Beyond <i>Pennhurst</i>: Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court

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BEYOND PENNHURST—PROTECTIVE JURISDICTION, 
THE ELEVENTH AMENDMENT, AND THE POWER OF 
CONGRESS TO ENLARGE FEDERAL JURISDICTION IN 
RESPONSE TO THE BURGER COURT

George D. Brown*

In the 1984 case of Pennhurst State School and Hospital v. Halderman (Pennhurst II), the Supreme Court addressed a seemingly technical point of federal jurisdiction: in a suit against state officials, may a federal district court invoke the doctrine of pendent jurisdiction to award relief on the basis of state law rather than relying on any federal claims asserted by the plaintiff? A bitterly divided Court held that pendent jurisdiction is not available in such circumstances. Justice Powell, writing for the majority, based his analysis on the eleventh amendment, which he characterized as an "explicit limitation on federal jurisdiction."

The various opinions in the case deal primarily with such arcana as sovereign immunity, pendent jurisdiction, the scope of the elev-

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2 The doctrine of pendent jurisdiction applies in federal question cases in which there is no diversity of citizenship. In general terms, it permits the plaintiff to add to his federal claim any state claims that arise out of a "common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). See generally C. Wright, Law of Federal Courts § 19 (4th ed. 1983) (discussing the scope of federal question jurisdiction).

3 "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.

4 104 S. Ct. at 917.
enth amendment, and the extent to which the amendment can be circumvented by resort to "fiction." Yet it would be a serious mistake to characterize Pennhurst II as a narrow, jurisdictional decision. The case has important consequences for those seeking to litigate grievances against state governments. Of even greater significance is the close relationship of Pennhurst II to other cases in which the Burger Court has sought to ban "public law" litigation in general, and "institutional" litigation in particular, from federal tribunals. The current Court, or at least a majority thereof, has expressed grave doubts about the desirability of federal trial courts exercising broad supervisory power over the operations of state and local institutions and programs. These concerns are based primarily on principles of federalism.

Many on the Court and in the ranks of academia, however, view institutional litigation as one of the vital functions of federal courts. Individuals whose federal rights may be harmed by the institutions and policies of state and local governments may have no other forum in which those rights can be effectively vindicated. The critics of institutional litigation are equally insistent that such suits distort delicate federal-state balances and thrust the federal courts into areas where they have neither competence nor legitimacy.

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6 In certain cases the eleventh amendment ban against suing states can be avoided by suing state officials. The Court originally justified such suits by resorting to the fiction that if the official had violated the Constitution, he was "stripped" of any immunity he might otherwise possess. Ex parte Young, 209 U.S. 123, 149-60 (1908); see text accompanying infra notes 31-37.
7 The term "public law" is used here in a somewhat general sense to denote cases in which the plaintiff attacks governmental programs or policies, and whose decision can have an impact on many persons beyond the plaintiff. For a helpful discussion of public law and related concepts, see Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1, 1-5 (1984).
8 "Institutional" litigation refers to the particular class of public law suits that challenges the operation of state and local institutions. In such suits plaintiffs generally seek broad equitable relief that can involve the courts deeply in the workings of a particular institution. See id. at 4-5.
10 E.g., Pennhurst II, 104 S. Ct. at 910 n.13.
major elements of the debate over "judicial activism." The Burger Court has shown an increasing hostility to public law litigation. Those who oppose this tendency may well turn to Congress and seek legislative nullification of one or more of the recent decisions restricting such litigation. The principal focus of this article is on the power of Congress to take such action with respect to *Pennhurst II*. I have chosen this case both because of the particularly vexing problems it poses for plaintiffs' lawyers, thus making recourse to Congress a tempting alternative, and because of the difficult theoretical questions posed by the interrelationship of article III and the eleventh amendment.

Section I of the article outlines the *Pennhurst II* decision and considers the critical responses to the case as well as its possible consequences for litigants. Section II addresses briefly two aspects of the decision which seem particularly puzzling. First, it raises the question of why the doctrine of pendent jurisdiction played such a

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14 Indeed, one suggestion for such action has already come. See Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61, 79 n.110 (1984). There is a certain irony in the prospect of liberals turning to Congress to "correct" the Court after they have spent years criticizing conservatives for doing so. In the ongoing dialogue between the Court and Congress, considerable attention has been paid to attempts by conservative critics of the Supreme Court to curtail federal court jurisdiction over such matters as abortion and school prayer. See, e.g., Congressional Limits on Federal Court Jurisdiction, 27 Vill. L. Rev. 893 (1982). There is precedent, however, for liberal critics of Burger Court decisions to turn to Congress to have those decisions overturned, as hypothesized in the text. The legislative effort most directly on point is the Civil Rights Improvement Act of 1977, S. 35, 95th Cong., 1st Sess., 123 Cong. Rec. 554-59 (1977). According to Professor Howard the bill proposed, in part, to

1. make states, municipalities, and other governmental units and agencies liable to section 1983 suits,
2. narrow the immunity available to prosecutors,
3. make the doctrines of abstention and exhaustion of state remedies inapplicable to section 1983 suits,
4. guard against the Court's making it harder for federal courts to intervene in pending state criminal proceedings (and prevent the extension of the noninterference doctrine to state civil proceedings),
5. limit the circumstances under which the doctrine of res judicata could be used to prevent the relitigation of questions in federal courts, and
6. provide that the right to enjoy one's reputation is protected by the due process clause of the fourteenth amendment.


15 U.S. Const. art. III.
minor role in both the majority and dissenting opinions. Second, it addresses the Court’s choice not to use *Pennhurst II* as an opportunity to lay down remedial guidelines for federal courts in institutional cases. Section III turns to the article’s main focus: the power of Congress to overturn the decision. The question is first analyzed in light of basic article III principles. This analysis suggests that one possible approach to overturning *Pennhurst II* is through the doctrine of protective jurisdiction, although the validity of any such doctrine is far from established. Section IV then shifts to the effect of eleventh amendment doctrines, in particular the notion that Congress has some power to displace the amendment’s grant of immunity from suit. This analysis suggests that a limited overturning of *Pennhurst II* is possible but would be fraught with uncertainties. The net effect of any statute, regardless of the source of congressional power to enact it, might well be to force the Court to confront the remedial issues it so carefully avoided in *Pennhurst II*.

I. *Pennhurst II* AND THEREAFTER

A. Decision and Discord

Because of the considerable complexity of *Pennhurst II*, I will analyze the majority opinion and the dissent at some length. The 1984 decision was but the latest chapter in a complex lawsuit initiated in 1974. At issue were conditions at a Pennsylvania institution for care of the mentally retarded. The plaintiff class asserted rights under the eighth and fourteenth amendments, two federal grant statutes, and one state statute. In 1981, the Supreme Court reversed a district court judgment favorable to plaintiffs that had been affirmed by the Court of Appeals for the Third Circuit. The Court held that the portions of the Developmentally Disabled Assistance and Bill of Rights Act upon which the court of appeals had relied did not grant enforceable substantive rights. The case was remanded for consideration of other possible grounds of relief not considered by the court of appeals.

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16 104 S. Ct. at 904.
19 Id. at 2-3.
On remand the court of appeals again ruled in favor of plaintiffs, this time relying solely on state law. It held that a recent construction of the Pennsylvania statute by the Pennsylvania Supreme Court supported the plaintiffs' claim that they were entitled to treatment in accordance with the "least restrictive environment" approach. The defendants raised an eleventh amendment defense. The court of appeals rejected this argument on the grounds that whatever relief might be available against them under federal law, in accordance with the doctrine of Ex parte Young, would also be available under state law through the principles of pendent jurisdiction. The Supreme Court reversed, holding that the eleventh amendment barred any relief against the defendants based solely on state law.

Justice Powell's opinion for the majority analyzed the amendment at some length, variously characterizing it as resting on "the fundamental principle of sovereign immunity," a guarantee against "intrusion on state sovereignty," and based on "the principles of federalism." Prior to Pennhurst II the Court had struggled to reach a delicate accommodation between the eleventh amendment's obvious intent to protect states from suits in federal forums and the equally obvious importance of making the rights guaranteed by the fourteenth amendment enforceable. Hans v. Louisiana was an important step in the direction of protecting states. Although the eleventh amendment does not by its terms forbid suits against states by their own citizens, the Court in Hans held that such suits would be contrary to the spirit of the amendment and to the original understanding that it restored. In Ex parte Young, however, the Court ruled that plaintiffs could cir-

22 673 F.2d at 651-56.
24 673 F.2d at 657-59.
26 Id. at 906.
27 Id. at 911.
28 Id.
29 134 U.S. 1 (1890).
30 Id. at 10-16.
cumvent this barrier by suing state officials rather than the state itself, at least if the official was enforcing an unconstitutional state statute. A federal court could enjoin such enforcement, the Court reasoned, because the unconstitutionality of the statute "stripped" the defendant of his official character, turning the suit into one between private parties.\textsuperscript{32}

Justice Powell's treatment of Young is the key to his eleventh amendment analysis in Pennhurst II. He called the Young "fiction" an exception to the "general rule... that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."\textsuperscript{33} Although the relief awarded in Young—an injunction prohibiting a state attorney general from suing to enforce a state statute—looked like relief against the sovereign, Justice Powell stated that the authority-stripping fiction was necessarily invoked to permit a suit to ensure "the supreme authority of the United States."\textsuperscript{34} Furthermore, Justice Powell characterized Young as establishing a narrow exception to state immunity from suit in federal court. His analysis relied heavily on Edelman v. Jordan,\textsuperscript{35} in which the Court held that federal courts may issue only prospective relief in suits where state officials are found to be in violation of federal law. The Edelman rule bars injunctions with retroactive effect, even though such relief would be proper under Young. In Justice Powell's view, Edelman's confinement of Young serves to "preserv[e] to an important degree the constitutional immunity of the States"\textsuperscript{36} without sacrificing the basic function of Young-type suits.

In Pennhurst II the prospective relief ordered below was consistent with the Edelman rule. Thus, it might seem that the Young fiction would permit the suit, even though the ground of relief was state rather than federal law. Justice Powell categorically rejected any such rationale. The justification for Young, he reasoned, was not the lack of effect on the state of a judgment against the stripped official, but the need to promote federal supremacy. No such need is present if the plaintiff seeks relief on state law

\textsuperscript{32} Id. at 159-160.
\textsuperscript{33} 104 S. Ct. at 908, 911 (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam)).
\textsuperscript{34} Id. at 909 (quoting Ex parte Young, 209 U.S. 123, 160 (1908)).
\textsuperscript{35} 415 U.S. 651 (1974).
\textsuperscript{36} 104 S. Ct. at 911.
grounds. For Justice Powell, federal court orders to state officials based on state law constitute a serious “intrusion on state sovereignty.”

Justice Powell also dealt with the dissent’s invocation of an ultra vires exception to the principles of sovereign immunity reflected in the eleventh amendment. He questioned the validity of any such exception, arguing that it would apply only if state officials were acting “without any authority whatever.” The defendants’ operation of the facility in question was not beyond their delegated authority, even if in that operation they committed error. Finally, Justice Powell summarily rejected the argument that plaintiffs’ state law claim was properly before the federal courts under the doctrine of pendent jurisdiction. Although cases might be found that seemed to support such an argument, the short answer to any such contention is that pendent jurisdiction is “a judge-made doctrine” that cannot displace “the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.”

Justice Stevens, in dissent, argued that the eleventh amendment embodies the common law doctrine of sovereign immunity. The fundamental nature of his disagreement with Justice Powell can best be seen in the dissent’s analysis of Young. For Justice Stevens there is nothing fictional about Young; it is not “an unprincipled accommodation between federal and state interests.” Rather, Young was a classic application of sovereign immunity principles: suits against officers are different from suits against the state, and an illegal act, regardless of the source of illegality, “strips the official of his state-law shield, thereby depriving the official of the sovereign’s immunity.” Edelman is not contrary to this interpretation of Young; rather, Edelman reinforces it. The

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37 Id.
38 Id. at 908 n.11 (quoting Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 697 (1982)).
39 Id.
41 104 S. Ct. at 917.
42 Id. at 922 (Stevens, J., dissenting). Justice Brennan authored a short dissent reiterating his view that the amendment is not applicable to suits by in-state plaintiffs. Id. at 921. He also joined in the Stevens dissent.
43 Id. at 933.
44 Id. at 935.
line between injunctive relief and damages mirrors the distinction between the official and the sovereign.\textsuperscript{45}

Justice Stevens also invoked the doctrine of \textit{Siler v. Louisville & Nashville R.R.}\textsuperscript{46} for the proposition that in suits against state officials presenting both state and federal constitutional questions, a court should rely on state provisions, if dispositive, to avoid unnecessary federal constitutional decisions. Although \textit{Siler} is an important case in the development of pendent jurisdiction, Justice Stevens made only passing reference to that doctrine.\textsuperscript{47} He did allude briefly to the argument, developed below,\textsuperscript{48} that the rule of \textit{Pennhurst II} may ultimately be harmful to states.\textsuperscript{49} As a consequence of \textit{Pennhurst II}, whenever plaintiffs such as those in \textit{Pennhurst} bring suits against state officials in federal court, the court may decide the case only on federal grounds. If the state is unhappy with the decision it is virtually powerless to alter it, whereas a decision based on \textit{state} law grounds could be altered by changing that law.\textsuperscript{50}

\textsuperscript{45} Id. at 933 n.29. Justice Stevens characterized the \textit{Edelman} line as one "between actions for injunctive relief and actions for damages." Id. Justice Powell's reading of the \textit{Edelman} distinction as "between prospective and retroactive relief," id. at 911, seems a more accurate characterization. See \textit{Edelman v. Jordan}, 415 U.S. 651, 666-71 (1974).

\textsuperscript{46} 213 U.S. 175 (1909).

\textsuperscript{47} 104 S. Ct. at 941. On the role of \textit{Siler} in the development of pendent jurisdiction, see C. Wright, supra note 2, at 103-04.

\textsuperscript{48} See infra text accompanying notes 64-68.

\textsuperscript{49} 104 S. Ct. at 942.

