Deepening the Anomaly of Sovereign Immunity: Pennhurst State School and Hospital v. Halderman

Robert G. Klepp

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DEEPENING THE ANOMALY OF
SOVEREIGN IMMUNITY: PENNHURST
STATE SCHOOL AND HOSPITAL v.
HALDERMAN

The doctrine of sovereign immunity, which originated at early
English common law, embodies the principle that a sovereign can-
not be sued without its consent. This principle underlies the elev-
inth amendment to the United States Constitution, which is con-
strued to immunize states from suits brought in federal court.

1 THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, SOVEREIGN IMMUNITY: THE LIABIL-
ITY OF GOVERNMENT AND ITS OFFICIALS 1 (rev. ed. 1976) [hereinafter cited as THE LIABILITY
OF GOVERNMENT AND ITS OFFICIALS]. At English common law, it was settled by the thir-
teenth century that, absent the king's consent, the king could not be sued in his own courts. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1, 2
(1963); Martin, The New Interpretation of Sovereign Immunity for the States, 16 CAL.
W.L. REV. 39, 40 (1980). However, sovereign immunity did not leave those subjects with
claims against the crown without any remedy. Jaffe, supra at 1. By using certain procedural
devices, the potential hardship of sovereign immunity was avoided and subjects were al-
lowed to obtain relief from the king and government officials. Id. at 3-8. Indeed, courts
habitually granted "petitions of right," id. at 5, or allowed suits for damages against govern-
ment officials, id. at 9. Moreover, subjects could sue without the king's consent in cases
involving real property. Id. at 6 n.10. Thus, it is generally accepted that the king enjoyed
only a nominal immunity under common law that did not reflect the actual accountability of
the government to its subjects. Gibbons, The Eleventh Amendment and State Sovereign
Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1895 (1983); see also C. JACOBS,
THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 6 (1972) ("The immunity doctrine . . .
was largely a legal conception, which determined the forms of procedure in some cases but
did not seriously impair the subject's right to recovery in accordance with substantive law"); Jaffe, supra, at 1 ("When it was necessary to sue the Crown eo Nomine consent apparently
was given as of course").

Prior to the American Revolution, colonial subjects were afforded the same procedural
remedies against government officials as their English counterparts. See Jaffe, supra, at 19.
In addition, colonists relied upon their right to sue local government entities. Gibbons,
supra, at 1896. Indeed, the colonial charters of Massachusetts, Connecticut, and Rhode Is-
land expressly authorized suits against the governor and the colonial governments, id., and
the Virginia Corporations, although acting as sovereign over its colonial inhabitants, "was no
less suable than corporations generally," id. at 1897. Similarly, the governments of New
York, Maryland, and Pennsylvania were founded on proprietary grants to individuals "who
at common law enjoyed no immunity from suit." Id.

2 U.S. CONST. amend XI. The eleventh amendment, ratified in 1798, 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.
Id. Although the language of the eleventh amendment addresses only suits brought against
Although state immunity is firmly entrenched in the scheme of federal jurisdiction, many states have enacted laws abrogating their immunity from private suits. Consequently, federal courts are often unable to entertain a suit against a state even though the state has consented to be sued in its own courts. Recently, in *Pennhurst State School & Hospital v. Halderman*, the Supreme Court held that when a plaintiff asserts both state and federal claims against his state arising from the same transaction, and adequate relief can be granted on the basis of state law alone, a federal court may not exercise pendent jurisdiction over the state.

a state by a citizen of another state, the doctrine of sovereign immunity has been interpreted to prohibit a federal court from exercising jurisdiction over an unconsenting state in a suit brought by a citizen of that state. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 15, 19-20 (1890). Nevertheless, the doctrine of sovereign immunity contains several provisos whereby a state or its officials may be subjected to suit in federal court. See infra notes 40-42, 46-47 and accompanying text.

3 See *The Liability of Government and Its Officials*, supra note 1, at 29-43. The trend toward abrogation of sovereign immunity at the state level became apparent in the 1950's. *Id.* at 29; *Van Alstyne, Governmental Tort Liability: A Decade of Change*, 1966 U. Ill. L.F. 919, 920. It is generally believed among those who support the trend toward abrogation that sovereign immunity has outlived its own validity. *The Liability of Government and Its Officials*, supra note 1, at 29; see also *Van Alstyne, supra*, at 921 (noting policy considerations supporting abrogation stated by both courts and commentators). Indeed, in overruling a law that immunized the state from suit in state court, the Minnesota Supreme Court observed:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.


4 See, e.g., *Florida Dep't of Health & Rehabilitation Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (state statute whereby agency could "sue and be sued" held not to constitute waiver of immunity from suit in federal court); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (waiver of immunity is accomplished only by unequivocal consent to suit in federal court); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946) (consent to suit in state court does not waive eleventh amendment immunity).


*See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The *Gibbs* Court defined pendent jurisdiction as follows:

Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"... and the relationship between that claim and the state claim permits the conclusion that the entire
claims unless the state has explicitly waived immunity to suit in federal court.\(^7\)

In *Pennhurst*, the plaintiffs claimed that substandard conditions at a state institution for the mentally retarded constituted a violation of the residents' rights under the eighth and fourteenth amendments to the United States Constitution, as well as a violation of various federal and state statutes.\(^8\) Upon finding conditions at Pennhurst to be dangerously inadequate, the District Court for the Eastern District of Pennsylvania granted an injunction to close the institution, and required state officials to provide suitable community living arrangements for the displaced residents.\(^9\) After several appeals and remands, the Supreme Court granted a petition

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\(^7\) 104 S. Ct. at 919.

