

**THE NEW JUDICIAL
FEDERALISM: WHERE WE ARE NOW***
19 Georgia L. Rev. 1075 (1985)

*Louise Weinberg***

Some years ago I published a pair of essays examining the Burger Court's response to public interest litigation.¹ I focused on the Court's reshuffling of federal/state adjudicatory powers, giving to the phenomenon the unsprightly but earnest name of "the new judicial federalism."² I felt then, as now, that commentators, fixated on developments in constitutional jurisprudence, were in danger of missing the point.³ What was interesting about the Burger Court had to do with procedure, not substance.

That view was not much of a surprise coming from a teacher of procedural courses. But today I think we can be agreed that the Court's characteristic method, taken all in all, has been either to find that a claim lies beyond the purview of prudently exercised federal jurisdiction, or to impose upon the claimant some new burden calculated to discourage the litigation.

If we now scan the Court's more current work, three separate strands seem to emerge.

First, of course, there is the now familiar *struggle to stay in*, the litigant's effort to secure some federal judicial processing for a federal claim.⁴ **(1985) 19 Georgia L. Rev. 1076**

1. Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Weinberg, *A New Judicial Federalism?*, 107 Daedalus 129 (1978).

2. See W. STEWART, CONCEPTS OF FEDERALISM 126 (1984).

3. See, e.g., M. Tolchin, *Conference Looks at Supreme Court Under Burger*, N.Y. Times Nov. 11, 1985, at 14, col. 1 (report of remarks at Burger Court symposium of law scholars at Hofstra University Law School, concluding that the Burger Court "had not moved backward on many Constitutional issues as some had feared").

4. E.g., *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984) (*Pennhurst*) (eleventh amendment bars pendent jurisdiction over state law actions seeking injunctions against state officials in civil rights suits); *Rose v. Lundy*, 455 U.S. 509 (1982) (a state prisoner seeking federal habeas corpus must plead exhausted claims); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (no private federal cause of action is available for water pollution, whether under federal common law, or by implication under federal

But today there is also a new phenomenon, a *struggle to keep out*. It takes more than one typical form. In one of these, litigants resort to state courts for trial of the essentially federal claims. They then discover that the United States Supreme Court seems newly prepared to entertain challenges to the already inferior powers of those courts.⁵ In another form, litigants struggle to insulate their claims from federal review by trying them under state law theories of relief. Here, they find the Supreme Court reaching down to root out a state court's insufficiently disguised interpretation of the Bill of Rights, if the state court has been overly generous to the citizen.⁶ Or they find their state law cases removed to federal courts and processed as federal law cases, with the blessing of the Supreme Court.⁷ In these cases of "struggle to keep out," it seems to me that the Court tips its hand. No federal docket-clearing concern can

statutes governing water pollution, or as against a governmental agency, as a violation of the federal civil rights statute).

5. *See, e.g.,* *Shutts v. Phillips Petroleum Co.*, 105 S. Ct. 242 (1984) (certiorari granted to review a state supreme court's holding that the state could take jurisdiction over a nationwide class). In *Shutts*, the Court ultimately managed to clip the wings of the state court not as a matter of jurisdiction, but of choice of law. *Shutts*, 105 S. Ct. 2965, 2977, 2980 (1985). *See also* *Gillette Co. v. Miner*, 459 U.S. 86 (1982) (per curiam) dismissing for want of jurisdiction). In *Gillette*, too, certiorari had been granted to consider a due process challenge to the state court's jurisdiction over a nationwide class. *Gillette*, 456 U.S. 914 (1982).

One author recently had noted that federal cases presumably remitted to state courts under modern rules of judicial federalism are not in fact being brought in state courts in great numbers. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 436-37 (1984). It would seem that the state courts are unable, or are perceived to be unable, to handle these cases effectively.

6. *See* *Michigan v. Long*, 463 U.S. 1032, 1040, 1041 (1983) (Supreme Court has power to take jurisdiction of a case raising questions not clearly federal, revising the traditional rule requiring dismissal); *see also* *Florida v. Meyers*, 104 S. Ct. 1852 (1984) (per curiam) (remanding for correction of over-liberal interpretation of the fourth amendment by state lower court despite discretionary denial of review by state supreme court).

7. *E.g.,* *Federated Dep't Stores, Inc., v. Moetie*, 452 U.S. 394, 402 (1981) (federal district court denied motion to remand a removed claim pleaded under state common law because claim was "essentially federal"); *see also* *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2851 (1983) (federal removal jurisdiction over complaint brought under state declaratory judgment act to be determined in same way as is original federal jurisdiction over case brought under federal declaratory judgment act).

paste over the political coloration these state court cases give to the Court's hostility to public interest litigation.

A third, rather weak, impulse can sometimes be detected amid (1985) 19 GEORGIA L. REV. 1077 these currents. Although the Court's late opinions may not always shine with sustained intellectual power, shifting majorities will sometimes cause the Court to emit an occasional *flash of realism*.⁸ In these cases the Court seems to bestow a nod of recognition upon its battered adversary, the private attorney general.⁹

In this brief essay I will focus on the first category, the continuing "struggle to stay in," chiefly through critical analysis of an acute instance, a civil rights case. The discussion will draw on other, interrelated late cases, and will consider their structural implications for the dual court system, tracing out certain doctrinal readjustments currently being effected.

8. *See, e.g.*, *Brandon v. Holt*, 105 S. Ct. 873 (1985) (suit against the head of a police department was tantamount to one against the municipality, although the suit was brought before the abrogation of municipal immunity, *see infra* note 81, and the municipality had neither been served nor joined as a party); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (plaintiff class counsel must be allowed reasonable communication with potential class members to fulfill purposes underlying FED. R. CIV. P. 23); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980) (Supreme Court may review the denial of certification of a class action arguably mooted by entry of judgment, in view of the continuing interest of plaintiffs' attorney in fee award); *see also* *Delta Air Lines v. August*, 450 U.S. 346 (1981) (a prevailing defendant may not recover attorneys' fees from a Title VII); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416-18 (1978) (prevailing plaintiffs, but not prevailing defendants, normally are entitled to recover attorneys' fees under The Civil Rights Attorneys' Fees Act of 1976, 28 U.S.C. § 1988).

9. For early identifications of plaintiff's role in public interest litigation as that of private attorney general, *see* *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.) (Frank, J.) *vacated*, 320 U.S. 707 (1943); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980), is to the same effect, although the Court there seems aware that, at least in class litigation, the private attorney general is plaintiffs' counsel. *Roper*, 445 U.S. at 338 (Burger, C.J.); *id.* at 350 (Powell, J., dissenting). *See* *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 424 (1980) (Powell, J., dissenting) ("In any realistic sense, the only persons before this Court who appear to have [a continuing interest in the controversy] are the defendants and a lawyer who no longer has a client").