\textsuperscript{50} The exceptionally acerbic tone of the two opinions toward each other should be noted in passing. Justice Powell's opinion stated that the dissent is "out of touch with reality" and would "emasculate the Eleventh Amendment." Id. at 911. Not to be outdone, Justice Stevens called the majority opinion a "perverse result" and a "voyage into the sea of undisciplined lawmaking." Id. at 922, 944. As with other decisions concerning access to federal courts, the clash of opinions and doctrines in \textit{Pennhurst II} is a sharp reminder of the fundamental difference within the Court over the proper role of article III tribunals in a federal system. See, e.g., \textit{Allen v. Wright}, 104 S. Ct. 3315 (1984) (suit by parents of black schoolchildren challenging tax exempt status of discriminatory private schools dismissed for lack of an actual controversy); \textit{City of Los Angeles v. Lyons}, 461 U.S. 95 (1983) (past exposure to an illegal chokehold used by police does not present a case or controversy that would justify equitable relief, absent a showing that the plaintiff faced a future chance of injury from the challenged practice); \textit{Huffman v. Pursue, Ltd.}, 420 U.S. 592 (1975) (federal courts should not intervene in certain state civil suits unless conducted in bad faith, with intent to harass, or based on a flagrantly unconstitutional state statute).
B. Critics and Consequences

The very little published analysis of *Pennhurst II* that has appeared to date suggests that the decision will play to almost universally hostile reviews.\(^{51}\) For example, Professor Shapiro views the decision as an unfortunate extension of the linkage between the Constitution (i.e., the eleventh amendment) and the doctrine of sovereign immunity, as well as an incorrect expansion of the sovereign immunity defense.\(^{52}\)

Two common themes recur in most of the critical analyses of *Pennhurst II*. The first is that the decision restricts access to federal courts by multiple-claim plaintiffs by biasing the choice of forum in favor of state courts.\(^{53}\) State courts are now the only forums in which all claims, state and federal, can be tried in one proceeding. Yet these courts may be hostile to claims based on federal law.\(^{54}\) (One critic has argued that they may even be hostile to state law claims.\(^{55}\)) The second theme echoes Justice Stevens' dissent. *Pennhurst II* will lead to "greater friction between the federal judiciary and the states"\(^{56}\) because, under the supremacy clause, states cannot alter decisions based on federal law. To assess the validity of these criticisms it will be helpful to review the operational consequences of *Pennhurst II* for plaintiffs and defendants.

Although one plaintiff's lawyer has delineated six alternative methods of proceeding with a *Pennhurst*-type case,\(^{57}\) only two op-

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\(^{51}\) See, e.g., English, The *Pennhurst II* Decision and Its Implications for Foster Care Litigation, 18 Clearinghouse Rev. 33 (1984); Lewin, White's Flight, The New Republic, August 27, 1984, at 17, 19 (*Pennhurst II* will have "sweeping effect on the ability to obtain court relief against state officials."); Neuborne, Taking Away the Right to Sue, The Nation, September 29, 1984, at 268, 270 (*Pennhurst II* example of Burger Court's narrowing of judges' power to grant injunctive relief); Remes, 11th Amendment Reading 'Deeply Unfortunate,' Legal Times, March 28, 1984, at 10; Schwartz, The Eleventh Amendment and State Law Claims, 18 Clearinghouse Rev. 151 (1984); Shapiro, supra note 14.

\(^{52}\) Shapiro, supra note 14, at 79.

\(^{53}\) See Remes, supra note 50, at 11; Schwartz, supra note 51, at 154; cf. English, supra note 51, at 36 (access to federal forums by foster children and their families has been severely restricted by *Pennhurst II*).

\(^{54}\) See English, supra note 51, at 36; Remes, supra note 51, at 11.

\(^{55}\) Remes, supra note 51, at 11.

\(^{56}\) Schwartz, supra note 51, at 153.

\(^{57}\) English, supra note 51, at 36-37. The alternatives are: (1) explore the possibility that the challenged program is run by sub-state officials—counties and other local governments cannot invoke the eleventh amendment; (2) argue that relevant state statutes create a property interest, the deprivation of which presents a federal claim; (3) sue first in federal court
tions appear to be viable. The first is to bring all claims in state court. State courts probably can hear federal claims and, indeed, may be under a duty to do so. Plaintiffs may feel, however, that there is a substantial risk of hostility toward or unfamiliarity with their federal claims. The second option is to proceed in federal court on only the federal claims. This avoids any problems of hostility or unfamiliarity but deprives plaintiffs of the economy and fairness of having all claims litigated in the same lawsuit. It is true that if plaintiffs are unhappy with the federal court's decision they can bring a subsequent suit in state court on the unlitigated state law claim. Under principles of "claim preclusion," the federal decision would not bar the second action. But there is the cost of a second suit, as well as the risk of unfavorable "issue preclusion" from a ruling or finding by the federal court.

Plaintiffs might want to have available the flip-side of this second option: bring the initial suit in state court on the state claims only, with subsequent recourse to federal court on the federal claims. Basic principles of claim preclusion, however, rule out any such option. The black letter law of res judicata is that "a party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion." The recent case of Migra v. Warren City School District Board of Education makes it clear that this doctrine includes federal plaintiffs who have had a prior opportunity to raise

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on federal claims and subsequently in state court on state claims; (4) sue first in state court on state claims and subsequently in federal court on federal claims; (5) choose only one forum and one set of claims; (6) bring all claims in state court. For an extensive analysis of the problems facing plaintiffs in such cases, see Smith, The Eleventh Amendment, Erie, and Pendent State Law Claims, 34 Buffalo L. Rev. ____ (forthcoming 1985).


89 The term "claim preclusion" generally refers to theories of relief that were, or might have been, asserted in a prior suit based on the same factual setting as the second suit in which preclusion is asserted. See C. Wright, supra note 2, at 680-81.

90 "The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Id. at 682 (footnote omitted).

91 Id. at 678 (quoting Hazard, Res Nova in Res Judicata, 44 S. Cal. L. Rev. 1036, 1043 (1971)).

federal claims in state court.\textsuperscript{63}

As this discussion indicates, \textit{Pennhurst II} poses problems for institutional litigation plaintiffs with both federal and state claims.\textsuperscript{64} It does not necessarily follow, however, that \textit{Pennhurst II} is a bonanza for defendants. Justice Stevens and the critics have invoked the spectre of federalization of multi-claim cases. The argument is that states would be better off if judgments against them were rendered on state law grounds since they could, presumably, seek a change in their own law to impose less onerous burdens on their programs and policies. Conversely, any judgment based on federal law is beyond their control.

This argument has two minor flaws. If plaintiffs' state law victory is taken away from them by subsequent changes in that law, they may well be able to reassert their federal claims.\textsuperscript{65} Second, if relief is awarded on federal statutory grounds; the affected state may prevail on Congress to change that law.\textsuperscript{66} Overall, however, the federalization argument has substantial force. This force is enhanced by developments in the law of federal jurisdiction that may seriously impair the ability of private parties to enforce federal statutes either under the implied right of action approach or under

\textsuperscript{63} Id. at 896. \textit{Migra} stands for the proposition that "when a state court judgment is followed by a federal ... civil rights action, the federal court must give the prior judgment the same res judicata effect that the rendering state would give." Shapiro, supra note 14, at 80. But see id. at 81 (expressing "hope" that federal claims need not be asserted in a state suit).

\textsuperscript{64} Such multi-claim cases may be the norm rather than the exception. See English, supra note 51, at 36 (indicating the frequency of multi-claim cases in the foster care context). The \textit{Pennhurst} litigation itself is a classic example of a multi-claim institutional lawsuit. See also Smith v. Robinson, 104 S. Ct. 3457 (1984) (suit on behalf of handicapped child based on state law, federal statutory law, and the Constitution). The extensive volume of \textit{Smith}-type suits demonstrates the difficulty of drawing a line between "public" and private law litigation. Although the suits present claims by individual plaintiffs for individualized relief, any decision will obviously have generalized consequences affecting the conduct of educational programs involving large numbers of children.

\textsuperscript{65} Cf. \textit{Pennhurst II}, 104 S. Ct. at 942 n.46 (Stevens, J., dissenting) (discussing federal decrees based on state law that authorize reopening the decree if state law changes). It is doubtful that principles of either issue or claim preclusion would bar re-assertion of such federal claims in any second suit. It should also be noted that state law may not be as easily changed as suggested; the decision might, for example, rest on the state constitution.

\textsuperscript{66} See generally Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954) (developing thesis that Congress protects states from undue federal intrusion because members will defend interests of states from which they are elected). But see Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 865 (1979) (questioning continued validity of Wechsler thesis).
the express right of action granted by section 1983. If these restrictive trends continue, the resulting paradox might be that Burger Court doctrine has forced federal judges to base any relief granted in institutional and similar suits on the federal Constitution—the one source of law that is virtually unchangeable.

None of the early critics, with the apparent exception of Professor Shapiro, has chosen to take up the cudgels in behalf of Justice Stevens' somewhat labored invocation of an ultra vires exception to sovereign immunity. This is perhaps not surprising given the weakness of the dissent. What is surprising is Justice Stevens' choice to fight the battle on this terrain at all. Despite frequent references to the eleventh amendment as embodying concepts of sovereign immunity, the doctrine simply does not fit neatly within the contours of a federal system. Sovereign immunity precepts developed within a unitary system may have to be altered or disregarded in a dual system in which each of the "sovereigns" can claim hierarchical superiority some of the time. Conversely, principles developed to deal with suits in the courts of one sovereign against an equal foreign sovereign are not directly on point either.

It is impossible to resolve eleventh amendment issues without resort to principles of federalism. Ex parte Young is a good ex-

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67 See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (absent strong congressional intent to the contrary, where a federal statute authorizes enforcement suits, it cannot be assumed that Congress authorized additional private suits by implication); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (adopting a stricter standard for implying rights of action under federal statutes).

68 Indeed, in Pennhurst II Justice Powell invited the lower court, on remand, to consider recent developments involving the constitutional rights of mental patients. 104 S. Ct. at 921 n.35 (citing Youngberg v. Romeo, 457 U.S. 307 (1982)).

69 Shapiro, supra note 14, at 83-85.


72 See, e.g., Baker, supra note 70, at 165-66.

73 209 U.S. 123 (1908).
ample. Most analysts, including one critic of *Pennhurst II,* view *Young* as a fiction. Yet to do so does not, as Justice Stevens disparagingly put it, deprecate *Young* as "merely an unprincipled accommodation between federal and state interests that ignores the principles contained in the Eleventh Amendment." What *Young* did accommodate was a systemic need to avoid the diametrically opposed results that might have been reached: that is, either the amendment bars all suits against state officials if the relief effectively runs against the state, or plaintiffs can simply render the amendment a nullity by suing officials only, cleverly avoiding naming the state as a party.

The commentary on *Pennhurst II's* effect on a plaintiff's ability to choose a forum in a multi-claim case is to some extent weakened by the reliance of such criticisms on the view of state courts as hostile to federal rights. Although this negative attitude toward state courts is one of the shibboleths of academic writing about the Burger Court, the Supreme Court has continued to reject any such view. Paradoxically, another important theme of current writing on judicial enforcement of individual rights is the extent to which state courts invoke state law doctrines to fashion new rights, a development that commentators have largely approved. Regarding the enforcement of federal law by state courts, Professor Bator has offered the interesting theoretical counterpoint that values of federalism might be advanced by letting state courts be the initial interpreters of some federal claims, with the Supreme Court having the final say. For Bator, "in interpreting the constitu-

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74 Remes, supra note 51, at 10.
75 See, e.g., M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 154 (1980) ("There has long existed a legal fiction, most closely associated with . . . Ex *Parte Young*, that when state officers violate the Constitution they lose their status as agents of the State . . . ."); C. Wright, supra note 2, at 289; see also Hart & Wechsler, supra note 58, at 935 (*Young* court "abandoned the use of general principles of common law liability").
76 104 S. Ct. at 933.
77 See sources cited supra note 53.
81 Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030, 1037 (1982).
tional provisions which restrict state power, it may be wise [and] . . . politically healthy to give the state courts the opportunity in the first instance to enforce federal constitutional restrictions on state power.”82 Even more relevant is recent empirical analysis that concludes that “state courts are no more ‘hostile’ to the vindication of federal rights than are their federal counterparts.”83

One way to reformulate the forum-access critique of *Pennhurst II* is to recognize that plaintiffs will almost always bring their claims under section 1983.84 The importance of section 1983 is two-fold. First, it offers federal claim plaintiffs a choice of forum, regardless of the reasons for exercising that choice. The doctrine of pendent jurisdiction maximizes this choice by ensuring that either forum can hear all the claims. Second, most section 1983 suits are brought in federal courts. This helps to preserve the role of the federal courts as the principal interpreters of federal law. Taking away the doctrine of pendent jurisdiction lessens their ability to perform this function because it tilts the multiple-claim section 1983 plaintiff towards state courts. Given these arguments, it is surprising that considerations of pendent jurisdiction played such a minimal role in *Pennhurst II*. To this first puzzle we now turn.

