The Evolution and Expansion of Eleventh Amendment Immunity: Legal Implications for Public Institutions of Higher Education

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THE EVOLUTION AND EXPANSION OF ELEVENTH AMENDMENT IMMUNITY:
LEGAL IMPLICATIONS FOR PUBLIC INSTITUTIONS OF HIGHER EDUCATION

By
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For my mother and father:
my sounding boards, my cheerleaders, my best friends.
Without their unconditional love, boundless support, and relentless encouragement,
fulfillment of this personal goal (like so many others) would not have been possible.
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ABSTRACT

The purpose of this study was to explore the evolution of Eleventh Amendment immunity and the resulting implications for public institutions of higher education. Despite the relatively simple language of the Amendment, its interpretation has not been clear, consistent, or textual. This area of law has enormous implications for entities and individuals within education, as each contraction or expansion of the scope of the immunity defense has a direct impact on public higher education. In most cases, state universities are considered “arms of the state,” which affords them an extension of the state’s immunity protection. The study explored the importance of this tenuous relationship.

This study served to enhance understanding and advance knowledge in this constantly evolving area of federal jurisprudence, through an investigation of the evolution of Eleventh Amendment jurisprudence and the arm of the state doctrine. The primary basis for conducting this research was an historical-legal approach and reasoning by analogy. The first research question addressed the historic evolution of Eleventh Amendment immunity in federal courts. The second research question examined the development of the arm of the state doctrine, particularly as it related to public institutions of higher education. In each case, an overview of its evolutionary development was presented and related case law was thoroughly examined. The body of knowledge gathered through the research questions provided the basis for the conclusions of the study, which served to develop an understanding of legal implications in the relationship between Eleventh Amendment immunity and public institutions of higher education.

The analysis and synthesis of reported case law indicated that Eleventh Amendment jurisprudence has undergone an evolutionary process through which it has become firmly ensconced as part of the higher education legal landscape. The interrelationship between public institutions of higher education and Eleventh Amendment immunity has implications for all individuals within higher education, and the recent behavior of the Supreme Court confirms that
the defense of Eleventh Amendment immunity, as established within the arm of the state doctrine, is a viable and constant component of legal proceedings in higher education.
CHAPTER 1
INTRODUCTION

While sovereign immunity remains unfamiliar to many public higher education administrators, comprehension of the concept is of vital importance to them and the institutions they serve.\(^1\) Essentially, the doctrine of sovereign immunity means that private corporations or individuals cannot sue the States, agencies of the state, or institutions of the state.\(^2\) This doctrine generally deems a state university and its administrators (when sued in their official capacity), immune from lawsuits, provided the university is considered an “arm of the state” by the court.\(^3\) To that end, the courts have held, almost without exception, state universities are considered arms of the state for purposes of sovereign immunity.\(^4\) However, the concept takes on renewed importance when considered in light of changes in governance and variations in schemes of institutional autonomy. With increased autonomy and responsibility also comes more independence from the state, in turn making determinations of institutions as arms of the state (and thus their protection under the tenets of sovereign immunity) all the more difficult for the courts to ascertain.

The sovereignty discussed above was applied through an investigation related to the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment provides “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”\(^5\) The United States Supreme Court has extended the interpretation of this original language beyond its literal context. States do not enjoy immunity in suits brought by the United States or by sister states. However, the Court has reaffirmed the

\(^2\) Id at 1.
\(^3\) Id at 2.
\(^5\) US Const Amend XI.
proposition that an unconsenting state enjoys immunity from suits brought in federal courts by “her own citizens” and by “citizens of another state.”" Pennhurst State School and Hospital v. Halderman also extended this immunity into “state law claims brought into federal court under pendent jurisdiction.”

Despite the relatively simple language of the Amendment, interpretation of that language has been neither consistent nor clear. In fact, Justice Brennan noted in one dissenting opinion that “by the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity…. The case law of the Eleventh Amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions. Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges.”

Recent years have seen widespread transformation in Eleventh Amendment jurisprudence. The protections afforded to states against suits in federal court have been extended to some state agencies, deemed “arms of the state.” However, the protections enjoyed by the states and their arms are not absolute. There are three judicially recognized exceptions to sovereign immunity. The first of these exceptions is the Ex Parte Young doctrine, which holds that sovereign immunity does not bar actions against individual state officers seeking declaratory judgments that the officer is violating federal law and injunctions forcing that officer to conform to the federal law. The second exception is waiver by the states, through which a state waives its immunity protection by way of an express or constructive waiver. The final exception is abrogation by Congress, by which Congress abolishes a sovereign immunity claim through passing legislation.

Many recent decisions by the United States Supreme Court have demonstrated the Court’s interest in restricting Congress’ power to subject states to federal court suits seeking to enforce federal rights. For instance, Congress’s abrogation power was severely curtailed by the

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7 Id at 121.
11 Ex Parte Young, 209 US 123 (1908).
decision in *Seminole Tribe v. Florida*. However, it should be noted that the case also bolstered the principle that Congress may enact legislation abrogating a state’s immunity for claims based on a particular statute, when acting pursuant to the Fourteenth Amendment. This metamorphosis of Eleventh Amendment jurisprudence is particularly significant for public colleges and universities, and will be explored in detail in this study. Each of these exceptions will be revisited and investigated fully within.

Public higher education institutions may be considered an arm of the state for sovereign immunity purposes. When the Supreme Court expands or contracts the scope of the sovereign immunity defense, it has a direct impact on these educational institutions. The evolution of Eleventh Amendment jurisprudence will have profound implications for the immunity status of public institutions of higher education falling within the Eleventh Amendment protection afforded by arm of the state status. This study investigated the evolution of Eleventh Amendment jurisprudence as we know it today, detailed particular concerns for public institutions of higher education, and synthesized that information to determine the legal implications of this constantly evolving segment of jurisprudence for those public institutions.

**Purpose of the Research**

The purpose of this study was to explore the evolution of Eleventh Amendment immunity and the resulting implications for public institutions of higher education. The following research questions were addressed in this analysis:

1. What has been the historic evolution of Eleventh Amendment immunity in federal courts?
2. What has been the development of the arm of the state doctrine, particularly in its application to public institutions of higher education?

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14 Thro, *Why You Cannot Sue State U* at 6 (cited in note 1).
Significance of the Research

Since the mid-twentieth century, events and changes have “worked a revolution in the relationship between academia and law.”\(^{16}\) Federal and State governments have become increasingly involved in postsecondary education, and a growing litigious society has prompted students, employees, and others to sue institutions of higher education. In examining this relationship, Young wrote:

The relationship between the courts and education is one of kinship, yet also one of mutual independence. Both are indebted to each other for support and protection. Both are concerned with the achievement of justice, and each needs the other in order that the pursuit of ideal justice may be advanced.\(^{17}\)

Change is a constant in our society, and institutions of higher education are certainly not immune to that inevitability. This continued change engenders the need for updated analyses of the legal issues facing institutions of higher education.\(^{18}\) As stated by Goonen and Blechman, “the law reaches into almost every aspect of campus life, and its impact on the day-to-day decisions of the academic administrators has been increasing over the years."\(^{19}\) As further explained by Melear, identifying patterns in legal precedents, and establishing corresponding implications for the future, will better enable college and university administrators to make sound decisions concerning the effective administration of their institutions.\(^{20}\)

One significant area of change for institutions of higher education is Eleventh Amendment jurisprudence. The sovereign immunity revolution has enormous implications for entities and individuals within education, with each Supreme Court contraction or expansion of its scope wielding direct impact on educational institutions.\(^{21}\) In decisions reshaping the law, the Supreme Court defines the relationship between states and individuals, as well as the Supreme Court and Congress.\(^{22}\) In turn, those decisions continue to be affected by a wide variety of ever-

\(^{17}\) D. Parker Young, *The Legal Aspects of Student Dissent and Discipline in Higher Education* 13 (Institute of Higher Education Monograph Series, 1970).
\(^{21}\) Thro, 146 Educ L Rep (cited in note 15).
changing finance, origin, and governance structures in systems of higher education today. While most public institutions of higher education are considered an arm of the state for sovereign immunity purposes, continuing manipulations and transformations in higher education governance structures may inadvertently compromise such protection due to the resulting autonomy level of their member institutions. As the foregoing reasons might suggest, it is imperative higher education professionals have a clear understanding of the issues therein, as well as the implications of self-imposed waiver or Congress’ abrogation of this protection. As such, this research will serve to advance knowledge and enhance understanding of this evolving area of federal jurisprudence.

