
Camille Gearhart

When you sue the government . . . you must falsely pretend . . . that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.¹

Fiction and illogic mark the eleventh amendment’s barrier to citizens’ suits against state governments. The eleventh amendment’s mandate that federal courts respect states’ sovereignty² conflicts with the fourteenth amendment’s mandate that states respect the federal rights of their citizens.³ Instead of resolving this conflict, the Supreme Court has used fictions to avoid it.⁴

In particular, the Court has relied on the fictions produced by the decision of *Ex Parte Young*.⁵ In *Ex Parte Young*, the Court ruled that a suit against a state official to enjoin enforcement of an unconstitutional state statute is not a suit against the state.⁶ The doctrine of *Ex Parte Young* frustrates careful

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². The eleventh amendment provides:

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

> U.S. CONST. amend. XI.

Even though the amendment by its terms applies only to suits brought by private citizens against states other than their own, the courts have construed the eleventh amendment to bar suits against a state by its own citizens. See infra note 31 and accompanying text.

³. The fourteenth amendment provides in part:

> 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.

> U.S. CONST. amend. XIV, § 1.


⁵. 209 U.S. 123 (1908).

⁶. *Id.* at 160; see infra notes 39–46 and accompanying text.
analysis by the courts of the conflicting interests of (1) the states, which must allocate their limited resources among the many needs of their citizens, (2) the federal judiciary, which is bound to vindicate citizens’ federal rights, and (3) citizen plaintiffs, who demand redress for their injuries.

Justice Powell’s majority opinion in *Pennhurst State School and Hospital v. Halderman*7 takes a large step toward eliminating the fictions that confuse eleventh amendment doctrine. The *Pennhurst* Court abandoned the fiction that prospective injunctive relief ordered against state officials does not affect the state.8 The Court also abandoned the fiction that suits against state officers whose conduct is dictated by state policy are not suits against the state itself.9 After abandoning these fictions, the Court ruled that the doctrine of state-law pendent jurisdiction cannot override the bar of the eleventh amendment.10

The *Pennhurst* Court’s re-evaluation of eleventh amendment doctrine did not go far enough, however. The Court failed to resolve the conflict between the eleventh and fourteenth amendments.11 The Court also failed to advance a coherent characterization of the eleventh amendment.12 Instead, the Court ultimately reaffirmed the *Ex Parte Young* fictions.

This Note encourages lower federal courts to abandon the fictions of *Ex Parte Young* completely.13 The Note begins by exploring the history of the fictions of eleventh amendment doctrine. The Note then examines the

8. Id. at 910–11; see infra notes 93–94 and accompanying text.
9. Id. at 911–12; seeinfra notes 95–97 and accompanying text.
10. Id. at 919. The doctrine of state-law pendent jurisdiction is a judge-made device that allows a federal court to entertain state claims that otherwise would be outside the court's jurisdiction. The doctrine is necessary for federal courts to function effectively; without the doctrine, plaintiffs with both federal-law and state-law claims would in effect be forced into the state forum to obtain full relief. See generally 13B C. WRIGHT, supra note 4, § 3567 (2d ed. 1984). The doctrine first appeared early in the nineteenth century. Id. The modern form was established in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), where the Court ruled that federal courts possess the judicial power to entertain federal and state claims arising from a “common nucleus of operative fact,” if the plaintiff’s claims are such that “he would ordinarily be expected to try them all in one judicial proceeding.” Id. at 725.
11. See infra notes 112–13 and accompanying text.
12. See infra notes 114–18 and accompanying text.
13. This Note’s discussion is limited to the use of the fictions of *Ex Parte Young* after the *Pennhurst* decision. For discussion of other issues raised by the *Pennhurst* decision, see Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61 (1984) (eleventh amendment doctrine is based on faulty reasoning); Note, Constitutional Law—Pendent Jurisdiction v. Eleventh Amendment: Dismissed for Failure to State a Claim upon Which Relief Can Be Granted, 18 Creighton L. Rev. 75 (1984–85) (*Pennhurst* decision raises unanswered procedural questions); Comment, Constitutional Law: State Sovereign Immunity Reaffirmed in *Pennhurst State School & Hospital v. Halderman*, 24 Washburn L.J. 152 (1984) (*Pennhurst* decision prevents pendent jurisdiction from providing an exception to the eleventh amendment’s bar).
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Pennhurst Court’s step forward in scorning these fictions and acknowledging that suits against state officers implicate state sovereignty. The Note next discusses the dilemma created by the Court’s ruling that the eleventh amendment constitutionally prohibits federal judicial infringement of state sovereignty while at the same time acknowledging that the doctrine of Ex Parte Young allows such judicial infringement. Finally, the Note proposes that federal courts rely on 42 U.S.C. section 1983 as congressional authorization to entertain citizens’ challenges to state officials’ actions. The Note also proposes that courts recognize states’ eleventh amendment immunities as limited defenses to the section 1983 cause of action.

I. LEGAL BACKGROUND

The Supreme Court has not precisely resolved the nature of the states’ defense of eleventh amendment immunity. Those who favor protecting state autonomy tend to argue that the defense is jurisdictional. Those who favor protecting judicial power tend to argue that it is substantive, however, and subject to judicial abrogation. The fiction that suits to enjoin state officials’ conduct do not implicate state sovereignty has allowed courts to control state action without resolving the issue. Yet this uncertainty regarding the nature of the eleventh amendment defense has produced so many inconsistencies within the case law that the doctrine cries out for reform.

A. The Eleventh Amendment and State Sovereignty: Confusion Begins

The dilemma of eleventh amendment doctrine begins with the United States Constitution. At the time the Constitution was drafted, American courts honored the British doctrine of sovereign immunity, and states
enjoyed immunity from private suit in their own courts. However, article III's grant of judicial power to the federal courts included ambiguous language that suggested that states were subject to private suit in federal court.

In the 1793 decision of *Chisholm v. Georgia*, the Supreme Court held that article III's grant of diversity of citizenship jurisdiction abrogated Georgia's sovereign immunity. Reaction to the decision was swift. Within two years Congress adopted the eleventh amendment to overrule the decision, and within five years the amendment was ratified.

Scholars disagree as to the effect of the eleventh amendment on article III's grant of jurisdiction. Some argue that the eleventh amendment...

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20. The doctrine of sovereign immunity originated in feudal England, where landowners maintained their own courts. These lords could forbid—or consent to—suits against themselves in their own courts, but were subject to suit in courts of superior sovereigns. Engdahl, supra note 17, at 2–3; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–3 (1963). The king, at the apex of the system, was immune to all suits to which he did not consent. Engdahl, supra note 17, at 2–3; Jaffe, supra at 2–3. In medieval times the mechanism of the "petition of right" developed, however, whereby the king routinely consented to suit. Engdahl, supra note 17, at 3; Jaffe, supra, at 5–9. American courts adopted the concept of sovereign immunity without the accompanying doctrine of the petition of right. Jaffe, supra, at 18–19.

21. The text of article III, § 2 provides in part that:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States . . . [and] between a State and citizens of another State . . . .

U.S. CONST. art. III, § 2.