II. THE PUZZLES OF *Pennhurst II*

A. Short Shrift for Pendent Jurisdiction

1. The Doctrine of Pendent Jurisdiction

One of the staples of article III jurisprudence, derived from the 1966 case of *United Mine Workers v. Gibbs*,85 is that the plaintiff in a federal question case may join with his initial federal claim a related state law claim “whenever the state and federal claims ‘derive from a common nucleus of operative fact’ and are such that a plaintiff ‘would ordinarily be expected to try them all in one judicial proceeding.’”86 In *Gibbs*, both the state and federal claims

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82 Id.
84 42 U.S.C. § 1983 (1982). Under Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980), plaintiffs may use § 1983 to assert claims under any federal statute (as well as the Constitution), not merely under statutes protecting civil or equal rights.
86 C. Wright, supra note 2, at 105 (quoting, in part, United Mine Workers v. Gibbs, 383
that the plaintiff sought to bring to federal court grew out of the same transaction and were closely related. This fact-relatedness is at the heart of the Gibbs rule of pendent jurisdiction.87

The doctrine of pendent jurisdiction stems ultimately from the seminal case of Osborn v. Bank of the United States,88 in which Chief Justice Marshall established that a federal court with jurisdiction over a case could hear all issues necessary to decide the matter. Otherwise, it would be exceedingly difficult for federal tribunals to function as courts.89 Pendent jurisdiction serves a number of important interests, including that derived from Osborn of permitting a court to adjudicate all issues that in some sense ought to be before it. Pendent jurisdiction serves the plaintiff's interest in having one forum in which to try all of his claims;90 it also respects the congressional decision that he should have that option.91 Considerations of economy, and convenient and efficient litigation are present as well.92 Fairness to the defendant is not a serious objection to the assertion of these interests, because the defendant is already validly in court and forced to advance arguments concerning the same transaction that gives rise to the pendent state claim.93 Perhaps the strongest argument in favor of pendent jurisdiction is that it serves to vindicate the underlying federal claim embodied in the federal statute or constitutional provision that forms the basis of the case in the first place.94 The logic of the federal system suggests that, at least since the creation of general federal question jurisdiction in 1875, federal tribunals should be available for such claims to insure that federal issues are in the hands of those courts that can apply the maximum expertise

U.S. 715, 725 (1966)). The Gibbs test also requires that the federal claim be substantial. See Matasar, A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction, 17 U.C.D. L. Rev. 103, 123-28 (1983) (characterizing the fact relatedness requirement as "the most significant" element of the Gibbs test).

87 See Matasar, supra note 86, at 128-34.
88 22 U.S. (9 Wheat.) 738 (1824).
89 See Hart & Wechsler, supra note 58, at 922.
91 See Matasar, supra note 86, at 109-10; Note, supra note 89, at 1936.
92 See Matasar, supra note 86, at 104 n.3.
93 Attempts by litigants to add additional parties, as opposed to claims, raise different issues. See infra text accompanying notes 97-100.
94 See Note, supra note 90, at 1942.
and bring about the greatest uniformity of federal law.\textsuperscript{95}

Although the current Supreme Court has shown a willingness to re-examine or tighten the various access doctrines to preserve the strictly limited nature of article III courts,\textsuperscript{96} it has given no indication that the broad pendent claim rule of Gibbs is now in disfavor. For example, in Aldinger \textit{v.} Howard\textsuperscript{97} the Court refused to allow a section 1983 plaintiff to join a pendent party defendant. In denying joinder, Justice Rehnquist, writing for the majority, took pains to distinguish the plaintiff's effort to bring in a pendent party from the joinder of pendent claims in Gibbs. Indeed, he referred to a line of cases "from Osborn to Gibbs" that demonstrates that "where non-federal questions or claims were bound up with the federal claim upon which the parties were already in federal court, this Court has found nothing in Art. III's grant of judicial power which prevented adjudication of the nonfederal portions of the parties' dispute."\textsuperscript{98} In Owen Equipment and Erection Co. \textit{v.} Kroger\textsuperscript{99} the Court refused to allow the plaintiff in a diversity case to name as an additional defendant a corporation that had been impleaded as a third party defendant by the initial defendant. Although the majority opinion noted a close relationship between cases in which joinder of parties is sought and those in which the joinder involves claims, it stressed the distinction between the two, noting that in the Gibbs context of pendent jurisdiction the defendant is already in court and is defending essentially "one action."\textsuperscript{100} Thus there is no indication that these recent denials of pendent party jurisdiction cast any doubt on the continuing validity of Gibbs.

\textsuperscript{95} Id. at 1942-43. But see Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262, 265 (1968) (arguing that the Gibbs doctrine raises serious federalism issues by forcing a substantial body of state law litigation into federal courts).

\textsuperscript{96} See, e.g., Valley Forge Christian College \textit{v.} Americans United for Separation of Church and State, 454 U.S. 464 (1982) (church-state separation organization does not have standing to challenge an allegedly unconstitutional federal land transfer to a religious college absent a showing of personal injury); see also Cannon \textit{v.} University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting) (suggesting a stricter standard for implying rights of action under federal statutes because of article III limitations).

\textsuperscript{97} 427 U.S. 1 (1976).

\textsuperscript{98} Id. at 9.


\textsuperscript{100} Id. at 370.
2. Why Should One Judge-Made Doctrine Prevail Over Another?

In his dissenting opinion in *Pennhurst II*, Justice Stevens stated that the issue of the pendent state law claim could be solved easily by the somewhat automatic application of sovereign immunity precepts. Justice Powell, on the other hand, was surely correct in approaching *Pennhurst II* as a difficult case that involved the balancing of important policies. Yet he dismissed pendent jurisdiction as “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.”

This doctrine, whatever its merits, could not displace “the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.”

Justice Powell’s disparate treatment of these two doctrines is curiously simplistic. Eleventh amendment jurisprudence is surely as much judge-made as any other aspect of article III lore. Consider a case in which the defendant state official invokes the *Edelman* rule of prospective versus retroactive relief. At least four elements of judge-made fiction are present. First, the literal language of the eleventh amendment does not even apply, assuming that the suit is by citizens of the same state. Second, there is the classic *Young* fiction that the suit is between two private parties. Third is the unexplained mystery of how such a suit is governed by the federal law ground of the fourteenth amendment, which speaks only to states. Finally, there is the highly problematical validity of the line drawn in *Edelman*, which attempts to accurately distinguish suits between states from suits against state officials. Indeed, one might view as a fifth fiction the notion that the problems in such cases are “jurisdictional.” Unlike the other limitations in article III, the eleventh amendment can be waived. Recognizing that eleventh amendment decisions are grounded in “principles of federalism,” Justice Powell ought to have spent considerably more time balancing these policies against the important article III principles underlying the *Gibbs* doctrine of pendent jurisdiction. All the classic rationales for pendent jurisdiction were present in *Pennhurst II*,

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101 104 S. Ct. at 919.
102 Id. at 917.
104 104 S. Ct. at 911.
including that of avoiding federal constitutional questions when a state law ground is present. Thus, the Court should have framed the issue as whether these considerations take precedence over the eleventh amendment policy of protecting states from suits in federal courts.

The only aspect of Justice Powell’s opinion that might help to answer this question is his conclusion that a federal court directive to state officials based on state law involves a major “intrusion on state sovereignty.”\textsuperscript{105} It is not immediately clear why this is so. After all, the federal trial court, under well-recognized \textit{Erie} principles,\textsuperscript{106} is forced to apply the law that the state itself has formulated to govern the situation at hand. This would seem somewhat less intrusive than forcing officials to adhere to norms promulgated by another sovereign. Perhaps the intrusion really consists of forcing the defendant officials into federal court, but this argument obviously fails because they are already in that court due to the existence of federal questions. The validity of their presence in federal court was settled by \textit{Young}. The weakness of Justice Powell’s analysis is highlighted by the contrast between his brief assertion about state sovereignty and the careful analysis by the Court in \textit{National League of Cities v. Usery}.\textsuperscript{107} Regardless of the current status of that decision, and whatever one thinks of its correctness, Justice Rehnquist’s majority opinion indisputably went to some lengths to demonstrate how federal wage and hour legislation might well limit the freedom of state and local governmental choices about the delivery of services.\textsuperscript{108} There is no similar analysis in \textit{Pennhurst II}.

The history of the eleventh amendment may supply a partial justification for Justice Powell’s conclusion. A recent analysis of the amendment by Professor Fletcher relies heavily on the drafters’ concern about suits against states based on state law, as opposed to private federal question suits.\textsuperscript{109} He views the latter as

\textsuperscript{105} Id.
\textsuperscript{106} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64 (1938).
\textsuperscript{108} 426 U.S. at 844-52.
\textsuperscript{109} Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983).
posing a new problem to which the drafters of the original Constitution and the amendment had not yet formulated clear answers. On the other hand, well recognized principles of sovereign immunity protected states from suits under their own law to which they did not consent. This was "essentially a variant on the familiar sovereign immunity question of whether a sovereign could be made judicially liable without its consent under its own law—a question on which writers from Bodin to Blackstone were unanimous that it could not." Perhaps Justice Powell had this history in mind. It certainly buttresses his conclusion. Yet, given the highly policy-oriented construction that the modern Court has applied to the amendment, it is far from clear that the issue of intrusion can be answered by resort to Bodin and Blackstone.

In sum, the short shrift that the majority gave to the doctrine of pendent jurisdiction is one of the puzzles of Pennhurst II. Perhaps the answer is to be found in the larger context of the current Court's reservations about institutional litigation. As Justice Powell noted in Pennhurst II, suits in which federal courts are asked to oversee the activities of state officials pose serious questions of "comity and federalism." Pennhurst II might thus be rationalized as another step in an overall process of making it harder to bring such suits in federal courts. Yet it is unclear how much of a gain the decision represents for those who oppose institutional litigation. To begin with, the decision is of absolutely no help to the beleaguered local officials who cannot invoke whatever protection the eleventh amendment gives to their state counterparts. Even at the state level, the decision is a mixed blessing for defendants. It will take time to see how Pennhurst II shakes out in the real world of litigation, but given the resourcefulness of plaintiffs' lawyers, even states may not find themselves appreciably bet-

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110 Id. at 1069-70.
111 It is also worth noting that Justice Stevens might have found a more persuasive basis for his dissent had he relied primarily on pendent jurisdiction rather than the law of sovereign immunity.
112 104 S. Ct. at 910 n.13.
113 Cf. Taylor, Whoever Is Elected, Potential Is Great for Change in High Court's Course, N.Y. Times, October 21, 1984, at 30, col. 5 (Reagan supporter predicts that a more conservative Court will restrict access doctrines even further).
114 But see Shapiro, supra note 14, at 81 (suggesting that "the Court may be planning to rethink" the applicability of the eleventh amendment to local governments).
115 See supra text accompanying notes 64-68.
ter off. In this respect, it is noteworthy that the Court might well have decided the case in defendants' favor on an alternative ground: that principles of comity and federalism limit the intrusiveness of the relief that federal courts may grant, and that the decree below ran contrary to these overriding principles. In other words, Pennhurst II presented the Court with an opportunity to cut back on institutional litigation by providing remedial guidelines for the lower courts. Such guidelines might reduce the friction produced by such suits while still allowing them to be brought. The Court's failure to take this route is another one of the puzzles of Pennhurst II.

B. Public Law Litigation in the Burger Court—Remedies as a Middle-ground?

The debate over public law litigation stems largely from the seminal article by Professor Chayes about the role of the judge in public law suits.\(^{116}\) According to Chayes, such suits are grievances about the conduct or content of governmental policy and represent a fundamentally different model from a private bipolar suit for money damages.\(^{117}\) Public law suits are characterized by an amorphous and changing party structure and controversy; an essentially prospective rather than historical orientation; forward-looking relief not necessarily derived logically from the right asserted; and continuing judicial involvement, with an active judge responsible for "organizing the case and supervising the implementation of relief."\(^{118}\)


\(^{117}\) Id. at 1285-88.


Although broad, Professor Chayes' terminology might seem to exclude such classic examples of public law suits as the taxpayers' challenge in Flast v. Cohen, 392 U.S. 83 (1968), to governmental expenditures in aid of a religious organization. In a recent essay on the future of public law litigation, Professor Fallon has suggested that there is no need for a strict definition of public law suits, and that one should recognize that the term embraces a large number of suits such as class actions, taxpayer challenges of the Flast variety, and suits to restructure the operations of governmental institutions and programs. Fallon, supra note 7, at 3. Within the overall area of public law litigation, Professor Fallon finds that it is useful to distinguish between "non-Hohfeldian" plaintiffs who seek to redress injuries essentially to the public at large, and suits in which plaintiffs seek structural or "institutional" relief. Id. at 3-4 & n.15. Much of Professor Chayes' work and the massive volume of literature that it has generated deals with the latter type of law suit.
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How has the Burger Court reacted to the extraordinary increase in the volume of public law litigation, however defined? Although the results are mixed, one can clearly discern reservations and even hostility toward the overall phenomenon as well as toward particular subsets of lawsuits.\(^1\) Perhaps the most obvious example of this response is in suits brought by non-Hohfeldian\(^2\) plaintiffs such as taxpayers and advocacy groups. As cases such as *Valley Forge Christian College v. Americans United for Separation of Church and State*\(^3\) demonstrate, a majority of the current Court has erected standing into a formidable barrier to suits by any such private attorneys general.\(^4\) Such a result is hardly surprising given the Court's emphasis on the limited role of article III courts generally. With regard to institutional litigation, the results have been considerably more mixed, and the Court has upheld broad remedial decrees involving both schools and prisons.\(^5\) Again, the result is not surprising given the moral capital that *Brown v. Board of Education*\(^6\) bestowed upon such activities by the federal judiciary. At the same time, the Burger Court has noted that this type of lawsuit necessarily puts the federal judiciary in direct conflict with state and local governments.\(^7\) Any such conflicts run counter to the notion of deferential federalism that has become a hallmark of Burger Court jurisprudence.\(^8\) Thus, there is an inevitable clash between plaintiffs who want to resort to federal courts for relief from grievances with state and local governments, and the Burger Court, which wants to keep the federal judiciary out of such situations.