\(^8\) *Id.* at 904. The suit was originally brought by Terri Lee Halderman, a resident of Pennhurst, in the District Court for the Eastern District of Pennsylvania. *Id.* at 903. Subsequently, the complaint was amended to include as plaintiffs all present and potential future residents of Pennhurst, the Pennsylvania Association for Retarded Citizens ("PARC") and the United States Government. *Id.* at 904. The named defendants in the suit were Pennhurst, several Pennhurst officials, the Pennsylvania Department of Public Welfare, several public welfare officials, and other various state and county officials. *Id.* The plaintiffs claimed that conditions at the institution not only violated the residents' rights under the eighth and fourteenth amendments, but also their rights under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1982), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 & Supp. 1984). 104 S. Ct. at 904.

\(^9\) *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1326 (E.D. Pa. 1977). At trial, the district court observed that the eighth and fourteenth amendments guarantee that residents of state institutions shall be free from harm, *id.* at 1321-22, 1324, *aff'd in part rev'd in part*, 612 F.2d 84 (3d Cir. 1982), *rev'd*, 104 S. Ct. 900 (1984), and that the equal protection and due process clauses of the fourteenth amendment respectively provide for non-discriminatory habitation and habilitation in the least restrictive environment. *Id.* at 1319-20. In addition, the plaintiffs claimed that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, created a federal statutory right to freedom from discrimination, *id.* at 1323. The plaintiffs further claimed that the Pennsylvania Mental Health and Mental Retardation Act, guaranteed retarded residents in state institutions a right to minimally adequate habilitation. *Id.* at 1322. The district court appointed a Special Master "with power and duty to plan, organize, direct, supervise and monitor the implementation" of the district court's order to close the institution and to provide suitable community living arrangements for Pennhurst patients. *Id.* at 1326.
for a writ of certiorari to the Third Circuit Court of Appeals to determine whether the injunction based on the plaintiffs' state-law claim was barred by the eleventh amendment.\textsuperscript{10}

Adopting the view that states enjoy a constitutionally granted immunity that is waived only by unequivocal consent to suit in federal court, a bare majority reversed,\textsuperscript{11} holding that federal courts lack authority to issue injunctions against state officials based on state law.\textsuperscript{12} Thus, the Court remanded the matter to the Third Circuit to consider whether the injunction could rest on the eighth or fourteenth amendments, or on federal statutory law.\textsuperscript{13}

Writing for the majority, Justice Powell noted that, while an unconsenting state ordinarily may not be sued in federal court, \textit{Ex parte Young}\textsuperscript{14} created a significant exception that permits a state official to be sued for federal constitutional violations.\textsuperscript{15} The \textit{Young} doctrine, the majority reasoned, was intended to ensure only that state officials would comply with federal constitutional limits, and, therefore, could not be extended to relief based on state law.\textsuperscript{16} In considering the relationship between state immunity and the doctrine of pendent jurisdiction, Justice Powell noted that federal

\textsuperscript{10} 104 S. Ct. at 906. The Third Circuit Court of Appeals affirmed the lower court's decision, but modified the injunction based on the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1982). Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 107 (3d Cir. 1979), \textit{rev'd}, 104 S. Ct. 900 (1984). In modifying the injunctive order, the Third Circuit ordered that hearings be conducted to determine which patients could live in the community and which patients should remain institutionalized. \textit{Id.} at 114 (3d Cir. 1979). In 1980, the Supreme Court granted certiorari and rendered the first of two decisions on Pennhurst. 451 U.S. 1 (1981). Reasoning that § 6010 of the Federal Mental Health and Mental Retardation Act, the "bill of rights" provision of the Act, contained an expression of congressional policy and not a mandate concerning the substantive rights of mentally retarded persons, \textit{see Pennhurst}, 451 U.S. at 18, the Supreme Court reversed the lower court and remanded the case to the Third Circuit, \textit{id.} at 32. On remand, the court was ordered to determine whether relief could be granted upon state law grounds. \textit{Id.} at 31. The Third Circuit upheld the injunction based on the Pennsylvania Mental Health and Mental Retardation Act, Halderman v. Pennhurst State School & Hospital, 673 F.2d 647, 661 (3d Cir. 1982) (en banc). The Act previously had been interpreted by the Pennsylvania Supreme Court to require that the "least restrictive means of adequate habitation" be used to care for mentally retarded citizens of the state. \textit{Id.; see In re Schmidt}, 494 Pa. 86, 96, 829 A.2d 631, 636 (1981). The Third Circuit rejected the defendant's claim of state immunity, as well as its claim that the court lacked jurisdiction to consider the state law claim. 673 F.2d at 659.