**Scope and Limitations**

- This research was limited to the realm of legal inquiry.
- The collection and synthesis of judicial opinion, legislation, and legal standards was limited to specifically address the development and growth of Eleventh Amendment immunity in the federal courts, and the implications that any such opinions may have on higher education.
- Cases addressing issues or theories outside of the above limitation were only introduced if they were persuasive to the immediate issue.
- The investigation focused primarily on “public institutions of higher education,” which for purposes of this study include public colleges and universities awarding degrees at the baccalaureate level or higher.
- Judicial opinion, legislation, or legal standards pertaining to institutions of higher learning falling outside the above limitation were introduced only if they have a persuasive effect on the status of or serve to inform the aspect of Eleventh Amendment immunity being discussed.
- The terminologies “institution,” “college,” “university,” “institution of higher education,” and “institution of higher learning” were employed interchangeably throughout this study in reference to institutions of higher education awarding degrees at the baccalaureate level or higher.
CHAPTER 2

REVIEW OF RELATED LITERATURE

The Supreme Court, in a recent line of cases, seems to have reinterpreted the traditional sovereign immunity doctrine of the states.\(^\text{23}\) The primary thrust of this jurisprudence has been to essentially preclude state employees from suing their employer for damages under several federal statutes, including the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA).\(^\text{24}\) The possibility of recovery was expressly eliminated under ADEA and ADA causes of action in the past (although, it appears as though the Court’s stance with regard to the ADA may be changing due to recent developments in case law to be discussed below), with the strong possibility that suits to recover money damages under the FLSA and FMLA will be similarly barred.\(^\text{25}\)

While the text of the Eleventh Amendment refers to diversity suits, the Supreme Court has long understood it to represent a broad understanding of state immunity from suits for damages in federal courts.\(^\text{26}\) The Court in Pennsylvania v. Union Gas held that Congress may, “pursuant to its powers under Article I, abrogate such immunity.”\(^\text{27}\) Then, as proffered by Beckham, in the decision representing the most substantial line of cases for application to public colleges and universities, the Court in Seminole Tribe v. Florida expressly overruled Pennsylvania v. Union Gas.\(^\text{28}\) In Seminole Tribe, the Court reviewed an injunctive relief request under Indian Gaming Regulatory Act provisions, and effectively broadened the scope of applicable analysis through dicta. The Court in Seminole Tribe interpreted congressional

\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Hans v Louisiana, 134 US 1 (1890).
\(^{27}\) 491 US 1, 19 (1989).
\(^{28}\) Beckham, 27 Stetson L Rev (cited in note 10).
authority under the Interstate Commerce Clause, and through rationale, held that Congress could not abrogate the states’ Eleventh Amendment Immunity.\textsuperscript{29} This was due primarily to reasoning that the Eleventh Amendment was enacted subsequent to, and thus amended, the Interstate Commerce Clause.\textsuperscript{30}

The resulting rationale advanced by the majority was congressional reliance on the Interstate Commerce Clause would not permit jurisdiction over states not consenting to suit in federal forums.\textsuperscript{31} The majority continued that a state official (acting in their official capacity) could not be sued for injunctive relief if the federal law on which a plaintiff relied provided other, more restrictive remedies.\textsuperscript{32} The significance of this decision for public colleges and universities will be primarily for those enjoying protection as arms of the state per the Eleventh Amendment.\textsuperscript{33} As the Court has implicitly recognized through case law, Congress still has the power to abrogate state immunity through statutes enacted pursuant to the Fourteenth Amendment, as it was adopted following the Interstate Commerce Clause. However, this power (with regard to the reach of legislation permitting suits against public institutions), is susceptible to limitation by the decision in \textit{Seminole Tribe}.\textsuperscript{34} The importance of this decision will be discussed further below.

**Eleventh Amendment Generally**

“\textit{The King can do no wrong.}”\textsuperscript{35} This is the British common-law maxim from which the Eleventh Amendment principle of sovereign immunity is said to derive.\textsuperscript{36} As a reaction to \textit{Chisholm v. Georgia},\textsuperscript{37} which held there was federal jurisdiction over suits against a state by citizens of another state for purposes of payment of damages, the Eleventh Amendment was ratified in 1798.\textsuperscript{38} The text of the Eleventh Amendment simply bars suits against a state by

\begin{footnotes}
\item[29] 517 US 56.
\item[30] Id.
\item[31] Id.
\item[32] Id.
\item[33] Beckham, 27 Stetson L Rev (cited in note 10).
\item[34] Id.
\item[36] Id.
\item[37] 2 US 419 (1793).
\item[38] Royer, 34 Akron L Rev (cited in note 35).
\end{footnotes}
citizens of another state.\(^{39}\) However, in \textit{Hans v. Louisiana}, the Supreme Court held the amendment applies equally to suits against a state by its own citizens.\(^{40}\) This is one of the primary ideas at issue.

As it has been opined that the Eleventh Amendment did not reinstate “an original understanding of state sovereign immunity,”\(^{41}\) differing views exist regarding whether or not state sovereign immunity was a dominant doctrine at the time of the Constitution’s ratification.\(^{42}\) As a furtherance of the above opinion, it has been stated that the reason the Constitution is silent on sovereign immunity is that the constitutional grant of broad powers to the federal judiciary dispelled any notion that states were immune as sovereign entities.\(^{43}\) In fact, none of the newly created states at the time had a constitution embodying the principle of sovereign immunity.\(^{44}\) Another view is the “leading statesmen of the time”\(^{45}\) disagreed as to whether states could be sued in federal court, with the general consensus being they could not. While overwhelming academic animosity to sovereign immunity is also advanced, Hill provides what is uncontested is that the Eleventh Amendment was intended to bar suits against states in federal court by non-citizens for the payment of debt and damages for past actions, which was a level of immunity sufficient to reverse \textit{Chisholm}.\(^{46}\)

It has been argued the Eleventh Amendment was nothing more than an amendment to Article III, Section 2.\(^{47}\) Article III, Section 2 provides in part “the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made… between a State and Citizens of another State… and between a State… and foreign States, Citizens or Subjects.”\(^{48}\) Behind that argument is the contention the amendment was intended solely to eliminate the power of federal courts to hear suits against states where the status of the parties was the only basis for jurisdiction, and accordingly, the Eleventh Amendment was nothing more than an amendment to Article III, Section 2.\(^{47}\) Article III, Section 2 provides in part “the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made… between a State and Citizens of another State… and between a State… and foreign States, Citizens or Subjects.”\(^{48}\) Behind that argument is the contention the amendment was intended solely to eliminate the power of federal courts to hear suits against states where the status of the parties was the only basis for jurisdiction, and accordingly, the Eleventh Amendment was nothing more than an amendment to Article III, Section 2.

\begin{enumerate}
\item US Const Amend XI.
\item 134 US 1.
\item Royer, 34 Akron L Rev (cited in note 35).
\item Gibbons, 83 Colum L Rev (cited in note 41).
\item Id.
\item Id.
\item Gibbons, 83 Colum L Rev (cited in note 41).
\item US Const Art III, § 2, cl 1.
\end{enumerate}
Amendment was not intended to affect the power of federal courts to hear cases involving federal question jurisdiction.\textsuperscript{49}

Analyses under the Eleventh Amendment involve five basic inquiries, including the identity of the plaintiff, the identity of the defendant, the nature of the relief, any waiver of immunity, and the existence of a congressional grant of authority.\textsuperscript{50} The amendment is invoked only when citizens sue a state, and does not apply in the event another state or the United States sues a state.\textsuperscript{51} It is important to note the United States can actually sue a state in federal court to establish individuals’ rights, thus widening that distinction.\textsuperscript{52} Further, a state or its agencies must be named as defendant in order for the Amendment to apply. Political subdivisions of the state, typically including school boards, municipalities, and counties, are generally not protected under the Eleventh Amendment.

Eleventh Amendment jurisprudence is rounded out by significant consideration of the tenuous relationship between state autonomy and federal supremacy. To that end, three exceptions to the doctrine of Eleventh Amendment immunity have been judicially recognized. These exceptions include the \textit{Ex Parte Young} doctrine, waiver of immunity, and abrogation by Congress.