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1. See generally Chayes, supra note 118 (critically reviewing developments in “three procedural areas of importance for the concept of public law litigation: standing, class actions, and remedial discretion.”).
2. See, e.g., Fallon, supra note 7, at 3-4.
8. The best example of deferential federalism is the line of cases extending Younger v. Harris, 402 U.S. 37 (1971). See generally C. Wright, supra note 2, at 320-30 (discussing the *Younger* line of cases under the rubric “Our Federalism”).
The most important statement by the Court suggesting restraint in this area is Justice Rehnquist's opinion in *Rizzo v. Goode.*\(^{127}\) *Rizzo* involved a challenge to various procedures of the Philadelphia Police Department in which plaintiffs sought a broad restructuring of the department’s operations. The Supreme Court ordered the case dismissed on what appear to be three alternative grounds. Justice Rehnquist first questioned whether the individual plaintiffs had suffered specific injuries that would grant them standing to challenge department operations.\(^{128}\) Second, because the claims appeared to focus on actions by individual officers rather than on overall city or department policy, they were not actionable under section 1983.\(^{129}\) Although the opinion might well have stopped there, Justice Rehnquist went on to note that granting the relief requested would put the district court in something of a supervisory capacity vis-à-vis the police department. Analogizing from the line of cases that cautions against federal interference with state *judicial* proceedings,\(^{130}\) Justice Rehnquist reasoned that the same principles of comity and federalism “likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here.”\(^{131}\)

The leap from the judicial context to the police practices at issue in *Rizzo* was substantial. *Younger v. Harris,*\(^{132}\) the foundation of this particular form of “abstention,” was clearly grounded, in part, on historical doctrines concerning the interrelationship between the systems of law and equity.\(^{133}\) Although Justice Black’s opinion in *Younger* rested on general principles of federalism as well, the line of post-*Younger* cases emphasizes the special factors cautioning against the interference with state judicial systems that section 1983’s equitable relief would entail.\(^{134}\) For a time, it seemed that

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\(^{128}\) Id. at 371-73.
\(^{129}\) Id. at 373-77.
\(^{130}\) See supra note 126.
\(^{131}\) 423 U.S. at 380.
\(^{133}\) Id. at 43-44.
\(^{134}\) See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592, 603-09 (1975).
Rizzo would be of little generative force.\textsuperscript{135}

In \textit{City of Los Angeles v. Lyons},\textsuperscript{136} however, Rizzo made a remarkable comeback. Lyons involved a challenge to the "chokehold" practices of the Los Angeles Police Department. A majority of the Court held that the individual plaintiff lacked standing to seek injunctive relief against any such practices and, as an alternative holding, that under principles of equity he was not in a position to seek an injunction. The opinion relied in part on Rizzo for both grounds, adopting Justice Rehnquist's rationale that principles of \textit{Younger} deference should apply to non-judicial officials in their enforcement of state law.\textsuperscript{137} Lyons can be seen as another example of the Burger Court's hostility to public law litigation and its willingness to use access doctrines to bar such suits from the federal courts.\textsuperscript{138} The decision in \textit{Pennhurst II} also fits this pattern. The multi-claim plaintiff is barred from bringing the state claim to federal court. The net result may effectively be to bar his entire case from federal court by creating strong inducements to bring it in state court.

The question arises whether such an either/or attitude toward public law litigation is the only alternative available. One might grant the Court's premise—that institutional law suits in particular raise serious problems of comity and federalism—without necessarily concluding that such suits should never be brought in a federal tribunal. A possible middle ground might be to limit the relief awarded. Such a limit could be derived from the same principles of comity and federalism that trouble the Court in this context.\textsuperscript{139} One of the most interesting aspects of \textit{Pennhurst II} is that

\textsuperscript{135} See Howard, supra note 14, at 427-28.

\textsuperscript{136} 461 U.S. 95 (1983).

\textsuperscript{137} Id. at 112.

\textsuperscript{138} See, e.g., Fallon, supra note 7; Note, Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of Lyons, 25 B.C.L. Rev. 765 (1984).

\textsuperscript{139} Professor Fallon has suggested that a relief-based approach would have been preferable to the constitutionalization of the access issue in cases like Lyons, although he admits that formulating guidelines to control remedial discretion is no easy task. Fallon, supra note 7, at 43, 64. Perhaps the principal problem is that a trial court's remedial choices generally escape any meaningful review at the appellate level. Id. at 41. Nonetheless, Professor Fallon argues that "the familiar framework of equity" offers meaningful alternatives. Id. at 43. For example, federal courts might develop standards that establish presumptions in favor of the least coercive forms of relief available to the court. Id. at 46. Thus, "declaratory judgments and negative decrees, forbidding or limiting unconstitutional practices, generally should be preferred to a court's affirmatively restructuring the operation of some state or local institu-
the Court was asked to decide the case in defendant's favor on the
ground that the relief granted was an abuse of discretion. Thus, the Pennhurst Court might well have seized the opportunity to lay
down guidelines for lower courts based on the principles of comity
and federalism that Rizzo now arguably makes applicable to all
suits involving the activities of state and local governments. In-
deed, the Court suggested that it was prepared to do so, but still
refused to bite the bullet. Perhaps the Court is simply opposed
to such suits and will invoke access doctrines to prevent their be-
ing brought whenever possible. Alternatively, the Court may feel
that whatever guidelines it does enunciate in this area simply will
not be followed by district judges. In this respect, the experience
with the short-lived right-remedy linkage in the school desegrega-
tion context may be an important factor. If Congress success-
fully overturned the access decisions, however, the Court would
then be confronted with the task that it hinted in Pennhurst II it

Other commentators have also suggested ways of controlling the remedial discretion of the courts. Professor Fletcher suggests that a presumption of illegitimacy attaches to the remedial discretion of a district court in institutional cases because the court in such cases is
taking over the political function ordinarily "fulfilled by a politically responsive entity." Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 653, 693 (1982). In Professor Fletcher's view, however, this presumption against the exercise of remedial discretion can be overcome where there is a "demonstrated unwillingness or incapacity of the political body" to resolve the problems giving rise to the suit. Id. at 694. As for specific guidelines, Professor Frug suggests that, in shaping remedies, the courts should have limited ability to order the state to spend money. Frug, The Judicial Power of the Purse, 126 U. Pa. L. Rev. 715, 787-94 (1978). He argues that the courts should allow the legislature to retain the discretion to raise and allocate funds by providing the legislature more time to comply. Id. at 788-89. In addition, Professor Frug maintains that the courts should refrain from ordering detailed plans for the states to implement; instead, he suggests that "the courts should adopt their requirements in the form of generally stated constitutional standards and should allow sufficient executive flexibility to enable the states to design their implementation." Id. at 790.

In its one attempt to formulate an overall remedial principle for cases such as those under discussion, the Supreme Court suggested that the remedy granted should be commensurate with the violation of the underlying right. Milliken v. Bradley, 418 U.S. 717, 738 (1974). As Professor Chayes demonstrates convincingly, this right-remedy linkage has not proven workable in practice, and it has been essentially abandoned by the Court. Chayes, supra note 118, at 47-55. Professor Chayes agrees with the Court's decision not to pursue this line but is somewhat ambiguous on whether an alternative law of remedies governing public litigation is likely to surface. Id. at 55-56.

140 104 S. Ct. at 906.
141 Id. at 910 n.13.
142 See supra note 139.
might undertake. In other words, a federalism-based jurisprudence of remedies would emerge from a Supreme Court forced to permit institutional litigation, but determined to minimize the frictions that such suits create. This assumes that Congress would leave to the judiciary the last word on the remedial aspects of institutional suits, a result that the Court would surely strain to reach.143 In any event, for such a scenario to unfold, Congress would first have to remove one or more of the bars to institutional litigation that the Court has erected. Pennhurst II may be a prime candidate for such congressional action. The doctrinal obstacles to such action, however, are substantial indeed.

III. OVERTURNING Pennhurst II AND Article III—A QUESTION OF PROTECTIVE JURISDICTION?

A. Article III and the Eleventh Amendment—An Overview

The line of cases from Hans v. Louisiana144 to Pennhurst II adds a substantial gloss to the eleventh amendment, a gloss that, in turn, must be read into article III. A partial updating of the amendment might look something like this:

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 that state, by Citizens of another state, or by Citizens or Subjects of any Foreign State. In any case arising under the Constitution, laws or treaties of the United States in which a state official is a party defendant, and in which any relief awarded would in fact operate against the State, a federal court shall have jurisdiction to order prospective relief only. In any such suit a federal court shall have no jurisdiction over claims based on state law even though such claims derive from the same basis of operative fact as those arising under the Constitution, laws, or treaties of the United States.145

The net result of this development is an expansion of the protection afforded to states against suits in federal tribunals, and a corresponding restriction on the ability of persons with grievances

143 See Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (equitable jurisdiction of federal courts is only limited by a clear and valid command of Congress).
144 134 U.S. 1 (1890).
145 This “restatement” is not complete. For example, it does not deal with congressional power to override the amendment.
against state governments to resort to those tribunals. If would-be plaintiffs turn to Congress to rectify what they perceive to be an imbalance by, for example, overturning the result in *Pennhurst II*, would Congress have the power to do so? Any such statute would, in effect, authorize federal courts to hear matters deemed to be outside article III as limited by the amendment. After *Marbury v. Madison* the answer would seem to be “no.” *Marbury* stands for both the general proposition that the Court is the final arbiter of the meaning of the Constitution and the specific proposition that Congress may not enlarge the jurisdiction of the federal courts.

Notwithstanding Justice Frankfurter’s admonitions about the precision of article III, the question is not easy and the answer is not necessarily “no.” As a starting point, it must be noted that the eleventh amendment is not purely “jurisdictional” in the article III sense. A state, for example, may waive its immunity. The Court has also established that Congress has some ability to override that immunity, although this authority may be limited to the exercise of specific grants of power. Alternatively, an attempt to overturn *Pennhurst II* might be based on the doctrine of protective jurisdiction. This approach would not be limited to the exercise of any particular congressional power. Thus, it offers the possibility of a broad-scale overturning of the decision and will be considered first.

**B. The Concept of Protective Jurisdiction**

Under article III, section 2, Congress may confer jurisdiction over cases arising under the Constitution and laws of the United States upon any inferior tribunals that it chooses to create. Federal courts, however, are not limited to federal law disputes. Article III permits jurisdiction over certain nonfederal cases delineated essentially by the citizenship of the parties.

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146 5 U.S. (1 Cranch) 137 (1803).
148 See infra text accompanying note 274.
149 See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (Congress has power to enforce the fourteenth amendment against the states “by appropriate legislation” notwithstanding the eleventh amendment).
150 The first paragraph of § 2 sets out the various cases to which the judicial power of the United States extends.
151 Article III, for example, extends federal jurisdiction to controversies between citizens
Are the instances specified in article III, section 2 (the so-called "party clauses") the only ones in which Congress may authorize federal courts to entertain cases not governed by any federal rule of decision? Congress might, for example, wish to extend the availability of federal tribunals to individuals beyond those enumerated. Alternatively, Congress, as part of an ongoing federal program, might wish to place all disputes respecting the program in a federal court, even if state law governed in particular instances. Such statutes may go beyond the carefully defined limits of article III unless one accepts the bootstrapping argument that because these jurisdictional statutes are laws of the United States, cases brought pursuant to them "arise under" them. To be valid, these enactments might require the exercise of some congressional power other than the grant of power to implement article III.

These constitutional issues are part of the debate over "protective jurisdiction," defined by one commentator as the "vesting by Congress of power in the federal courts to adjudicate cases which do not directly present issues of substantive federal law." Although the concept of protective jurisdiction has generated a substantial body of academic writing, its validity is uncertain, particularly because the Supreme Court recently sidestepped a clear opportunity to address the issue. A statute passed to overturn Pennhurst II might be analyzed as an attempt to exercise protective jurisdiction. The analogy is not perfect, because protective jurisdiction issues usually arise in the context of Congress' power over cases rather than over individual claims within a particular case. Nonetheless, similar considerations are present. The pen-
dent claim against a state official raises issues of nonfederal law between nondiverse parties. The claim is outside article III, as limited by the eleventh amendment after Pennhurst II. Consequently, it is necessary to examine whether Congress can go beyond the apparent limits of article III. There exist both precedent and analysis suggesting that it can.

C. Protective Jurisdiction—The Cases

On several occasions, the Supreme Court has come close to adopting some form of a protective jurisdiction doctrine. At no point, however, has a majority stepped forward to embrace the doctrine. The starting point is Chief Justice Marshall’s opinion in Osborn v. Bank of the United States.158 A majority of the Court upheld a jurisdictional provision in the Bank’s act of incorporation that authorized it to sue in any court including the federal trial courts. The major question before the Court was whether such a jurisdictional grant would be constitutional in cases in which the Bank was suing on purely state law claims. Marshall insisted that these cases posed no constitutional problem because they arose under the laws of the United States. The opinion appears to stand for the proposition that jurisdiction is proper because federal defenses such as the Bank’s right to sue or to make a particular contract were potentially part of a case whether the defendant raised them or not.159 Indeed, Marshall appears to have included within these potential federal questions issues that had already been litigated, but that might be raised again.160

Marshall’s opinion clearly stretches the concept of “arising under” to the breaking point, if not beyond.161 Congress could not

Cases removable to a federal forum because they fall within the original jurisdiction of the district courts. This subsection permits joinder of “separate and independent” claims that are removable and “one or more otherwise non-removable claims or causes of action.” The provision might be viewed as directly on point—a claim-specific example of jurisdiction beyond that seemingly permitted by article III. Unfortunately, the numerous analyses of § 1441(c) deal only with whether it is or is not within article III without addressing the issue of Congress’ ability to expand jurisdiction in removal or any other context. They offer no insight into means by which Congress might overturn Pennhurst II.

158 22 U.S. (9 Wheat.) 738 (1824).
159 See M. Redish, supra note 75, at 55-56.
160 22 U.S. (9 Wheat.) at 824.
161 Later cases have, in fact, cast doubt on the continuing validity of the Osborn rationale. See, e.g., Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214-15 (1921) (Holmes, J.,
have created substantive law to govern every one of the Bank's transactions, but the strong federal interest in ensuring the bank's ability to function justified making the federal forum available. This analysis of Osborn is appealing, but it has two serious flaws. First, in the case itself Marshall did not proffer any such justification for the result he reached. Second, subsequent Supreme Court decisions treating Osborn as a correct interpretation of the Constitution have done so on the basis that a broad reading of "arising under" is indeed proper.

The so-called bankruptcy cases may provide stronger support for a theory of protective jurisdiction. These cases, with little discussion, upheld provisions of the bankruptcy statutes permitting the trustee to sue in federal court on state law claims of the bankrupt. In the absence of diversity of citizenship in a particular case, hearing these claims would seem to be justifiable only under a protective jurisdiction rationale. Arguably, such suits are ancillary to the overall bankruptcy proceeding and therefore also arise under federal law. Alternatively, one might analogize to Osborn and argue that jurisdiction should be based on potential federal law challenges to the trustee's authority. On balance, however, the bankruptcy cases do look like protective jurisdiction in the flesh, despite the absence of any such language or analysis on the part of the Court.