\textsuperscript{11} 104 S. Ct. at 921.
\textsuperscript{12} \textit{Id.} at 919.
\textsuperscript{13} \textit{Id.} at 921.
\textsuperscript{14} 209 U.S. 123 (1908).
\textsuperscript{15} \textit{Id.} at 908-09; \textit{see Ex parte Young}, 209 U.S. 123, 159-60 (1908).
\textsuperscript{16} 104 S. Ct. at 911.
courts deciding federal claims usually have jurisdiction over related state claims and should consolidate those claims in one action.\textsuperscript{17} The Court also observed that courts should resolve cases on the basis of state law if necessary to avoid difficult questions of constitutional law.\textsuperscript{18} However, the Court perceived the doctrine of pendent jurisdiction as subordinate to the constitutionally mandated sovereign immunity of a state.\textsuperscript{19} While the majority recognized that its decision in \textit{Pennhurst} might frustrate the goal of judicial economy and lead to unnecessary constitutional interpretation, it concluded that such considerations of policy must yield to constitutional limits on federal power.\textsuperscript{20}

Justice Brennan dissented on the ground that common-law state immunity was superseded by ratification of the Constitution by the states.\textsuperscript{21} Justice Stevens dissented separately, arguing that the eleventh amendment does not protect state officials who violate state law.\textsuperscript{22} Justice Stevens, asserting that the \textit{Young} doctrine does not apply only to federal constitutional violations, contended that \textit{Young} also renders any state official acting in violation of state or federal law amenable to federal jurisdiction.\textsuperscript{23} Furthermore, Justice Stevens perceived that the majority's decision was an undue limitation on the principle of judicial restraint.\textsuperscript{24}

The \textit{Pennhurst} majority's recognition of a constitutional immunity that overrides the doctrines of pendent jurisdiction and judicial restraint allows states to decide whether and where to be sued. By deferring to a state's interest in determining the extent of its own liability, however, the \textit{Pennhurst} Court may have unnecessarily proscribed the power of federal courts to hear state-law

\textsuperscript{17} Id. at 917.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 919-20. The Court held that although the State of Pennsylvania had waived its immunity against suits in state court brought by mentally retarded citizens of the state, \textit{id.} at 923-24, the waiver was not sufficient to constitute a waiver of state sovereign immunity from suit in federal court, \textit{id.} at 907 n.9. Thus, a state may decide to be sued in state court without exposing itself to federal jurisdiction. \textit{id.} at 907. The \textit{Pennhurst} Court held that "this principle applies as well to state-law claims brought into Federal court under pendent jurisdiction." \textit{id.}
\textsuperscript{20} Id. at 919-20.
\textsuperscript{21} Id. at 921 (Brennan, J., dissenting) (citing \textit{Yeomans v. Kentucky}, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting)).
\textsuperscript{22} Id. at 933 (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined in Justice Stevens' dissent.
\textsuperscript{23} Id. (Stevens, J., dissenting).
\textsuperscript{24} Id. at 942 (Stevens, J., dissenting).
claims against state officials. This Comment will conclude that, from an historical perspective, *Pennhurst* grants unprecedented protection to state sovereign immunity interests. Furthermore, this Comment will note the potential effect of *Pennhurst* on the scope of pendent jurisdiction and on the doctrine of judicial restraint, and will submit that if the Supreme Court had weighed state immunity interests in light of the consent of the state to be sued in state court, the Court could have promoted comity without sacrificing federal power.

**THE DEVELOPMENT OF STATE IMMUNITY**

Prior to the ratification of the Constitution, the question of state immunity from suit in federal court was debated fiercely in state constitutional conventions.25 The controversy centered on the meaning of the sixth clause in Article III, section two, of the Constitution, which grants federal courts jurisdiction over all cases between a “State and Citizens of another State.”26 While some delegates viewed this clause as an abrogation of sovereign immunity that would subject unconsenting states to federal jurisdiction,27

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26 U.S. Const. art. III, § 2. Article III, § 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty, and maritime Jurisdiction;— to Controversies to which the United States shall be a party;— to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. (emphasis added).

27 See Field, supra note 25, at 531; Gibbons, supra note 1, at 1903-14; Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207, 212-14 (1968). In light of statements made in state conventions during the ratification of the Constitution, many delegates perceived that article III, § 2, abrogated sovereign immunity and subjected the states to suit in federal court. Field, supra note 25, at 531, Mathis, supra, at 212-14. Indeed, a majority of delegates in financially troubled states opposed the Constitution because they believed that states would be accountable for their debts in federal courts. Gibbons, supra note 1, at 1903-14; see e.g., 3 J. Elliot, *The Debates in the Several State
others contended that Article III would not affect a state's control over its immunity from suit in federal court. This controversy remained unresolved when the Constitution was ratified.

The ratification of the eleventh amendment in 1798 partially resolved the ambiguity surrounding the status of state immunity in the scheme of federal jurisdiction. Insofar as the amendment barred suits against states brought by citizens of another state, it dispelled the view that Article III contained an abrogation of sovereign immunity. The amendment did nothing, however, to clarify the federal stance toward jurisdiction over a suit against a state by a citizen of the same state.

