. Id. at 932-39.
49. Id. at 944.
presented by this case is an open one. . . . 50

Justice Stevens' proposed method of analysis would require a federal court to determine whether the federal claim supporting federal jurisdiction is barred by the eleventh amendment. If it is barred, no state law claim can be heard as pendent to it. However, if the federal claim is not prohibited by the amendment, the federal court has pendent jurisdiction to provide the same relief under state law as it could under federal law. 51 Not only could the federal court award prospective relief on state law grounds, but well-established prudential considerations guiding federal courts would usually require that the state law claim be considered first and that the federal claim not be reached unless state law fails to provide a remedy. 52

Justice Brennan's separate dissenting opinion staked out a distinct position regarding the relationship between common law sovereign immunity and the eleventh amendment. He disagreed with the views of both Justice Powell and Justice Stevens that the eleventh amendment embodies sovereign immunity doctrine as a constitutional, jurisdictional limitation on federal courts. He reiterated his view that the amendment should be applied as a jurisdictional limitation only to the extent of its express language—barring suits against a state by citizens of another state. 53 A state would not have a constitutional immunity from suits brought by its own citizens, but would have a defense based on the common law doctrine of sovereign immunity. He concluded: "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." 54

50. Id. at 928.

51. Justice Stevens would apply the same eleventh amendment limitation on relief under a state law claim as applies to a federal law claim. Pennhurst II, 104 S.Ct. at 924-29 (Stevens, J., dissenting)

52. Pennhurst II, 104 S. Ct. at 939-42 (Stevens, J., dissenting).


54. Pennhurst II, 104 S. Ct. at 922 (Brennan, J., dissenting).
II. SUMMARY OF THESIS AND A BRIEF DIGRESSION ON ERIE

There are both conceptual and practical problems with the *Pennhurst II* decision. The decision perpetuates an erroneous characterization of the eleventh amendment, maintaining that it establishes sovereign immunity as an absolute jurisdictional barrier to suits against state officials in federal court.\(^5^5\) The amendment should instead be seen as creating a narrow jurisdictional limitation, prohibiting only suits against a state by citizens of another state. This interpretation leaves common law state sovereign immunity intact as a defense on the merits to other suits against a state. The distinction is not particularly significant when the amendment is applied to federal claims against a state or its officials. In such actions, federal common law immunity would govern and would lead to the same result, whether characterized as jurisdictional or as a defense on the merits.\(^5^6\)

However, the distinction between sovereign immunity as a jurisdictional objection and as a defense on the merits is crucial in the consideration of pendent state law claims. If the immunity is absolute and is jurisdictional, then a federal court may not hear a state claim against a state or against its officials. However, if sovereign immunity is characterized as a defense on the merits, then a federal court may have pendent jurisdiction over the state law claim and would determine it on the basis of state law.\(^5^7\) Unlike

\(^{55}\) See, e.g., Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934); Ex parte New York, 256 U.S. 490, 497 (1921).

\(^{56}\) If sovereign immunity is treated as a jurisdictional bar, a suit in federal court would be dismissed at the onset. FED. R. CIV. P. 12(b)(1). Similarly, if common law provides an absolute immunity for a defendant, the court will dismiss at the pleading stage for failure to state a claim. Id. 12(b)(6). The Supreme Court has utilized federal common law immunity principles as a complete defense on the merits in section 1983 claims against state judges and state legislators. See Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 351 U.S. 367 (1951). See generally C. Wright, *supra* note 7, at § 60.

\(^{57}\) See United Mine Workers v. Gibbs, 383 U.S. 715 (1966), where the Court quoted *Erie* in discussing the doctrine of pendent jurisdiction:

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R.R. v. Tompkins*, 304 U.S. 64.

federal question cases, in which the federal courts apply a federal doctrine of state sovereign immunity, state law claims against either a state or state officials should be decided on the basis of state immunity principles. Under this approach, the issue in Pennhurst II should have been addressed as a question of state law: whether the defendant officials were immune under Pennsylvania law from suits for injunctive relief regarding their operation of Pennhurst State Hospital.

The federalism principles established in Erie provide a better means of protecting state sovereignty than an over-extended and tortured application of the eleventh amendment. The application of state law immunity doctrine to pendent state claims will fully protect a state's self-defined interest in preserving its sovereignty.

The Supreme Court's decision in Erie established that a federal court adjudicating claims based on state law should apply the decisional law of that state. Prior to 1938, federal courts were required to follow the statutory law of the state, but were allowed to make their own determinations regarding common law matters. Justice Brandeis concluded in Erie that this role, which federal courts had assumed under Swift v. Tyson, derogated the sovereignty retained by the states in our federal system. His opinion presented a view of federal-state relations which recognized the autonomy of states to determine, whether by statute or by court decision, the substantive rules governing the day-to-day conduct of its citizens. The diversity jurisdiction provisions which permit federal courts to hear certain state law claims were designed to provide out-of-state litigants with a neutral forum. They did not authorize federal courts to develop a body of law separate from that of the state courts.

The Erie decision also reflected a significant change in jurisprudential thinking about the common law adjudication process itself. The traditional view that judges were “finding” the law under state causes of action. See supra note 8. Erie construed the Rules of Decision Act as requiring federal courts to apply both state statutory and decisional law in such cases.


59. Erie, 304 U.S. at 74-78. The broader federalism implications of Erie, beyond the diversity jurisdiction context, have been explored in a variety of articles and books. See, e.g., T. Freyer, Harmony and Dissonance: The Swift & Erie Cases in American Federalism 155-64 (1981); Brown, Of Activism and Erie-The Implication Doctrine's Implications for the Nature and Role of Federal Courts, 69 Iowa L. Rev. 617 (1984).
yielded to the legal realist's observation that judges were "making" the law.\textsuperscript{60} During the 1800s, judges did not distinguish between "state" common law and "federal" common law. Judges, both state and federal, were engaged in an enterprise of discovering the best rules for governing human activities. Differences between court systems in the rules they applied, were seen as temporary discrepancies which would be resolved as part of the evolutionary process of the common law.\textsuperscript{61}

Thus, when the eleventh amendment was enacted in 1795, the common law doctrine of sovereign immunity was viewed as a body of principles equally applicable to state and federal governments. When a federal court had jurisdiction to hear claims against a state based on state law, it would not defer to state court decisions regarding the common law immunity of that state. The federal court would itself develop the appropriate scope of sovereign immunity available to the state.

By 1938, however, a very different view of the common law process had emerged. In their common law decisions, judges were seen as creating law for that particular jurisdiction, much as legislatures create law by passing statutes. Common law rules not only differed between states, but also between state and federal courts sitting in the same state. Variations between states were not problematic, since each was sovereign within its own boundaries. Discrepancies between state rules and those applied by federal courts created intolerable problems, however, because of the dual sovereignty within our federal system. \textit{Erie} clarified that confusion, holding that the overlapping jurisdiction of the state and federal courts did not alter the intent of the framers that states were to remain sovereign in all matters not delegated to the federal government.\textsuperscript{62}

Since the \textit{Erie} decision, a federal court hearing a claim based on state law must follow that state's common law rules. Thus, had the Supreme Court not applied the eleventh amendment as a jurisdictional bar in \textit{Pennhurst II}, the Pennsylvania common law and statutory principles of sovereign immunity would have gov-

\textsuperscript{60} "The notion that decisions of a court are not 'laws' was ridiculed by a new generation, which was prepared to accept the idea that judges do not merely find the law but in fact make it." C. Wright, \textit{supra} note 7, at § 54.

\textsuperscript{61} \textit{Swift}, 41 U.S. at 11.

\textsuperscript{62} \textit{Erie}, 304 U.S. at 79.
The defendant officials would have had a good defense on the merits to the extent that Pennsylvania law protected them from injunctive relief and damages. If Pennsylvania had chosen not to protect its officials from suit or had waived its sovereign immunity, liability could be found under state law.

The next section of this Article will review the Court's fluctuating and often conflicting construction of the eleventh amendment in light of this thesis. It is followed by a summary of the development of pendent jurisdiction, which concludes that the constitutional stature and significant practical benefits of that doctrine were underestimated by the *Pennhurst II* decision. As will be shown, a discretionary exercise of pendent jurisdiction is sufficiently protective of state sovereignty. It was unnecessary for the court to fashion a novel construction of the eleventh amendment to bar all pendent state claims against the state or its officials.

The concluding section of this Article will consider the practical consequences of the *Pennhurst II* ruling for the litigation of concurrent state and federal claims. It will demonstrate that the construction of the amendment adopted in *Pennhurst II* is not only unjustified and unnecessary, but also unwise. It further complicates the principles governing federal jurisdiction in ways which will increase the judicial resources spent considering jurisdictional issues, and it effectively denies a federal forum to litigants with concurrent state and federal claims.

### III. The Eleventh Amendment and Sovereign Immunity

The majority in *Pennhurst II* did not rely on the express language or the legislative history of the eleventh amendment in reaching its conclusion that the pendent state claim was barred. For nearly one hundred years the Court has used the eleventh amendment as a broad mandate to fashion a doctrine of state sovereign immunity which fulfills the federalism scheme of the Constitution. This has resulted in applications of the amendment

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63. Professor Shapiro reached the same conclusion regarding the applicability of Pennsylvania sovereign immunity law. He concluded that there was no Pennsylvania doctrine of sovereign immunity that could possibly apply to the case. See Shapiro, *supra* note 57, at 78 n.107.

64. In Monaco v. Mississippi, 292 U.S. 313 (1934), for example, the Court relied upon notions of state sovereignty which underlie the eleventh amendment in ruling that the amendment barred suits against states by foreign nations, even though such are not within.
which are sometimes broader,\textsuperscript{65} and other times narrower,\textsuperscript{66} than its literal language. In its decisions, the Court has been struggling with a basic tension in our federalism—how much sovereignty do the states retain when they have entered into a federal system which establishes restrictions on permissible state conduct?

The original Constitution set few substantive limits on state action.\textsuperscript{67} Initial application of the eleventh amendment established it as an absolute, jurisdictional bar to suits within its express prohibition. After the Civil War, however, the scope of the amendment and the balance between state sovereignty and the supremacy of federal law had to be reconsidered in light of the massive realignment of federal-state relations effected by the thirteenth,\textsuperscript{68} four-

\begin{itemize}
\item the express prohibition of the amendment. "Manifestly, we cannot . . . 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." Id. at 322. In Hutto v. Finney, 437 U.S. 678 (1978) the Court referred to "[t]he principles of federalism that inform Eleventh Amendment doctrine." Id. at 691. Professors Hart and Sachs present the prevalent view that the eleventh amendment was a narrowly framed provision which invited judicial elaboration of its underlying "postulates." 2 H. HART & A. SACHS, THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION 807 (1958). The federalism basis for the Court's application of the eleventh amendment is discussed in Baker, Federalism and the Eleventh Amendment, 48 COLO. L. REV. 139, 172-88 (1977) ("Considerations of federalism seem to underlie all aspects of the eleventh amendment."); see also Nowak, The Scope Of Congressional Power To Create Causes Of Action Against State Governments And The History Of The Eleventh And Fourteenth Amendments, 75 COLUM. L. REV. 1413, 1441 (1975) ("[A]ny case involving the Eleventh Amendment raises an intensely practical problem inherent in the concept of federalism."); Note, Express Waiver of Eleventh Amendment Immunity, 17 GA. L. REV. 513, 520-26 (1983) ("The Courts treat the Eleventh Amendment as a tool of federalism.").
\item 65. Although the literal language of the amendment would not seem to reach such suits, the Court has relied on it to prohibit suits against a state by a foreign country, Monaco v. Mississippi, 292 U.S. 313 (1934); admiralty actions involving a state, Ex parte New York, 256 U.S. 490, 497 (1921); and suits by citizens against their home states, Hans v. Louisiana, 134 U.S. 1 (1890). See Baker, supra note 63, at 147-53.
\item 66. The Court has permitted suits which would fall within the express limitations of the amendment on the basis of a state's "consent" to suit. See, e.g., Missouri v. Fiske, 290 U.S. 18, 20 (1933); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906). Also, Congress has authority to abrogate the limitation of judicial power. See Fitzpatrick v. Blitzer, 427 U.S. 445 (1976); Parden v. Terminal Ry., 377 U.S. 184 (1964).
\item 67. Article I, section 10 is one of the few sections of the original Constitution which established express limitations on state action. U.S. CONST. art. I, § 10. It prohibits states from, \textit{inter alia}, entering into treaties, coining money, passing bills of attainder, passing ex post facto laws or passing laws impairing the obligation of contracts.
\item 68. The thirteenth amendment provides:

\begin{itemize}
\item Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
\end{itemize}
teenth, and fifteenth amendments. Those amendments, along with the civil rights and jurisdictional legislation enacted in the 1860s and 1870s, vastly expanded the substantive restrictions on the states and created new bases of federal court jurisdiction for the enforcement of those restrictions.

The Supreme Court, in its decisions reconciling state sovereignty and the mandates of federal law, has functioned as a common law court, striking what it considers to be an appropriate balance in light of the political philosophies and practical realities of the day. Unfortunately, the Court has not candidly admitted to what it is doing. It purports to apply an absolute form of immunity, which has no analogue in either state or federal common law, as a jurisdictional limitation on the federal courts. It is actually balancing state sovereign immunity against the substantive federal right being litigated. The Court's eleventh amendment decisions reflect the relative importance placed on state sovereignty and the federal rights at issue. In this sense, they are more accu-

Section 2. Congress shall have power to enforce this article by appropriate legislation.
U.S. Const. amend. XIII.

69. The fourteenth amendment provides:
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
U.S. Const. amend. XIV.

70. The fifteenth amendment provides:
Section 1. The Right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.
U.S. Const. amend. XV.

71. See, e.g., Civil Rights Act of 1875, 18 Stat. 335; Civil Rights Act of 1871, 17 Stat. 13; Act of March 5, 1875, 18 Stat. 470 (federal question jurisdiction); Civil Rights Act of 1870, 16 Stat. 140; Civil Rights Act of 1866, 14 Stat. 27. These statutes have been codified in scattered sections of 42 U.S.C.


73. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 122-25 (1972);
rately characterized as rulings on the merits than as elaboration of a consistent principle of federal court jurisdiction.

A. Historical Context and Initial Construction of the Eleventh Amendment

In its absolute, historical form in English common law, sovereign immunity barred any action against the King in his own courts. At the time the Constitution was ratified, the American colonial governments had by charter or by court decision adopted some form of sovereign immunity from suit. However, by the late 1700s in both England and the colonies, sovereign immunity was by no means absolute. Suits were routinely permitted against state officials as a means of testing the legality of the official's action on behalf of the sovereign. As Justice Stevens noted in his Pennhurst II dissent, the common law mitigated the unfairness of an absolute immunity doctrine by distinguishing between the sovereign itself and officials who were allegedly acting ultra vires.

The original Constitution did not expressly adopt or abrogate the common law immunity of states. Article III created federal...
jurisdiction for the Supreme Court, and such inferior courts as Congress might create, in two categories of cases: (1) those involving certain subject matter, such as federal questions and admiralty matters; and (2) party-based jurisdiction which rests on the citizenship or official position of the parties. In the ratification debates, some argued that the jurisdictional grant for suits "between a state and Citizens of Another State" could be construed to permit individual suits against a state, contrary to the existing common law immunity. Delegates from at least four state conventions asked that the article be amended to clarify that it was not intended to condone such suits. It was passed without amendment, however, at least in part due to the assurances of James Madison, Alexander Hamilton and John Marshall that article III only authorized suits by a state as plaintiff and should not be construed to alter a state's immunity.

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time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which, shall not be diminished during their Continuance in Office.

Section 2. 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 in which a State 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.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III.

80. The subject matter jurisdictional provisions make no reference to states as parties; the party-based provisions mention states as parties in establishing jurisdiction over controversies "between two or more States;" "between a State and Citizens of another State;" and "between a State . . . and foreign States, Citizens or Subjects." Id.

81. See C. Jacobs, supra note 73, at 40; Baker, supra note 64, at 141; Field, supra note 73, at 529-31; Gibbons, supra note 74, at 1902-14.

82. Baker, supra note 64, at 141 n.10.

83. Statements made by James Madison, Alexander Hamilton and John Marshall in the Federalist Papers and state ratification conventions appear to support the retention of state immunity from suit despite language in article III extending federal judicial power to controversies between states and citizens of another state. See M. Redish, supra note 74, at
Nothing in the debates, however, suggests that article III was intended to affirmatively establish sovereign immunity as a constitutional principle. Recent scholarship affirms this reading of article III's history—that it was intended to leave untouched the pre-existing common law immunity of the states.4

In *Chisholm v. Georgia*,85 the Supreme Court attempted to resolve this ambiguity. The Court permitted citizens of South Carolina, executors of a British creditor, to bring an original action in the Supreme Court to collect a debt from the State of Georgia. The suit would have been barred under common law immunity principles since it was a suit expressly against the sovereign. However, the Court held the defense of sovereign immunity was unavailable because Georgia had impliedly waived some aspects of its sovereignty upon entering the federal union. They interpreted the language in article III as abrogating common law immunity and authorizing suits against a state in federal court.

The eleventh amendment was swiftly proposed and ratified in order to reverse the *Chisholm* decision.86 There was widespread support for the amendment, not necessarily because it reflected better than *Chisholm* the original intention of article III, but because of the fear of financial and political consequences that would result if states could be held accountable for their revolutionary war debts.87

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139; Baker, *supra* note 64, at 140-41; Field, *supra* note 73, at 527-29.


85. 2 U.S. (2 Dall.) 419 (1793).

86. President Adams declared the amendment to be part of the Constitution on January 8, 1798, in a message to Congress. 1 ANNALS OF CONG. 482, 809 (J. Gales ed. 1789). Ratification by three-quarters of the states occurred on February 7, 1795, when the amendment was approved by North Carolina. U.S.C.A. CONST. amend. XI hist. note (1972).

87. An article appearing in the *Independent Chronicle*, July 25, 1793 stated: "[N]umerous prosecutions that will immediately issue from the serious claims of refugees, Tories, etc. that will introduce such a series of litigation as will throw every state in the Union into the greatest confusion.” (Quoted in 1 C. Warren, *The Supreme Court in United States History* 99 (rev. ed. 1947)).

The absence of legislative history and serious debate regarding the eleventh amendment's passage,\textsuperscript{88} has provoked considerable disagreement within the Court, as well as among commentators, about the amendment's proper scope. A review of the alternative formulations of the amendment considered by Congress indicates that it was not intended to be a broad prohibition of federal jurisdiction, but a narrow overruling of the construction of article III that had been adopted in \textit{Chisholm}.

The initial version of the amendment, proposed in the House of Representatives just one day after the \textit{Chisholm} decision, would have established the broad principle that an individual may not sue a state as a party defendant in any federal court.\textsuperscript{89} The following day, a second amendment was filed in the House which proposed a much more specific overturning of \textit{Chisholm}: "The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by citizens or subjects of any foreign state."\textsuperscript{90}

Neither of these proposals were acted upon by Congress. The second version, however, was introduced again in both the House and Senate the following year, with one alteration: "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."\textsuperscript{91} The amendment was passed in that form by Congress in January, 1794 and ratified by three-quarters

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\textsuperscript{88} It is not known who drafted the amendment and there are no committee reports nor discussions in Congress to guide in its interpretation. Both of the dominant political parties at the time, the Democratic-Republicans and the Federalists, supported the amendment. \textit{Nowak, supra} note 64, at 1436-41.
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\textsuperscript{89} The initial version provided:

\begin{quote}
That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.
\end{quote}

\textit{Pa. J. & Weekly Advertisers, Feb. 27, 1793, at 1, col.2, reprinted in \textit{Fletcher, supra} note 74, at 1059 n.116. This proposed amendment reflected the sentiment held by many state officials that \textit{Chisholm} should be reversed by establishing a blanket immunity from suit in federal court. C. \textit{Warren, supra} note 87, at 100.}
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\textsuperscript{90} \textit{3 Annals of Cong.} 651-52 (1793).
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\textsuperscript{91} \textit{4 Annals of Cong.} 25 (1794) (emphasis added).
\end{flushleft}
of the states in 1795.

Had the framers of the eleventh amendment intended to est- 
blish a constitutional principle of absolute state sovereign immu-
nity, they would not have adopted the third version submitted to 
Congress. The first proposal would have expressly created such a 
blanket barrier. The language of the amendment as enacted was 
more carefully drafted to effect only a reversal of Chisholm’s con- 
struction of article III, and it does no more than that. It clarifies 
that “The Judicial power of the United States,” the same phrase 
used in article III, is not to be construed, as the Supreme Court 
had in Chisholm, to extend to suits against a state by citizens of 
another state.\textsuperscript{92}

The Supreme Court’s initial application of the amendment 
followed the express language and contained no hint of the 
broader doctrine which was to develop after the Civil War. Its lit- 
eral application provided protection for state treasuries—the goal 
of the amendment. Prior to the Civil War, there was no original 
jurisdiction in the federal courts to hear federal question suits 
against a state by citizens of that same state.\textsuperscript{93} Strict construction 
of the amendment was thus sufficient to bar the bulk of cases 
which might be brought against a state.

The Supreme Court was called upon to decide disputes be- 
tween a state and citizens of the same state in reviewing admiralty 
decisions of the lower federal courts and rulings on federal ques- 
tions by the state courts. The implication of the Supreme Court’s 
decisions in those cases was that the eleventh amendment did not 
apply to suits against a state by citizens of the same state.\textsuperscript{94}

Thus, prior to the Civil War, the Court’s application of the 
eleventh amendment was consistent with its express language and 
with its historical context—it was seen as narrowing the construc-

\textsuperscript{92} The amendment goes slightly further than reversing the Chisholm decision in its 
prohibition of suits by citizens of a foreign state. This phrase was presumably added to 
clarify the provision in article III that the judicial power shall extend to controversies “be-
tween a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. Const. 
art. III, § 2. This addition is still consistent with the thesis that the amendment was in-
tended to clarify the construction of article III and not as a broad incorporation of an 
absolute immunity for states as defendants.

\textsuperscript{93} There was a federal question statute in the early 1800’s which was quickly re-
pealed. Act of February 13, 1801, ch. 4, 2 Stat. 89, repealed by Act of March 8, 1802, ch. 9, 
2 Stat. 132.

\textsuperscript{94} See Fletcher, supra note 74, at 1078-87; Gibbons, supra note 74, at 1941-68.
tion of the party-based jurisdictional provisions of article III.

B. Post Civil War

The economic conditions of the 1790s which led to passage of the eleventh amendment were again prevalent in many of the Southern states after the Civil War. Several states passed legislation repudiating public bonds, raising an apparent conflict with the contract clause of article I, section 10. Because of changes in the jurisdiction of the federal courts the Supreme Court developed a more expansive reading of the amendment in order to protect Southern state treasuries from suits to collect public debts. The express language of the amendment was unhelpful because after passage of the "federal question" jurisdictional statute in 1875, suit could be brought in federal court against a repudiating state by one of its own citizens, on a claim that the state was violating the federal Constitution. Furthermore, several of the suits which reached the Court were brought against state officials, not the state itself, to avoid the restrictions of the eleventh amendment.

The Supreme Court apparently did not want to require officials to make payments from the state treasuries. Such relief was viewed as contrary to the spirit and historical genesis of the eleventh amendment. It was quite probably unenforceable as well. By 1877, Congress and the Executive branch were relinquishing federal oversight of Southern state governments which they had undertaken during Reconstruction. They were unlikely to come to the aid of the Supreme Court if it attempted to compel payments by resisting states.

The Court's decisions denying recovery against the Southern states were premised on state sovereign immunity, but were ambiguous as to the relationship between that immunity and the eleventh amendment. For example, in *Hans v. Louisiana*, a federal question suit against the State of Louisiana was dismissed on

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96. Article I, section 10 provides: "No State shall . . . pass any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const. art. I, § 10.
97. Act of March 5, 1875, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1982)).
99. 134 U.S. 1 (1890).
sovereign immunity grounds. The Court's opinion did not clarify whether the suit was barred by a broad construction of the eleventh amendment which incorporated sovereign immunity, or by general common law immunity principles.\textsuperscript{100}

The Supreme Court has cited \textit{Hans} in subsequent cases as the source of its broad construction of the eleventh amendment.\textsuperscript{101} Eight of the Justices in \textit{Pennhurst II}\textsuperscript{102} accepted this view—that the amendment and the reversal of \textit{Chisholm} reinstated the so-called "original understanding"\textsuperscript{103} of article III that unconsenting states have an absolute immunity from suit. State sovereignty is thus seen to be incorporated as a constitutional restriction of federal court jurisdiction.

Justice Brennan's reading of \textit{Hans}, persuasively supported by several recent historical studies, is that the incorporation of broad immunity principles into the eleventh amendment was neither intended nor necessary to protect state sovereignty in federal question suits.\textsuperscript{104} Justice Brennan's interpretation of the amendment is more consistent with its historical context and its initial construction. The reversal of \textit{Chisholm} merely established that article III did not abrogate common law sovereign immunity; it did not dictate the further proposition that article III was intended to impose a constitutional immunity. The amendment, under this approach, is seen as restoring the original neutrality of article III toward sovereign immunity and as leaving the common law defense available as a non-constitutional, non-jurisdictional protection for state autonomy.\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{100} See Field, supra note 73, at 537 n.81.
\item \textsuperscript{101} See, e.g., \textit{Pennhurst II}, 104 S. Ct. at 906-07; Florida Dep't of State v. Treasure Salvors, Inc., 450 U.S. 670, 683 n.17 (1982).
\item \textsuperscript{102} This was the position adopted by the five Justices joining in the \textit{Pennhurst II} majority opinion, \textit{Pennhurst II}, 104 S. Ct. at 906-07, as well as by dissenting Justices Stevens, Marshall and Blackmun, \textit{id.} at 929.
\item \textsuperscript{104} Id. at 313 (Brennan, J., dissenting); see also C. Jacobs, supra note 73; M. Redish, supra note 74, at 144; Cullison, \textit{Interpretation of the Eleventh Amendment}, 5 Hous. L. Rev. 1 (1967); Field, supra, note 73; Fletcher, supra note 74; Gibbons, supra note 74; Thornton, \textit{The Eleventh Amendment: An Endangered Species}, 55 Ind. L.J. 295 (1980).
\item \textsuperscript{105} This is basically the approach of Justice Brennan. See \textit{Pennhurst II}, 104 S. Ct. at 921-22 (Brennan, J., dissenting); Employees v. Department of Pub. Health & Welfare, 411 U.S. at 310 (Brennan, J., dissenting). See also Cullison, supra note 104; Field, supra note 73; Gibbons, supra note 74; Thornton, supra note 104.
\end{itemize}
A common law application of immunity could have been employed to protect Southern state treasuries in cases similar to *Hans*. In other instances, the Supreme Court has denied recovery against government officials on the basis of common law immunities which are not incorporated in the Constitution.106

Why, then, did the Court in *Hans* and subsequent decisions craft this particular immunity as a constitutional one? A possible explanation is that the Court was more comfortable premising its ruling on its lack of jurisdiction than it was deciding that the state had an immunity defense on the merits. By incorporating sovereign immunity doctrine into the eleventh amendment’s limitation on federal judicial power, the Court was able to avoid all discussion of the merits. It was thus able to avoid the troublesome issue of resolving the conflict between a constitutional requirement, the contract clause, and a common law doctrine of immunity.107

The Court also had to manipulate its doctrine regarding suits against state officials in order to protect the Southern state treasuries. There had previously been a clear distinction between suits against officials who were acting illegally and suits against the state itself. In a series of decisions, the Court shifted the focus away from the nominal defendant to the relief being sought and barred suits against state officials when the remedy would run against the sovereign.108


107. To have ruled in favor of the defendant states on the merits, the *Hans* Court would have had to either hold that the contract clause was not violated by the states’ repudiation of bonds—a deviation from their previous construction of that provision—or hold that this express constitutional restriction on the states was limited by non-constitutional, common law immunity principles.