The language of the article does not reveal whether immunities to judicial power limit its grant of jurisdiction. See C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 19–21 (1972); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines (Pt. I)*, 126 U. PA. L. REV. 515, 521 (1977). The use of the word "between" to describe the grant of jurisdiction with respect to controversies arising between states and citizens of other states suggests that jurisdiction exists regardless of the status of the state as party plaintiff or party defendant. Apparently even the members of the committee that drafted the provision did not agree whether the provision abrogated the common law doctrine of sovereign immunity. C. Jacobs, supra, at 17–19.

22. 2 U.S. (2 Dall.) 419 (1793).

23. *Id.* at 479–80. The justices delivered their opinions seriatim. Four justices concurred in the judgment. Justices Blair and Cushing, in relatively brief opinions, emphasized a literal reading of article III. *Id.* at 450–53 (Blair, J.); *Id.* at 466–69 (Cushing, J.). Justice Wilson authored an eloquent exposition endorsing a strongly nationalist constitutional policy. *Id.* at 453–66 (Wilson, J.). Chief Justice Jay argued that state suability is not inconsistent with state sovereignty. *Id.* at 469–79 (Jay, C.J.). The one dissenting justice argued that regardless of the effect of article III, the Judiciary Act of 1789 did not authorize federal courts to abrogate state immunity. *Id.* at 436–37 (Iredell, J., dissenting).

24. C. Jacobs, supra note 21, at 64–67; 13 Wright, supra note 4, § 3507, at 30 n.14 (2d ed. 1984) (eleventh amendment, adopted to overrule Chisholm v. Georgia, is one of only five amendments adopted by Congress to overturn Supreme Court rulings).

25. Commentators attribute the states' swift approval of the amendment to their desire to protect themselves from out-of-state creditors attempting to collect on the states' many outstanding debts. See, e.g., Cullison, supra note 4, at 7–8, 14–15; see also Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 406 (1821) (purpose of eleventh amendment is to protect states from debt liability).

26. The effect intended by the framers of the amendment is virtually impossible to determine. The congressional debates accompanying the amendment's adoption were not recorded, and no contemporary indication of its intended scope exists. C. Jacobs, supra note 21, at 64–72; Field, supra note 21, at...
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represents a jurisdictional bar to the assertion of judicial power over states. Most modern scholars argue, however, that the eleventh amendment merely asserts that the substantive common-law doctrine of sovereign immunity survived the adoption of article III. These scholars insist that since states' immunity under the eleventh amendment is not a constitutional limit of federal court jurisdiction, the immunity is subject to judicial abrogation. A third characterization is that the amendment provides states a constitutional right that is analogous to individual constitutional rights.

Eleventh amendment case law reflects the controversy over the nature of the eleventh amendment's bar. The defense is jurisdictional, for example, to the extent that it can be raised on the appellate level. Yet other aspects of the doctrine are inconsistent with a jurisdictional defense. The amendment

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27. The traditional theory is that the eleventh amendment reasserted the "original understanding" that article III's grant of power was limited by the doctrine of sovereign immunity. See, e.g., M. IRISH & J. PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 123 (1959) (stylistic error probably produced the clause interpreted by Chisholm v. Georgia Court to abrogate state immunity); Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 GA. L. REV. 207, 230 (1968) (supporters of eleventh amendment intended to end all suits against states). Two modern scholars also advocate that the amendment constitutionally limits the federal judiciary. See 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, 1442 (1975) (eleventh amendment constitutionally limits courts, but not Congress); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 HARV. L. REV. 682, 693 (1976) (same).

28. See C. JACOBS, supra note 21, at 163 (eleventh amendment not intended to constitutionalize the doctrine of sovereign immunity); Cullison, supra note 4, at 35 (impact of eleventh amendment should be confined to cases in which state law is enforced; any further federal recognition of sovereign immunity should be recognized as subject to judicial abrogation); Field, supra note 21, at 39; Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines (pt. 2), 126 U. PA. L. REV. 1203, 1205 (1978) [hereinafter Field, pt. 2] (history of amendment's adoption does not compel conclusion that sovereign immunity is constitutionally imposed); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 2004 (1983) (amendment should be narrowly construed, although federal judiciary is free to develop a federal doctrine of state sovereign immunity). See also Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1108 (1983) (eleventh amendment does not constitutionally impose sovereign immunity; other provisions of Constitution may, however, encompass sovereign immunity).


30. Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"). But see Patsy v. Board of Regents of Florida, 457 U.S. 496, 516 n.19 (1982) (amendment is not jurisdictional in the sense that it must be raised and considered by the Supreme Court on its own motion).
bars suits against a state by its own citizens even though the language of the amendment addresses only suits by a citizen of another state.\textsuperscript{31} Even though neither states nor individuals may enlarge the federal courts' jurisdiction by consenting to suit, a state may waive its eleventh amendment immunity\textsuperscript{32} or consent to suit in federal court.\textsuperscript{33} Likewise, even though Congress may not enlarge the federal courts' jurisdiction beyond its constitutional parameters, Congress may, pursuant to the enforcement clause of the fourteenth amendment, authorize federal courts to award money damages against state officials.\textsuperscript{34}

**B. The Fourteenth Amendment and State Sovereignty: Fictions Introduced**

The effect of the eleventh amendment on article III’s grant of federal question jurisdiction was not immediately significant. When the amendment was ratified, the Constitution provided few, if any, private causes of action against states.\textsuperscript{35} The impact of the amendment became controversial a century later, however, when the Civil War Amendments\textsuperscript{36} and accompanying legislation\textsuperscript{37} imposed obligations on the states in favor of private individuals.\textsuperscript{38}

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\textsuperscript{31} Hans v. Louisiana, 134 U.S. 1, 10-12 (1890) (state cannot be sued even if case is one arising under the constitution or laws of the United States; immunity to suit is inherent in the sovereign).

\textsuperscript{32} Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 390-91 (1894) (waiver of eleventh amendment immunity found in state statute); Clark v. Barnard, 108 U.S. 436 (1883) (waiver of eleventh amendment immunity found in state's voluntary appearance in federal court).

\textsuperscript{33} Parden v. Terminal Ry. of the Alabama State Docks Dept., 377 U.S. 184 (1964) (state consented to suit in federal court by commencing operation of a railroad after enactment of the Federal Employers' Liability Act).

\textsuperscript{34} Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Court has not yet resolved the debate among lower courts over whether Congress can limit state immunity under other constitutional provisions. See generally 13 WRIGHT, supra note 4, § 3524, at 179–81 nn.103–04 (2d ed. 1984) and cases cited therein.

\textsuperscript{35} See Fletcher, supra note 28, at 1071–78 (potential liability of states under the new federal constitution was not clearly established by the framers).

\textsuperscript{36} U.S. Const. amend. XIII (ratified 1865; abolished slavery); id. amend. XIV (ratified 1868; designed to guarantee former slaves the privileges of citizenship); id. amend. XV (ratified 1870; prohibited the use of racial criteria to limit the voting privilege). The most significant provision is the fourteenth amendment; see supra note 3 for its text.