Conventions on the Adoption of the Federal Constitution 543 (1937) (remarks of Patrick Henry before the Virginia State Convention). Likewise, proponents of the Constitution shared the view that sovereign immunity was abrogated by article I, § 2. See, e.g., 2 J. Elliot, supra, at 207, 491 (remarks of James Wilson in favor of ratification of the Constitution); 3 J. Elliot, supra, at 207 (remarks of Edmund Randolph). See Field, supra note 25, at 527-36; Gibbons, supra note 1, at 1905-12; Mathis, supra note 27, at 214. Alexander Hamilton, James Madison, and John Marshall sought to gain support for the Constitution in the state conventions by reassuring those who feared that article III, § 2, abrogated state immunity from suit in federal courts. See Gibbons, supra note 1, at 1905-06; Hans v. Louisiana, 134 U.S. 1, 14 (1890). Indeed, Hamilton asserted that in order to be amenable to suit in federal court a state must give its consent. See Hans v. Louisiana, 134 U.S. 1, 14 (1890). Likewise, Madison and Marshall reassured state delegates by interpreting the clause "between a state and Citizens of another State" to provide a neutral federal forum where states may sue as plaintiff and recover debts owed by citizens of other states. See id. (quoting U.S. Const. art. II § 2).

See Field, supra note 25, at 529-30; Currie, supra note 25, at 888. U.S. Const. amend XI; see supra note 2. The eleventh amendment was adopted as a direct response to the decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), wherein the Supreme Court held that under article III, § 2, Congress could subject the states to suits brought in federal court by citizens of other states. See Pennhurst, 104 S. Ct. at 906; Nevada v. Hall, 440 U.S. 410, 420 (1979); C. WARREN, supra note 25, at 101. In Chisholm, the Supreme Court interpreted the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, as providing that the Court had original jurisdiction to grant a writ of assumpsit against the State of Georgia brought by a citizen of the State of South Carolina. Chisholm, 2 U.S. (2 Dall.) at 477. The public reaction to the Court's decision is commonly characterized as being one of "profound shock." Pennhurst, 104 S. Ct. at 906; C. WARREN, supra note 25, at 96-100. The eleventh amendment was ratified within 5 years of Chisholm to overrule that decision and to grant states immunity from suit in federal court by citizens of another state. U.S. Const. amend. XI.


There is considerable debate among Supreme Court Justices concerning federal jurisdiction over suits against a state brought by citizens of the same state because the eleventh
Not until ninety-four years later, in *Hans v. Louisiana*, Justice Powell interpreted *Hans* as holding that sovereign immunity is constitutionally mandated, it is submitted that the *Hans* Court held only that when a state court would not entertain a private suit against a state, a federal court similarly lacked jurisdiction. Moreover, the *Hans* Court was construing a federal statute that granted federal courts jurisdiction over state claims concurrent with that of the states. Thus, *Hans* left open the question of amendment expressly prohibits only suits by citizens of another state. Compare *Pennhurst*, 104 S. Ct. at 907 (sovereign immunity is a constitutional limitation on the power of the courts) with *Employees of Dept' of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting) (sovereign immunity affords a state only non-constitutional immunity from a suit brought by a same-state citizen). Most commentators addressing the subject have agreed that the Constitution embodies a common-law doctrine of immunity. See *Pennhurst*, 104 S.Ct. at 930 n.18 (Stevens, J., dissenting) (articles cited therein).


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23 134 U.S. 1 (1890).

24 Id. at 10. In *Hans*, the State of Louisiana disavowed all its contractual obligations concerning state-issued bonds by adopting a new state constitution that, in superseding the old constitution, stated that the money from the bonds would be used to "defray the expenses of state government." Id. at 2. Thus, the plaintiff, a bondholder and citizen of the state of Louisiana, sued in federal court alleging that the state had violated the Contract Clause of the Constitution, which prohibits a state from passing any law to impair its contractual obligations. Id. at 3; see U.S. CONsT. art. I, § 10, cl. 1.

25 See supra text accompanying note 19.

26 See *Hans*, 134 U.S. at 14-15. Relying upon the presumption that at the time the Constitution was ratified it was not the intent of the Framers to adopt "new and unheard of proceedings or remedies," the *Hans* Court perceived that sovereign immunity as it existed at common law had not been abrogated by article III, § 2, of the Constitution. See id. at 13-16 (adopting the view that the Framers, in ratifying the Constitution, meant to preserve the principle that a state cannot be sued without its consent). Moreover, the *Hans* Court cited with approval the dissenting opinion of Justice Iredell in *Chisholm*. Id. at 16, 18-19 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (Iredell, J., dissenting)). Justice Iredell perceived that it was unheard of at common law for a sovereign to be sued without its consent, and argued that it was not the intent of the Framers in ratifying the Constitution to abrogate sovereign immunity. *Chisholm*, 2 U.S. (2 Dall.) at 449 (Iredell, J., dissenting). The Justice concluded that the Court was without jurisdiction because the state of Georgia had not given its consent to suit, even in its own state courts. Id. at 434 (Iredell, J., dissenting). In contrast to the *Pennhurst* majority's view that the Constitution contains an affirmative grant of sovereign immunity, the *Hans* Court and Justice Iredell in *Chisholm* argued that the Constitution is neutral concerning state immunity from suit and, thus, preserved sovereign immunity as it existed at common law. See *Field*, supra note 25 at 532.