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Readers of the late Supreme Court cases may share my reluctant admiration of the dexterity with which the Court, assisted by the ingenuities of defense counsel, identifies entrenched barriers to adjudication one would have sworn were not there, in places where one would have imagined there was no more room. *Pennhurst State School & Hospital v. Halderman*¹⁰ (*Pennhurst*) is just such (1985) **19 GEORGIA L. REV. 1078** an exercise, paradigmatic in the directness of the Court's confrontation there with federal judicial power.

Pennhurst was an action to obtain injunctive relief from inhumane conditions in a state institution for the retarded. When the case was first before the Court (*Pennhurst I*), judgment for the plaintiff class, grounded on certain federal statutory rights, was reversed, and the case remanded for consideration of other legal theories.¹¹ In *Pennhurst*, the Court had before it the plaintiffs' judgment under state law.

Here we discover, suddenly, in 1985, that there is no pendent jurisdiction in civil rights injunction cases. It is no good joining a count

10. 104 S. Ct. 900 (1984).

11. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (*Pennhurst I*). The failure to approve any federal remedy for the violations of congressionally declared national policy in *Pennhurst I* was itself a significant part of a significant chapter in the story of the "struggle to stay in." In the Warren Court, it had been assumed that more effective enforcement of national law required the recruitment of the private attorney general by affording private remedies for violation of federal law. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (holding available a private right of action for violation of the proxy rules promulgated by the Securities and Exchange Commission). But in the Burger Court the availability of implied private rights is now said to depend on the intent of Congress, *Touche Rosse & Co. v. Redington*, 442 U.S. 560, 568 (1979), although ex hypothesi in every case raising the question Congress will not have provided a private remedy. In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), the Court held that the Civil Rights Act of 1871 gave a cause of action for deprivations of federal statutory, as well as constitutional law. In later cases, however, the Court evidently has assimilated the rules governing this cause of action to those governing implied private rights generally. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1980); see also *Bush v. Lucas*, 462 U.S. 367 (1983) (no private action available to federal employees to remedy violations of the first amendment rights by the superiors in view of comprehensive alternative remedial procedures available to them); *Pennhurst I*, 451 U.S. at 28 n. 21.

for relief from the constitutional tort with a count under state law, even though these are merely alternative legal theories. We learn (how is it we did not understand this?) that the eleventh amendment bars federal injunction suits against state officials under state law.¹² The rule of *Ex parte Young*¹³ that a suit against an official is not a suit against the state, we now learn applies in cases of violation of *federal law only*.

Why was the contrary always assumed?¹⁴ Surely it is at least as **(1985) 19 GEORGIA L. REV. 1079** plausible. *Ex parte Young*¹⁵ (stripping a wrongdoing official of immunity) plus *United Mine Workers v. Gibbs*¹⁶ (expanding federal jurisdiction over pendent state claims) equals pendent jurisdiction for civil rights cases. Once *Ex parte Young* is in place, after all, the eleventh amendment is out of the picture. The defendant official, “stripped” of immunity by wrongdoing,¹⁷ is now properly before the court, and fairly can be required to defend the whole case.¹⁸

12. I use here the limiting language used, with few exceptions, throughout *Pennhurst*. As will be seen, however, the case may be much broader in scope than this statement of it indicates.

13. 209 U.S. 123 (1908).

14. See cases cited in *Pennhurst*, 104 S. Ct. at 924-28, 943 n. 50 (Stevens J., dissenting); see also C. Wright, *THE LAW OF FEDERAL COURTS* 292 n. 25 (4th ed. 1983) (relying on *Cory v. White*, 457 U.S. 85 (1982)).

15. 209 U.S. 123 (1908). In *Ex parte Young*, the court ruled that the eleventh amendment does not bar a federal action against a state official alleged to have violated federal law. Rather, the official is “stripped” of governmental authority by the illegal action. Nevertheless the court recognized a cause of action under the fourteenth amendment, ruling that the official violation remained “state action” for that purpose. Despite the “irony” of these barely compatible holdings, *Ex parte Young*, of course, is an essential component of federal judicial civil rights enforcement. *Pennhurst*, 104 S. Ct. at 910 (quoting *Florida Dept of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (Stevens, J.)).

16. 383 U.S. 715 (1966) (federal court with jurisdiction over a substantial federal claim has pendent jurisdiction over a state claim sharing with the federal claim “a common nucleus of operative fact”).

17. *Ex parte Young*, 209 U.S. at 160.

18. That was the position taken before the Court by the Justice Department. See Brief for the United States at 16, 20, *Pennhurst*. That is also what a unanimous Supreme Court reasonably can be thought to have held in *Siler v. Louisville & N.R.R.*, 213 U.S. 175, 191 (1909) (Peckham, J.). Justice Peckham was the author of *Ex parte Young*, 209 U.S. 123 (1908). Judge Gibbons, writing for the Third Circuit Court of Appeals in the *Pennhurst* litigation, thought *Siler* decisive. *Halderman v. Pennhurst State School & Hosp.*,

But Justice Powell, writing for the Court in *Pennhurst*, purported to find that a violation of federal, not state, law had always been prerequisite to federal relief in actions against state officials.¹⁹ Only a federal violation could justify *Ex parte Young*'s exception to the eleventh amendment's otherwise total bar.

The Court remanded for consideration of possible actionable claims under federal law (beyond the claims of struck down in *Pennhurst I*). But the Court warned, by way of a footnote, that "principles of comity and federalism" might bar relief even if a violation of federal law should not be found,²⁰ citing the 1976 case (1985) 19 GEORGIA L. REV. 1080 of *Rizzo v. Goode*.²¹

Rizzo, a police misconduct case, stands, inter alia, for the proposition that injunctive enforcement of national civil rights law must yield to a policy of noninterference with the internal affairs of a state agency. The thinness and candor of the *Rizzo* defense are striking. It simply cancels out *Ex parte Young* and the Civil Rights Act²² whenever the Court sees fit to use it. *Rizzo*'s "principles of comity and federalism" have been extended by the Court to bar relief in an action for damages for wrongful assessment of state taxes.²³ *Rizzo*'s "principles of equity" were relied on in *City of Los Angeles v. Lyons*, in which the Court disapproved a federal

673 F.2d 647, 657-58 (3d Cir. 1982). Judge Gibbons' views on the eleventh amendment are of particular interest in light of his noteworthy *The Eleventh Amendment and State Sovereign Immunity: A reinterpretation*, 83 COLUM. L. REV. 1889 (1983), referred to the Court in *Pennhurst*, 104 S. Ct. at 906 n. 5; *id.* at 922 (Brennan, J., dissenting). But the *Pennhurst* Court brushed *Siler* aside with the remark that the *Siler* Court had not mentioned the eleventh amendment. *Id.* at 917.

