912 F.2d 605
United States Court of Appeals,
Second Circuit.

Harold **NANCE**, Appellant,
v.
Walter C. **KELLY**, Superintendent,
Attica Correctional Facility, Appellee.

No. 997, Docket 89–2310.
|
Submitted May 15, **1990**.
|
Decided Aug. 28, **1990**.

Synopsis
Pro se inmate filed in forma pauperis civil rights complaint against superintendent of correctional facility. The United States District Court for the Western District of New York, John T. Curtin, J., dismissed complaint sua sponte, and inmate appealed. The Court of Appeals held that inmate's claim that he was deliberately denied medical treatment stated cognizable claim of cruel and unusual punishment under Eighth Amendment, and thus in forma pauperis complaint should not have been dismissed sua sponte on grounds of frivolity, even though complaint may not have withstood motion to dismiss since it lacked details as to time and place of relevant events and superintendent's role in them.

Reversed and remanded.

George C. Pratt, Circuit Judge, filed dissenting opinion.

West Headnotes (3)

[1] Federal Civil Procedure
Forma Pauperis Proceedings

District court should look with far more forgiving eye in determining whether in forma pauperis complaint rests on meritless legal theory, for purpose of determining whether complaint should be dismissed on grounds of frivolity, than it does in testing complaint against motion to dismiss. 28 U.S.C.A. § 1915(d); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

142 Cases that cite this headnote

[2] Federal Civil Procedure
Forma Pauperis Proceedings

Inmate's claim against correctional facility's superintendent, that he was deliberately denied medical treatment, stated cognizable claim of cruel and unusual punishment under Eighth Amendment, and thus district court should not have sua sponte dismissed in forma pauperis civil rights complaint on grounds of frivolity, even though complaint may not have withstood motion to dismiss since it lacked details as to time and place of relevant events and superintendent's role in them. 28 U.S.C.A. § 1915(d); 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

196 Cases that cite this headnote

[3] Federal Civil Procedure
Forma Pauperis Proceedings

Once in forma pauperis plaintiff raises cognizable claim, district court may not dismiss it sua sponte on grounds of frivolity, even if complaint does not flesh out all of the requisite details; dismissal on basis of factual deficiencies in complaint must wait until defendant attacks lack of such details on motion to dismiss. 28 U.S.C.A. § 1915(d); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

366 Cases that cite this headnote

Attorneys and Law Firms

***605** Harold **Nance**, pro se.

***606** Before OAKES, Chief Judge, PRATT, Circuit Judge, and LEVAL, District Judge. [1]

Opinion

PER CURIAM:

Harold **Nance**, pro se, appeals a June 19, 1989, judgment of the United States District Court for the Western District of New York, John T. Curtin, Judge, dismissing his complaint *sua sponte* under 28 U.S.C. § 1915(d) (1988). **Nance's** complaint seeks relief pursuant to 42 U.S.C. § 1983 (1982) against Walter **Kelly**, the Superintendent of Attica Correctional Facility, in connection with alleged constitutional violations during **Nance's** imprisonment at Attica. We reverse and remand.

Nance filed his complaint in forma pauperis. His complaint consisted of handwritten responses to a printed "Form to be Used in Filing a Complaint Under the Civil Rights Act, 42 U.S.C. § 1983," which was supplied by the district court. Under the heading asking for the "Statement of Claim," **Nance** wrote, "Plaintiff is Wrongfully and Intentionally being deprived of his Constitutional Rights By not being Treated Medically Properly. Orthopedically For *Foot,* Problems." Under the heading that followed, asking for the relief requested, **Nance** added, "Proper Medical Treatments. Persistant After Care. Mone[ta]ry Compensations for Mistreatments and damages $2,000." Prior to the defendant's answer, the district court ruled that by failing to make requisite factual allegations concerning the time and place of any alleged constitutional violations, and failing to allege that defendant **Kelly** had any personal knowledge or involvement with the alleged constitutional violations, the complaint failed to state a claim upon which relief may be granted. On this basis, the district court *sua sponte* dismissed the complaint, without prejudice, as frivolous within the meaning of 28 U.S.C. § 1915(d). Upon plaintiff's failure to file an amended complaint, the district court dismissed the action.

A district court may *sua sponte* dismiss a case filed in forma pauperis "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). In *Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989), the Supreme Court explained the two instances in which a district court may dismiss a complaint pursuant to section 1915(d). First, it may dismiss when the "factual contentions are clearly baseless," such as when allegations are the product of delusion or fantasy. *Id.* 109 S.Ct. at 1833. Or, second, it may dismiss when the claim is "based on an indisputably meritless legal theory." *Id.*

[1] *Neitzke* stressed that the showing a plaintiff must make to establish that a complaint is not "based on an indisputably meritless legal theory" is not the same as one necessary to withstand a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *See id.* at 1832–33. The district court's role in ensuring that an in forma pauperis complaint is non-frivolous is meant to replace the role played by court costs and filing fees in deterring frivolous complaints. *See id.* at 1833. Accordingly, a district court should look with a far more forgiving eye in examining whether a complaint rests on a meritless legal theory for purposes of section 1915(d) than it does in testing the complaint against a Rule 12(b)(6) motion. By way of illustration, the Court noted that claims in which the defendants are clearly immune from suit or claims seeking redress for a non-existent legal interest would be examples of claims which would be considered indisputably meritless and properly dismissed under section 1915(d). *See id.*

[2] We believe there is a significant difference between the type of claims the Court sanctioned in *Neitzke* as subject to dismissal under section 1915(d) and **Nance's** complaint. Reading **Nance's** pro se complaint broadly, as we must, *see Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 595–96, 30 L.Ed.2d 652 (1972), his claim that he was deliberately denied medical treatment states a cognizable claim of cruel and unusual punishment under the Eighth ***607** Amendment. *See Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). According to the district court, **Nance's** complaint failed because it lacked details as to the time and place of the relevant events and **Kelly's** role in them. By contrast, the two examples furnished by the Court did not suffer solely from a lack of pleading requisite details; rather, they sought to assert rights which plainly do not exist.

[3] We conclude that once an in forma pauperis plaintiff raises a cognizable claim, a district court may not dismiss it *sua sponte* under section 1915(d), even if the complaint does not flesh out all of the requisite details. So long as the in forma pauperis plaintiff raises a cognizable claim, dismissal on the basis of factual deficiencies in the complaint must wait until the defendant attacks the lack of such details on a Rule 12(b)(6) motion. *See Wilson v. Rackmill,* 878 **F.2d** 772, 774–75 (3d Cir.1989) (identifying failure to state facts with requisite specificity as "a problem more properly addressed under Rule 12(b)(6)"). Requiring a Rule 12(b)(6) motion as a predicate for dismissal on the basis of factual deficiencies guarantees that the in forma pauperis plaintiff will have benefit of certain fundamental procedural protections, such as notice of the alleged deficiencies of his complaint and an opportunity to

refine those alleged deficiencies, *see Neitzke,* 109 S.Ct. at 1834, so as to avoid dismissal.

Kelly has refused to defend this appeal on grounds that he was never properly served with the complaint. Because the district court dismissed the complaint prior to the filing of an answer, we have no basis on which to address this argument and accordingly express no opinion on it.

Judgment reversed. Cause remanded.

GEORGE C. PRATT, Circuit Judge (dissenting):
I dissent. We should affirm the district judge's wise dismissal of this *in forma pauperis* complaint under 28 U.S.C. § 1915(d), because the claim is based on not one, but two "indisputably meritless legal theor[ies]." *Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 1835, 104 L.Ed.2d 338 (1989).

First, the majority concludes that **Nance's** allegation that he was deliberately denied medical treatment states a cognizable claim of cruel and unusual punishment under the eighth amendment. I cannot join in that conclusion. To sink to the level of a constitutional violation a prison's medical mistreatment must not only constitute "deliberate indifference", but that indifference must be to a "serious medical need". *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). **Nance's** complaint of sore feet and a deprivation of orthopedic sneakers by the defendant does not meet this standard.

The "serious medical need" requirement contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain. *See Archer v. Dutcher,* 733 **F.2d** 14, 16–17 (**2d Cir.**1984) ("extreme pain"); *Todaro v. Ward,* 565 **F.2d** 48, 52 (**2d Cir.**1977) ("physical torture and lingering death"). The types of conditions which have been held to meet the constitutional standard of serious medical need include a brain tumor, *Neitzke,* 109 S.Ct. 1827; broken pins in a hip, *Hathaway v. Coughlin,* 841 **F.2d** 48 (**2d Cir.**1988); premature return to prison after surgery, *Kelsey v. Ewing,* 652 **F.2d** 4 (8th Cir.1981); diabetes requiring special diet, *Johnson v. Harris,* 479 F.Supp. 333 (S.D.N.Y.1979); a bleeding ulcer, *Massey v. Hutto,* 545 **F.2d** 45 (8th Cir.1976); and loss of an ear, *Williams v. Vincent,* 508 **F.2d** 541 (**2d Cir.**1974) (claim stated against a doctor who threw away a prisoner's ear and stitched up the stump).

Far from resembling the foregoing serious medical problems, **Nance's** sore feet and alleged need for orthopedic sneakers is more analogous to those conditions that have been held to fall short of the constitutional standard, such as a broken pin setting an injured shoulder, *Wood v. Housewright,* 900 **F.2d** 1332 (9th Cir.**1990**); a mild concussion and broken jaw, *Jones v. Lewis,* 874 **F.2d** 1125 (6th Cir.1989); a kidney stone, *Hutchinson v. United States,* 838 **F.2d** 390 (9th Cir.1988); cold symptoms, ***608** *Gibson v. McEvers,* 631 **F.2d** 95 (7th Cir.1980); headaches, *Dickson v. Colman,* 569 **F.2d** 1310 (5th); *cert. denied,* 439 U.S. 897, 99 S.Ct. 259, 58 L.Ed.2d 244 (1978); a broken finger, *Rodriguez v. Joyce,* 693 F.Supp. 1250 (D.Me.1988); toothache, *Tyler v. Rapone,* 603 F.Supp. 268 (E.D.Pa.1984); or "bowel problems", *Glasper v. Wilson,* 559 F.Supp. 13 (W.D.N.Y.1982).

Second, even if **Nance's** sore feet met the constitutional standard, it is inconceivable that he could sustain this action against the only defendant he has named: Walter C. **Kelly**, who is superintendent of the prison where **Nance** is confined. A prerequisite for a § 1983 claim is "personal involvement" by the defendant in the alleged constitutional deprivation. *Williams v. Smith,* 781 **F.2d** 319, 323 (**2d Cir.**1986). Not only does **Nance** fail to make any allegation that **Kelly** knew of him, knew of his sore feet, or knew of the denial of orthopedic shoes, he fails to suggest any other basis on which **Kelly** might be held liable other than the insufficient one that he was in charge of the prison. *See Gill v. Mooney,* 824 **F.2d** 192, 196 (**2d Cir.**1987); *Williams v. Vincent,* 508 **F.2d** 541, 546 (**2d Cir.**1974); *see also Neitzke,* 109 S.Ct. at 1829 n. 2.

Reversal here simply adds extra, useless burdens to the work of the district court. The inevitable result of this case, after the additional paperwork, lawyer's time, and court time required in the district court by our reversal, will be dismissal. The district judge recognized this when he dismissed under § 1915(d), and we should affirm his wise, practical decision.

All Citations

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Footnotes

1 Of the Southern District of New York, sitting by designation.

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109 S.Ct. 2304
Supreme Court of the United States

Ray **WILL**, Petitioner
v.
MICHIGAN DEPARTMENT OF **STATE POLICE** et al.

No. 87–1207.
|
Argued Dec. 5, 1988.
|
Decided June 15, **1989**.

Synopsis

Michigan state employee brought action against Department of **State Police** and its director under federal civil rights statute. The Court of Claims, Thomas L. Brown, J., entered judgment for employee. Department and director appealed. The **Michigan** Court of Appeals, 145 Mich.App. 214, 377 N.W.2d 826,vacated in part and remanded in part. On appeal, the **Michigan** Supreme Court, 428 **Mich**. 540, 410 N.W.2d 749,affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justice White, held that neither state nor its officials acting in their official capacities were "persons" under federal civil rights statute.

Affirmed.

Justice Brennan dissented and filed opinion in which Justices Marshall, Blackmun and Stevens joined.

Justice Stevens dissented and filed opinion.

West Headnotes (4)

[1] **Federal Courts**
Abrogation by Congress

Federal Courts
Waiver by State; Consent

While federal civil rights statute provides federal forum to remedy many deprivations of civil liberties, it does not provide federal forum for litigants who seek remedy against state for alleged deprivations of civil liberties; Eleventh Amendment bars such suits unless state has waived its immunity or Congress has exercised its undoubted power under § 5 of Fourteenth Amendment to override that immunity. U.S.C.A. Const.Amends. 11, 14, § 5; 42 U.S.C.A. § 1983.

4478 Cases that cite this headnote

[2] **Federal Courts**
Civil rights and discrimination in general

Scope of Eleventh Amendment is consideration in deciphering congressional intent as to scope of federal rights statute. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

1845 Cases that cite this headnote

[3] **States**
What are suits against state or state officers

Suit against state official in his or her official capacity is suit not against official, but rather against official's office; as such, suit is no different from one against state itself. 42 U.S.C.A. § 1983.

11638 Cases that cite this headnote

[4] **Civil Rights**
States and territories and their agencies and instrumentalities, in general

Civil Rights
Liability of Public Employees and Officials

Neither state nor its officials acting in their official capacities are "persons" under federal civil rights statute. 42 U.S.C.A. § 1983.

11195 Cases that cite this headnote

****2305** *Syllabus* [*]

***58** Petitioner filed **Michigan** state-court suits under 42 U.S.C. § 1983 alleging that respondents, the Department of **State Police** and the Director of **State Police** in his official capacity, had denied him a promotion for an improper reason.

The state-court judge ruled for petitioner, finding that both respondents were "persons" under § 1983, which provides that any person who deprives an individual of his or her constitutional rights under color of state law shall be liable to that individual. However, the State Court of Appeals vacated the judgment against the Department, holding that a State is not a person under § 1983, and remanded the case for a determination of the Director's possible immunity. The State Supreme Court affirmed in part and reversed in part, agreeing that the State is not a person under § 1983, but holding that a state official acting in his or her official capacity also is not such a person.

Held: Neither States nor state officials acting in their official capacities are "persons" within meaning of § 1983. Pp. 2307–2312.

(a) That a State is not a person under § 1983 is supported by the statute's language, congressional purpose, and legislative history. In common usage, the term "person" does not include a State. This usage is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before. Reading § 1983 to ****2306** include States would be a decidedly awkward way of expressing such a congressional intent. The statute's language also falls short of satisfying the ordinary rule of statutory construction that Congress must make its intention to alter the constitutional balance between the States and the Federal Government unmistakably clear in a statute's language. Moreover, the doctrine of sovereign immunity is one of the well-established common-law immunities and defenses that Congress did not intend to override in enacting § 1983. Cf. *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616; *Railroad Co. v. Tennessee,* 101 U.S. 337, 25 L.Ed. 960. The "Dictionary Act" provision that a "person" includes "bodies politic and corporate" fails to evidence such an intent. This Court's ruling in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611—which held that a municipality is a person under § 1983—is not to the contrary, since States are protected by the Eleventh Amendment while municipalities are not. Pp. 2307–2311.

***59** b) A suit against state officials in their official capacities is not a suit against the officials but rather is a suit against the officials' offices and, thus, is no different from a suit against the State itself. Pp. 2311–2312.

428 **Mich**. 540, 410 N.W.2d 749, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post,* p. 2312. STEVENS, J., filed a dissenting opinion, *post,* p. 2321.

Attorneys and Law Firms

William Burnham argued the cause for petitioners. With him on the briefs were *Clark Cunningham, Paul D. Reingold, John A. Powell, Helen Hershkoff,* and *Steven R. Shapiro.*

George H. Weller, Assistant Attorney General of **Michigan**, argued the cause for respondents. With him on the brief were *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Thomas L. Casey,* Assistant Solicitor General.*

* *William A. Bradford, Jr., Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson,* and *Antonia Hernandez* filed a brief for the Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Tennessee et al. by *W.J. Michael Cody,* Attorney General of Tennessee, and *Michael W. Catalano,* Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Don Siegelman* of Alabama, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *John Van de Kamp* of California, *Duane Woodward* of Colorado, *Joseph Lieberman* of Connecticut, *Charles M. Oberly* of Delaware, *Robert Butterworth* of Florida, *Warren Pries III* of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Frederic J. Cowan* of Kentucky, *William J. Guste, Jr.,* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Hubert H. Humphrey III* of Minnesota, *Michael C. Moore* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *Hal Stratton* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Anthony J. Celebrezze, Jr.,* of Ohio, *Robert Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Hector Rivera-Cruz* of Puerto Rico, *Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *David L. Wilkinson* of Utah, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, *Don J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming;

and for the National Governors' Association et al. by *Benna Ruth Solomon, Kenneth S. Geller,* and *Andrew J. Pincus.*

Opinion

***60** Justice WHITE delivered the opinion of the Court.

This case presents the question whether a State, or an official of the State while acting in his or her official capacity, is a "person" within the meaning of Rev.Stat. § 1979, 42 U.S.C. § 1983.

Petitioner Ray **Will** filed suit in **Michigan** Circuit Court alleging various violations of the United States and **Michigan** Constitutions as grounds for a claim under § 1983.[1] He alleged that he had been denied a promotion to a data systems analyst position with the Department of **State Police** for an improper reason, that is, because his brother had been a student activist and the subject of a "red squad" file maintained by respondent. Named as defendants were the Department of **State Police** and the Director of **State Police** in his official capacity, also a respondent here.[2]

The Circuit Court remanded the case to the **Michigan** Civil Service Commission for a grievance hearing. While the grievance was pending, petitioner filed suit in the **Michigan** ***61** Court of Claims raising an essentially identical § 1983 claim. The Civil Service Commission ultimately found in petitioner's favor, ruling that respondents had refused to promote petitioner because of "partisan considerations." App. 46. On the basis of that finding, the state-court ****2307** judge, acting in both the Circuit Court and the Court of Claims cases, concluded that petitioner had established a violation of the United States Constitution. The judge held that the Circuit Court action was barred under state law but that the Claims Court action could go forward. The judge also ruled that respondents were persons for purposes of § 1983.

The **Michigan** Court of Appeals vacated the judgment against the Department of **State Police**, holding that a State is not a person under § 1983, but remanded the case for determination of the possible immunity of the Director of **State Police** from liability for damages. The **Michigan** Supreme Court granted discretionary review and affirmed the Court of Appeals in part and reversed in part. *Smith v. Department of Pub. Health,* 428 **Mich**. 540, 410 N.W.2d 749 (1987). The Supreme Court agreed that the State itself is not a person under § 1983, but held that a state official acting in his or her official capacity also is not such a person.

The **Michigan** Supreme Court's holding that a State is not a person under § 1983 conflicts with a number of state- and federal-court decisions to the contrary.[3] We granted certiorari to resolve the conflict. 485 U.S. 1005, 108 S.Ct. 1466, 99 L.Ed.2d 696 (1988).

***62** Prior to *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the question whether a State is a person within the meaning of § 1983 had been answered by this Court in the negative. In *Monroe v. Pape,* 365 U.S. 167, 187–191, 81 S.Ct. 473, 484–486, 5 L.Ed.2d 492 (1961), the Court had held that a municipality was not a person under § 1983. "[T]hat being the case," we reasoned, § 1983 "could not have been intended to include States as parties defendant." *Fitzpatrick v. Bitzer,* 427 U.S. 445, 452, 96 S.Ct. 2666, 2669, 49 L.Ed.2d 614 (1976).

But in *Monell,* the Court overruled *Monroe,* holding that a municipality was a person under § 1983. 436 U.S., at 690, 98 S.Ct., at 2035. Since then, various members ****2308** of the Court have debated whether a State is a person within the meaning of § 1983, see *Hutto v. Finney,* 437 U.S. 678, 700–704, 98 S.Ct. 2565, 2578–2581, 57 L.Ed.2d 522 (1978) (BRENNAN, J., concurring); *id.,* at 708, n. 6, 98 S.Ct., at 2583 n. 6 (Powell, J., concurring in ***63** part and dissenting in part), but this Court has never expressly dealt with that issue.[4]

Some courts, including the **Michigan** Supreme Court here, have construed our decision in *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), as holding by implication that a State is not a person under § 1983. See *Smith v. Department of Pub. Health, supra,* 428 **Mich**., at 581, 410 N.W.2d, at 767. See also, *e.g., State v. Green,* 633 P.2d 1381, 1382 (Alaska 1981); *Woodbridge v. Worcester State Hospital,* 384 Mass. 38, 44–45, n. 7, 423 N.E.2d 782, 786, n. 7 (1981); *Edgar v. State,* 92 Wash.2d 217, 221, 595 P.2d 534, 537 (1979), cert. denied, 444 U.S. 1077, 100 S.Ct. 1026, 62 L.Ed.2d 760 (1980). *Quern* held that § 1983 does not override a State's Eleventh Amendment immunity, a holding that the concurrence suggested was "patently dicta" to the effect that a State is not a person, 440 U.S., at 350, 99 S.Ct. 1139, 59 L.Ed.2d 358 (BRENNAN, J., concurring in judgment).

Petitioner filed the present § 1983 actions in **Michigan** state court, which places the question whether a State is a person under § 1983 squarely before us since the Eleventh Amendment ***64** does not apply in state courts. *Maine v. Thiboutot,* 448 U.S. 1, 9, n. 7, 100 S.Ct. 2502, 2507, n. 7, 65

L.Ed.2d 555 (1980). For the reasons that follow, we reaffirm today what we had concluded prior to *Monell* and what some have considered implicit in *Quern:* that a State is not a person within the meaning of § 1983.

We observe initially that if a State is a "person" within the meaning of § 1983, the section is to be read as saying that "every person, including a State, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects...." That would be a decidedly awkward way of expressing an intent to subject the States to liability. At the very least, reading the statute in this way is not so clearly indicated that it provides reason to depart from the often-expressed understanding that " 'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.' " *Wilson v. Omaha Tribe,* 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979) (quoting *United States v. Cooper Corp.,* 312 U.S. 600, 604, 61 S.Ct. 742, 743, 85 L.Ed. 1071 (1941)). See also *United States v. Mine Workers,* 330 U.S. 258, 275, 67 S.Ct. 677, 687, 91 L.Ed. 884 (1947).

This approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before. In *Wilson v. Omaha Indian Tribe, supra,* we followed this rule in construing the phrase "white ****2309** person" contained in 25 U.S.C. § 194, enacted as Act of June 30, 1834, 4 Stat. 729, as not including the "sovereign States of the Union." 442 U.S., at 667, 99 S.Ct., at 2537. This common usage of the term "person" provides a strong indication that "person" as used in § 1983 likewise does not include a State. [5]

***65** The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985); see also *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981); *South Dakota v. Dole,* 483 U.S. 203, 207, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

Our conclusion that a State is not a "person" within the meaning of § 1983 is reinforced by Congress' purpose in enacting ***66** the statute. Congress enacted § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983, shortly after the end of the Civil War "in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers." *Felder v. Casey,* 487 U.S. 131, 147, 108 S.Ct. 2302, 2311, 101 L.Ed.2d 123 (1988). Although Congress did not establish federal courts as the exclusive forum to remedy these deprivations, *ibid.,* it is plain that "Congress assigned to the federal courts a paramount role" in this endeavor, *Patsy v. Board of Regents of Florida,* 457 U.S. 496, 503, 102 S.Ct. 2557, 2561, 73 L.Ed.2d 172 (1982).

[1] Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, *Welch v. Texas Dept. of* ****2310** *Highways and Public Transportation,* 483 U.S. 468, 472–473, 107 S.Ct. 2941, 2945–2946, 97 L.Ed.2d 389 (1987) (plurality opinion), or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal–state balance in that respect was made clear in our decision in *Quern.* Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.

[2] This does not mean, as petitioner suggests, that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the ***67** scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it. [6]

Our conclusion is further supported by our holdings that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 258, 101 S.Ct. 2748, 2755, 69 L.Ed.2d 616 (1981). *Stump v. Sparkman,* 435 U.S. 349, 356, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978); *Scheuer v. Rhodes,* 416 U.S. 232, 247, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974); *Pierson v. Ray,* 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); and *Tenney v. Brandhove,* 341 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951), are also to this effect. The doctrine of sovereign immunity was a familiar doctrine at common law. "The principle is elementary that a State cannot be sued in its own courts without its consent." *Railroad Co. v. Tennessee,* 101 U.S. 337, 339, 25 L.Ed. 960 (1880). It is an "established principle of jurisprudence" that the sovereign cannot be sued in its own courts without its consent. *Beers v. Arkansas,* 61 U.S. (20 How.) 527, 529, 15 L.Ed. 991 (1858). We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent. [7]

***68** The legislative history of § 1983 does not suggest a different conclusion. Petitioner contends that the congressional debates on § 1 of the 1871 Act indicate that § 1983 was intended to extend to the full reach of the Fourteenth Amendment and ****2311** thereby to provide a remedy " 'against all forms of official violation of federally protected rights.' " Brief for Petitioner 16 (quoting *Monell,* 436 U.S., at 700–701, 98 S.Ct., at 2040–2041). He refers us to various parts of the vigorous debates accompanying the passage of § 1983 and revealing that it was the failure of the States to take appropriate action that was undoubtedly the motivating force behind § 1983. The inference must be drawn, it is urged, that Congress must have intended to subject the States themselves to liability. But the intent of Congress to provide a remedy for unconstitutional state action does not without more include the sovereign States among those persons against whom § 1983 actions would lie. Construing § 1983 as a remedy for "official violation of federally protected rights" does no more than confirm that the section is directed against state action—action "under color of" state law. It does not suggest that the State itself was a person that Congress intended to be subject to liability.

Although there were sharp and heated debates, the discussion of § 1 of the bill, which contained the present § 1983, was not extended. And although in other respects the impact on state sovereignty was much talked about, no one suggested that § 1 would subject the States themselves to a damages suit under federal law. *Quern,* 440 U.S., at 343, 99 S.Ct., at 1146. There was complaint that § 1 would subject state officers to damages liability, but no suggestion that it would also expose the States themselves. Cong.Globe, 42d Cong., 1st Sess., ***69** 366, 385 (1871). We find nothing substantial in the legislative history that leads us to believe that Congress intended that the word "person" in § 1983 included the States of the Union. And surely nothing in the debates rises to the clearly expressed legislative intent necessary to permit that construction.

Likewise, the Act of Feb. 25, 1871, § 2, 16 Stat. 431 (the "Dictionary Act"), [8] on which we relied in *Monell, supra,* 436 U.S., at 688–689, 98 S.Ct., at 2034–2035, does not counsel a contrary conclusion here. As we noted in *Quern,* that Act, while adopted prior to § 1 of the Civil Rights Act of 1871, was adopted after § 2 of the Civil Rights Act of 1866, from which § 1 of the 1871 Act was derived. 440 U.S., at 341, n. 11, 99 S.Ct., at 1145, n. 11. Moreover, we disagree with Justice BRENNAN that at the time the Dictionary Act was passed "the phrase 'bodies politic and corporate' was understood to include the States." *Post,* at 2316. Rather, an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States. [9] In our view, the ***70** Dictionary ****2312** Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable.

Finally, *Monell* itself is not to the contrary. True, prior to *Monell* the Court had reasoned that if municipalities were not persons then surely States also were not. *Fitzpatrick v. Bitzer,* 427 U.S., at 452, 96 S.Ct., at 2669. And *Monell* overruled *Monroe,* undercutting that logic. But it does not follow that if municipalities are persons then so are States. States are protected by the Eleventh Amendment while municipalities

are not, *Monell,* 436 U.S., at 690, n. 54, 98 S.Ct., at 2035, n. 54, and we consequently limited our holding in *Monell* "to local government units which are not considered part of the State for Eleventh Amendment purposes," *ibid.* Conversely, our holding here does not cast any doubt on *Monell,* and applies only to States or governmental entities that are considered "arms of the State" for Eleventh Amendment purposes. See, *e.g., Mt. Healthy Bd. of Ed. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977).

Petitioner asserts, alternatively, that state officials should be considered "persons" under § 1983 even though acting in their official capacities. In this case, petitioner named as defendant not only the **Michigan** Department of **State Police** but also the Director of **State Police** in his official capacity.

***71** **[3]** Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt,* 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. See, *e.g., Kentucky v. Graham,* 473 U.S. 159, 165–166, 105 S.Ct. 3099, 3104–3105, 87 L.Ed.2d 114 (1985); *Monell, supra,* at 690, n. 55, 98 S.Ct., at 2035, n. 55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. [10]

[4] We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983. The judgment of the **Michigan** Supreme Court is affirmed.

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

Because this case was brought in state court, the Court concedes, the Eleventh Amendment is inapplicable here. See *ante,* at 2308. Like the guest who would not leave, ***72** however, the Eleventh Amendment ****2313** lurks everywhere in today's decision and, in truth, determines its outcome.

I

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, renders certain "persons" liable for deprivations of constitutional rights. The question presented is whether the word "person" in this statute includes the States and state officials acting in their official capacities.

One might expect that this statutory question would generate a careful and thorough analysis of the language, legislative history, and general background of § 1983. If this is what one expects, however, one **will** be disappointed by today's decision. For this case is not decided on the basis of our ordinary method of statutory construction; instead, the Court disposes of it by means of various rules of statutory interpretation that it summons to its aid each time the question looks close. Specifically, the Court invokes the following interpretative principles: the word "persons" is ordinarily construed to exclude the sovereign; congressional intent to affect the federal-state balance must be "clear and manifest"; and intent to abrogate States' Eleventh Amendment immunity must appear in the language of the statute itself. The Court apparently believes that each of these rules obviates the need for close analysis of a statute's language and history. Properly applied, however, only the last of these interpretative principles has this effect, and that principle is not pertinent to the case before us.

The Court invokes, first, the "often-expressed understanding" that " 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.' " *Ante,* at 2308, quoting *Wilson v. Omaha Tribe,* 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979). This rule is used both to refute the argument that the language of § 1983 demonstrates an intent that States be included as defendants, *ante,* at 2308, and to overcome the argument ***73** based on the Dictionary Act's definition of "person" to include bodies politic and corporate, *ante,* at 2310–2310. It is ironic, to say the least, that the Court chooses this interpretive rule in explaining why the Dictionary Act is not decisive, since the rule is relevant only when the word "persons" has no statutory definition. When one considers the origins and content of this interpretive guideline, moreover, one realizes that it is inapplicable here and, even if applied, would defeat rather than support the Court's approach and result.

The idea that the word "persons" ordinarily excludes the sovereign can be traced to the "familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words." *Dollar Savings Bank v. United States,* 86 U.S. (19 Wall.) 227, 239, 22 L.Ed. 80 (1874). As this passage suggests, however, this interpretive principle applies only to "the enacting sovereign." *United States v. California,* 297 U.S. 175, 186, 56 S.Ct. 421, 425, 80 L.Ed. 567 (1936). See also *Jefferson County Pharmaceutical Assn., Inc. v. Abbott Laboratories,* 460 U.S. 150, 161, n. 21, 103 S.Ct. 1011, 1019, n. 21, 74 L.Ed.2d 882 (1983). Furthermore, as explained in *United States v. Herron,* 87 U.S. (20 Wall.) 251, 255, 22 L.Ed. 275 (1874), even the principle as applied to the enacting sovereign is not without limitations: "Where an act of Parliament is made for the public good, as for the advancement of religion and justice or to prevent injury and wrong, the king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words." It would be difficult to imagine a statute more clearly designed "for the public good," and "to prevent injury and wrong," than § 1983.

Even if this interpretative principle were relevant to this case, the Court's invocation of it to the exclusion of careful statutory analysis is in error. As we have made clear, this principle is merely "an aid to consistent construction of statutes of the ****2314** enacting sovereign when their purpose is in ***74** doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." *United States v. California, supra,* 297 U.S., at 186, 56 S.Ct., at 425. Indeed, immediately following the passage quoted by the Court today, *ante,* at 2308, to the effect that statutes using the word "person" are "ordinarily construed to exclude" the sovereign, we stated:

> "But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.
>
> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction." *United States v. Cooper Corp.,* 312 U.S. 600, 604–605, 61 S.Ct. 742, 743–744, 85 L.Ed. 1071 (1941).

See also *Wilson v. Omaha Indian Tribe, supra,* 442 U.S., at 667, 99 S.Ct., at 2537 ("There is ... 'no hard and fast rule of exclusion,' *United States v. Cooper Corp.,* [312 U.S. 600,] 604–605, 61 S.Ct., at 743–744 [(1941)]; and much depends on the context, the subject matter, legislative history, and executive interpretation"); *Pfizer Inc. v. India,* 434 U.S. 308, 315–318, 98 S.Ct. 584, 589–591, 54 L.Ed.2d 563 (1978); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* 224 U.S. 152, 155, 32 S.Ct. 457, 458, 56 L.Ed. 706 (1912); *Lewis v. United States,* 92 U.S. 618, 622, 23 L.Ed. 513 (1875); *Green v. United States,* 76 U.S. (9 Wall.) 655, 658, 19 L.Ed. 806 (1870).

The second interpretive principle that the Court invokes comes from cases such as *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981); *South Dakota v. Dole,* 483 U.S. 203, 207–208, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987); and *United States v.* ***75** *Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971), which require a "clear and manifest" expression of congressional intent to change some aspect of federal-state relations. *Ante,* at 2308–2309. These cases do not, however, permit substitution of an absolutist rule of statutory construction for thorough statutory analysis. Indeed, in each of these decisions the Court undertook a careful and detailed analysis of the statutory language and history under consideration. *Rice* is a particularly inapposite source for the interpretive method that the Court today employs, since it observes that, according to conventional pre-emption analysis, a "clear and manifest" intent to pre-empt state legislation may appear in the "scheme" or "purpose" of the federal statute. See 331 U.S., at 230, 67 S.Ct., at 1152.

The only principle of statutory construction employed by the Court that would justify a perfunctory and inconclusive analysis of a statute's language and history is one that is irrelevant to this case. This is the notion "that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Ante,* at 2308, quoting *Atascadero State Hospital*

v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985). As the Court notes, *Atascadero* was an Eleventh Amendment case; the "constitutional balance" to which *Atascadero* refers is that struck by the Eleventh Amendment as this Court has come to interpret it. Although the Court apparently wishes it were otherwise, the principle of interpretation that *Atascadero* announced is unique to cases involving the Eleventh Amendment.

**2315 Where the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other situation. Indeed, just today, the Court has intimated that this clear-statement principle is not simply a means of discerning congressional intent. See *Dellmuth v. Muth,* 491 U.S. 223, 232, 109 S.Ct. 2397, 2402, 105 L.Ed.2d 181 (1989) (concluding that one may not rely on a "permissible inference" from a statute's language and structure in finding abrogation of immunity); *76 at 238–239, 109 S.Ct., at 2405–2406 (BRENNAN, J., dissenting); but see *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). Since this case was brought in state court, however, this strict drafting requirement has no application here. The Eleventh Amendment can hardly be "a consideration," *ante,* at 2309, in a suit to which it does not apply.

That this Court has generated a uniquely daunting requirement of clarity in Eleventh Amendment cases explains why *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), did not decide the question before us today. Because only the Eleventh Amendment permits use of this clear-statement principle, the holding of *Quern v. Jordan* that § 1983 does not abrogate States' Eleventh Amendment immunity tells us nothing about the meaning of the term "person" in § 1983 as a matter of ordinary statutory construction. *Quern* 's conclusion thus does not compel, or even suggest, a particular result today.

The singularity of this Court's approach to statutory interpretation in Eleventh Amendment cases also refutes the Court's argument that, given *Quern* 's holding, it would make no sense to construe § 1983 to include States as "persons." See *ante,* at 2309. This is so, the Court suggests, because such a construction would permit suits against States in state but not federal court, even though a major purpose of Congress in enacting § 1983 was to provide a federal forum for litigants who had been deprived of their constitutional rights. See, *e.g., Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In answering the question whether § 1983 provides a federal forum for suits against the States themselves, however, one must apply the clear-statement principle reserved for Eleventh Amendment cases. Since this principle is inapplicable to suits brought in state court, and inapplicable to the question whether States are among those subject to a statute, see *Employees v. Missouri Dept. of Public Health and Welfare,* 411 U.S. 279, 287, 93 S.Ct. 1614, 1619, 36 L.Ed.2d 251 (1973); *Atascadero, supra,* 473 U.S., at 240, n. 2, 105 S.Ct., at 3146, n. 2, the answer to the question whether § 1983 provides a federal forum for suits against the States may be, and most often will *77 be, different from the answer to the kind of question before us today. Since the question whether Congress has provided a federal forum for damages suits against the States is answered by applying a uniquely strict interpretive principle, see *supra,* at 2308, the Court should not pretend that we have, in *Quern,* answered the question whether Congress intended to provide a federal forum for such suits, and then reason backwards from that "intent" to the conclusion that Congress must not have intended to allow such suits to proceed in state court.

In short, the only principle of statutory interpretation that permits the Court to avoid a careful and thorough analysis of § 1983's language and history is the clear-statement principle that this Court has come to apply in Eleventh Amendment cases—a principle that is irrelevant to this state-court action. In my view, a careful and detailed analysis of § 1983 leads to the conclusion that States are "persons" within the meaning of that statute.

II

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United **2316 States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

> at law, suit in equity, or other proper proceeding for redress."

Although § 1983 itself does not define the term "person," we are not without a statutory definition of this word. "Any analysis of the meaning of the word 'person' in § 1983 ... must begin ... with the Dictionary Act." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 719, 98 S.Ct. 2018, 2050, 56 L.Ed.2d 611 (1978) (REHNQUIST, J., dissenting). Passed just two months before ***78** § 1983, and designed to "suppl[y] rules of construction for all legislation," *ibid.,* the Dictionary Act provided:

> "That in all acts hereafter passed ... the word 'person' may extend and be applied to bodies politic and corporate ... unless the context shows that such words were intended to be used in a more limited sense...." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

In *Monell,* we held this definition to be not merely allowable but mandatory, requiring that the word "person" be construed to include "bodies politic and corporate" unless the statute under consideration "by its terms called for a deviation from this practice." 436 U.S., at 689–690, n. 53, 98 S.Ct., at 2035, n. 53. Thus, we concluded, where nothing in the "context" of a particular statute "call[s] for a restricted interpretation of the word 'person,' the language of that [statute] should prima facie be construed to include 'bodies politic' among the entities that could be sued." *Ibid.*

Both before and after the time when the Dictionary Act and § 1983 were passed, the phrase "bodies politic and corporate" was understood to include the States. See, *e.g.,* J. Bouvier, 1 A Law Dictionary Adapted to the Constitution and Laws of the United States of America 185 (11th ed. 1866); W. Shumaker & G. Longsdorf, Cyclopedic Dictionary of Law 104 (1901); *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 447, 1 L.Ed. 440 (1793) (Iredell, J.); *id.,* at 468 (Cushing, J.); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231, 13 L.Ed. 675 (1851) ("Every sovereign State is of necessity a body politic, or artificial person"); *Poindexter v. Greenhow,* 114 U.S. 270, 288, 5 S.Ct. 903, 29 L.Ed. 185 (1885); *McPherson v. Blacker,* 146 U.S. 1, 24, 13 S.Ct. 3, 6, 36 L.Ed. 869 (1892); *Heim v. McCall,* 239 U.S. 175, 188, 36 S.Ct. 78, 82, 60 L.Ed. 206 (1915). See also *United States v. Maurice,* 2 Brock. 96, 109, 26 F.Cas. 1211 (CC Va.1823) (Marshall, C.J.) ("The United States is a government, and, consequently, a body politic and corporate"); *Van Brocklin v. Tennessee,* 117 U.S. 151, 154, 6 S.Ct. 670, 672, 29 L.Ed. 845 (1886) (same). Indeed, the very legislators who passed § 1 referred to States in these terms. See, *e.g.,* Cong. Globe, 42d Cong., 1st Sess., 661–662 (1871) (Sen. Vickers) ("What is a State? Is ***79** it not a body politic and corporate?"); *id.,* at 696 (Sen. Edmunds) ("A State is a corporation").

The reason why States are "bodies politic and corporate" is simple: just as a corporation is an entity that can act only through its agents, "[t]he State is a political corporate body, can act only through agents, and can command only by laws." *Poindexter v. Greenhow, supra,* 114 U.S., at 288, 5 S.Ct. at 912–913. See also Black's Law Dictionary 159 (5th ed. 1979) ("[B]ody politic or corporate": "A social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good"). As a "body politic and corporate," a State falls squarely within the Dictionary Act's definition of a "person."

While it is certainly true that the phrase "bodies politic and corporate" referred to private and public corporations, see *ante,* at 2311, and n. 9, this fact does not draw into question the conclusion that this phrase also applied to the States. Phrases may, of course, have multiple referents. Indeed, each and every dictionary cited by the Court accords a broader realm—one ****2317** that comfortably, and in most cases explicitly, includes the sovereign—to this phrase than the Court gives it today. See 1B. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence 155 (1879) ("[T]he term body politic is often used in a general way, as meaning the state or the sovereign power, or the city government, without implying any distinct express incorporation"); W. Anderson, A Dictionary of Law 127 (1893) ("[B]ody politic": "The governmental, sovereign power: a city or a State"); Black's Law Dictionary 143 (1891) ("[B]ody politic": "It is often used, in a rather loose way, to designate the state or nation or sovereign power, or the government of a county or municipality, without distinctly connoting any express and individual corporate charter"); 1A. Burrill, A Law Dictionary and Glossary 212 (2d ed. 1871) ("[B]ody politic": "A body to take in succession, framed by *policy";* "[p]articularly ***80** applied, in the old books, to a Corporation sole"); *id.,* at 383 ("Corporation sole" includes the sovereign in England).

Because I recognize that both uses of this phrase were deemed valid when § 1983 and the Dictionary Act were passed, the Court accuses me of "confus [ing] [the] precise definition of [this] phrase with its use 'in a rather loose way,' " "to refer to *the* state (as opposed to *a* State)." *Ante,* at 2311, n. 9, quoting

Black, *supra,* at 143. It had never occurred to me, however, that only "precise" definitions counted as valid ones. Where the question we face is what meaning Congress attached to a particular word or phrase, we usually—and properly—are loath to conclude that Congress meant to use the word or phrase in a hypertechnical sense unless it said so. Nor does the Court's distinction between "*the* state" and "*a* State" have any force. The suggestion, I take it, is that the phrase "bodies politic and corporate" refers only to nations rather than to the states within a nation; but then the Court must explain why so many of the sources I have quoted refer to states *in addition to* nations. In an opinion so utterly devoted to the rights of the States as sovereigns, moreover, it is surprising indeed to find the Court distinguishing between our sovereign States and our sovereign Nation.

In deciding what the phrase "bodies politic and corporate" means, furthermore, I do not see the relevance of the meaning of the term "public corporation." See *ante,* at 2310–2311, n. 9. That is not the phrase chosen by Congress in the Dictionary Act, and the Court's suggestion that this phrase is coterminous with the phrase "bodies politic and corporate" begs the question whether the latter one includes the States. Nor do I grasp the significance of this Court's decision in *United States v. Fox,* 94 U.S. 315, 24 L.Ed. 192 (1877), in which the question was whether the State of New York, by including "persons" and "corporations" within the class of those to whom land could be devised, had intended to authorize devises to the United States. *Ante,* at 2311, n. 9. Noting that "[t]he question is to be determined by the laws of [New York]," the ***81** Court held that it would require "an express definition" to hold that the word "persons" included the Federal Government, and that under state law the term "corporations" applied only to corporations created under the laws of New York. 94 U.S., at 320–321. The pertinence of these state-law questions to the issue before us today escapes me. Not only do we confront an entirely different, *federal* statute, but we also have an express statement, in the Dictionary Act, that the word "person" in § 1 includes "bodies politic and corporate." See also *Pfizer Inc. v. India,* 434 U.S., at 315, n. 15, 98 S.Ct., at 589, n. 15.

The relevance of the fact that § 2 of the Civil Rights Act of 1866, 14 Stat. 27,—the model for § 1 of the 1871 Act—was passed before the Dictionary Act, see *ante,* at 2310, similarly eludes me. Congress chose to use the word "person" in the 1871 Act even after it had passed the Dictionary Act, presumptively including "bodies politic and corporate" within the category of "persons." Its decision to do so—and its failure to indicate in the 1871 Act that the ****2318** Dictionary Act's presumption was not to apply—demonstrate that Congress did indeed intend "persons" to include bodies politic and corporate. In addition, the Dictionary Act's definition of "person" by no means dropped from the sky. Many of the authorities cited above predate both the Dictionary Act *and* the 1866 Act, indicating that the word "persons" in 1866 ordinarily would have been thought to include "bodies politic and corporate," with or without the Dictionary Act.