27 *Hans*, 134 U.S. at 18. In *Hans*, the Supreme Court construed a statute that conferred original federal jurisdiction over "suits arising under the Constitution or laws of the United States . . . [c]oncurrent with the courts of the several States." Id. Because Louisiana had
whether a state's consent to suit in state court would be sufficient to waive immunity at the federal level.\textsuperscript{38} It is clear, however, that the \textit{Hans} Court did not interpret article III or the eleventh amendment as mandating that a state unequivocally consent to suit in federal court.\textsuperscript{39} By affirmatively granting a constitutional immunity that, absent consent by the state, bars suits against a state in federal court by citizens of that state, \textit{Pennhurst} has exceeded both the \textit{Hans} Court and the intent of the Framers, and, thus, it is submitted, constitutes an unprecedented deferral to state sovereign immunity.

\section*{Federal Jurisdiction Over A State}

Federal courts exercise jurisdiction over states pursuant to several exceptions to the doctrine of sovereign immunity.\textsuperscript{40} When a state engages in interstate commercial activity that is regulated by

\textsuperscript{38} Although the \textit{Hans} Court held that a state may not be sued by its own citizens, the decision is criticized for its lack of clarity. \textit{See} Engdahl, \textit{supra} note 3, at 60-61 (questioning \textit{Hans} decision as one that lacks precedent and that is internally inconsistent). Indeed, the decision is subject to contrasting interpretations. \textit{Compare Pennhurst}, 104 S. Ct. at 906-07 (interpreting \textit{Hans} to require constitutional grant of immunity to the states) \textit{with} Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting) (contending that \textit{Hans} Court mandated that common-law immunity was reserved for states by Constitution).

\textsuperscript{39} Contrary to Justice Powell's opinion, it is submitted that the \textit{Hans} case is no bar to a suit against a state by its own citizen in federal court when the state has already consented to suit in its own court. Since the state of Louisiana had not consented to suit in its own courts, \textit{see supra} note 34, \textit{Hans} is factually distinguishable from \textit{Pennhurst}. \textit{Compare Hans}, 134 U.S. at 2 (Louisiana had not waived sovereign immunity in Louisiana courts) \textit{with Pennhurst}, 104 S. Ct. at 909 (Pennsylvania has waived immunity for suits in Pennsylvania courts). Although the \textit{Hans} Court held that a federal court lacks jurisdiction unless there is concurrent jurisdiction in the state court, \textit{see supra} note 37, it is submitted that \textit{Hans} does not serve as a springboard for Justice Powell's view that the Constitution grants immunity that can only be waived by unequivocal consent to suit in federal court.

\textsuperscript{40} \textit{See} Mathis, \textit{supra} note 27, at 210. The power of the federal courts to exercise jurisdiction over suits involving state defendants has been reaffirmed in several leading Supreme Court decisions. \textit{See}, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Congress is empowered to extend federal jurisdiction to private suits involving state defendants pursuant to enforcement provisions of § 5 of the fourteenth amendment); Edelman v. Jordan, 415 U.S. 651, 677 (1974) (federal courts may provide remedial injunctive relief against state officials who violate federal law); Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 287 (1973) (Congress may abrogate state immunity when it acts pursuant to enumerated powers); \textit{see also} United States v. Mississippi, 380 U.S. 128, 140-141 (1965) (states are not immune from suits brought by federal government); North Dakota v. Minnesota, 283 U.S. 365, 372-73 (1923) (federal courts have jurisdiction over controversies between two states).
Congress, the state may be deemed to have waived its immunity and subjected itself to federal jurisdiction.\textsuperscript{41} In addition, under the "piercing doctrine," a state is amenable to suit in federal court when Congress legislates to abrogate state immunity pursuant to the enforcement clause of the fourteenth amendment.\textsuperscript{42} In both instances, a violation of state law often arises from the same transaction that gave rise to the federal claim.\textsuperscript{43} Although the doctrine of pendent jurisdiction normally would allow a federal court to entertain related federal and state-law claims in a single action, \textit{Pennhurst} prohibits a federal court from hearing state-law claims against a state when adequate relief can be granted solely on the basis of state law.\textsuperscript{44}

A further exception to state immunity was recognized by the Court in \textit{Ex parte Young}.\textsuperscript{45} To ensure that state action does not transgress limits prescribed by the federal Constitution, \textit{Young} held that a state official who acts in violation of the Constitution is stripped of his state authority and subject to federal jurisdiction.\textsuperscript{46} Balancing the state interest in protecting its treasury with the federal interest in enforcing constitutional rights, the Supreme Court


\textsuperscript{43} See, e.g., \textit{Hagans v. Lavine}, 415 U.S. 528, 545-46 (1974); \textit{Siler v. Louisville & Nashville R.R.}, 213 U.S. 175, 177 (1909); see also infra note 52.