19. See *Pennhurst*, 104 S. Ct. at 913-17 and cases there cited.

20. *Id.* at 910 n. 13.

21. 423 U.S. 362 (1976). For discussion of *Rizzo*, see Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1216-40 (1977).

22. 42 U.S.C. § 1983 (1982).

23. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981) (principles of comity and federalism bar civil rights actions seeking damages for overassessments of state tax). *McNary* cites *Younger v. Harris*, 401 U.S. 37 (1971), rather than its progeny, *Rizzo*. *McNary*, 454 U.S. at 112. But *Younger* was a case of equitable relief from state proceedings, rather than a challenge to the executive actions of state officials. For full analysis, see Weinberg, *The New Judicial Federalism*, 29 STAN L. REV. 1191, 1206-16 (1977).

injunction prohibiting police use of life-threatening body holds.²⁴ And, now we find *Rizzo* flashed like a badge of covert power in *Pennhurst*.²⁵

Why, then, did the Court not decided *Pennhurst* under *Rizzo*, rather than under the eleventh amendment? The eleventh amendment, after all, can be trumped by *Ex parte Young*. But *Ex parte Young* is trumped by *Rizzo*.

The answer to that question may have to do with the fact that *Pennhurst* has resonance far beyond the Court's narrow holding. There is intricate interplay in *Pennhurst* between the doctrines governing liabilities of state versus federal officials, for violations of state versus federal law, at law versus in equity, under the protections of the eleventh amendment versus sovereign immunity. The Court in fact somewhat relies on a pre-Warren Court case involving not state, but federal officials. In that case, *Larson v. Domestic & Foreign Commerce Corp.*,²⁶ the Court held federal courts powerless to enjoin federally authorized violations of (nonstatutory) state (1985) 19 GEORGIA L. REV. 1081 law by federal officials; that result was thought to be compelled by federal sovereign immunity.²⁷ Building on *Larson*, *Pennhurst* reconceptualizes the way *Ex parte Young* works. An official is "stripped" of governmental authority not by a violation of state, but only federal, law. But after *Pennhurst* that is arguably true for federal as well as state officials,²⁸ even when, without authorization, they have violated state statutory law.²⁹

The narrow target and chief casualty of *Pennhurst* is *Ex parte Young*. A meaningful part of the *Ex parte Young* power, relied on until now, has been sublimed away. But once *Ex parte Young* is diminished, the damage cannot be contained. The *Ex parte Young* device is more or less what, until now, has permitted actions against federal officials. That is the reason the sovereign immunity of the United States generally has not, until now, defeated suits against federal officials. The dispute over common-law sovereign immunity among the authors of the several

24. *Lyons*, 461 U.S. 95, 111-13 (1983) (equitable requisites not met by plaintiffs alleging both past and future harm, relying also on *O'Shea v. Littleton*, 414 U.S. 488 (1974).

25. *Pennhurst*, 104 S. Ct. at 910 n. 13.

26. 337 U.S. 682 (1949); see *Pennhurst*, 104 S. Ct. at 914-17.

27. *Id.* at 695.

28. See *Pennhurst*, 104 S. Ct. at 943 n. 50 (Stevens, J., dissenting).

29. Recall that *Larson*, *supra* note 26, extended immunity to federal officials only for authorized violations of nonstatutory state law. *Pennhurst*, however, had to do, inter alia, with violations of state statutory duties.

Pennhurst opinions³⁰ underscores the extent to which the eleventh amendment is only part of what is involved in *Pennhurst's* reworking of *Ex parte Young*. Federal and, possibly, state sovereign immunities are revised as well.³¹

In this context, *Rizzo* would have been beside the point. The attack on *Ex parte Young* in *Pennhurst* enlarges both eleventh amendment and federal sovereign immunities. But there is no real parallel, in cases against federal officials, for *Rizzo*. Principles of comity and federalism have no application in federal suits against federal officials. Thus, *Rizzo* could not have helped to build the Court's broader new structure.

Indeed, that new structure is broader than I have indicated thus far. Based as *Pennhurst* is on a revised and diminished *Ex parte Young*, and on concomitantly expanded notions of eleventh amendment and sovereign immunities, *Pennhurst* cannot be limited to pendent jurisdiction. State claims against government officials acting in their official capacities would now seem to be (1985) 19 GEORGIA L. REV. 1082 equally impossible even when otherwise properly within the diversity of citizenship jurisdiction or other heading of federal jurisdiction.³² There is simply no room for claims of official violation of *state* law under any heading of federal jurisdiction. Even where Congress, acting within its fourteenth amendment powers, overcomes the eleventh amendment immunity of the states, creating a federal cause of action against a state, *Pennhurst* seems to require dismissal of a pendent state claim. Thus, it is obviously the effect of *Pennhurst* to shift to state courts the litigation of federal claims against government officials whenever an alternative state law theory of recovery is too valuable to sacrifice.

Suppose, for example, that a litigant attempts parallel litigation in both sets of courts, the federal tort theory in federal court, and the state tort theory in state court. What then? Under current understandings, the consequence in the federal court could be a stay of proceedings.³³ If so,

30. *Pennhurst*, 104 S. Ct. at 913-15 (Powell, J.); *id.* at 930-37 (Stevens, J., dissenting).

31. *See infra* text following note 42; text at note 43.

32. Other jurisdictional possibilities include 28 U.S.C. § 1330 (1976). Diversity cases will be rear; *see infra* note 62 and accompanying text. For the significance of the distinction between "official capacity" suits and other civil rights suits, *see infra* notes 73-86 and accompanying text.

33. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (favoring stay of duplicative federal proceedings in the interest of comity and federalism when a stay would avoid piecemeal adjudication, in a case

plaintiff probably would be unable to “reserve” the federal question for subsequent federal adjudication; the reservation procedure approved in *England v. Louisiana State Board of Medical Examiners*³⁴ now appears to be unavailable outside the narrow “abstention” context of the *England* case itself.³⁵ That seems to be so even though our plaintiff’s post-*Pennhurst* litigation can scarcely be said to be voluntarily in state court.³⁶ The odds are, then, that only the state litigation could go to judgment. But the attempt to keep the federal question out of (1985) 19 GEORGIA L. REV. 1083 state court would have been a dismal failure; the state judgment would be capable of precluding subsequent adjudication of the federal claim based on the same violation in the stayed federal case, even if the plaintiff had refused to litigate the federal claim in state court.³⁷

If the litigant attempted first to sue only on the state claims in state court, the result would be exactly the same. Subsequent federal suit on

in which the motion for stay was filed before substantial federal proceedings on the merits, and where there were issues of state law). *Colorado River* itself, of course, is a first-class example of the “struggle to stay in”. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), is not to the contrary. Both cases involved federal questions, but in *Cone* a stay would have frustrated the purposes of the Federal Arbitration Act since it was unclear whether the state could wold have compelled arbitration in its enforcement of the Act, or merely stayed litigation.

34. 375 U.S. 411, 421 (1964).

35. *See* *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980).

36. *See* Comment, *Claim Preclusion and Section 1983 Civil Rights Actions: Migra v. Warren City School District Board of Education*, 70 IOWA L. REV. 287, 303 (1984).

37. *See, e.g.*, *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327 (1985); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Federated Dep’t Stores, Inc. v. Moetie*, 452 U.S. 394 (1981). *See infra* text accompanying notes 49-52. Only a state no-preclusion rule, such as might arise where the state lacked competence over the federal claim, might leave the federal claim to federal adjudication; and even in that case, the state’s issue-preclusion rules would defeat federal relitigation; otherwise, the stay would have been pointless. *See infra* note 41; *see also* Note, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding* 53 FORDHAM L. REV. 1193 (1985) (urging consideration of risk or preclusion when granting stay).

Even if the stay were not granted, and the federal action went first to judgment, the result would be unsatisfactory from the plaintiff’s point of view. *See infra* note 39 and accompanying text.

federal law theories would be blocked if, as is likely, state res judicata rules would preclude relitigation of the same claims under another sovereign's law.³⁸ It is as though the Supreme Court had set up a field of repellent force around the federal courthouse.

On the other hand, if the plaintiff attempted to sue first in federal court on the federal claims only, and subsequently to sue on the state theories in state court, supreme federal common-law res judicata rules would operate to block the attempt as relitigation; the state suit would have to be dismissed.³⁹

Thus, the only options would be to forego the state claims entirely, or to sue on the whole case in state court only. In other words, access to federal jurisdiction has been conditioned, in effect, on waiver or rights under state law. In civil rights suits, such a result seems singularly inappropriate. Congress gave civil rights jurisdiction to federal courts on the view that state courts should not be trusted with exclusive jurisdiction of civil rights claims.⁴⁰ Congress (1985) 19 GEORGIA L. REV. 1084 scarcely can have intended to force civil rights claims into state courts on pain of waiver of rights under state law, or to condition access to federal courts on any such sacrifice.⁴¹

38. See *supra* note 37; *infra* notes 50-52 and accompanying text.

39. See *infra* note 49. The scope of a federal judgment in any court is, of course, a federal question, although the Supreme Court has recently purported to reserve the question of the preclusive effect on state claims of a federal judgment. *Moetie*, 452 U.S. at 402; see *id.* at 410 (Brennan, J., dissenting).

40. See *Mitchum v. Foster*, 407 U.S. 226, 240-42 (1972).

41. I am indebted to my colleague, David Filvaroff, on this point. The Supreme Court makes an analogous point for antitrust suits in *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327, 1335 (1985). Professor Filvaroff also argues that, even were concern for the integrity of judgments believed to outweigh the national interest in federal enforcement of civil rights, such concern could be accommodated through use of collateral estoppel rather than claim preclusion, as the Court recognizes in *Marrese*, 105 S. Ct. at 1334 (scope of state judgment in federal antitrust suit). Thus, cases lost in federal court on a point of federal law would remain triable in state court under state law theories. I note that a federal rule to like effect was rejected in *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892, 898 (1984), decided on the same day as *Pennhurst*. But that case, like *Marrese*, involved full faith and credit to a state-court judgment in federal court, rather than the effect in state courts of federal judgments, a matter not referred to state law by 28 U.S.C. § 1738, and so clearly left within federal lawmaking competence. See *infra* note 49.

What happens to the plaintiff whose action is against *federal* officials? Non-exclusive federal claims against those officials, of course, remain actionable in both sets of courts, subject to removal.⁴² But what of *state* claims against federal officials?

For purposes of answering this question, it is important to note a bizarre feature of *Pennhurst's* reallocation of adjudicatory power. In actions *Pennhurst* now confines to state adjudication, it must be anticipated that state officials will continue to be “stripped” of authority, presumably under state common-law analogs to *Ex parte Young*. One might well ask why, in reason or policy, a defendant should be “stripped” in one set of courts and not “stripped” in the other. Yet unless the states keep their “stripping” rules divergent from *Pennhurst*, there will be no forum at all for complaints of governmental violations of state law. But in post-*Pennhurst* state court litigation of state law claims against federal officials, which sovereign’s law would govern the “stripping” issue?

It would seem that federal sovereign immunity now bars such claims in both sets of courts;⁴³ the new federal “stripping” rules presumably would have to govern the liabilities of federal officials. Otherwise the federal sovereign would be immune in federal, but not in state, courts—a position that makes scant sense.⁴⁴ If this is **(1985) 19 GEORGIA L. REV. 1085** where *Pennhurst* leaves us there is now no forum at all, absent specific waiver by Congress, in which to try claims of violation of state law by federal officials acting in their official capacities. Surely such a result is inconsistent with the rule of law.

Another question arises. *Pennhurst's* assault on *Ex parte Young* depends, as we have seen, on a reading of that case that has no greater plausibility than its opposite; a violation of state law as well as of federal might have been presumed—and by many was presumed—to “strip” a government official of eleventh amendment immunity.⁴⁵ *Pennhurst* also depends, at a further remove, on the hypothesis that state law and federal

42. 28 U.S.C. § 1442(a) (1984). State courts may be unable to enjoin federal officials.

43. See *supra* text accompanying notes 28-31 (after *Pennhurst*, federal officials immune in federal courts for civil rights claims under state law). For further refinement of this position, see *infra* notes 79-92 and accompanying text.

44. But see *Nevada v. Hall*, 440 U.S. 410 (1979) (California could determine under its own law the sovereign immunity of Nevada in California courts). The interstate and federal/state conflict of laws, however, are to be distinguished by the bearing of the supremacy clause on the latter.