Any discussion of protective jurisdiction raises difficult issues. In (dissenting) (Osborn "has been criticized and regretted"). Thus, some commentators, notably Professor Mishkin, have argued that "the purpose of the Osborn decision was the protection of the Bank in all its legal relations, including those governed wholly by state law." Mishkin, supra note 155, at 187.

162 See Mishkin, supra note 155, at 189.
163 See id. at 188; Note, supra note 155, at 972.
165 See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492 (1983) (referring to Osborn as the "controlling decision on the scope of Article III 'arising under' jurisdiction").
169 See Note, supra note 155, at 982.
National Mutual Insurance Co. v. Tidewater Transfer Co.," Justice Jackson advanced a solution that would remove these difficulties. Tidewater involved a statute permitting citizens of the District of Columbia to sue citizens of states in the federal courts. The constitutional problem arose from the Court's early declaration that citizens of the District of Columbia did not have the same status as citizens of the several states. Thus, a state-law based suit between a citizen of the District and a state citizen would not satisfy the diversity of citizenship requirement for jurisdiction under article III.

Justice Jackson's plurality opinion brushed aside any article III objections by asserting that the judicial power of the United States is not limited to the subjects specified in article III. He contended that Congress, in the exercise of its article I powers, might place additional classes of cases in the federal courts, provided that the cases did not involve any nonjudicial duties. Moreover, Congress could provide a forum only, with the law to be derived from a nonfederal source. Justice Jackson relied in part on the arcane jurisprudence concerning the difference between article III courts and article I (or legislative) courts. The law at the time appeared to prevent article I courts from entertaining article III business, while permitting article III courts to hear the same types of matters as article I courts. Thus article I could be an additional source of federal court jurisdiction, independent of article III.

For Justice Jackson, the bankruptcy cases were another important illustration of the role of article I. In exercising its power over bankruptcy matters, "Congress may add to [the federal courts'] jurisdiction cases between the trustee and others that, but for the bankruptcy powers, would be beyond their jurisdiction because of lack of diversity required under Art. III." The bankruptcy cases

170 337 U.S. 582 (1949).
172 Nor would it satisfy any of the other party clauses.
173 337 U.S. at 590-91.
174 This jurisprudence has been described as one of the most confusing and controversial areas of constitutional law. Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962) (Harlan, J., plurality opinion). For a recent discussion of the distinction, see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
175 See Williams v. United States, 289 U.S. 553 (1933).
176 See Tidewater, 337 U.S. at 592-97.
177 Id. at 594.
thus stand for a more general proposition: "Congress [has] power
to authorize an Art. III court to entertain a non-Art. III suit be-
cause such judicial power [is] conferred under Art. I."\textsuperscript{178}

As for the \textit{Tidewater} case itself, the statute stood because two
Justices agreed with Justice Jackson that it was a valid exercise of
congressional power over the District of Columbia and two others
were willing to declare the District a state.\textsuperscript{179} The six Justices who
were not members of the plurality, however, expressed strong res-
ervations about Justice Jackson's analysis.\textsuperscript{180} His approach is
troubling because it substantially erodes the notion of federal
tribunals as courts of limited jurisdiction, a notion reflected by the
enumerations of article III. In particular, a large body of state law
disputes could be transferred to federal courts without regard to
the citizenship of the parties, as long as Congress exercised an arti-
cle I power in transferring them. Given the scope of article I, these
fears are hardly imaginary. Commentators have labored to pre-
serve the concept of protective jurisdiction in a form somewhat less
broad than Justice Jackson's.\textsuperscript{181} In 1983, the Court had an oppor-
tunity to do the same, but declined to accept it.

\textit{Verlinden B.V. v. Central Bank of Nigeria}\textsuperscript{182} was a suit between
two foreign entities brought in federal district court pursuant to
the Foreign Sovereign Immunities Act (FSIA).\textsuperscript{183} The FSIA sets
forth a general statement of sovereign immunity for foreign states,
with certain specified exemptions.\textsuperscript{184} If a suit falls within one of
the exemptions it may be brought in either state or federal
court.\textsuperscript{185} The FSIA furnishes no substantive rules to govern the un-
derlying controversy. In \textit{Verlinden} itself the case clearly would be
decided under nonfederal law.\textsuperscript{186} Thus, the case appeared to pre-
sent a classic example of a congressional attempt to confer protec-
tive jurisdiction: the FSIA makes a federal forum available without

\textsuperscript{178} Id. at 595 (citing Schumacher v. Beeler, 293 U.S. 367 (1934)).
\textsuperscript{179} See id. at 623-26 (Rutledge and Murphy, JJ., concurring).
\textsuperscript{180} Id. at 626 (calling the analysis "a dangerous doctrine").
\textsuperscript{181} See authorities cited supra note 155.
\textsuperscript{182} 461 U.S. 480 (1983).
\textsuperscript{185} The Act favors federal adjudication by permitting removal. See 28 U.S.C. § 1441(d)
(1982).
\textsuperscript{186} According to the Court, the parties had stipulated that the contract would be governed
by Dutch law. 461 U.S. at 482.
providing any other law for a case to “arise under.”

The Court of Appeals for the Second Circuit upheld a dismissal of the suit, ruling that the FSIA’s jurisdictional grant was beyond the limits imposed by article III. In a unanimous, relatively brief, opinion the Supreme Court reversed, using an analysis that made the whole problem seem easy. Chief Justice Burger, for the Court, first adduced the broad reading of Osborn as the correct interpretation of article III’s “arising under” language. The Chief Justice agreed with Marshall that “Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law.” Whatever the outer limits to that theory’s validity, there is no problem in FSIA suits: in every case the trial court must determine whether immunity is available, regardless of whether the defendant has asserted an immunity defense.

The second step in Chief Justice Burger’s analysis was to overcome any constitutional doubts created by the fact that FSIA suits appear to “arise under” a purely jurisdictional statute. He finessed any such objection by declaring the FSIA a “comprehensive regulatory statute” that creates “substantive federal law.” The accuracy of this characterization is far from evident. The FSIA itself refers to “jurisdiction,” and the Chief Justice noted that “a major function of the Act as a whole is to regulate jurisdiction of federal courts over cases involving foreign states.” On the other hand, one commentator has suggested that the FSIA is more than purely jurisdictional because it “provides a legal standard that must be applied not only by the federal courts, but also by state

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188 See The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 212 (1983) [hereinafter cited as Supreme Court Note].
189 461 U.S. at 492.
190 Id. (emphasis added).
191 Id. at 493 n.20.
192 These doubts prompted the Second Circuit to uphold dismissal of the suit. See 647 F.2d at 328-29.
193 461 U.S. at 497.
195 461 U.S. at 495 n.22.
Enlarging Federal Jurisdiction

For present purposes it is perhaps enough to note that the FSIA certainly looks like an exercise of protective jurisdiction and that, unlike the Second Circuit, the Supreme Court manifested a decidedly hospitable approach to suits brought under the Act. The Court emphasized the strong congressional interest in suits against foreign states and noted that channelling such suits into federal tribunals furthers this interest. This is the language of protective jurisdiction, whatever the analysis. In light of Verlinden, it is particularly timely to re-examine the extensive academic debate over the possibility of protective jurisdiction as well as its limits.

D. Protective Jurisdiction—The Theories

Although the cases just discussed may support the existence of some form of protective jurisdiction, the only Supreme Court opinion dealing with the issue at any length is an elaborate dissent by Justice Frankfurter that rejects any such concept. While the Court has tread lightly, commentators have been eager to jump in. Indeed, protective jurisdiction has become one of the staples of the overall lore of federal courts. The two principal theories supporting the doctrine are those put forward by Professors Wechsler and Mishkin. This section will discuss and evaluate each theory. The following section will apply Professor Mishkin’s theory to a hypothetical statute designed to overturn Pennhurst II.

Professor Wechsler’s theory is the more expansive. He takes Osborn beyond cases that might involve a proposition of federal law “to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court.” Because the power to legislate

196 Supreme Court Note, supra note 188, at 214 (footnote omitted).
197 See generally Note, supra note 155, at 1003-14 (applying the theory of protective jurisdiction to the FSIA).
198 461 U.S. at 493.
199 Id. at 497.
201 See Note, supra note 155, at 936 n.23 (listing commentary on protective jurisdiction).
202 Mishkin, supra note 155; Wechsler, supra note 155.
203 Wechsler, supra note 155, at 224.
with respect to a matter constitutes a potential displacement of state law, it must include the "lesser step" of displacing the state tribunals only, while leaving the states as the operative lawmakers.\textsuperscript{204} Wechsler notes, candidly, that when Congress takes this route cases would "arise under" the jurisdictional provision.\textsuperscript{205}

Wechsler's thesis certainly would permit broad recourse to the federal courts. It bears a strong similarity to Justice Jackson's notion of judicial power conferred under article I, and is subject to the same criticisms.\textsuperscript{206} The thesis would seriously erode article III's limitations on federal jurisdiction. There are other problems, not the least of which is the notion that a case can arise solely under the jurisdictional statute that authorizes it to be brought. Some have questioned the "assumption that the power to legislate substantively somehow includes the power to provide jurisdiction alone."\textsuperscript{207} On the other hand, it has been argued that Professor Wechsler's approach does not go far enough, because it does not embrace areas in which Congress has an interest but lacks the power to legislate.\textsuperscript{208}

A more subtle objection to Wechsler's thesis is its apparent linkage of the lawmaking power of Congress to that of the federal courts. Any such linkage poses serious problems in light of \textit{Erie Railroad Co. v. Tompkins}.\textsuperscript{209} \textit{Erie} dealt not only with the relationship between federal and state law, but also with the allocation of lawmaking competence at the federal level. \textit{Erie} can be read for the proposition that both the doctrine of separation of powers and principles of federalism establish the primary role of Congress as the national lawmaking body.\textsuperscript{210} The creation of federal common law is universally viewed as a somewhat narrow exception to this norm.\textsuperscript{211} Yet a protective jurisdiction statute of the type envisaged by Professor Wechsler is an invitation to the federal courts to make law.

\textsuperscript{204} Id. at 224-225.
\textsuperscript{205} Id. at 225.
\textsuperscript{207} M. Redish, supra note 75, at 62.
\textsuperscript{208} Note, supra note 155, at 961.
\textsuperscript{209} 304 U.S. 64 (1938).
Any potential *Erie* problem might seemingly be countered by the argument that the law in question is state, not federal. The very reason for Congress' establishing such a jurisdiction in the federal courts, however, is the likelihood that litigants would resort to it. Even if jurisdiction were nominally concurrent, Congress might "channel" cases toward the federal courts via a removal device such as that found in the FSIA.\(^{212}\) The net result would be a serious diminution in the authority of state courts to pronounce on state law,\(^{213}\) as well as the creation of a substantial volume of quasi-federal common law. Both developments would fly in the face of *Erie*. The theory of protective jurisdiction advanced by Professor Mishkin\(^{214}\) is substantially different from Professor Wechsler's.\(^{215}\) Professor Mishkin would require that Congress act, either through "an articulated and active federal policy regulating a field"\(^{216}\) or through "statutes expressing a national policy in the area concerned."\(^{217}\) Such a legislative program could provide a federal forum for all disputes that arise in connection with the program, regardless of whether they are governed by federal law.\(^{218}\) The justification for the federal forum is "not so much the defense of the specific interests concerned, as the protection of the congressional legislative program in the area."\(^{219}\) State courts might be hostile or uninformed with respect to the federal policy. Even in purely state law cases, the program might be better served if all litigation relating to it were handled by the same set of courts, "well versed in, and receptive to, the national policies established by the legislation."\(^{220}\) For Professor Mishkin, all such cases would arise under the congressional program itself.\(^{221}\)

Professor Mishkin's theory of protective jurisdiction has two distinct advantages over Professor Wechsler's. First, the requirement

\(^{213}\) Note, supra note 155, at 960.
\(^{214}\) Mishkin, supra note 155.
\(^{215}\) See, e.g., M. Redish, supra note 75, at 59 (comparing the two theories).
\(^{216}\) Mishkin, supra note 155, at 192.
\(^{217}\) Id. at 195.
\(^{218}\) Id.
\(^{219}\) Id.
\(^{220}\) Id.
\(^{221}\) Id. at 196.
that Congress have acted with respect to a field serves several important functions. It alerts the states to possible displacement of their laws, triggering, at least in theory, a defense of state interests during establishment of the program.\textsuperscript{222} The requirement that Congress furnish at least some of the laws governing an area is also a form of limitation consistent with article III. There must apparently be some classic "arising under" jurisdiction before protective jurisdiction can be invoked.\textsuperscript{223}

Second, Mishkin's theory is consistent with the cases. The bankruptcy cases, for example, illustrate the exercise of a specific congressional power\textsuperscript{224} to permit adjudication of cases for which Congress probably could not supply the applicable law.\textsuperscript{225} Verlinden might be read the same way given the general background of federal legislation dealing with foreign affairs and the specific fact that the FSIA is more than a purely federal jurisdictional statute because it applies in state courts as well.\textsuperscript{226}

Professor Mishkin's theory of protective jurisdiction is not without its critics.\textsuperscript{227} The most serious criticism is raised by Professor Redish. How, he asks, "is a pre-existing federal program undermined by state court adjudication?"\textsuperscript{228} Mishkin's theory rests on the notion that there are important institutional differences between state and federal courts, and that Congress may well want to guard against hostility on the part of the former.\textsuperscript{229} But where is the danger of hostility toward any of the parties in the state-law portion of a bankruptcy case?\textsuperscript{230} Consider Verlinden. It is difficult to imagine that the New York courts would automatically tilt to-

\textsuperscript{222} Cf. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 476 (1957) (Frankfurter, J., dissenting) (this theory limits "incursions on state judicial power" to areas of "early substantive federal invasions").