This last point helps to explain why it is a matter of small importance that the Dictionary Act's definition of "person" as including bodies politic and corporate was retroactively withdrawn when the federal statutes were revised in 1874. See T. Durant, Report to Joint Committee on Revision of Laws 2 (1873). Only two months after presumptively designating bodies politic and corporate as "persons," Congress chose the word "person" for § 1 of the Civil Rights Act. For the purpose of determining Congress' intent in using this ***82** term, it cannot be decisive that, three years later, it withdrew this presumption. In fact, both the majority and dissent in *Monell* emphasized the 1871 version of the Dictionary Act, but neither saw fit even to mention the 1874 revision of this statute. 436 U.S., at 688–689, and nn. 51, 53, 98 S.Ct., at 2034–2035, and nn. 51, 53 (opinion for the Court); *id.,* at 719, 98 S.Ct., at 2050 (REHNQUIST, J., dissenting). Even in cases, moreover, where no statutory definition of the word "persons" is available, we have not hesitated to include bodies politic and corporate within that category. See *Stanley v. Schwalby,* 147 U.S. 508, 517, 13 S.Ct. 418, 421, 37 L.Ed. 259 (1893) ("[T]he word 'person' in the statute would include [the States] as a body politic and corporate"); *Ohio v. Helvering,* 292 U.S. 360, 370, 54 S.Ct. 725, 727, 78 L.Ed. 1307 (1934); *United States v. Shirey,* 359 U.S. 255, 257, n. 2, 79 S.Ct. 746, 747, n. 2, 3 L.Ed.2d 789 (1959).

Thus, the question before us is whether the presumption that the word "person" in § 1 of the Civil Rights Act of 1871 included bodies politic and corporate—and hence the States—is overcome by anything in the statute's language and history. Certainly nothing in the statutory language overrides this presumption. The statute is explicitly directed at action taken "under color of" state law, and thus supports rather than refutes the idea that the "persons" mentioned in the statute include the States. Indeed, for almost a century—until *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)—it was unclear whether the statute applied at all to action not authorized by the State, and the enduring

significance of the first cases construing the Fourteenth Amendment, pursuant to which § 1 was passed, lies in their conclusion that the prohibitions of this Amendment do not reach private action. See *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). In such a setting, one cannot reasonably deny the significance of § 1983's explicit focus on state action.

Unimpressed by such arguments, the Court simply asserts that reading "States" where the statute mentions "person" would be "decidedly awkward." *Ante,* at 2308. The Court does not describe the awkwardness that it perceives, but I take it that its objection is that the under-color-of-law ***83** requirement would be redundant if States were included in the statute because States necessarily act under color of state law. But § 1983 extends as well to natural persons, who do not necessarily so act; in order to ensure that *they* would be liable only when they did so, the statute needed the under-color-of-law requirement. The only way to remove the redundancy that the Court sees would have been to eliminate the catchall phrase "person" altogether, and separately describe each category of possible defendants and the circumstances under which they might be liable. I cannot think of a situation not involving the Eleventh Amendment, however, in which we have imposed such an unforgiving drafting requirement on Congress.

Taking the example closest to this case, we might have observed in *Monell* that § 1983 was clumsily written if it included ****2319** municipalities, since these, too, may act only under color of state authority. Nevertheless, we held there that the statute does apply to municipalities. 436 U.S., at 690, 98 S.Ct., at 2035. Similarly, we have construed the statutory term "white persons" to include " 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,' " see *Wilson v. Omaha Tribe,* 442 U.S., at 666, 99 S.Ct., at 2537, quoting 1 U.S.C. § 1, despite the evident awkwardness in doing so. Indeed, virtually every time we construe the word "person" to include corporate or other artificial entities that are not individual, flesh-and-blood persons, some awkwardness results. But given cases like *Monell* and *Wilson,* it is difficult to understand why mere linguistic awkwardness should control where there is good reason to accept the "awkward" reading of a statute.

The legislative history and background of the statute confirm that the presumption created by the Dictionary Act was not overridden in § 1 of the 1871 Act, and that, even without such a presumption, it is plain that "person" in the 1871 Act must include the States. I discussed in detail the legislative history of this statute in my opinion concurring in the judgment ***84** in *Quern v. Jordan,* 440 U.S., at 357–365, 99 S.Ct., at 1153–1158, and I shall not cover that ground again here. Suffice it to say that, in my view, the legislative history of this provision, though spare, demonstrates that Congress recognized and accepted the fact that the statute was directed at the States themselves. One need not believe that the statute satisfies this Court's heightened clear-statement principle, reserved for Eleventh Amendment cases, in order to conclude that the language and legislative history of § 1983 show that the word "person" must include the States.

As to the more general historical background of § 1, we too easily forget, I think, the circumstances existing in this country when the early civil rights statutes were passed. "[V]iewed against the events and passions of the time," *United States v. Price,* 383 U.S. 787, 803, 86 S.Ct. 1152, 1161, 16 L.Ed.2d 267 (1966), I have little doubt that § 1 of the Civil Rights Act of 1871 included States as "persons." The following brief description of the Reconstruction period is illuminating:

> "The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States. It had declared the governments in 10 'unreconstructed' States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.
>
> "For a few years 'radical' Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the ***85** White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.

> "Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866.... On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, ****2320** and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted." *Id.,* at 803–805, 86 S.Ct., at 1161–1163 (footnotes omitted).

This was a Congress in the midst of altering the " 'balance between the States and the Federal Government.' " *Ante,* at 2308, quoting *Atascadero State Hospital v. Scanlon,* 473 U.S., at 242, 105 S.Ct., at 3147. It was fighting to save the Union, and in doing so, it transformed our federal system. It is difficult, therefore, to believe that this same Congress did not intend to include States among those who might be liable under § 1983 for the very deprivations that were threatening this Nation at that time.

III

To describe the breadth of the Court's holding is to demonstrate its unwisdom. If States are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.

***86** This is indeed an exceptional holding. Not only does it depart from our suggestion in *Alabama v. Pugh,* 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978), that a State could be a defendant under § 1983 if it consented to suit, see also *Quern v. Jordan, supra,* 440 U.S., at 340, 99 S.Ct., at 1144, but it also renders ineffective the choices some States have made to permit such suits against them. See, *e.g., Della Grotta v. Rhode Island,* 781 F.2d 343 (CA1 1986). I do not understand what purpose is served, what principle of federalism or comity is promoted, by refusing to give force to a State's explicit consent to suit.

The Court appears to be driven to this peculiar result in part by its view that "in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law." *Ante,* at 2309. But the question whether States are "persons" under § 1983 is separate and distinct from the question whether they may assert a defense of common-law sovereign immunity. In our prior decisions involving common-law immunities, we have not held that the existence of an immunity defense excluded the relevant state actor from the category of "persons" liable under § 1983, see, *e.g., Forrester v. White,* 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), and it is a mistake to do so today. Such an approach entrenches the effect of common-law immunity even where the immunity itself has been waived.

For my part, I would reverse the judgment below and remand for resolution of the question whether **Michigan** would assert common-law sovereign immunity in defense to this suit and, if so, whether that assertion of immunity would preclude the suit.

Given the suggestion in the court below that **Michigan** enjoys no common-law immunity for violations of its own Constitution, *Smith v. Department of Public Health,* 428 **Mich**. 540, 641–642, 410 N.W.2d 749, 793–794 (1987) (Boyle, J., concurring), there is certainly a possibility that that court would hold that the State also lacks immunity against § 1983 suits for violations of the Federal Constitution. ***87** Moreover, even if that court decided that the State's waiver of immunity did not apply to § 1983 suits, there is a substantial question whether **Michigan** could so discriminate between virtually identical causes of action only on the ground that one was a state suit and the other a federal one. Cf. *Testa v. Katt,* 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); *Martinez v. California,* 444 U.S. 277, 283, n. 7, 100 S.Ct. 553, 558, n. 7, 62 L.Ed.2d 481 (1980). Finally, even if both of these questions were resolved in favor of an immunity defense, there would remain the question whether it would be reasonable to attribute to Congress an intent to allow States to decide for themselves whether to take cognizance of § 1983 suits brought against them. Cf. ****2321** *Martinez, supra,* at 284, and n. 8, 100 S.Ct., at 558, and n. 8; *Owen v. City of Independence,* 445 U.S. 622, 647–648, 100 S.Ct. 1398, 1413, 63 L.Ed.2d 673 (1980).

Because the court below disposed of the case on the ground that States were not "persons" within the meaning of § 1983, it did not pass upon these difficult and important questions. I therefore would remand this case to the state court to resolve these questions in the first instance.

Justice STEVENS, dissenting.

Legal doctrines often flourish long after their *raison d'être* has perished. [1] The doctrine of sovereign immunity rests on the fictional premise that the "King can do no wrong." [2] Even though the plot to assassinate James I in 1605, the execution ***88** of Charles I in 1649, and the Colonists' reaction to George III's stamp tax made rather clear the fictional character of the doctrine's underpinnings, British subjects found a gracious means of compelling the King to obey the law rather than simply repudiating the doctrine itself. They held his advisers and his agents responsible. [3]

In our administration of § 1983, we have also relied on fictions to protect the illusion that a sovereign State, absent consent, may not be held accountable for its delicts in federal court. Under a settled course of decision, in contexts ranging from school desegregation to the provision of public ***89** assistance benefits to the administration of prison systems and other state facilities, we have held the States liable under § 1983 for their constitutional violations through the artifice of naming a public officer as a nominal party. Once one strips away the Eleventh Amendment overlay applied to actions in federal court, it is apparent that the Court in these cases has treated the State as the real party in interest both for the purposes of granting prospective and ancillary relief and of denying retroactive ****2322** relief. When suit is brought in state court, where the Eleventh Amendment is inapplicable, it follows that the State can be named directly as a party under § 1983.

An official-capacity suit is the typical way in which we have held States responsible for their duties under federal law. Such a suit, we have explained, " 'generally represent[s] only another way of pleading an action against an entity of which an officer is an agent.' " *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 3104, 87 L.Ed.2d 114 (1985) (quoting *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978)); see also *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). In the peculiar Eleventh Amendment analysis we have applied to such cases, we have recognized that an official-capacity action is in reality always against the State and balanced interests to determine whether a particular type of relief is available. The Court has held that when a suit seeks equitable relief or money damages from a state officer for injuries suffered in the past, the interests in compensation and deterrence are insufficiently weighty to override the State's sovereign immunity. See *Papasan v. Allain,* 478 U.S. 265, 278, 106 S.Ct. 2932, 2940, 92 L.Ed.2d 209 (1986); *Green v. Mansour,* 474 U.S. 64, 68, 106 S.Ct. 423, 425, 88 L.Ed.2d 371 (1985); *Edelman v. Jordan,* 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974). On the other hand, although prospective relief awarded against a state officer also "implicate[s] Eleventh Amendment concerns," *Mansour,* 474 U.S., at 68, 106 S.Ct., at 426, the interests in "end[ing] a continuing violation of federal law," *ibid.,* outweigh the interests in state sovereignty and justify ***90** an award under § 1983 of an injunction that operates against the State's officers or even directly against the State itself. See, *e.g., Papasan, supra,* 478 U.S. at 282, 106 S.Ct., at 2942; *Quern v. Jordan,* 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979); *Milliken v. Bradley,* 433 U.S. 267, 289, 97 S.Ct. 2749, 2761, 53 L.Ed.2d 745 (1977).

In *Milliken v. Bradley, supra,* for example, a unanimous Court upheld a federal-court order requiring the State of **Michigan** to pay $5,800,000 to fund educational components in a desegregation decree "notwithstanding [its] *direct* and substantial impact on the state treasury." *Id.,* at 289, 97 S.Ct., at 2761 (emphasis added). [4] As Justice Powell stated in his opinion concurring in the judgment, "the State [had] been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate." *Id.,* at 295, 97 S.Ct., at 2764. Subsequent decisions have adhered to the position that equitable relief—even "a remedy that might require the expenditure of state funds," *Papasan, supra,* at 282, 106 S.Ct., at 2943—may be awarded to ensure future compliance by a State with a substantive federal question determination. See also *Quern v. Jordan,* 440 U.S., at 337, 99 S.Ct., at 1143.

Our treatment of States as "persons" under § 1983 is also exemplified by our decisions holding that ancillary relief, such as attorney's fees, may be awarded directly against the State. We have explained that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity ***91** or on the merits, § 1988 does not authorize a fee award ****2323** against that defendant." *Kentucky v. Graham, supra,* at 165, 105 S.Ct., at 3104. Nonetheless, we held in *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), a case challenging the administration of the Arkansas prison system, that a Federal District Court could award attorneys fees directly against the State under § 1988, [5] *id.,* at 700, 98 S.Ct., at 2578; see *Brandon v. Holt,* 469 U.S. 464, 472,

105 S.Ct. 873, 878, 83 L.Ed.2d 878 (1985), and could assess attorneys fees for bad faith litigation under § 1983 " 'to be paid out of Department of Corrections funds.' " 437 U.S., at 692, 98 S.Ct., at 2574. In *Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719, 739, 100 S.Ct. 1967, 1978, 64 L.Ed.2d 641 (1980), Justice WHITE reaffirmed for a unanimous Court that an award of fees could be entered against a State or state agency, in that case a State Supreme Court, in an injunctive action under § 1983. [6] In suits commenced in state court, in which there is no independent reason to require parties to sue nominally a state officer, we have held that attorney's ***92** fees can be awarded against the State in its own name. See *Maine v. Thiboutot,* 448 U.S. 1, 10–11, 100 S.Ct. 2502, 2506–2507, 65 L.Ed.2d 555 (1980). [7]

The Civil Rights Act of 1871 was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. New York City Dept. of Social Services,* 436 U.S. at 700–701, 98 S.Ct., at 2040–2041. Our holdings that a § 1983 action can be brought against state officials in their official capacity for constitutional violations properly recognize and are faithful to that profound mandate. If prospective relief can be awarded against state officials under § 1983 and the State is the real party in interest in such suits, the State must be a "person" which can be held liable under § 1983. No other conclusion is available. Eleventh Amendment principles may limit the State's capacity to be sued as such in federal court. See *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). But since those principles are not applicable to suits in state court, see *Thiboutot, supra,* at 9, n. 7, 100 S.Ct., at n. 7; *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), there is no need to resort to the fiction of an official-capacity suit and the State may and should be named directly as a defendant in a § 1983 action.

The Court concludes, however, that "a state official in his or her official capacity, ****2324** when sued for injunctive relief, would be a person under § 1983," *ante,* at 2311, n. 10, while that same party sued in the same official capacity is not a person when the plaintiff seeks monetary relief. It cites in support of this proposition cases such as *Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), in which the Court through Chief Justice Marshall held that an action against a state auditor to recover taxes illegally collected did not constitute an action against the State. This line of authority, the Court states, "would ***93** not have been foreign to the 19th-century Congress that enacted § 1983." *Ante,* at 2312, n. 10.

On the Court's supposition, the question would be whether the complaint against a state official states a claim for the type of relief sought, not whether it **will** have an impact on the state treasury. See, *e.g., Governor of Georgia v. Madrazo,* 26 U.S. (1 Pet.) 110, 124, 7 L.Ed. 73 (1828). At least for actions in state court, as to which there could be no constitutional reason to look to the effect on the State, see *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court's analysis would support actions for the recovery of chattel and real property against state officials both of which were well known in the 19th century. See *Poindexter v. Greenhow,* 114 U.S. 270, 5 S.Ct. 903, 29 L.Ed. 185 (1884); *United States v. Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882). Although the conclusion that a state officer sued for damages in his or her official capacity is not a "person" under § 1983 would not quite follow, [8] it might nonetheless be permissible to assume that the 1871 Congress did not contemplate an action for damages payable not by the officer personally but by the State.

The Court having constructed an edifice for the purposes of the Eleventh Amendment on the theory that the State is always the real party in interest in a § 1983 official-capacity action against a state officer, I would think the majority would be impelled to conclude that the State is a "person" under § 1983. As Justice BRENNAN has demonstrated, there is also a compelling textual argument that States are persons under § 1983. In addition, the Court's construction draws an illogical distinction between wrongs committed by county or municipal officials on the one hand, and those committed by state officials on the other. Finally, there is no necessity to ***94** import into this question of statutory construction doctrine created to protect the fiction that one sovereign cannot be sued in the courts of another sovereign. Aside from all of these reasons, the Court's holding that a State is not a person under § 1983 departs from a long line of judicial authority based on exactly that premise.

I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 1983 provides as follows:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

2 Also named as defendants were the **Michigan** Department of Civil Service and the State Personnel Director, but those parties were subsequently dismissed by the state courts.

3 The courts in the following cases have taken the position that a State is a person under § 1983. See *Della Grotta v. Rhode Island,* 781 F.2d 343, 349 (CA1 1986); *Gay Student Services v. Texas A & M University,* 612 F.2d 160, 163–164 (CA5), cert. denied, 449 U.S. 1034, 101 S.Ct. 608, **66** L.Ed.2d 495 (1980); *Uberoi v. University of Colorado,* 713 P.2d 894, 900–901 (Colo.1986); *Stanton v. Godfrey,* 415 N.E.2d 103, 107 (Ind.App.1981); *Gumbhir v. Kansas State Bd. of Pharmacy,* 231 Kan. 507, 512–513, 646 P.2d 1078, 1084 (1982), cert. denied, 459 U.S. 1103, 103 S.Ct. 724, 74 L.Ed.2d 950 (1983); *Rahmah Navajo School Bd., Inc. v. Bureau of Revenue,* 104 N.M. 302, 310, 720 P.2d 1243, 1251 (App.), cert. denied, 479 U.S. 940, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986).
A larger number of courts have agreed with the **Michigan** Supreme Court that a State is not a person under § 1983. See *Ruiz v. Estelle,* 679 F.2d 1115, 1137 (CA5), modified on other grounds, 688 F.2d 266 (1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Toledo, P. & W. R. Co. v. Illinois,* 744 F.2d 1296, 1298–1299, and n. 1 (CA7 1984), cert. denied, 470 U.S. 1051, 105 S.Ct. 1751, 84 L.Ed.2d 815 (1985); *Harris v. Missouri Court of Appeals,* 787 F.2d 427, 429 (CA8), cert. denied, 479 U.S. 851, 107 S.Ct. 179, 93 L.Ed.2d 114 (1986); *Aubuchon v. Missouri,* 631 F.2d 581, 582 (CA8 1980) (*per curiam*), cert. denied, 450 U.S. 915, 101 S.Ct. 1358, 67 L.Ed.2d 341 (1981); *State v. Green,* 633 P.2d 1381, 1382 (Alaska 1981); *St. Mary's Hospital and Health Center v. State,* 150 Ariz. 8, 11, 721 P.2d 666, 669 (App.1986); *Mezey v. State,* 161 Cal.App.3d 1060, 1065, 208 Cal.Rptr. 40, 43 (1984); *Hill v. Florida Dept. of Corrections,* 513 So.2d 129, 132 (Fla.1987), cert. denied, 484 U.S. 1064, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988); *Merritt ex rel. Merritt v. State,* 108 Idaho 20, 26, 696 P.2d 871, 877 (1985); *Woodbridge v. Worcester State Hospital,* 384 Mass. 38, 44–45, n. 7, 423 N.E.2d 782, 786, n. 7 (1981); *Bird v. State Dept. of Public Safety,* 375 N.W.2d 36, 43 (Minn.App.1985); *Shaw v. St. Louis,* 664 S.W.2d 572, 576 (Mo.App.1983), cert. denied, 469 U.S. 849, 105 S.Ct. 165, 83 L.Ed.2d 101 (1984); *Fuchilla v. Layman,* 109 N.J. 319, 323–324, 537 A.2d 652, 654 cert. denied, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988); *Burkey v. Southern Ohio Correctional Facility,* 38 Ohio App.3d 170, 170–171, 528 N.E.2d 607, 608 (1988); *Gay v. State,* 730 S.W.2d 154, 157–158 (Tex.App.1987); *Edgar v. State,* 92 Wash.2d 217, 221, 595 P.2d 534, 537 (1979), cert. denied, 444 U.S. 1077, 100 S.Ct. 1026, 62 L.Ed.2d 760 (1980); *Boldt v. State,* 101 Wis.2d 566, 584, 305 N.W.2d 133, 143–144, cert. denied, 454 U.S. 973, 102 S.Ct. 524, 70 L.Ed.2d 393 (1981).

4 Petitioner cites a number of cases from this Court that he asserts have "assumed" that a State is a person. Those cases include ones in which a State has been sued by name under § 1983, see, *e.g., Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), various cases awarding attorney's fees against a State or a state agency, *Maine v. Thiboutot, supra; Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), and various cases discussing the waiver of Eleventh Amendment immunity by States, see, *e.g., Kentucky v. Graham,* 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14, 87 L.Ed.2d 114 (1985); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). But the Court did not address the meaning of person in any of those cases, and in none of the cases was resolution of that issue necessary to the decision. Petitioner's argument evidently rests on the proposition that whether a State is a person under § 1983 is "jurisdictional" and "thus could have been raised by the Court on its own motion" in those cases. Brief for Petitioner 25, n. 15. Even assuming that petitioner's premise and characterization of the cases is correct, "this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine,* 415 U.S. 528, 535, n. 5, 94 S.Ct. 1372, 1377, n. 5, 39 L.Ed.2d 577 (1974).

5 *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories,* 460 U.S. 150, 103 S.Ct. 1011, 74 L.Ed.2d 882 (1983), on which petitioner relies, is fully reconcilable with our holding in the present case. In *Jefferson County,* the Court held that States were persons that could be sued under the Robinson–Patman Act, 15 U.S.C. §§ 13(a) and 13(f). 460 U.S.,

at 155–157, 103 S.Ct., at 1015–1017. But the plaintiff there was seeking only injunctive relief and not damages against the State defendant, the Board of Trustees of the University of Alabama; the District Court had dismissed the plaintiff's damages claim as barred by the Eleventh Amendment. *Id.,* at 153, n. 5, 103 S.Ct., at 1014, n. 5. Had the present § 1983 action been brought in federal court, a similar disposition would have resulted. Of course, the Court would never be faced with a case such as *Jefferson County* that had been brought in a state court because the federal courts have exclusive jurisdiction over claims under the federal antitrust laws. 15 U.S.C. §§ 15 and 26. Moreover, the Court in *Jefferson County* was careful to limit its holding to "state purchases for the purpose of competing against private enterprise ... in the retail market." 460 U.S., at 154, 103 S.Ct., at 1015. It assumed without deciding "that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions," *ibid.,* which presents a more difficult question because it may well "affec[t] the federal balance." See *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

6 Petitioner argues that Congress would not have considered the Eleventh Amendment in enacting § 1983 because in 1871 this Court had not yet held that the Eleventh Amendment barred federal-question cases against States in federal court. This argument is no more than an attempt to have this Court reconsider *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), which we decline to do.

7 Our recognition in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a municipality is a person under § 1983, is fully consistent with this reasoning. In *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), we noted that by the time of the enactment of § 1983, municipalities no longer retained the sovereign immunity they had previously shared with the States. "[B]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation," *id.,* at 646, 100 S.Ct., at 1413, and, as a result, municipalities had been held liable for damages "in a multitude of cases" involving previously immune activities, *id.,* at 646–647, 100 S.Ct., at 1413.

8 The Dictionary Act provided that
"in all acts hereafter passed ... the word 'person' may extend and be applied to bodies politic and corporate ... unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

9 See *United States v. Fox,* 94 U.S. 315, 321, 24 L.Ed. 192 (1877); 1 B. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence 155 (1879) ("most exact expression" for "public corporation"); W. Anderson, A Dictionary of Law 127 (1893) ("most exact expression for a public corporation or corporation having powers of government"); Black's Law Dictionary 143 (1891) ("body politic" is "term applied to a corporation, which is usually designated as a 'body corporate and politic' " and "is particularly appropriate to a *public* corporation invested with powers and duties of government"); 1 A. Burrill, A Law Dictionary and Glossary 212 (2d ed. 1871) ("body politic" is "term applied to a corporation, which is usually designated as a *body corporate and politic* "). A public corporation, in ordinary usage, was another term for a municipal corporation, and included towns, cities, and counties, but not States. See 2 Abbott, *supra,* at 347; Anderson, *supra,* at 264–265; Black, *supra,* at 278; 2 Burrill, *supra,* at 352.
Justice BRENNAN appears to confuse this precise definition of the phrase with its use "in a rather loose way," see Black, *supra,* at 143, to refer to *the* state (as opposed to *a* State). This confusion is revealed most clearly in Justice BRENNAN's reliance on the 1979 edition of Black's Law Dictionary, which defines "body politic or corporate" as "[a] social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." *Post,* at 2316. To the extent Justice BRENNAN's citation of other authorities does not suffer from the same confusion, those authorities at best suggest that the phrase is ambiguous, which still renders the Dictionary Act incapable of supplying the necessary clear intent.

10 Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham,* 473 U.S., at 167, n. 14, 105 S.Ct., at 3106, n. 14; *Ex parte Young,* 209 U.S. 123, 159–160, 28 S.Ct. 441, 453–454, 52 L.Ed. 714 (1908). This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, American Constitutional Law § 3–27, p. 190, n. 3 (2d ed. 1988), and would not have been foreign to the 19th–century Congress that enacted § 1983, see, *e.g., In re Ayers,* 123 U.S. 443, 506–507, 8 S.Ct. 164, 183–184, 31 L.Ed. 216 (1887); *United States v. Lee,* 106 U.S. 196, 219–222, 1 S.Ct. 240, 259–262, 27 L.Ed. 171 (1882); *Board of Liquidation v. McComb,* 92 U.S. 531, 541, 23 L.Ed. 623 (1876); *Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824). *City of Kenosha v. Bruno,* 412 U.S. 507, 513, 93 S.Ct. 2222, 2226, 37 L.Ed.2d 109 (1973), on which Justice STEVENS relies, see *post,* at 2324, n. 8, is not to the contrary. That case involved municipal liability under § 1983, and the fact that nothing in § 1983 suggests its "bifurcated application to municipal corporations depending on the nature of the relief sought against them,"

412 U.S., at 513, 93 S.Ct., at 2226, is not surprising, since by the time of the enactment of § 1983 municipalities were no longer protected by sovereign immunity. *Supra,* at 2310, n. 7.

1 "A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received." O. Holmes, The Common Law 8 (M. Howe ed. 1963).

2 See 1 W. Blackstone, Commentaries *246 ("The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing").

3 In the first chapter of his classic History of England, published in 1849, Thomas Macaulay wrote:
"Of these kindred constitutions the English was, from an early period, justly reputed the best. The prerogatives of the sovereign were undoubtedly extensive.

"But his power, though ample, was limited by three great constitutional principles, so ancient that none can say when they began to exist, so potent that their natural development, continued through many generations, has produced the order of things under which we now live.
"First, the King could not legislate without the consent of his Parliament. Secondly, he could impose no tax without the consent of his Parliament. Thirdly, he was bound to conduct the executive administration according to the laws of the land, and, if he broke those laws, his advisers and his agents were responsible." 1 T. Macaulay, History of England 28–29.
In the United States as well, at the time of the passage of the Civil Rights Act of 1871, actions against agents of the sovereign were the means by which the State, despite its own immunity, was required to obey the law. See, *e.g., Poindexter v. Greenhow,* 114 U.S. 270, 297, 5 S.Ct. 903, 917, 29 L.Ed. 185 (1885) ("The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible, except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State, and in violation of the Constitution of the United States"); *Davis v. Gray,* 83 U.S. (16 Wall.) 203, 220, 21 L.Ed. 447 (1873) ("Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record").

4 We noted in *Hutto v. Finney,* 437 U.S. 678, 692, n. 20, 98 S.Ct. 2565, 2574, n. 20, 57 L.Ed.2d 522 (1978):
"In *Milliken v. Bradley,* [433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977)], we affirmed an order requiring a state treasurer to pay a substantial sum to another litigant, even though the District Court's opinion explicitly recognized that 'this remedial decree **will** be paid for by the taxpayers of the City of Detroit and the State of **Michigan**,' App. to Pet. for Cert. in *Milliken v. Bradley,* O.T.1976, No. 76–447, pp. 116a–117a, and even though the Court of Appeals, in affirming, stated that 'the District Court ordered that the State and Detroit Board each pay one-half the costs' of relief. *Bradley v. Milliken,* 540 F.2d 229, 245 (CA6 1976)."

5 We explained that the legislative history evinced Congress' intent that attorney's fees be assessed against the State:
"The legislative history is equally plain: '[I]t is intended that the attorneys' fees, like other items of costs, **will** be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).' S.Rep. No. 94–1011, p. 5 (1976) (footnote omitted). The House Report is in accord: 'The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.' H.R.Rep. No. 94–1558, p. 7 (1976). The Report added in a footnote that: 'Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer*.' *Id.,* at 7 n. 14. Congress' intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act and immunize state and local governments from awards." *Hutto, supra,* at 694, 98 S.Ct., at 2575.

6 The Court is surely incorrect to assert that a determination that a State is a person under § 1983 was unnecessary to our decisions awarding attorney's fees against a State or state agency. *Ante,* at 2307, n. 4. If there was no basis for liability because the State or state agency was not a party under § 1983, it is difficult to see how there was a basis for imposition of fees.

7 Indeed, we have never questioned that a State is a proper defendant in a § 1983 action when the State has consented to being joined in its own name in a suit in federal court, see *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d

1114 (1978), or has been named as a defendant in an action in state court, see *Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980).

8 Cf. *City of Kenosha v. Bruno,* 412 U.S. 507, 513, 93 S.Ct. 2222, 2226, 37 L.Ed.2d 109 (1973) ("We find nothing in the legislative history discussed in *Monroe* [*v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)], or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them").

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Stahl v. Klotz, E.D.Cal., August 2, 2019

104 S.Ct. 900
Supreme Court of the United States

PENNHURST STATE SCHOOL & **HOSPITAL** et al., Petitioners
v.
Terri Lee **HALDERMAN** et al.

No. 81–2101.
|
Argued Feb. 22, 1983.
|
Reargued Oct. 3, 1983.
|
Decided Jan. 23, **1984**.

Synopsis
Class action was brought by mentally retarded citizens challenging the fact and condition of confinement in a state institution for the mentally retarded. The United States District Court for the Eastern District of Pennsylvania, Raymond J. Broderick, J., 446 F.Supp. 1295, rendered judgment for plaintiffs, and defendants, various state and local officials and institutions, appealed. The Court of Appeals for the Third Circuit, 612 F.2d 84, substantially affirmed, and certiorari was granted. The Supreme Court, 451 **U.S**. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694, reversed and remanded. On remand, the Court of Appeals, 673 F.2d 647,affirmed its prior judgment in its entirety. Certiorari was granted. The Supreme Court, Justice Powell, held that: (1) Eleventh Amendment prohibited federal district court from ordering state officials to conform their conduct to state law with respect to conditions of confinement at institution, since state was real, substantial party in interest; (2) Eleventh Amendment barred state law claims brought in district court under pendent jurisdiction; and (3) judgment could not be upheld against county officials on basis of their state law obligations where any relief granted against county officials alone on basis of state statute would be partial and incomplete at best.

Reversed and remanded.

Justice Brennan filed a dissenting opinion.

Justice Stevens filed a dissenting opinion in which Justice Brennan, Justice Marshall, and Justice Blackmun joined.

West Headnotes (15)

[1] Federal Courts
Suits Against States; Eleventh Amendment and Sovereign Immunity

A state's constitutional interest in immunity from suit encompasses not merely whether it may be sued, but where it may be sued. U.S.C.A. Const.Amend. 11.

192 Cases that cite this headnote

[2] Federal Courts
Suits Against States; Eleventh Amendment and Sovereign Immunity

In deciding issue of whether Eleventh Amendment prohibited federal district court from ordering state officials to conform their conduct in administering state institution for care of mentally retarded to state law, Supreme Court would be guided by principles of federalism that inform Eleventh Amendment doctrine. U.S.C.A. Const.Amend. 11.

452 Cases that cite this headnote

[3] Federal Courts
Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts
Waiver by State; Consent

Federal Courts
Agencies, officers, and public employees

In absence of consent, a suit in federal court in which a state or one of its agencies or departments is named as defendant is proscribed by the Eleventh Amendment. U.S.C.A. Const.Amend. 11.

2096 Cases that cite this headnote

[4] Federal Courts
Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts
Agencies, officers, and public employees

Eleventh Amendment's jurisdictional bar to suit brought in federal court against a state or one of its agencies or departments in absence of consent applies regardless of nature of relief sought. U.S.C.A. Const.Amend. 11.

4393 Cases that cite this headnote

[5] **Federal Courts**
Agencies, officers, and public employees

Eleventh Amendment bars a federal court suit against state officials when state is real, substantial party in interest. U.S.C.A. Const.Amend. 11.

3461 Cases that cite this headnote

[6] **United States**
Officer sued in official capacity

Generally, relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.

90 Cases that cite this headnote

[7] **Federal Courts**
Agencies, officers, and public employees

Since claim that a state officer was acting ultra vires his authority, and thus that Eleventh Amendment did not bar suit against officer because state was not real, substantial party in interest, rests on officer's lack of delegated power, claim of error in exercise of that power is therefore not sufficient to enable federal district court to exercise jurisdiction over such suit. U.S.C.A. Const.Amend. 11.

248 Cases that cite this headnote

[8] **Federal Courts**
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts
Agencies, officers, and public employees

A federal court suit against state officials that is in fact a suit against a state is barred regardless of whether it seeks damages or injunctive relief. U.S.C.A. Const.Amend. 11.

1083 Cases that cite this headnote

[9] **Federal Courts**
Agencies, officers, and public employees

State officials' actions in operating mental health institution were not beyond their delegated authority for purposes of determining whether Eleventh Amendment barred suit against officials on ground that state was real, substantial party in interest, since state law governing care of mentally disabled gave them broad discretion to provide "adequate" mental health services and essence of claim against officials concerned alleged failure to provide such services adequately. 50 P.S. §§ 4101–4704, 4201(1); U.S.C.A. Const.Amend. 11.

412 Cases that cite this headnote

[10] **Federal Courts**
Agencies, officers, and public employees

A suit challenging constitutionality of a state official's action is not one against state for Eleventh Amendment purposes. U.S.C.A. Const.Amend. 11.

2330 Cases that cite this headnote

[11] **Federal Courts**
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts
Agencies, officers, and public employees

The Eleventh Amendment prohibited a federal district court from ordering state officials to conform their conduct to state law with respect to conditions of confinement at an institution for the care of the mentally retarded, even though only prospective injunctive relief was sought, since state was real, substantial party in

interest. U.S.C.A. Const.Amend. 11; 50 P.S. §§ 4101–4704.

465 Cases that cite this headnote

[12] States

What are suits against state or state officers

Insofar as an injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override sovereign immunity of state where relief effectively is against it. U.S.C.A. Const.Amend. 11.

244 Cases that cite this headnote

[13] Federal Courts

Suits Against States; Eleventh Amendment and Sovereign Immunity

Eleventh Amendment's restriction on federal judicial power is based in large part on problems of federalism inherent in making one sovereign appear against its will in the courts of the other. U.S.C.A. Const.Amend. 11.

915 Cases that cite this headnote

[14] Federal Courts

Agencies, officers, and public employees

Principle that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is barred by the Eleventh Amendment applied as well to state law claims against state officials charged with administering state mental health institution brought into federal court under pendent jurisdiction. U.S.C.A. Const.Amend. 11; 50 P.S. §§ 4101–4704.

2172 Cases that cite this headnote

[15] Federal Courts

Counties; parishes

Where any relief granted against county officials in suit alleging that county and state officials were acting contrary to state law with respect to administering institution for care of mentally handicapped would be partial and incomplete at best without injunction against institution and officials, county officials would not be held subject to relief ordered below regardless of applicability of Eleventh Amendment to state claims against state officials. U.S.C.A. Const.Amend. 11; 50 P.S. §§ 4101–4704.

930 Cases that cite this headnote

**902 *89 *Syllabus* [*]

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

Held: The Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law. Pp. 906 – 921.

(a) The principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III of the Constitution. The Eleventh Amendment bars a suit against state officials when the State is the real, substantial party in interest, regardless of whether the suit seeks damages or injunctive relief. The Court in *Ex parte Young, supra,* recognized an important exception to this general rule: a suit challenging the federal constitutionality of a state official's action is not one against the State. Pp. 906 – 909.

(b) In *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, this Court recognized that the need to promote the supremacy of federal law that is the basis of *Young* must be accommodated to the constitutional immunity of the States. Thus, the Court declined to extend the *Young* doctrine to ***90** encompass retroactive relief, for to do so would effectively eliminate the States' constitutional immunity. *Edelman*'s distinction between prospective and retroactive relief fulfilled *Young'* s underlying purpose of vindicating the supreme authority of federal law while at the same time preserving to an important degree the States' constitutional immunity. But this need to reconcile competing interests is wholly absent when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. When a federal court instructs state officials on how to conform ****903** their conduct to state law, this conflicts directly with the principles of federalism that underlie the Eleventh Amendment. Pp. 909 – 911.

(c) The dissenters' view is that an allegation that official conduct is contrary to a state statute would suffice to override the State's protection from injunctive relief under the Eleventh Amendment because such conduct is *ultra vires* the official's authority. This view rests on fiction, is wrong on the law, and would emasculate the Eleventh Amendment. At least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacity will not suffice to override the sovereign immunity of the State where the relief effectively is against it. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628. Under the dissenters' view, the *ultra vires* doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it. Pp. 911 – 917.

(d) The principle that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment applies as well to state-law claims brought into federal court under pendent jurisdiction. Pp. 917 – 919.

(e) While it may be that applying the Eleventh Amendment to pendent state-law claims results in federal claims being brought in state court or in bifurcation of claims, such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. Pp. 919 – 920.

(f) The judgment below cannot be sustained on the basis of the state-law obligation of petitioner county officials, since any relief granted against these officials on the basis of the MH/MR Act would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction. Pp. 920 – 921.

673 F.2d 647, reversed and remanded.

Attorneys and Law Firms

***91** *H. Bartow Farr III* and *Allen C. Warshaw* reargued the cause for petitioners. With them on the briefs were *Thomas M. Kittredge, Joel I. Klein, LeRoy S. Zimmerman, Robert B. Hoffman, Debra K. Wallet, Alan J. Davis,* and *Mark A. Aronchick.*

David Ferleger reargued the cause and filed a brief for respondents **Halderman** et al. *Thomas K. Gilhool* reargued the cause for respondents Pennsylvania Association for Retarded Citizens et al. With him on the brief were *Frank J. Laski* and *Michael Churchill. Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Assistant Attorneys General Cooper* and *Wilkinson, Brian K. Landsberg,* and *Frank Allen* filed a brief for the United States.*

* A brief of *amici curiae* was filed for the State of Alabama et al. by *Francis X. Bellotti,* Attorney General of Massachusetts, *Thomas R. Kiley,* First Assistant Attorney General, and *Carl Valvo, William L. Pardee,* and *Judith S. Yogman,* Assistant Attorneys General, joined by the Attorneys General for their respective jurisdictions as follows: *Charles A. Graddick* of Alabama, *Robert K. Corbin* of Arizona (by *Anthony Ching,* Solicitor General), *J.D. MacFarlane* of Colorado, *Carl R. Ajello* of Connecticut, *Richard S. Gebelein* of Delaware, *Michael J. Bowers* of Georgia, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Steven L. Beshear* of Kentucky, *Frank J. Kelley* of Michigan, *John D. Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, *Richard H. Bryan* of Nevada, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *Hector Reichard* of Puerto Rico, *David L. Wilkinson* of Utah, *Bronson C. La Follette* of Wisconsin,

Steven Freudenthal of Wyoming, and *Aviata F. Fa'Aleveo* of American Samoa.

Opinion

Justice POWELL delivered the opinion of the Court.

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

***92** I

This litigation, here for the second time, concerns the conditions of care at petitioner **Pennhurst State School** and **Hospital**, a Pennsylvania institution for the care of the mentally retarded. See ***Pennhurst State School & Hospital v. Halderman***, 451 **U.S**. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). Although the litigation's history is set forth in detail in our prior opinion, see *id.,* at 5–10, 101 S.Ct., at 1534–1536, it is necessary for purposes of this decision to review that history.

This suit originally was brought in 1974 by respondent Terri Lee **Halderman**, a resident of **Pennhurst**, in the District Court for the Eastern District of Pennsylvania. Ultimately, plaintiffs included a class consisting of all persons who were or might become residents of **Pennhurst**; the Pennsylvania Association for Retarded Citizens (PARC); and the United States. Defendants were **Pennhurst** and various **Pennhurst** officials; the Pennsylvania Department of Public Welfare and several of its officials; and various county commissioners, county mental retardation administrators, and other officials of five Pennsylvania counties surrounding **Pennhurst**. Respondents' amended complaint charged that conditions at **Pennhurst** violated the class members' rights under the Eighth and Fourteenth Amendments; § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, ****904** 29 U.S.C. § 794 (1976 ed. and Supp. V); the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001–6081 (1976 ed. and Supp. V); and the Pennsylvania Mental Health and Mental Retardation Act of 1966 (the "MH/MR Act"), Pa.Stat.Ann., Tit. 50, §§ 4101–4704 (Purdon 1969 and Supp.1982). Both damages and injunctive relief were sought.

In 1977, following a lengthy trial, the District Court rendered its decision. 446 F.Supp. 1295 (1977). As noted in our prior opinion, the court's findings were undisputed: "Conditions at **Pennhurst** are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate ***93** for the 'habilitation' of the retarded. Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at **Pennhurst**." 451 **U.S**., at 7, 101 S.Ct., at 1534–1535 (footnote omitted). The District Court held that these conditions violated each resident's right to "minimally adequate habilitation" under the Due Process Clause and the MH/MR Act, see 446 F.Supp., at 1314–1318, 1322–1323; "freedom from harm" under the Eighth and Fourteenth Amendments, see *id.,* at 1320–1321; and "nondiscriminatory habilitation" under the Equal Protection Clause and § 504 of the Rehabilitation Act, see *id.,* at 1321–1324. Furthermore, the court found that "due process demands that if a state undertakes the habilitation of a retarded person, it must do so in the *least restrictive setting* consistent with that individual's habilitative needs." *Id.,* at 1319 (emphasis added). After concluding that the large size of **Pennhurst** prevented it from providing the necessary habilitation in the least restrictive environment, the court ordered "that immediate steps be taken to remove the retarded residents from **Pennhurst**." *Id.,* at 1325. Petitioners were ordered "to provide suitable community living arrangements" for the class members, *id.,* at 1326, and the court appointed a Special Master "with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court." *Ibid.* [1]

The Court of Appeals for the Third Circuit affirmed most of the District Court's judgment. 612 F.2d 84 (1979) (en banc). It agreed that respondents had a right to habilitation in the least restrictive environment, but it grounded this right solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010. See 612 F.2d, at 95–100, 104–107. The court did ***94** not consider the constitutional issues or § 504 of the Rehabilitation Act, and while it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation, see *id.,* at 100–103, the court did not decide whether that state right encompassed a right to treatment in the least restrictive setting.

On the question of remedy, the Court of Appeals affirmed except as to the District Court's order that **Pennhurst** be closed. The court observed that some patients would be unable to adjust to life outside an institution, and it determined that none of the legal provisions relied on by plaintiffs precluded institutionalization. *Id.,* at 114–115. It therefore remanded for "individual determinations by the [District

Court], or by the Special Master, as to the appropriateness of an improved **Pennhurst** for each such patient," guided by "a presumption in favor of placing individuals in [community living arrangements]." *Ibid.* [2]

****905** On remand the District Court established detailed procedures for determining the proper residential placement for each patient. A team consisting of the patient, his parents or guardian, and his case manager must establish an individual habilitation plan providing for habilitation of the patient in a designated community living arrangement. The plan is subject to review by the Special Master. A second master, called the Hearing Master, is available to conduct hearings, upon request by the resident, his parents or his advocate, on the question whether the services of **Pennhurst** would be more beneficial to the resident than the community living arrangement provided in the resident's plan. The Hearing Master then determines where the patient should reside, ***95** subject to possible review by the District Court. See App. 123a–134a (Order of April 24, 1980). [3]

This Court reversed the judgment of the Court of Appeals, finding that 42 U.S.C. § 6010 did not create any substantive rights. 451 **U.S**. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). We remanded the case to the Court of Appeals to determine if the remedial order could be supported on the basis of state law, the Constitution, or § 504 of the Rehabilitation Act. See *id.,* at 31, 101 S.Ct., at 1547. [4] We also remanded for consideration of whether any relief was available under other provisions of the Developmentally Disabled Assistance and Bill of Rights Act. See *id.,* at 27–30, 101 S.Ct., at 1545–1546 (discussing 42 U.S.C. §§ 6011(a), 6063(b)(5)).