\textsuperscript{38} The 42d Congress intended that the federal courts would enforce the new obligations that the amendments imposed upon the states. Mitchum v. Foster, 407 U.S. 225, 239–40 (1972) (in post-Civil War era "the role of the Federal Government as a guarantor of basic federal rights against state power
In the seminal case of *Ex Parte Young*, the Court avoided the clash between eleventh amendment doctrine and the Civil War Amendments by relying on the legal fiction of personal official liability. The Supreme Court ruled that, in spite of the eleventh amendment, a federal court could enjoin the state attorney general of Minnesota from enforcing a state statute against railroads when that statute violated the fourteenth amendment. The Court reasoned that because the state statute was unconstitutional it was "void," and thus did not impart any state immunity to the officer. Since the state could not legally authorize the attorney general's action, he was "stripped of his official representative character and [was] subjected to the consequences of his official conduct."

The *Ex Parte Young* decision introduced at least two fictions into eleventh amendment law. First, the decision established that state officials' conduct can constitute state action for the purpose of providing fourteenth amendment jurisdiction. This jurisdiction can exist even when the conduct is considered individual conduct for the purpose of avoiding the eleventh amendment's bar.

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39. 209 U.S. 123 (1908). Commentators have called the *Ex Parte Young* decision one of the three most important Supreme Court decisions. WRIGHT, supra note 4, § 4231, at 352 ("Ex Parte Young established the power of the federal courts to enforce the constitution against state legislative and executive action"); see also Edelman v. Jordan, 415 U.S. 651, 664 (1974) (the holding of *Ex Parte Young* "has permitted the Civil War Amendments . . . to serve as a sword, rather than merely as a shield, for those whom they were designed to protect").

40. The doctrine of personal official liability, or ultra vires, originated in England as a means to challenge government action. Engdahl, supra note 17, at 4. In the nineteenth century, American courts developed a doctrine of personal officer liability that was harsh on officials. Id. at 19–20. Officials could be liable personally for acts (1) not authorized-in-fact, and (2) authorized-in-fact, but not authorized in contemplation of law. The second category included "positive torts," such as trespass, acts performed under an order that a superior was not authorized to give, unconstitutional acts, and acts performed under an unconstitutional order or statute. Id. at 17–18. Officials, therefore, bore the risk of acting under illegal orders. Id. at 18.

Chief Justice Marshall was the first to use principles of officers' personal liability to avoid the eleventh amendment's bar. See Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 797 (1824) (eleventh amendment's limit of jurisdiction is limited to suits in which a state is named as party of record). See generally Engdahl, supra note 17 at 20.

The *Ex Parte Young* Court used the ultra vires doctrine to avoid ruling on the question of whether the later enactment of the Civil War Amendments limited the scope of the eleventh amendment to the extent necessary to effect the purposes of those amendments. 209 U.S. at 150. The Supreme Court has continued to avoid this issue. See, e.g., Edelman v. Jordan, 415 U.S. 651, 695 n.2 (Marshall, J., dissenting).

41. 209 U.S. 123 (1908).

42. Id.

43. Id. at 160.
amendment's bar to jurisdiction.\textsuperscript{44} Second, the decision rested on the fiction that an injunction against officers in their representative capacities does not affect the state, even though the effect is to hinder the state's ability to enforce its laws.\textsuperscript{45} These fictions have outlasted the ultra vires theory of the decision.\textsuperscript{46}

\section*{C. Eleventh Amendment Doctrine Today}

Today, federal courts will entertain a private party's challenge of state government officials' conduct only if the plaintiff alleges (1) unconstitutional conduct, or (2) conduct that is outside an official's statutory authority and is therefore ultra vires.\textsuperscript{47} Federal courts rarely rely upon the latter prong of the test in suits against state officials.\textsuperscript{48} Instead, courts generally rely upon asserted violations of the fourteenth amendment to extend jurisdiction under \textit{Ex Parte Young}.\textsuperscript{49}

Even when a plaintiff can prove unconstitutional conduct, federal courts will not entertain a claim against an official that is \textit{really} against a state.\textsuperscript{50}

\begin{footnotesize}
\begin{enumerate}
\item The Supreme Court ratified this principle in \textit{Home Telephone & Telegraph Co. v. Los Angeles}, 227 U.S. 278 (1913). The Court held that a federal court cannot refuse to assert jurisdiction over a fourteenth amendment challenge to a municipal ordinance on the grounds that the highest court of the state has not considered whether the ordinance violates the state constitution. \textit{Id.} at 283–84. The Court reasoned that an official's action can be "state action" for purposes of the fourteenth amendment even if contrary to local law. \textit{Id.} at 285–86.
\item In contexts other than eleventh amendment case law, a suit against an officer in his or her representative capacity is considered a suit against the government itself. \textit{See}, e.g., \textit{Monell v. Department of Social Services}, 436 U.S. 658, 690 n.55 (1978).
\item \textit{Engdahl, supra} note 17, at 69 n.335 (the broad ultra vires principles of which \textit{Ex Parte Young} was but one application are no longer law.)
\item \textit{Larson v. Domestic & Foreign Commerce Corp.}, 337 U.S. 682 (1949). The \textit{Larson} Court refocused the ultra vires doctrine by ruling that a government's immunity bars all suits against officers except those for conduct that is (1) not authorized-in-fact, or (2) that is unconstitutional. 337 U.S. at 689–90. \textit{Cf supra} note 40 (under nineteenth century principles, conduct authorized-in-fact but not authorized in contemplation of law could also be ultra vires). Government immunity therefore protects an officer for tortious but authorized acts, or for incorrect decisions as to law or fact, as long as the officer making the decision is empowered to do so. 337 U.S. at 695.
\item In one decision, the Supreme Court did authorize a federal court's assertion of jurisdiction over a state official solely on the basis of allegations that the official's conduct exceeded the scope of his authority. \textit{Scully v. Bird}, 209 U.S. 481 (1908).
\item Justice Stevens has tried to revive use of the ultra vires doctrine to authorize suits against state officials. \textit{See}, e.g., \textit{Florida Dept. of State v. Treasure Salvors, Inc.}, 458 U.S. 670, 691–97 (1982) (Stevens, J., writing for plurality) (in spite of the eleventh amendment, and in the absence of allegations of conduct contrary to the fourteenth amendment, a federal court can order seizure of artifacts in the possession of state officials for purposes of an in rem admiralty jurisdiction action when the officials obtained possession of those artifacts under a state law pre-empted by federal statute); \textit{Fitzpatrick v. Bitzer}, 47 U.S. 445, 458–59 (1976) (Stevens, J., concurring) (majority does not need to rely upon congressional abrogation of eleventh amendment immunity to hold officials liable since majority determined state statute to be invalid under federal legislation, officers' conduct was ultra vires).
\item \textit{Mathis, supra} note 27, at 239.
\item \textit{See generally 13 WRIGHT, supra} note 4, at 148 (2d ed. 1984).
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(Of course, it is often a fiction that the claim is not really against the state in the first instance.\textsuperscript{51}) Generally, courts scrutinize the nature of the relief sought to determine whether the state is the real party in interest.\textsuperscript{52} Suits are barred, for example, when plaintiffs seek to impose damages liability that will require compensation from state funds.\textsuperscript{53} In \textit{Edelman v. Jordan},\textsuperscript{54} the Court ruled that the eleventh amendment also bars suits in equity for retroactive monetary relief.\textsuperscript{55}