\textsuperscript{44} Id. at 159-60. In \textit{Young}, plaintiffs sought injunctive relief from the enforcement of statutorily prescribed railroad rates by the Attorney General of Minnesota. \textit{Id.} at 130. Because it was alleged that the railroad rates were unreasonably high and, therefore, constituted a violation of due process, \textit{Id.}, the Court upheld the injunction against the Attorney General, \textit{Id.} at 159. Recognizing the need to ensure that state officials conform to federal constitutional standards, the Court adopted the fiction that a state official is stripped of his state authority when he allegedly acts in violation of federal law and, consequently, is unprotected by the shield of state immunity. \textit{Id.}; see C. \textsc{Wright}, \textsc{The Law of Federal Courts} § 48 (4th ed. 1983). In determining whether a plaintiff may sue under the \textit{Ex Parte Young} doctrine, a federal court determines if the suit is against the state official in his individual capacity. \textit{See Ford Motor Co. v. Department of Treasury}, 323 U.S. 459, 464 (1945). The doctrine of sovereign immunity bars a federal court from entertaining the case if the state is the "substantial party of interest." \textit{Id.}; see \textit{Scheuer v. Rhodes}, 416 U.S. 232, 237 (1974).
subsequently limited the Young doctrine to suits seeking injunctive relief.\footnote{47} As in the cases involving implied consent, a federal court applying the Young doctrine ordinarily may exercise pendent jurisdiction over state claims.\footnote{48} Pursuant to Pennhurst, however, a federal court invoking Ex parte Young jurisdiction will be barred from hearing the pendent state-law claim.\footnote{49}

**The Purpose of Pendent Jurisdiction**

The Pennhurst majority, by prohibiting the exercise of pendent jurisdiction when suit is brought against a state in federal court, has affected legitimate federal interests in judicial restraint and fairness to litigants.\footnote{50} The requirement that a federal court examine each claim separately to see if that claim is barred by state immunity, it is submitted, cripples the long-standing principle that federal jurisdiction extends to "cases," and not merely questions, arising under the Constitution.\footnote{51} Indeed, the doctrine of pendent

\footnote{47} See Edelman v. Jordan, 415 U.S. 651, 656 (1976). In Edelman, a lower federal court found that Illinois state officials violated federal regulations under the Federal Aid to the Aged, Blind and Disabled Program, and ordered injunctive relief and retroactive payment by state officials of benefits wrongfully withheld. *Id.* at 658. The Supreme Court upheld the injunction, but reversed the order to make retroactive payments. *Id.* The Court observed that "a suit by private parties seeking to impose liability which must be paid from public funds in the state treasury is barred by the eleventh amendment." *Id.* at 656. Although Edelman indicates that the eleventh amendment bars all raids upon state treasuries, Congress may, "in determining what is 'appropriate legislation' for purposes of the fourteenth amendment, provide for private suits for damages against states or state officials." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); see supra note 42 and accompanying text. Moreover, in enforcing a prospective injunction, a federal court may provide ancillary relief to plaintiffs, such as attorney's fees, and may impose fines and other penalties against the state. *See*, e.g., Hutto v. Finney, 437 U.S. 678, 693-95 (1978); Milliken v. Bradley, 433 U.S. 267, 288-90 (1977); Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).

\footnote{48} See infra note 52 and accompanying text.

\footnote{49} 104 S. Ct. at 919.

\footnote{50} See *id.*

\footnote{51} See U.S. Const. art. III, § 2; 28 U.S.C. § 1331 (1982); see also Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) (contract claims based on state law should not be aired in federal court); Pacific R.R. Removal Cases, 115 U.S. 1, 14 (1885) (corporations owing their existence to acts of Congress permitted to remove cases to federal court); cf. Bank of the United States v. Planter's Bank, 22 U.S. (9 Wheat.) 904, 909-10 (1824). It is well recognized that Congress may extend federal jurisdiction to cases involving predominantly questions of state law as long as "there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question." *Textile Workers*, 353 U.S. at 471 (Frankfurter, J., dissenting); see also American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (federal courts may properly exercise jurisdiction when federal law "creates the cause of action"). *But see* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S.
jurisdiction springs directly from this article III-mandated principle. In federal question cases involving implied consent by the state, enforcement clause legislation, or *Ex parte Young* jurisdiction, the Court has recognized that the power to decide questions of state law is necessary if federal courts are to function effectively as forums of original jurisdiction. Under *Pennhurst*, however, since a federal court is precluded from hearing state-law claims, plaintiffs with integral state and federal claims against a state will be forced to choose among three undesirable courses of action: bifurcating the claims, consolidating both claims in state court, or

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677 (1950) (federal question must appear on face of well pleaded complaint); Taylor v. Anderson, 234 U.S. 74, 75-76 (1914); (complaint must present federal question “unaided by anything alleged in anticipation” of defenses that may be interposed). See, e.g., Aldinger v. Howard, 427 U.S. 1, 9 (1976); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Hurn v. Oursler, 289 U.S. 238, 243, 245-46 (1933). Gibbs involved a federal claim under the Taft-Hartley Act and a related state claim of unlawful interference with contractual relations brought by union workers against their employer. 383 U.S. at 720. The district court awarded damages based upon the state-law claim. *Id.* at 720-21. Writing for the Court, Justice Brennan reasoned that while pendent jurisdiction was a well-established principle of the federal courts, the Court had been “unnecessarily grudging” in allowing its use. *Id.* at 724 (questioning Hurn v. Oursler, 289 U.S. 238 (1933)). Furthermore, Justice Brennan devised a three-part test to determine whether jurisdiction may be exercised over a state claim: First, there must be a claim “arising under” the Constitution or laws of the United States; second, the federal claim must be substantial enough to confer jurisdiction; and, third, the federal and state claims must derive from a “common nucleus of operative fact.” *Id.* at 725. Justice Brennan noted that pendent jurisdiction should be extended to state claims when a federal court perceives that to do so will facilitate the goals of fairness to litigants and judicial economy. *Id.* at 726. See generally Note, *Federal Jurisdiction, 44 Tex. L. Rev. 1631, 1631-35 (1966).* Lastly, the *Gibbs* test is significant because it is the modern standard applied in federal courts to decide whether to assert or withhold jurisdiction over a pendent state claim. See Teruya, *Ancillary and Pendent Jurisdiction of Federal Courts, 31 Fed. B. News & J. 254, 256 (1984).*