On remand the Court of Appeals affirmed its prior judgment in its entirety. 673 F.2d 647 (3 Cir.1982) (en banc). It determined that in a recent decision the Supreme Court of Pennsylvania had "spoken definitively" in holding that the MH/MR Act required the State to adopt the "least restrictive environment" approach for the care of the mentally retarded. *Id.,* at 651 (citing *In re Schmidt,* 494 Pa. 86, 429 A.2d 631 (1981)). The Court of Appeals concluded that this state statute fully supported its prior judgment, and therefore did not ***96** reach the remaining issues of federal law. It also rejected petitioners' argument that the Eleventh Amendment barred a federal court from considering this pendent state-law claim. The court noted that the Amendment did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims, see 673 F.2d, at 656 (citing *Ex Parte Young,* 209 **U.S**. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)), and concluded that the same result obtained with respect to a pendent state-law claim. It reasoned that because *Siler v. Louisville & Nashville R. Co.,* 213 **U.S**. 175, 29 S.Ct. 451, 53 L.Ed. 753 (1909), an important case in the development of the doctrine of pendent jurisdiction, also involved state officials, "there cannot be ... an Eleventh Amendment exception to that rule." 673 F.2d, at 658. [5] Finally, the court ****906** rejected petitioners' argument that it should have abstained from deciding the state-law claim under principles of comity, see *id.,* at 659–660, and refused to consider petitioners' objections to the District Court's use of a special master, see *id.,* at 651 and n. 10. Three judges dissented in part, arguing that under principles of federalism and comity the establishment of a special master to supervise compliance was an abuse of discretion. See *id.,* at 662 (Seitz, C.J., joined by Hunter, J., dissenting in part); *ibid.* (Garth, J., concurring in part and dissenting as to relief). See also *id.,* at 661 (Aldisert, J., concurring) (seriously questioning the propriety of the order appointing the Special ***97** Master, but concluding that a retroactive reversal of that order would be meaningless). [6]

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

II

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

A

Article III, § 2 of the Constitution provides that the federal judicial power extends, *inter alia,* to controversies "between a State and Citizens of another State." Relying on this language, this Court in 1793 assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. *Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1793). The decision "created such a shock of surprise that

the Eleventh Amendment was at once proposed and adopted." *Monaco v. Mississippi,* 292 U.S. 313, 325, 54 S.Ct. 745, 749, 78 L.Ed. 1282 (1934). The Amendment provides:

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

***98** The Amendment's language overruled the particular result in *Chisholm,* but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III. Thus, in *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Court held that, despite the limited terms of the Eleventh Amendment, a federal court could not entertain a suit brought by a citizen against his own State. After reviewing the constitutional debates concerning the scope of Art. III, the Court determined that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Id.,* at 15, 10 S.Ct., at 507. See *Monaco v. Mississippi, supra,* 292 U.S., at 322–323, 54 S.Ct., at 747–748 (1934). [7] In short, ****907** the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but ***99** an exemplification." *Ex parte State of New York No. 1,* 256 U.S. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921) (emphasis added). [8]

[1] **[2]** A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court. See, *e.g., Clark v. Barnard,* 108 U.S. 436, 447, 2 S.Ct. 878, 882–883, 27 L.Ed. 780 (1883). We have insisted, however, that the State's consent be unequivocally expressed. See, *e.g., Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 1360–1361, 39 L.Ed.2d 662 (1974). Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see *Fitzpatrick v. Bitker,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), we have required an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States." *Quern v. Jordan,* 440 U.S. 332, 342, 99 S.Ct. 1139, 1146, 59 L.Ed.2d 358 (1979) (holding that 42 U.S.C. § 1983 does not override States' Eleventh Amendment immunity). Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued. [9] As Justice MARSHALL well has noted, "[b]ecause ***100** of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this." *Employees v. Missouri Public Health & Welfare Dep't,* 411 U.S. 279, 294, 93 S.Ct. 1614, 1622–1623, 36 L.Ed.2d 251 (1973) (MARSHALL, J., concurring in result). [10] Accordingly, ****908** in deciding this case we must be guided by "[t]he principles of federalism that inform Eleventh Amendment doctrine." *Hutto v. Finney,* 437 U.S. 678, 691, 98 S.Ct. 2565, 2573–2574, 57 L.Ed.2d 522 (1978).

B

[3] **[4]** This Court's decisions thus establish that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Employees, supra,* 411 U.S., at 280, 93 S.Ct., at 1616. There may be a question, however, whether a particular suit in fact is a suit against a State. It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. See, *e.g., Florida Department of Health v. Florida Nursing Home Assn.,* 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (*per*

curiam); *Alabama v. Pugh,* 438 **U.S**. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*). This jurisdictional bar applies regardless of the nature of the relief sought. See, *e.g., Missouri v. Fiske,* 290 **U.S**. 18, 27, 54 S.Ct. 18, 21, 78 L.Ed. 145 (1933) ("Expressly applying ***101** to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

[5] **[6]** **[7]** **[8]** **[9]** When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." *Ford Motor Co. v. Department of Treasury,* 323 **U.S**. 459, 464, 65 S.Ct. 347, 350, **89** L.Ed. 389 (1945). See, *e.g., In re Ayers,* 123 **U.S**. 443, 487–492, 8 S.Ct. 164, 173–176, 31 L.Ed. 216 (1887); *Louisiana v. Jumel,* 107 **U.S**. 711, 720–723, 727–728, 2 S.Ct. 128, 135–137, 141–142, 27 L.Ed. 448 (1882). Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 **U.S**. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed.2d 191 (1963) (*per curiam*). [11] And, as when the State ****909** itself is named as the ***102** defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. See *Cory v. White,* 457 **U.S**. 85, 91, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982).

[10] The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in *Ex parte Young,* 209 **U.S**. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908), in which a federal court enjoined the Attorney General of the State of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. This Court held that the Eleventh Amendment did not prohibit issuance of this injunction. The theory of the case was that an unconstitutional enactment is "void" and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." *Id.,* at 160, 28 S.Ct., at 454. Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected to the consequences of his official conduct." *Ibid.*

While the rule permitting suits alleging conduct contrary to "the supreme authority of the United States" has survived, the theory of *Young* has not been provided an expansive interpretation. Thus, in *Edelman v. Jordan,* 415 **U.S**. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court emphasized that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law. *Id.,* at 666–667, 94 S.Ct., at 1357–1358. In particular, *Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court ***103** may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of *Young,* such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment.

III

With these principles in mind, we now turn to the question whether the claim that petitioners violated *state law* in carrying out their official duties at **Pennhurst** is one against the State and therefore barred by the Eleventh Amendment. Respondents advance two principal arguments in support of the judgment below. [12] First, they contend that under the doctrine of *Edelman* ****910** *v. Jordan, supra,* the suit is not against ***104** the State because the courts below ordered only prospective injunctive relief. Second, they assert that the state-law claim properly was decided under the doctrine of pendent jurisdiction. Respondents rely on decisions of this Court awarding relief against state officials on the basis of a pendent state-law claim. See, *e.g., Siler v. Louisville & Nashville R. Co.,* 213 **U.S**. 175, 193, 29 S.Ct. 451, 455, 53 L.Ed. 753 (1909).

A

We first address the contention that respondents' state-law claim is not barred by the Eleventh Amendment because it seeks only prospective relief as defined in *Edelman v. Jordan, supra.* The Court of Appeals held that if the judgment below rested on federal law, it could be entered against petitioner state officials under the doctrine established in *Edelman* and *Young* even though the prospective financial burden was substantial and ongoing. [13] See 673 F.2d, at 656. The court assumed, and respondents assert, that this reasoning applies

as well when the official acts in violation of state law. This argument misconstrues the basis of the doctrine established in *Young* and *Edelman.*

As discussed above, the injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," *Young,* 209 U.S., at 160, 28 S.Ct., at 454. This ***105** rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. *Florida Department of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 685, 102 S.Ct. 3304, 3315, 73 L.Ed.2d 1057 (1982) (opinion of STEVENS, J.). Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." *Young,* 209 U.S., at 160, 28 S.Ct., at 454. As Justice BRENNAN has observed, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma,* 401 U.S. 82, 106, 91 S.Ct. 674, 687, 27 L.Ed.2d 701 (1971) (BRENNAN, J., concurring in part and dissenting in part). Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. See, *e.g., Quern v. Jordan,* 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979); *Scheuer v. Rhodes,* 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974); *Georgia R. & Banking Co. v. Redwine,* 342 U.S. 299, 304, 72 S.Ct. 321, 324, 96 L.Ed. 335 (1952).

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman v. Jordan, supra.* We recognized that the prospective relief authorized by *Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect." 415 U.S., at 664, 94 S.Ct., at 1356. But we declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, we concluded that although the difference between permissible ****911** and impermissible relief "will not in many instances be that between day and night," *id.,* at 667, 94 S.Ct., at 1357, an award of retroactive relief necessarily " 'fall[s] afoul of the Eleventh Amendment ***106** if that basic constitutional provision is to be conceived of as having any present force.' " *Id.,* at 665, 94 S.Ct., at 1357 (quoting *Rothstein v. Wyman,* 467 F.2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert. denied, 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973)). In sum *Edelman'* s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States.

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

B

The contrary view of Justice STEVENS' dissent rests on fiction, is wrong on the law, and, most important, would emasculate the Eleventh Amendment. [14] Under his view, an allegation that official conduct is contrary to a state statute would suffice to override the State's protection under that Amendment. The theory is that such conduct is contrary to the official's "instructions," and thus *ultra vires* his authority. ***107** Accordingly, official action based on a reasonable interpretation of any statute might, if the interpretation turned out to be erroneous, [15] provide the basis for injunctive relief against the actors in their official capacities. In this case, where officials of a major state department, clearly acting within the scope of their authority, were found not to have improved conditions in a state institution adequately under state law, the dissent's result would be that the State itself has forfeited its constitutionally provided immunity.

The theory is out of touch with reality. The dissent does not dispute that the general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief

sought. See *supra,* at 908; *post,* at 918, n. 29. According to the dissent, the relief sought and ordered here—which in effect was that a major state institution be closed and smaller state institutions be created and expansively funded—did not operate against the State. This view would make the law a pretense. No other court or judge in the ten-year history of this litigation has advanced this theory. And the dissent's underlying view that the named defendants here were acting beyond and contrary to their authority cannot be reconciled with reality—or with the record. The District Court in this case held that the individual defendants "acted in the utmost good faith ... *within the sphere of their official responsibilities,*" and therefore were entitled to immunity from damages. 446 F.Supp., at 1324 (emphasis added). The named defendants had **912 nothing to gain personally from their conduct; they were not found to have acted wilfully or even negligently. See *ibid.* The court expressly noted that the individual defendants "apparently took every means available to them to reduce the incidents of abuse and injury, but were *108 constantly faced with staff shortages." *Ibid.* It also found "that the individual defendants are dedicated professionals in the field of retardation who were given very little with which to accomplish the habilitation of the retarded at **Pennhurst**." *Ibid.* [16] As a result, all the relief ordered by the courts below was institutional and official in character. To the extent *109 there was a violation of state law in this case, it is a case of the State itself not fulfilling its legislative promises. [17]

The dissent bases its view on numerous cases from the turn of the century and earlier. These cases do not provide the support the dissent claims to find. Many are simply miscited. For example, with perhaps one exception, [18] none of its Eleventh **913 Amendment cases can be said to hold that injunctive relief could be ordered against State officials for failing to carry out their duties under State statutes. [19] And *110 the federal sovereign immunity cases the dissent relies on as analogy, while far from uniform, make clear that suit may not be predicated on violations of state statutes that command purely discretionary duties. [20] Since it cannot be doubted *111 that the statutes at issue here gave petitioners broad discretion in operating **Pennhurst**, see n. 11, *supra;* see also 446 F.Supp., at 1324, the conduct alleged in this case would not be *ultra vires* even under the standards of the dissent's cases. [21]

914 Thus, while there is language in the early cases that advances the authority-stripping theory advocated by the dissent, this theory had never been pressed as far as Justice STEVENS would do in this case. And when the expansive approach *112 of the dissent was advanced, this Court plainly and explicitly rejected it. In *Larson v. Domestic & Foreign Commerce Corp.,* 337 **U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), the Court was faced with the argument that an allegation that a government official committed a tort sufficed to distinguish the official from the sovereign. Therefore, the argument went, a suit for an injunction to remedy the injury would not be against the sovereign. The Court rejected the argument, noting that it would make the doctrine of sovereign immunity superfluous. A plaintiff would need only to "claim an invasion of his legal rights" in order to override sovereign immunity. *Id.,* at 693, 69 S.Ct., at 1463. In the Court's view, the argument "confuse[d] the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." *Id.,* at 692–693, 69 S.Ct., at 1462–1463. The dissent's theory suffers a like confusion. [22] Under the dissent's view, a plaintiff would need only to claim a denial of rights protected or provided by statute in order to override sovereign immunity. Except in rare cases it would make the constitutional doctrine of sovereign immunity a nullity.

*113 [12] The crucial element of the dissent's theory was also the plaintiff's central contention in *Larson.* It is that "[a] sovereign, like any other principal, cannot authorize its agent to violate the law," so that when the agent does so he cannot be acting for the sovereign. *Post,* at 937–; see also *post,* at 930, 934, 939; cf. **915 *Larson, supra,* at 693–694, 69 S.Ct., at 1463 ("It is argued ... that the commission of a tort cannot be authorized by the sovereign.... It is on this contention that the respondent's position fundamentally rests...."). It is a view of agency law that the Court in *Larson* explicitly rejected. [23] *Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it. *Id.,* at 690, 695, 69 S.Ct., at 1461, 1464. [24] Any resulting disadvantage to the plaintiff was "outweigh[ed]" by "the necessity of permitting the Government *114 to carry out its functions unhampered by direct judicial intervention." *Id.,* at 704, 69 S.Ct., at 1468. If anything, this public need is even greater when questions of federalism are involved. See *supra,* at 907 – 908. [25]

The dissent in *Larson* made many of the arguments advanced by Justice STEVENS' dissent today, and asserted that many

of the same cases were being overruled or **916 ignored. *115 See 337 U.S., at 723–728, 69 S.Ct., at 1478–1480 (Frankfurter, J., dissenting). Those arguments were rejected, and the cases supporting them are moribund. Since *Larson* was decided in 1949,[26] no opinion by any Member of this Court has cited the cases on which the dissent primarily relies for a proposition as broad as the language the dissent quotes. Many if not most of these cases have not been relied upon in an Eleventh Amendment context at all. Those that have been so cited have been relied upon only for propositions with which no one today quarrels.[27] The plain fact is that the dissent's broad theory, *116 if it ever was accepted to the full extent to which it is now pressed, has not been the law for at least a generation.

[13] The reason is obvious. Under the dissent's view of the *ultra vires* doctrine, the Eleventh Amendment would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name, or where he cannot produce some state statute that has been violated to his asserted injury. Thus, the *ultra vires* doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it. That result gives the dissent no pause presumably because of its view that the Eleventh Amendment and sovereign immunity " 'undoubtedly ru[n] counter to modern democratic notions of the moral responsibility of the State.' " *Post,* at 942, n. 48 (quoting *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 59, 64 S.Ct. 873, 879, 88 L.Ed. 1121 (1944) (Frankfurter, J., dissenting)). This argument has not been adopted by this Court. See *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 51, 64 S.Ct. 873, 875, 88 L.Ed. 1121 (1944) ("Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies **917 within the limits of the Constitution."); *Larson, supra,* 337 U.S., at 704, 69 S.Ct., at 1468 ("The Government, as representative of the community as a whole, cannot be stopped in its tracks ..."). Moreover, the argument substantially misses the point with respect to Eleventh Amendment sovereign immunity. As Justice MARSHALL has observed, the Eleventh Amendment's restriction on the federal judicial power is based in large part on "the problems of federalism inherent in making *117 one sovereign appear against its will in the courts of the other." *Employees v. Missouri Public Health Dept.,* 411 U.S. 279, 294, 93 S.Ct. 1614, 1622, 36 L.Ed.2d 251 (1973) (MARSHALL, J., concurring in the result). The dissent totally rejects the Eleventh Amendment's basis in federalism.

C

The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself. In reaching a contrary conclusion, the Court of Appeals relied principally on a separate line of cases dealing with pendent jurisdiction. The crucial point for the Court of Appeals was that this Court has granted relief against state officials on the basis of a pendent state-law claim. See 673 F.2d, at 657–658. We therefore must consider the relationship between pendent jurisdiction and the Eleventh Amendment.

This Court long has held generally that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. See, *e.g., Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Osborn v. Bank of the United States,* 9 Wheat. 738, 819–823, 6 L.Ed. 204 (1824). The Court also has held that a federal court may resolve a case solely on the basis of a pendent state-law claim, see *Siler, supra,* 213 U.S., at 192–193, 29 S.Ct., at 455, and that in fact the court usually should do so in order to avoid federal constitutional questions, see *id.,* at 193, 29 S.Ct., at 455; *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). But pendent jurisdiction is a judge-made doctrine inferred from the general language of Art. III. The question presented is whether this doctrine *118 may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.

As the Court of Appeals noted, in *Siler* and subsequent cases concerning pendent jurisdiction, relief was granted against state officials on the basis of state-law claims that were pendent to federal constitutional claims. In none of these cases, however, did the Court so much as mention the Eleventh Amendment in connection with the state-law claim. Rather, the Court appears to have assumed that once jurisdiction was established over the federal-law claim, the doctrine of pendent jurisdiction would establish power to hear the state-law claims as well. The Court has not addressed

whether that doctrine has a different scope when applied to suits against the State. This is illustrated by *Greene v. Louisville & Interurban R. Co.,* 244 U.S. 499, 37 S.Ct. 673, 61 L.Ed. 1280 (1917), in which the plaintiff railroads sued state officials, alleging that certain tax assessments were excessive under the Fourteenth Amendment. The Court first rejected the officials' argument that the Eleventh Amendment barred the federal constitutional claim. It held that *Ex parte Young* applied to all allegations challenging the constitutionality of official action, regardless of whether the state statute under which the officials purported to act was constitutional or unconstitutional. See *id.,* at 507, 37 S.Ct., at 677. Having determined that the Eleventh Amendment did not deprive the federal court of jurisdiction ****918** over the Fourteenth Amendment question, the Court declared that the court's jurisdiction extended "to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." *Id.,* at 508, 37 S.Ct., at 677. The case then was decided solely on state-law grounds. Accord, *Louisville & Nashville R. Co. v. Greene,* 244 U.S. 522, 37 S.Ct. 683, 61 L.Ed. 1291 (1917). [28]

***119** These cases thus did not directly confront the question before us. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine,* 415 U.S. 528, 533, n. 5, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974). [29] We therefore view the question as an open one.

As noted, the implicit view of these cases seems to have been that once jurisdiction is established on the basis of a federal question, no further Eleventh Amendment inquiry is necessary with respect to other claims raised in the case. This is an erroneous view and contrary to the principles established in our Eleventh Amendment decisions. "The Eleventh Amendment is an explicit limitation on the judicial power of the United States." *Missouri v. Fiske,* 290 U.S., at 25, 54 S.Ct., at 20. It deprives a federal court of power to decide certain claims against States that otherwise would be within the ***120** scope of Art. III's grant of jurisdiction. For example, if a lawsuit against state officials under 42 U.S.C. § 1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution. See *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Similarly, if a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting any relief on that claim. See *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*). The Amendment thus is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts. [30]

This constitutional bar applies to pendent claims as well. As noted above, pendent ****919** jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all "cases" arising under federal law or between diverse parties. See *Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). See also *Hagans v. Lavine,* 415 U.S. 528, 545, 94 S.Ct. 1372, 1383, 39 L.Ed.2d 577 (1974) (terming pendent jurisdiction "a doctrine of discretion"). The Eleventh Amendment should not be construed to apply with less force to this implied form of jurisdiction than it does to the explicitly granted power to hear federal claims. The history of the adoption and development of the Amendment, see *supra,* at 6–9, confirms that it is an independent limitation on all exercises of Art. III power: "the entire judicial power granted by the Constitution does not embrace authority to entertain suit brought by private parties against a State without consent given," *Ex parte State of New York No. 1,* 256 U.S. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921). If we were to hold otherwise, a federal court could award damages against a State on the basis of a pendent claim. Our decision in ***121** *Edelman v. Jordan, supra,* makes clear that pendent jurisdiction does not permit such an evasion of the immunity guaranteed by the Eleventh Amendment. We there held that "the District Court was correct in exercising pendent jurisdiction over [plaintiffs'] statutory claim," 415 U.S., at 653, n. 1, 94 S.Ct., at 1351, n. 1, but then concluded that the Eleventh Amendment barred an award of retroactive relief on the basis of that pendent claim. *Id.,* at 678, 94 S.Ct., at 1363.

[14] In sum, contrary to the view implicit in decisions such as *Greene, supra,* neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. [31] A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See *supra,* at 908. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

D

Respondents urge that application of the Eleventh Amendment to pendent state-law claims will have a disruptive effect on litigation against state officials. They argue that the "considerations of judicial economy, convenience, and fairness to litigants" that underlie pendent jurisdiction, see *Gibbs, supra,* 383 U.S., at 726, 86 S.Ct., at 1138, counsel against a result that may cause litigants to split causes of action between state and federal courts. They also contend that the policy of avoiding unnecessary constitutional decisions will be contravened if plaintiffs choose to forgo their state-law claims and sue only in federal court or, alternatively, that the policy of *Ex parte Young* ***122** will be hindered if plaintiffs choose to forgo their right to a federal forum and bring all of their claims in state court.

It may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims. That is not uncommon in this area. Under *Edelman v. Jordan, supra,* a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court. Challenges to the validity of state tax systems under 42 U.S.C. § 1983 also must be brought in state court. *Fair Assessment in Real Estate Ass'n. v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). Under the abstention doctrine, unclear issues of ****920** state law commonly are split off and referred to the state courts. [32]

***123** In any case, the answer to respondents' assertions is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. See *Missouri v. Fiske,* 290 U.S., at 25–26, 54 S.Ct., at 20–21 ("Considerations of convenience open no avenue of escape from the [Amendment's] restriction"). [33] That a litigant's choice of forum is reduced "has long been understood to be a part of the tension inherent in our system of federalism." *Employees v. Missouri Public Health & Welfare Dept.,* 411 U.S. 279, 298, 93 S.Ct. 1614, 1625, 36 L.Ed.2d 251 (1973) (MARSHALL, J., concurring in result).

IV

[15] Respondents contend that, regardless of the applicability of the Eleventh Amendment to their state claims against petitioner state officials, the judgment may still be upheld against petitioner *county* officials. We are not persuaded. Even assuming that these officials are not immune from suit challenging their actions under the MH/MR Act, [34] it is clear ***124** that ****921** without the injunction against the state institutions and officials in this case, an order entered on state-law grounds necessarily would be limited. The relief substantially concerns **Pennhurst**, an arm of the State that is operated by state officials. Moreover, funding for the county mental retardation programs comes almost entirely from the State, see Pa.Stat.Ann., Tit. 50, §§ 4507–4509 (Purdon 1969 and Supp. 1982), and the costs of the masters have been borne by the State, see 446 F.Supp., at 1327. Finally, the MH/MR Act contemplates that the state and county officials will cooperate in operating mental retardation programs. See *In re Schmidt,* 494 Pa. 86, 95–96, 429 A.2d 631, 635–636 (1981). In short, the present judgment could not be sustained on the basis of the state-law obligations of petitioner county officials. Indeed, any relief granted against the county officials on the basis of the state statute would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction.

V

The Court of Appeals upheld the judgment of the District Court solely on the basis of Pennsylvania's MH/MR Act. We hold that these federal courts lacked jurisdiction to enjoin petitioner state institutions and state officials on the basis of ***125** this state law. The District Court also rested its decision on the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973. See *supra,* at 904. On remand the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases. [35] The court also may consider whether relief may be granted to respondents under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6011, 6063. The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BRENNAN, dissenting.

I fully agree with Justice STEVENS' dissent. Nevertheless, I write separately to explain that in view of my continued belief that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," *Yeomans v. Kentucky,* 423 **U.S**. 983, 984, 96 S.Ct. 404, 46 L.Ed.2d 309 (1975) (BRENNAN, J., dissenting), I would hold that petitioners are not entitled to invoke the protections of that Amendment in this federal court suit by citizens of Pennsylvania. See *Employees v. Missouri Public Health & Welfare Dept.,* 411 **U.S**. 279, 298, 93 S.Ct. 1614, 1625, 36 L.Ed.2d 251 (1973) (BRENNAN, J., dissenting); *Edelman v. Jordan,* 415 **U.S**. 651, 697, 94 S.Ct. 1347, 1372, 39 L.Ed.2d 662 (1974) (BRENNAN, J., dissenting). In my view, *Hans v. Louisiana,* 134 **U.S**. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), upon which the Court today relies, *ante,* at 906, recognized that the Eleventh Amendment, by its terms, erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a *nonconstitutional* immunity from suit by its own citizens." *Employees v. Missouri Public* ***126** *Health & Welfare Dept., supra,* 411 **U.S**., at 313, 93 S.Ct., at 1632 (BRENNAN, J., dissenting) (emphasis added). For scholarly discussions supporting this view, see Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum.L.Rev. 1889, 1893–1894 (1983); Field, ****922** The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U.Pa.L.Rev. 515, 538–540 and n. 88 (1978). To the extent that such nonconstitutional sovereign immunity may apply to petitioners, I agree with Justice STEVENS that since petitioners' conduct was prohibited by state law, the protections of sovereign immunity do not extend to them.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

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

This remarkable result is the product of an equally remarkable misapplication of the ancient doctrine of sovereign immunity. In a completely unprecedented holding, today the Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania itself has prohibited. No rational view of the sovereign immunity of the States supports this result. To the ***127** contrary, the question whether a federal court may award injunctive relief on the basis of state law has been answered affirmatively by this Court many times in the past. Yet the Court repudiates at least 28 cases, spanning well over a century of this Court's jurisprudence, proclaiming instead that federal courts have no power to enforce the will of the States by enjoining conduct because it violates state law. This new pronouncement will require the federal courts to decide federal constitutional questions despite the availability of state-law grounds for decision, a result inimical to sound principles of judicial restraint. Nothing in the Eleventh Amendment, the conception of state sovereignty it embodies, or the history of this institution, requires or justifies such a perverse result.

I

The conduct of petitioners that the Court attributes to the State of Pennsylvania in order to find it protected by the Eleventh Amendment is described in detail in the District Court's findings. As noted in our prior opinion, 451 **U.S**. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), and by the majority today, *ante,* at 904, those findings were undisputed: "Conditions at **Pennhurst** are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded. The court found that the physical, intellectual, and emotional skills of some residents have deteriorated at **Pennhurst**." 451 **U.S**., at 7, 101 S.Ct., at 1534, 1535 (footnote omitted). The court concluded that **Pennhurst** was actually hazardous to its residents. [1] Organized programs of ****923** training or education ***128** were inadequate or entirely unavailable, and programs of treatment or training were not developed for residents. When they visited **Pennhurst**, shocked parents

of residents would find their children bruised, drugged and unattended. These conditions often led to a deterioration in the condition of the residents after being placed in **Pennhurst**. Terri Lee **Halderman**, for example, was learning to talk when she entered **Pennhurst**; after residing there she lost her verbal skills. At every stage of this litigation, petitioners have conceded that **Pennhurst** fails to provide even minimally adequate habilitation for its residents. See 612 F.2d 84, 92–94 (3d Cir.1979) (en banc); 446 F.Supp. 1295, 1304 (E.D.Pa.1977).

The District Court held that these conditions violated each resident's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended by 92 Stat. 2987, 29 U.S.C. § 794 (1976 ed., Supp. V), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa.Stat.Ann. tit. 50, §§ 4101–4704 (Purdon 1969 and Supp.1982) ("MH/MR Act"). The en banc Court of Appeals for the Third Circuit affirmed most of the District Court's judgment, but it grounded its decision solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1976 ed. and Supp. V). The court did not consider the constitutional issues or § 504 of the Rehabilitation Act. While it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation, the court did not decide whether that state right justified all of the relief granted by the District Court.

Petitioners sought review by this Court, asserting that the Court of Appeals had erred in its construction of both federal and state statutes. This Court granted certiorari and reversed, ***129** 451 **U.S**. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), holding that 42 U.S.C. § 6010 created no substantive rights. We did not accept respondents' state-law contention, because there was a possibility that the Court of Appeals' analysis of the state statute had been influenced by its erroneous reading of federal law. Concluding that it was "unclear whether state law provides an independent and adequate ground which can support the court's remedial order," 451 **U.S**., at 31, 101 S.Ct., at 1547, we "remand[ed] the state-law issue for reconsideration in light of our decision here." *Ibid.* In a footnote we declined to consider the effect of the Pennsylvania Supreme Court's then recent decision, *In re Schmidt,* 494 Pa. 86, 429 A.2d 631 (1981), on the state-law issues in the case, expressly stating that on remand the Court of Appeals could "consider the state law issues in light of the Pennsylvania Supreme Court's recent decision." 451 **U.S**., at 31, n. 24, 101 S.Ct., at 1547, n. 24.

On remand, 673 F.2d 647 (3d Cir.1982) (en banc), the Court of Appeals, noting that this Court had remanded for reconsideration of the state-law issue, examined the impact of *Schmidt.*[2] According to the Court of Appeals, which was unanimous on this point, the State Supreme Court had "spoken definitively" on the duties of the State under the MH/MR Act, holding that the State was required to provide care to the mentally retarded in the "least restrictive environment." *Id.,* at 651. Since the MH/MR Act fully justified the relief issued in the Court of Appeals' prior judgment, the court reinstated its prior judgment ****924** on the basis of petitioner's violation of state law.[3]

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

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

II

The majority proceeds as if this Court has not had previous occasion to consider Eleventh Amendment argument made by petitioners, and contends that *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) has no application to a suit seeking injunctive relief on the basis of state law. That is simply not the case. The Court rejected the argument that the Eleventh ***131** Amendment precludes injunctive relief on the basis of state law twice only two Terms ago. In *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), four Justices concluded that a suit for possession of property in the hands of state officials was not barred by the Eleventh Amendment inasmuch as the State did not have even a colorable claim to the property under state law. See *id.,* at 696–697, 102 S.Ct., at 3320 – 3321 (opinion of STEVENS, J., joined by BURGER, C.J., MARSHALL, and BLACKMUN, JJ.). Four additional Justices accepted the proposition that if the state officers' conduct had been in violation of a state statute, the Eleventh Amendment would not bar the action. *Id.,* at 714, 102 S.Ct., at 3329 (WHITE, J., concurring in the judgment in part and dissenting in part, joined by POWELL, REHNQUIST, and O'CONNOR, JJ.).[5] And in just one short paragraph in *Cory v. White,* 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982), the Court thrice restated the settled rule that the Eleventh Amendment does not bar suits against state officers when they are "alleged to be acting against federal or state law."[6] These ***132** are only the two ****925** most recent in an extraordinarily long line of cases.

By 1908, it was firmly established that conduct of state officials under color of office that is tortious as a matter of state law is not protected by the Eleventh Amendment. See *Reagan v. Farmers' Loan & Trust,* 154 U.S. 362, 390–391, 14 S.Ct. 1047, 1051–1052, 38 L.Ed. 1014 (1894); *Poindexter v. Greenhow,* 114 U.S. 270, 287, 5 S.Ct. 903, 912, 29 L.Ed. 185 (1885); *Cunningham v. Macon & Brunswick R. Co.,* 109 U.S. 446, 452, 3 S.Ct. 292, 296, 27 L.Ed. 992 (1883).[7] Cf. *Belknap v. Schild,* 161 U.S. 10, 18, 16 S.Ct. 443, 445, 40 L.Ed. 599 (1896) (same rule adopted for sovereign immunity of the United States); *Stanley v. Schwalby,* 147 U.S. 508, 518–519, 13 S.Ct. 418, 422, 37 L.Ed. 259 (1893) (same).[8] In ***133** *Hopkins v. Clemson Agricultural College,* 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911), the Court explained the relationship of these cases to the doctrine of sovereign immunity.

> "[I]mmunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for ****926** wrongs inflicted or injuries threatened.... Besides, neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury." *Id.,* at 642–643, 31 S.Ct., at 656–657.[9]

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

> "To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment. Surely an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both." *Id.,* at 545, 38 S.Ct., at 205.

Similarly, in *Rolston v. Missouri Fund Commissioners,* 120 U.S. 390, 7 S.Ct. 599, 30 L.Ed. 721 (1887), the Court rejected the argument that a suit to enjoin a state officer to comply with state law violated the Eleventh Amendment. The Court wrote, "Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state." *Id.,* at 411, 7 S.Ct., at 610.[10]

****927** ***135** Significantly, this rule was expressly reaffirmed in a case decided by this Court in the same Term as *Ex parte Young* and published in the same volume of the United States Reports. ***136** The appellant in *Scully v. Bird,* 209 U.S. 481, 28 S.Ct. 597, 52 L.Ed. 899 (1908), brought a

diversity suit seeking injunctive relief against the dairy and food commissioner of the State of Michigan, on the ground that "under cover of his office" he had maliciously engaged in a course of conduct designed to ruin plaintiff's business in the State. The circuit court dismissed the complaint on Eleventh Amendment grounds. On appeal, the plaintiff contended that the Eleventh Amendment "does not apply where a suit is brought against defendants who, claiming to act as officers of the State, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, acts of wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff." *Id.,* at 418, 28 S.Ct., at 597. This Court agreed. It noted that the complaint alleged action "in dereliction of duties enjoined by the statutes of the State," and concluded that it was "manifest from this summary of the allegations of the bill that this is not a suit against the State." *Id.,* at 490, 28 S.Ct., at 600. [11]

Finally, in *Greene v. Louisville & Interurban R. Co.,* 244 **U.S**. 499, 37 S.Ct. 673, 61 L.Ed. 1200 (1917), and its companion cases, *Louisville & Nashville R. Co. v. Greene,* 244 **U.S**. 522, 37 S.Ct. 683, 61 L.Ed. 1291 (1917); *Illinois Central R. Co. v. Greene,* 244 **U.S**. 555, 37 S.Ct. 697, 61 L.Ed. 1309 (1917), the plaintiffs challenged the conduct of state officials under both federal and state law. The Court, citing, *inter alia, Young* and *Clemson,* held that the Eleventh Amendment did not bar injunctive relief on the basis of state law, noting that the plaintiffs' federal claim was sufficiently substantial to justify the exercise ***137** of pendent jurisdiction over plaintiffs' state-law claims, [12] and that since violations of federal and state law had been alleged, it ****928** was appropriate for the federal court to issue injunctive relief on the basis of state law without reaching the federal claims, despite the strictures of the Eleventh Amendment. In short, the *Greene* Court approved of precisely the methodology employed by the Court of Appeals in this case. [13]

None of these cases contain only "implicit" or *sub silentio* holdings; all of them explicitly consider and reject the claim that the Eleventh Amendment prohibits federal courts from issuing injunctive relief based on state law. There is therefore no basis for the majority's assertion that the issue presented by this case is an open one, *ante,* at 918. [14]

***138** The Court tries to explain away these cases by arguing that the applicable state statutes gave petitioners such "broad discretion" over **Pennhurst** that their actions were not *ultra vires, ante,* at 913 – 914. The Court, however, does not dispute the Court of Appeals' conclusion that these state statutes gave petitioners *no discretion whatsoever* to disregard their duties with respect to institutionalization of the retarded as they did. Petitioners acted outside of their lawful discretion every bit as much as did the government officials in the cases I have discussed, which hold that when an official commits an act prohibited by law, he acts beyond his authority and is not protected by sovereign immunity. [15] After all, it is only common sense to conclude that States do not authorize their officers to violate their legal duties.

The Court also relies heavily on the fact that the District Court found petitioners immune from damages liability because they "acted in the utmost good faith ... *within the sphere of their official responsibilities,*" *ante,* at 912 (emphasis in original) (quoting 446 F.Supp., at 1324). This confuses two distinct concepts. An official ****929** can act in good faith and therefore be immune from damages liability despite the ***139** fact that he has done that which the law prohibits, a point recognized as recently as *Harlow v. Fitzgerald,* 457 **U.S**. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Nevertheless, good faith immunity from damage liability is irrelevant to the availability of injunctive relief. See *Wood v. Strickland,* 420 **U.S**. 308, 314–315, n. 6, 95 S.Ct. 992, 997, n. 6, 43 L.Ed.2d 214 (1975). The state officials acted in nothing less than good faith and within the sphere of their official responsibilities in asserting Florida's claim to the treasure in *Treasure Salvors;* the same can be said for the bank commissioner's actions in safeguarding bank deposits challenged in *Johnson v. Lankford,* the fund commissioner's decision to sell property mortgaged to the State challenged in *Rolston,* and the state food and dairy commissioner's decision to prosecute the appellant for violating the state food impurity act challenged in *Scully,* to give just a few examples. Yet in each of these cases the state officers' conduct was enjoined. *Greene* makes this point perfectly clear. There state officers did nothing more than carry out responsibilities clearly assigned to them by a statute. Their conduct was nevertheless enjoined because this Court held that their conduct violated the state constitution, despite the fact that their reliance on a statute made it perfectly clear that their conduct was not only in good faith but reasonable. See *Michigan v. DeFillippo,* 443 **U.S**. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). Until today the rule has been simple: conduct that exceeds the scope of an official's lawful discretion is not conduct the sovereign has authorized and hence is subject to injunction. [16] Whether that conduct also gives rise to damage liability is an entirely separate question.

***140** III

On its face, the Eleventh Amendment applies only to suits against a State brought by citizens of other States and foreign nations. [17] This textual limitation upon the scope of the states' immunity from suit in federal court was set aside in *Hans v. Louisiana,* 134 **U.S**. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). *Hans* was a suit against the State of Louisiana, brought by a citizen of Louisiana seeking to recover interest on the state's bonds. The Court stated that some of the arguments favoring sovereign immunity for the States made during the process of the Amendment's ratification had become a part of ****930** the judicial scheme created by the Constitution. As a result, the Court concluded that the Constitution prohibited a suit by a citizen against his or her own state. When called upon to elaborate in *Monaco v. Mississippi,* 292 **U.S**. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934), the Court explained that the Eleventh Amendment did more than simply prohibit suits brought by citizens of one State against another State. Rather, it exemplified the broader and more ancient doctrine of sovereign immunity, which operatesto ***141** bar a suit brought by a citizen against his own State without its consent. [18]

The Court has subsequently adhered to this interpretation of the Eleventh Amendment. For example, in *Quern v. Jordan,* 440 **U.S**. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), the Court referred to the Eleventh Amendment as incorporating "the traditional sovereign immunity of the States." *Id.,* at 341, 99 S.Ct., at 1145. Similarly, in *Fitzpatrick v. Bitzer,* 427 **U.S**. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Court referred to "the Eleventh Amendment and the principle of sovereign immunity it embodies...." *Id.,* at 456, 96 S.Ct., at 2671. See also *Nevada v. Hall,* 440 **U.S**. 410, 438–441, 99 S.Ct. 1182, 1197–1198, 59 L.Ed.2d 416 (1979) (REHNQUIST, J., dissenting). [19] Thus, under our cases it is the doctrine of sovereign immunity, rather than the text of the Amendment ***142** itself, which is critical to the analysis of any Eleventh Amendment problem. [20]

The doctrine of sovereign immunity developed in England, where it was thought that the king could not be sued. However, common law courts, in applying the doctrine, traditionally distinguished between the king and his agents, on the theory that the king would never authorize unlawful conduct, and that therefore the unlawful acts of the king's officers ought not to be treated as acts of the sovereign. See 1 W. Blackstone, Commentaries on the Laws of England * 244 (J. Andrews ed. 1909). As early as the fifteenth century, Holdsworth writes, servants of the king were held liable for their unlawful acts. See III W. Holdsworth, A History of English Law 388 (1903). During the seventeenth century, this rule of law was used extensively to curb the king's authority. The king's officers

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

****931** In one famous case, it was held that although process would not issue against the sovereign himself, it could issue against his officers. "For the warrant of no man, not even of the King himself, can excuse the doing of an illegal act." *Sands v. Child,* 83 Eng.Rep. 725, 726 (K.B.1693). [21] By the eighteenth century, this rule of law was unquestioned. ***143** See X W. Holdsworth,*supra,* at 650–652. And in the nineteenth Century this view was taken by the court to be so well-settled as to not require the citation of authority, see *Feather v. The Queen,* 122 Eng.Rep. 1191, 1205–1206 (K.B.1865). [22]

It was only natural, then, that this Court, in applying the principles of sovereign immunity, recognized the distinction between a suit against a State and one against its officer. [23] For example, while the Court did inquire as to whether a suit was "in essence" against the sovereign, it soon became settled law that the Eleventh Amendment did not bar suits against state officials in their official capacities challenging unconstitutional conduct. See *Smyth v. Ames,* 169 **U.S**. 466, 518–519, 18 S.Ct. 418, 423, 42 L.Ed. 819 (1898); *Pennoyer v. McConnaughy,* 140 **U.S**. 1, 10–12, 11 S.Ct. 699, 701–702, 35 L.Ed. 363 (1891); *Poindexter v. Greenhow,* 114 **U.S**. 270, 288, 5 S.Ct. 903, 913, 29 L.Ed. 185 (1885). [24] This rule was reconciled with sovereign immunity ***144** principles by use of the traditional rule that an action against an agent of the sovereign who had acted unlawfully was not considered to be against the sovereign. When an official acts pursuant to an unconstitutional statute, the Court reasoned, the absence of valid authority leaves the official *ultra vires* his authority, and thus a private actor stripped of his status as a representative of the sovereign. [25] In *Ex* ****932** *parte Young,* 209 **U.S**. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Court was merely restating a settled principle when it wrote:

> "The Act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.,* at 159–160, 28 S.Ct., at 454. [26]

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

The *Young* Court distinguished between the State and its attorney general because the latter, in violating the Constitution, had engaged in conduct the sovereign could not authorize. The pivotal consideration was not that the conduct violated federal law, since nothing in the jurisprudence of the Eleventh Amendment permits a suit against a sovereign merely because federal law is at issue. [27] Indeed, at least since *Hans v. Louisiana,* 134 **U.S**. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the law has been settled that the Eleventh Amendment applies even though the State is accused of violating the Federal Constitution. In *Hans* the Court held that the Eleventh Amendment applies to all cases within the jurisdiction of the federal courts including those brought to require compliance with federal law, and bars any suit where the State is the proper defendant under sovereign immunity principles. A long line of cases has endorsed that proposition, holding that irrespective ***146** of the need to vindicate federal law a suit is barred by the Eleventh Amendment if the State is the proper defendant. [28] It was clear until today ****933** that "the State [is not] divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' " *Parden v. Terminal R. Co.,* 377 **U.S**. 184, 186, 84 S.Ct. 1207, 1209–1210, 12 L.Ed.2d 233 (1964) (quoting *Hans,* 134 **U.S**., at 10, 10 S.Ct., at 505).

The pivotal consideration in *Young* was that it was not conduct of the sovereign that was at issue. [29] The rule that unlawful acts of an officer should not be attributed to the sovereign has deep roots in the history of sovereign immunity and makes *Young* reconcilable with the principles of sovereign immunity found in the Eleventh Amendment, [30] rather ***147** than merely an unprincipled accommodation between federal and state interests that ignores the principles contained in the Eleventh Amendment.

This rule plainly applies to conduct of state officers in violation of state law. *Young* states that the significance of the charge of unconstitutional conduct is that it renders the state official's conduct "simply an illegal act," and hence the officer is not entitled to the sovereign's immunity. Since a state officer's conduct in violation of state law is certainly no less illegal than his violation of federal law, in either case the official, by committing an illegal act, is "stripped of his official or representative character." For example, one of *Young's* predecessors held that a suit challenging an unconstitutional attempt by the Virginia legislature to disavow a state contract was not barred by the Eleventh Amendment, reasoning that

> "inasmuch as, by the Constitution of the United States, *which is also the supreme law of Virginia,* that contract, when made, became thereby unchangeable, irrepealable by the State, the subsequent act of January 26, 1882, and all other like acts, which deny the obligation of that contract and forbid its performance, are not the acts of the State of Virginia. The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of *its* fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been.... The State of Virginia ****934** has done none of ***148** these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without *her* authority, but contrary to *her* express commands." *Poindexter v. Greenhow,* 114 **U.S**. 270, 293, 5 S.Ct. 903, 915, 29 L.Ed. 185 (1885) (emphasis supplied). [31]

It is clear that the Court in *Poindexter* attached no significance to the fact that Virginia had been accused of violating

federal and not its own law.[32] To the contrary, the Court treated the Federal Constitution as part of Virginia's law, and concluded that the challenged action was not that of Virginia precisely because it violated Virginia's law. The majority's position turns the *Young* doctrine on its head—sovereign immunity did not bar actions challenging unconstitutional conduct by state officers since the Federal Constitution was also to be considered part of the State's law—and since the State could not and would not authorize a violation of its own law, the officers' conduct was considered individual ***149** and not sovereign. No doubt the Courts that produced *Poindexter* and *Young* would be shocked to discover that conduct authorized by state law but prohibited by federal law is not considered conduct attributable to the State for sovereign immunity purposes, but conduct prohibited by state law is considered conduct attributable to the very State which prohibited that conduct. Indeed, in *Tindal v. Wesley,* 167 **U.S**. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1896), the Court specifically found that it was impossible to distinguish between a suit challenging unconstitutional conduct of state officers and a suit challenging any other type of unlawful behavior:

> "If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute ... be not one against the State, it is impossible to see how a suit against the individuals to recover the possession of property belonging to the plaintiff and illegally held by the defendants can be deemed a suit against the State." *Id.,* at 222, 17 S.Ct., at 777.[33]

These cases are based on the simple idea that an illegal act strips the official of his state-law shield, thereby depriving the official of the sovereign's immunity. The majority criticizes this approach as being "out of touch with reality" because it ignores the practical impact of an injunction on the ****935** ***150** State though directed at its officers. *Ante,* at 911–912. Yet that criticism cannot account for *Young,* since an injunction has the same effect on the State whether it is based on federal or state law. Indeed, the majority recognizes that injunctions approved by *Young* "have an obvious impact on the State itself," *ante,* at 910. In the final analysis the distinction between the State and its officers, realistic or not, is one firmly embedded in the doctrine of sovereign immunity. It is that doctrine and not any theory of federal supremacy which the Framers placed in the Eleventh Amendment and which this Court therefore has a duty to respect.