45. See *supra* notes 14-18 and accompanying text.

law are as necessarily separate in this context as they are, for example, in *Erie Railroad v. Tompkins*.⁴⁶ But such a view is simply unreal in the specific context of pendent jurisdiction cases like *Pennhurst*. In such cases, claims pleaded as separate counts of a complaint under state and federal law respectively are, typically, simply alternative theories of recovery for the same grievance. Sometimes the trial court will choose to go to the jury on the state and not the federal claim, as the doctrine of pendent jurisdiction permits, just as it may decide to go to the jury on the federal claim only. Reviewing courts, as they did in *Pennhurst*, may sometimes choose to rule on one and not the other of the joined claims. But the reality is that a state law claim pleadable as a violation of federal right *is* a violation of federal right.

It is true, of course, that a federal law count and an alternative state law count may diverge importantly in the elements to be proved or the defenses allowed, especially if one or both are statutory. Nevertheless, the extent to which it is appropriate to treat state and federal claims as distinct varies with the context. The Federal Rules of Civil Procedure, for example, tend to encourage a federal trial judge to disregard the legal characterization of a suit.⁴⁷ **(1985) 19 GEORGIA L. REV. 1086**

The federal common-law rules governing judgments also work to blur a distinction between federal and state law, as we have just seen.⁴⁸ Litigation of federal claims in federal court would preclude a plaintiff from subsequently bringing claims based on the same facts under state law theories in state court, at least where there has been a full and fair opportunity to join the state claims in the federal proceeding,⁴⁹ and perhaps even when (as might occur after *Pennhurst*) there has not. And litigation of state law claims in state court will—within limits not yet

46. 304 U.S. 64 (1938) (although power to make federal law is delegated to the nation, power to make state law is reserved to the states, and no intermediate choices are available).

47. *See, e.g.*, FED. R. CIV. P. 8(a)(2) (short and plain statement of claim sufficient), 15(a) (leave to amend pleading to be freely given as justice requires). The Supreme Court has recently relied on the policy implications of R. 15(a) to justify imposing liability on a party neither formally served nor joined in the original complaint. *Brandon v. Holt*, 105 S. Ct. 873, 877 n. 19 (1985).

48. *See supra* text accompanying notes 37-39.

49. *See* C. WRIGHT, *THE LAW OF FEDERAL COURTS* 694 (4th ed. 1983); Degnan, *Federalized Res Judicata*, 85 *YALE L.J.* 741, 768 (1976). *But see* *Federated Dep't Stores, Inc. v. Moetie*, 452 U.S. 394, 402 (1981) (purporting to reserve the question).

announced⁵⁰—preclude the plaintiff from bringing claims based on the same facts under federal law theories in federal court, if state law purports to require the preclusion.⁵¹ That may be so even where the federal claim could not have been sued on in any subsequent state proceeding because within the exclusive competence of the federal courts.⁵² (1985) 19

50. The question of the effect on 28 U.S.C. § 1738 (requiring the forum to give the same faith and credit to a sister-state judgment as would be given in courts of the judgment rendering state) of state jurisdiction exercised notwithstanding an act of Congress placing a claim within exclusive federal adjudicatory competence was reserved in *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327, 1335 (1985) (in antitrust case, remanding for a determination whether state forum’s law would preclude subsequent relitigation of a claim beyond the subject-matter jurisdiction of the judgment-rendering court, and stating that only then would it become necessary to determine whether the grant of exclusive federal jurisdiction over antitrust claims would justify a finding of an implied partial repeal of § 1738 making possible relitigation in federal court). The existence of this question was also noted in *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982). The *Marrese* Court expressed itself as “unwilling to create a special exception to § 1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the State rendering the judgment. *Marrese*, 105 S. Ct. at 1334.

51. *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327 (1985); *Migra v. Warren City School Dist. Bd. of Educ.* 465 U.S. 75 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Because the weight of state law authority favors a requirement that, for preclusive effect, a judgment must be rendered by a court with competence over the subject matter, an exclusive federal claim tried in state court will tend, under *Marrese*, to remain open to subsequent federal adjudication. *See supra* note 37; *infra* note 52.

52. *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327 (1985); *Federated Dep’t Stores, Inc. v. Moetie*, 452 U.S. 394 (1981). The result may seem startlingly contrary to former understandings. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment g (1982) (the judgment-rendering court must have had competency over an unpleaded claim for its judgment to be held preclusive of litigation of the claim). In effect, the Supreme Court is deferring to Congress, under 28 U.S.C. § 1738, in allowing the law of the judgment-rendering state to govern the need for competency. That deference is possible, however, only if due process is not offended.

In *Marrese*, the Court did not reach the due process point. The Court argued that antitrust policy might override § 1738, but that the question whether it did was premature. The court rejected a rule of invariable preclusion. Thus, the Court’s deference to state law under § 1738 would tend to favor relitigation, given the general rule stated in RESTATEMENT, *supra*. But the court pointed out

GEORGIA L. REV. 1087 Here, too, with the benefit of quite current Supreme Court cases, we seem to be willing to blur the distinction between state and federal claims when they are in reality merely alternative modes of pleading the same case. Where the facts support the judgment under either theory, preclusion has seemed, although harsh, to make some sense.

We see a similar approach when the question is the existence of federal jurisdiction. Today a state law claim in state court may be treated as a federal claim for purposes of removal, if the facts support the federal theory, regardless of the intentions of the litigant.⁵³

Similarly, in determining the availability of Supreme Court review, when the source of the law on which the petitioner is relying is ambiguous, the Supreme Court today is willing to presume that a federal question is raised, and to take jurisdiction.⁵⁴

It is true that in determining whether a district court has federal question jurisdiction, artful pleading, it is sometimes said, will not be allowed to convert an essentially state law claim into a federal one⁵⁵ But in a pendent jurisdiction cases like *Pennhurst*, by hypothesis there exists a substantial federal claim.

A better counterexample does come to mind. Suppose a criminal prosecution in state court. The defendant raises a defense under state law, but is convicted, and the conviction is affirmed. It turns out that the defense was a good one under federal law, and that the prisoner was wrongly convicted. The defendant seeks federal habeas corpus. Since the defense has already been presented to the state court, one might now suppose it to be an “exhausted” claim, for purposes of fulfilling the statutory requirement of exhaustion of state judicial remedies.⁵⁶ But the claim will be held unexhausted **(1985) 19 GEORGIA L. REV. 1088** unless it has been presented to the state court “in its federal character”; that is so even though the facts litigated would support a ruling for the accused under either theory.⁵⁷ The virtue of this rule, presumably, is in allowing

that state law on issue preclusion would in any event prevent relitigation of issues of fact. *Marrese*, 105 S. Ct. at 1334.