The \textit{Edelman} Court did note, however, that states can have imposed upon them costs “ancillary” to an order of compliance.\textsuperscript{56} Subsequent decisions have established that federal courts can require that states allocate substantial funds to support court-ordered injunctive relief.\textsuperscript{57}

II. THE PENNHURST COURT’S DECISION

In 1974 Teri Halderman, a resident of Pennsylvania’s Pennhurst State School and Hospital, initiated a class action suit against the institution and various state and county officials.\textsuperscript{58} The plaintiffs claimed that the conditions at Pennhurst violated rights provided by the eighth and fourteenth amendments,\textsuperscript{59} two federal statutes,\textsuperscript{60} and a Pennsylvania state statute.\textsuperscript{61} The district court ruled for the plaintiffs on almost all issues, and concluded that the plaintiffs possessed a right to habilitation in the least restrictive environment possible.\textsuperscript{62} The district court ordered Pennsylvania to close Pennhurst, and place its residents in smaller, less restrictive group homes.\textsuperscript{63}

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\item \textsuperscript{51} See supra notes 44–46 and accompanying text.
\item \textsuperscript{52} See 13 Wright, supra note 4, at 148 & n.7 (2d ed. 1984) and cases cited therein.
\item \textsuperscript{53} Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).
\item \textsuperscript{54} 415 U.S. 651 (1974).
\item \textsuperscript{55} Id. at 660.
\item \textsuperscript{56} Id. at 668–78.
\item \textsuperscript{57} The Court has affirmed some quite intrusive awards against state officials as “ancillary” to orders for prospective injunctive relief. See, e.g., Quern v. Jordan, 440 U.S. 332, 346–49 (1979) (federal court’s order that state notify plaintiff class members of administrative procedures available for recovering improperly withheld federal benefits properly viewed as “ancillary” to injunction requiring future compliance with federal regulations); Milliken v. Bradley, 433 U.S. 267, 289–90 (1977) (federal court’s order that state bear one-half of cost of remedial education programs is permissible as an order requiring prospective compliance by state officials).
\item \textsuperscript{59} Id. at 904.
\item \textsuperscript{62} The district court found violations of both constitutional provisions, the state act, and § 504 of the Rehabilitation Act. \textit{Pennhurst}, 104 S. Ct. at 904–05.
\item \textsuperscript{63} Id.
\end{itemize}
The Third Circuit affirmed the district court's decision on the basis of Pennsylvania's Mental Health and Mental Retardation Act (MH/MR Act) alone. The court reasoned that federal courts should rely on state law when possible, and that this policy mandated reliance on the state act. The court also reasoned that Supreme Court precedent allowed courts to rely on state-law grounds to order injunctive relief against state officials despite the eleventh amendment.

A five-member majority of the Supreme Court reversed the Third Circuit's decision. Justice Powell, writing for the Court, stated that the doctrine of *Ex Parte Young* does not authorize suits against state officials who are alleged to have violated state law. The Court held that the eleventh amendment bars federal court adjudication of all pendent state-law claims against state officials.

The Court first rejected the argument that the eleventh amendment does not bar prospective injunctive relief ordered on the basis of state law. The fictions of *Ex Parte Young*, the Court noted, have been tolerated only because they are necessary for federal courts to satisfy their obligation to vindicate federal law. The Supreme Court stated that *Edelman v. Jordan*.

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65. The MH/MR Act establishes a comprehensive program for the care of the mentally ill and mentally retarded. Among other provisions, the Act allocates responsibilities between the state (Pa. STAT. ANN., tit. 50, §§ 4201–4203) and its counties (id. §§ 4301–05), and provides guidelines for the admission (id. §§ 4401–19) and care (id. §§ 4421–26) of the mentally disabled. In ruling that the MH/MR Act supported the district court's award, the Third Circuit relied on a Pennsylvania Supreme Court decision, *In Re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981), that construed the Act to require the state to provide the least restrictive environment possible for institutionalized mentally disabled individuals. *Pennhurst State School and Hospital v. Halderman*, 673 F.2d 647, 651 (3d Cir. 1982), *rev'd*, 104 S. Ct. 900 (1984).

66. 673 F.2d at 658.

67. *Id.* (relying on *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909)).


69. *Id.* at 919.

70. *Id.* at 919.

71. *Id.* at 910–11.

72. *Id.*


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represents an accommodation of that need to vindicate federal rights to the need to protect state sovereignty. The Court rejected the view that *Edelman* teaches that injunctive relief does not impact state sovereignty. The *Pennhurst* Court instead ruled that, because federal court decisions of state law claims do not vindicate federal rights, pendent state-law claims do not qualify for *Ex Parte Young*’s exception to the barrier of the eleventh amendment. Moreover, the Court noted, a federal court’s order that state officials conform their conduct to state law is especially intrusive into state sovereignty.

The Court also rejected the dissent’s theory that because the defendants’ conduct failed to achieve the purposes of Pennsylvania’s MH/MR Act, they acted ultra vires and, under the *Ex Parte Young* doctrine, were subject to injunction by a federal court. The Court noted that the Pennsylvania legislature’s inadequate funding caused the defendants’ failure to satisfy the MH/MR Act’s requirements. The Court apparently concluded that the ultra vires doctrine can operate to avoid the eleventh amendment’s bar only (1) when necessary to vindicate federal rights, and (2) when an official acts without any authority whatsoever.

The Court asserted that eleventh amendment doctrine addresses concerns of federalism; the doctrine dictates where, not whether, a state may be sued. The Court characterized the eleventh amendment as a constitutional deprivation of federal judicial power over claims against states. This jurisdictional bar cannot be displaced, the Court ruled, by the judge-made doctrine of state-law pendent jurisdiction. In response to arguments that the doctrine of pendent jurisdiction satisfies policies of convenience, judicial economy, and fairness to litigants, the Court noted that a constitutional bar to jurisdiction cannot fall to considerations of policy.

Justice Stevens vigorously dissented. By abandoning previous reliance on the ancient doctrine of sovereign immunity, he argued, the Court disregarded the holdings of at least twenty-eight decisions. Justice Stevens

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74. 104 S. Ct. at 910-11.
75. Id. at 910-11, 915 n.25.
76. Id. at 911.
77. Id.
78. Id. at 911-17.
79. Id. at 912.
80. Id. at 916 n.25.
81. Id. at 907-08.
82. Id. at 907.
83. Id. at 918-19.
84. Id. at 919-20.
85. Id.
86. Id. at 943 (Stevens, J., dissenting).
insisted that the Court ignored the pivotal point of *Ex Parte Young*, that suits to enjoin officials’ ultra vires conduct do not constitute suits against the state.\(^87\)

Justice Stevens interpreted the federal ultra vires doctrine differently from the majority. He reasoned that the defendant officials’ conduct was ultra vires because it failed to satisfy the obligations established by Pennsylvania’s MH/MR Act.\(^88\) The law provided the defendants no discretion, he argued, to disregard their duties with respect to the institutionalization of the mentally disabled.\(^89\) Because the state sovereign did not authorize the conduct of the defendants, he concluded, the Court should not have ruled that state immunity shielded the officials from the federal court’s injunction.\(^90\)