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

> "[P]ublic officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattel, recoverable by appropriate action at law or in equity [the] dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." *Land v. Dollar,* 330 **U.S**. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947).[34]

The majority's position that the Eleventh Amendment does not permit federal courts to enjoin conduct that the sovereign State itself seeks to prohibit thus is inconsistent with both ***151** the doctrine of sovereign immunity and the underlying respect for the integrity of State policy which the Eleventh Amendment protects. The issuance of injunctive relief which enforces state laws and policies, if anything, enhances federal courts' respect for the sovereign prerogatives of the States.[35] The majority's approach, which requires federal courts to ignore questions of state law and to rest their decisions on federal bases, will create more rather than less friction between the States and the federal judiciary.

Moreover, the majority's rule has nothing to do with the basic reason the Eleventh Amendment was added to the Constitution. There is general agreement that the Amendment was passed because the States were fearful that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin.[36] Entertaining a suit for injunctive relief based on state law implicates none of the concerns of the Framers. Since only injunctive relief is sought there is no threat to the state treasury of the type that concerned the Framers, see *Milliken v. Bradley,* 433 **U.S**. 267, 288–290, 97 S.Ct. 2749, 2761–2762, 53 L.Ed.2d 745 (1977); *Edelman v. Jordan,* 415 **U.S**. 651, 667–668, 94 S.Ct. 1347, 1357–1358, 39 L.Ed.2d 662 (1974); and if the State wishes to avoid the federal injunction, it can easily do so simply by changing its law. The possibility of States left helpless in the face of disruptive ****936** federal decrees which led to the passage of the Eleventh ***152** Amendment simply is not presented by this case. Indeed, the Framers no doubt would

have preferred federal courts to base their decisions on state law, which the State is then free to reexamine, rather than forcing courts to decide cases on federal grounds, leaving the litigation beyond state control.

In light of the preceding, it should come as no surprise that there is absolutely no authority for the majority's position that the rule of *Young* is inapplicable to violations of state law. The only cases the majority cites, *ante,* at 910 – 911, for the proposition that *Young* is limited to the vindication of federal law do not consider the question whether *Young* permits injunctive relief on the basis of state law—in each of the cases the question was neither presented, briefed, argued nor decided. [37] It is curious, to say the least, that the majority disapproves of reliance on cases in which the issue we face today was decided *sub silentio,* see *ante,* at 918, yet it is willing to rely on cases in which the issue was not decided at all. In fact, not only is there no precedent for the majority's position, but, as I have demonstrated in Part II, *supra,* there is an avalanche of precedent squarely to the contrary. [38]

***153** That the doctrine of sovereign immunity does not protect conduct which has been prohibited by the sovereign is clearly demonstrated by the case on which petitioners chiefly rely, *Larson v. Domestic & Foreign Commerce Corp.,* 337 **U.S**. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). The *Larson* opinion teaches that the actions of state officials are not attributable to the state—are *ultra vires* —in two different types of situations: (1) when the official is engaged in conduct that the sovereign has not authorized, and (2) when he has engaged in conduct that the sovereign has forbidden. A sovereign, like any other principal, cannot authorize its agent to violate the law. When an agent does so, his actions are considered *ultra vires* and he is liable for his own conduct under the law of agency. Both types of *ultra vires* conduct are clearly identified in *Larson.*

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a ****937** suit against the sovereign. If the War Assets Administrator had completed a sale of his own personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, *where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.* The officer is not doing ***154** the business which the sovereign has empowered him to do *or he is doing it in a way that the sovereign has forbidden.* His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." *Id.,* at 689–690, 69 S.Ct., at 1461 (emphasis supplied).

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

Following the two-track analysis of *Larson,* the cases considering the question whether the state official is entitled to the sovereign's immunity can be grouped into two categories. In cases like *Larson, Malone v. Bowdoin,* 369 **U.S**. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962), and *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 **U.S**. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), which usually involve the state functioning in its proprietary capacity, the *ultra vires* issue can be resolved solely by reference to the law of agency. Since there is no specific limitation on the powers of the officers other than the general limitations on their authority, the only question that need be asked is whether they have acted completely beyond their authority. But when the State has placed specific limitations on the manner in which state officials may perform their duties, as it often does in regulatory or other administrative contexts as were considered in *Scully v. Bird* and *Johnson v.* ***155** *Lankford,* the *ultra vires* inquiry also involves the question whether the officials acted in a way that state law forbids. No sovereign would authorize its officials to violate its own law, and if the official does so, then *Larson* indicates that his conduct is *ultra vires* and not protected by sovereign immunity.

Larson confirms that the Court's disposition of this case in 1981—ordering the Court of Appeals to consider respondents' state law claims—was fully harmonious with established sovereign immunity principles. The jurisdiction of the federal court was established by a federal claim; [39] the Court of Appeals therefore had jurisdiction to resolve the case and to grant injunctive relief on either federal or state grounds.

Respondents pleaded a specific statutory limitation on the way in which petitioners were entitled to run **Pennhurst**. The District Court and the Court of Appeals have ****938** both found that petitioners operated **Pennhurst** in a way that the sovereign has forbidden. Specifically, both courts concluded that petitioners placed residents in **Pennhurst** without any consideration at all of the limitations on institutional confinement that are found in state law, and that they failed to create community living programs that are mandated by state law. In short, there can be no dispute that petitioners ran **Pennhurst** in a way that the sovereign had ***156** forbidden. Under the second track of the *Larson* analysis, petitioners were acting *ultra vires* because they were acting in a way that the sovereign, by statute, had forbidden.[40]

***157** Petitioners readily concede, both in their brief and at oral argument, that the Eleventh Amendment does not bar a suit against state officers who have acted *ultra vires.* The majority makes a similar concession, *ante,* at 908, n. 11. Yet both ignore the fact that the cases, and most especially *Larson,* set out a two-step analysis for *ultra vires* conduct—conduct that is completely beyond the scope of the officer's authority, or conduct that the sovereign has forbidden. In fact, the majority goes so far as to quote the passage from *Larson* indicating that a state official acts *ultra vires* when he completely lacks power delegated from the state, *ante,* at 908 – 909, n. 11. That quotation ignores sentences immediately preceding and following the quoted passage stating in terms that where an official violates a statutory prohibition, he acts *ultra vires* and is not protected by sovereign immunity. This omission is understandable, since petitioners' conduct in ****939** this case clearly falls into the category of conduct the sovereign has specifically forbidden by statute. Petitioners were told by Pennsylvania how to run **Pennhurst**, and there is no dispute that they disobeyed their instructions. Yet without explanation, the Court repudiates the two-track analysis of *Larson* and holds that sovereign immunity extends to conduct the sovereign has statutorily prohibited.[41] Thus, contrary ***158** to the Court's assertion, *Larson* is in conflict with the result reached today.[42]

In sum, a century and a half of this Court's Eleventh Amendment jurisprudence has established the following. A suit alleging that the official had acted within his authority but in a manner contrary to state statutes was not barred because the Eleventh Amendment prohibits suits against States; it does not bar suits against state officials for actions not permitted by the State under its own law. The sovereign could not and would not authorize its officers to violate its own law; hence an action against a state officer seeking redress for conduct not permitted by state law is a suit against the officer, not the sovereign. *Ex parte Young* concluded in as explicit a fashion as possible that unconstitutional action by state officials is not action by the State even if it purports to be authorized by state law, *because the federal Constitution strikes down the state law shield.* In the tort cases, if the plaintiff proves his case, there is by definition no state-law defense to shield the defendant. Similarly, *when the state officer violates a state statute, the sovereign has by definition erected no shield against liability.* These precedents make clear that there is no foundation for the contention that the majority embraces—that *Ex parte Young* authorizes injunctive relief against state officials only on the basis of federal law. To the contrary, *Young* is as clear as a ***159** bell: the Eleventh Amendment does not apply where there is no state-law shield. That simple principle should control this case.

IV

The majority's decision in this case is especially unwise in that it overrules a long line of cases in order to reach a result that is at odds with the usual practices of this Court. In one of the most respected opinions ever written by a Member of this Court, Justice Brandeis wrote:

> "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
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> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the ****940** Court will decide only the latter. *Siler v. Louisville & Nashville R. Co.,* 213 **U.S.** 175, 191 [29 S.Ct. 451, 454–455, 53 L.Ed. 753]." *Ashwander v. Tennessee Valley Authority,* 297 **U.S.** 288, 346–347, 56 S.Ct. 466, 482–483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

The *Siler* case, cited with approval by Justice Brandeis in *Ashwander,* employed a remarkably similar approach to that used by the Court of Appeals in this case. A privately owned railroad corporation brought suit against the members of the railroad commission of Kentucky to enjoin the enforcement of a rate schedule promulgated by the commission. The federal circuit court found that the schedule violated the plaintiff's federal constitutional rights and granted relief. ***160** This Court affirmed, but it refused to decide the constitutional question because injunctive relief against the state officials was adequately supported by state law. The Court held that the plaintiff's claim that the schedule violated the Federal Constitution was sufficient to justify the assertion of federal jurisdiction over the case, but then declined to reach the federal question, deciding the case on the basis of state law instead:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." *Siler v. Louisville & Nashville R. Co.,* 213 **U.S**. 175, 193, 29 S.Ct. 451, 455, 53 L.Ed. 753 (1909). [43]

The *Siler* principle has been applied on numerous occasions; when a suit against state officials has presented both federal constitutional questions and issues of state law, the Court has upheld injunctive relief on state law grounds. See, *e.g., Lee v. Bickell,* 292 **U.S**. 415, 425, 54 S.Ct. 727, 731, 78 L.Ed. 1337 (1934); *Glenn v. Field Packing Co.,* 290 **U.S**. 177, 178, 54 S.Ct. 138, 138, 78 L.Ed. 252 (1933); *Davis v. Wallace,* 257 **U.S**. 478, 482–485, 42 S.Ct. 164, 165–166, 66 L.Ed. 325 (1922); *Louisville & Nashville R. Co. v. Greene,* 244 **U.S**. 522, 527, 37 S.Ct. 683, 686, 61 L.Ed. 1291 (1917); *Greene v. Louisville & Interurban R. Co.,* 244 **U.S**. 499, 508, 512–514, 37 S.Ct. 673, 679–680, 61 L.Ed. 1280 (1917). [44]

***161** In *Hagans v. Lavine,* 415 **U.S**. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), the Court ****941** quoted from the *Siler* opinion and noted that the "Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims." *Id.,* at 546, 94 S.Ct., at 1384. It added:

> "Numerous decisions of this Court have stated the general proposition endorsed in *Siler* —that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose ***162** of the case solely on the nonfederal ground. See, *e.g., Hillsborough v. Cromwell,* 326 **U.S**. 620, 629–630, 66 S.Ct. 445, 451, 90 L.Ed. 358 (1946); *Waggoner Estate v. Wichita County,* 273 **U.S**. 113, 116–119, 47 S.Ct. 271, 272–273, 71 L.Ed. 566 (1927); *Chicago G.W.R. Co. v. Kendall,* 266 **U.S**. 94, 45 S.Ct. 55, 69 L.Ed. 183 (1924); *United Gas Co. v. Railroad Comm'n,* 278 **U.S**. 300, 308, 49 S.Ct. 150, 152, 73 L.Ed. 390 (1929); *Risty v. Chicago, R.I. & P.R. Co.,* 270 **U.S**. 378, 387, 46 S.Ct. 236, 240, 70 L.Ed. 641 (1926). These and other cases illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." 415 **U.S**., at 547, n. 12, 94 S.Ct., at 1384, n. 12.

In fact, in this very case we applied the *Siler* rule by remanding the case to the Court of Appeals with explicit instructions to consider whether respondents were entitled to relief under state law.

Not only does the *Siler* rule have an impressive historical pedigree, but it is also strongly supported by the interest in avoiding duplicative litigation and the unnecessary decision of federal constitutional questions.

> "The policy's ultimate foundations ... lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our ***163** system." *Rescue Army v. Municipal Court,* 331 **U.S**. 549, 571, 67 S.Ct. 1409, 1421, 91 L.Ed. 1666 (1947). [45]

In addition, application of the *Siler* rule enhances the decisionmaking autonomy of the States. *Siler* directs the federal court to turn first to state law, which the State is free to modify or repeal.[46] By leaving the policy determinations underlying injunctive relief in the hands of the State, the Court ****942** of Appeals' approach gives appropriate deference to established state policies.

In contrast, the rule the majority creates today serves none of the interests of the State. The majority prevents federal courts from implementing State policies through equitable enforcement of State law. Instead, federal courts are required to resolve cases on federal grounds that no State authority can undo. Leaving violations of state law unredressed and ensuring that the decisions of federal courts may never be reexamined by the States hardly comports with the respect for States as sovereign entities commanded by the Eleventh Amendment.

V

One basic fact underlies this case: far from immunizing petitioners' conduct, the State of Pennsylvania prohibited it. Respondents do not complain about the conduct of the State of Pennsylvania—it is Pennsylvania's commands which they seek to enforce. Respondents seek only to have **Pennhurst** ***164** run the way Pennsylvania envisioned that it be run. Until today, the Court understood that the Eleventh Amendment does not shield the conduct of state officers which has been prohibited by their sovereign.

Throughout its history this Court has derived strength from institutional self-discipline. Adherence to settled doctrine is presumptively the correct course.[47] Departures are, of course, occasionally required by changes in the fabric of our society.[48] When a court, rather than a legislature, initiates ***165** such a departure, it has a special ****943** obligation to explain and to justify the new course on which it has embarked. Today, however, the Court casts aside well settled respected doctrine that plainly commands affirmance of the Court of Appeals—the doctrine of the law of the case,[49] the doctrine of *stare decisis* (the Court repudiates at least 28 cases),[50] the ***166** doctrine of sovereign immunity,[51] the doctrine of pendant jurisdiction,[52] and the doctrine of judicial restraint. No sound reason justifies the further prolongation of this litigation or this Court's voyage into the sea of undisciplined lawmaking.

***167** As I said at the outset, this case has illuminated the character of an institution.

I respectfully dissent.

All Citations

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

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 **U.S**. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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

2 In a companion case, the Court of Appeals affirmed the District Court's denial of the **Pennhurst** Parents-Staff Association's motion to intervene for purposes of appeal, finding the denial harmless error. See 612 F.2d 131 (3 Cir.1979) (en banc). The Association subsequently was granted leave to intervene and is a petitioner in this Court.

3 On July 1, 1981, Pennsylvania enacted an appropriations bill providing that only $35,000 would be paid for the Masters' expenses for the fiscal year July 1981 to June 1982. The District Court held the Pennsylvania Department of Public Welfare and its Secretary in contempt, and imposed a fine of $10,000 per day. Pennsylvania paid the fines, and the contempt was purged on January 8, 1982. On appeal the Court of Appeals affirmed the contempt order. ***Halderman** v. **Pennhurst** **State** **School** & **Hospital***, 673 F.2d 628 (3 Cir.1982), cert. pending, No. 81–2363.

4 Three Justices dissented from the Court's construction of the Act, but concluded that the District Court should not have adopted the "far-reaching remedy" of appointing "a Special Master to decide which of the **Pennhurst** inmates should remain and which should be moved to community-based facilities.... [T]he court should not have assumed the task of managing **Pennhurst**...." 451 **U.S**., at 54, 101 S.Ct., at 1558–1559 (WHITE, J., dissenting in part).

5 The Court of Appeals also noted that "the United States is an intervening plaintiff ... against which even the state itself cannot successfully plead the Eleventh Amendment as a bar to jurisdiction," and that "the counties, even as juridical

entities, do not fall within the coverage of the Eleventh Amendment. Against those defendants even money damages may be awarded." 673 F.2d, at 656 (citation omitted).

As Justice BRENNAN notes in his dissent, *post,* at 1, Judge Gibbons has expanded on his views of the Eleventh Amendment in a recent law review article. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum.L.Rev. 1889 (1983). Judge Gibbons was the author of both the first and second opinions by the Court of Appeals in this case.

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

7 See *Employees v. Missouri Public Health Dep't,* 411 **U.S**. 279, 291–292, 93 S.Ct. 1614, 1621–1622, 36 L.Ed.2d 251 (1973) (MARSHALL, J., concurring in judgment) (The Eleventh Amendment "clarif[ied] the intent of the Framers concerning the reach of federal judicial power" and "restore[d] the original understanding" that States could not be made unwilling defendants in federal court). See also *Nevada v. Hall,* 440 **U.S**. 410, 430–431, 99 S.Ct. 1182, 1193–1194, 59 L.Ed.2d 416 (1979) (BLACKMUN, J., dissenting); *id.,* at 437, 99 S.Ct., at 1196 (REHNQUIST, J., dissenting).

8 The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding. "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment ... even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury,* 323 **U.S**. 459, 467, 65 S.Ct. 347, 352, **89** L.Ed. 389 (1945).

9 For this reason, the Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts. See, *e.g., Florida Department of Health v. Florida Nursing Home Assn.,* 450 **U.S**. 147, 150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (1981) *(per curiam).* "[I]t is not consonant with our dual system for the federal courts ... to read the consent to embrace federal as well as state courts.... [A] clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." *Great Northern Life Insurance Co. v. Read,* 322 **U.S**. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944).

10 See *Nevada v. Hall,* 440 **U.S**., at 418–419, 99 S.Ct., at 1187–1188 (States were "vitally interested" in whether they would be subject to suit in the federal courts, and the debates about state immunity focused on the question of federal judicial power). Cf. *id.,* at 430–431, 99 S.Ct., at 1193 (BLACKMUN, J., dissenting) (sovereign immunity is "a guarantee that is implied as an essential component of federalism" and is "sufficiently fundamental to our federal structure to have implicit constitutional dimension"); *id.,* at 437, 99 S.Ct., at 1196 (REHNQUIST, J., dissenting) ("[T]he States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions").

11 "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Dugan v. Rank,* 372 **U.S**. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted).

Respondents do not dispute that the relief sought and awarded below operated against the state in each of the foregoing respects. They suggest, however, that the suit here should not be considered to be against the state for the purposes of the Eleventh Amendment because, they say, petitioners were acting *ultra vires* their authority. Respondents rely largely on *Florida Dep't of State v. Treasure Salvors, Inc.,* 458 **U.S**. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), which in turn was founded upon *Larson v. Domestic & Foreign Commerce Corp.,* 337 **U.S**. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). These cases provide no support for this argument. These and other modern cases make clear that a state officer may be said to act *ultra vires* only when he acts "without any authority whatever." *Treasure Salvors, supra,* 458 **U.S**., at 697, 102 S.Ct., at 3321 (opinion of STEVENS, J.); accord *id.,* at 716, 102 S.Ct., at 3330 (WHITE, J., concurring in judgment in part and dissenting in part) (test is whether there was no "colorable basis for the exercise of authority by state officials"). As the Court in *Larson* explained, an *ultra vires* claim rests on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson, supra,* 337 **U.S**., at 690, 69 S.Ct., at 1461. Petitioners' actions in operating this mental health institution plainly were not beyond their delegated authority in this sense. The MH/MR Act gave them broad discretion to provide "adequate" mental health services. Pa.Stat.Ann., Tit. 50, § 4201(1) (Purdon 1969). The essence of respondents' claim is that petitioners have not provided such services adequately.

In his dissent, Justice STEVENS advances a far broader—and unprecedented—version of the *ultra vires* doctrine, which we discuss *infra,* at 929 – 935.

12 We reject respondents' additional contention that Pennsylvania has waived its immunity from suit in federal court. At the time the suit was filed, suits against Pennsylvania were permitted only where expressly authorized by the legislature, see, *e.g., Freach v. Commonwealth,* 471 Pa. 558, 370 A.2d 1163 (1977), and respondents have not referred **us** to any provision expressly waiving Pennsylvania's Eleventh Amendment immunity. The State now has a statute governing sovereign immunity, including an express preservation of its immunity from suit in federal court: "Federal courts.—Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 42 Pa.Cons.Stat. § 8521(b) (1980).

We also do not agree with respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, see, *e.g., Monaco v. Mississippi,* 292 **U.S**. 313, 329, 54 S.Ct. 745, 750, 78 L.Ed. 1282 (1934), the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs. In any case, we think it clear that the United States does not have standing to assert the state-law claims of third-parties. For these reasons, the applicability of the Eleventh Amendment to respondents' state-law claim is unaffected by the United States' participation in the case.

13 We do not decide whether the District Court would have jurisdiction under this reasoning to grant prospective relief on the basis of federal law, but we note that the scope of any such relief would be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' " *Rizzo v. Goode,* 423 **U.S**. 362, 378, 96 S.Ct. 598, 607, 46 L.Ed.2d 561 (1976) (quoting *Stefanelli v. Minard,* 342 **U.S**. 117, 120, 72 S.Ct. 118, 120, 96 L.Ed. 138 (1951)).

14 We are prompted to respond at some length to Justice STEVENS' 41-page dissent in part by his broad charge that "the Court repudiates at least 28 cases," *post,* at 922. The decisions the dissent relies upon simply do not support this sweeping characterization. See nn. 19, 20, and 21, *infra.*

15 In this case, for example, the court below rested its finding that state law required habilitation in the least restrictive environment on dicta in *In re Schmidt,* 494 Pa. 86, 429 A.2d 631 (1981). That decision was not issued until seven years after this suit was filed, and four years after trial ended.

16 This part of the court's findings and judgment was not appealed. See 612 F.2d, at 90, n. 4. See also 446 F.Supp., at 1303 ("On the whole, the staff at **Pennhurst** appears to be dedicated and trying hard to cope with the inadequacies of the institution").

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

A truth of which the dissent's theoretical argument seems unaware is the plight of many if not most of the mental institutions in our country. As the District Court in this case found, "History is replete with misunderstanding and mistreatment of the retarded." 446 F.Supp., at 1299. Accord Message from President Kennedy Relative to Mental Illness and Mental Retardation, H.R.Doc. No. 58, 88th Cong., 1st Sess. 13 (1963) ("We as a Nation have long neglected the mentally ill and the mentally retarded"). It is common knowledge that "insane asylums," as they were known until the middle of this century, usually were underfunded and understaffed. It is not easy to persuade competent people to work in these institutions, particularly well trained professionals. Physical facilities, due to consistent underfunding by state legislatures, have been grossly inadequate—especially in light of advanced knowledge and techniques for the treatment of the mentally ill. See generally *id.,* at 2, 4; The President's Comm. on Mental Retardation, MR 68: The Edge of Change 11–13 (1968); President's Comm. on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded 1–58 (R. Kugel & W. Wolfensberger ed. 1969); R.C. Scheerenberger, A History of Mental Retardation 240–243 (1983). Only recently have States commenced to move to correct widespread deplorable conditions. The responsibility, as the District Court recognized after a protracted trial, has rested on the *State itself.*

17 The dissent appears to be confused about our argument here. See *post,* at 928 – 929. It is of course true, as the dissent says, that the finding below that petitioners acted in good faith and therefore were immune from damages does not affect whether an injunction might be issued against them by a court possessed of jurisdiction. The point is that the courts

below did not have jurisdiction because the relief ordered so plainly ran against the State. No one questions that the petitioners in operating **Pennhurst** were acting in their official capacity. Nor can it be questioned that the judgments under review commanded action that could be taken by petitioners only in their official capacity—and, of course, *only* if the State provided the necessary funding. It is evident that the dissent would vest in federal courts authority, acting solely under *state law,* to ignore the sovereignty of the States that the Eleventh Amendment was adopted to protect. Article III confers no jurisdiction on this Court to strip an explicit Amendment of the Constitution of its substantive meaning.

Contrary to the dissent's view, see *post,* at 935–, an injunction based on federal law stands on very different footing, particularly in light of the Civil War Amendments. As we have explained, in such cases this Court is vested with the constitutional duty to vindicate "the supreme authority of the United States," *Young,* 209 **U.S**., at 160, 28 S.Ct., at 454. There is no corresponding mandate to enforce state law.

18 See *Rolston v. Missouri Fund Commissioners,* 120 **U.S**. 390, 7 S.Ct. 599, 30 L.Ed. 721 (1887). In *Rolston,* however, the state officials were ordered to comply with "a plain ministerial duty," see *Great Northern Life Insurance Co. v. Read,* 322 **U.S**. 47, 51, 64 S.Ct. 873, 875, 88 L.Ed. 1121 (1944), a far cry from this case, see n. 20, *infra.*

19 The cases are collected in n. 50 of the dissent, *post,* at 943. Several of the cases do not rest on an Eleventh Amendment holding at all. For example, federal jurisdiction in fact was held to be *lacking* in *Martin v. Lankford,* 245 **U.S**. 547, 38 S.Ct. 205, 62 L.Ed. 464 (1918), because of lack of diversity. A fair reading of *South Carolina v. Wesley,* 155 **U.S**. 542, 15 S.Ct. 230, 39 L.Ed. 254 (1895), and the cases it cites, makes clear that the ruling there was on the purely procedural point that the party pressing the appeal was not a party to the proceeding. In two other cases the allegation was that a state officer or agency had acted *unconstitutionally,* rather than merely contrary to state law. *Atchison, T. & S.F.R. Co. v. O'Connor,* 223 **U.S**. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1897); *Hopkins v. Clemson Agricultural College,* 221 **U.S**. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911). In *Johnson v. Lankford,* 245 **U.S**. 541, 38 S.Ct. 203, 62 L.Ed. 460 (1918), the relief sought was not injunctive relief but money damages against the individual officer. See *infra* n. 21. None of these cases can be said to be overruled by our holding today. As noted *infra,* at 935 – 936, the *Greene* cases do not discuss the Eleventh Amendment in connection with the state-law claim.

Tindal v. Wesley, 167 **U.S**. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897), and *Scully v. Bird,* 209 **U.S**. 481, 28 S.Ct. 597, 52 L.Ed. 899 (1908), are more closely analogous cases. In both of these old cases, however, the allegation was that the defendants had committed common law torts, not, as here, that they had failed to carry out affirmative duties assigned to them by statute. See *Tindal, supra,* 167 **U.S**., at 221, 17 S.Ct., at 777 (distinguishing suits brought "to enforce the discharge by the defendants of any specific duty enjoined by the State"); Transcript of Record, *Tindal v. Wesley* 3 (complaint alleged that defendants had "wrongfully entered into said premises and ousted the plaintiff ... to the damage of the plaintiff ten thousand dollars"); *Scully, supra,* 209 **U.S**., at 483, 28 S.Ct., at 597 (allegation was that defendant had "injuriously affect[ed] the reputation and sale of [plaintiff's] products"). Tort cases such as these were explicitly overruled in *Larson v. Domestic & Foreign Commerce Corp.,* 337 **U.S**. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). See *infra,* at 932 – 934.

20 See, *e.g., Philadelphia Co. v. Stimson,* 223 **U.S**. 605, 620, 32 S.Ct. 340, 344, 56 L.Ed. 570 (1912) ("The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made"); *Santa Fe P.R. Co. v. Fall,* 259 **U.S**. 197, 198–199, 42 S.Ct. 466, 467, 66 L.Ed. 896 (1922) (same); see also *Kendall v. Stokes,* 3 How. 87, 98, 11 L.Ed. 506 (1845) ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake"); *Noble v. Union River Logging R.,* 147 **U.S**. 165, 171–172, 13 S.Ct. 271, 272–273, 37 L.Ed. 123 (1893); *Belknap v. Schild,* 161 **U.S**. 10, 18, 16 S.Ct. 443, 445, 40 L.Ed. 599 (1896) (under Eleventh Amendment, injunctive relief is permitted where officer commits a tort that is "contrary to a plain official duty requiring no exercise of discretion"); *Wells v. Roper,* 246 **U.S**. 335, 338, 38 S.Ct. 317, 318, 62 L.Ed. 755 (1918); *Larson v. Domestic & Foreign Commerce Corp.,* 337 **U.S**. 682, 695, 69 S.Ct. 1457, 1464, 93 L.Ed. 1628 (1949) (suit challenging "incorrect decision as to law or fact" is barred "if the officer making the decision was empowered to do so"); *id.,* at 715, 69 S.Ct., at 1474 (Frankfurter, J., dissenting) (noting that cases involve orders to comply with nondiscretionary duties). The opinions make clear that the question of discretion went to sovereign immunity, and not to the court's mandamus powers generally. See, *e.g., Philadelphia Co., supra,* 223 **U.S**., at 618–620, 32 S.Ct., at 344. The rationale appears to be that discretionary duties have a greater impact on the sovereign because they "brin[g] the operation of governmental machinery into play." *Larson, supra,* 337 **U.S**., at 715, 69 S.Ct., at 1474 (Frankfurter, J., dissenting).

21 In any event, as with the Eleventh Amendment cases, see n. 19, *supra,* the dissent also is wrong to say that the federal sovereign immunity cases it cites *post,* at 943, n. 50, are today overruled. Many of them were actions for damages in

tort against the individual officer. *Little v. Barreme,* 2 Cranch 170, 2 L.Ed. 243 (1804); *Wise v. Withers,* 3 Cranch 331, 2 L.Ed. 457 (1806); *Mitchell v. Harmony,* 13 How. 115, 14 L.Ed. 75 (1851); *Bates v. Clark,* 95 **U.S**. 204, 24 L.Ed. 471 (1877); *Belknap v. Schild,* 161 **U.S**. 10, 16 S.Ct. 443, 40 L.Ed. 599 (1896). In *Belknap* the Court drew a careful distinction between such actions and suits in which the relief would run more directly against the State. *Id.,* at 18, 16 S.Ct., at 445. The Court disallowed injunctive relief against the officers on this basis. *Id.,* at 23–25, 16 S.Ct., at 447–448. Contrary to the view of the dissent, *post,* at 926, n. 10, nothing in our opinion touches these cases. The Court in *Larson* similarly distinguished between cases seeking money damages against the individual officer in tort, and those seeking injunctive relief against the officer in his official capacity. It held that the latter sought relief against the sovereign, while the former might not. 337 **U.S**., at 687–688, and nn. 7, 8, 69 S.Ct., at 1460–1461 and nn. 7, 8.

There is language in other cases that suggests they were actions alleging torts, not statutory violations. See *Philadelphia Co. v. Stimson,* 223 **U.S**. 605, 623, 32 S.Ct. 340, 345, 56 L.Ed. 570 (1912); *Sloan Shipyards v. **U.S**. Fleet Corp.,* 258 **U.S**. 549, 568, 42 S.Ct. 386, 388–389, 66 L.Ed. 762 (1922); *Land v. Dollar,* 330 **U.S**. 731, 736, 67 S.Ct. 1009, 1011, 91 L.Ed. 1209 (1947). The remainder clearly distinguish cases (like the present one) involving statutes that command discretionary duties. See n. 20, *supra.* In any case, the Court in *Larson* explicitly limited the precedential value of all of these cases. See *Malone v. Bowdoin,* 369 **U.S**. 643, 646, and n. 6, 82 S.Ct. 980, 982, and n. 6, 8 L.Ed.2d 168 (1962).

22 In fact, as the dissent itself states, the argument in *Larson* that an allegation of tortious activity overrides sovereign immunity is essentially the same as the dissent's argument that an allegation of conduct contrary to statute overrides sovereign immunity. See *post,* at 939. The result in each case—as the Court in *Larson* recognizes—turns on whether the defendant state official was empowered to do what he did, *i.e.,* whether, even if he acted erroneously, it was action within the scope of his authority. See *Larson,* 337 **U.S**., at 685, 69 S.Ct., at 1459 (controversy on merits concerned whether officer had interpreted government contract correctly); *id.,* at 695, 69 S.Ct., at 1464; *id.,* at 716–717, 69 S.Ct., at 1474–1475 (Frankfurter, J., dissenting) (in cases alleging a tort, the "official seeks to screen himself behind the sovereign"); *id.,* at 721–722, 69 S.Ct., at 1477–1478. What the dissent fails to note is that the Court in *Larson* explicitly rejected the view that the dissent here also advances, which is "that an officer given the power to make decisions is only given the power to make correct decisions." *Id.,* at 695, 69 S.Ct., at 1464. The Court in *Larson* made crystal clear that an officer might make errors and still be acting within the scope of his authority. *Ibid.* (There can be no question that the defendants here were "given the power to make decisions" about the operation of **Pennhurst**. See n. 11, *supra.*) The dissent's view that state officers "have no discretion to commit a tort," *post,* at 925, n. 7, cannot be reconciled with the plain holding of *Larson.*

23 "It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal." *Id.,* at 694, 69 S.Ct., at 1463 (footnote omitted).

24 The *Larson* Court noted that a similar argument "was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected." 337 **U.S**., at 694, 69 S.Ct., at 1463. See 10 Fletcher Cyclopedia of the Law of Private Corporations § 4877, at 350 (1978 ed.) (a corporation is liable for torts committed by its agent within the scope of its authority even though the "act was contrary to or in violation of the instructions or orders given by it to the offending agent"); *id.,* § 4959 (same as to crimes).

The dissent's strained interpretation of *Larson, post,* at 918 – 919, simply ignores the language that the dissent itself quotes: "It is important to note that in [*ultra vires*] cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." 337 **U.S**., at 689–690, 69 S.Ct., at 1461–1462.

25 As we have discussed *supra,* at 909 – 910, *Edelman v. Jordan,* 415 **U.S**. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), also shows that the broad *ultra vires* theory enunciated in *Young* and in some of the cases quoted by the dissent has been discarded. In *Edelman,* although the State officers were alleged to be acting contrary to law, and therefore should have been "stripped of their authority" under the theory of the dissent, we held the action to be barred by the Eleventh Amendment. The dissent attempts to distinguish *Edelman* on the ground that the retroactive relief there, unlike injunctive relief, does not run only against the agent. *Post,* at 918, n. 29. To say that injunctive relief against State officials acting in their official capacity does not run against the State is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign perhaps, an American State can act only through its officials. It is true that the Court in *Edelman* recognized that retroactive relief often, or at least sometimes, has a greater impact on the State treasury than

does injunctive relief, see 415 **U.S**., at 666, n. 11, 94 S.Ct., at 1357, n. 11, but there was no suggestion that damages alone were thought to run against the State while injunctive relief did not.

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

26 The dissent appears to believe that *Larson* is consistent with all prior law. See *post,* at 936. This view ignores the fact that the *Larson* Court itself understood that it was required to "resolve [a] conflict in doctrine." 337 **U.S**., at 701, 69 S.Ct., at 1467. The Court since has recognized that *Larson* represented a watershed in the law of sovereign immunity. In *Malone v. Bowdoin,* 369 **U.S**. 643, 82 S.Ct. 980, 8 L.Ed.2d 168, Justice Stewart's opinion for the Court observed that "to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task." *Id.,* at 646, 82 S.Ct., at 983. His opinion continued:

"The Court's 1949 *Larson* decision makes it unnecessary, however, to undertake that task here. For in *Larson* the Court, aware that it was called upon to 'resolve the conflict in doctrine' ..., thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents." *Ibid.* The Court included many of the cases upon which the dissent relies in its list of cases that were rejected by *Larson.* See *id.,* n. 6.

27 *E.g., Rolston v. Missouri Fund Commissioners,* 120 **U.S**. 390, 7 S.Ct. 599, 30 L.Ed. 721 (1887) (never cited); *Scully v. Bird,* 209 **U.S**. 481, 28 S.Ct. 597, 52 L.Ed. 899 (1908) (never cited); *Hopkins v. Clemson Agricultural College,* 221 **U.S**. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911) (never cited); *Johnson v. Lankford,* 245 **U.S**. 541, 38 S.Ct. 203, 62 L.Ed. 460 (1918) (never cited); *Land v. Dollar,* 330 **U.S**. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) (cited only for proposition that judgment that would expend itself on public treasury or interfere with public administration is a suit against the United States); *Cunningham v. Macon & B.R. Co.,* 109 **U.S**. 446, 3 S.Ct. 292, 27 L.Ed. 992 (1883) (cited only for proposition that a suit alleging unconstitutional conduct is not barred by the Eleventh Amendment, and that State cannot be sued without its consent); *Poindexter v. Greenhow,* 114 **U.S**. 270, 5 S.Ct. 903, 962, 29 L.Ed. 185, 207 (1885) (unconstitutional-conduct suit is not suit against State); *Reagan v. Farmers' Loan & Trust,* 154 **U.S**. 362, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894) (same). Prior to *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 **U.S**. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), *Tindal v. Wesley,* 167 **U.S**. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897), had been cited only for the proposition that a suit alleging unconstitutional conduct is not barred by the Eleventh Amendment. The plurality opinion in *Treasure Salvors* discussed *Tindal* at some length, 458 **U.S**., at 685–688, 102 S.Ct., at 3315 – 3316, but noted that the rule of *Tindal* "was clarified in *Larson.*" *Id.,* at 688, 102 S.Ct., at 3316; see also *id.,* at 715, n. 13, 102 S.Ct., at 3330 (WHITE, J., dissenting).

As noted, n. 26, *supra,* some of these cases were also cited—and rejected—in *Malone v. Bowdoin,* 369 **U.S**. 643, 646, n. 6, 82 S.Ct. 980, 982, n. 6, 8 L.Ed.2d 168 (1962).

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

Nor do any of the other pendent-jurisdiction cases cited in Justice STEVENS' dissent, *post,* at 944, n. 52, discuss the Eleventh Amendment in connection with the state-law claims. Moreover, since *Larson* was decided in 1949, making clear that mere violations of state law would not override the Eleventh Amendment, these cases have been cited only for the proposition that, as a general matter, a federal court should decide a case on state-law grounds where possible to avoid a federal constitutional question. Nothing in our decision is meant to cast doubt on the desirability of applying the *Siler* principle in cases where the federal court has jurisdiction to decide the state-law issues.

29 See *Edelman v. Jordan,* 415 **U.S**. 651, 671, 94 S.Ct. 1347, 1359–1360, 39 L.Ed.2d 662 (1974) ("Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of [certain prior] cases to the extent that they are inconsistent with our holding today").

30 See, *e.g., Monaco v. Mississippi,* 292 **U.S**. 313, 322, 54 S.Ct. 745, 747, 78 L.Ed. 1282 (1934) ("[A]lthough a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens"); *Missouri v. Fiske,* 290 **U.S**. 18, 25–26, 54 S.Ct. 18, 20–21, 78 L.Ed. 145 (1933).

31 See *Missouri v. Fiske,* 290 **U.S**., at 27, 54 S.Ct., at 21 ("This is not less a suit against the State because the bill is ancillary and supplemental.").

32 Moreover, allowing claims against state officials based on state law to be brought in the federal courts does not necessarily foster the policies of "judicial economy, convenience and fairness to litigants," *Mine Workers v. Gibbs,* 383 **U.S**. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), on which pendent jurisdiction is founded. For example, when a federal decision on state law is obtained, the federal court's construction often is uncertain and ephemeral. In cases of ongoing oversight of a state program that may extend over years, as in this case, the federal intrusion is likely to be extensive. Duplication of effort, inconvenience, and uncertainty may well result. See, *e.g., Burford v. Sun Oil Co.,* 319 **U.S**. 315, 327, 63 S.Ct. 1098, 1104, 87 L.Ed. 1424 (1943) ("Delay, misunderstanding of local law, and needless conflict with the state policy, are the inevitable product of this double [*i.e.,* federal-state] system of review"). This case is an example. Here, the federal courts effectively have been undertaking to operate a major state institution based on inferences drawn from dicta in a state court opinion not decided until four years after the suit was begun. The state court has had no opportunity to review the federal courts' construction of its opinion, or their choice of remedies. The only sure escape from an erroneous interpretation of state law is presumably the rather cumbersome route of legislation.

Waste and delay may also result from abstention, which often is called for when state law is unclear, see *Baggett v. Bullitt,* 377 **U.S**. 360, 378–379, 84 S.Ct. 1316, 1326–1327, 12 L.Ed.2d 377 (1964) ("abstention operates to require piecemeal adjudication in many courts, thereby delaying ultimate adjudication on the merits for an undue length of time") (citations omitted), or from dismissals on the basis of comity, which has special force when relief is sought on state-law grounds, see *Gibbs, supra,* 383 **U.S**., at 726, 86 S.Ct., at 1139; *Hawks v. Hamill,* 288 **U.S**. 52, 61, 53 S.Ct. 240, 243, 77 L.Ed. 610 (1933).

33 Cf. *Aldinger v. Howard,* 427 **U.S**. 1, 14–15, 96 S.Ct. 2413, 2420–2421, 49 L.Ed.2d 276 (1976) (Although "considerations of judicial economy" would be served by permitting pendent-party jurisdiction, "the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress").

34 We have held that the Eleventh Amendment does not apply to "counties and similar municipal corporations." *Mt. Healthy City* ***School*** *District v. Doyle,* 429 **U.S**. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977); see *Lincoln County v. Luning,* 133 **U.S**. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). At the same time, we have applied the Amendment to bar relief against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 **U.S**. 391, 401, 99 S.Ct. 1171, 1177, 59 L.Ed.2d 401 (1979). See, *e.g., Edelman v. Jordan, supra* (Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits). The Courts of Appeals are in general agreement that a suit against officials of a county or other governmental entity is barred if the relief obtained runs against the State. See, *e.g., Moore v. Tangipahoa Parish* ***School*** *Board,* 594 F.2d 489, 493 (CA5 1979); *Carey v. Quern,* 588 F.2d 230, 233–234 (CA7 1978); *Incarcerated Men of Allen County Jail v. Fair,* 507 F.2d 281, 287–288 (CA6 1974); *Harris v. Tooele County* ***School*** *District,* 471 F.2d 218, 220 (CA10 1973). Given that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials, when exercising their functions under the MH/MR Act, effectively runs against the State. Cf. *Farr v. Chesney,* 441 F.Supp. 127, 130–132 (MD Pa.1977) (holding that Pennsylvania county commissioners, acting as members of the board of the county office of mental health and retardation, may not be sued for back pay under the Eleventh Amendment). We need not decide this issue in light of our disposition above.

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

1 Infectious diseases were common and minimally adequate health care was unavailable. Residents of **Pennhurst** were inadequately supervised, and as a consequence were often injured by other residents or as a result of self-abuse. Assaults on residents by staff members, including sexual assaults, were frequent. Physical restraints were employed in lieu of adequate staffing, often causing injury to residents, and on one occasion leading to a death. Dangerous psychotropic

drugs were indiscriminately used for purposes of behavior control and staff convenience. Staff supervision during meals was minimal, and residents often stole food from each other—leaving some without enough to eat. The unsafe conditions led to aggressive behavior on the part of residents which was punished by solitary confinement. There was often urine and excrement on the walls.

2 In the questions raised in their petition for certiorari, petitioners do not ask this Court to reexamine the Court of Appeals' conclusion that respondents are clearly entitled to relief under state law. Nor would it be appropriate for this Court to reexamine the unanimous conclusion of the en banc Court of Appeals on a question of state law. See, *e.g., Bishop v. Wood,* 426 **U.S**. 341, 345–346, 96 S.Ct. 2074, 2077–2078, 48 L.Ed.2d 684 (1976).

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

4 Although the Court struggles mightily to distinguish some of the cases that foreclose its holding today, see *ante,* at 911 – 916, this vain effort merely brings into stark relief the total absence of any affirmative support for its holding.

5 "*Larson* established that where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions." *Ibid.*

6 "Neither did *Edelman* deal with a suit naming a state officer as defendant, but not *alleging a violation of either federal or state law.* Thus, there was no occasion in the opinion to cite or discuss the unanimous opinion in *Worcester* that the Eleventh Amendment bars suits against state officers *unless they are alleged to be acting contrary to federal law or against the authority of state law. Edelman* did not hold that suits against state officers who are *not alleged to be acting against federal or state law* are permissible under the Eleventh Amendment if only prospective relief is sought." 457 **U.S**., at 91, 102 S.Ct., at 2329 (emphasis supplied).

See also *Worcester County Co. v. Riley,* 302 **U.S**. 292, 297, 58 S.Ct. 185, 187, 82 L.Ed. 268 (1937) (citations omitted) ("[G]enerally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States. The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."). In *Worcester* the Court held a suit barred by the Eleventh Amendment only after stating: "Hence, it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States." *Id.,* at 299, 58 S.Ct., at 188.

7 The Court explained that the state officer sued in tort "is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts jurisdiction as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." *Cunningham,* 109 **U.S**., at 452, 3 S.Ct., at 297, quoted in *Poindexter,* 114 **U.S**., at 287, 5 S.Ct., at 912. Today's majority notes that these cases involve nondiscretionary duties of governmental officers, *ante,* at 913, but overlooks the reason for this characterization—officers have no discretion to commit a tort. The same is true of the Court's treatment of the federal sovereign immunity cases I discuss below.

8 See also *Butz v. Economou,* 438 **U.S**. 478, 489–490, 98 S.Ct. 2894, 2902, 57 L.Ed.2d 895 (1978) (officers of the United States are liable for their torts unless the torts are authorized by federal law); *Philadelphia Co. v. Stimson,* 223 **U.S**. 605, 619–620, 32 S.Ct. 340, 344, 56 L.Ed. 570 (1912) (officers of the United States may be enjoined where they wrongfully interfere with property rights). Justice Holmes had occasion to state that sovereign immunity does not generally extend to the acts of an officer of the sovereign. "In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name." *Sloan Shipyards v. **U.S**. Fleet Corp.,* 258 **U.S**. 549, 568, 42 S.Ct. 386, 388, 66 L.Ed. 762 (1922). He characterized petitioner's argument in that case—that sovereign immunity should extend to the unlawful acts of agents of the United States acting within the scope of their authority—as "a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction is always amenable to the law.... An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." *Id.,* at 566–567, 42 S.Ct., at 388. See also *Brady v. Roosevelt S.S. Co.,* 317 **U.S**. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943) (following *Sloan*).