The first exception, the \textit{Ex Parte Young} doctrine, refers to the idea that a citizen may sue state officials to vindicate a federal or constitutional law claim.\textsuperscript{53} In essence, the \textit{Ex Parte Young} doctrine is a method to ensure the “doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law.”\textsuperscript{54} While the Eleventh Amendment serves as a bar if the relief sought from the state includes damages, past debts, or retroactive relief,\textsuperscript{55} \textit{Ex Parte Young} holds specifically that sovereign immunity does not bar actions in federal court against individual state officers in their official capacity, when the relief sought is (1) declaratory judgment that there is currently a violation of federal law by the state officer, and (2) injunction forcing conformity of the state officer’s conduct to federal law.\textsuperscript{56}

\begin{itemize}
  \item \textsuperscript{49} Gibbons, 83 Colum L Rev (cited in note 41).
  \item \textsuperscript{50} John E. Nowak and Ronald D. Rotunda, \textit{Constitutional Law} (West Publishing 5\textsuperscript{th} ed 1995).
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} 209 US 123.
  \item \textsuperscript{54} \textit{Idaho v Coeur d'Alene Tribe}, 521 US 261, 269 (1997).
  \item \textsuperscript{55} Nowak and Rotunda, \textit{Constitutional Law} (cited in note 50).
  \item \textsuperscript{56} \textit{Ex Parte Young}, 209 US 123.
\end{itemize}
It is important to note this does not apply when the alleged violation of law occurred entirely in the past.\textsuperscript{57} In other words, this exception only applies where an ongoing violation of federal law is taking place, which may be cured through declaratory or injunctive relief.\textsuperscript{58} In such a case, the court can order state officers to comply prospectively with federal law, even if the use of state funds will be involved, indicating the intention of the amendment never included an ability to subvert the supremacy clause.\textsuperscript{59}

As noted by one scholar, \textit{Ex Parte Young} actions may be of limited usefulness as an effective remedy, as they cannot provide aggrieved employees with money damages.\textsuperscript{60} As mentioned by Landau, additional problems with utilizing the \textit{Ex Parte Young} exception may also exist.\textsuperscript{61} These include the inability of individual employees to bring suits for injunctive relief under some statutes, such as the FMLA and the FLSA, and the possible limited availability of \textit{Ex Parte Young} actions recently exercised by the Supreme Court.\textsuperscript{62} In the latter factor, the \textit{Seminole Tribe} Court held “where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon \textit{Ex Parte Young},”\textsuperscript{63} noting a reluctant nature on the part of the courts to permit such actions where a statute provides for its own remedial scheme, as in the case of most federal employment laws.\textsuperscript{64}

In addition, the possibility of filing suits for damages against state officials in their individual capacity, as they are not protected by state sovereign immunity, may come with its own set of tribulations. One issue is the federal statute in question must specifically allow for suits against individual officials.\textsuperscript{65} Further, individual state officials may be able to assert a qualified immunity defense, which is “an entitlement not to stand trial or face the other burdens

\textsuperscript{57} \textit{Green v Mansour}, 474 US 64 (1985).
\textsuperscript{58} \textit{DeBauche v Trani}, 191 F3d 499 (4th Cir 1999).
\textsuperscript{60} Landau, 39 Harv J on Legis (cited in note 23).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{64} Landau, 39 Harv J on Legis (cited in note 23).
\textsuperscript{65} Id.
of litigation."\textsuperscript{66} Such a defense is available to state officials who do not “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\textsuperscript{67}

The second exception, the waiver exception, is that a state may waive immunity; however this must be done explicitly.\textsuperscript{68} Such express waiver will only be found where stated “by the most expressive language or by such overwhelming implication from the text as (will) leave no room for any other reasonable construction.”\textsuperscript{69} Also, while a state may subject itself to suit in federal court through a waiver of sovereign immunity, waiver alone is insufficient. It must also note the intent to subject itself to suit in federal court.

Finally, general participation in a federal program, receipt of federal funds, or an agreement to recognize and abide by federal laws, regulations, and guidelines are all alone insufficient to be considered waivers of sovereign immunity.\textsuperscript{70} It has been stated in commentary “the most promising enforcement strategy may turn on state waivers of immunity.”\textsuperscript{71} However, states may be disinclined to increase their own liability by waiving immunity. This is true even in light of such options possibly serving persuasive, such as collective bargaining by state employees, congressional spending power, or other methods resulting in unilateral waiver.

As mentioned above, waiver may be accomplished through collective bargaining by the employees themselves. Through grievance arbitration, unions may be able to negotiate for a waiver of sovereign immunity or for protections equivalent. However, as noted by Dilts, Deitsch, and Rassuli, not every state has a strong union presence, and due to public employer exemption from coverage of the National Labor Relations Act (NLRA), the collective bargaining rights for state employees must derive from state statutes.\textsuperscript{72}

Perhaps the biggest lure in the waiver class is congressional spending power. Congress is given power by the Constitution to “lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States”\textsuperscript{73} pursuant to which they may “further broad policy objectives by conditioning receipt of federal monies

\textsuperscript{66} Mitchell v Forsyth, 472 US 511, 526 (1985).
\textsuperscript{67} Harlow v Fitzgerald, 457 US 800, 818 (1982).
\textsuperscript{68} Atascadero State Hospital v Scanlon, 473 US 234 (1985).
\textsuperscript{69} Murray v Wilson Distilling Co., 213 US 151, 171 (1909).
\textsuperscript{70} Scanlon, 473 US 234.
\textsuperscript{71} Landau, 39 Harv J on Legis at 184 (cited in note 23).
\textsuperscript{73} US Const Art I, § 8, cl 1.
upon compliance by the recipient with federal statutory and administrative directives.” As Congress could attach waivers as conditions to any number of federal spending programs, it may prove less difficult than thought to sway a state into a waiver of immunity. There exists the possibility a state could terminate the waiver of immunity at any time, simply through declining the federal funds they may have been awarded. In fact, even in the context of a pending lawsuit, this has proven possible. Still, as noted by Hamrick, there exists “the empirical question of whether a state actually would choose to terminate a substantial, popular program.”

It is also possible, albeit highly unlikely, that a state will unilaterally waive its sovereign immunity from federal employment suits. Such a waiver may be induced through political pressure, the interest in self-regulation, the unpopular outcome of a case, or any other means. Regardless of the method used, waiver appears to be the most promising way for state employees to enforce their rights under federal employment laws.

Finally, the last of the exceptions is that Congress may abrogate a state’s Eleventh Amendment immunity, provided it does so “unequivocally” and “pursuant to a valid exercise of power.” One problem is while the Court has stated Congress must make its intention to abrogate state immunity unmistakably clear in statute, exactly what constitutes unequivocal application of congressional intent requires judicial interpretation. The Supreme Court held in Fitzpatrick v. Bitzer, that Congress may validly create federal causes of action for retroactive damage by acting pursuant to Section 5 of the Fourteenth Amendment. Further, the Fourteenth Amendment was enacted in part to provide enhanced authority to Congress over the states.

Although Seminole Tribe clearly reaffirmed the basic principle that Congress may enact legislation abrogating a state’s sovereign immunity for claims based on particular statutes, the Supreme Court held in that case Congress cannot use its powers under the Commerce Clause to abrogate a state’s Eleventh Amendment immunity. In other words, within some limitation, if

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77 Green, 474 US at 68.
80 Nowak and Rotunda, Constitutional Law (cited in note 50).
81 517 US 56.
Congress so designates, sovereign immunity becomes meaningless for particular claims. For this reason, it is the Court’s decision that in order to effect such action, Congress must not only meet the element of unequivocal expression of intent as discussed above, but also must act pursuant to Section 5 of the Fourteenth Amendment. In enacting legislation under Section 5, Congress must show “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” If both the “unequivocal” and “valid exercise of power” elements are not met, then the abrogation attempt is deemed invalid.

The Court in City of Boerne v. Flores recognized the above limitation, as stated, was more theoretical than practical. When the decision in Seminole Tribe took place, jurisprudence indicated Congress had almost unlimited power, even indicating comparable power to that of the Necessary and Proper Clause. With such a broad view of Section 5, possible argument could be made that virtually any statute might have been passed pursuant to Section 5, thus finding all abrogation attempts constitutional. However, the Flores Court imposed significant limitations on this particular power, holding that Congress’ powers under Section 5 of the Fourteenth Amendment are limited to enforcing the actual substantive guarantees of the Amendment itself. Pursuant to this finding, Congress must make specific findings that substantive guarantees of the Fourteenth Amendment are being violated in order for legislation to be considered valid.

The significance of both Seminole Tribe and Flores was reiterated when the Supreme Court announced three confirmatory decisions at the end of the 1998-99 term. The first of those was Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank. In that opinion, it was stated the Flores standards must be applied in determining whether an abrogation attempt was conducted pursuant to Section 5 of the Fourteenth Amendment. The second decision was in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, in which the Court held the doctrine of implied waiver was inapplicable within the context of sovereign immunity. Third, in Alden v. Maine, the Court held the States’

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84 517 US 56.  
85 Katzenbach, 384 US 641.  
87 119 S Ct 2199 (1999).  
88 527 US 666.  
immunity from federal claims was neither limited nor conferred by the Eleventh Amendment. While *Seminole Tribe*\(^9\) affected only suits brought in federal court, some statutes, such as the FLSA, provide for suits by employees to enforce statutory rights in state and federal court. However, the *Alden* Court rejected this enforcement option, stating “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts.”\(^9\) In other words, it was stated that the principles of sovereign immunity applicable to federal claims against the States in federal court were equally applicable to federal claims against those states in state court.\(^9\)

Together, *Seminole Tribe* and *Alden* indicate that individuals lack a judicial forum in which to file damage suits against states, particularly when the case of action was created by Congress pursuant to its powers under Article I.\(^9\)