Justice Brennan wrote a brief separate dissent to reassert his view that the eleventh amendment bars only those federal court suits against states that are brought by citizens of another state.\(^91\)

III. ANALYSIS OF THE PENNHURST DECISION

A. One Step Forward: Some Fictions Abandoned

In 1965 Professor Jaffe advocated that federal courts abandon “fruitless and unhistorical attempts to determine whether a suit is ‘really’ against the state.”\(^92\) The *Pennhurst* decision heeds Professor Jaffe’s cry in two ways. First, the Court held that the eleventh amendment barred the injunction ordered against the Pennhurst officials.\(^93\) This holding acknowledges that even prospective injunctive relief ordered against state officials interferes with a state’s sovereignty and is therefore “really” against the state.\(^94\)

Second, the Court’s rejection of Justice Stevens’ ultra vires theory acknowledges that judicial condemnation of state officers’ failure to achieve statutory objectives can actually constitute condemnation of the state entity itself. In the *Pennhurst* case, the Pennsylvania legislature’s failure to provide adequate funding caused the individual Pennhurst defendants’ failure to provide adequate care for the institution’s residents.\(^95\)

\(^{87}.\) Id. at 932–33.

\(^{88}.\) Id. at 928–29, 939.

\(^{89}.\) Id. at 928.

\(^{90}.\) Id. at 942.

\(^{91}.\) Id. at 921–22 (Brennan, J., dissenting).

\(^{92}.\) L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 229 (1965).

\(^{93}.\) 104 S. Ct. at 911.

\(^{94}.\) See id. at 915 n.25. At other points in the decision, however, Justice Powell embraces the fiction of *Ex Parte Young* that “a suit challenging the constitutionality of a state official’s action is not one against the State.” Id. at 909. Justice Powell’s alternate acceptance and rejection of the fictions underlying *Ex Parte Young* appear to be irreconcilable. See infra notes 111–20 and accompanying text.

\(^{95}.\) 104 S. Ct. at 912.
individual officer's failure to follow statutory instructions, caused the injuries suffered by the plaintiffs. As Justice Powell concluded, if state law was violated, it was a case of the state itself not fulfilling its legislative promises.

The *Pennhurst* opinion reveals the fictive nature of the *Ex Parte Young* doctrine. The doctrine attempts to distinguish between suits challenging state action and suits challenging state officers' official actions that are unconstitutional or, at least before *Pennhurst*, ultra vires. As Justice Powell notes, however, a state can act only through its officers. Thus a suit challenging the authorized activities of state officers is necessarily a suit against the state itself.

Abandoning the fictions of *Ex Parte Young* is a step toward producing a coherent eleventh amendment doctrine. By pretending that prospective injunctive relief awarded against state officials does not implicate state immunities, courts disguise the underlying question of these cases: when should the nondemocratic branch of the federal government impose fourteenth amendment obligations upon states? Neither courts nor legislatures can easily answer the question of when a state's interest in conducting its business without interference must fall to the federal judiciary's obligation to protect federal rights. However, courts can better resolve the issue by explicitly acknowledging the competing interests of the state entity, the federal courts, and the plaintiff, than by engaging in fictions.

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96. Theoretically, as Justice Stevens argued, the individual *Pennhurst* defendants could be considered to have acted contrary to the objectives outlined in Pennsylvania's MHMR Act, see supra note 65, and therefore to have acted ultra vires. Generally, however, courts find that officials have acted outside their statutory authority only when they in some manner have chosen to act outside the scope of their office. See, e.g., Kozera v. Spirito, 723 F.2d 1003, 1008 (1st Cir. 1983) (sovereign immunity does not bar claim that Secretary of Health and Human Services promulgated a regulation that violated federal statute and constitution); Washington v. Udall, 417 F.2d 1310, 1316-17 (9th Cir. 1969) (sovereign immunity does not bar claim that Secretary of the Interior imposed limits on delivery of irrigation water without statutory authorization). It is difficult to argue that an officer has acted contrary to the state's mandate when the state itself refuses to provide the funds necessary to comply with the statute. Cf. William v. Bennett, 689 F.2d 1370, 1387-89 (11th Cir. 1982) (even though state may not avoid injunction ordering prison reform by claiming inadequate funds, individual officers may be allowed to escape personal liability by proving they possessed inadequate resources to comply with mandates of constitution), cert. denied, 104 S. Ct. 335 (1983).

97. 104 S. Ct. at 912.

98. Id. at 915, n.25.

99. See L. JAFFE, supra note 92, at 200; Davis, supra note 1, at 435.

100. K. DAVIS, ADMINISTRATIVE LAW TEXT § 27.02, at 498 (3d ed. 1972); L. JAFFE, supra note 92, at 200; Baker, supra note 29, at 165.

101. For studies that identify and evaluate the interests at stake in an eleventh amendment controversy, see L. JAFFE, supra note 92, at 215-22; Baker, supra note 29, at 175-80; Davis, supra note 1, at 27; and Lichenstein, Retroactive Relief in the Federal Courts Since Edelman v. Jordan: A Trip Through the Twilight Zone, 32 CASE W. RES. L. REV. 364 (1982).

102. As Professor Davis observed: "The forms do matter. . . . [F]alse pretenses cause much harm
In *Pennhurst*, for example, abandoning the fictions of *Ex Parte Young* allowed the Court to consider explicitly whether a state's failure to fund its own legislative programs warranted a federal court's assertion of power over state officials absent proof of violations of federal law. The question of whether federal courts should rely on state law is difficult, especially when a plaintiff seeks to effect institutional reform. The majority candidly assessed the tension between the states' interest in protecting their policymaking functions from federal court intrusion and the federal courts' obligation to vindicate federal rights. The Court also recognized that a state forum is available for plaintiffs to pursue state law claims. These considerations support the majority's ultimate conclusion that state sovereignty precludes assertion of federal jurisdiction over state officers' official conduct when that conduct violates no federal law.

As Justice Stevens pointed out in his dissent, the Court's decision does disregard time-honored arguments. Reliance on state law allows federal courts to avoid unnecessary constitutional adjudication and duplicative litigation. Reliance on state law also enhances the decisionmaking autonomy of the states. As Justice Stevens also pointed out, the decision overturns precedents that dictate that once a federal court has acquired jurisdiction over state officers under *Ex Parte Young*, the court can and should rule on pendent state-law claims.

even when no one is fooled by them." Davis, *supra* note 1, at 438. See also L. Jaffe, *supra* note 92, at 229; Baker, *supra* note 29, at 172-75.

103. The *Pennhurst* controversy reveals a conflict in two lines of federal court tradition. Supreme Court decisions suggest that federal courts' power to impose institutional reforms on state or local facilities is limited to redressing established constitutional violations. See, e.g., Dayton Bd. of Education v. Brinkman, 433 U.S. 406, 419-20 (1977); Milliken v. Bradley, 433 U.S. 267, 281-83 (1977); Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 16 (1971).

Federal courts, however, prefer to rely on state law whenever possible. Reliance on state law avoids decisions under the federal constitution; this doctrine is often called the "Ashwander doctrine" because it was so clearly articulated in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). See also Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1097 n.96 (1974). Reliance on state law is also considered a means to honor state sovereignty. Theoretically, a state may avoid completely a federal court ruling that is based on state law by changing its law legislatively or by obtaining a state court ruling on the matter.