\textsuperscript{223} The notion of a national "policy" in an area might conceivably stop short of actual regulatory statutes under which cases could arise. See Note, supra note 155, at 962.

\textsuperscript{224} Among the enumerated powers in article I, section 8 of the Constitution is that to "establish . . . uniform laws on the subject of bankruptcies throughout the United States."

\textsuperscript{225} M. Redish, supra note 75, at 61; Mishkin, supra note 155, at 189.

\textsuperscript{226} Supreme Court Note, supra note 188, at 214-15.

\textsuperscript{227} See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 483-84 (1957) (Frankfurter, J., dissenting) (criticizing the theory as a departure from article III); Note, supra note 155, at 962-63 (theory is underinclusive because it does not extend to inchoate federal interests for which there is no congressional plan).

\textsuperscript{228} M. Redish, supra note 75, at 63.

\textsuperscript{229} Mishkin, supra note 155, at 184, 195.

\textsuperscript{230} See M. Redish, supra note 75, at 63.
ward the Dutch cement merchant and against Nigeria, or vice-versa. Perhaps the Mishkin theory should be altered slightly to emphasize the advantages of uniformity that federal decision making brings about, rather than inapplicable and outmoded notions about state courts. Such an alteration does not disturb the basic premise of the thesis: protective jurisdiction is valid only when Congress has enacted more than a purely jurisdictional statute permitting federal adjudication of nonfederal matters.\footnote{The articles by Mishkin and Wechsler constitute the basic statements of a theory of protective jurisdiction. Although both contributed to the Hart and Wechsler casebook, there is some ambiguity as to which approach is advocated therein. Despite the contrary views of a perceptive student author, see Note, supra note 155, at 963, I believe the casebook essentially adopts the Mishkin position. See Hart & Wechsler, supra note 58, at 417 (paraphrasing Mishkin theory and arguing Tidewater is invalid under it); id. at 868 (requiring “active and articulated congressional legislative program”).

One commentator questions whether there are any limits upon a grant of protective jurisdiction, once the concept is recognized as valid, beyond a “necessary-and-proper standard of scrutiny.” Note, supra note 155, at 963-64. The author feels that this standard is inadequate, id. at 956, and would require that Congress’ interest in providing a federal forum be “substantial,” and that the jurisdictional grant not exceed the forum-based interest. Id. at 958-59. (The author distinguishes forum-based interests such as uniformity of procedure from substance-based interests such as expertise in construing federal law. This distinction may end up complicating even further an already difficult area.) It is not clear that these requirements add much to the necessary and proper standard.

Because of the serious federalism questions involved, the use of protective jurisdiction in suits against state officials might trigger state sovereignty limitations. The analysis of these limitations in the eleventh amendment context may be relevant here as well. See infra text accompanying notes 283-90.}

\textbf{E. Protective Jurisdiction as One Route to Overturning Pennhurst II}

Some theory of protective jurisdiction might be the source of authority for a congressional statute to overturn \textit{Pennhurst II}. Professor Wechsler’s theory, apart from grave doubts as to its validity, is not on point. Wechsler posits situations in which Congress has the power to establish the underlying norm but has not acted. In the typical multi-claim case, Congress will frequently lack power to deal with the issue presented by the state law claim. On the other hand, Professor Mishkin’s theory does seem applicable. He requires the presence of a federal program or interest. In the context of a \textit{Pennhurst}-type suit one can identify several distinct federal interests.

The first is a general interest in the adjudication of federal
claims in federal courts. The basic manifestation of this interest is the creation of the general federal question jurisdiction in 1875.232 This step reversed the prior policy of relying on state courts as the primary adjudicators of federal law issues, concomitant with the creation of substantial new federal rights under the Civil War amendments and accompanying legislation. The recent abolition of the jurisdictional amount in federal question cases reinforces Congress' desire to ensure the primacy of federal courts as interpreters and enforcers of federal laws.233 This same general interest can be found in the basic provision for removal jurisdiction234 as well as in section 1331,235 the current provision for federal question jurisdiction. While the ability to remove diversity cases to federal court is limited,236 any case cognizable under section 1331 can be removed.237

A more specific congressional interest or policy that favors the federal adjudication of claims of individual rights under the Constitution and federal statutes can also be identified. Section 1983 embodies this interest, despite lingering debate over whether it should be read to embrace all statutory claims.238 Section 1983 provides an express cause of action for the vindication of a class of federal claims. To facilitate further the bringing of such cases in federal court, Congress, long before the abolition of the jurisdictional amount, provided a jurisdictional counterpart to section 1983 that essentially dispensed with any amount-in-controversy requirement for section 1983 plaintiffs.239 Multi-claim plaintiffs such

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232 Act of March 3, 1875, ch. 137, 18 Stat. 470. There had been a brief conferral of general federal question jurisdiction in 1801, but it was repealed within a year. See Hart & Wechsler, supra note 58, at 845.


236 Under § 1441(b), diversity actions are not removable if any of the defendants is a citizen of the forum state.

237 The first sentence of § 1441(b) provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."


239 28 U.S.C. § 1443(a)(3) (1982). As to limits on the availability of this jurisdiction, see
Enlarging Federal Jurisdiction as those in Pennhurst may legitimately invoke both interests.

A third federal interest is the substantive policy that furnishes the basic federal question in the lawsuit. The specific federal law relied on reflects a legislative (or constitutional) choice that a federal norm must supplement or even supercede existing state policy. The provision of the federal forum ensures that this interest will be vindicated in a court that has the requisite expertise and that is part of a judicial system that can ensure the maximum degree of uniformity.240

Thus, the basic precondition of the Mishkin theory is satisfied in the Pennhurst context. The remaining question is whether permitting the assertion of federal jurisdiction over the non-pendent federal claim “protects” the federal interests outlined above. Professor Mishkin’s reliance on the institutional differences between state and federal courts, particularly the presumed hostility of the former, is not persuasive in this respect. Nonetheless, the congressional goals of federal court adjudication of federal claims are substantially advanced by allowing the pendent claim. Accordingly, the arguments for protective jurisdiction mirror those advanced for pendent jurisdiction.241 Absent the doctrine, the underlying federal question may never be litigated in a federal court.

Armed with the Mishkin thesis, Congress might consider drafting a statute along the following lines. The existing language of section 1331 would be renumbered 1331A, and a new sub-section 1331B would be inserted, providing that:

In any civil action of which the district courts have jurisdiction under subsection A of this section, in which a state official is a party defendant and the relief sought would, if effect, operate against the state, they shall also have jurisdiction of any claim based on state law that derives from the same nucleus of operative fact as that arising under the Constitution, laws, or treaties of the United States; provided, however, that any relief granted under state law does not exceed the extent of relief that could have been granted under federal law.


240 See Note, supra note 155, at 949.

241 See supra text accompanying notes 90-95.
Although one could certainly tinker with the draftsmanship, the net effect of such a statute is to permit a ruling like the court of appeals decision reversed by the Supreme Court in *Pennhurst II*. The basic question, of course, is whether this statute is constitutional. One cause of doubt is the uncertainty of the entire doctrine of protective jurisdiction, no matter how persuasively it has been argued by Professor Mishkin and others. The strict views of article III that Justice Frankfurter invoked to deny the validity of any version of protective jurisdiction might well be accepted by the current Court, given its predilection for emphasizing the limited nature of federal tribunals.

The Mishkin theory, as Justice Frankfurter admitted, is the strongest basis available for such congressional action based on a protective jurisdiction rationale. The hypothetical statute sketched out above is not merely jurisdictional in nature; it does not merely authorize the hearing of non-federal claims by non-diverse parties in federal court. It is tied both to the general federal question statute and to the underlying federal substantive provision. Perhaps the real problem is that what is at stake is overturning, via statute, a Supreme Court decision that purports to rest on an interpretation of the Constitution. A possible distinction is that the issue here is "truly jurisdictional," in that it involves only the power to hear cases, or portions thereof, rather than dealing with substantive interpretations of the Constitution. Nonetheless, it would seem that those who invoke the *Marbury* principle for the proposition that the Supreme Court should have the last word in constitutional adjudication ought to balk at a statute that takes that word away and gives it to Congress.

IV. THE BEARING OF ELEVENTH AMENDMENT LORE

While protective jurisdiction remains in the realm of the theoretical, a substantial body of eleventh amendment jurisprudence has established that Congress can, in fact, deprive states of the

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242 Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 466-77 (1957) (Frankfurter, J., dissenting). An additional argument against a protective jurisdiction approach is that the doctrine deals only with congressional power in the context of article III. Overturning *Pennhurst II* may present different problems because that decision is based on the eleventh amendment. Although there are differences between the two provisions, both delineate the "judicial power of the United States." Given the close relationship it seems valid to apply an article III analysis to an eleventh amendment problem.
amendment's protection in certain instances. To some extent, Congress can induce states to waive their immunity as a condition to participating in federally funded activities. Congress is not, however, limited to indirect action; the Court has squarely held that the national legislature possesses power to override the amendment directly, without resort to any theory of waiver. Given this, one might suppose that proponents of a statute to overturn Pennhurst II would turn to eleventh amendment doctrines first, rather than pursue the uncertain course of protective jurisdiction.

On closer examination, it turns out that any attempt to find answers to the question of the statute's validity in the lore of the eleventh amendment is likely to resemble a trip through the twilight zone. To begin with, the Court's decisions on congressional power are so inconsistent that any answers they yield may only generate a multitude of further questions. Many of the key decisions contain multiple opinions reflecting fundamental disagreements among the Justices over how to approach the subject. The recent eleventh amendment cases have inspired a torrent of academic writing, yet these commentators also offer sharply divergent views of the cases and of eleventh amendment doctrine in general. By comparison, the literature dealing with protective jurisdiction seems harmonious.

Two important differences separate eleventh amendment theories of congressional power and the doctrine of protective jurisdiction. First, the latter deals with the precise issue that any statutory

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243 This metaphor has already occurred to one author. Lichtenstein, Retroactive Relief in the Federal Courts Since Edelman v. Jordan: A Trip Through the Twilight Zone, 32 Case W. Res. L. Rev. 364 (1982).


245 E.g., Edelman v. Jordan, 415 U.S. 651 (1974) (four separate opinions). Justice Rehnquist, for the majority, found no waiver of state immunity through participation in a federal grant program. Id. at 673. Justice Brennan argued that the state had no immunity to waive. Id. at 687. Justice Marshall, joined by Justice Blackmun, argued that there had been a waiver. Id. at 688-89. Justice Douglas authored a fourth opinion that appears to incorporate both the Brennan and Marshall positions. Id. at 685.

attempt to overturn Pennhurst II would raise: the validity of federal adjudication of state-law matters in suits between non-diverse parties. Eleventh amendment inquiries, by contrast, have focused on the power of Congress to remove the states' immunity from suits between a state and its own citizens based on federal law. Second, eleventh amendment analysis deals primarily with congressional power to impose damages and other monetary relief against states without regard to the Young-Edelman line. Overturning Pennhurst II is not, or at least need not be, a matter of imposing damages, but of subjecting states to state-law based prospective relief. These differences aside, however, the eleventh amendment analysis is worth pursuing because the cases and commentators do raise issues that are close to the mark.

A. The Major Cases and the State of the Law

Over the last twenty years, the Supreme Court has decided a number of important cases involving Congress' power to impose suits on states. This subsection reviews the major cases in the area and concludes with an attempt to summarize the state of the law with respect to congressional power.

Many of the difficulties encountered in this area can be traced to the ambiguity of the Court's decision in Parden v. Terminal Railway. In Parden, the first of the major cases to approach the problem, the Court held that the eleventh amendment did not bar suit in a federal court under the Federal Employer's Liability Act by employees of a state-owned railroad company. At first the Court seemed to ground its holding squarely on Congress' power over interstate commerce, a power that obviously included the ability to regulate the railroad in question. The opinion suggested that in the exercise of any of its enumerated powers Congress could force the states to be sued in federal court, because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."

According to

\[\text{Vol. 71:343}\]
this approach, whether the state had in some way consented to suit or otherwise waived its immunity would make no difference. The Court went on, however, to state that Alabama’s decision to operate the railroad twenty years after enactment of the FELA did amount to a form of consent because it presumably knew of the federal regulations applicable to the railroad.261 Thus, Parden might lead either in the direction of absolute congressional power or, alternatively, in the direction of congressional power to place states in federal court only when some form of constructive consent on the part of the state could be found.

The next case, Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare,252 compounded this ambiguity. At issue was a suit by state employees against a state agency under the Fair Labor Standards Act. The Act appeared to authorize the suit because it included employees such as the plaintiffs in the class of those regulated. Nonetheless, a majority of the Court concluded that Congress had not explicitly authorized direct private suits against states. Again there was the suggestion of plenary power when the Court referred to Congress’ ability to bring “the States to heel, in the sense of lifting their immunity from suit in a federal court,”253 even if such action would place substantial fiscal burdens on the states. In a footnote, however, the Court referred to the states’ traditional immunity, thereby suggesting that the language in the opinion itself was not quite as absolute as it might seem.254

Edelman v. Jordan,255 decided one year later, cast some doubt on Congress’ ability to do what the Employees court had appeared to sanction. The principal issue in Edelman was whether Illinois had waived its eleventh amendment immunity by participating in a federal grant-in-aid program that might be enforceable by private plaintiffs suing under section 1983. The Court not only found that Congress did not expressly impose a waiver of state immunity,
as required by the previous cases, but raised the question whether Congress could act in such a fashion. The majority opinion described the states' immunity as a constitutional right, indicating that the doctrine of unconstitutional conditions might apply to any attempt to wrest immunity from the states. In dealing with *Parden* and *Employees*, the *Edelman* court suggested that both congressional intent and some form of state consent to the removal of immunity were necessary.