Again, addressing federal employment law, *Kimel v. Florida Board of Regents*,\(^9\) affirmed the standard from *Florida Prepaid*.\(^9\) The Supreme Court held the ADEA\(^9\) did not validly abrogate states’ Eleventh Amendment immunity from suit by private individuals.\(^9\) The ADEA was enacted in order to protect individuals at least 40 years of age by prohibiting “arbitrary age discrimination in employment.”\(^9\) When originally enacted, the language of the ADEA did not include states within the definition of “employer.”\(^9\) However, it was later amended to include states and their political subdivisions. The *Kimel* Court cautioned that Congress cannot abrogate Eleventh Amendment immunity by redefining the states’ legal obligations with respect to age discrimination.\(^9\)

In order to determine whether Congress validly abrogated the states’ sovereign immunity from ADEA suits, the *Kimel* Court applied a two-part test. Justice O’Connor, writing for the majority, noted Congress must first have made its intention to abrogate immunity “unmistakably

\(^9\) *Seminole Tribe*, 517 US 56.
\(^1\) 527 US at 712.
\(^9\) *Kimel*, 528 US at 91.
\(^9\) ADEA, 29 USC § 621.
\(^9\) Id.
\(^9\) 528 US 62.
clear in the language of the statute."101 She continued on to note that “the plain language of [the ADEA] clearly demonstrates Congress’ intent to subject the States to suit for money damages at the hands of individual employees.”102 She also noted the statute must have utilized a valid exercise of power in abrogating state sovereign immunity.103 While it was recognized that extension of the ADEA to the states was within the Article I powers of Congress, under Seminole Tribe, abrogation of state sovereign immunity cannot come at the hands of Article I alone.104 In order to determine the possibility of valid abrogation, the Court looked to the “congruence and proportionality” test of Flores.105 As a result, it considered unconstitutional age discrimination under the Equal Protection Clause, reaffirming “age is not a suspect classification,”106 and stating “age classifications, unlike governmental conduct based on race or gender, cannot be characterized as ‘so seldom relevant to the achievement of any legitimate state interest that law grounded in such considerations are deemed to reflect prejudice and antipathy’”107.

It was ultimately concluded in Kimel that states may discriminate on the basis of age without violating the Equal Protection Clause so long as the use of age as a factor is “rationally related to a legitimate state interest.”108 The Kimel Court declared that the ADEA “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”109 As the Court found that “Congress never identified any pattern of age discrimination whatsoever that rose to the level of constitutional violation,”110 it held invalid the ADEA’s abrogation of state sovereign immunity.111

In another foray into the area of state immunity, the Supreme Court held, in Board of Trustees of University of Alabama v. Garrett,112 that in enacting the ADA,113 Congress also had

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101 Id at 73.
102 Id at 74.
103 Id at 78.
104 517 US 56.
105 Kimel, 528 US at 82-83.
106 Id at 83.
107 Id at 83 (quoting Cleburne v Cleburne Living Ctr., Inc., 473 US 432 [1985]).
108 528 US at 83.
109 Id at 86.
110 Id at 89.
111 Id at 91.
not validly abrogated the states’ sovereign immunity from suits by private parties.\textsuperscript{114} Similar to \textit{Kimel}, the Court’s analysis considered whether the Equal Protection Clause could support the abrogation of immunity.\textsuperscript{115} In reliance on \textit{Cleburne v. Cleburne Living Center, Inc.},\textsuperscript{116} Chief Justice Rehnquist, in writing for the majority, reaffirmed disability was not a “quasi-suspect” classification for purposes of the Fourteenth Amendment.\textsuperscript{117} The Court proceeded on to conduct a rational basis review, and concluded Congress did not have sufficient evidence of patterned unconstitutional discrimination.\textsuperscript{118}

Title I of the ADA\textsuperscript{119} prohibits employers from discriminating against qualified, disabled individuals. As opposed to the ADEA,\textsuperscript{120} the ADA expressly states a “state shall not be immune under the Eleventh Amendment.”\textsuperscript{121} In \textit{Board of Trustees of University of Alabama v. Garrett}, the Court held that the Eleventh Amendment was a bar to suits in federal court for money damages under the ADA, and as such, the state of Alabama could not be forced to pay damages to its employees for failure to comply with the Act.\textsuperscript{122} The Court ultimately concluded “even if it were possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in \textit{City of Boerne}” and the “accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.”\textsuperscript{123}

A related view is also proffered regarding the outcome of this case.\textsuperscript{124} In this view, although the rational basis test is used by the legislature for disability and age classifications, a heightened level of scrutiny should be utilized when state officials use “animus” and “stereotypes” to make individual decisions.\textsuperscript{125} Accordingly, differing by the case at hand,

\begin{footnotes}
\item\textsuperscript{114} \textit{Garrett}, 531 US at 374, n.9.
\item\textsuperscript{115} Id.
\item\textsuperscript{116} 473 US 432.
\item\textsuperscript{117} \textit{Garrett}, 531 US at 367.
\item\textsuperscript{118} Id at 370.
\item\textsuperscript{119} ADA, 42 USC §12101.
\item\textsuperscript{120} ADEA, 29 USC § 621.
\item\textsuperscript{121} ADA, 42 USC §12101 at 12202.
\item\textsuperscript{122} \textit{Garrett}, 531 US 356.
\item\textsuperscript{123} Id at 372.
\item\textsuperscript{125} Id at 2148.
\end{footnotes}
distinct levels of scrutiny would be used with rational basis for legislative classifications and heightened scrutiny for individualized determinations. As a result, Congress might be able to abrogate a state’s sovereign immunity due to a stricter scrutiny possibly resulting in constitutional violations requiring action under Section 5 of the Fourteenth Amendment.

It is important to note that, in May 2004, the Court’s long-standing take on the applicability of the Eleventh Amendment to the ADA was impacted when an uncharacteristic Rehnquist Court decided the case of *Tennessee v. Lane*. The Plaintiffs in that case brought suit against the State of Tennessee, seeking money damages and equitable relief under Title II of the ADA, which provides that persons who have been impacted by discrimination under the terms of the ADA, can seek damages, including those sought against States.

The State of Tennessee answered that it was immune from suit under the ADA, pursuant to the protections afforded it by the Eleventh Amendment. In support of this argument, the State cited *Garrett*. The Court ultimately found that there was sufficient demonstration by Congress regarding the issues faced by disabled persons to warrant its conclusion that Title II of the ADA validly abrogated state immunity under the Eleventh Amendment.

**Arm of the State Doctrine**

In this world of specialized entities and privatized traditional state functions, we must consider what it is that actually constitutes a state for purposes of the Eleventh Amendment. This consideration necessarily points toward a doctrine termed the “arm of the state,” which helps determine which state-related entities are open to private damages suits, absent consent or waiver. Of great importance to the doctrine are the concepts that an entity’s reliance on the state treasury for funds, the degree of state control over the entity, and the nature of the entity as categorized under state law can distinguish one entity from another for purposes of Eleventh Amendment applicability. As a result, broad applications of the arm of the state doctrine can

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126 Id.
127 Id at 2148-2149.
129 Id.
130 Lynch and DeFrancis, 44 Boston Bar Journal (cited in note 22).
131 Id.
significantly affect the amount of quasi-entities receiving immunity under the Eleventh Amendment, resulting in a reduced ability of Congress to regulate and for private individuals to recover under claims involving violations of federal law.

In other words, one reason a federal court may find an entity is not protected under Eleventh Amendment immunity is because it falls outside the status of an arm of the state.\textsuperscript{132} For purposes of this type of analysis, state entities are classified as either an arm of the state or a political subdivision, with political subdivisions historically not enjoying governmental immunity due primarily to their level of autonomy from the state.\textsuperscript{133}

The Court has been consistent in their decisions that state agencies are protected under this immunity, however, this protection has not extended to municipalities and counties. In \textit{Ford Motor Co. v. Department of the Treasury}, the Court applied a test termed a real substantial party interest test.\textsuperscript{134} It was held that a suit against the Department of the Treasury was actually a suit against the State of Indiana. Under this reasoning, the suit was barred by the Eleventh Amendment, due to the fact that state funds would be needed to satisfy a judgment.

In another applicable case, \textit{Lincoln County v. Luning}, the immunity defense was rejected by the Court.\textsuperscript{135} This suit was brought against a Nevada county to recover overdue bonds and coupons issued by the county. The Court distinguished the county from the state by defining it as a corporation through the determination of several powers enjoyed by and characteristics of the county. The Court reasoned while the county did receive funds from the state legislature, counties in Nevada were empowered to generate their own revenue. For this reason, the debt would not be assumed by the state if the county defaulted.