Another possible explanation for “constitutionalizing” its ruling is that the Court wished to place it beyond the review of Congress. If state sovereignty in federal question cases was protected only by common law principles, it could be modified or abolished through legislation. In 1890, there was no immediate basis for concern that Congress would legislatively curb state sovereignty. By the 1920’s and 1930’s, however, the Court was embroiled in conflicts with Congress. These conflicts may have made the Court much more sensitive to the possibility of Congressional reversal of its decisions. This might explain why it was the Court’s subsequent decisions, in the 1920’s and 1930’s, and not the *Hans* decision itself which expressly established the constitutional basis for sovereign immunity. *See, e.g.*, Monaco v. Mississippi, 292 U.S. 313 (1934); and *Ex parte* New York, 256 U.S. 490 (1921).

108. *In re* Ayers, 123 U.S. 443 (1887); Antoni v. Greenhow, 107 U.S. 769 (1882);
While these expansive interpretations of the eleventh amendment accomplished the Court's aims in the Southern debt cases, they went too far in insulating state activities in other areas. The Court quickly cut back on the broad construction of the eleventh amendment in order to preserve a role for federal courts in enforcing the Constitution.

C. Ex Parte Young

In matters affecting the national economy, the Supreme Court of the late 1800s and early 1900s wished to restrict state interference with interstate commerce. If an absolute form of sovereign immunity were incorporated as a jurisdictional limitation, the states would effectively be beyond the control of the Supreme Court and the Constitution. Suits against a state or its officials requiring them to comply with the Constitution could only be brought in state court, immune even from Supreme Court appellate review. If the Court was to utilize substantive due process to invalidate state legislation, there had to be some limitation established on the immunity of states. The Court accomplished that in Ex parte Young, by permitting the plaintiff to bring a suit against a state official even though the relief requested clearly operated against the state and not the individual official.

In Ex parte Young railroad stockholders sought to enjoin state officials from implementing a rate structure that they alleged was unfair, confiscatory, and violative of the due process clause of the fourteenth amendment. The Supreme Court upheld the jurisdiction of the lower court which had issued an injunction against Young, the Attorney General of Minnesota, prohibiting him from enforcing the penalty provisions of the rate statute. The Court reasoned that the attorney general was separate from the state for eleventh amendment purposes:

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

110. As a limitation on the construction of article III, the eleventh amendment restricts the original jurisdiction of the district courts as well as the appellate jurisdiction of the Supreme Court.
111. See Orth, supra note 72, at 453-55.
112. Ex parte Young, 209 U.S. at 143-45.
of the complainants is a proceeding without the authority of and one which
does not affect, the State in its sovereign or governmental capacity. It is sim-
ply 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 be-
cause 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 subject in his person to the consequences of his individual
conduct.\footnote{113. \textit{Id.} at 159-60.}

Thus, the Attorney General of Minnesota was considered to be
acting on behalf of the state for purposes of the fourteenth
amendment, which only restricts "state action," but was not acting
on behalf of the state for eleventh amendment purposes, which
prohibits suit against a state.\footnote{114. \textit{Id.} at 160; see also \textit{Pennhurst II}, 104 S. Ct. at 910.}
The "wedge" between the official
and the state was the allegation of illegal conduct on the part of
the official. The sovereign could not authorize illegal or unconsti-
tutional actions, and thus the official was acting without authority
of the sovereign.

In \textit{Pennhurst II}, Justice Powell read \textit{Ex parte Young} as a feder-
alism decision which reconciled the conflict between state sover-
eignty and the supremacy of federal law.\footnote{115. \textit{See supra} text accompanying notes 31-45.}
The fictional distinction between the Attorney General and the State of Minnesota
was necessary to justify an intrusion into the state's autonomy in
order to vindicate federal law. Because the state law claim in \textit{Pen-
nhurst II} involved no conflict between state sovereignty and fed-
eral law, he saw no basis for transporting the \textit{Ex parte Young} fic-
tion to \textit{Pennhurst II}.\footnote{116. \textit{Pennhurst II}, 104 S. Ct. at 910-11.}

Justice Stevens, however, regarded \textit{Ex parte Young} as a sover-
eign immunity case calling for application of the well-settled con-
cept that an official acting illegally can not be acting for the sover-
eign.\footnote{117. \textit{Id.} at 932-36 (Stevens, J., dissenting).}
For Stevens, the significance of \textit{Ex parte Young} is that
because of the supremacy clause, federal law can render officials' actions \textit{ultra vires}, even though state law would appear to author-
ize their conduct. In Justice Stevens' opinion, that decision did not hinge on the federal nature of the claim, but rather on the asser-
tion that the official was acting illegally, under either state or federal law. The justification for the fiction is not the supremacy of federal law, but the amelioration of what would otherwise be an absolute immunity of all persons claiming to act on behalf of the sovereign.\textsuperscript{118}

The majority's conclusion in \textit{Pennhurst II} was that the eleventh amendment incorporates an absolute immunity both for states and for state officials when the relief sought would operate against the state. This immunity only yields under the supremacy clause and the \textit{Ex parte Young} rationale, when it is in conflict with a principle of comparable constitutional stature, such as the fourteenth amendment.\textsuperscript{119} The Stevens' dissent argued that the eleventh amendment does embody sovereign immunity principles, but in the form they existed at common law. The doctrine was not absolute, but was subject to qualifications, such as the \textit{ultra vires} liability of state officials.\textsuperscript{120}

Cases decided subsequent to \textit{Ex parte Young} considered and restricted the scope of the fictional distinction between the state and its officials. \textit{Ex parte Young} was not applied to suits against state officials in which monetary relief would come not from the individual, but from the state treasury. In \textit{Edelman v. Jordan},\textsuperscript{121} for example, the Court upheld an injunction requiring a welfare commissioner to disburse state benefits in conformity with federal law. It reversed an order requiring the commissioner to make additional payments of past benefits which had been improperly calculated. Payment of such retroactive benefits would come directly from the state treasury and not from the individual. Prospective relief was considered permissible because it had only an "ancillary effect" on the state treasury.\textsuperscript{122} The majority was willing to indulge in the fictional distinction between the welfare commissioner and the State of Illinois as to orders regarding administration of the Department in the future, but not as to orders to pay past benefits which had been illegally withheld. This purported distinction between prospective and retroactive relief in terms of its effect on the treasury is not a convincing one. A prospective

\textsuperscript{118} Id.
\textsuperscript{119} Id. at 906-11.
\textsuperscript{120} Id. at 929-31 (Stevens, J., dissenting).
\textsuperscript{121} 415 U.S. 651 (1974).
\textsuperscript{122} Id. at 664-70.
order like the one in *Pennhurst* will cost the Commonwealth substantially more than would a suit seeking $10,000 in damages, yet the *Edelman* distinction will permit the former and not the latter.123

In *Hans*, *Ex parte Young*, and *Edelman* the Court balanced state sovereignty against the substantive right raised by the plaintiffs. In *Hans*, vindication of the contract clause would have constituted too great an intrusion into state sovereignty. Other suits challenging repudiation of state debts were successful, however, based on the contract clause, when providing relief did not require an order compelling payment of state funds.124 *Ex parte Young* created a fictional distinction between the State of Minnesota and its Attorney General because of the importance of holding states accountable to the due process clause. In *Edelman*, the Court was unwilling to indulge in a similar fiction because the intrusion into the heart of state sovereignty—the state's treasury—was perceived as greater than the federal interest at stake—state conformity with federal welfare regulations. The resort to fictitious and unsatisfactory distinctions in these cases reflects an unwillingness on the part of the Court to acknowledge that its expansive reading of the amendment as incorporating state sovereignty goes too far in insulating states from federal court jurisdiction.

It is both misleading and unnecessary for the Court to characterize its state sovereign immunity decisions as jurisdictional rulings. Jurisdictional principles are threshold standards which must be met in order for a court to consider the merits. In contrast, these eleventh amendment decisions have considered the merits and have balanced the relative importance of the rights asserted.

123. Justice Rehnquist acknowledged in *Edelman* that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." He also recognized that the Supreme Court has authorized equitable relief which has had substantial effect on the state treasury. *Edelman*, 415 U.S. at 667. There may be a basis for the distinction in some instances, however, since in response to an order awarding prospective relief, the state may choose whether to continue participating in the program, as in *Edelman*, or to operate institutions for the retarded, as in *Pennhurst*. Prospective relief does not normally require the state to spend funds, but is a conditional imperative; such as, if you operate a school system it must not be segregated by race, or if you operate a mental hospital and deprive residents of their liberty you must provide certain conditions for treatment and habilitation.

against the resulting degree of intrusion into state sovereignty. Viewed from this perspective, the decision in *Pennhurst II* confronted two apparently conflicting doctrines: state sovereignty and pendent jurisdiction. The Court adopted an absolute form of state immunity to the total derogation of pendent jurisdiction.

The mythical absolute sovereign immunity supposedly incorporated in the eleventh amendment is particularly inappropriate in the *Pennhurst II* context. As the remainder of this Article will show, pendent jurisdiction doctrine, as it has developed, coupled with the *Erie* principle that state law governs pendent claims, adequately protects a state’s interest in its sovereignty.

IV. PENDENT JURISDICTION

In a series of decisions rendered soon after *Ex parte Young*, the Supreme Court affirmed awards of prospective relief against state officials on the basis of pendent state law claims.\(^{125}\) Prior to *Pennhurst II* the Court never made any distinction between federal claims and state law claims when it applied the prospective/retroactive standard of *Ex parte Young* and *Edelman*. As recently as two years prior to *Pennhurst II*, the Court had described the *Ex parte Young* doctrine as applying when state officials act in a manner which is contrary to “federal or state law.”\(^{126}\) These decisions had considered and rejected eleventh amendment defenses raised by state defendants. They formed the precedential basis for the dissenting Justices’ argument in *Pennhurst II* that pendent jurisdiction claims should be governed by the same *Young/Edelman* distinction as governs federal claims.\(^{127}\)

The seeds of pendent jurisdiction doctrine were planted in 1824 by *Osborn v. Bank of United States*.\(^{128}\) Chief Justice Marshall


\(^{126}\) Cory v. White, 457 U.S. 85, 91 (1982); see also Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 696-97 (1982). The majority was comprised of Chief Justice Burger and Justices Stevens, Marshall and Blackmun. Justice White concurred in the judgment and disagreed in part and was joined by Justices Powell, Rehnquist and O'Connor. *Id.* at 714. This decision was premised on precedent which had established, prior to *Ex parte Young*, that conduct of state officials, under color of office, which is tortious as a matter of state law is not protected by the eleventh amendment.

\(^{127}\) See *Pennhurst II*, 104 S. Ct. at 924-29 (Stevens, J., dissenting).

\(^{128}\) 22 U.S. (9 Wheat.) 738 (1824).
recognized in Osborn that a federal court has authority to determine all questions of fact or law which arise in a suit, even those that go beyond the particular issue which gave rise to federal jurisdiction.129 In 1909, Siler v. Louisville & Nashville Railroad Co.130 expanded the doctrine by applying it to a suit alleging that state officials' actions in regulating railroad rates violated federal and state law. Statutory jurisdiction covered only the federal claim, but the Supreme Court concluded that jurisdiction to decide the state law claim existed as well because of its relation to the federal action:

The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.131

The constitutional authority for pendent jurisdiction is article III's provision giving federal courts jurisdiction over "cases" and "controversies." This language does not restrict federal jurisdiction to the issues upon which that jurisdiction is premised. Pendent jurisdiction arises when federal and state issues are sufficiently related to be considered part of the same case or controversy. In order to fully resolve a dispute over which it has jurisdiction, a federal court may have to decide issues of state law. In fact, due to the doctrine of judicial restraint, it is well-established that relief should be granted on the basis of state law, whenever possible, to avoid unnecessary determinations of federal constitutional questions.132

The modern formulation of pendent jurisdiction doctrine was established in 1966 in United Mine Workers v. Gibbs.133 Under Gibbs, a federal court may adjudicate a state law claim not otherwise within the federal jurisdiction statutes when it is brought together with a sufficiently related federal claim134 so that a plaintiff

129. Id. at 822-23.
130. 213 U.S. 175 (1909).
131. Id. at 191.
134. Gibbs held that it is within the constitutional power of a federal court to exercise pendent jurisdiction whenever state and federal claims "derive from a common nucleus of
"would ordinarily be expected to try them all in one judicial proceeding." Gibbs expanded the scope of pendent jurisdiction from the Siler line of cases by permitting determination of the state law claim whenever it is closely related to a federal claim, not only when necessary to avoid determination of a federal question.

The Gibbs Court, while announcing an expansive constitutional authority for federal courts to hear pendent state claims, also emphasized the need for prudential exercise of that jurisdiction. It indicated that lower courts should use discretion in utilizing their power to determine pendent claims, informed by "considerations of judicial economy, convenience and fairness to litigants" and should remain conscious of the federal policy to avoid needless determinations of state law. Thus, a plaintiff does not have a right to the exercise of pendent jurisdiction, rather it is a discretionary power to be extended only when supported by policy considerations.

The Pennhurst litigation was a model example of pendent jurisdiction under the Siler and Gibbs standards. Plaintiffs challenged the conditions at Pennhurst as violative of federal and state law, sought identical relief under both legal theories, and based each claim on the same set of facts. The court of appeals granted relief on the basis of state law, thereby avoiding the federal constitutional claim.