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See, e.g., Hurn v. Oursler, 289 U.S. 238, 245. (1933); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 823 (1824). While the Supreme Court will limit the scope of review to federal questions when exercising appellate jurisdiction over state court decisions, C. Wright, *supra* note 46, at 536-37, it is widely recognized that a federal court of original jurisdiction must have power to decide questions of state law involved in a case in order to function effectively, see, e.g., Osborne, 22 U.S. (9 Wheat.) at 821-22. Moreover, commentators on federal jurisdiction enumerate several reasons why a federal rather than a state court should hear federal cases, such as federal judges have expertise in deciding questions of federal law, federal jurisdiction promotes uniform interpretation of the law, and state courts may be hostile to federally created rights. See American Law Institute, *Study on the Division of Jurisdiction Between State and Federal Courts* 163-68 (1969); D. Currie, *Federal Courts—Cases and Materials* 160 (1982). Because of the importance of federal determination of the facts at trial, it is frequently noted that review of a state court decision by the Supreme Court is an inadequate substitute for original jurisdiction in federal district court. See, e.g., England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964); Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 822-23 (1824); American Law Institute, *supra*, at 168.
foregoing the state claim and bringing only the federal claim in
court. Furthermore, Pennhurst pressures federal courts to
resolve unnecessary and difficult questions of constitutional law,
thereby draining the power and the legitimacy of the federal
system.

While the Pennhurst Court engaged in weighing state and fed-
eral interests before choosing not to exercise pendent jurisdiction
over the related state claims, it is suggested that the Court af-
forded less credence to what heretofore have been recognized as
strong federal interests. It is further suggested that a federal
court, when presented with jurisdictional facts similar to those in
Pennhurst, should measure the interest in judicial economy and
fairness to the litigants promoted by consolidating all claims in a
single case, as well as the interest in deciding cases on the basis of
state law to avoid unnecessary constitutional questions. These in-

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84 See 104 S. Ct. at 919-20. Usually courts attempt to resolve as many claims as is
practical in a single action. D. Siegel, New York Practice 115 (Supp. 1982). Thus, plain-
tiffs suing in state court are permitted to state in a single complaint as many claims as they
have against an opposing party. See, e.g., Mass. R. Civ. P. 18; N.Y. Civ. Prac. Law § 601
(McKinney 1984); Tex. R. Civ. P. 51(a).

85 Id. at 939-42 (Stevens, J., dissenting). Since the Pennhurst majority held that a fed-
eral court is prohibited from exercising jurisdiction over a pendent state claim against a
state official, the decision is contrary to the principle that a federal court should avoid con-
stitutional questions where a case may be resolved on the basis of state or local law. Id. at
939-40 (Stevens, J., dissenting). This principle of judicial restraint is derived from the belief
that unnecessary constitutional issues should be avoided whenever possible. See, e.g., Ha-
(1946); Waggoner Estate v. Wichita County, 273 U.S. 113, 116-19 (1927). Moreover, the
majority decision overruled numerous cases where a suit against state officials involved both
federal and pendent state claims and the district court, following the principle of judicial
restraint, fashioned relief on the basis of state law. See, e.g., Lee v. Bickell, 292 U.S. 415, 425
(1934); Glenn v. Field Packing Co., 290 U.S. 177, 178 (1933); Davis v. Wallace, 257 U.S. 478,
482-85 (1922); Louisville & Nashville R.R. v. Greene, 244 U.S. 522, 527 (1917); Greene v.
Louisville & Interurban R.R., 244 U.S. 499, 508, 512-14 (1917); Siler v. Louisville & Nash-
ville R.R., 213 U.S. 175, 193 (1909). The Pennhurst majority contended that because in each
of these cases the jurisdictional issue was not addressed by the Court, the application of the
eleventh amendment to pendent state claims against state officials was a question of first
impression. 104 S. Ct. at 918. But see Greene v. Louisville & Interurban R.R., 244 U.S. 499,
508 (1917) (noting that jurisdiction over state officials extends to state law claims); Rolston
v. Missouri Fund Comm'rs, 120 U.S. 390, 411 (1887) (explicitly rejecting argument that ele-
venth amendment bars federal court from asserting jurisdiction over state official who viol-
ates state law). Thus, while the Pennhurst majority perceived that policy considera-
tions such as those underlying the doctrine of judicial restraint may not override constitutional
limits on the power of federal courts, 104 S. Ct. at 920, the Court overruled prior decisions
that clearly indicated that the eleventh amendment does not bar federal courts from adjudi-
cating pendent state claims against state officials.