In \textit{Mt. Healthy City School District Board of Education v. Doyle}, the immunity of a local school district was at issue.\textsuperscript{136} The Court held a local school district was not entitled to protection under Eleventh Amendment immunity, because the school district was a political subdivision, rather than an arm of the state, even though the school district was provided significant financial support and was under some policy control by the state. In this case, the Court developed four factors to determine whether or not the school district reached arm of the

\textsuperscript{132} \textit{Hess v Port Authority Trans-Hudson Corp.}, 513 US 30 (1994).
\textsuperscript{134} 223 US 459 (1945).
\textsuperscript{135} 133 US 529 (1890).
\textsuperscript{136} 429 US 274.
state status. These factors included: (1) state law designation of local school districts as political subdivisions; (2) degree of supervision over districts by the state board; (3) funding levels received from the state; and (4) the level of authority held by the district to generate revenue through bond issuance or tax levies.\footnote{137}

When applying these factors to the case to reach a decision, the Court pointed to the power of the school district to sue and be sued, its discretionary authority to make resource allocations, and its authority to levy taxes and issue bonds. For purposes of the decision, more emphasis was placed on the state law characterization of the school district than on the fact that most of the district’s annual operating funds came from the state. Finally, the Court reasoned the school district fit the description of a political subdivision, much like municipalities and counties mentioned above.

The tests used to determine the status of entities for purposes of the Eleventh Amendment have become increasingly more elaborate and complex. This complexity is due primarily to the increased emphasis on privatization, revenue sharing, and decentralization by the states, the expansion of state services, and the emergence of specialized agencies and positions created by the states. It has become increasingly more difficult to immediately categorize state entities as either arms of the state or political subdivisions, so the tests reflect that difficulty. In resolving the difficulties presented in this effort, federal courts have resorted to employing a balancing test to determine applicability of Eleventh Amendment immunity. This test is fact intensive and technical, and uses a range of factors. An entity is classified on the basis of its origin, mission, status in statute and constitutional provision, funding sources, independence from state control and oversight, and whether a judgment against the entity would have to be satisfied by the state.

In \textit{Hess v. Port Authority Trans-Hudson Corp.}, the Court was charged with evaluating a claim for immunity for a bistate agency.\footnote{138} The Court took into consideration the high degree of state control over the entity in comparison to the large amount of financial independence it enjoyed. However, the Court found these factors inconclusive. The Court ultimately based its decision to deny immunity on whether extension of immunity to the entity would compromise the financial solvency or dignity of either state. The Court held financial solvency of the states

\footnote{137} Id. \footnote{138} 513 US 30.
would not be compromised because the entity was empowered to pay its own debts and generate its own revenue.

The Court also found it would not compromise dignity of the states, based on the fact that the entity had been a joint creation with the federal government. In another bistate entity case, the Court again denied immunity. In this case, a compact between two states, namely Nevada and California, created the agency. A range of factors was used to determine the status of the entity, such as status under state law, origins, purpose, funding sources, and governing authority in relation to degree of state oversight. The applicable tests continue to grow and vary, further evidenced by Rogers’ statement that the decisions of the United States Supreme Court, speaking to arm of the state status, have resulted in a wide array of tests in lower federal courts.  

The Courts and Higher Education

As stated by Kaplin and Lee, the law’s relationship to higher education was traditionally different from what it is now. Higher education was typically viewed as a private and unique enterprise, best regulated internally. The judiciary was also generally deferential to institutions of higher education, as evidenced by the courts’ apparent refuge in the doctrine of “in loco parentis,” or putting the institution “in the place of a parent.” The courts’ siding with the institution in such matters also extended to the ability, or lack thereof, of students to lay claim to constitutional rights in the setting.  

As a result of this outlook, public institutions of higher education also enjoyed immunity from a broad range of lawsuits, arising primarily from the concept of governmental immunity. This resulted in immunity doctrines substantially limiting the availability of suits against the institutions. Further, even if a claim was successfully made, the chances of prevailing on the merits was unlikely due to the mindset of the court mentioned above.

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143 Id at 6.
144 Id.
However, since about the mid-1900’s, a revolution of sorts has taken place with regard to the relationship between academia and the law, as both the federal and state governments have developed a intense interest in higher education. In turn, courts have also become more willing to entertain suits and offer relief under certain applications of the law. Ironically, sovereignty is one concept that was not entirely immune to the events during this transformation.

Eleventh Amendment Immunity as Applied to Public Institutions of Higher Education

Eleventh Amendment immunity is considerably important when dealing with state colleges and universities. However, it is also much more difficult to narrow applicability, due to the wide variety of finance, origin, and governance structures that are inherent in the systems of higher education in the United States. Thus, Eleventh Amendment analysis must be done on a case-by-case basis with state colleges and universities. When applying the arm of the state doctrine to determine whether a public institution is protected under the Eleventh Amendment, an institution can be entitled to protection if the state is the “real party in interest.” Federal courts have been very willing to extend protection under the Eleventh Amendment to state universities. However, federal courts have been much less likely to do so with public community colleges. Since community colleges have typically been viewed as political subdivisions, they have historically not enjoyed the level of immunity protection provided to those entities that have been deemed arms of the state.

A number of multi-factor tests have been used to apply the arm of the state analysis to public colleges and universities. In Sherman v. Curators of the University of Missouri, the court granted immunity after the two-prong test of autonomy level and whether the funds required to pay an award would have to come from the state. In another situation, however, Clemson Agriculture College (now Clemson University) was denied immunity due to its funding sources, power to enter into contracts, power to buy and hold property, power to sue and be sued, and ability to accept gifts in its own name.

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146 Id.
148 16 F3d 860 (8th Cir 1994).
While the autonomy of a university from the state may endanger a claim to immunity, there have been cases where universities with constitutionally recognized autonomy have been granted immunity. The University of Minnesota was protected due to the language of the state constitution deeming it an instrumentality of the state.\textsuperscript{149} The University of Wyoming received a similar grant of immunity based upon statutory language describing the institution.

\textit{Skehan v. State System of Higher Education} saw a state system of higher education in Pennsylvania analyzed with a multi-factor test.\textsuperscript{150} The court concluded the system was a state agency, which was entitled to protection under the Eleventh Amendment. The system was distinguished from the state-related and state-aided institutions in Pennsylvania (which were both found to exercise proprietary functions) due to the fact it performed essential governmental functions and objectives.\textsuperscript{151}

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\textsuperscript{149} \textit{Walstad v University of Minnesota Hospitals}, 442 F2d 634 (1971).
\textsuperscript{150} 815 F2d 244 (3rd Cir 1994).
\textsuperscript{151} Id.
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CHAPTER 3
METHODOLOGY AND PROCEDURES

An historical-legal approach and reasoning by analogy served as a basis for conducting this study. This body of research will employ the following research questions:

1. What has been the historic evolution of Eleventh Amendment immunity in federal courts?
2. What has been the development of the arm of the state doctrine, particularly in its application to public institutions of higher education?

The primary data source for the analysis sequence of this study was case law pertaining to the Eleventh Amendment, with special emphasis on that related to the arm of the state doctrine and institutions of higher education. After development of the research vocabulary\textsuperscript{152} corresponding to this study, numerous resource materials, or finding tools, were used to identify pertinent sources in the area, including American Law Reports, American Jurisprudence, Shepard’s Citators, American Digest System, Corpus Juris Secundum, as well as computerized resources such as Lexis-Nexis Academic Universe, Westlaw, and other automated research tools. Legal standards regarding the Eleventh Amendment’s applicability to institutions of higher education were extrapolated from judicial opinions, commentary by judges \textit{in dictum}, and from secondary sources including law reviews and academic periodicals. The research encompassed all pertinent primary authority and relevant secondary authority, and utilized the information located to explore the historic evolution of Eleventh Amendment immunity in the federal courts and the relationship between that and public institutions of higher education, and to derive the conclusions of the study relating to the legal implications of the aforementioned relationship.

Conceptual Framework

In the conceptual framework embraced for the conduct of this research, Rebell and Block examine judicial activism in the realm of educational policymaking.153 Judicial activism is a construct developed to explain increased intervention by the federal courts in social policy realms, including education, which had previously been almost the exclusive purview of the individual states.154 Rebell and Block explain the theory as “judicial involvement in the enforcement, if not in the creation, of basic rights” that can be “attributed to the expansion of government activities in the welfare state era,” which “has simultaneously led to an increase in regulations with concomitant judicial review, and to an easing of traditional limitation of court jurisdiction (e.g., standing rules and doctrines of justiciability).”155 The framework detailed by Rebell and Block will be discussed in further detail below, following more detailed description of the construct itself.

Since original reaction to the Warren Court’s civil rights and criminal procedure decisions initiated a conservative drumbeat against judicial activism, the response has been fueled by such moments as Richard Nixon’s 1968 Presidential campaign vow to place “strict constructionalists” on the Supreme Court, the 1982 founding of the Federalist Society (which holds as a core principle that “it is emphatically the province and duty of the judiciary to say what the law is, not what it should be,” Orrin Hatch’s vow to oppose “judicial activists who twist the law to impose their own policy preferences” after Republicans took control of Congress during the Clinton administration, and then-candidate George W. Bush’s 2000 presidential campaign statement to voters that “I don’t believe in liberal activist judges… I believe in – I believe in strict constructionists…And those are the kind of judges I will appoint.”156 In some authors’ opinions, such conservative attacks on judicial activism over the last three decades have created “the durable myth” that “conservative judges engage in principled interpretation of the law, while liberal judges legislate from the bench, usurping power that properly belongs to the

155 Rebell and Block, Educational Policy Making at 3-4 (cited in note 153).
When considering the foregoing, it may appear as though conservative legal proponents claim to adhere wholeheartedly to the cause of principled legal reasoning; however, the federal court decisions may tell a different story. That story is one that, in the eyes of some scholars, may be the replacement of principled legal rules with a conservative political agenda.