The pendulum swung in favor of congressional power in the 1976 case of *Fitzpatrick v. Bitzer*. *Fitzpatrick* allowed an award of damages for violation by a state of Title VII of the Civil Rights Act of 1964. The Court reasoned that because the statute was enacted pursuant to the power to enforce the fourteenth amendment, Congress was on stronger grounds in this context than if it were merely acting under one of the enumerated powers of article I. The Court's opinion might be read as based on the simple chronological fact that the fourteenth amendment was adopted after the eleventh, and, therefore, its adoption constitutes a de facto consent to any enforcement measures. The Court stated, however, that congressional action under the fourteenth amendment supercedes the normal federalism concerns advanced by the eleventh amendment, given the particular importance of national action under the Civil War Amendments. Indeed, the opinion indicates that Congress may impose suits under the fourteenth amendment that would be "impermissible" in the exercise of other sources of power.

*Fitzpatrick*, then, might stand for the proposition that Congress exercises relatively unconstrained power under the fourteenth amendment to subject non-consenting states to suit. *Hutto v. Finney* appears to confirm this interpretation of congressional authority. *Hutto* upheld an award of attorney's fees against a state under the Civil Rights Attorney's Fees Awards Act of 1976. The

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256 Id. at 673.
257 Id. at 672.
259 Id. at 447.
260 See id. at 453; cf. Hart & Wechsler, supra note 58, at 231 (Supp. 1981) (suggesting that *Fitzpatrick* is correct because state legislatures consented to the fourteenth amendment).
261 427 U.S. at 453-56.
262 Id. at 456.
Court cited Fitzpatrick for the proposition that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." The legislative history made it quite clear that Congress was relying on Fitzpatrick, even though the Act did not refer explicitly to awards against states.  

Had the Court stopped at this point, Hutto would seem to be nothing more than a reaffirmation and extension of Fitzpatrick in the context of a different statute. The Court went to some pains, however, to characterize the relief involved as other than retroactive, and also to argue that any awards of attorney's fees could be reconciled with the Edelman line between prospective and retroactive relief. The opinion stressed that the awards in question would not involve a substantial fiscal hardship for states.  

The analysis in Hutto is curiously tentative. The Court could be saying that different standards will be used for attempts to sue states under federal statutes passed pursuant to the fourteenth amendment, depending on the degree of clarity with which the statute actually refers to states as defendants. Fitzpatrick would be a case in which because there was such clarity, any relief would be appropriate. Hutto would be distinguishable because there was substantially less clarity. Thus, the plaintiff in Hutto could sue the state, but the extent of the relief might well be limited. Alternatively, the Court may have drawn no such line but instead introduced a limiting principle that Congress, even when acting pursuant to the fourteenth amendment, may not impose extreme financial burdens on states. Any such principle would be a marked retreat from the blanket language of Fitzpatrick, and, indeed, from Hutto's own characterization of that case as support for "plenary" congressional power. The Court reaffirmed Hutto, without clarifi-
ication of these issues, in *Maher v. Gagne*.*

Despite the confusion of these precedents, they establish two propositions. First, the doctrine of constructive waiver enunciated in *Parden* retains some vitality, although the Court may be most reluctant to find any such waiver. As I will discuss below, the technique of imposing waivers may provide a partial route toward overturning *Pennhurst II* in the context of statutes based on the spending power. Second, Congress possesses greater power to impose a waiver, absent consent, when it is acting pursuant to the fourteenth amendment than when it is merely exercising an article I power. Other powers—such as the war power—may enjoy a similar status, but they are few in number.

The *Pennhurst* problem may therefore be approached via the fourteenth amendment, although the means of proceeding are far from clear. After *Hutto* the nagging question remains whether the plenary power really is plenary, or whether there are some limitations—such as the extent to which a statute abrogating state immunity imposes substantial financial burdens. In considering the existence of possible limitations on congressional power, it may be helpful to consider briefly the various analyses put forward by those who have commented on the Court’s recent eleventh amendment jurisprudence.

**B. The Commentators and the Question of Congressional Power**

Academic commentary on the eleventh amendment has gone beyond the scope of a cottage industry, though much of the analysis is not directly relevant for purposes of this article. For example, the division between those who can accept the existing post-*Hans* doctrine, with minor modifications, and those who feel that the Supreme Court should scrap the last century of eleventh amendment jurisprudence and begin again is surely an interesting one. The

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269 448 U.S. 122 (1980).

270 This proposition would appear to be supported by *Edelman*. See supra notes 255-57 and accompanying text. But see M. Redish, supra note 75, at 160 (*Edelman* "has cast doubt on the current vitality of the concept of constructive waiver").

271 See infra notes 295-311 and accompanying text.

272 See *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979).

273 Professors Nowak and Tribe, for example, probably belong in the first category. See infra notes 274-75. On the other hand, Professor Redish views the cases and much of the
Court, however, has given no indication that it will depart from its elaborate, albeit imperfect, construction that allows some suits some of the time. Because any congressional statute of the type hypothesized in this article must be tested against the law as it is, rather than the law as it might be, the analysis here will be confined to the somewhat pedestrian task of ascertaining possibilities and limits as they exist under current law. Nonetheless, the commentators' work is exceedingly helpful in two respects.

The commentary is primarily helpful in explaining why Congress might possess the power to expand an apparently jurisdictional limitation contained in the Constitution, despite the lack of power to expand the jurisdiction elaborated in article III. As a starting point, it must be noted that the eleventh amendment is not truly jurisdictional because a state can waive its eleventh amendment protection. In contrast, article III cannot be broadened by consent of the parties who wish to have a suit heard.274 Once this conceptual distinction between these two constitutional provisions is recognized, the question arises whether Congress is somehow more suited than the courts to impose suits ostensibly outside of the amendment.

A pair of highly influential articles by Professors Nowak and Tribe have offered several convincing rationales for an approach preferring congressional over judicial power.275 Both are based, in part, on the view that the interests of the states are far better protected within the congressional process than in the federal courts.276 Thus, Professor Tribe asserts that to reconcile the cases with some “conception of the eleventh amendment as either con-


274 See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 684-85 (1976). But see M. Redish, supra note 75, at 151-52 n.94 (“Aside from pointing to this one difference, commentators have failed to justify so drastic a distinction in construction between the limits on the judicial power imposed by Article III and those imposed by the eleventh amendment.”).

275 Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975); Tribe, supra note 274.

276 This view of federalism draws heavily from Professor Wechsler's work. See Wechsler, supra note 66.
ferring a category of rights upon the states or at least confirming the states’ retention of rights against unconsented suit, [one must] distinguish rights conferred against the federal judiciary from rights conferred against Congress.”

Professor Nowak supplements these functional considerations with an extensive historical analysis. He argues that the history surrounding the ratification of the original Constitution and that surrounding the adoption of the eleventh amendment evince substantial distrust of the powers of the national judiciary. As he puts it, “[o]pposition to Article III was based primarily on the fear that federal judges, who were tenured for life, would assume jurisdiction over [cases brought by a citizen of one state against another state] and subject the sovereign immunity of the states to their will.” On the other hand, he finds nothing in either set of ratification debates to indicate a similar distrust of the power of Congress. Under article III federal laws would presumably be enforceable against states in federal courts. Like Professor Tribe, Professor Nowak relies on the functional justification that “the pragmatic problems of federalism posed by the eleventh amendment should be resolved by Congress, not by the judiciary.” Although some commentators have questioned the validity of Professor Nowak’s historical analysis and have suggested that pragmatic justifications by themselves do not justify alteration of constitutional doctrine, many of those who do not share the Nowak/Tribe point of view appear to reach similar conclusions with respect to the power of Congress, as opposed to the power of the federal courts, to impose suits against states.

Another helpful aspect of the commentators’ work is its examination of the existence of possible limits on congressional power. The analyses vary, but there is substantial agreement that principles of state sovereignty, as articulated in National League of Cities v. Usery, do impose some limits. For example, in his initial

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277 Tribe, supra note 274, at 693.
278 Nowak, supra note 275, at 1430.
279 Id. at 1429.
280 Id. at 1441 (citing Wechsler, supra note 66).
281 See M. Redish, supra note 75, at 151 n.93.
282 See, e.g., Fletcher, supra note 109, at 1127-30.
treatment of the issue, Professor Nowak indicated that the only
limitation on Congress might be against imposing liability for con-
duct that occurred prior to the passage of the statute in question.
Aside from this narrow limitation, he suggested that Congress was
relatively free. In the latest volume of his treatise, however, written
after National League of Cities, he recognizes the possibility of
state sovereignty limitations. 284

Professor Tribe suggests the following principles that could limit
congressional power:

First, Congress cannot confer upon an article III Court any author-
ity to resolve disputes outside the textual confines of that article.
Second, any congressional attempt to confer jurisdiction and abro-
gate immunity must be reasonably ancillary to an otherwise valid
substantive exercise of federal lawmaking power. Third, insofar as
the tenth amendment “expressly declares the constitutional policy
that Congress may not exercise power in a fashion that impairs the
States’ integrity or their ability to function effectively in a federal
system,” the Supreme Court should not lightly infer serious con-
gressional inroads upon state autonomy. 285

In addition, Professor Tribe would retain the Court’s current re-
quirement that Congress state clearly its intention to abrogate
immunity.

Other commentators have arrived at similar conclusions. 286 For
example, Stewart Baker argues against “unlimited congressional
power over the states’ immunity.” 287 He would require the Court to
engage in a process of balancing state interests in independence
against the national policies reflected in the pertinent congress-
sional statute. According to Baker, however, Congress would al-
most always win any such contest, although he recognizes that the
present Supreme Court may be more inclined to come out in favor
of the states at least some of the time. 288 The relatively unanimous
recognition by these commentators of the relevance of state sover-
eignty principles, even by those who no doubt disagree with the
result in National League of Cities, may still accord with the

285 Tribe, supra note 274, at 696-97 (footnotes omitted).
286 See, e.g., Field, supra note 244, at 1239-40.
287 Baker, supra note 246, at 184.
288 Id.
Court's own views on the matter.

The question which arises, however, is whether the recent overruling of National League of Cities in Garcia v. San Antonio Metropolitan Transportation Authority has implications for the continued existence of sovereignty-based limits on congressional power in the eleventh amendment context. It is possible to read Garcia as preserving some notion of inviolable state sovereignty even though the majority in that case rejected the method of analysis generated by National League of Cities. Alternatively, one might focus on the fact that Garcia dealt only with limits on Congress derived from the tenth amendment. Because the eleventh amendment is a separate and distinct constitutional provision it may contain (and retain) its own state sovereignty-based limits on congressional power, whatever the status of the tenth amendment.

National League of Cities sought, in part, to guard against the imposition of substantial financial burdens on states. This same concern is a major motivation underlying many of the modern eleventh amendment cases, notably Edelman, in which the line between prospective and retroactive relief was justified on financial grounds. Similarly, the Court's otherwise perplexing insistence in Hutto that the relief awarded would not be seriously intrusive, despite the fact that Congress was acting pursuant to a "plenary" power, suggests the Court's willingness to impose some limitations in the eleventh amendment area even when it recognizes Congress' power to act in the first instance. Of course, the source of the congressional power exercised in any particular case may make a difference, given the clear suggestion in Fitzpatrick that Congress has greater freedom to override the eleventh amendment when it acts to enforce the fourteenth amendment than in other contexts.


290 One aspect of the commentators' work distinctly not helpful for present purposes is the insistence that congressional authority to override the eleventh amendment does not depend on which of its powers Congress is exercising. Both Professors Tribe and Nowak offered their initial analyses before the decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Both viewed the issue as one of congressional power vel non regardless of the source. Thus, for Tribe, "[n]othing in the language or the history of the eleventh amendment suggests that it must be construed to limit congressional power under the commerce clause or under any other head of affirmative legislative authority." Tribe, supra note 274, at 693. Although Professor Nowak saw the possibility that power might be greater under the fourteenth amendment than under other areas of national competence, Nowak, supra note 275, at 1460-64, he seemed to conclude that the fourteenth amendment was only a confirmation of a
One way of looking at the question of limits versus the question of the source of congressional power is to suggest that ultimately the inquiries are the same. This approach has been put forward in its most complete form by Professor Fletcher, who believes that sovereign immunity does have constitutional status. He finds, however, that the doctrine derives not from the eleventh amendment but from the other provisions of the Constitution and from its structure as a whole. The obvious echoes of National League of Cities are not unintentional. For Professor Fletcher, any exercise of congressional power must be matched against "the underlying structural imperatives that should control the shape of state sovereign immunity to private causes of action under federal law." This approach is fully consistent with the view that Congress' authority to impose suit is greater under the Civil War amendments than under other sources of congressional power. Again, however, it will be necessary to consider the impact of Garcia on these "structural imperatives."

In sum, building on the recent decisions, the commentators have opened the door to one or more approaches to a statute that would overturn the result in Pennhurst II while reminding us that there are inherent limits on just how far Congress may go in this area. In

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Fletcher, supra note 109, at 1109-13.

According to Professor Fletcher, National League of Cities "may help us perceive an analytical structure that can protect the states against unwarranted private causes of action but that can avoid the distortions introduced by the jurisdictional aspects of the Ex Parte Young fiction." Id. at 1109-10.

Id. at 1109.

See id. at 1113-18.
the next subsection, I will consider specific statutes based on eleventh amendment doctrine. Before leaving the subject of limits, however, it may be useful to inquire whether subjecting states to pendent claims based on state law is such an inherent violation of state sovereignty per se that it should never be allowed regardless of the source of congressional power. Again, because Justice Powell did not analyze precisely what the "intrusion" was in *Pennhurst II* we are left somewhat in the dark. History might point to an answer in favor of the states, whereas analysis based on the importance of vindicating the federal right to which the state claim is pendent might suggest a different answer. Perhaps a way out of the dilemma is that all of the statutes discussed below involve the imposition of prospective relief only, in accordance with the *Edelman* line of cases. The likelihood of massive retroactive burdens at least is thereby reduced, and the danger of transcending sovereignty-based limits is concomitantly reduced if not eliminated.

C. The Eleventh Amendment Analyses Applied to a Statute to Overturn *Pennhurst II*

1. The Possibility of Congressionally Induced Waiver

The notion that Congress can impose a waiver of eleventh amendment immunities in some circumstances still appears valid despite the *Edelman* Court's obvious unhappiness with the doctrine. An obvious area in which Congress might pass one or more statutes to overturn the result in *Pennhurst II* is that of grant-in-aid programs to states enacted pursuant to the spending power.