9 The Court also stated,

"Corporate agents or individual officers of the State stand in no better position than officers of the General Government, and as to them it has often been held that: 'The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded, or injured, *even by authority of the United States.*'

Belknap v. Schild, 161 U.S. 10, 18 [16 S.Ct. 443, 445, 40 L.Ed. 599].” 221 U.S., at 645, 31 S.Ct., at 657 (emphasis supplied). The language I have quoted in the text makes it clear that the Court is incorrect to suggest *ante,* at 913, n. 19, that *Clemson* dealt only with unconstitutional conduct and not with conduct in violation of state tort law. See also *Old Colony Trust Co. v. Seattle,* 271 U.S. 426, 431, 46 S.Ct. 552, 554, 70 L.Ed. 1019 (1926) (reaffirming the rationale of *Clemson* in an action against city and county officials).

10 In *Reagan v. Farmers' Loan & Trust Co.,* 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894), the Court held that the Eleventh Amendment does not bar a suit alleging that a state officer has wrongfully administered a state statute. The Court awarded injunctive relief against state officers on the basis of both state and federal law. In *Atchison &c. R. Co. v. O'Connor,* 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912), the Court held that a suit against state officers seeking recovery of taxes paid under duress was not against the State since a state statute required the recovery of wrongfully paid taxes. See *id.,* at 287, 32 S.Ct., at 218. In *Lankford v. Platte Iron Works Co.,* 235 U.S. 461, 35 S.Ct. 173, 59 L.Ed. 316 (1915), the Court assumed that the Eleventh Amendment would not bar a suit “to compel submission by the officers of the State to the laws of the State, accomplishing at once the policy of the law and its specific purpose,” *id.,* at 471, 35 S.Ct., at 175, but rejected the appellees' construction of the state statute. See also *Parish v. State Banking Board,* 235 U.S. 498, 35 S.Ct. 185, 59 L.Ed. 330 (1915); *American Water Co. v. Lankford,* 235 U.S. 496, 35 S.Ct. 184, 59 L.Ed. 329 (1915). In *Martin v. Lankford,* 245 U.S. 547, 38 S.Ct. 205, 62 L.Ed. 464 (1918), the Court stated that the case was not barred by the Eleventh Amendment since the claim “is based, as we have seen, not in exertion of the state law but in violation of it. The reasoning of [*Johnson v. Lankford*] is therefore applicable and the conclusion must be the same, that is, the action is not one against the State, and the District Court erred in dismissing it for want of jurisdiction on that ground.” *Id.,* at 551, 38 S.Ct., at 207. While it is true, as the Court points out *ante,* at 913, n. 19, that the *Martin* Court went on to hold that there was no federal diversity jurisdiction over the case, it cannot be denied that the majority today repudiates the reasoning of *Martin.* As for the Court's treatment of *Johnson v. Lankford* and *O'Connor, ante,* at 913, n. 19, it is true that Johnson sought only damages, but the holding of that case, that the action was not barred by the Constitution since it alleged conduct in violation of state law, is utterly at odds with the Court's decision today. Surely the Court cannot mean to rely on a distinction between damages and injunctive relief, for it states: “A federal court's grant of relief against state officers on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law.... We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.” *Ante,* at 911. Awarding damages for a violation of state law by state officers acting within their authority is inconsistent with the majority's position that only a need to vindicate federal law justifies the lifting of the Eleventh Amendment bar. If an order to pay damages for wrongful conduct against a state officer is not against the State for purposes of the Eleventh Amendment, an additional order in the form of an injunction telling the officer not to do it again is no more against the State. It cannot be doubted that today's decision overrules *Johnson.* Finally, as for *O'Connor,* while it involved an allegation of unconstitutional action, that allegation was insufficient to lift the bar of the Eleventh Amendment because the complaint sought retroactive relief. It was the fact that relief was authorized by state law that defeated the Eleventh Amendment claim in *O'Connor.* See 223 U.S., at 287, 32 S.Ct., at 218.

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

12 The Court cited *Siler v. Louisville & Nashville R. Co.,* 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed. 753 (1917), which will be discussed in Part IV, *infra,* in support of this proposition.

13 The unanimous rejection of the argument that the Eleventh Amendment bars claims based on state officers' violations of federal statutes in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 156 n. 6, 98 S.Ct. 988, 994 n. 6, 55 L.Ed.2d 179 (1978) is entirely consistent with my analysis of our cases. But under the majority's view, it represented a rather dramatic extension of *Ex parte Young* to encompass federal statutory claims as well as constitutional claims. *Ray* demonstrates that it cannot be maintained that *Young* and the other cases of this Court permit injunctive relief only when the constitutionality of state officers' conduct is at issue. If that were so *Ray* would be wrongly decided—an argument that a state officer has violated a federal statute does not constitute a challenge to the constitutionality of the officer's conduct. *Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 612–615, 99 S.Ct. 1905, 1913–1914, 1915, 60 L.Ed.2d 508 (1979); *Swift & Co. v. Wickham,* 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965). In my view, the Eleventh Amendment claim in *Ray* deserved no more than the cursory footnote it received, since the state officials had engaged in conduct forbidden

by statute. If the Court were willing to adhere to settled rules of law today, the Eleventh Amendment claim could be rejected just as summarily.

14 The majority incredibly claims that *Greene* contains only an implicit holding on the Eleventh Amendment question the Court decides today. *Ante,* at 917 – 918. In plain words, the *Greene* Court held that the Eleventh Amendment did not bar consideration of the pendent state-law claims advanced in that case. The Court then considered and sustained those claims on their merits.

15 Contrary to the Court's treatment of them, the cases discussed above rely on the doctrine embraced in the quotation from *Clemson* I have set out—officials have no discretion to violate the law. The same is true of the federal sovereign immunity cases. See, *e.g., Land v. Dollar,* 330 **U.S**. 731, 736, 67 S.Ct. 1009, 1011, 91 L.Ed. 1209 (1947) ("the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action [and] a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' "); *Payne v. Central P.R. Co.,* 255 **U.S**. 228, 236, 41 S.Ct. 314, 316, 65 L.Ed. 598 (1928) ("But of course [the Secretary's statutory authority] does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act"); *Waite v. Macy,* 246 **U.S**. 606, 610, 38 S.Ct. 395, 397, 62 L.Ed. 892 (1918) ("The Secretary and the board must keep within the statute ... and we see no reason why the restriction should not be enforced by injunction ..."); *Philadelphia Co. v. Stimson,* 223 **U.S**. 605, 620, 32 S.Ct. 340, 618, 56 L.Ed. 570 (1912) ("And in the case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process").

16 In a rather desperate attempt to explain these cases, amici suggest that the Court simply did not realize that it was deciding questions of state law, since in the era before *Erie R. Co. v. Tompkins,* 304 **U.S**. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and *United Mine Workers v. Gibbs,* 383 **U.S**. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), it was not clear that diversity cases or pendent claims were governed by state rather than federal law. That suggestion is refuted by the cases discussed above in which it was held that relief could issue against state officers who had violated state statutes. Even under the construction of the Rules of Decision Act, 28 U.S.C. § 1652, adopted in *Swift v. Tyson,* 16 Pet. 1, 10 L.Ed. 865 (1842), and repudiated in *Erie,* federal courts were bound to apply state statutes. See, *e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 **U.S**. 518, 529–531, 48 S.Ct. 404, 407–408, 72 L.Ed. 681 (1928); *Swift,* 16 Pet., at 18–19. Thus, in these cases the Court was indisputably issuing relief under state law. The Court was explicit about the state-law basis for the relief it granted in *Greene,* to use just one example. It stated that federal jurisdiction "extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." 244 **U.S**., at 508, 37 S.Ct., at 677. It then granted plaintiffs relief under state law, and concluded by declining to decide any question of federal law. "It is obvious, however, in view of the result reached upon the questions of state law, just discussed, that the disposition of the cases would not be affected by whatever result we might reach upon the federal question.... Therefore, we find it unnecessary to express any opinion upon the question raised under the Fourteenth Amendment." *Id.,* at 519, 37 S.Ct., at 681–682.

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

18 "Manifestly, we cannot rest with a mere literal application of the words of § 2 or Article III, or assume that the letter of the Eleventh Amendment exhausts the restriction upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' " *Id.,* at 322–323, 54 S.Ct., at 748 (footnote omitted). See also *Ex parte New York,* 256 **U.S**. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921); *Hans v. Louisiana,* 134 **U.S**. 1, 15–18, 10 S.Ct. 504, 507–508, 33 L.Ed. 842 (1890). Most commentators have understood this Court's Eleventh Amendment cases as taking the position that the Constitution incorporates the common law doctrine of sovereign immunity. See, *e.g.,* Baker, Federalism and the Eleventh Amendment, 48 U.Col.L.Rev. 139, 153–158 (1977); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U.Pa.L.Rev. 515, 538–546 (1978); Thornton, The Eleventh Amendment: An Endangered Species, 55 Ind.L.J. 293, 305–310 (1980); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, **89** Harv.L.Rev. 682, 684–688 (1976); Comment, Private Suits Against States in the Federal Courts, 33 U.Chi.L.Rev. 331, 334–336 (1966).

19 Petitioners themselves treat the Eleventh Amendment as equivalent to the doctrine of sovereign immunity. See Brief for Petitioners 12 n. 10. The Court appears to agree. *Ante,* at 906.

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

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

22 Commentators have noted the influence of these English doctrines on the American conception of sovereign immunity. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv.L.Rev. 1, 19–29 (1963); Note, Express Waiver of Eleventh Amendment Immunity, 17 Ga.L.Rev. 513, 517–518 (1983); Note, Developments in the Law —Remedies Against the United States and its Officials, 70 Harv.L.Rev. 827, 831–833 (1957). In fact, in *Belknap v. Schild,* 161 **U.S**. 10, 16 S.Ct. 443, 40 L.Ed. 599 (1896), the Court, in holding that officers of the United States were liable for injuries caused by their unlawful conduct even if they did so acting pursuant to official duties, cited the passage from *Feather v. The Queen.* See 161 **U.S**., at 18, 16 S.Ct., at 445.

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

24 See also *McNeill v. Southern R. Co.,* 202 **U.S**. 543, 559, 26 S.Ct. 722, 724–725, 50 L.Ed. 1142 (1906); *Gunter v. Atlantic C.L.R. Co.,* 200 **U.S**. 273, 283–284, 26 S.Ct. 252, 255–256, 50 L.Ed. 477 (1906); *Prout v. Starr,* 188 **U.S**. 537, 23 S.Ct. 398, 47 L.Ed. 584 (1903); *Scott v. Donald,* 165 **U.S**. 58, 67–70, 17 S.Ct. 265, 266, 41 L.Ed. 632 (1897); *Reagan v. Farmers' Loan & Trust Co.,* 154 **U.S**. 362, 388–391, 14 S.Ct. 1047, 1050–1051, 1052, 38 L.Ed. 1014 (1894); *In re Tyler,* 149 **U.S**. 164, 190–191, 13 S.Ct. 785, 792–793, 37 L.Ed. 689 (1893); *In re Ayers,* 123 **U.S**. 443, 506–507, 8 S.Ct. 164, 183–184, 31 L.Ed. 216 (1887); *Hagood v. Southern,* 117 **U.S**. 52, 70, 6 S.Ct. 608, 616, 29 L.Ed. 805 (1886); *Allen v. Baltimore & O.R. Co.,* 114 **U.S**. 311, 315–316, 5 S.Ct. 925, 927–928, 29 L.Ed. 200 (1885); *Board of Liquidation v. McComb,* 92 **U.S**. 531, 541, 23 L.Ed. 623 (1875). Cf. *United States v. Lee,* 106 **U.S**. 196, 219–222, 1 S.Ct. 240, 259–262, 27 L.Ed. 171 (1883) (sovereign immunity of the United States not a defense against suit charging officers of the United States with unconstitutional conduct).

25 "That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence." *Poindexter v. Greenhow,* 114 **U.S**., at 288, 5 S.Ct., at 913.

26 See generally Orth, The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power, 1983 U.Ill.L.Rev. 423. The Court has adhered to this formulation to the present day. See *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 **U.S**. 670, 684–690, 102 S.Ct. 3304, 3314 – 3318, 73 L.Ed.2d 1057 (1982) (opinion of STEVENS, J.); *id.,* at 714–715, 102 S.Ct., at 3329 – 3330 (WHITE, J., concurring in the judgment in part and dissenting in part); *Ray v. Atlantic Richfield Co.,* 435 **U.S**. 151, 156 n. 6, 98 S.Ct. 988, 994 n. 6, 55 L.Ed.2d 179 (1978); *Scheuer v. Rhodes,* 416 **U.S**. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974); *Georgia R. Co. v. Redwine,* 342 **U.S**. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952); *Sterling v. Constantin,* 287 **U.S**. 378, 393, 53 S.Ct. 190, 193, 77 L.Ed. 375 (1932). Of course, the fragment from *Young* quoted by the Court, *ante,* at 912, n. 17, does not convey the same meaning when considered in the context of the paragraph quoted above.

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

28 See *Quern v. Jordan,* 440 **U.S**. 332, 345 n. 17, 99 S.Ct. 1139, 1147 n. 17, 59 L.Ed.2d 358 (1979); *Alabama v. Pugh,* 438 **U.S**. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*); *Edelman v. Jordan,* 415 **U.S**. 651, 668–669, 94 S.Ct. 1347, 1358–1359, 39 L.Ed.2d 662 (1974); *Employees v. Missouri Public Health Dept.,* 411 **U.S**. 279, 280 n. 1, 93 S.Ct. 1614, 1616 n. 1, 36 L.Ed.2d 251 (1973); *Smith v. Reeves,* 178 **U.S**. 436, 444–449, 20 S.Ct. 919, 922–924, 44 L.Ed.

1140 (1900); *Fitts v. McGhee,* 172 **U.S**. 516, 19 S.Ct. 269, 43 L.Ed. 535 (1899); *In re Ayers,* 123 **U.S**. 443, 8 S.Ct. 164, 31 L.Ed. 216 (1887); *Hagood v. Southern,* 117 **U.S**. 52, 6 S.Ct. 608, 29 L.Ed. 805 (1886); *Louisiana v. Jumel,* 107 **U.S**. 711, 2 S.Ct. 128, 27 L.Ed. 448 (1882). See generally C. Jacobs, The Eleventh Amendment and Sovereign Immunity 88–91, 109–110 (1972).

29 The distinction between the sovereign and its agents not only explains why the rationale of *Ex parte Young* and its predecessors is consistent with established sovereign immunity doctrine, but it also explains the critical difference between actions for injunctive relief and actions for damages recognized in *Edelman v. Jordan,* 415 **U.S**. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1973). Since the damages remedy sought in that case would have required payment by the State, it could not be said that the action ran only against the agents of the State. Therefore, while the agents' unlawful conduct was considered *ultra vires* and hence could be enjoined, a remedy which did run against the sovereign and not merely its agent could not fit within the *ultra vires* doctrine and hence was impermissible. If damages are not sought from the State and the relief will run only against the state official, damages are a permissible remedy under the Eleventh Amendment. See *Scheuer v. Rhodes,* 416 **U.S**. 232, 237–238, 94 S.Ct. 1683, 1686–1687 (1974).

30 "While in England personification of sovereignty in the person of the King may have been possible, attempts to adopt this reasoning in the United States resulted in the postulation of the abstract State as sovereign. Since the ideal State could only act by law, whatever the State did must be lawful. On this ground a distinction was drawn between the State and its officers, and since the State could not commit an illegal act, any such act was imputed to government officers. It logically followed that a suit against state officers was not necessarily a suit against the State." Note, The Sovereign Immunity of the States: The Doctrine and Some of its Recent Developments, 40 Minn.L.Rev. 234, 244–245 (1956) (footnotes omitted). Curiously, the majority appears to acknowledge that it has created a sovereign immunity broader than had ever been enjoyed by the king of England. *Ante,* at 915, n. 25.

31 See also *Barney v. City of New York,* 193 **U.S**. 430, 439–441, 24 S.Ct. 502, 504–505, 48 L.Ed. 737 (1904).

32 This approach began long before *Poindexter.* The earliest cases in which this Court rejected sovereign immunity defenses raised by officers of the sovereign accused of unlawful conduct did not involve charges of unconstitutional conduct, but rather simple trespass actions. In rejecting the defense, the Court simply noted that although the officers were acting pursuant to their duties, they were engaged in unlawful conduct which therefore could not be the conduct of the sovereign. See *Bates v. Clark,* 95 **U.S**. 204, 209, 24 L.Ed. 471 (1877); *Mitchell v. Harmony,* 13 How. 115, 137, 14 L.Ed. 75 (1851); *Wise v. Withers,* 3 Cranch 331, 2 L.Ed. 457 (1806); *Little v. Barreme,* 2 Cranch 169, 2 L.Ed. 243 (1804). In the landmark case of *Osborn v. Bank of the United States,* 9 Wheat. 738, 6 L.Ed. 204 (1824), the Court took it as beyond argument that if a state officer unlawfully seized property in an attempt to collect taxes he believed to be owed the state, the Eleventh Amendment would not bar a simple trespass action against the officer. The majority strangely takes comfort in the fact that the former cases allowed damages actions against federal officers. *Ante,* at 914, n. 21. The allowance of a damage remedy is no more consistent with the Court's approach than the allowance of an injunction, see n. 10, *supra.*

33 To the same effect as *Tindal* is *South Carolina v. Wesley,* 155 **U.S**. 542, 15 S.Ct. 230, 39 L.Ed. 254 (1895). The majority argues that the case notes that South Carolina was not a party to the proceeding and suggests the ruling was "purely procedural," *ante,* at 913, n. 19, but that misses the whole purpose of the "procedural" point made in the opinion—Eleventh Amendment immunity may only be claimed by the State; it does not extend to state officers accused of violating state law. See also *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 **U.S**. 670, 697, 102 S.Ct. 3304, 3321, 73 L.Ed.2d 1057 (1982) (opinion of STEVENS, J.) ("If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity.").

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

35 For example, in cases barring suits against individual officers as suits against the state, the Court has also acknowledged the importance of state-law authority for the challenged conduct of the officer. In such cases the Court has frequently noted that the relief sought would be unauthorized by state law and would therefore adversely affect the state itself. See, *e.g., Hagood v. Southern,* 117 **U.S**. 52, 68, 6 S.Ct. 608, 615, 29 L.Ed. 805 (1886); *Louisiana v. Jumel,* 107 **U.S**. 711, 721, 2 S.Ct. 128, 135–136, 27 L.Ed. 448 (1882). In contrast, in cases of official actions contrary to state law, a federal court's remedy would not adversely affect any state policy.

36 See, *e.g., Petty v. Tennessee-Missouri Bridge Comm'n,* 359 **U.S**. 275, 276 n. 1, 79 S.Ct. 785, 787 n. 1, 3 L.Ed.2d 804 (1959); *Missouri v. Fiske,* 290 **U.S**. 18, 27, 54 S.Ct. 18, 21, 78 L.Ed. 145 (1933); *Cohens v. Virginia,* 6 Wheat. 264, 406–407, 5 L.Ed. 257 (1821).

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

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

39 There can be no doubt that respondents' federal claims were sufficiently substantial to justify federal jurisdiction in this case. In another case brought by a resident of **Pennhurst**, we held that the Due Process Clause of the Fourteenth Amendment requires, at a minimum, that petitioners provide the residents with reasonable care and safety. See *Youngberg v. Romeo,* 457 **U.S**. 307, 324, 102 S.Ct. 2452, 2462–2463, 73 L.Ed.2d 28 (1982). The uncontested findings of the District Court in this case establish that **Pennhurst** was neither safe nor providing reasonable care to its residents. Therefore, respondents' federal claims not only were sufficiently substantial to support the exercise of federal jurisdiction in this case, but would almost certainly have justified the issuance of at least some injunctive relief had a state-law basis for the relief been unavailable.

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

> "There was, it is true, an allegation that the Administrator was acting 'illegally,' and that the refusal to deliver was 'unauthorized.' But these allegations were not based and did not purport to be based upon any lack of delegated power. Nor could they be, since the Administrator was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." 337 **U.S**. at 691–92, 69 S.Ct., at 1462 (footnotes omitted).
>
> Thus, the Administrator had acted properly. He was doing what any agent would do—holding on to property he believed was his principal's and insisting that the claimant sue the principal if it wanted the property. He was merely exercising the "normal" duties of a sales agent. Congress envisioned that he do exactly that; the remedy it had provided required the claimant to sue for damages in the Court of Claims rather than obtaining the property directly from the Administrator, and no one had questioned the constitutional sufficiency of that alternate remedy. See McCord, Fault Without Liability: Immunity of Federal Employees, 1966 U.Ill.L.F. 849, 862–867. "Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States." *Malone v. Bowdoin,* 369 **U.S**. 643, 647, 82 S.Ct. 980, 983, 8 L.Ed.2d 168 (1962). *Malone* can be explained similarly. These cases hold that Congress had empowered the governmental official to make necessary decisions about whether to hold onto property the official believes is the government's, at least pending the aggrieved party's remedy in the Claims Court under the Tucker Act, 28 U.S.C. §§ 1491–1507 (1976 ed. and Supp. V 1981 and West Supp.1983). See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensible Parties,

Mandamus, 75 Harv.L.Rev. 1479, 1490–1491 (1962); Jaffe, The Right to Judicial Review I, 71 Harv.L.Rev. 401, 436–437 (1958). Thus, where the official acts as the sovereign intends, he is entitled to the sovereign's immunity under the principles discussed above. Where that is not the case, *Larson* permits injunctive relief. In this case, respondents did plead a specific limitation on petitioners' powers, and the holding of the Court of Appeals on the merits of respondents' state law claims indicates that petitioners were not exercising the "normal" duties that the sovereign had envisioned for them, unlike the Administrator in *Larson.* Instead, petitioners were running **Pennhurst** "in a way which the sovereign has forbidden." 337 **U.S**., at 689, 69 S.Ct., at 1461.

41 The majority also repudiates Justice WHITE's recent statement in *Treasure Salvors:* "where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions." 458 **U.S**., at 714, 102 S.Ct., at 3329. Four Members of today's majority subscribed to that statement only two Terms ago.

42 Indeed, the majority senses as much, by admitting that it cannot reconcile the *ultra vires* doctrine endorsed by *Larson* with its approach. See *ante,* at 915, n. 25. The majority is also incorrect in suggesting that *Larson* overruled most if not all of the cases contrary to its position. In fact, *Larson* cited most of those cases with approval, including *Clemson, Tindal v. Wesley, Poindexter v. Greenhow* and *Land v. Dollar;* the *Larson* opinion stated that it was overruling only a single case, *Goltra v. Weeks,* 271 **U.S**. 536, 46 S.Ct. 613, 70 L.Ed. 1074 (1926). See 337 **U.S**., at 698–702, 69 S.Ct., at 1465–1467. *Larson* simply did not wreak the kind of havoc on this Court's precedents that the majority does today.

43 In *Siler* the Court decided the case on state-law grounds, even though it acknowledged that "[i]n this case we are without the benefit of a construction of the statute by the highest state court of Kentucky, and we must proceed in the absence of state adjudication upon the subject." *Id.,* 213 **U.S**., at 194, 29 S.Ct., at 456.

44 Justice Peckham's opinion in *Siler* rested on a long line of cases, dating back to Chief Justice Marshall's decision in *Osborn v. Bank of the United States,* 9 Wheat. 738, 822, 6 L.Ed. 204 (1824), holding that a federal court has jurisdiction over all the issues—state as well as federal—presented by a case that properly falls within its jurisdiction. Nor was *Siler* breaking new ground in avoiding a federal constitutional question by deciding on state law grounds. In *Santa Clara County v. Southern Pacific R. Co.,* 118 **U.S**. 394, 6 S.Ct. 1132, 30 L.Ed. 118 (1886), the Court noted the importance of the federal constitutional questions. Even though these had been treated as dispositive by the lower court, and though they were the "main—almost the only—questions discussed by counsel," *id.,* at 395, 6 S.Ct., at 1132, the Court stated, "These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise." *Id.,* at 410, 6 S.Ct., at 1140. It then determined that the challenged tax assessments were not authorized by state law and affirmed the judgment solely on that ground. In addition, the Court has routinely applied the *Siler* rule in cases upholding injunctive relief on the basis of state law against municipal officials, see, *e.g., Hillsborough v. Cromwell,* 326 **U.S**. 620, 629, 66 S.Ct. 445, 451, 90 L.Ed. 358 (1946); *Cincinnati v. Vester,* 281 **U.S**. 439, 448–449, 50 S.Ct. 360, 363, 74 L.Ed. 950 (1930); *Risty v. Chicago, Rock Island & Pacific R. Co.,* 270 **U.S**. 378, 46 S.Ct. 236, 70 L.Ed. 641 (1926); *Bohler v. Callaway,* 267 **U.S**. 479, 489, 45 S.Ct. 431, 435, 69 L.Ed. 745 (1925); *Lincoln Gas & Electric Light Co. v. City of Lincoln,* 250 **U.S**. 256, 268–269, 39 S.Ct. 454, 458, 63 L.Ed. 968 (1919); and in cases in which the plaintiffs were not held to be entitled to the relief they sought, see *Schmidt v. Oakland Unified* ***School*** *Dist.,* 457 **U.S**. 594, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982) (*per curiam*); *Railroad Comm'n of California v. Pacific Gas & Electric Co.,* 302 **U.S**. 388, 391, 58 S.Ct. 334, 337, 82 L.Ed. 319 (1938); *United Gas Co. v. Railroad Commission of Kentucky,* 278 **U.S**. 300, 307, 49 S.Ct. 150, 151, 73 L.Ed. 390 (1929); *Waggoner Estate v. Wichita County,* 273 **U.S**. 113, 116, 47 S.Ct. 271, 272, 71 L.Ed. 566 (1927); *Chicago Great Western R. Co. v. Kendall,* 266 **U.S**. 94, 97–98, 45 S.Ct. 55, 56–57, 69 L.Ed. 183 (1924); *Ohio Tax Cases,* 232 **U.S**. 576, 586–587, 34 S.Ct. 372, 373–374, 58 L.Ed. 737 (1914); *Louisville & Nashville R. Co. v. Garrett,* 231 **U.S**. 298, 303–304, 34 S.Ct. 48, 50, 58 L.Ed. 229 (1913). Numerous other cases decided by this Court have cited *Siler* as an accurate statement of the law regarding pendent jurisdiction. See, *e.g., Aldinger v. Howard,* 427 **U.S**. 1, 7, 96 S.Ct. 2413, 2417, 49 L.Ed.2d 276 (1976); *Florida Lime Growers v. Jacobsen,* 362 **U.S**. 73, 81, n. 7, 80 S.Ct. 568, 573 n. 7, 4 L.Ed.2d 568 (1960); *Hurn v. Oursler,* 289 **U.S**. 238, 243–245, 53 S.Ct. 586 (1933).

45 Cf. *H.L. v. Matheson,* 450 **U.S**. 398, 407, 101 S.Ct. 1164, 1170, 67 L.Ed.2d 388 (1981) (citing Justice Brandeis' opinion in *Ashwander*); *Hutchinson v. Proxmire,* 443 **U.S**. 111, 122, 99 S.Ct. 2675, 2681, 61 L.Ed.2d 411 (1979) (citing the Court's opinion in *Siler*).

46 In some of the cases following *Siler,* this Court has required that the decree include a provision expressly authorizing its reopening in the event that a state court later decided the question of state law differently. See *Lee v. Bickell,* 292 **U.S**. 415, 426, 54 S.Ct. 727, 732, 78 L.Ed. 1337 (1934); *Wald Transfer & Storage Co. v. Smyth,* 290 **U.S**. 602, 54 S.Ct. 227, 78 L.Ed. 528 (1933); *Glenn v. Field Packing Co.,* 290 **U.S**. 177, 178–179, 54 S.Ct. 138, 138, 78 L.Ed. 252 (1933).

47 "I agree with what the Court stated only days ago, that 'the doctrine of *stare decisis,* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.' *City*

of Akron v. Akron Center for Reproductive Health, Inc., —— **U.S**. ——, ——, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). While the doctrine of *stare decisis* does not absolutely bind the Court to its prior opinions, a decent regard for the orderly administration of justice requires that directly controlling cases either be followed or candidly overruled." *Solem v. Helm,* ——**U.S**. ——, ——, 103 S.Ct. 3001, 3020–3021, 77 L.Ed.2d 637 (1983) (BURGER, C.J., dissenting) (footnote omitted).

This statement was joined by four members of today's majority. The fifth was the author of the opinion of the Court in *City of Akron.*

48 This is an especially odd context in which to repudiate settled law in that if anything changes in our social fabric favor limitation rather than expansion of sovereign immunity. The concept that the sovereign can do no wrong and that citizens should be remediless in the face of its abuses is more a relic of medieval thought than anything else.

"Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago that, 'it is a wholesome sight to see "the Crown" sued and answering for its torts.' " *Great Northern Life Ins. Co. v. Read,* 322 **U.S**. 47, 59, 64 S.Ct. 873, 879, 88 L.Ed. 1121 (1944) (Frankfurter, J., dissenting) (citation omitted).

In the even older decision of *Poindexter v. Greenhow,* 114 **U.S**. 270, 5 S.Ct. 903, 29 L.Ed. 185 (1884), the Court, after observing that "the distinction between the government of a State and the State itself is important, and should be observed," *id.,* at 290, 5 S.Ct., at 914 wrote:

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say *'L'Etat c'est moi.'* Of what avail are written constitutions whose bills of right for the security of individual liberty are written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked...." *Id.,* at 291, 5 S.Ct., at 914–915. See also Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum.L.Rev. 1889 (1983).

49 The heart of today's holding is that this Court had no power to act as it did in 1981 when it ordered the Court of Appeals to consider and decide the state law issues in this very case.

50 In the following cases the Court held injunctive relief may issue against state officers on the basis of state law after *explicitly* rejecting their Eleventh Amendment defense: *Rolston v. Missouri Fund Commissioners,* 120 **U.S**. 390, 7 S.Ct. 599, 30 L.Ed. 721 (1887); *South Carolina v. Wesley,* 155 **U.S**. 542, 15 S.Ct. 230, 39 L.Ed. 254 (1895); *Tindal v. Wesley,* 167 **U.S**. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897); *Scully v. Bird,* 209 **U.S**. 481, 28 S.Ct. 597, 52 L.Ed. 899 (1908); *Hopkins v. Clemson College,* 221 **U.S**. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911); *Atchison &c. R. Co. v. O'Connor,* 223 **U.S**. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912); *Johnson v. Lankford,* 245 **U.S**. 541, 38 S.Ct. 203, 62 L.Ed. 460 (1918); *Martin v. Lankford,* 245 **U.S**. 547, 38 S.Ct. 205, 62 L.Ed. 464 (1918); *Greene v. Louisville & Interurban R. Co.,* 244 **U.S**. 499, 37 S.Ct. 673, 61 L.Ed. 1220 (1917); *Louisville & Nashville R. Co. v. Greene,* 244 **U.S**. 522, 37 S.Ct. 683, 61 L.Ed. 1291 (1917); *Illinois Central R. Co. v. Greene,* 244 **U.S**. 555, 37 S.Ct. 697, 61 L.Ed. 1309 (1917).

Since petitioners' position applies also to federal sovereign immunity (indeed the principal case on which they rely, *Larson,* is a federal sovereign immunity case), the following additional cases which refused to apply sovereign immunity to suits against federal officers acting within the scope of their authority because the plaintiff had alleged that the officers had engaged in unlawful conduct are rejected: *Little v. Barreme,* 2 Cranch 169, 2 L.Ed. 243 (1804); *Wise v. Withers,* 3 Cranch 331, 2 L.Ed. 457 (1806); *Mitchell v. Harmony,* 13 How. 115, 14 L.Ed. 75 (1851); *Bates v. Clark,* 95 **U.S**. 204, 24 L.Ed. 471 (1877); *Belknap v. Schild,* 161 **U.S**. 10, 16 S.Ct. 443, 40 L.Ed. 599 (1896); *Sloan Shipyards v. **U.S**. Fleet Corp.,* 258 **U.S**. 549, 42 S.Ct. 386, 66 L.Ed. 762 (1922); *Santa Fe Pac. R. Co. v. Fall,* 259 **U.S**. 197, 42 S.Ct. 466, 66 L.Ed. 896 (1922); *Philadelphia Co. v. Stimson,* 223 **U.S**. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912); *Land v. Dollar,* 330 **U.S**. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947). *Larson* itself cites most of these cases with approval, and disapproves of none of them. All are overruled today. In fact, today the Court repudiates the two-track analysis of *Larson,* since in *Larson* the Court stated that conduct which has been specifically prohibited by statute is not protected

by sovereign immunity even if it is performed within the scope of the official's duties, yet today the Court holds that even if an officer violates a statute, his conduct is protected by sovereign immunity. The Court also overrules the cases cited in n. 52, *infra.* If some of these cases have been rarely cited, see *ante,* at 916, n. 27, this is because until today the law was thought to be well-settled on this point.

51 From the fifteenth century English common law to *Larson* and beyond, courts have never held that prohibited conduct can be shielded by sovereign immunity. That rule makes good sense—since a principal cannot authorize unlawful conduct, such conduct is of necessity *ultra vires.* There is no reason to abandon such a well settled and sensible rule.

52 The majority also overrules *Siler v. Louisville & Nashville R. Co.,* 213 **U.S**. 175, 29 S.Ct. 451, 53 L.Ed. 753 (1909), and its progeny, including *Louisville & Nashville R. Co. v. Garrett,* 231 **U.S**. 298, 34 S.Ct. 48, 58 L.Ed. 229 (1913); *Davis v. Wallace,* 257 **U.S**. 478, 42 S.Ct. 164, 66 L.Ed. 325 (1922); *Chicago Great Western R. Co. v. Kendall,* 266 **U.S**. 94, 45 S.Ct. 55, 69 L.Ed. 183 (1924); *United Gas Co. v. Railroad Commission,* 278 **U.S**. 300, 49 S.Ct. 150, 73 L.Ed. 390 (1919); *Glenn v. Field Packing Co.,* 290 **U.S**. 177, 54 S.Ct. 138, 78 L.Ed. 252 (1933); *Lee v. Bickell,* 292 **U.S**. 415, 54 S.Ct. 727, 78 L.Ed. 1337 (1934); *Railroad Commission of California v. Pacific Gas & Electric Co.,* 302 **U.S**. 388, 58 S.Ct. 334, 82 L.Ed. 319 (1938).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Khadr v. U.S., D.C.Cir., June 20, 2008

113 S.Ct. 684
Supreme Court of the United States

PUERTO RICO AQUEDUCT AND **SEWER** AUTHORITY, Petitioner
v.
METCALF & EDDY, INC.

No. 91–1010.
|
Argued Nov. 9, 1992.
|
Decided Jan. 12, **1993**.

Synopsis

Engineering firm which had entered into contract with **Puerto Rico** agency to provide extensive services regarding subject matter of environmental consent decree brought action seeking declaration of rights with respect to agreement along with damages for alleged breach of contract. The United States District Court, District of **Puerto Rico**, Jaime Pieras, Jr., J., denied agency's motion to dismiss based on Eleventh Amendment immunity, and agency appealed. The Court of Appeals for the First Circuit, 945 F.2d 10, dismissed appeal. Certiorari was granted, 112 S.Ct. 1290. The Supreme Court, Justice White, held that states and state entities claiming to be "arms of the state" may take advantage of collateral order doctrine to appeal district court order denying claim of Eleventh Amendment immunity.

Reversed and remanded.

Justice Blackmun filed concurring opinion.

Justice Stevens filed dissenting opinion.

West Headnotes (8)

[1] Federal Courts
Immunity

States and state entities claiming to be "arms of the state" may take advantage of collateral order doctrine to appeal district court order denying claim of Eleventh Amendment immunity; such denials purport to be conclusive determinations that state and state entities have no right not to be sued in federal court, immunity claim involves fundamental constitutional protection, resolution of which will generally have no bearing on merits of underlying action, and value to state of Eleventh Amendment immunity is for most part lost as litigation proceeds past motion practice. U.S.C.A. Const.Amend. 11.

438 Cases that cite this headnote

[2] Federal Courts
Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts
Waiver by State; Consent

Federal Courts
Agencies, officers, and public employees

Absent waiver of Eleventh Amendment immunity, neither state nor agencies acting under its control may be subject to suit in federal court. U.S.C.A. Const.Amend. 11.

623 Cases that cite this headnote

[3] Federal Courts
Suits Against States; Eleventh Amendment and Sovereign Immunity

Eleventh Amendment does not merely provide states and state entities with defense to liability, but confers immunity from suit. U.S.C.A. Const.Amend. 11.

176 Cases that cite this headnote

[4] Federal Courts
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts
Agencies, officers, and public employees

Doctrine under which suits seeking prospective relief may be brought against state officials in federal court challenging constitutionality of official conduct and enforcing state law carves out narrow exception to Eleventh Amendment immunity; exception applies only to prospective

relief, does not permit judgments against state officers declaring that they violated federal law in past, and has no application in suits against states and their agencies, which are barred regardless of relief sought. U.S.C.A. Const.Amend. 11.

622 Cases that cite this headnote

[5] **Federal Courts**
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine
Federal Courts
Agencies, officers, and public employees

Rather than defining nature of Eleventh Amendment immunity, case law under which suits seeking prospective relief may be brought against state officials in federal court challenging constitutionality of official conduct enforcing state law renders Eleventh Amendment wholly inapplicable to certain class of suits deemed to be against officials and not states or their agencies, which retain their immunity against all suits in federal court. U.S.C.A. Const.Amend. 11.

915 Cases that cite this headnote

[6] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Eleventh Amendment is rooted in recognition that states, although a union, maintain certain attributes of sovereignty, including sovereign immunity, and it thus accords states respect owed them as members of federation. U.S.C.A. Const.Amend. 11.

110 Cases that cite this headnote

[7] **Federal Courts**
Immunity

While application of collateral order doctrine to allow states and state entities claiming to be "arms of the State" to appeal district court order denying claim of Eleventh Amendment immunity is justified in part by concern that states not be unduly burdened by litigation, its ultimate justification is importance of ensuring that states' dignitary interests can be fully vindicated. U.S.C.A. Const.Amend. 11.

266 Cases that cite this headnote

[8] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Eleventh Amendment is concerned not only with states' ability to withstand suit, but with their privilege not to be sued. U.S.C.A. Const.Amend. 11.

29 Cases that cite this headnote

****685** *Syllabus* [*]

Petitioner, an autonomous **Puerto Rico** government instrumentality, moved to dismiss the diversity action brought against it by respondent, a private firm, on the grounds that it was an "arm of the State," and that the Eleventh Amendment therefore prohibited the suit. After the District Court denied the motion, the Court of Appeals dismissed petitioner's appeal for want of jurisdiction, concluding that Circuit precedent barred both States and their agencies from taking an immediate appeal on a claim of Eleventh Amendment immunity.

Held: States and state entities that claim to be "arms of the State" may take advantage of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 **U.S**. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, to appeal a district court order denying a claim of Eleventh Amendment immunity from suit in federal court. Although 28 U.S.C. § 1291 requires that appeals be taken from "final decisions of the district courts," *Cohen, supra,* at 546, 69 S.Ct., at 1225, provides that a "small class" of judgments that are not complete and final will be immediately appealable. Once it is acknowledged that a State and its "arms" are, in effect, immune from federal-court suit under the Amendment, see, *e.g., Welch v. Texas Dept. of Highways and Public Transportation,* 483 **U.S**. 468, 480, 107 S.Ct. 2941, 2949, 97 L.Ed.2d 389, it follows that the elements of the collateral order doctrine necessary to bring an order within *Cohen's* "small class," see *Coopers & Lybrand v. Livesay,* 437 **U.S**. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, are satisfied. First, denials of Eleventh Amendment

immunity claims purport to be conclusive determinations that States and their entities have no right not to be sued in federal court. Second, a motion to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection whose resolution generally will have no bearing on the merits of the underlying action. Third, the value to the States of their constitutional immunity—like the benefits conferred by qualified immunity to individual officials, see *Mitchell v. Forsyth,* 472 **U.S**. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411—is for the most part lost as litigation proceeds past motion practice, such that the denial order will be effectively unreviewable on appeal from a final judgment. Respondent's claim that the Amendment does not confer immunity from suit, but merely a defense to liability, misunderstands the role of the Amendment in our system of federalism and is rejected. ***140** Moreover, there is little basis for respondent's alternative argument that a distinction should be drawn between cases in which the determination of an Eleventh Amendment claim is bound up with factual complexities whose resolution requires trial and cases in which it is not. In any event, the determination of petitioner's Eleventh Amendment status does not appear to implicate any extraordinary factual difficulty ****686** and can be fully explored on remand. Pp. 687–689.

945 F.2d 10, (CA1 1991) reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 689. STEVENS, J., filed a dissenting opinion, *post,* p. 690.

Attorneys and Law Firms

Richard G. Taranto, Washington, D.C., for petitioner.

Peter W. Sipkins, Minneapolis, Minn., for respondent.

Opinion

***141** Justice WHITE delivered the opinion of the Court.

The question before the Court is whether a district court order denying a claim by a State or a state entity to Eleventh Amendment immunity from suit in federal court may be appealed under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 **U.S**. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We conclude that it may.

I

Petitioner, the **Puerto Rico Aqueduct** and **Sewer** Authority (PRASA), is "an autonomous government instrumentality" which functions to "provide to the inhabitants of **Puerto Rico** an adequate drinking water, sanitary sewage service and any other service or facility proper or incidental thereto." P.R.Laws Ann., Tit. 22, §§ 142, 144 (1987). In 1985, PRASA entered into a consent decree with the federal Environmental Protection Agency under which it agreed to upgrade many of its wastewater treatment plants to ensure compliance with the federal Clean Water Act. PRASA subsequently contracted with respondent, a private engineering firm incorporated in Delaware, to assist it with this task. In 1990, PRASA withheld payments on the contract in light of alleged overcharging by respondent. Respondent brought a diversity action in the United States District Court for the District of **Puerto Rico**, alleging breach of contract and damage to its business reputation.

PRASA moved to dismiss on the grounds that it was an "arm of the State," and that the Eleventh Amendment therefore prohibited the suit.[1] The District Court found that ***142** petitioner did not qualify for immunity "because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds" and denied the motion. App. to Pet. for Cert. A–9. PRASA filed a timely notice of appeal to the Court of Appeals for the First Circuit and sought to stay proceedings while the appeal was pending. The court denied the stay and subsequently dismissed the appeal for want of jurisdiction, 945 F.2d 10, 14 (1991), concluding that First Circuit precedent barred both States and their agencies from taking an immediate appeal on a claim of Eleventh Amendment immunity. *Id.,* at 12 (discussing *Libby v. Marshall,* 833 F.2d 402 (CA1 1987)).

In light of the conflict between the decision below and those of the other Courts of Appeals that have considered the issue, we granted certiorari.[2] 503 **U.S**. 918, 112 S.Ct. 1290, 117 L.Ed.2d 514 (1992).

****687** II

[1] Title 28 U.S.C. § 1291 provides for appeal from "final decisions of the district courts." Appeal is thereby precluded "from any decision which is tentative, informal

or incomplete," as well as from any "fully consummated decisions, where they are but steps towards final judgment in which they will merge." *Cohen v. Beneficial Industrial Loan Corp.,* 337 **U.S**., at 546, 69 S.Ct., at 1225. Nevertheless, a judgment that is ***143** not the complete and final judgment in a case will be immediately appealable if it

> "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.*

Thus, in *Cohen* itself, the Court held that appeal could be taken from a district court order denying the defendant's motion to compel the plaintiffs in a shareholder derivative suit to post a bond. The Court found the order appealable because it "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment" and because, after final judgment, it would "be too late effectively to review the present order, and the rights conferred by the [bond] statute, if it is applicable, will have been lost." *Ibid.*

The Court has held that orders denying individual officials' claims of absolute and qualified immunity are among those that fall within the ambit of *Cohen.* See *Nixon v. Fitzgerald,* 457 **U.S**. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *Mitchell v. Forsyth,* 472 **U.S**. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). *Mitchell* bears particularly on the present case. There, the Attorney General of the United States appealed from a District Court order denying his motion to dismiss on grounds of qualified immunity.[3] The Court of Appeals held that the order was not appealable and remanded the case for trial. We reversed, holding that the order denying qualified immunity was a collateral order immediately appealable under *Cohen.* We found that, absent immediate appeal, the central benefits of qualified immunity—avoiding the costs and general consequences of subjecting public officials to the ***144** risks of discovery and trial—would be forfeited, much as the benefit of the bond requirement would have been forfeited in *Cohen.* "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra,* at 526, 105 S.Ct., at 2815 (emphasis in original).