86 See supra note 53 and accompanying text.
terests should then be weighed against the state interest underlying sovereign immunity. In *Pennhurst*, the interest of the state in determining the scope of its own liability already was satisfied when Pennsylvania chose to waive its immunity and vest a legally enforceable right in a certain class of citizens. Thus, if a court were to engage in balancing federal and state interests, the only state interest remaining would be the preference of the state to adjudicate claims against itself in its own forum. It is suggested, however, that this is not a legitimate state interest, since there should be no difference in outcome whether the pendent state claim is heard at the federal or state level. The only conceivable reason the state would have for refusing to consent to suit in federal court would be to preserve state bias in the adjudication of such suits and to prevent federal courts from supplying a neutral forum. Clearly, this is not a legitimate reason that should be

\[\text{Note 57: See supra notes 54-55 and accompanying text.}\]

\[\text{Note 58: 104 S. Ct. at 905 (citing Pennhurst State School & Hosp. v. Halderman, 673 F.2d 647 (3d Cir. 1982); In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981)). Noting that the Pennsylvania Supreme Court held that the state was required by statute to adopt the "least restrictive means" in caring for its mentally retarded citizens, the Third Circuit Court of Appeals concluded that relief for the *Pennhurst* plaintiffs should be predicated on state law grounds. 673 F.2d at 654-56; see supra note 10.}\]

\[\text{Note 59: The Court consistently has upheld a state's right to consent to suit in state court while reserving immunity from suit in federal court. See, e.g., Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981); Nevada v. Hall, 440 U.S. 410, 418-19 (1979); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944); see also Comment, States—Waiver of Immunity to Suit with Special Reference to Suits in Federal Courts, 45 Mich. L. Rev. 348, 355-58 (1947) (it is unclear whether a blanket suit brought by a state permits federal jurisdiction). Prior to *Pennhurst*, however, no cases have held that the state's reservation of immunity from suit in federal court attaches to pendent state claims that arise in federal cases. In fact, it is submitted that the weight of authority indicates that federal courts may exercise jurisdiction over such claims. See supra note 55.}\]

\[\text{Note 60: See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1965); C. Wright, supra note 46, at 109 (1982). Federal courts deciding pendent state claims are bound to apply the substantive law of the state. C. Wright, supra, at 109. Thus, whether a federal or state court entertained a state claim against a state official, there presumably would be no difference in outcome. Moreover, by prohibiting federal courts from exercising jurisdiction over state claims, *Pennhurst* "prevents federal courts from implementing state policies through equitable enforcement of state law." *Pennhurst*, 104 S. Ct. at 942 (Stevens, J., dissenting). In addition to impeding the interest of comity, *Pennhurst*, by requiring a federal court to resolve cases on federal grounds, will necessarily produce more decisions concerning the liability of state officials that may not be reexamined by the state. Id. (Stevens, J., dissenting).}\]

\[\text{Note 61: See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474-75 (1957) (Frankfurter, J., dissenting) (theory of "protective jurisdiction" which extends federal jurisdiction to suit involving interstate commerce is predicated upon belief in inadequacy of state courts to decide questions of state law in an impartial manner); Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-23 (fear of prejudice in state courts prompted Congress to enact 1829 Act).}\]
Conversely, legitimate federal interests are threatened by the *Pennhurst* Court's bar on pendent jurisdiction in suits against a state. It is suggested that a federal court should consider the need to consolidate related federal and state claims and avoid resolving unnecessary constitutional questions, particularly when, as in *Pennhurst*, there are no jurisdictional or precedential considerations compelling the court to refrain from exercising pendent jurisdiction over the related state claim. Therefore, it is submitted that due to the state's consent to suit in state court, and the federal interests that would be advanced by the exercise of jurisdiction, the *Pennhurst* majority should have held that article III jurisdiction extends to the state-law claim.

**Conclusion**

In *Pennhurst*, the Supreme Court held that, despite the consent of a state to be sued in state court, the constitutional limitations imposed by Article III and the eleventh amendment bar the extension of pendent jurisdiction to state officials' violations of state law. Not only is the Court's decision unprecedented, but it impedes established federal policies of judicial economy and judicial restraint. Moreover, since the state had already consented to suit, the Court's decision does not significantly serve the state interest in determining the scope of its liability. It is suggested, therefore, that the Court could have more sensitively weighed the

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63 *See supra* notes 54-55 and accompanying text.

64 *See supra* text accompanying note 58.

65 *See supra* notes 54-55 and accompanying text.

66 104 S. Ct. at 919.
federal and state interests and decided to extend the doctrine of pendent jurisdiction to consolidate related federal and state claims against a state in one action.67

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67 See supra notes 54-55 and accompanying text. The Pennhurst majority reasoned that constitutionally granted sovereign immunity precludes the Court from considering the federal interest in: (1) providing a federal forum in which to vindicate federally created rights, and (2) avoiding unfairness to litigants. 104 S. Ct. at 919-20. It is submitted that the doctrine of sovereign immunity," of which the [eleventh] amendment is but an exemplification," In re New York 256 U.S. 490, 497 (1921), is itself predicated upon public policy. See Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949); K. Davis, supra note 3, at 497-99. Moreover, the federal interests in vindicating federal rights and facilitating litigation underlie the doctrine of pendent jurisdiction, which, itself, is a constitutionally mandated principle. See supra note 52. Thus, it is submitted that contrary to the view of the Pennhurst majority, the federal interests override the state interest in sovereign immunity from suit in federal court.