In order to justify its conclusion that the pendent claim in Pennhurst II was barred, the Supreme Court majority had to explain why its prior decisions granting relief on state law grounds had not already settled the issue of whether federal courts may exercise pendent jurisdiction over state law claims against state officials. Further, the Court had to justify why the conflict between pendent jurisdiction doctrine based on article III, and the sovereign immunity principles embodied in the eleventh amendment should be resolved in favor of the latter. Justice Powell's opinion failed to do either satisfactorily.

The majority asserted that none of its prior decisions had addressed the issue in Pennhurst II: the application of the eleventh amendment

operative fact." Id. at 725.
135. Id.
136. Id. at 726.
137. Halderman, 673 F.2d at 650, 658-59.
amendment to a pendent claim against state officials.\textsuperscript{138} Even if this was technically correct,\textsuperscript{139} it was disingenuous for Justice Powell not to give any weight to the implicit finding of jurisdiction made in the numerous cases cited by the dissent. These decisions awarded relief against state officials based on pendent claims and referred, at least in dicta, to the applicability of Ex parte Young to both state and federal law claims.\textsuperscript{140} No prior decision of the Supreme Court, no lower court decision, and no commentator had ever suggested that Ex parte Young might not apply to state law claims.\textsuperscript{141} The dissent fairly characterized the majority's position as "repudiating" a method of analyzing eleventh amendment objections in pendent jurisdiction cases which had gone unquestioned for seventy-five years.\textsuperscript{142}

Even if it was appropriate to consider as an open question the

\textsuperscript{138} Justice Powell contended that the eleventh amendment was considered in cases such as Greene v. Louisville & I.R.R., 244 U.S. 499 (1917), only in relation to the federal claim. He concluded that because prospective relief was sought, Ex parte Young permitted the federal court to hear the federal claims. The Court in Greene went on to award relief on the basis of the pendent state claims without considering anew the effect which the eleventh amendment might have on the state claim. The majority concluded that the Pennhurst II issue was thus an open question unaffected by Greene. Pennhurst II, 104 S. Ct. at 917-18. The majority also relied upon the principle stated in Hagans v. Lavine, 415 U.S. 528 (1974), modified, 560 F.2d 160, 167 (3d Cir. 1977), that when "questions of jurisdiction have been passed . . . sub silentio, . . . [the] Court has never considered itself bound when a subsequent case . . . [explicitly] brings the jurisdiction issue before [the Court]." Pennhurst II, 104 S. Ct. at 918 (quoting Hagans v. Lavine, 415 U.S. at 533 n.5).

\textsuperscript{139} Justice Stevens vigorously dissented from the majority's reading of Greene and prior decisions. He concluded that these decisions "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." Pennhurst II, 104 S. Ct. at 928 (Stevens, J., dissenting).


\textsuperscript{141} It was noted in the en banc decision of the court of appeals that the state defendants' eleventh amendment objection had not "previously been advanced in this action, and from the dearth of authorities cited in its support, not previously advanced anywhere." Halderman, 673 F.2d at 656. Justice Powell's opinion in Pennhurst II does not refer to any judicial authority or scholarly support for the majority's position.

\textsuperscript{142} Pennhurst II, 104 S. Ct. at 943 (Stevens, J., dissenting).
conflict between pendent jurisdiction and sovereign immunity, the majority's resolution of the issue was deceptively simplistic. The opinion concluded that pendent jurisdiction must be subject to the limitation of the eleventh amendment because pendent jurisdiction is merely a judge-made doctrine of convenience, while the eleventh amendment is an "explicit" constitutional restriction of federal courts.\(^\text{143}\) This characterization of the two doctrines overstates the relationship between state sovereign immunity and the eleventh amendment and discounts the constitutional underpinnings of pendent jurisdiction.

As the prior section demonstrates,\(^\text{144}\) there is nothing "explicit" in the eleventh amendment which would bar federal jurisdiction over the pendent claim in Pennhurst II. The Supreme Court has chosen to use the eleventh amendment as a vehicle for protecting state sovereignty and has read common law principles into it. At most, these notions of state sovereignty might be considered implicit in the amendment; the fairest reading of the evolving eleventh amendment doctrine, however, is that sovereign immunity principles are not even implicit in the amendment but have been developed by the Court acting as a common law court.

Neither pendent jurisdiction nor state sovereign immunity is explicit in the Constitution. Both doctrines have been recognized and developed by the Court because of their usefulness in fulfilling the purposes of the federalism scheme and because each has a plausible source in the language of the Constitution. Pendent jurisdiction is as much a constitutionally supported doctrine as is state sovereign immunity.

Therefore, when the two doctrines are in conflict, as they may be in suits against a state or its officials, it is misleading to conclude that state sovereignty always "trumps" pendent jurisdiction. The Court can and should reach an accommodation between the policies supporting each doctrine, much in the same way that Ex parte Young was an accommodation between state sovereignty and the supremacy of federal law.\(^\text{145}\)

The starting point in reconciling the doctrines of pendent jurisdiction and state sovereignty is to recognize that pendent juris-

\(^{143}\) Id. at 917.

\(^{144}\) See supra text accompanying notes 64-125.

\(^{145}\) See supra text accompanying notes 109-24.
diction involves a discretionary exercise of jurisdiction. A federal court is not required to hear pendent state law claims, but is permitted to do so when supported by policy considerations. The Court has articulated as guiding principles: judicial economy, convenience and fairness to litigants, tempered by the policy to avoid unnecessary determinations of state law. The latter point acknowledges that federalism concerns limit the exercise of pendent jurisdiction. The discretionary decision to entertain pendent state claims against state officials should include consideration of the degree of intrusion into state sovereignty which may result.

In making that determination, the federal court should look to sovereign immunity principles as they have evolved in the affected state. There is no justification, either in history or in policy, for Pennhurst II's application of an absolute form of sovereign immunity. Even if one accepts Justice Powell's premise that the eleventh amendment was intended to elevate eighteenth century sovereign immunity doctrine to a constitutional status, common law immunity principles did not establish an absolute barrier to suits against state officials. As commentators have amply documented, suits challenging the legality of governmental action were commonplace, both in Britain and in the American Colonies. While actions for money damages were generally prohibited, mandamus and injunctive relief were routinely awarded in suits against the responsible officials.

The movement away from sovereign immunity and toward governmental accountability has accelerated in this century with the passage of state and federal tort claims acts. Through judi-

146. United Mine Workers v. Gibbs, 383 U.S. at 726. See also text accompanying notes 134-37.


cial decision, constitutional provision, or legislative action, sovereign immunity has become the exception rather than the rule. An absolute form of immunity, derived as it was from a monarchical form of government, is largely discredited as incompatible with democratic notions of the rule of law and of a government ultimately accountable to the people.

In *Pennhurst II*, Justice Powell presented a federalism justification for application of an absolute barrier to suit: "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their con-


duct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.\textsuperscript{152} Two possible affronts to state sovereignty underlie his concern: (1) that a state will be compelled to appear and defend its actions in a federal court; and (2) the actual imposition of a remedy by that court against the state. In evaluating the intrusiveness of such federal court action, one must bear in mind that the Court is considering state law claims brought along with federal law claims seeking similar or identical relief. Requiring state officials to appear and defend the state law claims is not a significant, incremental affront to state sovereignty since under \textit{Ex parte Young} the officials may be sued in federal court on the federal claims.

It is also not clear that federalism is promoted, as Justice Powell concludes, when a federal court is deprived of state law grounds for awarding relief as an alternative to federal law claims. Under the usual rules of judicial restraint, a federal court will avoid deciding issues of federal constitutional law when there is a nonconstitutional or state law basis for resolution of the controversy.\textsuperscript{153} By taking away state law claims in \textit{Pennhurst}-type cases, federal courts will necessarily address the remaining federal claims and may enter comparable relief against the state. It is difficult to see how a federal court decree based on federal law will result in any less federal-state friction. Indeed, the state is left with much less influence over implementation of federal court orders since its legislature and courts are unable to modify federal law, as they could shape and interpret the state law which formed the basis for the \textit{Pennhurst} decree.

Thus, an absolute form of immunity accomplishes very little in terms of federalism, and what it does accomplish is at substantial cost. The negative consequences of \textit{Pennhurst II}, which are discussed in the concluding portions of this Article, include the further complication of federal court jurisdictional doctrines by establishing different interpretations of the eleventh amendment for state and federal claims. It will also lead to protracted litigation over the propriety of "splitting" state and federal claims into separate actions and will increase the pressure on civil rights liti-

\begin{itemize}
  \item 152. \textit{Pennhurst II}, 104 S. Ct. at 911.
\end{itemize}
gants to bring federal claims in state court rather than in federal
court.

In summary, the eleventh amendment should not be seen as
an absolute jurisdictional bar to pendent state law claims against
state officials. Such a reading is not mandated by the language,
legislative history, previous construction or purposes of the
amendment; moreover it undervalues the considerations which
support pendent jurisdiction. Federal courts should have discre-
tion, informed by the factors previously discussed, to hear state
law claims against state officials. In adjudicating such claims, the
federal court should apply state law, including state sovereign im-
munity doctrine. In application, this approach would result in the
*Ex parte Young/Edelman* rules for federal claims which also govern
pendent state law claims. In balancing state sovereignty against
the benefits of pendent jurisdiction, monetary relief will usually
not be available because the integrity of the state treasury lies at
the heart of state sovereignty.\(^1\) Declaratory and injunctive relief
are not so intrusive and would be more freely allowed. Even
though the distinctions drawn in *Ex parte Young* and *Edelman*
are themselves not totally satisfactory,\(^2\) the advantages of pendent
jurisdiction are best achieved if the same types of claims and relief
are permitted under both state and federal law.

The next sections of this Article will explore the policy and
pragmatic problems created by the *Pennhurst II* decision which
would be avoided under this proposed approach. The majority of
the *Pennhurst II* Court failed to recognize the full extent of the
difficulties posed by its ruling, and underestimated the detrimental
effects which its decision would have on the litigation of concur-
rent federal and state claims.

### V. Scope of Pendent Jurisdiction After *Pennhurst II*

The practical effect of *Pennhurst II* is to relegate nearly all
claims against state officials brought under state law to state
courts. It creates a barrier to suing state officials that will affect a
substantial proportion of pendent jurisdiction claims since the de-

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154. Thus, pendent claims for money damages would not be heard by a federal court
unless the state has, as a matter of state law, waived its sovereign immunity in a manner
indicating its willingness to permit suits in courts other than its own.

fendant in a federal claim is often a state official. Some pendent jurisdiction claims may still be heard after Pennhurst II. For example, claims that do not seek relief from the state—when relief is sought against county or municipal officials, or against officials "individually" rather than in their official capacities—may still be heard in federal court. Likewise, when the state has waived its immunity under the eleventh amendment, the suit will not be barred. These are, however, narrow doctrines as construed by the Supreme Court and do not mitigate the problems created by Pennhurst II.

This section of the Article will explore the parameters of the Pennhurst II ruling by briefly considering those types of claims that may still be maintained pendent to a federal action. The subsequent section will consider the options which remain for those actions barred from federal court by Pennhurst II, and the consequences of those options for the litigation of concurrent federal and state claims.

A. Suits Against Political Subdivisions of a State

In Pennhurst II, the plaintiffs argued that the lower court judgment could be upheld insofar as it required county officials to develop community placements for residents being deinstitutionalized from Pennhurst. The majority reaffirmed that the eleventh amendment applies only to suits against the state and not to actions against counties and similar municipal corporations. The Court's brief discussion of this issue indicates that it would apply the same functional test in pendent jurisdiction cases as it has in federal question suits: if the relief will ultimately come from a local official or governmental body sufficiently insulated from the state, there is no eleventh amendment prohibition regardless of who is the nominal defendant.

Justice Powell suggested that county officials in the Pennhurst

156. For example, the "state action" requirement of the fourteenth amendment and the "under color of state law" element of section 1983 actions usually dictate that state officials, and not private parties, are defendants in litigation under those provisions. U.S. Const. amend. XIV; 42 U.S.C. § 1983 (1982); see also Adickes v. Kress, 398 U.S. 144 (1970).
158. Id. at 920 n.34.
159. Id. at 920-21.
litigation could well be immune because it appeared that state monies would ultimately finance the changes in county practices required by the district court. 160 That factual question was not reached, however, because relief against the county officials alone would not accomplish the objectives of the lower court order—deinstitutionalization of patients at Pennhurst, a state institution. The majority concluded that the discretionary exercise of pendent jurisdiction, grounded in notions of efficiency and convenience, should not support "partial and incomplete" enforcement of state law by a federal court when full relief would be available in a state forum. 161

Thus, a pendent suit against a local governmental body or its officials may avoid the bar of Pennhurst II, but only when complete relief can be obtained without effects extending beyond that subdivision. Such a pendent state law claim has to avoid a second sovereign immunity hurdle—the immunity state law may provide to a municipal or county government. 162 Under state common law, local governments were often immune from suits for money damages, but not those for injunctive relief. Statutory tort claims acts have abrogated that absolute immunity in many jurisdictions and permit recovery against local governmental bodies for injuries resulting from the negligent conduct of local officials and employees. 163 These statutes usually establish strict notice requirements and limitations on amounts recoverable. They also often exclude officials from liability for claims arising from discretionary actions providing a complete defense on the merits to such officials. 164 Thus, county officials who operate an institution like Pennhurst

160. Id. at 921.

161. Id.

162. It is helpful to contrast the treatment of federal and state law claims in this respect. In a section 1983 claim, for example, the Supreme Court has ruled, as a matter of construction of that federal statute, that a municipality has no immunity from suit. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). Thus, if a section 1983 claim against a municipality avoids the jurisdictional limitation on federal courts of the eleventh amendment, because no relief is sought against the state, then there is no sovereign immunity defense on the merits available to the defendant. However, for a state law pendent claim, there may well be a defense on the merits in addition to the jurisdictional barrier of the eleventh amendment, namely, that state law does not permit such relief against a municipality.

163. Most states have judicially or legislatively abrogated sovereign immunity under the common law. See supra notes 148-50 and accompanying text.

might be protected from suit under a state tort claims act even though not protected by the eleventh amendment.