[2] Petitioner maintains, and we agree, that the same rationale ought to apply to claims of Eleventh Amendment immunity made by States and state entities possessing a claim to share in that immunity. Under the terms of the Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State...." This withdrawal of jurisdiction effectively confers an immunity from suit. Thus, "this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan,* 415 **U.S**. 651, 662–663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974). Absent waiver, neither a State nor agencies ****688** acting under its control may "be subject to suit in federal court." *Welch v. Texas Dept. of Highways and Public Transportation,* 483 **U.S**. 468, 480, 107 S.Ct. 2941, 2949–2950, 97 L.Ed.2d 389 (1987) (plurality opinion); see also *Will v. Michigan Dept. of State Police,* 491 **U.S**. 58, 66, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989); *Cory v. White,* 457 **U.S**. 85, 90–91, 102 S.Ct. 2325, 2328–2329, 72 L.Ed.2d 694 (1982); *Alabama v. Pugh,* 438 **U.S**. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*); *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 **U.S**. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977).

Once it is established that a State and its "arms" are, in effect, immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied. "To come within the 'small class' of ... *Cohen,* the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v.* ***145** *Livesay,* 437 **U.S**. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (footnote omitted). Denials of States' and state entities' claims to Eleventh Amendment immunity purport to be conclusive determinations that they have no right not to be sued in federal court. Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, cf. *Lauro Lines s.r.l. v. Chasser,* 490 **U.S**. 495, 502–503, 109 S.Ct. 1976, 1980, 104 L.Ed.2d 548 (1989) (SCALIA, J., concurring), whose resolution generally will have no bearing on the merits of the underlying action. Finally, the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice.[4]

[3] Respondent, following the rationale of the First Circuit in this case and in *Libby v. Marshall,* 833 F.2d 402 (1987), maintains that the Eleventh Amendment does not confer

immunity from suit, but merely a defense to liability. Were this true, petitioner arguably would not be entitled to avail itself of the collateral order doctrine. See, *e.g., Van Cauwenberghe v. Biard,* 486 **U.S**. 517, 526–527, 108 S.Ct. 1945, 1951–1952, 100 L.Ed.2d 517 (1988). Support for this narrow view of the Eleventh Amendment is drawn mainly from *Ex parte Young,* 209 **U.S**. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), under which suits seeking prospective, but not compensatory or other retrospective relief, may be brought against state officials in federal court challenging the constitutionality of official conduct enforcing state law.

[4] **[5]** ***146** The doctrine of *Ex parte Young,* which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity. See, *e.g., Green v. Mansour,* 474 **U.S**. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985). Moreover, the exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, *id.,* at 73, 106 S.Ct., at 428, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought, *Cory v. White, supra.* Rather than defining the nature of Eleventh Amendment ****689** immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court.

[6] **[7]** **[8]** More generally, respondent's claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers,* 123 **U.S**. 443, 505, 8 S.Ct. 164, 183, 31 L.Ed. 216 (1887). The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. See *Hans v. Louisiana,* 134 **U.S**. 1, 13, 10 S.Ct. 504, **506**, 33 L.Ed. 842 (1890). It thus accords the States the respect owed them as members of the federation. While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated. [5]

***147** Respondent argues in the alternative that a distinction should be drawn between cases in which the determination of a State or state agency's claim to Eleventh Amendment immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not. See Tr. of Oral Arg. 30–32; cf. *Dube v. State University of New York,* 900 F.2d 587, 594 (CA2 1990), (immediate appeal will lie where immunity can be found as a matter of law), cert. denied, 501 **U.S**. 1211, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991). On this view, for example, an order denying a motion to dismiss a suit against a named State would be immediately appealable, whereas the same order, when issued in a suit which presents difficult factual questions as to whether an agency is an "arm of the State," would not. We see little basis for drawing such a line. See *Mitchell v. Forsyth,* 472 **U.S**., at 527–529, and n. 10, 105 S.Ct., at 2816–2817, and n. 10. In any event, it does not appear to **us** that the determination of PRASA's status under the Eleventh Amendment implicates any extraordinary factual difficulty and the issue of its entitlement to immunity can be fully explored in the Court of Appeals on remand.

III

We hold that States and state entities that claim to be "arms of the State" may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring.

I join the Court's opinion but write separately to make plain once again my position on one feature. I continue to ***148** believe that the Court's interpretation of the Eleventh Amendment as embodying a broad principle of state immunity from suit in federal court "simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments." *Atascadero State Hospital v. Scanlon,* 473 **U.S**. 234, 303, 105 S.Ct. 3142, 3178, 87 L.Ed.2d 171 (1985) (BLACKMUN, J., dissenting). Nevertheless, because I believe that the Eleventh Amendment does preserve a State's immunity ****690** from suit in the limited context of an action by a citizen of another State or of a foreign country on a state-law cause of action brought in federal court, *id.,* at 301, 105 S.Ct., at 3177 (Brennan,

J., dissenting), a claim of immunity under the Eleventh Amendment ought to be appealable immediately. Whether the assertion of an Eleventh Amendment claim is well founded —a matter not before us in this case, see *ante,* at 686, n. 1— is a question separate from the question whether the Eleventh Amendment interests are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). Because I believe that the Eleventh Amendment does guarantee immunity from suit in a narrow class of cases, I concur in the Court's opinion and judgment that, regardless of the merits, a district court's denial of a claim of immunity under the Eleventh Amendment should be appealable immediately. See *Sullivan v. Finkelstein,* 496 U.S. 617, 632, 110 S.Ct. 2658, 2667, 110 L.Ed.2d 563 (1990) (opinion concurring in judgment).

Justice STEVENS, dissenting.

This case arises out of a commercial dispute between respondent, a private engineering firm, and the Puerto Rico Aqueduct and Sewer Authority (PRASA or Authority). The parties entered into a multimillion dollar contract providing for the construction of extensive improvements to Puerto Rico's wastewater treatment facilities. Respondent brought suit in the Federal District Court for the District of ***149** Puerto Rico alleging breach of contract. The Authority filed a motion to dismiss, claiming that the action was barred by the Eleventh Amendment. The District Court concluded that the claim had no merit and denied the motion to dismiss. The Court of Appeals dismissed PRASA's appeal from that order because it was not final within the meaning of 28 U.S.C. § 1291.

If the Authority were a private litigant engaged in a commercial dispute, it would be perfectly clear that the dismissal of its appeal was required by our precedents. For the denial of a motion to dismiss on jurisdictional grounds— a motion that asserts that the defendant cannot be sued in a particular forum—is not a final order within the meaning of § 1291. *Van Cauwenberghe v. Biard,* 486 U.S. 517, 526–527, 108 S.Ct. 1945, 1951–1952, 100 L.Ed.2d 517 (1988); *Catlin v. United States,* 324 U.S. 229, 236, 65 S.Ct. 631, 635, 89 L.Ed. 911 (1945). In this case, PRASA makes the same assertion— namely, that it may not be sued in a federal forum, but rather must be sued in another court. Brief for Petitioner 4–5.

Nonetheless, despite our decisions in *Biard* and *Catlin,* the Court holds that when a State or state entity claiming to be an "arm of the State" asserts that it cannot be sued in a federal forum because of the Eleventh Amendment, the "final decision" rule must give way and the claim must be subject to immediate appellate review. The Court reasons that such a claim is analogous to a government official's claim of absolute or qualified immunity, which we have held is subject to interlocutory appeal. *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). I cannot agree.

The defense of absolute or qualified immunity is designed to shield government officials from liability for their official conduct. In the absence of such a defense, we have held, "officials would hesitate to exercise their discretion in a way injuriously affecting the claims of particular individuals even when the public interest required bold and unhesitating action." *Nixon v. Fitzgerald,* 457 U.S., at 744–745, 102 S.Ct., at 2698 (internal ***150** quotation marks and citation omitted). Because the specter of a long and contentious legal proceeding in and of itself would inhibit government officials from exercising ****691** their authority with the freedom and independence necessary to serve the public interest, we have held that claims of absolute or qualified immunity are subject to immediate appeal. *Id.,* at 742–743, 102 S.Ct., at 2697–2698; *Mitchell v. Forsyth,* 472 U.S., at 526–527, 105 S.Ct., at 2815–2816.

While the Eleventh Amendment defense available to States and state entities is often labeled an "immunity," that label is virtually all that it has in common with the defense of absolute or qualified immunity. In contrast to the latter, a defense based on the Eleventh Amendment, even when the Amendment is read at its broadest, does not contend that the State or state entity is shielded from liability for its conduct, but only that the federal courts are without jurisdiction over claims against the State or state entity. See *ante,* at 687. Nothing in the Eleventh Amendment bars respondent from seeking recovery in a different forum. Indeed, as noted above, petitioner acknowledges that it is not seeking immunity for its conduct, but merely that the suit be brought in the courts of the Commonwealth of Puerto Rico. Brief for Petitioner 4–5.

Plainly, then, the interests underlying our decisions allowing immediate appeal of claims of absolute or qualified immunity do not apply when the so-called "immunity" is one based on the Eleventh Amendment. *Whether* petitioner must bear

the burden, expense, and distraction of litigation stemming from its contractual dispute with respondent has nothing whatsoever to do with the Eleventh Amendment; the Eleventh Amendment only determines *where,* or more precisely, *where not,* that suit may be brought. * Because the Amendment goes to the jurisdiction of the federal court, as opposed to the underlying liability of the State or state entity, ***151** *Biard* and *Catlin,* not *Nixon* and *Mitchell,* are the relevant precedent for determining whether PRASA's claim is subject to interlocutory appeal.

If indeed the interests underlying our decisions permitting immediate appeal of claims of absolute or qualified immunity do not apply to a State or state entity's objection to federal jurisdiction on Eleventh Amendment grounds, what then is driving the Court to hold that PRASA's claim under the Eleventh Amendment is subject to immediate appeal? The Court tells **us**, *ante,* at 689: "[The] ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated." Whereas a private litigant must suffer through litigation in a federal tribunal despite his claim that the court lacks jurisdiction, *e.g., Biard* and *Catlin,* a State or state entity must be protected from the *"indignity"* of having to present its case—as to both the court's jurisdiction and the underlying merits—in the neutral forum of a federal district court.

I find that rationale to be embarrassingly insufficient. The mandate of § 1291 that appellate jurisdiction be limited to "final decisions of the district courts" is not predicated upon "mer[e] technical conceptions of 'finality,' " *Catlin,* 324 **U.S**., at 233, 65 S.Ct., at 633–634, but serves important interests concerning the fair and efficient administration of justice. The "final decision" rule preserves the independence of the trial judge and conserves the judicial resources that are necessarily expended by piecemeal appeals. Moreover, and of particular relevance to this case, it serves an important "fairness" purpose by preventing "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise...." *Firestone Tire & Rubber Co. v. Risjord,* 449 **U.S**. 368, 374, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981) (internal quotation marks and citation omitted). Sacrificing those interests in the ****692** name of preserving the freedom and independence that government officials need to carry out their official duties ***152** is one thing; doing so out of concern for the "dignitary" interest of a State or, in this case, a state **aqueduct** and **sewer** authority, is quite another.

For me, the balance of interests is easy. The cost to the courts and the parties of permitting piecemeal litigation of this sort clearly outweighs whatever benefit to their "dignity" States or state entities might derive by having their Eleventh Amendment claims subject to immediate appellate review. I would therefore hold, as did the court below, that the denial of a motion to dismiss on Eleventh Amendment grounds is not subject to immediate appellate review. Accordingly, I respectfully dissent.

All Citations

506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605, 61 USLW 4045

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 **U.S**. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 As the case comes to **us**, the law of the First Circuit—that the Commonwealth of **Puerto Rico** is treated as a State for purposes of the Eleventh Amendment, see *Ramirez v. **Puerto Rico** Fire Serv.,* 715 F.2d 694, 697 (1983)—is not challenged here, and we express no view on this matter. Because the Court of Appeals dismissed the appeal on jurisdictional grounds, it did "not consider the merits of PRASA's Eleventh Amendment defense and [took] no view as to whether PRASA is actually entitled to the claimed immunity." 945 F.2d 10, 14, n. 6 (CA1 1991). We likewise express no view on the merits of the immunity claim.

2 See *Dube v. State University of New York,* 900 F.2d 587, 594 (CA2 1990), cert. denied, 501 **U.S**. 1211, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991); *Coakley v. Welch,* 877 F.2d 304, 305 (CA4), cert. denied, 493 **U.S**. 976, 110 S.Ct. 501, 107 L.Ed.2d 503 (1989); *Chrissy F. v. Mississippi Dept. of Pub. Welfare,* 925 F.2d 844, 848–849 (CA5 1991); Kroll v. Board of Trustees of University of Illinois, 934 F.2d 904, 906 (CA7), cert. denied, 502 **U.S**. 941, 112 S.Ct. 377, 116 L.Ed.2d 329 (1991); *Barnes v. Missouri,* 960 F.2d 63, 64 (CA8 1992) *(per curiam); Durning v. Citibank, N.A.,* 950 F.2d 1419, 1422 (CA9 1991); *Schopler v. Bliss,* 903 F.2d 1373, 1377 (CA11 1990) *(per curiam).*

3 The District Court also denied absolute immunity. This order was held appealable by the Court of Appeals and was affirmed, as it was by **us**. *Mitchell v. Forsyth,* 472 **U.S**., at 520, 105 S.Ct., at 2813.

4 The result reached today was largely anticipated by *Ex parte New York,* 256 **U.S**. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). There, private citizens brought an *in rem* libel action in Federal District Court against ships chartered and operated by New York State. New York moved to dismiss on the ground that the action was in the nature of an *in personam* proceeding and was thus barred by the Eleventh Amendment. When the District Court denied the motion, the State applied to the Court for a writ of prohibition. Although noting that the State's interest could be pressed on appeal, *id.,* at 497, 41 S.Ct., at 589, the Court issued the extraordinary writ in order to vindicate fully the "fundamental" constitutional rule that a State may not be sued in federal court without its consent, *id.,* at 497, 503, 41 S.Ct., at 589, 591.

5 For this reason, the First Circuit's attempt to distinguish *Mitchell v. Forsyth,* 472 **U.S**. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), on the grounds that the States, as compared to individual officials, are better able to bear the burden of litigation, fails. See *Libby v. Marshall,* 833 F.2d 402, 406 (1987). The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.

* Not surprisingly, we have expressly characterized the Eleventh Amendment defense, albeit in a different context, as "partak[ing] ... of a jurisdictional bar." *Edelman v. Jordan,* 415 **U.S**. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974).

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251 F.3d 84
United States Court of Appeals,
Second Circuit.

Mary **McGINTY**, as Administratrix of the Estate of Maureen Nash, and James Nash on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,

v.

State of **NEW YORK**, **New York** State and Local Employees Retirement System, and **New York** State Department of Taxation and Finance, Defendants–Appellees.

Docket No. 00–7189.
|
Argued Oct. 20, 2000.
|
Decided May 22, **2001**.

Synopsis

Executrix of estate of deceased employee of **New York** State Department of Taxation and Finance, and named beneficiary of employee's death benefits, brought putative class action against State of **New York**, State and Local Employees Retirement System, and Department, alleging that System violated Age Discrimination in Employment Act (ADEA) by discriminating on basis of age in calculation of death benefits and in payment of disability benefits. The United States District Court for the Northern District of **New York**, Lawrence E. Kahn, J., 14 F.Supp.2d 241, dismissed action for lack of subject matter jurisdiction. Appeal was taken. The Court of Appeals, 193 **F.3d** 64, reversed and remanded. On remand, the District Court, **84** F.Supp.2d 314, Kahn, J., dismissed complaint sua sponte, holding that sovereign immunity barred the claims. Appeal was taken. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) United States Supreme Court decision in *Kimel v. Fla. Bd. of Regents,* holding that the ADEA does not validly abrogate states' Eleventh Amendment sovereign immunity, applied to preclude ADEA claim absent state's consent to be sued; (2) state did not waive its immunity defense; (3) Retirement System was an "arm of the state" entitled to Eleventh Amendment immunity; and (4) plaintiffs were not entitled to attorney fees.

Affirmed.

West Headnotes (28)

[1] Federal Courts
Jurisdiction

Federal Courts
"Clearly erroneous" standard of review in general

On appeal from a decision regarding subject matter jurisdiction, court of appeals reviews factual findings for clear error and legal conclusions de novo.

6 Cases that cite this headnote

[2] Federal Courts
Sua sponte determination

Whether a federal court has subject matter jurisdiction is a question that may be raised at any time by the court sua sponte.

40 Cases that cite this headnote

[3] Federal Civil Procedure
Notice

District court's dismissal of ADEA action against state of **New York**, on grounds that state had sovereign immunity under the Eleventh Amendment, without first giving plaintiffs notice that it was contemplating such action constituted error. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b).

29 Cases that cite this headnote

[4] Federal Civil Procedure
Notice

A district court should not dismiss an action pending before it without first providing the adversely affected party with notice and an opportunity to be heard.

4 Cases that cite this headnote

[5] **Federal Civil Procedure**
Notice

Rule that district court should not dismiss action without first providing adversely affected party with notice and opportunity to be heard serves several important purposes: it gives adversely affected party a chance to develop the record to show why dismissal is improper, it facilitates de novo review of legal conclusions by ensuring the presence of a fully-developed record before an appellate court, and it helps the trial court avoid the risk that it may have overlooked valid answers to what it perceives as defects in plaintiff's case.

5 Cases that cite this headnote

[6] **Federal Courts**
Dismissal or nonsuit in general

A sua sponte dismissal absent notice and an opportunity to be heard can be grounds for reversal.

4 Cases that cite this headnote

[7] **Federal Courts**
Immunity

Court of Appeals would review district court's dismissal of ADEA action against state of **New York**, on grounds that state had sovereign immunity under the Eleventh Amendment, despite district court's failure to give plaintiffs notice that it was contemplating dismissal; plaintiffs and defendants fully briefed all the issues raised on appeal, and such issues were predominantly of a legal nature. U.S.C.A. Const.Amend. 11.

19 Cases that cite this headnote

[8] **Courts**
Supreme Court decisions

Courts
In general; retroactive or prospective operation

Federal Courts
Intervening judicial decision

When the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review.

3 Cases that cite this headnote

[9] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Eleventh Amendment bars suits against a state that seek either money damages or injunctive relief. U.S.C.A. Const.Amend. 11.

32 Cases that cite this headnote

[10] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Sovereign immunity under the Eleventh Amendment extends beyond the literal text of the Amendment to bar a citizen from suing his own state under federal question jurisdiction. U.S.C.A. Const.Amend. 11.

19 Cases that cite this headnote

[11] **Federal Courts**
Abrogation by Congress

Federal Courts
Waiver by State; Consent

There are two exceptions to the rule that the Eleventh Amendment bars a citizen from suing his own state under federal question jurisdiction: when Congress authorizes such a suit through enforcement of §5 of the Fourteenth Amendment, and where a state consents to being sued. U.S.C.A. Const.Amends. 11, 14 § 5.

23 Cases that cite this headnote

[12] **Federal Courts**
Abrogation by Congress

To determine whether Congress properly abrogated states' Eleventh Amendment immunity in a federal statute, two questions are asked: first, did Congress unequivocally express its intent to abrogate immunity; and second, did Congress act pursuant to a valid grant of constitutional authority. U.S.C.A. Const.Amend. 11.

10 Cases that cite this headnote

[13] Constitutional Law

Age

Because age is not a suspect classification under the Equal Protection clause, states may discriminate on the basis of age if the age classification is rationally related to a legitimate state interest. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[14] Federal Courts

Civil rights and discrimination in general

United States Supreme Court decision in *Kimel v. Fla. Bd. of Regents,* holding that the ADEA does not validly abrogate states' Eleventh Amendment sovereign immunity, applied to preclude class action suit against state and its retirement system for alleged violations of the ADEA, absent state's consent. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b).

14 Cases that cite this headnote

[15] Federal Courts

Waiver by State; Consent

A waiver of Eleventh Amendment immunity is voluntary, made either by invoking federal jurisdiction or by a clear declaration. U.S.C.A. Const.Amend. 11.

7 Cases that cite this headnote

[16] Federal Courts

Objections, proceedings, and determination

Federal Courts

Litigation conduct

Failure of state to raise Eleventh Amendment immunity defense in proceedings before the Equal Employment Opportunity Commission (EEOC) did not constitute "waiver of immunity" in subsequent action under the ADEA; state could assert Eleventh Amendment immunity at any stage of the proceedings. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b).

32 Cases that cite this headnote

[17] Federal Courts

Participation in federal programs

State's acceptance of federal funds did not constitute waiver of its Eleventh Amendment immunity in class action under the ADEA; plaintiffs failed to identify under what statutes state received federal funding, or what Congress provided for in those statutes with respect to sovereign immunity. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b).

10 Cases that cite this headnote

[18] Federal Courts

Participation in federal programs

Although Congress may, pursuant to its spending power, extract a constructive waiver of Eleventh Amendment immunity by placing conditions on the grant of funds to states, waiver based on participation in a federal program will be found only if stated in express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. U.S.C.A. Const.Amend. 11.

8 Cases that cite this headnote

[19] Federal Courts

Participation in federal programs

Mere participation by a state in a federal program providing financial assistance does not establish the state's consent to be sued in federal

court, waiving immunity under the Eleventh Amendment. U.S.C.A. Const.Amend. 11.

6 Cases that cite this headnote

[20] Federal Courts
Arms of the state in general

The Eleventh Amendment extends immunity not only to a state, but also to entities considered "arms of the state." U.S.C.A. Const.Amend. 11.

44 Cases that cite this headnote

[21] Federal Courts
Arms of the state in general

In determining whether an entity is an arm of a state, subject to Eleventh Amendment immunity, six factors are initially considered: (1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state. U.S.C.A. Const.Amend. 11.

31 Cases that cite this headnote

[22] Federal Courts
Arms of the state in general

When applying six factor analysis to determine whether an entity is an arm of the state, as would subject it to Eleventh Amendment immunity, inquiry is complete if factors point in one direction; if not, a court must ask whether a suit against the entity in federal court would threaten the integrity of the state and expose its treasury to risk, and if the answer is still in doubt, a concern for the state fisc will control. U.S.C.A. Const.Amend. 11.

21 Cases that cite this headnote

[23] Federal Courts
Other particular entities and individuals

New York State and Local Employees Retirement System was an "arm of the state," and therefore, Eleventh Amendment immunity applied to preclude class action suit against System under the ADEA; system's officers were designated by state statute, death benefits were payable out of fund to which only the state contributed, and state was responsible for replenishing monies used from pension accumulation fund to pay judgment increasing amount of benefits owed. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b); N.Y.McKinney's Retirement and Social Security Law §§ 11, subd. a, 13, subd. b, 14, 15, 18, 24, subd. a, 60, subd. b.

24 Cases that cite this headnote

[24] Federal Civil Procedure
Result; prevailing parties; "American rule"

In order to recover attorney fees under the catalyst theory, the plaintiff need not necessarily obtain a judgment or settlement in his favor, so long as the defendant, under pressure of the lawsuit, alters his conduct or threatened conduct towards the plaintiff that was the basis for the suit.

2 Cases that cite this headnote

[25] Federal Civil Procedure
Result; prevailing parties; "American rule"

In order to recover attorney fees under the catalyst theory, a causal connection must exist between the lawsuit and a change in the defendant's conduct.

Cases that cite this headnote

[26] Federal Courts
Necessity of Objection; Power and Duty of Court

When a federal court lacks jurisdiction, the case must be stricken from the docket.

20 Cases that cite this headnote

[27] Federal Courts

Grounds or Exclusions of Jurisdiction in General

Where federal court lacks subject matter jurisdiction, it also lacks jurisdiction to award attorney fees.

21 Cases that cite this headnote

[28] Civil Rights

Results of litigation; prevailing parties

Plaintiffs whose ADEA class action against a state and its retirement system was dismissed on Eleventh Amendment immunity grounds were not entitled to attorney fees under catalyst theory, though plaintiffs initially prevailed and Eleventh Amendment bar did not exist at the outset of case; a United States Supreme Court decision, rather than any action taken by the defendants, was responsible for the dismissal. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C.A. § 626(b).

6 Cases that cite this headnote

Attorneys and Law Firms

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Laura Etlinger, Albany, NY (Eliot Spitzer, Attorney General of the State of New York, Nancy A. Spiegel, Daniel Smirlock, Albany, NY, of counsel), for Defendants–Appellees.

Before: CARDAMONE, SOTOMAYOR, and KATZMANN, Circuit Judges.

Opinion

CARDAMONE, Circuit Judge:

The evolution of this appeal illustrates the potential consequences when a decree of the Supreme Court is applied retroactively to a different case open at the time it is issued. Just prior to the decree, plaintiffs were well on their way to recovering damages for age discrimination in pension benefits concededly committed by the State of New York. When the Supreme Court ruled, in another case, that states had sovereign immunity from suit under the statute upon which plaintiffs had been relying, plaintiffs' prospects for victory vanished like spent light.

Plaintiff Mary McGinty is the executrix [1] of the estate of Maureen Nash, who was employed by the New York State Department of Taxation and Finance (Department) and a member of the New York State and Local Employees' Retirement System (Retirement System). Her death benefit beneficiary was plaintiff James Nash. Plaintiffs McGinty and Nash, acting on behalf of themselves and all others similarly situated, filed suit against defendants, the Retirement System, the State of New York (State) and the Department under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634, as amended by the Older Workers Benefit Protection Act of 1990, Pub.L. No. 101–433, 104 Stat. 978. In particular, plaintiffs challenge what they claim were wrongful reductions in certain death and disability benefits based upon the age of the Retirement System member.

Plaintiffs appeal to this Court for a second time, seeking reversal of a judgment entered in favor of defendants by the United States District Court for the Northern District of New York (Kahn, J.). *See McGinty v. New York,* 84 F.Supp.2d 314 (N.D.N.Y.2000). On plaintiffs' first appeal from an adverse judgment, we reversed in part and remanded for further proceedings. *See McGinty v. New York,* 193 F.3d 64, 72 (2d Cir.1999). The key issue on the appeal now before us is whether the federal courts have subject matter jurisdiction over the State of New York defendants in light of the Supreme Court's recent decision in *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 67, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), holding that the ADEA does not validly abrogate states' Eleventh Amendment sovereign immunity. Relying on *Kimel,* the district court dismissed plaintiffs' complaint *sua sponte. See McGinty,* 84 F.Supp.2d at 314–15.

***89** BACKGROUND

The facts are set forth in detail in our prior opinion, with which familiarity is presumed. *See McGinty,* 193 F.3d at 67–68. We set out only those facts relevant to the present appeal.

Payment of Death Benefits

Defendants admit that for some three-and-a-half years, from October 16, 1992 to June 20, 1996, the New York State death benefit system violated the ADEA. *McGinty,* 193 F.3d at 67. Death benefits were reduced when an employee joined the Retirement System after turning age 52, and were further reduced 10 percent for each year the employee worked after turning age 60, subject to a floor of 10 percent of the benefit in force at age 60. N.Y. Retire. & Soc. Sec. Law § 508(a)(2) (McKinney 1999); *accord McGinty,* 193 F.3d at 67 n. 4. Maureen Nash became a member of the Retirement System at age 53 and died at age 62 while still employed; her death benefit was thereby reduced under state law, in what defendants concede was a violation of the ADEA.

Plaintiffs filed complaints of age discrimination with the Equal Employment Opportunity Commission (EEOC) in early 1996. *McGinty,* 193 F.3d at 68. At the same time, the state comptroller's office—which was unable to persuade the legislature to amend the law—decided to correct the ADEA violations by voluntarily making supplemental death benefit payments. *Id.* at 67. It began making such payments in late 1996. *Id.* at 67–68. In October 1996 a benefits examiner contacted James Nash as Maureen Nash's beneficiary regarding the differential payment. *Id.* at 68. Plaintiffs commenced the instant class action in federal district court on October 17, 1996.

Prior Proceedings

When plaintiffs brought their first appeal, the district court had dismissed their action on defendants' motion under Fed.R.Civ.P. 12(b)(1). We reversed the determination that plaintiffs' death benefit claims were moot in light of the Retirement System's corrective supplemental payments, and ruled instead that the ADEA violations were "willful" and that plaintiffs were therefore entitled to liquidated damages under the ADEA. *Id.* at 69–71. We remanded for a determination of damages and for a resolution of plaintiffs' charge that the new administrative method for calculating death benefits still violated the ADEA. *Id.* at 71. We also vacated the dismissal of plaintiffs' disability benefit claims and remanded for the district court to reconsider plaintiffs' standing to bring these claims. *Id.* at 72. Finally, we rejected defendants' assertion of sovereign immunity. *Id.* at 71–72 (quoting *Cooper v. N.Y. State Office of Mental Health,* 162 F.3d 770, 776 (2d Cir.1998), *vacated sub nom. Bd. of Trustees of Univ. of Conn. v. Davis,* 528 U.S. 1110, 120 S.Ct. 928, 145 L.Ed.2d 806 (2000)).

Meanwhile, after plaintiffs had filed their appeal on July 31, 1998, but before we issued our decision on October 1, 1999, the Supreme Court granted certiorari in *Kimel. Kimel v. Fla. Bd. of Regents,* 139 F.3d 1426 (11th Cir.1998), *cert. granted,* 525 U.S. 1121, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999). Following our decision on the first appeal, defendants requested the district court to stay the matter pending the Supreme Court's determination in *Kimel.* That request was granted on October 7, 1999.

Kimel was decided on January 11, 2000. On January 19, 2000 the district court *sua sponte* dismissed plaintiffs' claims for lack of subject matter jurisdiction. In a brief order it cited *Kimel*'s holding that Congress ***90** did not validly abrogate states' sovereign immunity when it passed the ADEA. *McGinty,* 84 F.Supp.2d at 314. The trial court gave the parties no advance notice that dismissal was contemplated and afforded them no opportunity to brief the question of subject matter jurisdiction. From that order, plaintiffs appeal.

DISCUSSION

[1] On appeal from a decision regarding subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo. Viacom Int'l, Inc. v. Kearney,* 212 F.3d 721, 725–26 (2d Cir.), *cert. denied,* 531 U.S. 1051, 121 S.Ct. 655, 148 L.Ed.2d 558 (2000).

I Propriety of District Court's *Sua Sponte* Dismissal

[2] Whether a federal court has subject matter jurisdiction is a question that "may be raised at any time ... by the court *sua sponte*." *Lyndonville Sav. Bank & Trust Co. v. Lussier,* 211 F.3d 697, 700 (2d Cir.2000). Thus, the district court properly considered whether in light of *Kimel* defendants had sovereign immunity that deprived it of subject matter jurisdiction. Having found this immunity could be and was raised, the district court had reason to dismiss plaintiffs' complaint. *See id.* at 700–01 ("If subject matter jurisdiction is lacking, the action must be dismissed.").

[3] **[4]** **[5]** Yet, the district court inappropriately dismissed the case without informing plaintiffs it was contemplating such action. A district court should not dismiss an action pending before it without first providing the adversely affected party with notice and an opportunity

to be heard. *Acosta v. Artuz,* 221 F.3d 117, 124 (2d Cir.2000). Notice serves several important purposes. It gives the adversely affected party a chance to develop the record to show why dismissal is improper; it facilitates *de novo* review of legal conclusions by ensuring the presence of a fully-developed record before an appellate court, *see B.F. Goodrich v. Betkoski,* 99 F.3d 505, 522 (2d Cir.1996); and, it helps the trial court avoid the risk that it may have overlooked valid answers to what it perceives as defects in plaintiff's case, *Snider v. Melindez,* 199 F.3d 108, 113 (2d Cir.1999). For example, while the district court ruled the ADEA did not abrogate defendants' right to assert sovereign immunity, it failed to address whether immunity might have been waived or whether the Retirement System was entitled to assert immunity as an arm of the state. Either a "yes" answer to the first question, or a "no" answer to the second, would have required a different result.

[6] **[7]** Recognizing that a *sua sponte* dismissal absent notice and an opportunity to be heard can itself be grounds for reversal, *Lewis v. New York,* 547 F.2d 4, 5–6 & n. 4 (2d Cir.1976), we nevertheless undertake to address the issues raised on this appeal ourselves. Unlike *Lewis,* where defendants refused to defend the merits of the district court's *sua sponte* dismissal because they had never been served, plaintiffs and defendants here have fully briefed all the questions raised on this appeal. Since those issues are predominantly of a legal nature, we believe we are adequately informed to decide them. *Cf. Stone v. Williams,* 970 F.2d 1043, 1061 (2d Cir.1992) (question not passed on by district court was addressed because the facts were undisputed and the legal question fully briefed).

II Applicability of *Kimel*

[8] Prior to the Supreme Court's decision in *Kimel,* plaintiffs had prevailed in this action. Regarding the sequence of ***91** events relative to a Supreme Court pronouncement, when that "Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review." *Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

[9] 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. That Amendment bars suits that seek either money damages, *see Edelman v. Jordan,* 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (recognizing that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"), or injunctive relief, *see Cory v. White,* 457 U.S. 85, 90–91, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982) (holding that "the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction").

[10] **[11]** Although sovereign immunity extends beyond the literal text of the Eleventh Amendment to bar a citizen from suing his own state under federal question jurisdiction, *see Hans v. Louisiana,* 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890), there are two recognized exceptions to the bar: when Congress authorizes such a suit through enforcement of § 5 of the Fourteenth Amendment, and where a state consents to being sued. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). *Kimel* examines the first exception with respect to the ADEA.

[12] To determine whether Congress properly abrogated states' Eleventh Amendment immunity, two questions are asked. *See Kimel,* 528 U.S. at 73, 120 S.Ct. 631. First, did Congress unequivocally express its intent to abrogate immunity? And second, did Congress act pursuant to a valid grant of constitutional authority? *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 55, 59, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). The Supreme Court answered the first question "yes," saying that the plain language of the ADEA "clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." *Kimel,* 528 U.S. at 74, 120 S.Ct. 631. But the answer to the second question was "no."

[13] The Supreme Court had previously ruled that the ADEA's embrace of state governments within its ambit was

constitutional as an exercise of Congress' Commerce Clause powers under Article I of the Constitution. *See EEOC v. Wyoming,* 460 U.S. 226, 243, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). *Kimel,* however, reaffirmed the holding of *Seminole Tribe* that Article I "[did] not include the power to subject States to suit at the hands of private individuals." 528 U.S. at 80, 120 S.Ct. 631. The Court therefore turned its attention to § 5 of the Fourteenth Amendment where it applied a "congruence and proportionality" test to decide whether a federal statute is appropriate remedial legislation or improper legislation that purports to redefine the Fourteenth Amendment right at issue. *Id.* at 81–82, 120 S.Ct. 631. Because age is not a suspect classification under the Equal Protection clause, states may discriminate on the basis of age if the age classification is rationally related to a legitimate state interest. *Id.* at 83, 120 S.Ct. 631.

***92** Surveying cases in which states were found not to have violated the Equal Protection clause by relying on broad generalizations regarding age, the Supreme Court observed that "it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " *Id.* at 86, 120 S.Ct. 631 (quoting *City of Boerne v. Flores,* 521 U.S. 507, 532, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). Nothing in the legislative history of the ADEA, the Court continued, indicated Congress had identified a pattern of age discrimination by the states, or that any discrimination rose to the level of a constitutional violation. *Id.* at 89–91, 120 S.Ct. 631. Hence, it concluded

> In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Id. at 91, 120 S.Ct. 631.

Plaintiffs attempt to distinguish *Kimel* by seizing upon the opinion's language reviewing the rational relationship test under the Equal Protection clause and the ADEA's legislative history. Plaintiffs highlight defendants' willful violations of the ADEA. Yet, while no one disputes the willful nature of defendants' actions, the Supreme Court made clear that ADEA violations do not necessarily translate into violations of the Equal Protection clause. *See Kimel,* 528 U.S. at 86, 120 S.Ct. 631 ("The [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.").

Pressing their argument, plaintiffs maintain that defendants' calculation of death benefits is a form of age discrimination with no rational relationship to a legitimate state interest. Even assuming defendants' conduct rose to the level of a constitutional violation, such would not show a pattern of unconstitutional age discrimination by the states across the nation sufficient to justify the broad prohibitions in the ADEA. Moreover, nothing in *Kimel* suggests sovereign immunity is limited under the ADEA should a state engage in age discrimination in violation of the Equal Protection clause. Rather, the Supreme Court unequivocally stated that "the ADEA does not validly abrogate the States' sovereign immunity." *Id.* at 92, 120 S.Ct. 631.

[14] Consequently, while an aggrieved party can pursue avenues other than the ADEA when faced with age discrimination, *see id.* at 91–92 & n. *, 120 S.Ct. 631, it clearly cannot mount an ADEA claim against a state without its consent in federal court, *see id.* at 73, 120 S.Ct. 631 ("[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States."). Since plaintiffs in this case assert federal question jurisdiction premised solely on the ADEA, they may continue their suit only if defendants waived immunity. We turn next to that issue.

III Waiver of Sovereign Immunity

[15] Plaintiffs contend defendants waived immunity by declining to raise it as a defense and instead participating in the EEOC proceeding initiated when plaintiffs filed their complaint with the agency. The standards for finding waiver were recently reiterated. Since a waiver of immunity is ***93** voluntary, made either by invoking federal jurisdiction or by a clear declaration, a "stringent" test is used to determine whether waiver has occurred. *College Sav. Bank,* 527 U.S. at 675–76, 119 S.Ct. 2219.

Before addressing the merits of plaintiffs' contention, we pause to consider defendants' argument that it was not possible for them to have raised an immunity defense before the EEOC since states are deemed to have consented to suits brought by the federal government. *See Alden,* 527 U.S. at 755, 119 S.Ct. 2240. The ADEA does give the EEOC authority to enforce employees' rights under the statute. *See* 29 U.S.C. § 626(c)(1) (1994) ("[T]he right of any person to bring such action [under the ADEA] shall terminate upon the commencement of an action by the [EEOC]...."). This enforcement, however, occurs when the EEOC brings suit in federal court. *See, e.g., EEOC v. Kidder, Peabody & Co.,* 156 F.3d 298, 300 (2d Cir.1998) (indicating the EEOC filed a complaint in federal court pursuant to the ADEA). That procedure is distinct from an individual filing a complaint with the agency.

In addition, the Supreme Court in *Alden* explained that the concerns associated with a state being able to assert sovereign immunity in a suit brought by private persons do not exist when a suit "is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.' " 527 U.S. at 755, 119 S.Ct. 2240 (quoting U.S. Const. art. II, § 3). Nothing before us suggests that plaintiffs' complaint with the EEOC was commenced or prosecuted in the name of the federal government.

[16] Returning to plaintiffs' argument, they make no representation that defendants expressly consented to being sued in district court. *See College Sav. Bank,* 527 U.S. at 676, 119 S.Ct. 2219. Instead, plaintiffs assert defendants' failure to raise the immunity defense before the EEOC was tantamount to affirmatively invoking federal jurisdiction. But the cases upon which plaintiffs rely to demonstrate this proposition are factually distinguishable.

For example, in *Clark v. Barnard,* 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883), a state waived sovereign immunity when it voluntarily appeared in court prosecuting its claim to a fund that was the subject of the controversy. Because it intervened as an actor as well as a defendant, the court had to adjudicate the adverse rights of the parties, including the state, to the fund. *Id.* at 448, 2 S.Ct. 878. The same cannot be said of defendants in the pending appeal. They were all named as respondents in plaintiffs' EEOC proceeding and as defendants in the instant action. No intervention occurred, no claims were asserted by the state defendants, and no resolution of issues other than those presented by plaintiffs' complaints had to be resolved.

Plaintiffs also rely on *Gardner v. New Jersey,* 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947). In that case a state filed a claim against a debtor's estate, which was subject to the rulings of the bankruptcy court. Where a state is an actor, seeking something as a claimant, it waives any immunity it might otherwise have respecting adjudication of the claim. *Id.* at 573–74, 67 S.Ct. 467. Here, none of the state defendants filed claims before the EEOC or the district court. The facts underlying *Gardner* therefore are inapposite.

Finally, plaintiffs point to one of our decisions to show defendants' participation in the EEOC proceeding amounts to a waiver of immunity. In that case, the state of New York imposed a gains tax ***94** upon a debtor about to sell its interest in a hotel as part of a reorganization plan. *995 Fifth Ave. Assocs., L.P. v. N.Y. State Dep't of Taxation & Fin.* (*In re 995 Fifth Ave. Assocs., L.P.*), 963 F.2d 503, 506 (2d Cir.1992). The debtor sought a declaration in bankruptcy court that it was exempt from the tax and entitled to a refund from the state. The state filed an administrative expense claim for additional gains tax liability. The lower courts considered that act of filing to be a waiver of sovereign immunity. The bankruptcy code then in effect provided that "[a] governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose." 11 U.S.C. § 106(a) (1988), *later amended and recodified at* 11 U.S.C. § 106(b) (1994). We read the statute on appeal as a clear expression of Congress' purpose to require a waiver of immunity. 963 F.2d at 508–09. Since the basis for the state's administrative expense claim and the debtor's claim for a refund both arose out of the sale of the debtor's interest in the hotel, we reasoned that the state had waived its Eleventh Amendment immunity. *Id.* at 509.

What distinguishes the present case from *995 Fifth Avenue Associates* is that here no affirmative claim was made by the State of New York, the Department or the Retirement System. Thus, their involvement in the EEOC proceeding constitutes no waiver of sovereign immunity. Nor can plaintiffs prevail on their implicit argument that the fact of defendants' participation in the EEOC proceeding warrants a finding of waiver, even without the filing of independent claims. Not only do plaintiffs fail to cite any case—other than the three just distinguished in the foregoing paragraphs—but

also we were unable to find any case resolving this issue in plaintiffs' favor. Rather, we recently affirmed a decision where the district court found no waiver of immunity when, prior to the lawsuit, the state consented to the EEOC taking over responsibility from the New York State Division of Human Rights for investigating the plaintiff's discrimination complaints. *See Jungels v. State Univ. Coll. of N.Y.,* 922 F.Supp. 779, 784 (W.D.N.Y.1996), *aff'd,* 112 F.3d 504 (2d Cir.1997) (table).

Moreover, the Supreme Court and this Court have repeatedly held that a state may assert Eleventh Amendment sovereign immunity at any time during the course of proceedings. *See, e.g., Calderon v. Ashmus,* 523 U.S. 740, 745 n. 2, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998) (the Eleventh Amendment is jurisdictional in that it limits a federal court's judicial power, and may be invoked at any stage of the proceedings); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 n. 8, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (same); *Richardson v. N.Y. State Dep't of Corr. Serv.,* 180 F.3d 426, 449 (2d Cir.1999) (the defense of Eleventh Amendment immunity need not be raised in trial court to be considered on the merits); *Leonhard v. United States,* 633 F.2d 599, 618 n. 27 (2d Cir.1980) (sovereign immunity need not be expressly raised in the district court or on appeal since it is a jurisdictional defect and may be raised at any time). Consequently, while defendants appeared before the EEOC, and even though they never asserted sovereign immunity as a defense, they are entitled to raise it in response to plaintiffs' ADEA complaint.

This conclusion holds true regardless whether the EEOC proceeding is separate from or part of this federal lawsuit. If the EEOC investigation is distinct from the instant ADEA litigation, defendants' participation in the investigation would have no bearing on their right to raise sovereign ***95** immunity as a defense to a federal court action. If the two are not distinct, defendants' ability to raise the defense at any time means that waiting did not constitute a waiver of their right to raise the defense later in their answer.

[17] **[18]** **[19]** It is urged, finally, that defendants waived immunity through their acceptance of federal funds. Because this argument was raised for the first time in plaintiffs' reply brief, we generally would not consider it. *Thomas v. Roach,* 165 F.3d 137, 146 (2d Cir.1999). But were we to reach the merits, this contention would also fail. Although Congress may, pursuant to its spending power, extract a constructive waiver of Eleventh Amendment immunity by placing conditions on the grant of funds to states, *see College Sav. Bank,* 527 U.S. at 686, 119 S.Ct. 2219 (citing *South Dakota v. Dole,* 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987)), waiver based on participation in a federal program will be found only if stated in " 'express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction,' " *Fla. Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n,* 450 U.S. 147, 150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (per curiam) (alteration in original) (quoting *Edelman,* 415 U.S. at 673, 94 S.Ct. 1347). That is to say, mere participation by a state in a federal program providing financial assistance does not establish the state's consent to be sued in federal court. *Edelman,* 415 U.S. at 673, 94 S.Ct. 1347. Because plaintiffs failed to identify under what statutes defendants receive federal funding, or what Congress provided for in those statutes with respect to sovereign immunity, we have no way of ascertaining what Congress intended or whether the abrogation of immunity was expressed in "unmistakably clear language." *Welch v. Tex. Dep't of Highways & Pub. Transp.,* 483 U.S. 468, 478, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987).

In sum, plaintiffs have not demonstrated that the "stringent" test for finding waiver of immunity has been met. Nor have we seen any of the required evidence that defendants made a "clear declaration" that they intended to submit to federal court jurisdiction. Hence, plaintiffs' waiver argument may not succeed.

IV Whether the Retirement System Is an "Arm of the State"

[20] We pass now to the question of whether defendant Retirement System is an arm of the state entitled to assert sovereign immunity as a defense to this suit against it. The Eleventh Amendment extends immunity not only to a state, but also to entities considered "arms of the state." *Posr v. Court Officer Shield # 207,* 180 F.3d 409, 414 (2d Cir.1999); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (asking whether the defendant board of education was an arm of the state, in which case sovereign immunity would be extended to it). Plaintiffs argue that the Retirement System falls outside this category.