Stated in its simplest form, the argument would be that Congress has a virtually free hand in attaching conditions to grant programs and that submission to suit under the grant program, including suits on related claims, is the type of condition that Congress might reasonably impose. The only immediate limitation might be that, after *Edelman*, any such statute would have to state

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295 See M. Redish, supra note 75, at 159-62.
296 *Edelman*, 415 U.S. 651, 673 (1974). Some commentators have also expressed doubts about the continued vitality of waiver doctrine. See, e.g., Fletcher, supra note 109, at 1113 n.311.
with specificity that participation in the program represented consent to suit. Congress could add clauses to individual grant programs stating that any state grantee consents to suit for injunctive relief under the grant statute as well as under any pendent state law claims. Alternatively, Congress could approach the problem through the so-called "crosscutting" conditions that apply to large numbers of grant programs, such as section 504 of the Rehabilitation Act of 1973. Thus, Congress might pass one or more statutes adding to these generally applicable requirements a proviso that state grantees accepting funds subject to a given crosscutting provision also consent to suit under it, including pendent claims. The task for Congress might be viewed simply as one of draftsmanship; that is, finding and amending the relevant grant statutes applicable to states, bearing in mind the Supreme Court's requirement of specific language enunciated in Edelman.

Not surprisingly, however, the matter is not this simple. An initial problem is what might be called the "federal grant law" doctrine enunciated by Justice Rehnquist in the Supreme Court's first Pennhurst decision. In that case, the Court examined at some length the nature of the grantor-grantee relationship, particularly in the context of grants to states. The majority viewed grants as creating an essentially mutual relationship, like that contained in a contract. This mutuality imposes limits on the power of the grantor (Congress, in particular) to make unilateral changes and requires that it state clearly the grantee's obligations. In particular, Justice Rehnquist noted that states must be in a position to

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298 The Ninth Circuit recently permitted suit against state entities under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1978), apparently using this rationale. See Scanlon v. Atascadero State Hosp., 735 F.2d 359 (9th Cir.), cert. granted, 105 S. Ct. 503 (1984). Scanlon presents the following question: "Does doctrine of sovereign immunity as exemplified by Eleventh Amendment bar private action in federal courts under § 504 of Rehabilitation Act against states and their agencies?" 53 U.S.L.W. 3390, 3391 (U.S. Nov. 27, 1984). The Supreme Court's resolution of this case may shed substantial light on the area, although Scanlon may quite possibly be disposed of on grounds that will not add to existing eleventh amendment doctrine.


"knowingly decide whether or not to accept [grant] funds," and that "[t]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions." Thus, Congress might not be able to apply an amendment such as those hypothesized above to existing grant statutes.

Although this limit is substantial, it can be circumvented. Congress frequently reauthorizes grant programs after a period of limited authorization or recasts them altogether, as in the case of the Omnibus Budget Reconciliation Act of 1981. Because any such actions would amount to the creation of "new" grant programs, the states might be said to consent to suit provisions included therein if they choose to participate.

There is yet another hurdle, this one derived directly from eleventh amendment doctrine. Recall that in Edelman, Justice Rehnquist analogized the states' immunity under the amendment to personal constitutional rights and suggested that the doctrine of unconstitutional conditions might apply to any forced waiver. If this analogy applied, one would have to inquire, once more, whether submission to suit on state-based claims is such an intrusion on state sovereignty that it cannot be done even in the context of consent. Again, the problem may be more theoretical than real. This article has questioned whether the fact of amenability to prospective-relief suit on state law grounds really constitutes, as Justice Powell asserted, a serious intrusion on state sovereignty. Moreover, in a substantial number of cases state and local grantees have attempted to mount challenges based on National League of Cities to conditions in federal grant programs that affected matters such as the structure and organization of government. These arguments were plausible because they aimed at preventing Congress from doing indirectly what it could not do directly through one of its coercive powers. Nonetheless, the federal courts have been virtually unanimous in rejecting all such challenges to grant

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301 451 U.S. at 24-25.
303 Edelman, 415 U.S. at 673. But see M. Redish, supra note 75, at 163 (criticizing application of doctrine).
304 104 S. Ct. at 911.
305 See R. Cappalli, supra note 297, § 10.13 (discussing cases).
The basic message of the cases is that Congress may attach any reasonable condition to a program enacted under the spending power, and that if the state or other grantee does not like the condition, it has the "simple expedient of not yielding" by not accepting the funds. Thus, Congress may well have substantial latitude to overturn Pennhurst II in the area of grant statutes. As Professor Field has stated, "[t]he nexus between the privilege granted and the demanded waiver may, however, be sufficient to save it from invalidation as an unconstitutional condition; it may be legitimate to demand the waiver because it is the grant of the privilege that created the need for the waiver." There is, however, substantial uncertainty as to whether this rationale extends beyond the context of grant statutes. For example, Justice Marshall's dissent in Edelman suggested a fundamental distinction between grant programs in which the state makes a voluntary decision to participate and regulatory statutes that impose "federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies." Indeed the notion of "state consent" to a regulatory measure seems somewhat far-fetched unless one is prepared to argue that by engaging in the underlying program, such as providing services through state employees, the state acquiesces to any congressional regulation of the area. Parden v. Terminal Railway may be the rare example where one can find such a form of consent—the state could presumably have chosen not to run the railroad. Beyond that, something is essentially false about any notion of "engaging in interstate commerce" through the provision of government services as a form of privilege. In the context of federal regulatory statutes, then, the ability of Congress to overturn Pennhurst II is problematical indeed. There is also the additional question of what sort of legislation would be required to permit pendent state claims in the context of federal constitutional claims. This question leads, in turn, back to the previously discussed issue of sources of congressional power to impose suit regardless of consent.

308 See id.
308 Field, supra note 244, at 1217 (footnote omitted).
310 377 U.S. 184 (1964); see supra text accompanying notes 249-51.
311 See Field, supra note 244, at 1217.
2. *The Fourteenth Amendment and Section 1983 Broadly Construed*

It was argued above that the only clearly available source of congressional power to override state immunity is the Civil War Amendments, notably the fourteenth amendment. To some extent, Congress has already taken a step towards using this power through the enactment of section 1983. Section 1983 was without question enacted under the enforcement clause of the fourteenth amendment,\(^1\) even though the Court in *Quern v. Jordan*\(^2\) held that section 1983 did not explicitly include states as defendants. The fiction of *Young* mitigates the effects of the *Quern* rule for plaintiffs, given the broad availability of prospective relief. After *Pennhurst II*, Congress might consider the following amendment to section 1983:

> In any action brought pursuant to this section in which a state official is a party defendant, and in which the relief sought would, in effect, run against the state, the plaintiff may also assert any claim based on state law that derives from the same nucleus of operative fact; provided, however, that any relief granted under state law does not exceed the extent of relief that could have been granted under federal law.

This statute is a somewhat narrower version of the across-the-board statute permitting pendent claims that was discussed as an exercise of protective jurisdiction.\(^3\) The rationale is similar: permitting joinder of the pendent claim maximizes section 1983 plaintiffs' access to federal forums. Although it is narrower, the statute would seem to have the advantage of being beyond constitutional challenge, given the acknowledged fact of Congress' power under the fourteenth amendment.

Nonetheless, two problems remain. The first is the status of constitutional claims based not directly on the provisions of the fourteenth amendment but on those portions of the Bill of Rights that

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312 See, e.g., *Hutto v. Finney*, 437 U.S. 678, 708-09 (1978) (Powell, J., concurring in part and dissenting in part) (referring to § 1983 as "the quintessential Fourteenth Amendment measure").


314 See supra text accompanying notes 241-42.
the Court has treated as “incorporated” into the amendment and applicable to the states. In his dissenting opinion in *Hutto*, Justice Rehnquist expressed uncertainty as to whether “Congress has the same enforcement power under § 5 with respect to a constitutional provision which has *merely* been judicially ‘incorporated’ into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.” Justice Rehnquist does raise a problem, although it is not clear just how serious his objection is. To the extent that the Court views the provisions of the incorporated amendments as directly “applicable” to the states, claims under them benefit from whatever power Congress has under the core of the amendment itself. Perhaps Justice Rehnquist has merely introduced a red herring; Professor Tribe dismisses the argument as an “ingenious but implausible suggestion.”

A somewhat more serious question is the validity of using a statute such as that hypothesized to authorize the hearing of pendent state law claims when the underlying federal claim is based on the fourteenth amendment. The problem has its origin in the case of *Maine v. Thiboutot*, in which the Court established that the word “laws” in section 1983 refers to all federal statutes whether or not they could be classified as pertaining to civil or equal rights. If the rationale for Congress’ power to use the fourteenth amendment to override the eleventh is the fundamental principles of federalism stated in the former, there would seem to be serious questions about the validity of piggy-backing claims under statutes that have nothing to do with the fourteenth amendment onto that power using a broadly construed section 1983.

In the analogous area of awards under the Attorney’s Fees Act, however, the lower courts seem headed toward an affirmative answer to the question left open in the 1980 case of *Maher v. Gagne*: “whether a federal court could award attorney’s fees against a State based on a statutory, non-civil-rights claim.” If

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316 L. Tribe, American Constitutional Law 8 n.28 (Supp. 1979).
317 448 U.S. 1 (1980).
318 See Fletcher, supra note 109, at 1117 n.318.
319 448 U.S. 122, 132 n.16 (1980).
320 Id. at 130; see Note, Civil Rights Attorneys’ Fees in Cases Resolved on State Pendent
the Court ultimately upholds such awards on the ground that the Fees Act was passed pursuant to the fourteenth amendment, this reasoning might validate the broad amendment to section 1983 hypothesized above. On the other hand, one commentator has suggested that the fees cases show no more than a special solicitude for awarding fees broadly.321

3. A Narrower Use of Section 1983

If one considers the reservations about federal statutes and the incorporation problem to be serious, that does not mean that section 1983 is no longer available as a vehicle to overturn Pennhurst II in a substantial number of cases. On the contrary, the hypothetical amendment could be redrafted to include only "any action brought pursuant to this section to enforce rights secured by the fourteenth amendment of the Constitution or statutes passed pursuant to it." Although such a statute would be both constitutional and workable, there would remain the problem of identifying whether a given statute had been passed pursuant to the fourteenth amendment or to some other source of congressional power.

In the first Pennhurst decision,322 the Court dealt with a grant statute aimed at improving the lot of developmentally disabled persons. Because it was a grant statute, Justice Rehnquist assumed without analysis that it had been passed pursuant to the spending power.323 In Fullilove v. Klutznick,324 however, the Court dealt with a provision requiring a set-aside of a specified percentage of contracts to minority-owned businesses under the Local Public Works Act,325 also a grant program. Chief Justice Burger, in the Court's plurality opinion, went out of his way to argue that Congress had exercised an "amalgam" of its powers under the spending power, commerce power, and the fourteenth amendment.326

Consequently, it is an open question whether a provision in a grant program that prevents some form of discrimination, other
than racial discrimination, should be viewed solely as an exercise of the spending power, or tied more broadly to the civil rights power in section 5 of the fourteenth amendment. The Ninth Circuit recently indicated that Section 504 of the Rehabilitation Act was an exercise of fourteenth amendment power even though it is drafted as a requirement applicable to grant programs. The question is relatively easy in most cases, however, and the Court may announce further guidelines to help in the hard cases. Thus, the narrower amendment to section 1983 that relates directly to the fourteenth amendment would appear to be a valid attempt by Congress to overturn Pennhurst II and to require the hearing of pendent claims against states in some federal law cases.

The question remains, of course, whether Congress should exercise any such power either under this theory or the alternative of protective jurisdiction. Perhaps one’s answer to this question depends on how one weighs the relative merits of Congress’ overturning a constitutional decision of the Supreme Court vis-à-vis the merits of altering the Court’s apparent policy of channeling a substantial amount of public law litigation out of the federal courts. A facile answer is that because any statute such as those discussed in this article would be truly “jurisdictional,” it would not disturb fundamental notions of who has the last word in matters of constitutional adjudication. The same might be said, of course, with respect to the jurisdictional statute at issue in Marbury.

V. Conclusion

Those who have followed the discussion in this article up to this point may have noticed a tentativeness that stems from something beyond the uncertain nature of the legal doctrines under discussion. In part I must admit to a certain ambiguity both about Pennhurst II itself and about the propriety of any congressional action to overturn it. One can, as I do, agree with the Court’s reservations about institutional litigation in the federal courts and its recognition of the serious federalism problems that such suits present. At the same time, however, it is hard not to find Justice Powell’s opinion disappointing, both in its failure to take seriously the pen-

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327 Scanlon v. Atascadero State Hosp., 735 F.2d 359, 361 (9th Cir.), cert. granted, 105 S. Ct. 503 (1984); see supra note 298 and accompanying text.
dent jurisdiction arguments and in its literalistic and simplistic application of eleventh amendment analysis. Equally troubling is the Court's apparent unwillingness to pursue the alternative, other than in dicta, of remedial guidelines that would lessen the admitted intrusiveness of such lawsuits.

I have also indicated substantial ambiguity about both whether Congress has the power to overturn the decision and whether it should do so. In the final analysis, my own view is that such power does exist, and that protective jurisdiction is an analytically preferable means of exercising it. This approach, although untested, is free of the extensive baggage of eleventh amendment jurisprudence. At least in the hands of the Burger court, there is little danger that protective jurisdiction would turn out to be a doctrine that swallows up all meaningful limits contained in article III. (It does, of course, let such a genie out of the bottle.) As to the propriety of congressional action, I find it harder to give a yes or no answer. Perhaps a saving grace of one or more of the statutes discussed in this article is that they would not necessarily tie the hands of the federal courts. For example, to the extent that entertaining state law claims introduces particular problems, the discretionary nature of the doctrine of pendent jurisdiction may soften the blow. More to the point, the Supreme Court would get a second bite at the apple of formulating guidelines for how institutional litigation is to be handled. Perhaps the Court should try again.