B. Suits Against State Officials in an Individual Capacity

The fact that an official was acting within the scope of his or her office and under the apparent authority of state law, does not mean that a suit challenging those actions is necessarily against the defendant in an "official capacity." The fact that a particular decision was made while the defendant was acting in an "official capacity" is not dispositive for purposes of eleventh amendment analysis. It is the nature of the relief sought, not the apparent authority for the conduct, which determines whether a suit is against a defendant in an official or individual capacity.¹⁶⁵

A suit is against a defendant in an "official capacity" when the remedy is to be provided by the official qua officeholder. Any monies awarded in such a suit come from the budget of the applicable agency or governmental treasury and injunctive relief requires the official to change agency rules or practices. If the named defendant ceases to serve in that office, the new officeholder is substituted as a party defendant.¹⁶⁶

An action against a defendant "individually" or in an "individual capacity" seeks relief not from the agency or governmental body, but directly from the individual defendant. Most commonly, damages are sought against state officials in their individual capacities since damages sought against persons in their official capacities would be payable from state funds and thus be barred by Edelman. The obligation to pay any judgment in such a suit rests on the individual defendant.¹⁶⁷

Since a suit brought against a state official "individually" seeks no relief from the state, the eleventh amendment presents no barrier to such an action in a federal court. The majority opinion in Pennhurst II referred to cases establishing this distinction for federal claims against state officials in a way indicating that a similar rule would be applied for pendent state law claims seeking

¹⁶⁵. See, e.g., Pennhurst II, 104 S. Ct. at 911-12 & n.17.
¹⁶⁷. Many state and local governments, however, choose to indemnify their employees as long as the actions in question were taken in good faith and were within the scope of their office. See, e.g., MASS. GEN. LAWS ANN. ch. 258, § 13 (West 1959 & Supp. 1984-85).
relief from state officials individually.\textsuperscript{168}

This "individual capacity" exception to the eleventh amendment does not provide adequate relief in many situations because state law provides a defense on the merits. Under tort claims acts in many states, officials are relieved of any liability for their negligent actions and relief is only available against their employing governmental body.\textsuperscript{169} In other states, officials have a qualified immunity—good faith defense—to claims for damages. This allows the official to avoid liability when the actions were taken in good faith, albeit, illegal or unconstitutional. If the goal of litigation is to establish the fact that official conduct violates state or federal law, a suit for damages, against an official "individually," will often fail because of the good faith defense. A suit for declaratory and/or injunctive relief, in an official capacity, may succeed however, because the good faith of the defendant is not relevant.\textsuperscript{170}

C. \textit{State Waiver of Eleventh Amendment Immunity}

In many respects, the immunity from federal suit provided by the eleventh amendment is treated as a limitation on subject matter jurisdiction.\textsuperscript{171} However, the immunity provided by the amendment differs from subject matter jurisdiction in that suits,

\begin{itemize}
\item \textsuperscript{168} \textit{Pennhurst II}, 104 S. Ct. at 912-14, nn.17 & 21.
\item \textsuperscript{169} At common law in most states, officials could be individually liable for harm they caused when acting egregiously or in bad faith, but the state itself was immune. When legislatures waived sovereign immunity and permitted tort judgments against the state based on the conduct of its employees, it was commonly provided that the statutory remedy against the state was to be the exclusive remedy against either the state or the employee. \textit{See, e.g.}, \textsc{Mass. Gen. Laws Ann. ch. 258, § 2} (West 1959 & Supp. 1984-85).
\item \textsuperscript{170} The \textit{Pennhurst} litigation is a good example of this common outcome: the trial court found that the defendants had acted in good faith in operating Pennhurst and therefore denied any monetary relief against them individually, while it provided extensive injunctive relief to conform defendants' policies and practices to state and federal law. \textit{Pennhurst II}, 104 S. Ct. at 904 & n.1. In those cases where defendant is unsuccessful in raising a good faith defense, a claim against an official individually may be effective both in compensating the plaintiff and in altering government policies. Although a judgment against an official in an individual capacity does not order policy changes by the defendant, it does entail a determination that the official acted unconstitutionally or illegally. Its deterrent effect, therefore, may effectively compel future compliance. Also, a money judgment against an official is as good as a judgment against the governmental body in those jurisdictions which indemnify officials acting within the scope of their office.
\item \textsuperscript{171} For example, immunity may be raised as an objection at any point in the litigation, even for the first time on appeal. This is consistent with the incorporation approach which treats sovereign immunity as a limitation on the federal judicial power under article III. \textit{Pennhurst II}, 104 S. Ct. at 907.
\end{itemize}
otherwise outside of the judicial power, may be heard if the state consents to suit.\textsuperscript{172} Might a pendent state claim, particularly one based on a statute permitting suit against a state, such as a tort claims act, be heard in federal court under the consent doctrine? Because of the narrowness of the consent, or waiver concept as developed by the Supreme Court, there will be few instances where pendent state claims avoid the eleventh amendment on this basis.

Consent analysis begins with a presumption against waiver of the immunity:

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. . . . We have insisted, however, that the State’s consent be unequivocally expressed. . . . 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.\textsuperscript{173}

The distinction mentioned, between a states’ interest in whether it is sued and where it is sued, reflects the difference between a waiver of state law sovereign immunity and a waiver of the eleventh amendment. The Court in \textit{Pennhurst II} reiterated that a state’s waiver of its state law sovereign immunity in its own courts, such as that embodied in a tort claims act, is not to be construed as a waiver of its eleventh amendment immunity in fed-

\textsuperscript{172}\textsuperscript{172} See generally C. Wright, A. Miller & M. Kane, \textit{Federal Practice and Procedure} § 3524, at 159-66 & nn.72-78 (2d ed. 1982). Note, \textit{Express Waiver of Eleventh Amendment Immunity}, 17 Ga. L. Rev. 513 (1983). In addition to the “consent” doctrine, the Supreme Court has recognized that states may be subject to federal jurisdiction when Congress has legislated to abrogate the eleventh amendment immunity. Some decisions appeared to endorse an “implied consent” doctrine to justify non-application of eleventh amendment immunity. See, e.g., Parden v. Terminal Ry., 377 U.S. 184, 194-96 (1964). Subsequent decisions have pulled back from that rationale. See, e.g., Edelman v. Jordan, 415 U.S. 651, 673 (1974). Later decisions conclude that Congress can “waive” or abrogate the state’s eleventh amendment immunity when it is implementing other substantive provisions of the Constitution. See, e.g., M. Redish, \textit{supra} note 74, at 152-54. This line of authority was not discussed in \textit{Pennhurst II} and is not relevant to this Article which considers federal jurisdiction over claims based on state law. For an insightful discussion of Congressional power to overrule \textit{Pennhurst II}’s limitation of federal court jurisdiction over pendent state law claims see, Brown, \textit{Beyond Pennhurst—Protective Jurisdiction, The Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court}, 71 Va. L. Rev. 343 (1985).

\textsuperscript{173}\textsuperscript{173} \textit{Pennhurst II}, 104 S. Ct. at 907.
eral court.\textsuperscript{174} There must be a "clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation."\textsuperscript{176}

The plaintiffs in Pennhurst II had contended that state legislation abrogating sovereign immunity in certain respects had the effect of waiving the state's immunity from suit in federal courts. This was rejected because the Pennsylvania statutes expressly provided that the legislation should not be construed to waive the eleventh amendment immunity of the commonwealth.\textsuperscript{176} It appears from the Court's brief discussion of this issue that it will find consent to suit in federal court only when there is an express waiver of eleventh amendment immunity.\textsuperscript{177}

VI. Litigation of Pendent Claims Barred by Pennhurst II

Because of the limited scope of the consent/waiver doctrine and, in many cases, the inadequacy of relief solely against local governmental bodies or against officials in their individual capacities, a significant proportion of pendent jurisdiction claims are effectively barred from federal court by Pennhurst II. As the major-

\begin{itemize}
  \item 174. \textit{Id.} at 907 n.9.
  \item 175. \textit{Id.}
  \item 176. \textit{Id.} at 909 n.12.
  \item 177. Justice White suggested a less stringent standard in his concurring opinion in Patsy v. Board of Regents, 457 U.S. 496 (1982) (White, J., concurring). He concluded that a Florida statute allowing the Board of Regents to sue and be sued in "all courts of law and equity" was a waiver of the state's eleventh amendment immunity. \textit{Id.} at 519. There was no need for the federal courts to be expressly mentioned in order to be an effective waiver. In Patsy, Justice Powell disagreed with Justice White and would have required evidence of an intent to waive immunity in federal court. \textit{Id.} at 522-23 & n.5 (Powell, J., dissenting). Prior to Pennhurst II, lower courts were divided over the question of whether consent to suit, as found in state tort claims statutes, waived sovereign immunity only to the extent of permitting suit against the state in state court, or also allowed suits in federal court. In the following cases, state and federal courts held that a state's waiver of immunity in its own courts did not constitute a waiver of the eleventh amendment: Verner v. Colorado, 533 F. Supp. 1109 (D. Colo. 1982), \textit{cert. denied}, 104 S. Ct. 2175 (1984); Irwin v. Calhoun, 522 F. Supp. 576 (D. Mass. 1981) (certified question to Massachusetts Supreme Judicial Court, answered in Irwin v. Comm'r, 388 Mass. 810, 448 N.E.2d 721 (1983)); New Hampshire v. Brosseau, 124 N.H. 184, 470 A.2d 869, (1983). \textit{Compare} Marrapese v. Rhode Island, 500 F. Supp. 1207 (D.R.I. 1980) which found a statutory waiver of sovereign immunity to be "sweeping," \textit{id.} at 1216, and "extraordinarily liberal in comparison to then-existing law in most states," \textit{id.}, and concluded it waived the state's eleventh amendment immunity. Some courts and commentators have questioned the constitutionality of permitting state law to dictate the jurisdiction of the federal courts. See Markham v. City of Newport News, 292 F.2d 711, 719-14 (4th Cir. 1961); \textit{C. Wright, supra} note 7, at 274-75 (1960).
\end{itemize}
ity opinion noted, this leaves litigants wishing to raise concurrent state and federal claims with two options: either file separate suits in state and federal court, or file both claims in state court. The majority appears to assume that each option would actually result in an adjudication on the merits of both the state and federal claims and that the unavailability of a federal court to hear both is a relatively minor inconvenience.

The *Pennhurst II* majority seriously underestimated the policy and pragmatic implications of its decision. As the next sections demonstrate, it is doubtful that the merits of each claim will be reached if the suit is split between state and federal court. If both claims are brought in state court, the chances of obtaining rulings on the merits are increased; however the resulting pressure on litigants to file federal claims in state courts conflicts with Congressional purposes behind the federal jurisdictional statutes.

A. "Splitting" State and Federal Claims

In suggesting that a post-*Pennhurst II* litigant may "bifurcate" the claims, the majority implied that simultaneous suits regarding the same transaction or occurrence may be maintained in state and federal court. That is the general rule, but it is one riddled with judicially created, discretionary exceptions. The various forms of federal court abstention allow or require a federal court to defer to a pending state proceeding. If the federal and state claims in *Pennhurst* had been separated and brought in federal and state court respectively, a federal court might have stayed its proceedings under the *Colorado River* doctrine.


180. In *Colorado River*, the Supreme Court held that a federal court could stay its proceedings pending the outcome of a parallel state court proceeding involving the same parties and arising out of the same transaction. In a majority opinion by Justice Brennan the Court noted the general rule that the pendency of a state action is not a bar to federal proceedings, 424 U.S. at 817, but held, however, that there are exceptions to this general rule, based on "exceptional circumstances," id. at 813, that allow a federal court to stay its proceedings (quoting Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)). The policy behind such stay is the promotion of "wise judicial administration," conservation of
A federal judge would presumably be concerned about the inefficient use of judicial resources if both state and federal court systems adjudicate the same dispute. The preference would normally be to have one case delayed and determine whether additional consideration is really necessary.\textsuperscript{181} Usually a federal court cannot enjoin the state action; the statutory restriction of the Anti-Injunction Statute\textsuperscript{182} and the comity-based restraint of Younger normally would prohibit such intervention. Thus, the only mechanism available to a federal court to avoid duplication is a stay of the federal action. Under the Colorado River doctrine, a federal court may stay federal proceedings as a matter of judicial economy, in light of pending state proceedings, when there are "exceptional circumstances."\textsuperscript{183}

The breadth of this standard has been a source of debate within the Court and a source of division among the lower courts. Justice Brennan's opinion in Colorado River emphasized the usual obligation of the federal courts to exercise their statutory jurisdiction despite pending state proceedings, although it concluded that the "exceptional circumstances" of that case justified abstention.\textsuperscript{184} In Will v. Calvert Fire Insurance Co.,\textsuperscript{185} the plurality opin-
ion of Justice Rehnquist appeared to endorse an expanded use of the stay doctrine. He concluded that the decision to stay federal proceedings in favor of pending state proceedings is within the discretion of the district court and is not reviewable in an action for mandamus. 186 Some federal courts, in response to Will, have freely exercised stays under Colorado River when judicial economy will be served. 187 The Supreme Court's most recent decision applying Colorado River, however, indicates that these lower court decisions to stay have gone further than the Court intended. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 188 a stay order was reversed. The majority, in an opinion by Justice Brennan, concluded that a judge's discretion in granting a stay is reviewable under the Colorado River standard as a final order. Justice Brennan indicated that despite Will's apparent liberalization of the Colorado River doctrine, "exceptional circumstances" are nonetheless required and had not been shown to exist. 189

It is not easy to predict how the Colorado River doctrine would be applied to a bifurcated Pennhurst suit. On one hand, judicial economy would usually be served by a stay of federal proceedings. On the other hand, Moses H. Cone, the most recent guide, indicates that the obligation of federal courts to exercise their statutory jurisdiction will, in most cases, outweigh a concern for judicial economy. A stay is only appropriate when there are

186. Id. at 665-66 n.7.


189. In Moses H. Cone, the issue of whether parties to a construction contract were required to honor an arbitration clause came before both the federal and state courts. The federal court stayed the proceedings, and the federal plaintiff appealed the order to stay. The Supreme Court, in a majority opinion by Justice Brennan, held that the stay order is a "final" order within 28 U.S.C. § 1291 and therefore is appealable. Id. at 10-13 & n.11. The Court held that despite Will's language apparently undermining the Colorado River standard, the test was indeed the one of "exceptional circumstances." Id. at 16-19 & n.20. The Court held that a judge's discretion in granting a stay order was reviewable under the standards of Colorado River. Because there had been no showing in Moses H. Cone that "exceptional circumstances" existed, the Supreme Court reversed the stay order.
"exceptional circumstances."\textsuperscript{190}

Even when parallel state and federal actions are permitted, there will be claim and issue preclusion consequences which will substantially narrow, or totally preclude, the second court's consideration of the remaining claim as soon as one proceeds to judgment.\textsuperscript{191} The Supreme Court's decision in \textit{Migra v. Warren City School District Board of Education},\textsuperscript{192} handed down the same day as \textit{Pennhurst II}, demonstrates the risks posed by the preclusion doctrine if a plaintiff splits federal and state causes of action into separate suits.