53. *See supra* note 7.

54. *Michigan v. Long*, 463 U.S. 1032, 1041, 1942 (1983).

55. *See, e.g.* *Franchise Tax Bd. v. Construction Laborers’ Vacation Trust*, 103 S. Ct. 2841, 2853 (1983).

56. 28 U.S.C. § 2254(b), (c) (1982). The “exhaustion” rules are spelled out in *Fay v. Noia*, 372 U.S. 391, 434-38 (1963).

57. *See, e.g.*, *Rose v. Lundy*, 445 U.S. 509, 510-13, 522 (1982).

the state to pass on the question of federal law. Although that generally may be a reasonable policy, in this context it is a mere form: a state court's ruling of law cannot bind a federal court sitting in habeas corpus.⁵⁸ Given this reality, such formalism in administration of "exhaustion" in habeas corpus seems unjustified.

In all the examples given, then, despite problems of comity, and differences in burden of proof, defenses, or remedy, there is a practical convergence of state and federal law. The effects of joinder or of failure to join, characterization or failure to characterize, litigation or failure to litigate, seem to depend on the existence or not of a "common nucleus of fact."⁵⁹ It is that common nucleus that would make compartmentalization of the two kinds of claims in most of the examples given seem unduly formalistic, if not arbitrary. That reasoning applies, a fortiori, to the question of the availability of pendent jurisdiction. As to that, a common nucleus of operative fact binding the state and federal claims has, until now, been held specifically to justify a flexible stance. The presence of a governmental defendant need not affect this flexibility; in a case of pendent jurisdiction, the defendant is properly before the trial court on the federal claim in any event. Only *Pennhurst* itself interrupts this logic, with its new and constricted view of *Ex parte Young*.

The Supreme Court reasoned that what was at stake in *Pennhurst* was not pendent jurisdiction, but the eleventh amendment. The doctrine of pendent jurisdiction, merely a judge-made rule, could not be permitted to erode the force of the amendment.⁶⁰ But pendent jurisdiction is no more judge made than is *Ex parte Young*. With respect, the Court begs the question. The issue (1985) 19 GEORGIA L. REV. 1089 is whether, under *Ex parte Young*, an official is "stripped" of immunity by a violation of state as well as federal law; that question remains the same whether one's starting point for thinking about it is the general availability of pendent jurisdiction or the defense of eleventh amendment immunity.

The argument that there is a practical convergence of alternative state and federal legal theories in a variety of contexts may seem to have scant

58. *Brown v. Allen*, 344 U.S. 443 (1953) (on federal habeas corpus a federal constitutional claim may not be precluded by prior state adjudication).

59. This is the familiar language of *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (pendent jurisdiction over a state claim is available where the federal court has jurisdiction over a substantial federal claim and the claims share a common nucleus of operative fact).

60. *Pennhurst*, 104 S. Ct. at 919; see also Brief for Petitioners at 20, *Pennhurst*.

relevance for cases in which a civil rights claim is pleadable only under state law. But such cases are very rare. It is an inartful pleader indeed who cannot plead a state claim as a federal one; the pleader may, indeed, be deemed to have done so.⁶¹ In any event, diversity of citizenship must be infrequent in suits complaining of state governmental wrong;⁶² thus, state law civil rights claims in federal court would tend to be pleaded as pendent claims. *Pennhurst* undermines federal judicial power overall all of them on the basis of a distinction that, as far as we have seen, seems almost wholly formal.

It cannot be supposed that there is some special characteristic of an alternative state law theory that would justify a denial of a federal remedy for a violation of right colorably pleadable as federal. As we have seen, the Court's insistence that an official cannot be "stripped" of eleventh amendment immunity by violating state law makes systemic sense only if the same official *is* stripped of sovereign immunity in state court.⁶³ Thus, violations of state law cannot be inherently deficient in "stripping" power. The mysterious deficiency arises only when the official is brought into federal court.

Of course, the implication is that comity and federalism are somehow at risk. Yet is passeth understanding how a forum's refusal to enforce any law but its own is conducive to good inter-sovereign relations. The unwisdom of that stance is embarrassingly plain where the officials who will thereby escape liability happen to **(1985) 19 GEORGIA L. REV. 1090** be in the forum sovereign's own. As Justice Stevens points out in his *Pennhurst* dissent, comity would be served best by federal judicial cooperation in the state's law enforcement effort.⁶⁴

In sum, there seems to be no good reason for *Pennhurst's* compartmentalized treatment of state and federal theories in civil rights cases.

61. *See, e.g.*, *Federated Dep't Stores, Inc. v. Moetie*, 452 U.S. 394, 396 (1981).

62. *But see, e.g.*, *Stafford v. Briggs*, 444 U.S. 527 (1980), in which diversity of citizenship would seem to have existed at the time of trial, at least for some of the opponents. Other jurisdictional possibilities for the single state claim include the Federal Sovereign Immunities Act, 28 U.S.C. § 1330 (1982). *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (federal courts have jurisdiction under the Federal Sovereign Immunities Act of cases based on claims under nonfederal law).

63. *See supra* text following note 42; text at note 43.

64. *Pennhurst*, 104 S. Ct. at 941-42 (Stevens, J., dissenting).

One further question, What is the effect of *Pennhurst* on the eleventh amendment rules as previously understood after their synthesis in *Edelman v. Jordan*?⁶⁵ After *Edelman*, the position has been that actions for damages against state officials are available in federal court only where the damages are to be paid by the named individual defendants and not out of the state treasury. Federal court orders for retroactive payments from state coffers would also violate the eleventh amendment.⁶⁶ And, until *Pennhurst*, actions for prospective injunctive relief against state officials have been fully available under the doctrine of *Ex parte Young*—even where compliance with federal court orders will entail significant state governmental expenditures.⁶⁷

Given these ground rules, the language of *Pennhurst*, seemingly limited to the availability of injunctions, is almost unintelligible if taken to mean that the eleventh amendment does *not* bar federal court damages actions under state law, wherever the damages are ultimately payable by the state. Such damages were barred under prior law and would be barred now a fortiori.⁶⁸

But, of course, damages, when *not* payable by the state, have been available for some time in federal civil rights suits, under both *Monroe v. Pape*⁶⁹ and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.⁷⁰ Had the Court left the theory **(1985) 19 GEORGIA L. REV. 1091** of sovereign responsibility undeveloped beyond the understandings just described, *Pennhurst* might have been taken to mean that state law theories would not support a federal award even of the damages clearly

65. 415 U.S. 651 (1974) (federal civil rights actions seeking court orders for retroactive monetary relief payable by the state are barred by the eleventh amendment).