104. The Court identified three intrusive aspects of the court of appeals' affirmation of the trial court's award: (1) subjecting a sovereign state to suit in the forum of the federal sovereign; (2) imposing a substantial and ongoing financial burden on the state; and (3) imposing relief on the state that does not vindicate federal law, but instead merely instructs state officials on how to conform their conduct to state law. *Pennhurst*, 104 S. Ct. at 907, 910, 911.

105. *Id.* at 910-11.

106. *Id.* at 919-20.

107. *Id.* at 939-42.

108. *Id.*

109. *Id.* at 939. The majority decision overrules at least three Supreme Court decisions. See Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909); see also Louisville & Nashville R.R. Co. v. Greene, 244 U.S. 522 (1917); Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499 (1917).
Confronting the Fictions of the Eleventh Amendment

The majority's reasoning is persuasive, however, because of the Court's acknowledgment that the court of appeals' award significantly affected the sovereignty of Pennsylvania. In contrast, Justice Stevens' analysis refuses to acknowledge that the award interfered with the state.110 This refusal to acknowledge reality robs his ultra vires argument of persuasiveness.

B. Two Steps Backward: A Jurisdictional Tangle

Even though the Pennhurst Court took a step forward by discarding the fiction that suits to enjoin state officials' conduct do not affect state sovereignty, the Court also created a jurisdictional tangle. As discussed earlier, the use of fiction in eleventh amendment doctrine has allowed courts to avoid resolving the issue of the nature of the eleventh amendment defense and its relationship to the fourteenth amendment.111 The Pennhurst Court discarded a fiction of Ex Parte Young, but still failed to resolve this issue. On one hand, the Court based its holding that the eleventh amendment bars state law pendent jurisdiction claims on a characterization of the eleventh amendment as a jurisdictional defense.112 On the other hand, however, the Court seemed to describe states' eleventh amendment immunity as a substantive defense that must be balanced against the federal courts' fourteenth amendment obligation to vindicate federal rights.113

Moreover, the Court's holding that the eleventh amendment is a jurisdictional bar that cannot be overcome by the judge-made doctrine of pendent jurisdiction114 creates a dilemma. The Ex Parte Young doctrine is entirely judge-made.115 The Pennhurst Court acknowledged, however, that the use of Ex Parte Young is necessary if federal courts are to satisfy their fourteenth amendment obligation to vindicate federal rights.116 The Court failed to explain how courts can use the Ex Parte Young doctrine,117 which the Court

110. Even Justice Stevens admits that his ultra vires argument is better supported by history than by logic. Id. at 937 ("the distinction between the State and its officers, realistic or not, is one firmly embedded in the doctrine of sovereign immunity.").
111. See supra notes 15-19 and accompanying text.
112. Pennhurst, 104 S. Ct. at 919-20; see supra notes 83-85 and accompanying text. Justice Powell's opinion appears to adopt the theories of Professors Nowak and Tribe that article III creates judicial power over controversies between states and private citizens, and that the eleventh amendment constitutionally limits the judiciary, but not Congress. See Nowak, supra note 27 (courts possess limited inherent power under the fourteenth amendment to impose prospective relief against states; Congress possesses broader power); Tribe, supra note 27 (eleventh amendment does not equally limit Congress and the judiciary).
113. 104 S. Ct. at 910-11 see supra notes 73-75 and accompanying text.
114. 104 S. Ct. at 919-20.
115. see supra notes 39-46 and accompanying text.
116. 104 S. Ct. at 910-11.
117. The Court did emphasize that the Ex Parte Young doctrine is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the
acknowledged infringes upon state sovereignty, when the eleventh amendment constitutionally bars federal court infringement of state sovereignty.

The Court avoided the tangle it created by resorting to the fiction that it scorned. At several points in the opinion, the Court invoked *Ex Parte Young*'s fiction that suits challenging the constitutionality of a state official's conduct are not suits against the state itself. Apparently, the Court's rejection of this fiction is limited to state-law claims.

The Court should have discarded the doctrine of *Ex Parte Young* altogether. Confusion and illogic will plague eleventh amendment doctrine as long as courts hide the conflict between the eleventh and fourteenth amendments behind fictions. Lower courts should follow the spirit of the holdings of *Pennhurst* and completely abandon the fiction of *Ex Parte Young*.

IV. AN ALTERNATIVE APPROACH: SECTION 1983 JURISDICTION OVER STATES

The fictive doctrine of *Ex Parte Young* is not necessary to resolve the conflict between the eleventh and fourteenth amendments. An alternative means to justify federal court assertion of power over state officials is to rely on section 1983 as congressional authorization for federal courts to

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118. 104 S. Ct. at 915 n.25; see supra notes 92–97 and accompanying text.
119. *Id.* at 908–09, 919.
120. The issue addressed by the Court was limited to claims that state officials violated state law in carrying out their official responsibilities. *Id.* at 911, 919.

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

*Id.*

The provision, originally part of the Civil Rights Act of 1871, was enacted to enforce the guarantees of the fourteenth amendment by providing individuals a cause of action in federal court. See Act of April 20, 1871, ch. 22, § 1, 17 Stat 13. At the time of the statute's enactment, the federal trial courts possessed no general jurisdiction over cases arising under the federal constitution, laws, or treaties. J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, Moore's Federal Practice ¶ 0.62, at 700.12 (2d ed. 1984) [hereinafter cited as Moore]; see generally Developments in the Law, supra note 38, at 1135, 1153–56. The provision now exists in a remedial portion, 42 U.S.C. § 1983, and a jurisdictional counterpart, 28 U.S.C. § 1343(a)(3) (1982). 13B Wright, supra note 4, § 3573, at 192–94 (2d ed. 1984); I Moore, supra, ¶ 0.62. Today, a plaintiff who asserts a cause of action under § 1983 can also rely on 28 U.S.C. § 1331 (1982), which provides federal district courts original jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. 13B Wright, supra note 4, § 3573.2, at 207.
fashion those remedies necessary to vindicate federal rights. Congress may authorize causes of action that infringe on state immunity when acting under the authority of the enforcement clause of the fourteenth amendment. Lower federal courts could rely on section 1983 as authority to fashion remedies against states and their functional equivalents, state officials acting in their representative capacity. This alternative allows courts to abandon many of the fictions of *Ex Parte Young*. Moreover, courts can abandon the fictions even while the Supreme Court struggles to characterize the nature of the eleventh amendment.

The *Pennhurst* majority's characterization of the purposes of the *Ex Parte Young* doctrine is strikingly similar to the Court's characterization of the purposes of section 1983. The purpose of the *Ex Parte Young* doctrine, according to the *Pennhurst* Court, is to enable the federal courts to fulfill their obligation to promote federal rights and to hold state officials responsible to the supreme authority of the United States. This theme of state officials' accountability for violations of federal rights is echoed in section 1983 doctrine. Even though section 1983 was enacted as the enabling statute for the fourteenth amendment, the statute's remedy is not limited to violations of that amendment. The statute instead provides a private cause of action for the violation of any constitutional provision and any statutory right for which Congress has not provided an alternative remedy.