[21] **[22]** In determining whether an entity is an arm of a state, six factors are initially considered. *See Mancuso v. N.Y. State Thruway Auth.,* 86 F.3d 289, 293 (2d Cir.1996). Those factors, identified in *Feeney v. Port Authority Trans–*

Hudson Corp., 873 F.2d 628, 630–31 (2d Cir.1989), *aff'd on other grounds,* 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990), are derived from *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 401–02, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). They are: (1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is ***96** funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state. *Mancuso,* 86 F.3d at 293. If these factors point in one direction, the inquiry is complete. If not, a court must ask whether a suit against the entity in federal court would threaten the integrity of the state and expose its treasury to risk. *Id.* If the answer is still in doubt, a concern for the state fisc will control. *Hess v. Port Auth. Trans–Hudson Corp.,* 513 U.S. 30, 48–49, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (quoting *Feeney,* 873 F.2d at 631, with approval).

We examine the six factors.

A. *How the Retirement System Is Referred to in State Statutes*

[23] The Retirement System was formed under New York statute, now codified at Article 2 of N.Y. Retire. & Soc. Sec. Law §§ 2–119 (McKinney 1999 & Supp.2001), and has the "powers and privileges of a corporation," *id.* § 10. In *Mancuso,* we noted that the phrase "public corporation" is of little help in determining whether an entity is an arm of the state, and looked to New York case law for clarification. *See* 86 F.3d at 294.

The New York Court of Appeals has stated that "the Retirement System is the kind of state instrumentality that is clothed with the sovereign immunity of the state." *Glassman v. Glassman,* 309 N.Y. 436, 440, 131 N.E.2d 721 (1956). Notwithstanding that the State Retirement System is a corporation, endowed with the powers and privileges that inhere to that kind of entity, *Glassman* said this fact had no effect on the agency's immunity. *See id.* at 441, 131 N.E.2d 721. Plaintiffs say this conclusion was *dicta* since the Retirement System was only an incidental party to the real controversy between a husband and wife over the wife's entitlement as creditor to reach funds deposited by the husband in the System. *Id.* at 442, 131 N.E.2d 721. Even granting that, still, New York's highest court tells us how New York courts view the Retirement System, and because plaintiffs point to no contrary authority, this factor favors granting immunity to the System.

B. *How Governing Members of the Retirement System Are Appointed*

Retirement System officers are designated by statute. The state comptroller serves as administrative head, N.Y. Retire. & Soc. Sec. Law § 11(a), as well as trustee, *id.* § 13(b). The state attorney general serves as legal advisor, *id.* § 14, and the System is subject to supervision by the state superintendent of insurance, *id.* § 15. The superintendent of insurance is in turn appointed by the governor with the advice and consent of the senate. N.Y. Ins. Law § 201 (McKinney 2000). The custody of the Retirement System's funds is vested in the head of the division of the treasury of the Department of Taxation and Finance. N.Y. Retire. & Soc. Sec. Law § 13(d). Given that the state legislature and the governor ratified the statutes by which these officers were designated, this factor too leans in favor of immunity. *See Glassman,* 309 N.Y. at 441, 131 N.E.2d 721 ("The close relationship between the Retirement System and the state government is apparent throughout the Civil Service Law provisions [from which the Retirement and Social Security Law was derived] which create and govern the affairs of the System.").

It makes no difference that the comptroller and the attorney general are elected officials because, regardless of that fact, the state has named them to positions of ***97** authority in the Retirement System. *Cf. Mancuso,* 86 F.3d at 295 (holding that the appointment of Thruway Authority members by the governor with the advice and consent of the state senate leans toward immunity); *Feeney,* 873 F.2d at 631 (noting that the state appointment of commissioners to the Port Authority Trans Hudson Corporation favors immunity).

C. *How the Retirement System Is Funded*

The Retirement System consists of four funds titled annuity savings, annuity reserve, pension accumulation, and pension reserve. N.Y. Retire. & Soc. Sec. Law § 20. Monies are provided by several sources. The state as an employer makes an annual appropriation, *id.* § 16(a), as do other participating employers, *id.* § 17. Employee members of the Retirement System also make contributions via payroll deductions. *Id.* § 21(b) & (d). An exception exists however, for state employees

who became members prior to July 1, 1973, in which case no further contributions are required. *Id.* § 75–a(a). Their contributions are covered by the state in its annual appropriation. *Id.* § 75–a(b).

Ascertaining the particular funds where these contributions are deposited and from which benefits are paid is equally important. Payroll deductions from a Retirement System member, once remitted to the comptroller, are deposited in the annuity savings fund. *Id.* § 21(f). Upon retirement, contributions to that fund are transferred to the annuity reserve fund, from which all annuities and all benefits in lieu of annuities are paid. *Id.* § 22(a) & (b). An "annuity" is defined as "[t]he annual allowance for life, payable in monthly installments and derived from a member's accumulated contributions." *Id.* § 2(3).

The state and other employers make contributions to the pension accumulation fund. *Id.* §§ 16(a), 23(a)(1). Expenses incurred by the Retirement System are covered by monies contributed to this fund, in addition to monies appropriated in the state executive budget. *Id.* §§ 16(b), 23(b)(3). When a pension becomes payable, monies are transferred from the pension accumulation fund to the pension reserve fund. *Id.* § 24(b). Ordinary death benefits, however—such as those received by plaintiff James Nash—are payable wholly out of the pension accumulation fund. *Id.* §§ 24(a), 60(b).

Even with the payroll deductions of member employees, the state makes significant payments each year to the Retirement System for the payment of benefits and expenses. In particular, death benefits are payable out of a fund to which only the state and other participating employers presently contribute. These facts distinguish *Mancuso* where we ruled the state was not required to fund the Thruway Authority's operations since such funding was limited by law to a guarantee on the initial bond offering and to isolated instances of allocated funds for specific projects advocated by the state. *See* 86 F.3d at 295. Hence, the third factor also weighs in favor of immunity.

D. *Whether the Function of the Retirement System Is Traditionally One of State or Local Government*

Glassman described the Retirement System as taking part in an important governmental function by "providing retirement pensions, annuities and other employment benefits for its personnel, comparable to those received by the employees of private industry." 309 N.Y. at 440–41, 131 N.E.2d 721. In so doing, it "assists and promotes the efficient operation of the affairs of the state itself." *Id.* at 441, 131 N.E.2d 721.

***98** The fact that the Retirement System also facilitates pension benefits for municipal employees does not mean it is not serving state employees, since it was originally created as a plan for state employees. Only later was it extended to cover county, city, town and village employees. *McDermott v. Regan,* 82 N.Y.2d 354, 358, 604 N.Y.S.2d 890, 624 N.E.2d 985 (1993). Moreover, by way of analogy, we said in *Mancuso* that since the State Thruway covered the entire state, the Thruway Authority performed a function that a state would normally provide, even though the construction and operation of roads and bridges could be seen as either a state or local function. 86 F.3d at 295. Although the Retirement System does not service state employees exclusively, it assists in the business of the state by enabling the state to meet its pension and benefits obligations, and immunity should accordingly be extended to the Retirement System.

E. *Whether the State Has Veto Power Over the Actions of the Retirement System*

The comptroller as the administrative head and trustee of the funds of the Retirement System is thereby authorized to "adopt and amend ... only such rules and regulations as he determines to be for the best interests of the retirement system." N.Y. Retire. & Soc. Sec. Law § 11(g).

There are certain legal restraints on the Retirement System. For example, funds are to be invested only in accordance with state law. *Id.* § 13(b). Without specifying exactly how funds may be invested, the statutory scheme includes percentage limits, and identifies permissible and impermissible investments. *See generally id.* § 13 (entitled "Management of funds"); *id.* §§ 176–179 a (entitled "Investments of Public Pension Funds"). Further, the System is subject to the supervision of the superintendent of insurance, *id.* § 15, who may require the comptroller to file an annual report and to respond to inquiries related to transactions or to the condition of the Retirement System, N.Y. Ins. Law § 314(b)(1). The superintendent may promulgate "standards" with respect to a number of financial practices including "investment policies and financial soundness." *Id.* § 314(b)(2). He is required to conduct an examination into the affairs of the Retirement System at least once every five years and to incorporate his

findings in a report made available for public inspection and filed with the governor, the comptroller and the legislature. *Id.* § 314(b)(3). While these provisions do not constitute a veto power, they subject the comptroller to strong oversight protections limiting his discretion.

At the same time, New York's Court of Appeals has held that the state legislature does not have unfettered power over the Retirement System. *Sgaglione v. Levitt,* 37 N.Y.2d 507, 375 N.Y.S.2d 79, 337 N.E.2d 592 (1975), struck down § 14 of the New York State Financial Emergency Act for the City of New York, which was enacted in 1975. *Sgaglione* ruled that this section of the law violated the state constitution because implicit in the constitution is protection for the source of funds for retirement benefits. *Id.* at 511–12, 375 N.Y.S.2d 79, 337 N.E.2d 592. Thus, although the legislature reserved to itself some flexibility in shaping the Retirement System, "it is not unlimited." *Id.* at 512, 375 N.Y.S.2d 79, 337 N.E.2d 592.

These concepts were reaffirmed in *McDermott v. Regan,* where the court stated that "[w]here the State maintains [some independent] authority in regard to the [comptroller], ... concomitant with that authority is the State's duty to act in a manner consistent with the goal of the 'protection' of [the Retirement System] funds as required by article V, § 7 of New York's Constitution." ***99** 82 N.Y.2d at 362, 604 N.Y.S.2d 890, 624 N.E.2d 985. Thus, any changes the legislature proposes for the Retirement System must be enacted for the purpose of protecting the interests of its beneficiaries.

As a consequence, while it does not appear from the above discussion that absolute veto power exists over decisions made by the comptroller in his capacity as administrator and trustee of the Retirement System, nonetheless the acts of the legislature, the oversight of the superintendent of insurance, and the contractual relationship created by New York's constitution restrain the comptroller from the exercise of unfettered discretion.

We think this case, contrary to plaintiffs' contentions, is unlike *Mancuso.* In that case we held the decisions of the Thruway Authority were essentially unreviewable. *See* 86 F.3d at 295. Moreover, our statement in *Mancuso* that "monies deposited with the Comptroller are not under the state's control," *id.,* is inapplicable to the pending appeal. In *Mancuso* we were refuting an argument that the Thruway Authority was subject to state control because it deposited all receipts with the comptroller and could issue bonds only with the comptroller's permission. *See id.* The "monies" referred to were monies belonging to the Thruway Authority-not all monies deposited with the comptroller. We also noted that the comptroller lacked discretion to refuse payment on the Thruway Authority's debts and had no duty to supervise the Authority. *See id.* at 295–96. The same clearly cannot be said with respect to the Retirement System. The fifth factor therefore tips toward immunity.

F. *Whether the Obligations of the Retirement System Are Binding Upon the State*

The relevant question with respect to this sixth factor is "whether a judgment against the [Retirement System] would have the practical effect of requiring payments from New York." *Mancuso,* 86 F.3d at 296. In *Mancuso,* this factor worked against a finding of immunity because the Thruway Authority was self-sustaining and produced no evidence that it could not satisfy a judgment. *Id.* In contrast, the Retirement System is not self-sustaining as it requires contributions from employees, the state and other participating employers.

Further, employers utilizing the Retirement System—including the state—are obligated for interest charges that are payable, the creation and maintenance of reserves in the pension accumulation fund, the maintenance of annuity reserves and pension reserves, the payment of all pensions, annuities and benefits, plus the expenses of the System. N.Y. Retire. & Soc. Sec. Law § 18 (entitled "Guaranty"). Since the state constitution mandates that the benefits of the Retirement System not be diminished or impaired, the state will become responsible for replenishing monies used from the pension accumulation fund and the other reserve funds to pay a judgment increasing the amount of death and/or disability benefits owed. *Cf. Cabell v. New York,* No. 84 Civ. 1062, 1985 WL 2313, at *3 (S.D.N.Y. Aug.14, 1985) (finding judgment against Retirement System to compensate for discriminatory monthly retirement benefits amounts to judgment against the state, since state must cover annuity payments to non-contributory members and Retirement System must remain actuarially sound).

In finding the Retirement System was cloaked with sovereign immunity, the New York Court of Appeals applied similar reasoning. It said that as an employer the state is obligated to maintain the various ***100** reserves and funds of the System, and is also obligated for the expenses and payment of employee benefits. *See Glassman,* 309 N.Y. at 441, 131

N.E.2d 721 (relying on the statutory predecessor to § 18 of the Retirement and Social Security Law).

This final factor provides the greatest weight in favor of immunity. *See Feeney,* 873 F.2d at 631 ("[W]hether liability will place the state treasury at risk, although not exclusively determinative, is the single most important factor."). As stated at the outset of our discussion, the Supreme Court has recognized that "the vulnerability of the State's purse [is] the most salient factor" when deciding whether sovereign immunity applies. *Hess,* 513 U.S. at 48, 115 S.Ct. 394. Indeed, we once remanded a case precisely for clarification as to what extent the state would be required to satisfy a judgment entered against the defendant, the City University of **New York**. *See Pikulin v. City Univ. of N.Y.,* 176 **F**.**3d** 598, 600–01 (**2d** **Cir**.1999) (per curiam).

Satisfied that we have properly resolved this factor, and being persuaded that all of the factors identified in *Feeney* and *Mancuso* point in the same direction, we conclude the Retirement System is cloaked with Eleventh Amendment immunity from plaintiffs' claims.

V Plaintiffs' Request for Attorney's Fees

With each defendant successfully asserting sovereign immunity, the federal courts lack jurisdiction over this case. *See 995 Fifth Ave. Assocs.,* 963 F.2d at 506. Plaintiffs urge they should nevertheless be awarded attorney's fees as "prevailing parties" under the catalyst theory of recovery.

[24] **[25]** We have recognized that "a plaintiff who has obtained at least some part of what he sought in bringing the suit may be considered a prevailing party and may therefore seek an award of attorney's fees." *Marbley v. Bane,* 57 **F**.**3d** 224, 234 (**2d** **Cir**.1995) (considering award under 42 U.S.C. § 1988); *accord Bonner v. Guccione,* 178 **F**.**3d** 581, 593–94 (**2d** **Cir**.1999) (42 U.S.C. § 2000e–5(k)); *McManus v. Gitano Group, Inc.,* 59 **F**.**3d** 382, 384 (**2d** **Cir**.1995) (29 U.S.C. § 1132(g)(1)); *Gerena–Valentin v. Koch,* 739 F.2d 755, 758–59 (**2d** **Cir**.1984) (42 U.S.C. § 1973*l*(e)). The plaintiff need not necessarily obtain a judgment or settlement in his favor, so long as "the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit." *Hewitt v. Helms,* 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). A causal connection must exist between the lawsuit and the change in the defendant's conduct. *Koster v. Perales,* 903 F.2d 131, 135 (**2d** **Cir**.1990).

[26] **[27]** But when a federal court lacks jurisdiction, the case must be stricken from the docket. *The Mayor v. Cooper,* 73 U.S. (6 Wall.) 247, 250, 18 L.Ed. 851 (1868). It therefore follows that where we lack subject matter jurisdiction, we also lack jurisdiction to award attorney's fees. *W.G. v. Senatore,* 18 **F**.**3d** 60, 64 (**2d** **Cir**.1994); *see also Farrar v. Hobby,* 506 U.S. 103, 109, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (" '[W]here a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant.' ") (quoting *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)).

The ADEA is enforced in accordance with the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b). Under the FLSA, a court may award costs and attorney's fees "in addition to any judgment awarded to the plaintiff or plaintiffs." 29 U.S.C. § 216(b) (1994). Because in this ***101** case no judgment may be awarded plaintiffs, no application for attorney's fees may be considered. *See W.G.,* 18 **F**.**3d** at 65 n. 2 ("Jurisdiction over the fee application in this case is nonexistent, because there is no jurisdiction over the substantive ... claims.").

An exception may lie where Eleventh Amendment immunity does not exist at the outset of the lawsuit, but arises as a direct result of actions taken by a defendant to provide some or all of the relief sought by the plaintiff. In *Marbley,* one of the claims at issue was whether the **New** **York** State Department of Social Services violated equal protection rights when it adopted a policy of reducing home heating assistance to tenants in federally-subsidized housing. *See* 57 **F**.**3d** at 228, 232. After the plaintiffs filed a motion for summary judgment, the department rescinded its policy, thereby precluding any prospective relief. *Id.* at 228, 235. As a result, the plaintiffs could seek only a retrospective declaration that the department had violated federal law. *Id.* at 232. But such relief was barred by the Eleventh Amendment.

In *Marbley* the district court denied attorney's fees for lack of jurisdiction. On appeal, we observed that while sovereign immunity did not exist when the suit began, the department's change in policy gave rise to the Eleventh Amendment defense that left plaintiffs without a claim. *Id.* at 235. We remanded for consideration of whether plaintiff's litigation triggered the policy change.

[28] Although here the Eleventh Amendment bar did not exist at the outset—in fact plaintiffs were originally

successful—the reason it is now a complete defense has no connection to any action taken by the defendants, including the decision to correct the ADEA violations with supplemental death benefits payments. Rather, it is solely the Supreme Court's decision in *Kimel* that mandates the Eleventh Amendment dismissal of plaintiffs' suit.

Since plaintiffs' lawsuit was not a catalyst for corrective action that resulted in the loss of subject matter jurisdiction, no attorney's fees may be awarded. In light of this conclusion, we need not reach defendants' contention that attorneys' fees cannot be awarded under the ADEA based upon the language in the FLSA permitting such an award only in connection with a judgment entered for plaintiffs. *See* 29 U.S.C. § 216(b).

CONCLUSION

Despite defendants' admitted violations of the ADEA, we are constrained to agree with the district court that it lacked subject matter jurisdiction over plaintiffs' claims because the Eleventh Amendment cloaks all defendants with sovereign immunity.

Accordingly, the judgment appealed from is affirmed. No costs to either party.

All Citations

251 F.3d 84, 85 Fair Empl.Prac.Cas. (BNA) 1493, 26 Employee Benefits Cas. 1257

Footnotes

1 Plaintiffs note that the title of “administratrix” in the caption is in error, but they were denied an opportunity to amend their complaint.

316 F.3d 93
United States Court of Appeals,
Second Circuit.

Samuel **DAVIS**, Plaintiff–Appellant,
v.
State of **NEW YORK**; George Pataki, Governor; **New York** State Department of Correctional Services; Glenn Goord, Commissioner; Attica Correctional Facility; Walter R. Kelly, Superintendent; Officer Stachewicz, Corr. Sergeant; Ron Christen, [1] Correction Officer; Marty McDonald, Correction Officer; Mary Barone, Correction Officer, Defendants–Appellees.

Docket No. 01–0118.
|
Submitted Feb. 13, **2002**.
|
Decided Dec. 13, **2002**.

Synopsis

Pro se state prisoner sued state, governor, state department of correctional services and its commissioner, prison and its superintendent, and correctional officers under § 1983, alleging that he was exposed to unreasonably high levels of second-hand smoke, in violation of Eighth Amendment. The United States District Court for the Western District of **New York**, H. Kenneth Schroeder, Jr., United States Magistrate Judge, and Carol E. Heckman, United States Magistrate Judge, 1999 WL 1390247,granted summary judgment for defendants, and denied prisoner's motion to amend complaint and for preliminary injunction, respectively. Prisoner appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) prisoner's claim for permanent injunctive relief was not moot; (2) fact questions precluded summary judgment on issue of whether prisoner was exposed to unreasonable levels of secondhand smoke; (3) governor was not liable; and (4) state, department, prison, and prison officials in their official capacities were immune under Eleventh Amendment.

Affirmed in part, vacated and remanded in part.

West Headnotes (8)

[1] Constitutional Law
Mootness

Prisoner's claim for injunctive relief in action under § 1983, alleging that he was exposed to unreasonably high levels of secondhand smoke in violation of Eighth Amendment, was not moot despite transfer of prisoner to different housing block, and prison's implementation of restrictive smoking policy, since prisoner was housed in block without individual cell windows, in conditions similar to those he experienced prior to transfer, and prisoner asserted that prison's new smoking policy was not being enforced. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

17 Cases that cite this headnote

[2] Federal Courts
Case or Controversy Requirement

Federal courts lack jurisdiction to decide questions that cannot affect rights of litigants in case before them. U.S.C.A. Const. Art. 3, § 2.

10 Cases that cite this headnote

[3] Federal Courts
Available and effective relief

Federal Courts
Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

Case is moot when it can be said with assurance that there is no reasonable expectation that alleged violation will recur, and interim relief or events have completely and irrevocably eradicated effects of alleged violation.

10 Cases that cite this headnote

[4] Sentencing and Punishment
Hazardous and unhealthful conditions

Prisoner states cause of action under Eighth Amendment by alleging that prison officials

have, with deliberate indifference, exposed him to levels of secondhand smoke that pose unreasonable risk of serious damage to his future health. U.S.C.A. Const.Amend. 8.

25 Cases that cite this headnote

[5] Federal Civil Procedure

Civil rights cases in general

Genuine issue of material fact as to whether state prisoner was exposed to unreasonable levels of secondhand smoke precluded summary judgment for prison officials in prisoner's action under § 1983 alleging violation of Eighth Amendment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

219 Cases that cite this headnote

[6] Civil Rights

Criminal law enforcement; prisons

Prisoner failed to allege governor's personal involvement in prison's smoking policies, as required to hold governor liable under § 1983 for prisoner's alleged exposure to unreasonable levels of secondhand smoke in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

17 Cases that cite this headnote

[7] Federal Courts

Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts

Law Enforcement

Federal Courts

Prisons and jails

State, state department of corrections, state prison, and prison officials in their official capacities were immune under Eleventh Amendment in prisoner's action under § 1983 alleging exposure to unreasonable levels of secondhand smoke in violation of Eighth Amendment. U.S.C.A. Const.Amends. 8, 11; 42 U.S.C.A. § 1983.

185 Cases that cite this headnote

[8] Federal Courts

Preliminary injunction; temporary restraining order

Court of Appeals reviews district court's denial of preliminary injunction for abuse of discretion.

23 Cases that cite this headnote

Attorneys and Law Firms

***94** Samuel **Davis**, pro se, Attica, NY.

Eliot Spitzer, Attorney General, State of **New York**, Victor Paladino, Nancy A. Spiegel, Assistant Solicitor Generals, on the ***95** brief, Albany, NY, for Defendants–Appellees.

Before SACK, B.D. PARKER, JOHN R. GIBSON, [*] Circuit Judges.

Opinion

JOHN R. GIBSON, Circuit Judge.

Samuel **Davis** appeals from a judgment of the United States District Court for the Western District of **New York** (H. Kenneth Schroeder, Jr., *Magistrate Judge*), granting summary judgment for appellees and dismissing his 42 U.S.C. § 1983 complaint, and from interlocutory orders (Carol E. Heckman, *Magistrate Judge*) denying **Davis's** preliminary injunction motion and motion to file a supplemental complaint. **Davis** filed a complaint against **New York** State, Governor Pataki, the **New York** State Department of Correctional Services ("the Department"), Glenn S. Goord, its commissioner, the Attica Correctional Facility ("Attica"), Walter R. Kelly, its superintendent, [2] Corrections Sergeant Stachewicz, and Corrections Officers McDonald, Christen, and Barone, and their successors, in their individual and official capacities, alleging that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by exposing him to high levels of second-hand smoke. He also alleged that defendants retaliated against him for engaging in constitutionally protected activity. The district court denied his motions for preliminary injunctive relief and to file an amended complaint, and granted summary judgment

for defendants. For the reasons set forth below, we affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

Davis has been incarcerated at Attica since 1993. Liberally construing his *pro se* complaint, **Davis** had been concerned, throughout his incarceration, about his exposure to excessive levels of second-hand smoke while housed in various housing "blocks." He ultimately filed an inmate grievance in February 1999, complaining that he needed to minimize his exposure to the smoke-laden air by opening the window across from his cell, but Stachewicz, McDonald and Barone told him not to open the window, and threatened to move him out of the honor block, where he was housed at the time, if he opened the window. These concerns were also expressed in a letter to Goord, which was carbon copied to Kelly.

The grievance was dismissed in March 1999, because **Davis** had been moved out of the honor block by that time. **Davis** attempted to appeal. In April 1999, **Davis** was informed that the grievance was not appealable, because it had been dismissed rather than denied. He was further informed that he could request a review of the dismissal, but that the only review available was by the same supervisor who conducted the original investigation into the complaint, and this supervisor had no intention of reopening the complaint.

Davis filed a complaint in the United States District Court for the Western District of **New York** in April 1999, alleging that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by forcing him to be exposed to excessive levels of second-hand smoke on a daily basis, because he was housed in an area where a majority of the inmates smoked frequently, the ventilation ***96** was inadequate, and he was prevented from opening the window. **Davis** claimed that these conditions jeopardized his current and future health. He claimed to suffer from dizziness, blackouts, congestion, difficulty breathing, watery eyes, and other respiratory problems, as a result of his exposure to smoke. **Davis** also alleged that Pataki, Goord and Kelly acted with deliberate indifference to his rights as a non-smoker because they failed to implement policies to protect non-smokers' health, failed to train and supervise officers regarding the rights of non-smoking inmates, and failed to remedy the problem after it was brought to their attention. He further alleged that Stachewicz, Christen, McDonald and Barone retaliated against him, through harassment and threats, for complaining about violations of the Eighth and Fourteenth Amendments. **Davis** alleged that McDonald harassed and intimidated him, threatened to inflict physical harm, physically assaulted and verbally abused him, and that Goord and Kelly had been deliberately indifferent to this misconduct. **Davis** sought declaratory and injunctive relief, as well as monetary damages.

In July 1999, **Davis** moved for a preliminary injunction and temporary restraining order enjoining named and unnamed defendants from "assaulting, harassing, intimidating, threatening and verbally abusing" him in retaliation for exercising his constitutional rights. **Davis** alleged that he would suffer irreparable harm without the injunction, because the civilian employees who administered his prison work program and other Corrections officers had begun to retaliate against him because of his complaints about excessive second-hand smoke exposure. **Davis** alleged that a Corrections Sergeant filed a false misconduct report regarding an altercation with a fellow inmate, and that he was found guilty of the charges after a biased and procedurally defective hearing, resulting in thirty days of "keeplock" and loss of his assigned work program. **Davis** also filed a motion for leave to file a supplemental complaint, raising essentially the same allegations as in the motion for preliminary injunctive relief, and seeking to add Attica supervisory staff and the parties involved in the misconduct report and hearing as defendants.

The parties consented to have a magistrate judge handle all proceedings, pursuant to 28 U.S.C. § 636(c). The magistrate judge denied **Davis's** motion for a preliminary injunction and temporary restraining order, finding that **Davis** failed to show that he would suffer irreparable harm because he had no liberty interest in his work assignment or in the privileges lost while in keeplock, and that **Davis** would not likely succeed on the merits because he could not show that defendants had a retaliatory motive. *See* ***Davis*** *v. State of* ***New York***, No. 99–CV–307, 1999 WL 1390253 (W.D.N.Y. Sept.29, 1999). The magistrate judge also denied **Davis's** motion to amend his complaint, holding that **Davis's** new allegations failed to state a claim upon which relief could be granted. *See* ***Davis*** *v. State of* ***New York***, No. 99–CV–307, 1999 WL 1390247 (W.D.N.Y. Dec.14, 1999).

In September 1999, **Davis** wrote to Superintendent Herbert, with a carbon copy to Goord, complaining about his medical problems due to second-hand smoke exposure, and requesting placement in a cell with an individual window. According to **Davis's** letter, the only housing blocks at Attica that have

individual windows in each cell are blocks C and E. Davis explained that on February 28, 1999, he was transferred from the honor block to the C block due to his respiratory problems. Thereafter, he was moved to the B block from June 18 until July 13, and was finally *97 transferred to the A block on July 21, where he remained on the waiting list to be assigned to work programs that would require him to be housed in blocks C or E.

In July 2000, Davis moved for summary judgment. He argued that he had demonstrated that his Eighth Amendment rights were violated when defendants knowingly caused him and other non-smoking inmates to be exposed involuntarily to excessive levels of second-hand smoke without adequate ventilation, jeopardizing his current and future health. Davis further contended that he had demonstrated that he was harassed, intimidated, and threatened for exercising his constitutional rights, and that such retaliation was in violation of the Eighth Amendment.

Defendants filed a cross-motion for summary judgment, arguing that Davis's Eighth Amendment rights were not violated because he did not meet the two-pronged test for establishing an Eighth Amendment claim based on second-hand smoke exposure. Defendants noted that, pursuant to *Helling v. McKinney,* 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), where the harm is allegedly due to second-hand smoke, the plaintiff must meet the objective prong by showing serious harm resulting from exposure to unreasonably high levels of smoke. In addition, defendants noted that, pursuant to *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), the plaintiff must satisfy the subjective prong of the test by showing that prison officials acted with deliberate indifference to inmate health or safety.

Defendants contended that Davis did not submit evidence to establish serious injuries due to second-hand smoke, or that he was exposed to a sufficiently high level of smoke to result in serious injury. In support of their argument that Davis had no serious injuries, defendants submitted the affidavit of Dr. Takos, the health services director of Attica. According to Takos, Davis only complained of smoke-related symptoms once, in February 1999. Takos asserted that Davis's congestion was due to a deviated septum, which Davis had refused to get corrected. In Takos's opinion, there was no medical evidence that Davis exhibited intolerance to smoke, or had a condition that warranted housing in a smoke-free environment. Davis had also complained to health services about experiencing blackouts, but the Takos affidavit states that the ambulatory health records had a notation July 9, 1998 that Davis complained that said episodes occurred while laughing. A request for consultation of that date recites that there were two such episodes in the past two weeks "following 'laughing episodes.' " These particular entries contain no mention of exposure to second-hand smoke.

Defendants also asserted that the exposure to second-hand smoke was not substantial. They claimed that Davis's complaint focused only on the time period during which Davis, housed in a single cell honor block, was not allowed to have the window open. Although there were no non-smoking units at Attica, defendants claimed that Davis should have asked to transfer within the honor block if the smoke in his area was bothering him, and that the transfer would have been granted.

Defendants also argued they did not act with deliberate indifference to the effects of tobacco smoke or Davis's health. They cited Attica's smoking policy, which prohibits smoking in common areas but permits smoking in residential areas, as evidence of their good faith. They also noted that a new smoking policy was being phased in, and effective in June 2001, it was "contemplated" that smoking would not be permitted inside any of the Department's *98 buildings. In addition, defendants claimed that prison officials did not act with deliberate indifference by requiring Davis to keep his window closed, because other inmates complained they were cold, and ordering Davis to shut the window protected Davis from the wrath of other inmates.

In the remainder of their summary judgment brief, defendants argued that: (1) Pataki, Goord, and Kelly were not personally involved in the alleged constitutional violations, so they could not be liable in the § 1983 action; (2) Davis could not establish the retaliation claim; (3) Davis's physical assault, harassment, and intimidation claims should be dismissed because the alleged conduct did not rise to the level of a constitutional violation; (4) the court lacked subject matter jurisdiction over the claims against agencies of the State of New York and individual defendants in their official capacities, by virtue of the Eleventh Amendment; and (5) the defendants have qualified immunity from liability because the right to be free from second-hand smoke is not clearly established, and the defendants' actions were reasonable because (a) the Department had a smoking policy that complied with the New York Clean Air Act, and also accounted for the unique nature of the prison environment, in which it is not reasonable

to prohibit smoking entirely or have separate, non-smoking housing units, and (b) there is no case law supporting an Eighth Amendment violation based on second-hand smoke exposure where an inmate is housed in a single cell.

In opposition to defendants' summary judgment motion, **Davis** argued that defendants did not dispute that he had been exposed, in his open cell with only bars as barriers, to the second-hand smoke of chain smokers in surrounding cells, without adequate ventilation. **Davis** asserted that the evidence, viewed in the light most favorable to him, afforded a rational basis for a factfinder to conclude that his confinement exposed him to unreasonably high levels of second-hand smoke.

Davis also disputed statements in the Corrections officers' affidavits regarding the ventilation and degree of smoke in the housing unit, whether the windows were allowed to be kept open on cold days, whether other inmates had complained of being cold, and whether he had always been housed in a single cell. He asserted that from January 1996 to March 1997, he was housed in a double-bunk cell with a cellmate who smoked. **Davis** also disputed the validity of Dr. Takos's findings, asserting that he complained of conditions caused by second-hand smoke several times, but not all of the inmates' complaints become part of their medical record, and Dr. Takos is not a specialist in such conditions. **Davis** attacked the viability of the new smoking policy, asserting that it is not effective or enforceable, because officers and inmates continue to smoke inside.

The magistrate judge granted defendants' summary judgment motion as to Governor Pataki based on his lack of personal involvement, then denied **Davis's** summary judgment motion, and granted summary judgment for defendants. The magistrate judge concluded that, although the Supreme Court held in *Helling* that an inmate could state an Eighth Amendment claim for cruel and unusual punishment by showing unreasonable exposure to second-hand smoke, **Davis** failed to provide evidence that was sufficient to prove, as a matter of law, that he was exposed to unreasonably high levels of second-hand smoke, or that there were material issues of triable fact regarding his exposure.

The magistrate judge's conclusion was based on the following "facts": (1) **Davis's** ***99** complaint only specified three instances when his window was closed against his will; (2) the time period relevant to the complaint was very limited, spanning from October 1998 to February 1999;[3] (3) **Davis** was ordered to stop opening the window less than two months before he was transferred out of the housing block; (4) **Davis** had applied for and was voluntarily placed in the honor block; (5) **Davis** did not request to be transferred to a less smoky cell, even though requests to transfer within the honor block were liberally accommodated; (6) **Davis** occupied a private cell during the relevant time period; (7) a mechanical ventilation system drew air out of **Davis's** cell; and (8) **Davis's** medical records show only one reference to his complaint about smoke-related symptoms, and the symptoms were actually related to a previous condition. Based on these facts, and **Davis's** failure to come forward with enough credible evidence to support a jury verdict in his favor, the magistrate judge disposed of the motions without addressing the other arguments raised by the parties, or the retaliation claim.

II. DISCUSSION

A. *Justiciability and mootness*

[1] **[2]** **[3]** We first consider whether **Davis's** claim for permanent injunctive relief is justiciable, or whether the claim is moot, as **Davis** was transferred to a different housing block, and Attica implemented a new smoking policy. Under Article III, section 2 of the Constitution, federal courts lack jurisdiction to decide questions that cannot affect the rights of litigants in the case before them. *See DeFunis v. Odegaard,* 416 U.S. 312, **316**, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (citing *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)); *Bragger v. Trinity Capital Enterprise Corp.,* 30 **F.3d** 14, 16 (**2d Cir.**1994). A case is moot when "it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, [and] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Associated Gen. Contractors of Conn. v. City of New Haven,* 41 **F.3d** 62, 66–67 (**2d Cir.**1994) (quoting *County of Los Angeles v.* ***Davis,*** 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)).

Here, **Davis's** claim for injunctive relief is not moot because **Davis** indicates that his problems with second-hand smoke are ongoing. Despite defendants' contention that **Davis** does not complain of ongoing exposure to excessive amounts of second-hand smoke, the most recent information on record indicates that **Davis** is housed in a block without individual cell windows, in conditions similar to those he experienced prior to being transferred out of the honor block. Moreover, although defendants have implemented a new, restrictive

smoking policy, Davis asserts that the policy is not being enforced, and that inmates and Corrections officers are still smoking inside. Therefore, Davis's claim for permanent injunctive relief is not moot, and we may consider these issues.

B. *Summary judgment*

We review orders granting summary judgment *de novo* and determine whether ***100** the district court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *See Cronin v. Aetna Life Ins. Co.,* 46 F.3d 196, 202–03 (2d Cir.1995). Pursuant to Fed.R.Civ.P. 56(c), the district court must consider all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," in determining whether there is a genuine issue of material fact. The district court is required to resolve all ambiguities and draw all factual inferences in favor of the nonmovant. *See Cronin,* 46 F.3d at 202. However, reliance upon conclusory statements or mere allegations is not sufficient to defeat a summary judgment motion. *See Ying Jing Gan v. City of New York,* 996 F.2d 522, 532–33 (2d Cir.1993); Fed.R.Civ.P. 56(e). The nonmoving party must "go beyond the pleadings, and by [his or] her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(e)).

[4] In *Helling,* the Supreme Court, identifying both the objective and subjective components of the Eighth Amendment violation, determined that a plaintiff "states a cause of action under the Eighth Amendment by alleging that [prison officials] have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health."[4] *Helling,* 509 U.S. at 35, 113 S.Ct. 2475. Objectively, a plaintiff must show that "he himself is being exposed to unreasonably high levels of ETS." *Id.* "The objective factor not only embraces the scientific and statistical inquiry into the harm caused by ETS, but also 'whether society considers the risk ... to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.' " *Warren v. Keane,* 196 F.3d 330, 333 (2d Cir.1999) (quoting *Helling,* 509 U.S. at 36, 113 S.Ct. 2475) (emphasis in original). In granting summary judgment in favor of the defendants, the magistrate judge only reached the objective prong, concluding that Davis had failed to produce evidence which would create a genuine issue of fact as to whether Davis had been exposed to unreasonable levels of second-hand smoke.

[5] The magistrate judge evaluated the summary judgment motions as if Davis had only produced evidence indicating that he was exposed to unreasonable levels of second-hand smoke on the three occasions, between October 1998 and February 1999, when he was required to close the window. However, our *de novo* examination of the record demonstrates that Davis's evidence encompassed more than the district court identified. For example, Davis indicated that he had previously been housed in a double-bunk cell with a smoker, and he never alleged that the second-hand smoke problem was limited to the times when he was required to shut the window. Instead, he asserted that, during the time he had been at Attica since arriving in June 1993, he had always been housed in areas where the majority of inmates were smokers, and that, in the honor block area, he was surrounded by seven inmates who were chain smokers or frequent smokers, such that "the smell of smoke fills the air and enter[s] my cell in a manner as though I was myself smoking." Complaint, Ex. A (letter to Goord). Davis further alleged that the ***101** smoke caused him to suffer dizziness, difficulty breathing, blackouts, and respiratory problems. These assertions are not mere conclusory allegations, but may be sufficient to create an issue of fact as to the level of smoke to which Davis was exposed and, thus, whether his Eighth Amendment rights were violated. *See Warren,* 196 F.3d at 333 (rejecting the argument that the Eighth Amendment right to be free from exposure to unreasonable second-hand smoke levels is limited to the facts in *Helling,* where an inmate was double-celled with an inmate who smoked five packs of cigarettes daily).

We note that it is possible that Davis did not exhaust administrative remedies, pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), with respect to complaints about excessive second-hand smoke levels prior to, and following, the time period examined by the district court. *See Porter v. Nussle,* 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) (holding that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong"). However, the defendants did not raise the issue of failure to exhaust administrative remedies, nor did the district court cite this as the reason for its narrow construction of Davis's allegations. Accordingly,

we vacate, in part, the district court's grant of summary judgment for defendants, and remand for the district court to consider in the first instance **Davis's** claims relating to the time period between January 1993 and October 1998. The district court should determine (1) whether **Davis** properly exhausted his administrative remedies with regard to his claims with respect to the defendants' behavior during this time period, or whether the defendants waived compliance with the exhaustion requirement by failing to raise it, and if so, (2) whether the inclusion of **Davis's** claims regarding this time period creates a genuine issue of material fact as to whether **Davis** was exposed to unreasonable levels of second-hand smoke.

[6] **[7]** We decline to address whether **Davis** raised a genuine issue of material fact as to the defendants' deliberate indifference, as the magistrate judge did not reach the subjective prong of the Eighth Amendment claim. We uphold summary judgment with respect to some of the defendants on alternate grounds. *See Johnson v. Nyack Hosp.,* 964 F.2d 116, 122 (**2d Cir**.1992). The dismissal of **Davis's** claim against Pataki is affirmed, because **Davis** did not sufficiently allege Pataki's personal involvement in Attica's smoking policies. *See Moffitt v. Town of Brookfield,* 950 F.2d 880, 886 (**2d Cir**.1991). In addition, the dismissal of **Davis's** claims against the State of **New York**, the Department, and Attica, and **Davis's** claims for damages against all of the individual defendants in their official capacities is affirmed, because these claims are barred by the Eleventh Amendment. *See Kentucky v. Graham,* 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (a claim for damages against state officials in their official capacity is considered to be a claim against the State and is therefore barred by the Eleventh Amendment); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (agencies and departments of the state are entitled to assert the state's Eleventh Amendment immunity); *see also Santiago v. **New York** State Dep't of Corr. Servs.,* 945 F.2d 25, 28 n. 1 (**2d Cir**.1991) (the Department is an agency of the State, and therefore entitled to assert Eleventh Amendment immunity). However, to the extent that **Davis** raises genuine issues of material fact as to whether his Eighth ***102** Amendment rights were violated, the remaining claims for declaratory and injunctive relief and damages against defendants, in their individual capacities, are remanded to the district court for further proceedings. *See Hafer v. Melo,* 502 U.S. 21, 27–31, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (Eleventh Amendment does not bar damages actions against state officials sued in their personal or individual capacities); *Kostok v. Thomas,* 105 **F.3d** 65, 69 (**2d Cir**.1997) ("A federal court may grant prospective injunctive relief only to stop or prevent acts that are illegal under federal law.").

C. *Interlocutory orders*

Davis also appeals the magistrate judge's intermediate decisions, which include, in addition to the dismissal of **Davis's** claim against Pataki, the denial of **Davis's** motion for a preliminary injunction, and the denial of his motion to amend his complaint. [5] The latter two motions were based on alleged acts of retaliation surrounding the misconduct report, and the subsequent disciplinary proceeding and punishment.

[8] This Court reviews district court denials of preliminary injunctions and motions to amend a complaint for abuse of discretion. *See No Spray Coalition, Inc. v. City of **New York,*** 252 **F.3d** 148, 150 (**2d Cir**.2001) (per curiam) (preliminary injunction); *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.,* 192 **F.3d** 337, 343 (**2d Cir**.1999) (motion to amend complaint). Our review of these orders indicates that it was not an abuse of discretion for the magistrate judge to deny either motion, for substantially the reasons set forth in the orders.

III. CONCLUSION

For the foregoing reasons, we affirm, in part, the magistrate judge's grant of summary judgment for defendants and the magistrate judge's dismissal of **Davis's** claims against Pataki, the State of **New York**, the Department, and Attica, and the dismissal of **Davis's** damages claims against Goord, Kelly, Stachewicz, Christen, McDonald, and Barone, in their official capacities. However, we reverse the magistrate judge's grant of summary judgment in all other respects, and remand for further proceedings. On remand, the district court should consider (1) whether **Davis** properly exhausted his administrative remedies with regard to his claims with respect to the defendants' behavior between January 1993 and October 1998, or whether the defendants waived compliance with the exhaustion requirement by failing to raise it, and if so, (2) whether the inclusion of **Davis's** claims regarding this time period creates a genuine issue of material fact as to whether **Davis** was exposed to unreasonable levels of second-hand smoke. In addition, on remand the district court may reach the retaliation claims it did not reach earlier. Finally, the district court should consider appointing counsel to assist **Davis** with the ongoing proceedings.

All Citations

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Footnotes

1 The caption appears as it does in the complaint, but defendant Ronald Christensen is improperly named as Ron Christen in the caption.

* The Honorable John R. Gibson, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

2 Kelly retired in May 1999, and appears to have been replaced by Superintendent Herbert.

3 The magistrate judge observed in a footnote that, in his opposition to defendants' motion, **Davis** alleged that he had been subjected to second-hand smoke prior to the time he originally specified in his complaint. However, the magistrate judge concluded that "this cannot be construed in any way to be a part of the instant complaint. The allegations in the complaint clearly relate to a time period wherein plaintiff was housed in Honor Block, Company 43 and further relate to those times where the window was required to be closed." Decision and Order of Mar. 29, 2001 at 7 n. 1.

4 The Supreme Court uses the acronym "ETS" for environmental tobacco smoke. *See Helling,* 509 U.S. at 25, 113 S.Ct. 2475.

5 Although **Davis's** notice of appeal indicated that he was appealing all intermediate district court orders, the issue of whether the district court erred in denying his appointment of counsel motion is waived because **Davis** did not discuss it in his appellate brief. *See LoSacco v. City of Middletown,* 71 **F**.**3d** 88, 92–**93** (**2d** **Cir**.1995).

166 F.3d 45
United States Court of Appeals,
Second Circuit.

Frank D. **JONES**, Plaintiff–Appellant,
v.
NEW YORK STATE DIVISION OF **MILITARY** AND **NAVAL AFFAIRS** and **New York State** Army National Guard, Defendants–Appellees.

Docket 97–7723.
|
Argued Feb. 6, 1998.
|
Decided Jan. 7, **1999**.

Synopsis

Major in **New York State** Army National Guard (NYANG) brought § 1983 action alleging that NYANG and **New York State Division** of **Military** and **Naval Affairs** (DMNA) removed him from NYANG's aviation service without due process. The United States District Court for the Northern District of New York, Lawrence E. Kahn, J., 1997 WL 266765,dismissed action on grounds of Eleventh Amendment immunity and denied major's motion to amend complaint to add NYANG officers as defendants. Major appealed. The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that: (1) absent addition of officers as defendants, action was barred by Eleventh Amendment; (2) major could not seek damages for injuries suffered incident to **military** service in NYANG; and (3) major failed to exhaust administrative remedies prior to seeking equitable relief from civilian court based on NYANG's alleged failure to follow its own regulations.