66. That is the specific holding of *Edelman*, 415 U.S. at 678.

67. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977) (eleventh amendment does not bar a federal court from requiring the state to finance extensive court-imposed education programs). The prospective/retroactive distinction seems decreasingly workable. Compare *Green v. Mansour*, 54 U.S.L.W. 4011 (U.S. Dec 3, 1985) (No. 84-6270) with *Quern v. Jordan*, 415 U.S. 651 (1974).

68. *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). See *County of Oneida v. Oneida Indian Nation*, 105 S. Ct. 1245 (1985).

69. 365 U.S. 167 (1961) (authorizing suits for damages against state officials under the Civil Rights Act, 42 U.S.C. § 1983).

70. 403 U.S. 388 (1971) (authorizing suits for damages against federal officials under the United States Constitution).

payable by an individual officer.⁷¹ That is because *Pennhurst* operates within the fiction of *Ex parte Young*, that a wrongdoing official becomes personally answerable for the wrong. But in the wake of *Pennhurst*, the Court has moved to clarify the post-*Edelman* understandings.

This Term, in *Kentucky v. Graham*,⁷² the Court brought to the foreground quite ancient lore on “personal-capacity” suits and “official-capacity” suits.⁷³ It might be thought that all governmental officials acting under color of law are sued in their official capacities. That seems generally so for conduct from which injunctive relief is sought. But the Court is insisting on a distinction: when officials are sued in their official or representative capacities, the suit is against them in their personal or individual capacities, the suit is against them personally.⁷⁴ In the personal-capacity suit, as Justice Marshall points out in *Graham*, should the defendant die during the litigation, the defendant’s estate would be the substituted party defendant. But in the official-capacity suit, the substituted party defendant would be the original defendant’s successor in office.

The key point, the Court reminds us, is the allocation of financial responsibility. In *Brandon v. Holt*,⁷⁵ when a police chief was (1985) 19 GEORGIA L. REV. 1092 sued under the Civil Rights Act, the Court assumed that damages would be paid by the municipality; the suit was

71. *But see Pennhurst*, 104 S. Ct. at 914 n. 21 (distinguishing *Pennhurst* from other cases against officials because in *Pennhurst* the defendant hospital officials were sued only in their representative capacities).

72. 105 S. Ct. 3099 (1985) (attorneys’ fees could not be awarded against the state in a successful civil rights suit brought against a state official in his “personal capacity”).

73. *Graham*, 105 S. Ct. at 3104. The Court here was building on *Brandon v. Holt*, 105 S. Ct. 873 (1985) and *Pennhurst*, 104 S. Ct. at 912 n. 17, 914 n. 21. The concept is a familiar one at common law, however, and references to it can be found, *e.g.*, in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949), the federal sovereign immunity case on which Justice Powell relied in *Pennhurst*. *See supra* note 26 and accompanying text.

74. *Graham*, 105 S. Ct. at 3105 n. 11. This is not to suggest that naked statutory representative capacity is a sufficient basis for an official-capacity suit. *See, e.g.*, the inconclusive struggle in *Trawnik v. Lennox*, [1985] 1 W. L.R. 532 (C.A.) (questioning the capacity of the Attorney General, as statutory representative of the Crown, to defend an action for an injunction against the nuisance of a shooting range then under construction by the Ministry of Defense in Berlin). Ultimately in *Trawnik v. Lennox*, the Attorney General was dismissed from the proceedings. *Trawnik* [1985] All E.R. 368 (C.A.).

75. 105 S. Ct. 873 (1985).

therefore held tantamount to one against the municipality.⁷⁶ Similarly, in *Pennhurst*, the hospital officials there sued in equity were considered merely good faith representatives of an under-funded institution. The state would have had to finance the institution's compliance with any remedial court order. The suit was thus considered tantamount to suit against the state.⁷⁷ In *Monroe* and *Bivens*, on the other hand, the defendant officials were sued in their individual or personal capacities and held personally accountable for their torts. Thus, the *Graham* Court emphasizes, judgment in a personal-capacity suit is to be executed only on the defendant's personal assets.⁷⁸ And an award of attorneys' fees in such a suit runs against the defendant official, not the government employer.⁷⁹

Graham holds attorneys' fee awards against a city unavailable in a *Monroe v. Pape* action. Thus, it seems difficult to explain the participation of the liberal wing of the Court in *Graham*, and Justice Marshall's authorship of the unanimous opinion. Perhaps the answer lies in the function *Graham* seems to serve in shoring up *Monroe* and *Bivens* in the wake of *Pennhurst*. The individual capacity civil rights action for damages, even one against state officials, even under state law, appears safe, for the present. But a price is paid.

First, in the official-capacity suit, where damages are to be paid by the named official's governmental employer (whether or not the government is a formal party),⁸⁰ at least where that employer is a municipality, the litigation, under *Graham*, must now be ruled by the body of law that governs municipal liability.⁸¹ Thus, the burden of proof on the plaintiff in an official-capacity suit will now be the heavy burden imposed on litigants under *Monell v. New York (1985) 19 GEORGIA L. REV. 1093 City Department of Social Services*,⁸² a burden of showing the violation to be

76. *Id.* at 878.

77. *Pennhurst*, 104 S. Ct. 912 n. 17, 914 n.21.

78. *Graham*, 105 S. Ct. at 3105, *see also* *Stafford v. Briggs*, 444 U.S. 527 n. 10 (1980); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949). In the typical *Monroe* suit against a police office, municipalities commonly fund damages and fee awards through insurance or other mechanisms in any event. *Graham* disregards these realities, but may presage closer scrutiny of the actual source of funding for civil rights recoveries.

79. Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988.

80. *Graham*, 105 S. Ct. at 3106-07.

81. *Id.* at 3106; *see* *Monnell v. Department of Social Serv.*, 436 U.S. 658 (1978) (municipalities are "persons" subject to suit under the Civil Rights Act of 1871).

82. 436 U.S. 658 (1978).

governmental policy, necessitated by the unavailability, under *Monell*, of respondeat superior.⁸³ And punitive damages will be unavailable.⁸⁴ Second, where state waiver⁸⁵ or act of Congress⁸⁶ overcomes eleventh amendment or sovereign immunities, it now seems open to defendant state or federal officials to argue that the rules laid down in *Graham* for official-capacity suits against city officials should apply in these other contexts—that the *Monell* burden of proof and prohibition of punitive damages should obtain.