In a somewhat unexpected turn, a many time conservative favorite due to his writings on Catholic doctrine and religious freedom, Judge John T. Noonan, Jr. expressed that the Supreme Court has significantly changed course from the strong-national government and clear-definition-of-the-branches role advocated by the Marshall Court some 200 years ago. Noonan further explains that the Rehnquist Court is aggressively expanding both state and Court power, and such is taking place at the expense of the federal government. He illustrates this ambiguity between roles through citing a comment to George Washington by Alexander Hamilton in 1792:

There are some things which the General Government has clearly a right to do – there are others which it has clearly no right to meddle with, and there is a good deal of middle ground, about which honest & well disposed men may differ. The most that can be said is that some of this middle ground may have been occupied by the National Legislature; and this surely is no evidence of a disposition to get rid of the limitations in the constitution; nor can it be viewed in that light by men of candor.

Of particular importance to the immediate investigation, Noonan considers the Rehnquist Court’s federalism jurisprudence in the context of the common law doctrine of the states’ sovereign immunity, asserting that the Court’s application of the doctrine has not only “swelled beyond bounds” and “cannot be consistently applied or reconciled in the federal system,” but that the historical justification for doing so is also lacking.

Noonan asserts that without the fictions and exceptions inherent in the doctrine of sovereign immunity, it could not have survived to this day. His account of the development of the doctrine includes discussion on several cases applicable to the instant research, including

157 Id at 1.
158 Id.
159 John T. Noonan, Narrowing the Nation’s Power: The Supreme Court Sides with the States (University of California Press 2002).
160 Id.
161 Id at v.
162 Id at 156.
163 Id.
Seminole Tribe, Flores, and Kimel, among others. In one discussion, Noonan explained that the Rehnquist Court attempted in Seminole Tribe to justify sovereign immunity by declaring that the “States entered the federal system with their sovereignty intact,” to which Noonan asserted that only the original thirteen colonies and Texas were ever independently sovereign, and suggested that many founders believed that the states had waived any federal question immunity upon adoption of the Constitution. As a related portion of the discussion surrounding Flores, Noonan observes that the Court has all but succeeded in dismantling the ability of Congress to allow suits against states to enforce the equal protection clause of the Fourteenth Amendment, a power he states is the most obvious challenge to state sovereign immunity. His analysis is related primarily to the congruence and proportionality test established by the Court in Flores, and the Court’s application of that test in Kimel (which invalidated portions of the ADEA) generates significant criticism from Noonan related to judicial activism.

In detailing what he refers to as “metastasized” immunity, Noonan disparages what he considers the erroneous extension of protection to state universities and their divisions under the umbrella of state immunity. The underlying notion of his objection is a question regarding the merit of freeing states from the burden of having to pay damages for torts and/or fulfill debts while refusing to subject them to enforcement on issues of federal patent law, copyright law, and age/disability discrimination prohibitions. He articulates that, in expanding the protection, the Court essentially used the immunity of the 50 states to create numerous individual sovereign entities.

As stated earlier, Rebell and Block developed an extensive framework to analyze the role of the judiciary in education law litigation. The framework they developed was then applied to a sample of 65 cases and 2 case studies, from a broad range of educational issues. As a result of their analysis, they were able to identify several points of interest regarding the value of the activist approach, as well as the judiciary’s role in general.

The framework constructed by Rebell and Block is divided into two primary areas, namely legitimacy and capacity. For purposes of the study, legitimacy is defined as being the

164 Id at 2.
165 Id at 154.
166 Id.
167 Rebell and Block, Educational Policy Making (cited in note 153).
168 Id.
role of the Court as set forth in the separation of powers language within the Constitution. This section contains issues and analysis falling along the principle/policy dichotomy that has been utilized to frame deliberations on judicial activism and interest representation in educational-legal proceedings. As stated by Rebell and Block, “to the extent that courts decide issues in terms of ‘principles,’ they are acting within the proper sphere of judicial decision making”… and “to the extent that they decide issues in terms of ‘policies,’ they are, according to the critics, intruding into the legislative or executive domain.”  

Rebell and Block define a principle as a “statement establishing a right of an individual against the state or another individual; expressed as a general rule that should be enforced whenever applicable, regardless of social welfare consequences, except when it is outweighed by a countervailing principle.” The authors developed this further by stating that a strict principle approach “coincides with the views of those who favor a limited judicial role within the separation-of-powers scheme; a broader ‘policy’ approach would be consistent with the view of those who accept more substantial judicial ‘intrusions’ into the policy-making domains of the other branches [of government].” With regard to policy, Rebell and Block defined the concept as “a statement concerning collective goals,” and noted that:

policy arguments consider the relative importance or desirability of particular social goals, and/or the relative efficiency and desirability of particular methods for achieving such goals. A policy statement is normally expressed in more specific terms than a principle, and in a particular context it may be subordinated to compelling policy claims that are determined to be better able to serve collective goals more effectively.

The other factor included in the broad category of legitimacy in the study by Rebell and Block was the level of interest representation, which they defined as “the extent to which the parties for whom lawyers speak are sufficiently representative of all those interests likely to be affected by a court order.” In furtherance of this concept, Rebell and Block note that in courts participating in deliberations impacting policy, the “legitimacy of their actions is clearly undermined… if a limited number of litigants speak only for their particular interests and the

169 Id at 23.
170 Id at 23.
171 Id at 7.
172 Id at 24.
173 Id at 24.
174 Id at 9.
courts receive no direct input concerning the perspectives or needs of the majority of citizens who might be affected by a wide-ranging decree.\(^{175}\)

The category of capacity embraces arguments related to the courts’ “comparative ability… to deal effectively and efficiently with social problems that traditionally were handled exclusively by the legislative and administrative branches.”\(^{176}\) The first concept within capacity is fact-finding, or the ability of the courts to obtain and evenly comprehend factual information. The second factor in capacity is remediation, which means to develop and apply appropriate remedies for the issues under consideration.\(^{177}\) In their study findings, Rebell and Block interpreted the study to show that the adversarial process is relatively efficient with regard to the fact-finding element, and coupled with the magnitude of information obtained during the adversarial process, it ultimately results in a system with a highly effective data gathering mechanism. Furthermore, with regard to remediation, Rebell and Block’s findings largely countered any criticisms that the judiciary lacked expertise, resources, or comprehensive perspective to successfully implement educational reform. In particular, when it came to making such judgments, Rebell and Block found that the courts most often utilized relatively nonintrusive methods to assert rights of the plaintiffs, but if an extensive reform decree was issued, defendants and public agencies substantially contributed to the formulation of policy content. Ultimately, the study resulted in an assessment by Rebell and Block that the basic issues in the judicial activism debate required reformulation, particularly since they repeatedly found that:

the most notable defects in judicial performance, whether they concern interest representation, fact-finding, or remedies, are often cause not by comparative incapacities of the judiciary vis-à-vis other governmental agencies, but by the social, political, and technical characteristics of the particular controversies; or by the limitations of the participants in resources, skill, and motivation, which manifest themselves similarly regardless of whether a given dispute is addressed by a court or by another governmental institution. Seen in this light, the critical question, we now believe, is not whether the courts are ‘better’ or ‘more capable’ fact-finders or implementers of remedies than are legislatures, but whether particular aspects of social problems should be handled through the principled,

\(^{175}\) Id at 9.
\(^{176}\) Id at 11.
\(^{177}\) Id.
analytic judicial process or through the instrumental, mutual adjustment patterns of the legislatures.\textsuperscript{178}

As such, the immediate study focused primarily on the legitimacy portion of Rebell and Block’s framework, with particular emphasis on the principle/policy dichotomy, as the determination of whether the Court was acting in the proper role or sphere of responsibility served to better inform the direction of this study with regard to the scheme of judicial activism investigated than did the remaining constructs.

Through an examination of such related scholarly critique and analysis, the present researcher explored the case law of Eleventh Amendment immunity, in consideration of the judicial activism framework. Through combining the applicable portions of Rebell and Block’s theoretical framework with that of related commentary, it was possible to examine the impact of the judiciary and the construct of judicial activism within the development of higher education policy. The investigation also served to guide and develop the expansion analysis of Eleventh Amendment immunity within the federal courts. Further, the analysis helped to inform the investigation of the relationship between Eleventh Amendment immunity and public institutions of higher education. In doing so, the application of the construct as it related to this study was incorporated into and considered in development of the conclusions.