Affirmed.

West Headnotes (15)

[1] **Armed Services**
Establishment and organization

Federal government may order **New York State** Army National Guard (NYANG) into active federal duty whenever necessary, at which times NYANG is a component of the United States Army under the ultimate command of the President of the United States. 10 U.S.C.A. § 12401; 32 U.S.C.A. § 102.

Cases that cite this headnote

[2] **Federal Courts**
Pleading

District court's dismissal of complaint on the pleadings is reviewed de novo.

5 Cases that cite this headnote

[3] **Federal Courts**
Judgment or dismissal on the pleadings

In reviewing district court's dismissal of complaint on the pleadings, Court of Appeals accepts as true all material factual allegations in the complaint.

2 Cases that cite this headnote

[4] **Federal Courts**
Pleading

Denial of motion for leave to amend is reviewed for abuse of discretion.

24 Cases that cite this headnote

[5] **Federal Courts**
Pleading

If denial of a motion for leave to amend was based on an interpretation of law, Court of Appeals reviews that legal conclusion de novo.

11 Cases that cite this headnote

[6] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts
Waiver by State; Consent

Federal Courts
National Guard; state militia

Major's § 1983 action against **New York State** Army National Guard (NYANG) and **New York**

State Division of Military and Naval Affairs (DMNA) was barred by Eleventh Amendment, inasmuch as NYANG and DMNA were state agencies entitled to Eleventh Amendment immunity, and major did not argue that New York had waived, or that Congress had abrogated, New York's sovereign immunity. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

25 Cases that cite this headnote

[7] **Civil Rights**
Liability of Municipalities and Other Governmental Bodies

New York State Army National Guard (NYANG) and New York State Division of Military and Naval Affairs (DMNA) are not "persons" subject to suit under § 1983. 42 U.S.C.A. § 1983.

8 Cases that cite this headnote

[8] **Federal Courts**
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts
National Guard; state militia

Eleventh Amendment would not bar suit in law or equity against New York State Army National Guard (NYANG) officer in his personal capacity, nor would it bar suit seeking prospective equitable relief against officer in his capacity as a state official. U.S.C.A. Const.Amend. 11.

13 Cases that cite this headnote

[9] **Federal Civil Procedure**
Form and sufficiency of amendment; futility

District court may properly deny leave to amend pleading when amendment would be futile. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

208 Cases that cite this headnote

[10] **Civil Rights**
Particular cases and contexts

Civil Rights
Persons Aggrieved, and Standing in General

Major could not seek damages under § 1983 for injuries allegedly suffered incident to military service in New York State Army National Guard (NYANG). 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[11] **United States**
War, national emergency, and armed services

Member of the United States military may not seek damages from federal officials for injuries suffered incident to military service.

4 Cases that cite this headnote

[12] **Civil Rights**
Government Agencies and Officers

United States
Privilege or Immunity; Good Faith

Constitutional *Bivens* claims against federal officers and § 1983 claims against state actors are identical for purposes of official immunity. 42 U.S.C.A. § 1983.

5 Cases that cite this headnote

[13] **Armed Services**
Relation of Military to Civil Authority

Although federal courts will not normally review purely discretionary decisions by military officials which are within their valid jurisdiction, this rule is not absolute.

4 Cases that cite this headnote

[14] **Civil Rights**
Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies

Major failed to exhaust available internal administrative remedies with respect to alleged action of New York State Army National Guard (NYANG) of removing him from its aviation service without due process, as required for

major to seek equitable relief from civilian court under § 1983 based on NYANG's alleged failure to follow its own regulations; although New York State Assembly member wrote letter to Governor on major's behalf, it did not identify itself as complaint of wrongs made pursuant to New York Military Law. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; N.Y.McKinney's Military Law § 131.4.

11 Cases that cite this headnote

[15] Civil Rights

Administrative remedies in general

Generally, party is not required to exhaust administrative remedies prior to bringing § 1983 action. 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

Attorneys and Law Firms

***46** Bradley A. Sherman, O'Connell and Aronowitz, Albany, New York, for Plaintiff–Appellant.

Michael S. Buskus, Assistant Attorney General, (Peter H. Schiff, Deputy Solicitor General, Nancy A. Spiegel, Assistant Attorney General, Dennis C. Vacco, Attorney General of the State of New York, on the brief), Albany, New York, for Defendants–Appellees.

Before: KEARSE and WALKER, Circuit Judges, and WEINSTEIN, District Judge [*] .

Opinion

JOHN M. WALKER, Jr., Circuit Judge:

This is an appeal from the judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *District Judge*) (1) dismissing, on grounds of Eleventh Amendment immunity, plaintiff-appellant Frank D. Jones's 42 U.S.C. § 1983 action alleging that defendants-appellees, the New York State Division of Military and Naval Affairs ("DMNA") and the New York State Army National Guard ("NYANG" or "the Guard"), removed Jones from the NYANG's aviation service without due process of law in violation of the Fifth and Fourteenth Amendments. In order to defeat dismissal, Jones sought leave from the district court to amend his complaint pursuant ***47** to Fed.R.Civ.P. 15(a) to add three NYANG officers as defendants in their individual and official capacities. The district court denied leave to amend on the basis that amendment would be futile because (1) the claims against two of the proposed defendants would be time-barred and (2) the claims against all three proposed defendants would amount to a non-justiciable challenge to a discretionary military decision. *See Jones v. New York State Div. of Military Affairs*, No. 93–CV–0862, 1997 WL 266765, at *3, *9–10 (N.D.N.Y. May 7, 1997).

On appeal, Jones claims that the district court abused its discretion in denying leave to amend. He argues that the doctrine of non-justiciability does not apply to his claims that the proposed defendants failed to follow military regulations. *See Smith v. Resor,* 406 F.2d 141, 145–46 (2d Cir.1969). We hold that, whether or not the proposed defendants failed to follow military regulations as required by *Smith,* this particular exception to the non-justiciability rule is unavailable to Jones because he failed to exhaust the NYANG's procedures for appealing discretionary decisions. Because his claims against the proposed individual defendants could not succeed, it would have been futile for the district court to allow Jones to amend his complaint to add them. Since we agree with the district court that Jones's remaining claims, all of which were against state defendants, must be dismissed on Eleventh Amendment grounds, we affirm the judgment.

BACKGROUND

The following facts are undisputed. Jones, a highly decorated veteran of the United States Army, served 13 months in Vietnam as a helicopter combat pilot and aviation section commander. In September 1973, he left the active Army due to a reduction-in-force. That same year, he joined the NYANG.

[1] By June 29, 1990, Jones had risen to the rank of major in the NYANG, in which he served with the 42nd Infantry Division. The NYANG is part of the organized New York State militia. Its commander-in-chief is the Governor of New York. The NYANG's commanding general is appointed by the Governor and serves at his pleasure. *See* N.Y. Exec. Law § 190, N.Y. Mil. Law §§ 2, 40. The NYANG also has a federal role. The federal government may order the NYANG into

active federal duty whenever necessary, at which times the NYANG is a component of the United States Army under the ultimate command of the President of the United States. *See Perpich v. Department of Defense,* 496 U.S. 334, 347–48, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990); *Gilligan v. Morgan,* 413 U.S. 1, 6–7, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); 10 U.S.C. § 12401; 32 U.S.C. § 102. Thus, the NYANG must be trained, organized and operated according to federal standards as directed by the National Guard Bureau, a federal agency. *See* 10 U.S.C. § 10503. An enlistee of the NYANG simultaneously joins the United States Army National Guard.

Although **Jones** was in a non-aviation unit and was not assigned an aircraft, he continued to fly assault helicopters as part of the Career Development Aviator Program ("CDAP"). The CDAP permits NYANG aviators assigned to non-aviation units to maintain flight proficiency by participating in operational flying. *See* National Guard Regulation ("NGR") 95–210, ¶ 1–9(a) (Oct. 1, 1988), NGR 95–1, ¶ 1–14.2 (Apr. 30, 1980). On June 4, 1990, Colonel Joseph Ferreira informed **Jones** that he was being removed from the CDAP. Ferreira was **New York's State** Army Aviation Officer, with primary responsibility for overseeing the Guard's aviation program.

On June 5, 1990, **Jones**, dissatisfied with Ferreira's decision, submitted a written request to his commanding officer, NYANG Major General Martin Lind, seeking a Flight Evaluation Board ("FEB") hearing pursuant to Army Regulation ("AR") 600–105. The FEB is a review board which under certain circumstances convenes to examine an aviator's continued qualification for service. Although FEB recommendations are advisory, an aviator has a right to FEB review before he or she is deemed professionally unqualified to remain airborne.

***48** **Jones's** FEB request was forwarded to Major General Lawrence P. Flynn, Adjutant General and commanding officer of the NYANG. On June 29, 1990, Flynn wrote to **Jones** declining to convene the FEB. He explained that "[i]ndividuals are allowed to participate in the CDAP at the discretion of [the Adjutant General], when their participation will provide a benefit to the state." Finding no such benefit from **Jones's** continued participation, Flynn concluded that "an FEB is not warranted." He also stated that "a request for termination of [**Jones's**] aviation service has been requested from [the National Guard Bureau]."

In the face of this resistance, **Jones** contacted State Assembly member Neil W. Kelleher, who wrote a letter to then-New York Governor Mario Cuomo. The letter challenged the NYANG's failure to investigate certain unspecified charges of corruption in the NYANG allegedly raised by **Jones**. This letter, however, failed to include a clear statement of the material facts relating to **Jones's** removal from the CDAP and it did not request an FEB hearing or the reversal of the decision to remove **Jones** from the CDAP program. The record does not reveal whether the Governor took any action as a result of this letter, but the FEB was not convened to consider **Jones's** removal. **Jones** alleges that as a result of his removal from the CDAP, he was not retained as a NYANG member. **Jones** remained in the Guard until July 1, 1991.

On June 29, 1993, **Jones** filed this § 1983 action against the DMNA and the NYANG, alleging that the defendants' actions violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The complaint sought reinstatement in the Guard with back pay, or, in the alternative, "the convening of an impartial [FEB] to consider the merits of [**Jones's**] dismissal from Aviation Service." The complaint also sought $100,000 in damages.

In November 1996, the defendants moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b) and 12(h)(3). They argued that (1) **Jones's** claims involve non-justiciable **military** matters; (2) State entities are not "persons" within the meaning of 42 U.S.C. § 1983 [1]; (3) the Eleventh Amendment bars consideration of **Jones's** claims against the State; and (4) **Jones** failed to exhaust the administrative remedies provided in N.Y. Mil. Law § 131.4 and DMNA Regulation 27–7 promulgated pursuant thereto.

Jones cross-moved to amend his complaint, pursuant to Fed.R.Civ.P. 15, in order to add Flynn, Lind and Ferreira as individual defendants. **Jones's** purpose was two-fold: to avoid dismissal of the action on the ground of Eleventh Amendment immunity and to bring his complaint against "persons" within the purview of § 1983.

On May 7, 1997, the district court denied **Jones's** cross-motion and granted the defendants' motion to dismiss. *See* ***Jones***, 1997 WL 266765, at *11. The court concluded that the existing defendants, as state entities, are entitled to sovereign immunity from suit pursuant to the Eleventh Amendment, *see id.* at *2, and are not "persons" within the meaning of §

1983, *see id.* at *2 n. 1. Thus, the district court explained, unless the proposed individual defendants could be added to the suit, dismissal for lack of subject matter jurisdiction would be appropriate. *See id.* at *3. The district court went on to deny **Jones's** motion to amend the complaint to add the individual defendants on the basis of futility. The district court held that, even if the claims against the proposed new defendants were found to relate back to the date on which the complaint was originally filed, *see* Fed.R.Civ.P. 15(c), the action would be time-barred as against Ferreira and Lind. **Jones** alleged that the actions of Ferreira and Lind that violated his due process rights occurred on June 4, 1990 and June 5, 1990, respectively, ***49** more than three years before the complaint was filed. Because the applicable statute of limitations is three years, *see Leon v. Murphy,* 988 F.2d 303 (**2d Cir**.1993), the district court concluded that adding Lind and Ferreira as defendants would be futile. *See **Jones**,* 1997 WL 266765, at *3.

The district court concluded that the claim against Flynn was not time-barred because Flynn denied **Jones's** request to convene the FEB on June 29, 1990, within the three-year limitations period. Nonetheless, the district court determined that, in any event, amendment would be futile as to all of the defendants because the proposed complaint would be subject to immediate dismissal as pertaining to a non-justiciable discretionary **military** decision. *See id.* at *11. This appeal followed.

DISCUSSION

I. *Standard of Review*

[2] **[3]** **[4]** **[5]** We review the district court's dismissal of the complaint on the pleadings *de novo, see Jaghory v. **New** **York** **State** Dep't of Educ.,* 131 **F**.**3d** 326, 329 (**2d Cir**.1997); *Close v. **State** of **New** **York**,* 125 **F**.**3d** 31, 35 (**2d Cir**.1997), and accept as true all material factual allegations in the complaint, *see Shipping Fin. Servs. Corp. v. Drakos,* 140 **F**.**3d** 129, 131 (**2d Cir**.1998). We review the denial of a motion for leave to amend for an abuse of discretion. *See Sheldon v. PHH Corp.,* 135 **F**.**3d** 848, 851 (**2d Cir**.1998). If that denial was based on an interpretation of law, we review that legal conclusion *de novo. Id.* at 852.

II. *Eleventh Amendment Immunity*

[6] Absent the addition of the proposed defendants to the complaint, the district court correctly concluded that dismissal was proper. 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. The Supreme Court has interpreted the amendment to bar suits against the States by their own citizens as well as those of foreign jurisdictions. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Edelman v. Jordan,* 415 U.S. 651, 662–63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Both the DMNA and the NYANG are state agencies entitled to Eleventh Amendment immunity. *See Pennhurst,* 465 U.S. at 100, 104 S.Ct. 900; *Santiago v. **New** **York** **State** Dep't of Correctional Servs.,* 945 F.2d 25, 28 & n. 1 (**2d Cir**.1991). **Jones** has not argued that New York has waived its sovereign immunity in this matter, *see Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *Close,* 125 **F**.**3d** at 36, nor that Congress has abrogated New York's sovereign immunity, *see Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 59–60, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Close,* 125 **F**.**3d** at 36.

[7] Further, as the district court noted, neither the DMNA nor the NYANG are "persons" within the meaning of 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d **45** (1989); *Komlosi v. **New** **York** **State** Office of Mental Retardation and Developmental Disabilities,* 64 **F**.**3d** 810, 815 (**2d Cir**.1995). Thus, even apart from Eleventh Amendment considerations, **Jones** has failed to state a claim against either state agency. Resolution of this case turns, therefore, on whether the district court abused its discretion in denying leave to add the proposed individual defendants to the suit.

III. *Leave to Amend Under Rule 15*

[8] The district court denied leave to add Flynn, Lind and Ferreira as defendants on the ground that such amendment would be futile. On appeal, **Jones** challenges this

determination only as to Flynn. He seeks to add claims against Flynn individually and in his official capacity as **New York State** Adjutant General. The Eleventh Amendment would not bar a suit in law or equity against Flynn in his personal capacity, *see Hafer v. Melo,* 502 U.S. 21, 27–28, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), nor would it bar a suit seeking prospective equitable relief against Flynn in his capacity as a state official, *see* ***50** *Pennhurst,* 465 U.S. at 102–03, 104 S.Ct. 900; *Ex Parte Young,* 209 U.S. 123, 160, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[9] Once a responsive pleading has been served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). *See Hemphill v. Schott,* 141 **F.3d** 412, 420 (**2d Cir**.1998). However, a district court may properly deny leave when amendment would be futile. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc.,* 129 **F.3d** 240, 246 (**2d Cir**.1997). The defendants argue that it would be futile to add Flynn as a defendant because any claims brought against him based on his denial of **Jones's** request for an FEB hearing would be non-justiciable. **Jones** claims damages and injunctive relief arising out of the denial. We examine each in turn to determine whether seeking such relief from Flynn would be futile.

A. *Damages*

[10] **[11]** **Jones's** proposed amended complaint seeks damages of $100,000. However, his damages claim is not viable. It is well established that a member of the United States **military** may not seek damages for injuries suffered incident to **military** service. *See United States v. Stanley,* 483 U.S. 669, 684, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987). And we hold that similar suits brought by National Guard personnel also should be barred.

In *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. **1999**, 29 L.Ed.2d 619 (1971), the Supreme Court established a cause of action for damages against federal officials for violation of constitutional rights despite the absence of Congressional legislation creating such a cause of action. However, the Court has held that a *Bivens* action may not be brought by United States **military** personnel for injuries that "arise out of or are in the course of activity incident to service." *Stanley,* 483 U.S. at 684, 107 S.Ct. 3054 (quotation marks omitted); *see also Chappell v. Wallace,* 462 U.S. 296, 304, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); *cf. Feres v. United States,* 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (Federal Tort Claims Act does not authorize suit to remedy harms suffered incident to **military** service).

The refusal to extend *Bivens* to challenges in the **military** context is a result of the Court's reluctance to find a cause of action directly under the Constitution where "special factors counselling hesitation" are present. *Stanley,* 483 U.S. at 678, 107 S.Ct. 3054. In *Chappell,* 462 U.S. at 300, 103 S.Ct. 2362, the Court determined that such "special factors" were present in the context of a constitutional damages action brought by servicemembers against their superior officers. These were "[t]he need for special regulations in relation to **military** discipline, and the consequent need and justification for a special and exclusive system of **military** justice." *Id.; see also Stanley,* 483 U.S. at 684, 107 S.Ct. 3054.

The special nature of **military** discipline and the importance of judicial deference in **military affairs** have long been recognized.

> [J]udges are not given the task of running the [**military**].... The **military** constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff v. Willoughby, 345 U.S. 83, 93–94, 73 S.Ct. 534, 97 L.Ed. 842 (1953). The **military's** special task of fighting the nation's wars requires a particular level of discipline and of sacrifice of individual rights which would never be tolerated in civilian society. *See Able v. United States,* 155 **F.3d** 628, 632–34 (**2d Cir**.1998).

Another factor counseling hesitation is the fact that the Constitution places primary authority for control of the **military** in the executive and legislative branches. *See* U.S. Const. art. I, § 8 ("The Congress shall have the Power ... [t]o declare War ...; [t]o raise and support Armies ...; [t]o provide and maintain a Navy; [t]o make Rules for ***51** the Government and Regulation of the land and **naval** Forces; [and] to provide for calling forth the Militia"); U.S. Const.

art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States"). The Supreme Court has said that when a "case arises in the context of Congress' authority over national defense and **military affairs** ... perhaps in no other area [is] ... Congress [accorded] greater deference." *Rostker v. Goldberg,* 453 U.S. 57, 64–65, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981); *see Chappell,* 462 U.S. at 302, 103 S.Ct. 2362 ("Congress has exercised its plenary constitutional authority over the **military**, has enacted statutes regulating **military** life, and has established a comprehensive internal system of justice to regulate **military** life").

Thus, in light of the need for deference to the political branches of government in **military** matters, the *Chappell* Court concluded that, in the absence of an explicit, congressionally-authorized damages remedy for claims by **military** personnel to vindicate constitutional rights, a judicially-created *Bivens* remedy "would be plainly inconsistent with Congress' authority in this field." 462 U.S. at 304, 103 S.Ct. 2362. *See also Department of Navy v. Egan,* 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in **military** ... **affairs**").

Jones argues that because Flynn is a state rather than federal official, an action pursuant to 42 U.S.C. § 1983 which applies to state actors, will lie even though an action against federal **military** actors under *Bivens* would not. This is an issue of first impression for us. We have not decided whether the reasoning of *Chappell* and *Stanley* extends to a § 1983 damages action that seeks redress for injuries that "arise ... incident to [state **military**] service." *Stanley,* 483 U.S. at 684, 107 S.Ct. 3054 (quoting *Feres,* 340 U.S. at 146, 71 S.Ct. 153). If it does, then the proposed amendment would be futile because any injuries attributable to the decision to remove **Jones** from the CDAP and the refusal to convene an FEB hearing arose incident to **Jones's military** service in the NYANG. *See Bowen v. Oistead,* 125 **F.3d** 800, 804 (9th Cir.1997) (damages action barred "whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces") (internal quotation marks and citation omitted).

[12] In accordance with every other circuit to have considered the issue,[2] we believe that the reasoning of *Chappell* and *Stanley,* developed in the *Bivens* context, applies with equal force to a § 1983 claim against state **military** officials. We are guided by the Supreme Court's command in *Butz v. Economou,* 438 U.S. 478, 500, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), that claims brought pursuant to *Bivens* and § 1983 are identical for purposes of official immunity:

> in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983....
>
> ....
>
> [A contrary] analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity.

Id. at 500–01, 98 S.Ct. 2894. Accordingly, absent some reasoned distinction, justiciability of constitutional tort actions incident to federal and state **military** service should be co-extensive. This is particularly true in light of the central role the National Guard plays in the national defense and the close working relationship between the National ***52** Guard and the United States Army. The policy concerns are the same in both contexts. Allowing § 1983 actions based on injuries arising incident to service in the Guard would disrupt **military** service and undermine **military** discipline to the same extent as allowing *Bivens* actions based on injuries arising incident to service in the United States Army. *See Crawford v. Texas Army Nat'l Guard,* 794 F.2d 1034, 1036 (5th Cir.1986) ("Section 1983 ... claims, like those predicated on *Bivens,* invite judicial second-guessing of **military** actions and tend to overlap the remedial structure created within each service...."). In sum, the district court did not abuse its discretion in declining to permit **Jones** to amend his complaint to seek damages from General Flynn.

B. *Injunctive Relief*

Jones's proposed amended complaint also seeks an injunction reinstating him to the Guard with back pay or, in the alternative, requiring an FEB hearing to consider the merits of his dismissal from the CDAP.

[13] "[F]ederal courts will not normally review purely discretionary decisions by **military** officials which are within their valid jurisdiction." *Kurlan v. Callaway,* 510 F.2d 274,

280 (2d Cir.1974); *see also Smith,* 406 F.2d at 145; *Fox v. Brown,* 402 F.2d 837, 840 (2d Cir.1968); *cf. Orloff,* 345 U.S. at 92–93, 73 S.Ct. 534 (service members may not obtain habeas corpus review of assignments to duty). This policy is based on the common-sense notion that allowing service members to sue their superiors would unacceptably compromise **military** discipline and readiness for combat. The risk of improper judicial interference with **military** functioning is not abated "merely because the remedy sought is an injunction rather than damages." *Watson,* 886 F.2d at 1009. *See also Lovell v. Heng,* 890 F.2d 63, 64–65 (8th Cir.1989) (same).

The rule of non-justiciability of discretionary **military** decisions is not absolute. Among the exceptions we have recognized is where the **military** has failed to follow its own mandatory regulations in a manner substantially prejudicing a service member. "To the extent that a **military** regulation is mandatory, the courts will see that it is observed." *Ornato v. Hoffman,* 546 F.2d 10, 13 (2d Cir.1976); *see also Blassingame v. Secretary of the Navy,* 866 F.2d 556, 559–60 (2d Cir.1989); *Crawford v. Cushman,* 531 F.2d 1114, 1120 (2d Cir.1976). "This does not involve any undue interference with the proper and efficient operation of our **military** forces because we require only that the [**military**] carry out the procedures and regulations it created itself." *Smith,* 406 F.2d at 146.

In the present action, **Jones** seeks to amend his complaint to allege that Flynn failed to follow mandatory **military** regulations in failing to convene an FEB hearing. Army Regulation 600–105, Paragraph 4–1 provides:

> Each person authorized to pilot an Army aircraft or perform crewmember duties must maintain the highest professional standards. When his or her performance is doubtful, justification for continued qualification for aviation service or authorization to pilot Army aircraft is subject to complete review.

Paragraph 4–2 provides:

> *a.* [An FEB] convenes to—
>
> (1) Examine the qualifications of an officer for aviation service.
>
> (2) Evaluate the officer's potential for continued aviation service.
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> (3) Make recommendations to higher authorities.
>
> ....
>
> *c.* An FEB reviews the officer's past performance, background, and qualifications.

Paragraph 4–5 provides that "[a]n FEB *will* be convened when—a. One or more of the conditions in paragraph 3–10 exists." (emphasis added).

Paragraph 3–10 provides for "Nonmedical disqualification." It states:

> *a.* If an officer fails to remain professionally qualified or has marginal potential for continued aviation service, an FEB should be convened to consider the case. An FEB will be convened under the conditions in (1) through (7) below.
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> ...
>
> ***53** (1) *Lack of proficiency.* Evidence that shows the officer—
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> ...
>
> *(d)* Failed to maintain a current instrument qualification....
>
> (2) *Flagrant violation of flying regulations. ...*
>
> (3) *Undesirable habits or traits of character. ...*
>
> (4) *Insufficient motivation. ...*
>
> (5) *Failure to complete graduate flight training. ...*

Taken together, these Army regulations create a mandatory right to an FEB hearing whenever an aviator's continued professional qualification to fly is questioned. **Jones's** pleadings can be read to allege that his dismissal from the CDAP was caused by his failure to complete instrumental qualification training, thus triggering his right to have the FEB review his record. [3] Flynn's failure to convene a FEB hearing would thus constitute a failure of the **military** to follow its own mandatory regulations.

[14] The defendants make several arguments in response. First, they argue that **Jones's** removal from the CDAP did not constitute removal from the aviation service, and that AR 600–105 therefore does not apply. Second, they maintain that AR 600–105 does not apply to the instant circumstances because **Jones** was not disqualified for professional reasons. Third, the defendants argue that review would be inappropriate because **Jones** has failed to exhaust available internal administrative remedies. Because we agree with this third argument and affirm the district court's denial of leave to amend the complaint on that basis, we do not reach the first two arguments.

New York law provides Guard members an opportunity to file a "complaint of wrongs" when they are aggrieved by the decision of a superior officer. N.Y. Mil. Law § 131.4 provides an elaborate mechanism for administrative relief. Its salient features are that a service member who believes himself wronged by his commanding officer, and who has been refused redress by such officer, must file a written complaint with the officer's superior. *See id.;* DMNA Reg. 27–7(8)(June 3, 1994). The complaint must state that it is made in accordance with N.Y. Mil. Law § 131.4, set forth all material facts relating to the incident, and indicate all supporting documents or other written evidence concerning the complaint. *See* DMNA Reg. 27–7(6), (8). The superior officer must then forward the complaint to the Adjutant General, who must examine the matter and take appropriate corrective action. *See* DMNA Reg. 27–7(6). If the Adjutant General refuses redress, the member who initiated the complaint may appeal to the Governor of New York. *See id.*

Jones did not avail himself of these procedures. When General Flynn denied **Jones's** appeal, a **New York State** Assembly member wrote a letter to Governor Cuomo on **Jones's** behalf. Although the letter raised general allegations of misconduct, such as theft of **military** property, improper promotions, and nepotism, it did not identify itself as a complaint of wrongs made pursuant to N.Y. Mil. Law § 131.4. Nor did it request the specific redress denied **Jones**—convention of an FEB hearing or readmission to the CDAP. *See id.* The letter further failed to include a statement of all material facts relating to **Jones's** removal from the CDAP and Flynn's refusal to address that wrong. *See id.* Thus, by failing to appeal to the Governor in the manner outlined in DMNA Reg. 27–7, **Jones** neglected to exhaust the internal administrative remedies provided by the NYANG.

It has been an open question in this circuit whether a member of a state National Guard must exhaust administrative remedies before seeking equitable relief from a civilian court ***54** under § 1983 based on the Guard's failure to follow its own regulations. Several of our sister circuits have imposed an exhaustion requirement on members of state National Guard units seeking equitable relief pursuant to 42 U.S.C. § 1983. *See, e.g., Watson,* 886 F.2d at 1008 (Eighth); *Crawford v. Texas Army Nat'l Guard,* 794 F.2d at 1036 (Fifth); *Thornton v. Coffey,* 618 F.2d 686, 691–92 (10th Cir.1980). We have required exhaustion by members of the United States **military**. For example, in requiring that a United States Navy reservist exhaust administrative remedies before challenging the Navy's decision to discharge him in *Guitard v. Secretary of Navy,* 967 F.2d 737, 740 (**2d Cir**.1992), we relied both on the general principle that a party "may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself," *id.,* and on the particular need to minimize judicial interference with **military** discipline, *see id.* at 740–41. *See also Able v. United States,* 88 **F.3d** 1280, 1288 (**2d Cir**.1996) (subject to exceptions, members of United States armed forces may not seek judicial review of **military** action prior to exhaustion of agency remedies); *Diederich v. Department of Army,* 878 F.2d 646, 647 (**2d Cir**.1989) ("exhaustion rule applies to most claims against the **military**").

Consistent with our view that civilian courts must avoid unnecessary interference with state militias as well as the United States **military**, we hold that NYANG members must exhaust administrative remedies before bringing a federal challenge based on the NYANG's failure to follow its own regulations. We believe that it would interfere unnecessarily with Guard operations were service members allowed to complain of procedural irregularities to the courts without first appealing the error up through the chain of command. By failing to specify to the Governor the harm **Jones** allegedly suffered, **Jones** deprived the Governor of an opportunity to order the convention of an FEB hearing, which in turn might have obviated any need for judicial interference in **military affairs**. *Cf. McCarthy v. Madigan,* 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) ("The exhaustion doctrine ... acknowledges the commonsense notion ... that an agency ought to have an opportunity to correct its own mistakes ... before it is haled into federal court."). An exhaustion requirement, except in cases of inadequate administrative remedy, irreparable injury, futility, or certain "substantial constitutional question[s]," *Able,* 88 **F.3d** at

1288, none of which have been claimed here, is the fairest and wisest way to balance the need for non-interference in matters of the NYANG's legitimate discretion with the rights of service members to seek redress in the federal courts.

As **Jones** correctly argues, absent Congressional direction to the contrary, the exhaustion of administrative remedies is not a prerequisite to bringing an action pursuant to 42 U.S.C. § 1983. *See Patsy v. Board of Regents,* 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). The Supreme Court has cautioned that the absence of an exhaustion requirement in § 1983 has been explicitly recognized by Congress, *see id.* at 508, 102 S.Ct. 2557, and that "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent," *id.* at 513, 102 S.Ct. 2557. For a federal court to impose an exhaustion requirement on its own therefore "would be inconsistent with [congressional intent] ... and would usurp policy judgments that Congress has reserved for itself...." *Id.* at 508, 102 S.Ct. 2557. *See also Felder v. Casey,* 487 U.S. 131, 148–**49**, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (same).

[15] In requiring **Jones** to exhaust the NYANG's internal remedies before challenging Flynn's failure to convene a FEB hearing, however, we are not crafting an exception to the general rule that § 1983 does not have an exhaustion requirement. *But cf. Penagaricano v. Llenza,* 747 F.2d 55, 61 (1st Cir.1984) (acknowledging general rule that **military** personnel must exhaust administrative remedies, but questioning whether rule applies in § 1983 actions by National Guard members after *Patsy*), *overruled on other grounds, Wright,* 5 **F.3d** at 590–91. The general rule is that NYANG members may not bring a § 1983 action to challenge "purely ***55** discretionary decisions by **military** officials which are within their valid jurisdiction." *Kurlan,* 510 F.2d at 280; *see also Knutson,* 995 F.2d at 771; *Crawford v. Texas Army Nat'l Guard,* 794 F.2d at 1036. The ability of service members to challenge the NYANG's failure to follow its own regulations is an exception to this rule of non-justiciability. The exhaustion requirement is contained in the very regulations that plaintiff seeks to have enforced. In upholding this exhaustion requirement, therefore, we do not carve out a new exception to the non-exhaustion requirement of § 1983. Instead, we simply clarify the contours of the "regulations" exception to the well established rule that § 1983 does not generally afford a remedy to **military** personnel challenging discretionary **military** decisions.

In sum, because **Jones** failed to appeal Flynn's actions to the Governor of New York pursuant to DMNA Reg. 27–7, and because **Jones** may not seek damages based on injuries suffered incident to service in the Guard, **Jones's** proposed amended complaint would be subject to immediate dismissal. As such, the proposed amendment was futile. We hold, therefore, that the district did not abuse its discretion in denying leave to amend the complaint pursuant to Fed.R.Civ.P. 15(a).

CONCLUSION

The judgment of the district court denying leave to amend the complaint as futile is affirmed. The judgment of the district court dismissing the complaint for lack of subject matter is affirmed.

All Citations

166 F.3d 45

Footnotes

* The Honorable Jack B. Weinstein, of the United States District Court for the Eastern District of New York, sitting by designation.

1 42 U.S.C. § 1983 provides in relevant part:

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

2 *See, e.g., Wright v. Park,* 5 **F.3d** 586, 591 (1st Cir.1993); *Jorden v. National Guard Bureau,* 799 F.2d 99, 106, 108 (3d Cir.1986); *Holdiness v. Stroud,* 808 F.2d 417, 423 (5th Cir.1987); *Knutson v. Wisconsin Air Nat'l Guard,* 995 F.2d 765, 770 (7th Cir.1993); *Wood v. United States,* 968 F.2d 738, 739 (8th Cir.1992); *Watson v. Arkansas Nat'l Guard,* 886 F.2d 1004, 1007 (8th Cir.1989); *Bowen,* 125 **F.3d** at 803 n. 2 & 804–05(9th); *Martelon v. Temple,* 747 F.2d 1348, 1350–51 (10th Cir.1984).

3 Although he does not so allege in his complaint, **Jones's** request for an FEB hearing to Flynn, submitted as an exhibit to his complaint and his proposed amended complaint, indicates that **Jones** was unable to complete instrument flight training in a timely manner, and implies that this was the basis for Colonel Ferreira's decision to remove **Jones** from the CDAP. Rule 10(c) of the Federal Rules of Civil Procedure provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." We therefore rely on the FEB request in assessing the adequacy of **Jones's** proposed amended complaint. *See Austin v. Ford Models, Inc.,* 149 **F**.**3d** 148, 152 (**2d** **Cir**.1998).

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1995 WL 743719
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Anthony GENTILE, Plaintiff,
v.
REPUBLIC TOBACCO COMPANY, Defendant.

No. 95-CV-1500 (RSP) (DNH).
|
Dec. 6, 1995.

Attorneys and Law Firms

Anthony Gentile, Binghamton, NY, pro se.

DECISION and ORDER

POOLER, District Judge.

I. Background

***1** Presently before this Court is an application to proceed in forma pauperis and a civil rights complaint. Plaintiff Anthony Gentile ("Gentile") has not paid the partial filing fee required to maintain this action.

Because Gentile's complaint is without arguable basis in law, I dismiss it pursuant to 28 U.S.C. § 1915(d) and Rule 5.4(a) of the Local Rules of Practice of this District as without arguable basis in law.

In his *pro se* complaint, Gentile claims that defendant Republic Tobacco Company ("Republic") manufactures a product called TOP tobacco, and that Republic has negligently failed to put any warning labels on such product regarding possible health hazards which may be caused by the use of such product. For a more complete statement of plaintiff's claims, reference is made to the entire complaint filed herein.

II. Discussion

Consideration of whether a *pro se* plaintiff should be permitted to proceed in forma pauperis is a two-step process. First, the court must determine whether the plaintiff's economic status warrants waiver of fees and costs under 28 U.S.C. § 1915(a). If the plaintiff qualifies by economic status, the court must then consider whether the cause of action stated in the complaint is frivolous or malicious. *Moreman v. Douglas,* 848 F.Supp. 332, 333 (N.D.N.Y. 1994) (Scullin, J.); *Potnick v. Eastern State Hosp.,* 701 F.2d 243, 244 (2d Cir. 1983) (*per curiam*).

I have determined that Gentile's financial status qualifies him to file or "commence" this action in forma pauperis. 28 U.S.C. § 1915(a). I therefore turn to the second inquiry. A court may "dismiss the proceeding under 28 U.S.C. § 1915(d) if the court thereafter determines that ... the action is frivolous or malicious." *Moreman,* 848 F.Supp. at 333 (citation omitted).

In determining whether an action is frivolous, the court must look to see whether the complaint lacks an arguable basis either in law or in fact. *Neitzke v. Williams,* 490 U.S. 319, 325 (1989). The court has the duty to show liberality towards *pro se* litigants, *Nance v. Kelly,* 912 F.2d 605, 606 (2d Cir. 1990) (*per curiam*). In addition, the court should exercise extreme caution in ordering sua sponte dismissal of a *pro se* complaint before the adverse party has been served and the parties have had an opportunity to respond, *Anderson v. Coughlin,* 700 F.2d 37, 41 (2d Cir. 1983). Nonetheless, the Court has a responsibility to determine that a claim is not frivolous before permitting a plaintiff to proceed with an action in forma pauperis. Dismissal of frivolous actions pursuant to 28 U.S.C. § 1915(d) is appropriate to prevent abuses of the process of the court, *Harkins v. Eldredge,* 505 F.2d 802, 804 (8th Cir. 1974), and to discourage the waste of judicial resources. *Neitzke,* 490 U.S. at 327. *See generally Moreman,* 848 F.Supp. at 334.

Gentile brought this action under 42 U.S.C. § 1983, which permits individuals to seek redress for alleged violations of their constitutional rights. *See, e.g., Von Ritter v. Heald,* No. 91-CV-612, 1994 WL 688306, *3, 1994 U.S.Dist. LEXIS 17698, *8-9 (N.D.N.Y. Nov. 14, 1994) (McAvoy, C.J.). However, parties may not be held liable under this section unless it can be established that they have acted under the color of state law. *See, e.g., Rounseville v. Zahl,* 13 F.3d 625, 628 (2d Cir. 1994) (noting state action requirement under § 1983); *Wise v. Battistoni,* No. 92-Civ-4288, 1992 WL 380914, *1, 1992 U.S.Dist. LEXIS 18864, *2-3 (S.D.N.Y. Dec. 10, 1992) (same) (citations omitted).

***2** In the present case, Gentile has named Republic as the sole defendant herein. However, Gentile has not alleged any nexus between the State of New York and the challenged actions of Republic. State action is an essential element of any

§ 1983 claim. *See Velaire v. City of Schenectady,* 862 F.Supp. 774, 776 (N.D.N.Y. 1994) (McAvoy, C.J.) (citation omitted).

Moreover, the Court notes that Gentile contends that Republic's failure to warn the public of possible health hazards was the result of negligence on the part of the defendant. Complaint at 2. However, it is well settled that mere negligence is not cognizable under § 1983. *See Stevens v. Pinkney,* No. 95-CV-1338, slip op. at 4 (N.D.N.Y. Oct. 25, 1995) (Scullin, J.) (citations omitted).

Because no arguable basis in law supports Gentile's complaint, I must dismiss it pursuant to 28 U.S.C. § 1915(d). *Neitzke,* 490 U.S. at 328.

Accordingly, it is hereby

ORDERED, that leave to proceed or prosecute this action in forma pauperis is denied, and it is further

ORDERED, that this action is dismissed pursuant to 28 U.S.C. § 1915(d) and Rule 5.4(a) of the Local Rules of Practice of this District as lacking any arguable basis in law, and it is further

ORDERED, that the Clerk serve a copy of this Order on the plaintiff by regular mail.

I further certify that any appeal from this matter would not be taken in good faith pursuant to 28 U.S.C. § 1915(a).

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1995 WL 743719

171 F.3d 794
United States Court of Appeals,
Second Circuit.

Louis **GOMEZ**, Plaintiff–Appellant,

v.

USAA FEDERAL **SAVINGS BANK** and Janette Adger Mills, Defendants–Appellees.

Docket No. 97–9381
|
Argued March 17, **1999**.
|
Decided March 30, **1999**.

Synopsis
Pro se plaintiff brought in forma pauperis action against federal **savings bank**, alleging that **bank** violated his civil rights by initiating criminal investigation against plaintiff when he attempted to open account and that **bank** also committed libel and slander. The United States District Court for the Southern District of New York, Thomas P. Griesa, Chief Judge, dismissed complaint sua sponte. Plaintiff appealed. The Court of Appeals held that district court was required to give plaintiff opportunity to amend complaint before dismissal, given possibility that amendment could result in successful pleading of claim.

Vacated and remanded.

West Headnotes (4)

[1] Federal Civil Procedure
Forma pauperis proceedings

Although dismissal of pro se, in forma pauperis complaint that failed to state claim on which relief could be granted would normally be proper, district court was required first to give plaintiff opportunity to amend complaint, given possibility that amendment could result in successful pleading of claim, notwithstanding mandatory dismissal language of statute governing in forma pauperis proceedings. 28 U.S.C.A. § 1915(e)(2)(B)(ii).

372 Cases that cite this headnote

[2] Federal Civil Procedure
Pro Se or Lay Pleadings
Federal Civil Procedure
Pleading over

Pro se complaint is to be read liberally, and court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.

969 Cases that cite this headnote

[3] Federal Civil Procedure
Forma pauperis proceedings

Pro se plaintiff who is proceeding in forma pauperis should be afforded the same opportunity as a pro se fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim, unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim. 28 U.S.C.A. § 1915(e)(2)(B)(ii).

738 Cases that cite this headnote

[4] Federal Courts
Sua sponte determination

A district court may not dismiss a case sua sponte for improper venue absent extraordinary circumstances.

27 Cases that cite this headnote

Attorneys and Law Firms

***795** Jeffrey S. Burman, Esq., (Arthur S. Linker, Esq., on the brief), Rosenman & Colin LLP, New York, New York, for Plaintiff–Appellant.

Evan K. Kornrich, Esq., Fulbright & Jaworski LLP, New York, New York, for Defendants–Appellees.

Before: WALKER, CABRANES, Circuit Judges, and TSOUCALAS, Judge. *

Opinion

PER CURIAM:

Plaintiff-appellant Louis **Gomez** appeals from a judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Chief Judge*), dated September 17, 1997, which dismissed his *pro se, in forma pauperis* complaint *sua sponte* without prejudice pursuant to 28 U.S.C. § 1915(e)(2).

Gomez's complaint identified defendant's address as 10750 McDermott Freeway, San Antonio, TX 78288 and stated in its entirety:

> Plaintiff had attempted to open an account at Defendant's institution, the **bank**. On April 25, 1996, Defendant violated Plaintiff's Federal Civil Rights by prompting an investigation by the United States Secret Service ("USSS") for an alleged criminal act by plaintiff. This criminal act never occurred and was unfounded by the USSS.
>
> By prompting this investigation, Defendant committed acts of liable [sic] and slander, they not only violated Federal Tort Laws, but caused injury and a great deal of mental anguish and emotional distress to the Plaintiff. I believe that they acted with malice and willful intent. Therefore, I want to bring charges against the Defendant.
>
> Plaintiff is seeking relief in the form of $76,000.

The district court interpreted the complaint as an action under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 S.Ct. **1999**, 29 L.Ed.2d 619 (1971), permitting a suit for deprivation of a constitutional right against a federal governmental actor, but concluded that the complaint failed to state a claim because it did not allege facts showing that the defendants acted under color of federal law to deprive plaintiff of a constitutional right. The district court further noted that "[a]s for plaintiff's conclusory allegations of libel and slander under this Court's diversity jurisdiction, ... this United States District Court is not the appropriate venue for this action." The court refused to transfer the matter to the appropriate district court "because plaintiff has failed to detail these allegations sufficiently to suggest a cognizable claim." The district court then dismissed the complaint "because it 'lacks an arguable basis either in law or in fact.' " (quoting *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (discussing when complaint is frivolous)).

[1] **[2]** **[3]** While we believe that the record, insofar as it has been developed, is insufficient to support the district court's dismissal of the complaint as "frivolous or malicious" under § 1915(e)(2)(B)(i), the complaint nevertheless "fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). Accordingly dismissal of the case would normally be proper. However, "[a] *pro se* complaint is to be read liberally. Certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." ***796** *Branum v. Clark,* 927 F.2d 698, 705 (**2d Cir**.1991). Although the language of § 1915 is mandatory, stating that "the court shall dismiss the case" in the enumerated circumstances, we conclude that a *pro se* plaintiff who is proceeding *in forma pauperis* should be afforded the same opportunity as a *pro se* fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim, unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim. Because the district court did not give this *pro se* litigant an opportunity to amend his complaint, and because we cannot rule out the possibility that such an amendment will result in a claim being successfully pleaded, we vacate the judgment and instruct the district court to permit the plaintiff to amend the complaint and then determine whether he has successfully pled a cause of action.

[4] A district court may not dismiss a case *sua sponte* for improper venue absent extraordinary circumstances. *See Concession Consultants, Inc. v. Mirisch,* 355 F.2d 369, 371 (**2d Cir**.1966); *see also Stich v. Rehnquist,* 982 F.2d 88, 88–89 (**2d Cir**.1992) (per curiam). This case does not present any such extraordinary circumstances, and therefore the libel action was wrongly dismissed *sua sponte* on the basis of improper venue.

For the reasons stated above, the district court's judgment is vacated and the case remanded for further proceedings consistent with this opinion.

All Citations

171 F.3d 794

Footnotes

* The Honorable Nicholas Tsoucalas, Senior Judge of the United States Court of International Trade, sitting by designation.