Third, the courts may attempt to use the *Graham* distinction in civil rights suits in equity, as the Supreme Court itself does in *Pennhurst*.⁸⁷ Such an attempt would be nugatory in some cases, but threatening in others. It is true that one can identify equity suits against mere representatives and their successors in office and term these official-capacity suits. But *Monell* obviates any need for the category in actions against local officials, as the *Graham* Court concedes.⁸⁸ Nor is there need in this context to introduce a new, *Monell*-like burden of intentional violation. That is generally the requirement in civil rights suits in equity.⁸⁹

To the extent that official-capacity suits might sort out those equity actions in which governmental policy, as opposed to individual malice, is behind a threat to harm, *Graham* would merely shift the courts' difficulties from one frame of reference to another, with no apparent benefit. For it is a continuing theoretical difficulty that governmental policy can be demonstrated through a showing of **(1985) 19 GEORGIA L. REV. 1094**

83. *Id.* at 692-95.

84. Compare *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (municipal liability, no punitive damages), with *Carey v. Phipps*, 435 U.S. 247 (1978) (individual liability, punitive damages available).

85. *E.g.*, *Parden v. Terminal Ry.*, 377 U.S. 184 (1964).

86. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (fourteenth amendment enables Congress to authorize suits otherwise barred by eleventh amendment).

87. The distinction is drawn repeatedly by the Court in *Pennhurst*. See *supra* note 77 and accompanying texts. The function the distinction seems to serve for the *Pennhurst* Court is to force the eleventh amendment issue, since the suit is assumed to be tantamount to one against the state. But once *Pennhurst* is in place, remaining eleventh amendment issues should be controlled by *Ex parte Young*. That is, even a suit tantamount to one against the state should be permissible within the limits of *Ex parte Young*.

88. *Graham*, 105 S. Ct. at 3106 n. 14.

89. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

pattern or practice, which in turn is demonstrated through a showing of individual actions taken;⁹⁰ and sooner or later courts are confronted with the question whether, based on a showing of “isolated instances,” however numbers,⁹¹ they want to start governing a local agency by decree. It is difficult to see how *Graham* could help.

Graham does pose a distinct threat in equity, however. Of course, there can be few if any official-capacity injunction suits against the nation because Congress generally does not authorize injunction actions against the United States. There can be few official-capacity injunction suits against a state because the state is immune in federal court and has sovereign immunity for the most part in state courts. But one of the features of American law that makes the last observation not entirely true is *Ex parte Young* and its analogs in state law. And the fact is that *Graham* and *Ex parte Young* cannot occupy the same space at the same time. If extended to injunction suits against state officials *Graham* would require dismissal, under the eleventh amendment, of the very suit in which *Ex parte Young* would require denial of the motion to dismiss. The Court, in short, is in conceptual trouble if it attempts to distinguish personal- and official-capacity suits in equity. *Ex parte Young* is characterizable both ways. It is an exception to the rules governing official responsibility, rather than an alternative category. To insist that such suits are “really” suits against the state is to tell us what we already know and what it is the function of *Ex parte Young* to help us overlook.

It might be supposed that *Graham* is intended to substitute for *Ex parte Young* as the dividing line between those actions merely attributable to individuals and those attributable to the state. The Court might be considering some such step if, as might be feared, *Pennhurst*—be weakening the “authority-stripping” fiction of *Ex parte Young*—undermines federal suits against officials *even under federal law*. But *Graham* could be used in this way only with enormous damage to prior law. For example, to the extent that an official’s compliance with an injunction would necessarily **(1985) 19 GEORGIA L. REV. 1095** draw upon government resources, *Graham* would shift the injunction suit from the personal-capacity to the official-capacity category. That would make it tantamount to a suit against the state, and thus not maintainable in federal

90. See *Keyes v. School Dist. No 1*, 413 U.S. 189, 210 (1973).

91. This was a sticking point for the Court in *Rizzo*, 423 U.S. 375, in which proof of at least sixteen incidents of police misconduct was held insufficient to justify imposition of injunctive relief running, among others, to the chief of police.

court. But if used in this way, *Graham* would be at odds with *Edelman v. Jordan*,⁹² which allows such actions to be maintained. It would therefore effectively write finis to federal structural remedies for civil rights violations.

Thus, it appears that *Graham* will, and should be confined to actions at law, where its chief significance lies in sheltering *Monroe* and *Bivens* from the wider emanations of *Pennhurst*.

* * *

Pennhurst has yet to be worked through. But it may well turn out to be the wellspring of new defensive law that the narrow language of Justice Powell's opinion seems to play down. Federal as well as state officials, single as well as pendent state claims, damages as well as injunctions, sovereign federal and state immunities, as well as state eleventh amendment immunity, theoretically all fall within its long shadow. Some civil rights cases are arguably barred by *Pennhurst* in both sets of courts. All of this opens up new defensive possibilities for civil rights litigation.

The *Pennhurst* Court moved well beyond the necessities of demonstrating its reluctance to engage federal courts in the administration of institutions like the defendant state hospital:⁹³ in *Pennhurst*, the Court set out to redraw the map of judicial federalism. In its zeal, the Court overshot even that goal, and wound up recontouring the landscape of governmental responsibility.

92. 415 U.S. 651 (1974) (holding retroactive payments by a state, like damages, unobtainable in federal court under the eleventh amendment, but recognizing the availability of injunctions prospective compliance with which would entail expenditures ancillary to relief); see, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977).

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** Raybourne Thompson Professor of Law, The University of Texas. I would like to thank my colleague, David Filvaroff, for valuable comments.

93. See, e.g., *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985) (state had not waived its eleventh amendment immunity, despite participation in a federal funding program pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), in an action under the Act by a handicapped person against a state hospital alleging discrimination in employment); see also *Pennhurst*, 104 S. Ct. at 910 n. 13, 912 N. 16.

This was the work of a narrow majority.⁹⁴ Its unconvincing ruling on federal judicial powerlessness over official violations of state law was hardly necessary; and the damage, as we have seen, may **(1985) 19 GEORGIA L. REV. 1096** be difficult to contain. It is to be hoped that the Court will speedily reconsider. What is wanted is a “flash of realism.”⁹⁵

94. Four of the Justices dissented (Justices Brennan, Marshall, Blackmun and Stevens).

95. *See supra* note 8 and accompanying text. Four of the Justices now seem prepared for a fundamental reassessment of the Court’s eleventh amendment jurisprudence. *See Green v. Mansour*, 54 U.S.L.W. 4011, 4014 (U.S. Dec. 3, 1985) (Brennan, J., dissenting, joined by Justices Marshall, Blackmun and Stevens); *see also Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3155 (1985) (Brennan, J., dissenting).