\textbf{Method of Analysis}

As mentioned above, the primary basis for conducting this research was an historical-legal approach and reasoning by analogy. A historical overview of the evolution of the Eleventh Amendment, as well as its specific relationship to public institutions of higher education, was presented, and case law evidencing this relationship was examined. Historically, judges have viewed the law through the eyes of their predecessors, thus continually adapting legal principles to the changing needs of society.\textsuperscript{179} This concept of perpetual transformation represents the driving force behind the evolution of the issue at hand, and generates the need for further investigation.

\textsuperscript{178} Id at 215.
\textsuperscript{179} Melear, \textit{The Evolution of Contract Theory} (cited in note 18).
As discussed by Posner, reasoning by analogy is the center of legal reasoning as conceived by modern lawyers. It has also been noted that while this method of practical reason has an impeccable Aristotelian pedigree, it does not sustain definite content or integrity, and it maintains an unstable class of disparate reasoning methods. This is stated simply to argue that with formal logic playing little or no role in legal reasoning, reasoning by analogy represents the principle means by which the methods of lawyers may be set apart from the methods of everyday reasoners. Informal logic contributes to the ability of legal scholars to build upon precedents or analogies creating a certain discernable outcome.

There is a school of thought that reasoning by analogy is, in fact, induction, which reflects theories proffered by legal formalists. However, those individuals typically applying reasoning by analogy such as judges, law professors, and lawyers, enjoy a freedom in their inductive procedures that would be highly destructive to science. Still, there is another application of such reasoning by analogy. Analogies, simply defined as “instances similar to the problem at hand rather than as steps in a logical demonstration or even as the pieces in a regular pattern on which an inductive inference might be based,” provide a plethora of ideas and information on which to draw in making a decision. It is common for lawyers and judges utilize the information drawn from previously decided cases to decide what should take place in a current case. Further, they can utilize the information gained from those cases to formulate plans for the decision of future cases.

Use of previously decided cases as analogies may need to be distinguished from their use as authorities, as the two have potentially differing levels of authoritativeness. Utilizing precedent, or that which came before, as a means by which to draw to a decision does not necessarily commit one to stare decisis, just as the distinction between holding and dictum is not a clear line. With that in mind, reasoning by analogy is a useful exercise in recognizing patterns within existing areas of the law and determining implications for fields of interest.

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183 Id.
184 Id.
185 Id at 89.
186 Id at 96.
Initially, United States Supreme Court opinions and other applicable case law was identified through the use of primary and secondary sources, as well as reference citations in reported decisions. Secondary sources are those works falling outside of primary authority, which discuss or analyze legal doctrine. These include, but are not limited to, treatises, restatements of law, practice manuals, and academic journals. A legal history of the development of Eleventh Amendment immunity, and its application to state colleges and universities, was prepared. Selected Supreme Court decisions, and other Eleventh Amendment cases, particularly those that focused on the arm of the state doctrine, were analyzed. This research was conducted using the resources of The Florida State University College of Law Library. From this compilation of legal opinion and case law, state systems of higher education affected by Eleventh Amendment immunity issues were identified and intensively examined. The information extrapolated from the case law was organized and studied utilizing a spreadsheet application. The application allowed for proper placement of the data into categorical groupings, from which analysis of each research question component (explained in more detail below) was possible.

The first research question addressed the historic evolution of Eleventh Amendment immunity in federal courts. An historical overview of the Eleventh Amendment was presented, and case law evidencing this evolution was examined. This took place through the use of the primary and secondary sources mentioned above. Accordingly, the constitutional theory underlying Eleventh Amendment jurisprudence was explored, followed by an in-depth analysis of the case law contributing to the sovereign immunity doctrine. A chronology of the federal case law tied to Eleventh Amendment jurisprudence, as well as the types of claims, was detailed and analyzed. The first section outlines the advantages and disadvantages of these decisions, explores the Court’s recent abrogation doctrine and various legislative alternatives, and investigates other remedies available to those hoping to pursue an Eleventh Amendment cause of action.

The second research question examined the development of the arm of the state doctrine, particularly as it related to public institutions of higher education. An overview of the development of the doctrine was presented, and case law evidencing this evolution was examined. As in the first section, primary and secondary resources were used for this analysis, and specific development of Eleventh Amendment case law specific to higher education, and
how public institutions of higher education are impacted by the arm of the state doctrine was investigated. As judges have historically aimed to view the law through the eyes of their predecessors and legal principles continue to be retested and adapted to the changing needs of society, American jurisprudence is shaped. This continual process takes place through an interpretation of the facts in light of a re-examination of the law. Through focusing on such methods, this analysis sought to develop a comprehensive understanding of the relationship between the arm-of-the-state doctrine and public institutions of higher education, as well as the direction of case law which continues to shape the area.

The body of knowledge gathered through the above research questions provided the basis for the conclusions of the study, which served to develop an understanding of the legal implications of the relationship between Eleventh Amendment immunity and public institutions of higher education. The nature of judicial decisions is perpetually transformed through the adjudication of new cases. As case law evolves, legal concepts can be created out of particular instances initiating the continuous realignment of cases. Rules change from case to case and are remade with each case. Utilizing Levi’s three-phase sequence of legal reasoning, this section examines the legal principles addressing the application of the Eleventh Amendment, specifically as they relate to public institutions of higher education. As stated by Levi:

\[
\text{The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.}^{188}
\]

The first of Levi’s three stages is initiated when, as a result of generalization based upon the adjudication of similar cases, a legal concept begins to evolve. As the predictability of the courts’ reasoning increases, one enters the second phase of Levi’s reasoning, during which applicability of the immediate case to the legal concept can be ascertained. Finally, the third phase represents a disintegration in the legal concept being noted as “new decisions emerge which question the framework of the concept.”^{189}

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At this point, judicial reasoning based on prior example may be lacking appropriateness in certain instances, due to the increase in exceptions to the legal concept, and new questions evolve regarding appropriateness and viability of applying previous decisions to the current application of the legal concept. As Cardozo wrote, “Cases do not unfold their principles for the asking…. The instance cannot lead to a generalization till (sic) we know it as it is.” Levi is careful to point out that while reasoning by analogy brings to light similarities and differences in case law, statutory, and constitutional interpretation, it is effected in different ways with each. Levi continues on to explain that the courts enjoy a greater freedom in constitutional interpretation than with the application of statutory or case law. He explains that a constitution organizes certain conflicting community ideals in ambiguous categories, which bring along with them “satellite concepts covering the ambiguity,” with which reasoning by example must work. He also illustrates, however, that “no satellite concept, no matter how well developed, can prevent the court from shifting its course, not only by realigning cases which impose certain restrictions, but by going beyond realignment back to the over-all ambiguous category written into the document.” It is with this in mind that he declares, in this way, the constitution allows inconsistency in the court’s decisions, stating that the “freedom is concealed either as a search for the intention of the framers or as a proper understanding of a living instruments, and sometimes as both.” For the above reasons, Levi discusses the tendency of constitutional interpretation development to proceed in “shifts” with occasional “abrupt changes in direction” among periods of consistency within certain subject matter components, in which judges trained in reasoning by example will proceed by comparing and developing related case law. Investigating the research questions in this analysis allowed for exploration and development of an understanding of the legal implications of the relationship between Eleventh Amendment immunity and public institutions of higher education. For reference purposes, a comprehensive listing of the definitions utilized in this manuscript is provided in Appendix A.

190 Id.
193 Id at 7.
194 Id.
195 Id.
196 Id at 59-60.
CHAPTER 4

ELEVENTH AMENDMENT IMMUNITY: CASE LAW ANALYSIS

Despite the relatively simple language of the Eleventh Amendment, interpretation of that language has neither been consistent, nor clear.\(^{197}\) In fact, Justice Brennan noted in one dissenting opinion that “by the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity…. The case law of the Eleventh Amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions. Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges.”\(^{198}\)

Recent years have seen widespread transformation in this area of jurisprudence. The protections afforded to states against suits in federal court have been extended to some state agencies, deemed “arms of the state.”\(^{199}\) As public institutions of higher education most times fall in that category, it is of particular significance for those involved in higher education to be aware of this phenomenon, as well as appreciate that when the Supreme Court expands or contracts the scope of the sovereign immunity defense, it may have a direct impact on these educational institutions.\(^{200}\) The evolution of Eleventh Amendment jurisprudence will have profound implications for the immunity status of public institutions of higher education falling within the Eleventh Amendment protection afforded by arm of the state status.