A. Developing a Section 1983 Model

The Supreme Court has concluded that section 1983 does not completely override states' immunity to suit. The Court's decisions do not, however, foreclose a two-tiered analysis (1) that section 1983 provides federal courts

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122. A further means to justify federal court jurisdiction over state officials is to construe the fourteenth amendment to limit the barrier of the eleventh amendment. See, e.g., Nowak, supra note 27 (despite the eleventh amendment, under the fourteenth amendment federal courts possess inherent power to name states directly and order compliance with the fourteenth amendment). The Supreme Court has refused to rule that the fourteenth amendment overrides the eleventh amendment. See supra notes 39–40 and accompanying text. Until the Supreme Court rules that the fourteenth amendment authorizes federal courts to act against states, federal courts are constrained to rely on congressional authorization or the fictions of *Ex Parte Young*. Cf. Jagnandan v. Giles, 538 F.2d 1166, 1186–90 (5th Cir. 1978) (Goldberg, J., with Brown, C.J., concurring) (concurring justices requested Supreme Court to construe fourteenth amendment to empower federal courts to act against states).


127. See infra notes 135–38 and accompanying text.
jurisdiction to fashion remedies against states, and (2) that the states' sovereign immunity provides a limited defense to suits by private citizens.

The first tier of the proposed analysis requires that states be included within the scope of section 1983. The ambit of section 1983 can extend to states only if states qualify as "persons" for section 1983 purposes. In 1961, the Supreme Court ruled that Congress did not intend to include municipal corporations within the statute's definition of persons. Subsequently, the Court ruled—without considering whether states are persons for purposes of section 1983—that section 1983 does not abrogate states' eleventh amendment immunity to money damages or retroactive monetary relief. In 1978, the Court reversed its earlier position and ruled that a municipal corporation does qualify as a person within section 1983.

Lower courts now disagree whether states are persons for purposes of section 1983. Some lower courts interpret Supreme Court decisions to exclude states from section 1983's ambit. Other courts interpret the same decisions to leave the question open, however, and include states within the reach of section 1983. The latter interpretation is more consistent with the Court's standards for defining "person" for purposes of section 1983.

128. 13B WRIGHT, supra note 4, § 3573.1, at 198, 201–02 (2d ed. 1984).
The second tier of the proposed analysis encompasses states' defenses to section 1983 liability. Even if the scope of section 1983 includes states, the Supreme Court has held that states are immune to claims (1) for money damages, (2) for retroactive restitution, (3) that name a state as a party defendant, and (4) that are based on state law.

Arguably, these decisions establish that states are completely immune to section 1983 actions. Under this analysis, the eleventh amendment bars these claims against state officials because the claims are "really" against the state, or run "directly" against the state.

Supreme Court decisions, however, reject the view that the eleventh amendment renders section 1983 meaningless with regard to states. The Court has acknowledged that federal courts acting under section 1983 can interfere with state functions to a limited extent. Thus, a more precise analysis of the Court's decisions is that the eleventh amendment simply limits the remedial power of federal courts. Edelman v. Jordan, for example, should be interpreted merely to hold that section 1983 did not

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Ref: 731, 754–59 (1982).
137. Alabama v. Pugh, 438 U.S. 781, 782 (1978); see also infra notes 145–51 and accompanying text.
139. See, e.g., Note, supra note 134, at 752–53 (Supreme Court cases suggest that states are persons for purposes of § 1983, but § 1983 does not override states' eleventh amendment immunity from suit in federal court).
140. In Pennhurst, for example, Justice Powell tried to distinguish between claims that run "directly" against a state and claims that are permissible under the eleventh amendment. See 104 S. Ct. at 912 n.17, 917.
141. See, e.g., Quem v. Jordan, 440 U.S. 332, 345 (1979) ("Nor does our reaffirmance of Edelman render § 1983 meaningless insofar as States are concerned.").
142. See Pennhurst, 104 S. Ct. at 912 n.17 (in light of Civil War Amendments, an injunction based on federal law is not barred by state sovereignty); id. at 915 n. 25 (injunctive relief does run against a state); Edelman v. Jordan, 415 U.S. 651, 677 (1974) (citizen may sue a state under § 1983, but relief is limited to prospective injunctive relief).
143. Courts would not contravene principles of § 1983 case law if they were to recognize states' traditional immunities as limits to the scope of § 1983. Even though the text of § 1983 suggests that it is not limited by any exceptions, see supra note 121, the Court has allowed traditional immunities to be asserted as defenses by state legislative, executive, and judicial officials. See generally 13B WRIGHT, supra note 4, § 3573.3, at 220–25 (2d ed. 1984).

The proposed two-tiered model is consistent with reasoning advanced by both Justices Powell and Rehnquist. See Maine v. Thiboutot, 448 U.S. 1, 22 n.10 (1980) (Powell, J., concurring in part and dissenting in part) ("Section 1983 action may be brought against States . . . [that] are protected against retroactive damage awards by the Eleventh Amendment . . . . "); Hutto v. Finney, 437 U.S. 678, 709 n.6 (1978) (Powell, J., concurring in part and dissenting in part) (even if states are considered persons for purposes of § 1983, states should not lose their long-standing immunity to damages liability); Edelman v. Jordan, 415 U.S. 651, 677 (1974) (Rehnquist, J.) (citizen may sue a state under § 1983, but award is limited to prospective injunctive relief). Cf. Hutto, 437 U.S. at 702–03 (Brennan, J., concurring) (if states are persons within § 1983, they may also be vulnerable to monetary liability).
override the states' traditional immunity to money awards in the circumstances of that case. The decision should not be interpreted to hold that states are completely immune to federal courts' section 1983 authority.

B. A Limited Barrier to the Model

The Supreme Court's per curiam decision in *Alabama v. Pugh*\textsuperscript{145} presents a limited barrier to the proposed analysis. In *Pugh* the Court held that a state is immune from being named as a defendant in a section 1983 action.\textsuperscript{146} *Pugh* therefore bars federal courts from using the proposed analysis to entertain section 1983 claims against states that are actually named in the parties' pleadings.

The immunity recognized in *Pugh* is a meaningless formality, however.\textsuperscript{147} In *Pugh*, inmates of the state penitentiary system brought a section 1983 action against the State of Alabama and various government agencies and officials, seeking relief from allegedly unconstitutional conditions.\textsuperscript{148} The Supreme Court ordered that Alabama and the Alabama Board of Corrections be dismissed from the action.\textsuperscript{149} The Court otherwise left intact the federal district court's order that the Alabama prison system be reformed.\textsuperscript{150} The message of *Pugh* is clear: federal courts cannot entertain claims in which states are named as defendants, but they can control the official conduct of state officers. A state cannot be sued in form. It can, however, be sued in substance.

Despite the holding of *Pugh*, federal courts can use the proposed two-tiered approach to abandon the use of the *Ex Parte Young* doctrine when entertaining section 1983 suits against state officials. *Pugh* does not bar federal courts from acknowledging that any section 1983 suit against a state official for his or her officially sanctioned conduct is in substance a suit against the state itself.\textsuperscript{151} The proposed analysis can at least be used to partially eliminate the fictive doctrine of *Ex Parte Young*.