In \textit{Migra}, the plaintiff successfully litigated state law claims in an Ohio state court suit. The litigation resulted in her reinstatement as a supervisor of elementary education along with an award of back pay. She sought additional relief in federal court, asserting that non-renewal of her contract was intended to punish her for her exercise of first amendment rights, had the effect of depriving her of property without due process of law, and denied her equal protection. The Supreme Court ruled that claim preclusion could bar the federal claims because they could have been raised in the prior state proceeding.\textsuperscript{193}

The analysis of claim and issue preclusion consequences depends upon which suit, state or federal, goes to judgment first. The litigants cannot control the pace at which separate suits will proceed to judgment, so when considering the consequences of splitting state and federal claims, it is necessary to consider two scenarios—the effect of a state judgment on a pending federal suit.

\textsuperscript{190} The factors included in the "exceptional circumstances" test of \textit{Colorado River} and \textit{Moses H. Cone} appear to include the following: whether either state or federal court asserted jurisdiction over a "res"; the inconvenience of the federal forum; avoidance of piecemeal litigation; which case was filed first; presence of federal law issues and the adequacy of the state tribunal. 460 U.S. at 25-26. Further, the Court stated in \textit{Moses H. Cone} that the "task in cases such as this [simultaneous federal and state proceedings] is not to find some substantial reason for the exercise of federal jurisdiction . . . rather, the task is to ascertain whether there exist exceptional circumstances . . . to justify the surrender of that jurisdiction." \textit{Id.}

\textsuperscript{191} As the next section will demonstrate, application of claim preclusion will bar any subsequent action between the same parties based on the same transaction or occurrence. Application of issue preclusion binds a party to the specific findings made in a prior proceeding thereby limiting the issues to be determined in the second proceeding. If there is substantial overlap in the dispositive issues in the two proceedings issue, preclusion may justify summary judgment in the second proceeding.

\textsuperscript{192} 104 S. Ct. 892 (1984).

\textsuperscript{193} \textit{Id.} at 894-98.
("state-federal" preclusion) and the effect which a federal judgment will have on a pending state proceeding ("federal-state" preclusion).

1. **State-Federal Preclusion.** A sequence of decisions, starting with *Allen v. McCurry* and concluding with *Migra*, established that the Full Faith and Credit Statute governs preclusion questions in state-federal litigation. The statute requires that a federal court generally give a state court judgment the same claim and issue preclusive effect as would the state court that rendered the prior judgment.

In *Allen*, the Supreme Court rejected an argument that actions under section 1983 of the Civil Rights Act should be exempt from usual issue preclusion rules because of the legislative purposes of that statute and its jurisdictional counterpart. The *Allen* majority recognized that section 1983 was intended to provide the option of a federal forum to litigants wishing to escape state court adjudication of federal issues. However, it concluded that

195. The implementing statute of the full faith and credit clause of the Constitution is 28 U.S.C. § 1738 (1982). Section 1738 provides:

   The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

196. Prior to 1980, the Supreme Court had not been clear in its treatment of preclusion when a state judgment preceded federal litigation. The full faith and credit clause of the Constitution had been interpreted, along with its implementing statute, section 1738, to require state courts to give full effect to another state's judgments. However, the constitutional clause has no application to state-federal litigation and in such cases the court had not consistently applied section 1738, but appeared to rely instead on federal common law principles of preclusion. See Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59, 63-101 (1984).


198. The federal forum was provided because of congressional distrust of the state
the Full Faith and Credit Statute, enacted in 1789, should govern since section 1983, passed in 1871, did not expressly or impliedly repeal the earlier statute. There was no irreconcilable conflict between the choice of forum purpose of section 1983 and the issue preclusion principle that a party who voluntarily litigates an issue in the state court should be bound by that court's determination.\textsuperscript{199}

_Migra_ decided an issue which had been reserved in _Allen_—whether usual rules of claim preclusion should be applied in section 1983 suits to preclude litigation of claims which could have been raised but which were not actually litigated in a prior state proceeding. A unanimous Supreme Court ruled that section 1738 provides the rule of decision for claim preclusion as well as issue preclusion questions. The Court found no policy justifications for distinguishing between the issue and claim preclusive effects of state court judgments.\textsuperscript{200}

In _Migra_, the plaintiff argued that she should be permitted the choice of a federal forum for her federal claims and a state forum for her state law claims, in order to take advantage of the relative expertise of both court systems. The Court rejected this justification for claim splitting between federal and state court:

> Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by § 1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.\textsuperscript{201}

Applying _Migra_ and _Allen_ to a situation where federal and state claims are split, it is apparent that a state judgment will nearly always result in claim preclusion of the federal action. In those cases where claim preclusion may be avoided, issue preclusion will dramatically narrow, if not effectively decide, the federal issues.

a. _Claim Preclusion._ Claim preclusion, commonly referred to

\textsuperscript{199} _Allen_, 449 U.S. at 90, 98-99.

\textsuperscript{200} _Migra_, 104 S. Ct. at 897-98.

\textsuperscript{201} _Id._ at 898.

\textsuperscript{198} Mitchum v. Foster, 407 U.S. 225, 239-42 (1972).
as *res judicata*, provides that a final judgment may preclude later relitigation by the same parties of claims or defenses that arose from the same transaction and which were raised or could have been raised in a prior proceeding. After *Pennhurst II* the prerequisites for claim preclusion will usually be satisfied where federal and state claims are litigated separately.

In the *Pennhurst* litigation, for example, the state law claim was pending against the same state and county officials as the federal claims. Nominal differences as to the parties in the two proceedings would probably not avoid preclusion, since officials in a position to provide the relief requested on state and federal claims would presumably be considered to be in "privity" with each other.

In most jurisdictions, separate lawsuits are seen as raising the "same claim" when they arise out of the same transaction or occurrence and may be conveniently tried together. This is essen-

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202. This Article uses the terminology of the *Restatement (Second) of Judgments* to describe the preclusive effects of judgments on civil actions. The traditional terms, *res judicata* and *collateral estoppel*, are still employed by many courts to identify the claim preclusion and issue preclusion consequences of a judgment. The United States Supreme Court adopted the *Restatement* terminology in *Migra*, 104 S. Ct. at 894 n.1. The *Restatement* terminology conveys more precisely the preclusion concepts under consideration. *Res judicata* has been used interchangeably to describe the general field of preclusion as well as the more particular concepts of merger and bar within claim preclusion. The concept of *estoppel* also may be confusing in this context because parties may be "stopped" from asserting a position in litigation for reasons other than a prior judgment. For a discussion of these points, see *Restatement (Second) of Judgments* introduction at 1-5.

203. *Allen*, 449 U.S. at 94. Claim preclusion has two constituent principles—merger and bar. The general rule of merger is that a valid and final judgment in favor of the plaintiff will extinguish all claims that the plaintiff had against defendant arising from the same transaction. See *Restatement (Second) of Judgments*, supra note 202, at § 18. The plaintiff may sue on the judgment, but may not maintain a separate action on the original claim or any part thereof. Defenses are also merged in the judgment so that the defendant cannot raise defenses that might have been interposed, or were interposed in the first action. Id. The general rule of bar is that a valid and final judgment in favor of the defendant prohibits another action by the plaintiff on the same claim. Id. at §§ 19 & 20. Both the merger and bar aspects of claim preclusion apply to claims and defenses that could have been, but were not litigated, as well as those that actually were litigated and determined. Id. at § 18 comment a; § 19.

204. The concept of "privity" was traditionally employed to describe the identity of interests that justified holding a non-party to a judgment to the same extent as a party to the action. In *Montana v. United States*, 440 U.S. 147, 154-55 (1979), the Supreme Court adopted the functional approach suggested in the *Restatement*. See *Restatement (Second) of Judgments*, supra note 202, at § 39.

205. See *Restatement (Second) of Judgments*, supra note 202, at § 24 and comments thereafter. See also id. at §§ 18, 19. This is a broader concept than the traditional preclu-
tially the same standard that governs pendent jurisdiction.\(^{206}\)
Thus, whenever state and federal claims are sufficiently related to
have supported pendent jurisdiction pre-\textit{Pennhurst II}, they will be
treated as the "same claim" for preclusion purposes if they are
split post-\textit{Pennhurst II}. Finally, the fact that federal claims can be
brought in state courts of general jurisdiction means that the
"could have been raised" requirement will usually be satisfied as
well in state-federal litigation.

There are a few instances in which claim preclusion may be
avoided. One is when the state which rendered the prior judg-
ment utilizes a narrow concept of the "same cause of action"
which would permit suits seeking relief on different legal theories
to be prosecuted separately.\(^{207}\) In such instances, \textit{Migra} and sec-
tion 1738 direct application of state law rather than the more en-
compassing "same claim" standard employed by the federal
courts.\(^{208}\) Claim preclusion may be inapplicable in other cases be-
cause the federal claim could not have been brought in the state
proceeding, either because of the limited jurisdiction of the state
tribunal\(^{209}\) or because the federal claim is within the exclusive ju-
risdiction of the federal courts.\(^{210}\) It will be the rare case in which

\(^{206}\) Pendent jurisdiction under \textit{United Mine Workers v. Gibbs} may be exercised where
the claims "derive from [a] common nucleus of operative fact" such that a plaintiff "would
ordinarily be expected to try them all in one judicial proceeding." 383 U.S. 715, 725
(1966).

\(^{207}\) See \textit{supra} note 205.

\(^{208}\) \textit{Migra}, 104 S. Ct. at 899. \textit{See also id.} at 899-900 (White, J., concurring).

\(^{209}\) For example, the New York Court of Claims has exclusive jurisdiction to hear
state law claims against the state for money damages, but has no jurisdiction to award equi-
table relief or money damages against state officials in their individual capacities. \textit{Murphy v. Schuler}, 74 Misc. 2d 732, 345 N.Y.S.2d 295 (N.Y. Sup. Ct. 1973); \textit{Braun v. State}, 203
Misc. 563, 117 N.Y.S.2d 601 (N.Y. Ct.CI. 1952). Therefore, a judgment of the court of
claims will not preclude a subsequent claim for damages and injunctive relief against state
officials.

\(^{210}\) A state court may not exercise jurisdiction over a claim that falls within the ex-
clusive jurisdiction of the federal courts. \textit{Kalb v. Feuerstein}, 308 U.S. 433 (1940) (bank-
1327 (1985), the Supreme Court ruled that section 1738 governs in state-federal litigation
unless the exclusive federal jurisdiction statute expressly or impliedly repeals its full faith
and credit provisions. \textit{Id.} at 1332. As a result of the Court's narrow application of the
implied repeal doctrine, a federal court will usually follow state preclusion doctrine and
claim preclusion can be avoided when federal and state claims are split and the state suit goes to judgment first.

b. Issue Preclusion. Even if one avoids the total bar of claim preclusion, state-federal litigation will result in the preclusion of issues which were actually litigated in the prior state proceeding. In Allen, for example, the federal court plaintiff sued police officers for damages arising out of an allegedly unconstitutional search of his apartment. He had unsuccessfully moved, in previous state criminal proceedings, to suppress the evidence seized on the basis of the illegality of the search. Claim preclusion was not involved since the parties were not the same in both cases—the police officers were not parties to the criminal prosecution—and also because the civil damage claim could not have been raised in the criminal prosecution. However, the federal suit was effectively restricted by issue preclusion, since the state court had actually litigated and determined the issue of the constitutionality of the search in the suppression hearing.211

Issue preclusion, also known as collateral estoppel, binds parties to a prior suit to the specific findings of fact and law made in that proceeding. When the same issues arise in the context of another claim, they may not be relitigated. For issue preclusion to apply, the issue must be the same as the one previously litigated, it must have been actually litigated, actually determined, and essential to the prior judgment. In addition, the party being precluded must have had a full and fair opportunity to litigate the issue in the previous proceeding.212

In situations where claim preclusion is not applicable—for example, where the federal claim is seen as a different cause of action, or one that could not have been joined in the state proceeding—the litigants will still be bound by specific rulings made in the state proceeding. When there is a substantial overlap in the facts and legal theories underlying the state and federal claims, issue preclusion may effectively determine the outcome of the fed-

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212. Id. at 94; See also RESTATEMENT (SECOND) OF JUDGMENTS, supra note 202, at §§27-28.
eral suit. In the *Pennhurst* litigation, for example, the plaintiffs relied upon the same facts regarding conditions at the institution and the same legal theory—a right to habilitation in the least restrictive setting—for both the state and federal claims. If a state court found that the institution was well-kept, safe and provided effective treatment programs, those factual conclusions would be binding on the parties in a subsequent federal proceeding. Because such findings would be critical to the federal action, they presumably would lead to summary judgment for defendants.²¹³

2. **Federal-State Preclusion.** If the federal court is the first to enter judgment, there are different preclusion consequences for the state law claim. Claim preclusion should not be appropriate in cases like *Pennhurst* since the state claim could not have been joined in the federal suit because of the eleventh amendment; issue preclusion would normally be invoked, however, and could effectively be dispositive of the merits in the second action.

There are no federal statutory or constitutional provisions which expressly dictate the effect which a state court must give to a prior federal judgment.²¹⁴ Nor has the United States Supreme Court established principles of preclusion which are binding on the states in federal-state litigation.²¹⁵ Nevertheless, state courts

²¹³. As with claim preclusion, there is some variation among states regarding the elements of issue preclusion. The most significant distinction involves the "mutuality" requirement: the parties must be the same in each suit. The modern trend is to permit a non-party to use issue preclusion against one who was a party to the prior proceeding and who had a full and fair opportunity to litigate the issue. See Parklane Hosiery v. Shore, 459 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971); Restatement (Second) of Judgments, supra note 202, at § 29. However, several states retain the mutuality requirement for application of issue preclusion. See, e.g., Eliason Corp. v. Bureau of Safety & Regulation, 564 F. Supp. 1298 (W.D. Mich. 1983). In a federal suit following a judgment by such a state court, the federal court would not preclude unless there is mutuality, even though federal preclusion doctrine might permit preclusion. This follows from the Supreme Court's reliance on section 1738 and its directive to accord a state judgment the same effect as would the courts of the rendering state. Haring v. Prosise, 103 S. Ct. 2368, 2373-74 (1983). See also Marrese v. American Academy of Orthopedic Surgeons, 105 S. Ct. 1327 (1985).

²¹⁴. The full faith and credit clause of the Constitution and its implementing statute, 28 U.S.C. §1738, only address the effect which must be given to state court judgments.

²¹⁵. See Stoll v. Gottlieb, 305 U.S. 165 (1938). The Supreme Court expressly stated that where the federal court decided the question of its jurisdiction as a contested issue, the state court in subsequent proceedings was barred from re-examining that determination of jurisdiction, even if it was erroneous. Id. at 171-72. The Supreme Court held also that the predecessor to 28 U.S.C. §1738 was a broader dictate than the Constitutional full faith and credit provision, article IV, section 1. See Rev. Stat. § 905, 28 U.S.C. § 687 (1940).
uniformly accept the fact that they should accord finality to federal judgments, identifying differing sources for that obligation: the United States Constitution, the Full Faith and Credit Statute, state statutes and state common law.

Although the need for deference is recognized, there is divergence of opinion as to the extent of the obligation. Most states have not felt bound to apply federal principles of preclusion. Typically, the federal judgment is treated as if it were a state court judgment for purposes of claim and issue preclusion. As a result, federal judgments are not given completely uniform effect in subsequent state court suits, since the rules of claim and issue preclusion vary somewhat from state to state.

a. **Claim Preclusion.** The key question for application of claim preclusion in this context is whether the claim raised in the state proceeding could have been raised in the prior federal action. It is usually presumed that a state law claim which is factually related to a previously adjudicated federal claim would have been heard in the prior action under pendent jurisdiction. However,
following *Pennhurst II*, state law claims against state officials are absolutely barred as pendent claims in federal court. It follows that these state claims, which cannot be brought in a federal court, should not be claim precluded in subsequent state actions.\(^{223}\) In the analogous situation for state-federal litigation, when the second suit is brought under an exclusive federal jurisdiction statute, the federal courts have been fairly uniform in concluding that the federal suit is not claim precluded.\(^{224}\) Nevertheless, some state courts have applied claim preclusion to claims which they recognized as barred from joinder in a prior federal suit by the eleventh amendment.\(^{225}\) There is some risk, therefore,

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\(^{223}\)See Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n, 401 So. 2d 764 (Ala. S. Ct. 1981); Maldonardo v. Flynn, 417 A.2d 378, 380 (Del. Ch. 1980); McLean v. Cowen & Co., 48 N.Y.2d 696, 397 N.E.2d 750, 422 N.Y.S.2d 60 (1979). However, because of the discretionary nature of pendent jurisdiction and the lack of uniformity regarding its exercise, other state courts have allowed litigation of the state claim without any showing by the plaintiff that the claim could not have been brought in federal court. See Rennie v. Freeway Transport, 55 Or. App. 1008, 640 P.2d 704, rev'd, 294 Or. 319, 656 P.2d 919 (1982); Boyne v. Harrison, 647 S.W.2d 82, 88 (Tex. Civ. App. 1983).


\(^{225}\)In Rains v. State, 100 Wash. 2d 660, 674 P.2d 165 (1983) (en banc) a section
that litigants may not be able to rely on usual claim preclusion principles in deciding whether to file separate suits in state and federal court.

b. Issue Preclusion. Despite the apparent inapplicability of claim preclusion when the state claims are barred by the eleventh amendment, issue preclusion may still be dispositive of the state law claim. Where there is a common factual basis for the fed-

1983 suit was prosecuted in federal court against the State Public Disclosure Committee (PDC) and the Attorney General based on the defendant's enforcement of an unconstitutionally vague state law. PDC was held to have a qualified immunity from suit and the Attorney General was held absolutely immune from the section 1983 suit. Subsequently, the plaintiff brought a section 1983 suit against the state and PDC in state court. The Washington Supreme Court ruled that preclusion was appropriate, despite the fact that the state could not have been sued in the federal court proceeding due to the eleventh amendment. It concluded that the suits were "qualitatively the same," and therefore there was no injustice being worked on plaintiff by precluding the state action. Id. at 169. In Gagne v. Norton, 189 Conn. 29, 453 A.2d 1162 (1983), plaintiffs, recipients of Aid to Families with Dependent Children (A.F.D.C.) benefits, filed a federal class action seeking injunctive and declaratory relief and retroactive benefits from the state agency. Simultaneously, an appeal of the plaintiff's state fair hearing was pending in state court. The federal suit was settled and a consent decree entered. No money damages had been awarded and there was no reservation of that claim. Subsequently, the state court appeal was dismissed because the consent decree was treated as res judicata. The state court relied on a state rule of claim preclusion to the effect that a subsequent suit for money damages could not be maintained following an action for injunctive relief on the same cause. Id. at 1164. The plaintiffs argued that there should be an exception to this state rule of preclusion because the federal court was without jurisdiction to award the monetary relief requested due to the eleventh amendment bar to such awards. Id. The court avoided the "interesting" content of plaintiff's argument by holding that even though the federal court lacked jurisdiction over the claim for retroactive benefits, the parties were not prevented from settling all aspects of the controversy raised by the pleading. Id. at 1165. For a case similar to the eleventh amendment situation see, Varnal v. Kansas City, 481 S.W.2d 575 (Md. Ct. App. 1972). A federal section 1983 suit was brought against the city housing department and certain municipal officials. (The city itself was not amenable to suit under section 1983 prior to Monell v. New York City Dept' of Social Services, 436 U.S. 658 (1978)). Following a federal judgment for defendants, the plaintiffs filed state claims against the municipality in state court. The court held that even though the municipality was immune from the federal suit, it was in privity with the defendant officers in that suit. Because any subsequent suits against those officials would be barred by claim preclusion the court held that the municipality should also be free from further litigation to the same extent as the police officers. Varnal, 481 S.W.2d at 579-80. Contra Boyne v. Harrison, 647 S.W.2d 82, 86 (Tex. Ct. App. 1983) (suit for money damages against state officials in their official capacities could not have been joined with federal court action because of the eleventh amendment, therefore claim preclusion did not bar the litigation of that claim in state court); Toomey v. Blum, 54 N.Y.2d 669, 426 N.E.2d 181, 442 N.Y.S.2d 774 (because the federal court was without power to award retroactive benefits plaintiff requested in subsequent state court litigation, there was no preclusion of that state court claim by the federal judgment).

226. Issue preclusion analysis is not usually affected by the fact that the state law claim
eral and state claims, usual rules of issue preclusion would require the state court to accept findings made in prior federal court proceedings.\textsuperscript{227} Therefore, if Pennhurst-type claims are bifurcated, as was suggested by the Supreme Court, the state law claim often cannot be considered \textit{de novo} by the state court.

However, in the context of federal-state preclusion, when the subsequent suit is against a state official, there may be a basis for state court refusal to be bound by issue preclusion. The Pennhurst II ruling that federal courts may not adjudicate such state law claims was premised on notions of federalism and sovereign immunity. These are violated when a federal court orders state officials to comply with state law. In the majority's view, the eleventh amendment stands for the proposition that state law claims against a state and its officials can only be adjudicated by a state court. This rationale appears to support an argument that neither claim nor issue preclusion consequences of a federal proceeding should be permitted to dictate the outcome of a state claim barred from federal jurisdiction by Pennhurst II.\textsuperscript{228} Otherwise, a federal court would be able to do indirectly what it cannot do directly—adjudicate the merits of a state law claim against the state.

There do not appear to be any reported decisions which have considered this line of reasoning for issue preclusion analysis in federal-state litigation. There has been consideration of the analo-


\textsuperscript{228} This is especially true where the federal court has found against the plaintiff and for the state entity. The state or state officials not sued in federal court may nonetheless raise the federal judgment under the doctrine of defensive use of collateral estoppel. Where, however, the plaintiff prevailed in the federal action, some states have shown a reluctance to apply issue preclusion against the state defendants. Sometimes preclusion is denied by distinguishing the state court defendants from the federal defendants. The plaintiff's reasonable assertion of issue preclusion is denied by an artful determination that the state defendants are not the same as, nor in privity with the federal defendants. See, e.g., Duvernay v. New York, 76 A.D.2d 962, 962, 429 N.Y.S.2d 70, 71, \textit{aff'd} 51 N.Y.2d 744, 411 N.E.2d 784, 432 N.Y.S.2d 365 (1980). Thus even where issue preclusion is "fully applicable" the subtle differences between offensive and defensive use, coupled with the frequently fictitious distinctions between the state, state agency, state officials, etc. under the eleventh amendment stacks the deck against the state plaintiff.
gous issue in state-federal cases in which the second proceeding falls within the exclusive jurisdiction of a federal court. The Supreme Court has sent mixed signals: at times indicating that findings of fact should be given full effect, while rulings of law need not be deferred to, and at other times appearing to question even the binding nature of factual determinations. A fair reading of

229. The most common outcome in state-federal exclusive jurisdiction cases has been to deny claim preclusion as to a claim not raised in the prior proceeding (merger) but to allow preclusion of claims (bar) and issues which were actually litigated and determined. In Brown v. Felsen, 442 U.S. 127 (1979), for example, a creditor in a bankruptcy proceeding sought to establish that the bankrupt's debt to him was not dischargeable under section 17 of the Bankruptcy Act because it was the product of fraud by the debtor. The bankrupt countered that claim preclusion barred this assertion of fraud because of a prior collection proceeding in state court that had given judgment on the debt to the creditor, without allegations or findings of fraud. The bankrupt argued that the merger principle of claim preclusion should bar the creditor from raising new matters that could have been litigated in the state action.

The Supreme Court ruled that claim preclusion should not be applied because to give finality to the state proceeding "would undercut Congress' intent to commit § 17 to the jurisdiction of the bankruptcy court." Id. at 135. The Court concluded that one of the purposes of the 1970 amendments to the Act was to "take these § 17 claims away from state courts that seldom dealt with the federal bankruptcy laws and to give those claims to the bankruptcy court so it could develop expertise in handling them." Id. at 136. At the same time, the Court indicated in its opinion that had the fraud issue actually been litigated in the prior proceeding, it might be given issue preclusion consequences "in the absence of any countervailing statutory policy." Id. at 139 n.10.

230. Compare Will v. Calvert Fire Ins. Co., 437 U.S. 655, 668, 674 (1978), where Justices Burger and Brennan, in separate dissents, expressed concern whether state court determination of a claim over which the federal court has exclusive jurisdiction, should preclude federal de novo review of purely legal questions in subsequent proceedings with Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929). In Becher the Supreme Court ruled that a party to a patent infringement proceeding in federal court could be estopped by findings of fact made by a state court adjudicating a state law claim of breach of contract and fiduciary duty. Id. at 391. Becher has been construed narrowly by lower federal courts to apply to purely factual findings by state courts, thereby allowing litigation of mixed questions of fact and law as well as federal legal issues in the federal proceeding. See, e.g., Judge Learned Hand's influential opinion in Lyons v. Westinghouse Elec. Co., 22 F.2d 184, 188 (2d Cir.), cert. denied, 350 U.S. 825 (1955). Becher has been ignored for the most part by the Supreme Court; in a recent reference to the general issue of preclusion and exclusive jurisdiction the case was not considered to be governing. See Will v. Calvert, 437 U.S. 655, where four of the Justices joined in a dissenting opinion by Justice Brennan and identified as an open question whether it is "ever appropriate to accord res judicata effect to a state-court determination of a claim over which the federal courts have exclusive jurisdiction." Id. at 674. Justice Burger, writing a separate dissent, shared this doubt, but declined to address the issue. Id. at 668. Brennan reasoned that federal courts should always be able to consider purely legal questions de novo and even questioned the limited fact finding preclusive effect that Becher upheld:

It is at least arguable that, in creating and defining a particular federal claim, Congress assumed that the claim would be litigated only in the context of fed-
the shifting precedent is that preclusion principles should be applied with full force except when they would substantially interfere with the particular purposes of an exclusive jurisdiction statute. The fact that a matter falls within the exclusive jurisdiction of a federal court does not insulate it, per se, from preclusion consequences of a prior state action.231

The appropriate focus, therefore, in evaluating the application of issue preclusion in federal-state litigation is whether, and to what extent, such preclusion conflicts with the rationale for placing such claims exclusively in state forums. The purposes behind federal exclusive jurisdiction statutes are not directly analogous; they are usually intended to develop uniform construction of a federal statute, to place specialized cases before judges who possess particular expertise, and to guarantee federal procedural standards will be applied.232 The purposes articulated in Pennhurst II may have a little to do with expertise and uniformity in interpretation, but they are much more a reflection of the majority's view of federalism. It is a value judgment, purportedly embodied in the eleventh amendment, that it is inappropriate for federal courts to decide state law claims and enter relief against a state. State sovereignty and autonomy, the bases for giving exclusive jurisdiction over such claims to state courts, are clearly infringed if federal courts are allowed to dictate the outcome of state proceedings through application of claim and issue preclusion. It seems that the rationale of the Pennhurst II decision provides even more compelling support for an escape from preclusion than the purposes of federal exclusive jurisdiction statutes.