C. Applying the Model

The proposed two-tiered approach provides a means to preserve the Court's step toward producing a coherent eleventh amendment doctrine.\textsuperscript{152}

\textsuperscript{145} 438 U.S. 781 (1978).
\textsuperscript{146} Id. at 782.
\textsuperscript{147} Id. (Stevens, J., dissenting) ("Nothing . . . is accomplished by the summary action [the Court] takes today.").
\textsuperscript{149} 438 U.S. at 782.
\textsuperscript{150} Id. (Stevens, J., dissenting).
\textsuperscript{151} See supra notes 92–99 and accompanying text.
\textsuperscript{152} See supra notes 92–110 and accompanying text.
Section 1983 case law presents an excellent framework for analyzing state immunities that are asserted as defenses to fourteenth amendment obligations. As the Court noted in City of Newport v. Fact Concerts, Inc., when a state official asks the Court to recognize a traditional immunity as a defense to a section 1983 action, the Court considers the policies behind the immunity and whether they are compatible with the policies of section 1983. Traditional immunities must be limited to the extent that they interfere with section 1983 policies.

The Fact Concerts approach can be considered analogous to the Pennhurst Court’s observation that federal courts must accommodate states’ sovereign immunity and the federal courts’ obligation to vindicate federal law. If the Fact Concerts analysis were applied to eleventh amendment controversies, it would force courts to consider the competing interests of states and federal courts. The analysis also would allow courts to distinguish precedent and impinge upon immunities explicitly if necessary to vindicate federal rights. A court asked to award retroactive injunctive relief, for example, could do so if necessary to implement federal law. The court would not be hindered by an analysis that a suit requesting retroactive relief is a suit that is “really” against the state, nor would it have to characterize the relief awarded as “ancillary” to a prospective injunctive relief order.

The proposed two-tiered approach also provides a means to explain the irreconcilable aspects of the Pennhurst opinion. Construing section 1983 to provide federal jurisdiction over states encompasses both the jurisdictional and substantive aspects of eleventh amendment doctrine described by Justice Powell. The jurisdictional bar that cannot be overridden by judicial determinations of policy is instead overridden by congressional authorization under the enforcement clause of the fourteenth amendment. Courts must accommodate the section 1983 cause of action, however, to the substantive sovereign immunity defenses noted by the Pennhurst Court.
The proposed analysis may limit federal court power. If section 1983 provides the sole authority for federal courts to control state action, federal courts will be unable to accept cases in which the exercise of federal jurisdiction would serve federal interests other than the rights protected by section 1983. In his dissenting opinion to Cory v. White, for example, Justice Powell advocated a construction of the eleventh amendment that would permit a federal court to entertain an estate administrator's claim brought under the Federal Interpleader Act. Justice Powell argued that the eleventh amendment should not bar actions that arise because of the unique structure of the federal system.

Justice Powell foreclosed his own argument, however, by stating in Pennhurst that judicial determinations of convenience and fairness to litigants cannot override the bar of the eleventh amendment. The Pennhurst analysis demands the conclusion that, without congressional authorization, a federal court cannot assert jurisdiction over a suit that is substantially against a state. Although the exercise of pendent jurisdiction over state law claims is considered necessary for the effective functioning of federal courts, the Pennhurst Court held that as a judge-made doctrine it is barred by the eleventh amendment. That same reasoning must extend to assertions of jurisdiction made for the purpose of providing litigants a federal forum in which to litigate their claims in the absence of congressional or constitutional authority to do so.

By substituting section 1983's congressional authorization of suits against state officials acting in their official capacity for the fictions of Ex Parte Young, federal courts can begin to clear up the tangles created by Pennhurst. Federal courts can also begin to untangle eleventh amendment doctrine, and move toward carefully analyzing the interests at stake in an eleventh amendment controversy.

Most importantly, by relying upon section 1983 instead of the fictions of Ex Parte Young, federal courts will take a large step toward reducing the uncertainty of the parameters of federal court jurisdiction. Eleventh amendment doctrine is so unclear that predictability is impossible. Litigants

164. Id. at 96. Justice Powell stated that "in a case such as this, in which the very controversy is the result of our federal system, I continue to believe that resort to federal interpleader is not proscribed by the Eleventh Amendment."
165. 104 S. Ct. at 919-20.
166. See supra note 10.
167. 104 S. Ct. at 919-20.
168. Construing § 1983 to provide congressional authorization of private suits against states explains, for example, how states can waive their immunity and consent to federal court jurisdiction. Cf. supra notes 32–33 and accompanying text.
availing themselves of the federal forum risk an expensive and unpredictable determination that their appeal for relief must be sought in state courts.\footnote{170}{Id. at 723. ("Our failure to simplify federal jurisdictional rules has allowed them to become essentially a bag of tricks, traps for the unwary, and huge hurdles even for the most wary litigants.").} The proposed analysis provides a means to reduce the uncertainty regarding the federal courts' power to control state conduct.

V. CONCLUSION

It is tempting to discount Justice Powell's novel formulation of the eleventh amendment as a result-oriented decision to constitutionally bar from the federal courts state-law claims against state officials.\footnote{171}{Justice Powell has already revealed discomfort with the availability of state-law claims in federal court. See, e.g., Maine v. Thiboutot, 448 U.S. 1, 24 (1980) (Powell, J., dissenting) ("there is some evidence that § 1983 claims are already being appended to complaints solely for the purpose of obtaining [attorneys'] fees [under 42 U.S.C. § 1988] in actions where 'civil rights' of any kind are at best an afterthought."); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 629 (1974) (Justice Powell's suggestion in dissent—that case be remanded for determination of state-law claims against city officials—would misuse the constitutional decision-avoidance principles of Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).} The Burger Court has distinguished itself with its attempts to divert local issues to state courts and to preserve the federal courts for entertaining federal matters. Construing the eleventh amendment to require that all state-law claims be allocated to state court is perhaps merely a convenient means to foreclose argument that some state-law claims against state officials do belong in federal court.\footnote{172}{The \textit{Pennhurst} majority could have achieved the same result without relying on the eleventh amendment. Pendent jurisdiction is a doctrine of discretion, not of right. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The \textit{Pennhurst} Court could have ruled that use of pendent jurisdiction and reliance upon the constitutional decision-avoidance principles of \textit{Ashwander v. Tennessee Valley Authority} are inappropriate when a private citizen is challenging the conduct of state officials. See, e.g., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 629 (1974) (\textit{Ashwander} standards are susceptible to misuse).}

Justice Powell's attempt to refocus eleventh amendment doctrine should not, however, be discounted. Eleventh amendment doctrine is sorely in need of reform. Much of the case law is inconsistent, and attempts by various members of the divided Burger Court to develop a meaningful eleventh amendment doctrine have created further confusion.

Justice Powell's attempt to describe a new approach to the eleventh amendment doctrine reveals a willingness to brush away the fictions that obfuscate the competing concerns of states, federal courts, and litigants.
Federal courts should now begin working to eliminate the fictions that remain. The Civil War Amendments are over a hundred years old. It is time for federal courts to acknowledge that section 1983 authorizes and obligates the federal judiciary to insure that the sovereign states do not deprive their citizens of the rights guaranteed by the national sovereign.

Camille Gearhart