Thus, when claims are split between federal and state courts after Pennhurst II, and a federal judgment is entered first, existing precedent would apply issue preclusion doctrine in its usual scope.

231. See Smith, supra note 196, at 96-98.

232. See generally, 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4470 (1981); see also, Brown, 442 U.S. at 136 n.7.
In most instances a finding by the federal court should be given preclusive effect and will expedite the state proceeding by limiting the issues in controversy. However, the same concerns for state sovereignty, expressed by Justice Powell in *Pennhurst II*, give rise to a strong argument that a state may deviate from issue preclusion principles when application of issue preclusion would conflict with the sovereignty interests of the state. In such instances, a state court should be able to reconsider findings which would determine the ultimate issues of the state court action.

In summary, the "bifurcation" of federal and state claims is unlikely to result, as the *Pennhurst II* Court implied, in rulings on the merits of each claim. Even if simultaneous suits are permitted under the abstention doctrines, claim and issue preclusion in their present form will effectively limit consideration to the first suit which goes to judgment.

The net effect of *Pennhurst II*, in light of these difficulties in splitting claims, is to pressure litigants to bring both state and federal claims in a state court proceeding. As the next section demonstrates however, even that strategy may not guarantee that both claims will be adjudicated in a single proceeding. More importantly, this judicial channeling of litigants to state courts violates congressional purposes in providing a federal forum for federal claims.

**B. State and Federal Claims in State Court**

Normally, state and federal claims may be brought together in a single state court proceeding. Although the Supreme Court has never directly ruled that a state court *must* hear a section 1983 claim, it appears that state courts of general jurisdiction are not barred from hearing the federal claim and further, are not free to resist enforcement of section 1983 claims. A plaintiff's prefer-

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233. *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980) citing *Testa v. Katt*, 330 U.S. 386, 391 (1947)); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980). In some states, however, it is not possible to litigate state and federal claims together because suits against the sovereign must be brought in a special court of limited jurisdiction. In New York, for example, damage actions against the state must be brought in the state court of claims; claims for injunctive relief and suits against state officials for money damages cannot be brought in the court of claims, but are properly filed in the county supreme courts, trial courts of general jurisdiction. *See supra* note 188. This is not a problem in most states, which permit tort claims against the state in the same court of general jurisdiction which hears suits for injunctive relief and for money damages against state officials. *See, e.g.*, Massachusetts *Tort*
ence for litigating state and federal claims together in state court may be disturbed, however, by a defendant's attempt to remove the suit to federal court. A defendant is permitted, under 28 U.S.C. § 1441(a) to remove to federal district court a suit filed in state court when the action falls within the original jurisdiction of the federal court. A state law claim usually is not removable to federal court, unless it is joined with a closely related federal claim. When the federal claim is removed, the federal court will usually exercise jurisdiction over the related state claim on the basis of pendent jurisdiction.

However it is clear, after *Pennhurst II*, that a federal court could not assume removal jurisdiction over state law claims seeking relief against the state, absent waiver of the state's eleventh amendment immunity. In such a removal situation, the federal court has to choose between the defendant's right to have the fed-

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Claims Act, Mass. Gen. Laws Ann. ch.258, § 1 (West 1959). See references in *Restatement (Second) of Torts* § 895B (1982). When related state and federal claims seek different forms of relief against the state and its officials such exclusive jurisdiction provisions mandate separate lawsuits. This results in duplicative litigation and the same claim and issue preclusion problems as separate actions in state and federal court. See, e.g., Rooney v. Tufano Contracting Corp., 43 Misc.2d 358, 251 N.Y.S.2d 392 (N.Y. Sup. Ct. 1964) (judgment of court of claims finding plaintiff was contributorily negligent may be used to bar subsequent suit in New York Supreme Court by same plaintiff against another defendant).

234. The conventional wisdom has been that civil rights defendants, state and local officials, and governmental entitles, prefer litigating in state court while plaintiffs will usually choose to litigate in federal court. This varies in some localities, however. For example, plaintiffs in section 1983 actions in Boston, Massachusetts will sometimes file in state court because the racial and socio-economic make-up of Suffolk County juries may be more desirable than federal court juries drawn from the larger metropolitan area. For this same reason, the state defendants have attempted to remove such suits to federal court under 28 U.S.C. § 1441.

235. Section 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

236. A state law claim could be removed if the action falls within section 1332 jurisdiction—parties of diverse citizenship and a claim for more than $10,000—and the defendant is not a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b) (1982).

eral claim heard in federal court and the efficiency, economy and convenience of hearing both claims together. There is no clear precedent guiding federal courts in resolving this conflict.

The answer may lie in the fact that section 1441(a) provides for the removal of a "civil action" from state to federal court, not the removal of "claims." If the federal and state claims filed in state court are considered to be a single "civil action," then after Pennhurst II a court should conclude that such an action could not have been brought in federal court. Subsection (c) of section 1441 permits the removal of a "claim," as distinct from an "action," when it is joined with an otherwise non-removable claim, but only when it is "separate and independent" of the non-removable claim. In American Fire & Casualty Co. v. Finn, the Supreme Court ruled that factually related claims are not separate and independent claims for purposes of section 1441(c).

The difficulty with this line of reasoning is that it leads to the conclusion that a defendant's right to remove a federal question claim is subject to relatively easy veto by the plaintiff: if the federal question claim is joined with a related, but non-removable claim, such as a federal claim for money damages barred by Edelman or a state claim for injunctive relief prohibited by Pennhurst II, the suit must remain in state court.

If, instead, removal is permitted for the federal question claim alone, there will be not only the inconvenience and expense of two separate suits and the possibility of a Colorado River stay, but also the claim and issue preclusion consequences discussed earlier which may effectively preclude consideration of either the state or federal claim.

Even if federal and state claims can be brought together in a state court, the pressure to do so substantially interferes with a

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238. Section 1441(c) provides:
Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

239. 341 U.S. 6 (1951).
240. Id. at 14.
241. See supra notes 121-24 and accompanying text.
242. See supra notes 180-90 and accompanying text.
243. See supra text accompanying notes 194-232.
party's interest in having a federal court determine the federal claim. Congress has established a scheme of concurrent jurisdiction, giving litigants the opportunity to litigate claims that the state and its officials are violating federal statutes and the federal Constitution in a federal forum. The federal question and civil rights jurisdictional statutes permit a plaintiff to file such claims in the federal district courts and the removal statutes provide a defendant with the option of transferring suits raising federal issues from state to federal court.\(^\text{244}\) It was Congress' explicit determination that federal courts should be available to hear such federal claims because state courts could not be relied upon to enforce the Reconstruction era amendments and civil rights statutes.\(^\text{245}\)

In the Supreme Court's recent comity-based decisions restricting federal court jurisdiction, several Justices have questioned the continued validity of any distrust of state court adjudication in federal question suits.\(^\text{246}\) The implicit premise in many of these opinions urging deference to state court proceedings is that state courts have proven themselves worthy of reassuring the independence and sovereignty which they enjoyed prior to the Civil War. The fact remains, however, that Congress passed the Reconstruction era statutes and expanded federal court jurisdiction for the very purpose of altering the relationship between state and federal courts.\(^\text{247}\) The Supreme Court should not substitute its

\(^{244}\) The present versions of the removal statutes are 28 U.S.C. §§ 1441 and 1443 (1982). Portions of § 1441(a) and (c) appear supra notes 235 and 238. Section 1443 provides:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.


\(^{247}\) The Court, discussing the Civil Rights Act of 1871 (codified at 28 U.S.C. § 1331 (1982)), predecessor to sections 1983 and 1343(3) stated:

This legislative history makes evident that Congress clearly conceived that it
view of appropriate federal-state relations in the 1980s for that enacted into the jurisdictional statutes by Congress.

While concerns for comity, federalism and the burgeoning federal caseload have animated Supreme Court decisions restricting access to federal courts, Congress has acted to increase, rather than restrict, the role of federal courts in enforcing federal rights. In 1980, for example, the federal question jurisdictional statute was amended to delete the amount-in-controversy requirement.248 In addition, Congress has steadily increased the number of federal judges to meet the caseload demands.249

In two recent decisions, a majority of the Court has properly rejected invitations to impose judicially created restrictions on the scheme of jurisdiction and remedies established by Congress. In *Patsy v. Board of Regents*,250 the Court relied on the legislative history of section 1983 for its conclusion that the statute should be an exception to the usual, judicially-created doctrine requiring exhaustion of administrative remedies. Seven of the Justices recognized that, even though comity considerations weighed in favor of requiring resort to state administrative remedies, it was Congress' and not the Court's role to establish such a barrier to the section 1983 litigant's access to federal court.251 *Pulliam v. Allen*252 rejected an assertion of absolute immunity by a state court judge and found that she was subject to injunctive relief and an award of attorneys' fees in a section 1983 action. The majority acknowledged that "[i]t no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation."253 Nevertheless, they concluded that the Court could not immunize

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251. *Id.* at 502-07; *see also id.* at 516-17 (O'Connor & Rehnquist, JJ., concurring); *id.* at 517-19 (White, J., concurring).
253. *Id.* at 1981.
state judges when the clear intent of Congress was to subject judges to suits for injunctive relief and to awards of attorneys' fees.\textsuperscript{254}

There is good reason for maintaining federal courts as viable alternatives to state court systems, given the nature of many federal question suits, such as section 1983 actions against state officials for violation of federal rights. Such claims call upon a judge to assess state statutes or decisions made by state officials against the standards set by the federal Constitution. Even without the history of lawlessness in the post-Civil War South, it is understandable that Congress would permit litigants to seek relief in federal courts, whose judges are more likely to be insulated from political pressures and loyalties to the state officials being sued.\textsuperscript{255}

The \textit{Pennhurst II} decision does not directly deny access to federal court on a federal claim. In barring the pendent state law claim, it left intact federal jurisdiction for prospective relief against state officials under federal statutes or the Constitution.\textsuperscript{256} However, the practical effect of \textit{Pennhurst II}, in conjunction with the preclusion doctrines discussed earlier, is to permit access to federal court on the federal claim only at the cost of dropping related state law claims. If the state claim is brought along with the federal claim, in federal court, it will be dismissed under \textit{Pennhurst II}; if it is brought separately in state court it may trigger \textit{Colorado River} abstention or claim preclusion of the federal claim. Thus, the only way in which a litigant can be guaranteed a decision on the merits of the federal claim by a federal court is to forego litigation of the state claim.

In many instances this is a significant price to pay for access to a federal forum. State constitutions and state civil rights statutes often provide protections of individual liberties comparable to federal law.\textsuperscript{257} A litigant with a substantial state law claim against

\textsuperscript{254} Id.

\textsuperscript{255} See, Neuborne, \textit{The Myth of Parity}, 90 Harv. L. Rev. 1105 (1977). Professor Neuborne catalogues numerous differences in the background, selection process, tenure and working conditions of state and federal judges which call into question the Supreme Court's platitudes regarding the parity of state and federal court adjudication of federal constitution rights.

\textsuperscript{256} The \textit{Pennhurst II} decision does not alter the \textit{Ex parte Young} rule allowing claims for prospective injunctive relief against state officials on federal law grounds. See supra text accompanying notes 138-42.

\textsuperscript{257} Indeed, in a few instances state law may provide greater protection than federal
state officials would be under great pressure to litigate the federal claim in state rather than federal court in order to preserve both claims.

This forced trade-off between gaining access to federal court and pursuing a state law claim is the result of an unwise policy decision by the *Pennhurst II* majority. Justice Powell contended that "considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." However, as has been shown, the *Pennhurst II* ruling was not compelled by the language, history or prior construction of the eleventh amendment. The *Pennhurst II* decision is a misguided imposition of the majority's view of federal-state relations, clashing with Congressional purposes in establishing federal question and civil rights jurisdiction, and unnecessarily undermining the rationale and practical benefits of pendent jurisdiction doctrine.

CONCLUSION

Tension often exists between the exercise of pendent jurisdiction and the notions of state sovereignty which underlie our federal system. When a federal court awards extensive relief against state officials on the basis of state law, the friction is particularly acute. In *Pennhurst II*, the Supreme Court chose to resolve this tension by establishing an absolute, jurisdictional barrier to all pendent claims against state officials.

This Article has sought to demonstrate that the *Pennhurst II* decision is unjustified, unnecessary and unwise. The majority attempted to justify its result as one mandated by the eleventh amendment. In fact, *Pennhurst II* created a novel application of the amendment which goes beyond its language, history and prior construction. In extending the amendment to bar all pendent state law claims, the Court repudiated the analysis for applying

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the amendment to pendent claims which it, and the lower federal courts, had employed for seventy-five years.

The Pennhurst II approach is unnecessary because existing doctrines already adequately safeguard state sovereignty. Pendent jurisdiction is a discretionary exercise of jurisdiction which considers, along with efficiency, convenience and fairness, the intrusion into state sovereignty which might result. Furthermore, under Erie principles, when pendent jurisdiction is exercised, the immunities and defenses provided by state law will govern. This means that a federal court would apply the doctrine of sovereign immunity as it has evolved in the particular state. It thus adequately protects the state's sovereignty by letting state statutes and court decisions determine the scope of immunity.

Finally, the Pennhurst II ruling is unwise because it further complicates jurisdictional doctrines in federal court. It also has the effect of diverting federal claims away from the federal courts, contrary to Congressional purposes in establishing a federal forum for federal question and civil rights litigation.