One hundred thirty three primary cases, as well as seventy six secondary cases were identified for purposes of this analysis and synthesis of reported case law directly addressing the evolution and expansion of Eleventh Amendment immunity, as well as the arm of the state Doctrine. The two hundred nine cases were selected due to their ability to provide insight into the nature and extent of protection afforded through the immunity doctrine. The majority of the

\(^{197}\) Powers, 43 Vill L Rev (cited in note 8).
\(^{198}\) Welch, 483 US 468 at 520, n.20.
\(^{199}\) Beckham, 27 Stetson L Rev. at 145 (cited in note 10).
cases were collected from the United States Supreme Court level, as this is the level at which definitive action with regard to this area of jurisprudence takes place. However, several significant cases terminating at a lower federal court level were also collected, if they were determined to be important to inform the case law analysis, particularly with regard to its application in higher education.

The decisions range from the effective inception of Eleventh Amendment jurisprudence in 1793 to cases in the modern era through 2004. For purposes of analysis, the case law development was organized into the following evolutionary periods: Historic Origins and Foundations, Transitional Evolution, and Contemporary Federalism and State Sovereignty. Each evolutionary period is chronologically subdivided by the Court eras falling within it, primarily for purposes of facilitating the investigation of specific behaviors of each Court. Although the analysis relies heavily on Supreme Court cases, some sections may incorporate related lower federal court decisions, if they are of particular importance to the study. Regardless of the addition of such cases into a particular section, observations related to behaviors of the Supreme Court, or particular Justices, are limited to the decisions made by that Court.

**Historic Origins and Foundations**

During this period that was, by and large, characterized by dual federalism, or one with very little collaboration between the state and national governments (as they were considered equal partners with distinct areas of authority), the Eleventh Amendment was ratified and began to develop its foothold on American jurisprudence as we know it today. The very early years of this period saw federalists (those leaders such as George Washington, John Adams, and Alexander Hamilton who believed in the merits of a strong national government) opposed to the ideals of the anti-federalists or Democratic Republicans (those who argued for state-centered governance, rather than a strong national government).\(^{201}\) The nature of this existence necessarily resulted in occasional tensions between the governments regarding the concept of state sovereignty, as will be illustrated further in this section.

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As it has been opined that the Eleventh Amendment did not reinstate “an original understanding of state sovereign immunity,”\(^\text{202}\) differing views exist regarding whether or not state sovereign immunity was a dominant doctrine at the time of the Constitution’s ratification.\(^\text{203}\) As an extension of the above opinion, it has been stated that the reason the Constitution is silent on sovereign immunity is that the constitutional grant of broad powers to the federal judiciary dispelled any notion that states were immune as sovereign entities.\(^\text{204}\) In fact, none of the newly created states at the time had a constitution embodying the principle of sovereign immunity.\(^\text{205}\) Another view is the “leading statesmen of the time”\(^\text{206}\) disagreed as to whether states could be sued in federal court, with the general consensus being they could not. While overwhelming academic animosity to sovereign immunity is also advanced, Hill provides what is uncontested is that the Eleventh Amendment was intended to bar suits against states in federal court by non-citizens for the payment of debt and damages for past actions, which was a level of immunity sufficient to reverse *Chisholm*.\(^\text{207}\)

It has been argued the Eleventh Amendment was nothing more than an amendment to Article III, Section 2.\(^\text{208}\) Article III, Section 2 provides in part “the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made... between a State and Citizens of another State... and between a State... and foreign States, Citizens or Subjects.”\(^\text{209}\) Behind that argument is the contention the amendment was intended solely to eliminate the power of federal courts to hear suits against states where the status of the parties was the only basis for jurisdiction, and accordingly, the Eleventh Amendment was not intended to affect the power of federal courts to hear cases involving federal question jurisdiction.\(^\text{210}\) The Supreme Court was presented with the opportunity to investigate the relationship between Article III and sovereign immunity, with the case of *Chisholm v. Georgia* in 1793, to be discussed below. For purposes of this study, this period will

\(^{202}\) Gibbons, 83 Colum L Rev (cited in note 41).
\(^{203}\) *Edelman*, 415 US 651.
\(^{204}\) Royer, 34 Akron L Rev (cited in note 35).
\(^{205}\) Gibbons, 83 Colum L Rev (cited in note 41).
\(^{206}\) Hill, 42 BC L Rev at 493 (cited in note 45).
\(^{207}\) Id.
\(^{208}\) Gibbons, 83 Colum L Rev (cited in note 41).
\(^{209}\) US Const Art III, § 2, cl 1.
\(^{210}\) Gibbons, 83 Colum L Rev (cited in note 41).
focus on pertinent decisions from the Court eras of Chief Justices Jay, Ellsworth, Marshall, Taney, Chase, and Waite.

The Jay Court Era (1789-1795)

Under the leadership of the first Supreme Court Chief Justice, John Jay, the Jay Court is primarily recalled for its controversial decision in Chisholm v. Georgia. That decision, which the Eleventh Amendment was ultimately ratified specifically to overrule, essentially marked the beginning of the evolution of Eleventh Amendment immunity as we know it today. Chisholm involved an attempt by a citizen of South Carolina, Robert Farquar, to recover funds owed by the state of Georgia. Farquar had supplied materials to the state during the Revolutionary War, and although funds were appropriated to cover the debt, the commissaries did not pay for the purchases. Although Farquar died, the executor of his estate, Alexander Chisholm brought suit to recapture the money owed pursuant to the provision in the Judiciary Act of 1789 creating original jurisdiction for suits against a state by citizens of other states. The state officials involved in the case refused to appear, citing that Georgia was a sovereign state and therefore not liable in such actions. On February 18, 1793, the Court, in a four-to-one decision, ruled in favor of Chisholm, concluding that Article III authorized suits against a state by citizens of another state. Only one justice dissented in the case (Justice Iredell), arguing that the general language of Article III was insufficient to authorize a suit against Georgia without its consent. Notwithstanding the impeccable credentials of the justices in the majority (with Justices Blair and Wilson serving as delegates to the Constitutional Convention, Justice Cushing presiding over Massachusetts state ratification convention, and Chief Justice Jay being an author of the Federalist Papers), the state officials vehemently denied jurisdiction of the Court.

The Ellsworth Court Era (1796-1800)

Although there was a short period in 1795, during which Justice John Rutledge served as the Interim Chief Justice, it was actually the Court of Chief Justice Oliver Ellsworth that would

211 Chisholm v. Georgia, 2 US 419 (1793).
212 Id.
213 Id.
be in place during the time of ratification of the Eleventh Amendment, as well as that which would hear the first of the cases to follow ratification of that Amendment. Instigated by the widespread criticism of the Court’s decision in *Chisholm*, the Eleventh Amendment was proposed in Congress just two days following that decision, and less than three weeks later, was approved by both houses of Congress. The Amendment, as drafted at that time, provided that judicial power was not to extend to suits against one of the states commenced by citizens of another state or a foreign nation. Although it faced significant opposition by the Federalists, final ratification of the amendment occurred in 1798. Shortly thereafter, the Court delivered a unanimous opinion that “the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.” As will be explored further in this study, the Court has since diminished the force of the amendment through subsequent actions, such as allowing suits against state officials.

Among the initial cases considered after ratification of the amendment, thus contributing to the initial development of the legal concept and the first shift for purposes of interpretation and legal reasoning, were *Fowler v. Lindsey* and *Fowler v. Miller*, which were decided in 1799. The cases involved a question concerning land grants by different states, in which the Court ruled that a State was not a party to the suit simply because the land was granted by a State and claimed under the State grant. Rule had originally been obtained at the insistence of the Defendants demanding the Plaintiffs show cause why a venire should not be awarded to summon a jury outside of the states involved. But, that was changed, by consent, into a rule to show cause why the actions should not be removed to the Supreme Court, as exclusively belonging to that jurisdiction. The suits were instituted in the Circuit Court of the District of Connecticut, and were meant to recover a tract of land that was a part of the Connecticut Gore granted to Andrew Ward and Jeremiah Hasley by that state. It was by those parties that the land was conveyed to the Plaintiffs. The defendants pleaded in Circuit Court that they were inhabitants of New York, and the premises in question were in that state. Thus, they continued on to argue that only the courts of New York could take cognizance of the action. The Plaintiffs replied that the premises

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216 *Hollingsworth v Virginia*, 3 US 378 (1798).
217 *Fowler v Lindsey*, 3 US 411 (1799).
218 Lindsey, 3 US 411.
lay in the State of Connecticut, and as the issue was being joined, a venire was awarded.\textsuperscript{219} The Defendants challenged the array, because the Marshall of the District of Connecticut had arrayed the Jury by his deputy, and as a citizen of that state, was also an interested claimant in the Connecticut Gore under the same title as the Plaintiffs. The Plaintiffs declared that the deputy Marshall was not interested in the question in issue, and demurred to the challenge for being contrary to the record. The Defendants joined in demurrer, and Court overruled the challenge in part, respecting the general interest of the Marshall and his deputy, owing to their being citizens of Connecticut. However, the Court allowed it and quashed the array on account of the interest of the deputy in the same tract of land, under color of same title as the Plaintiffs. The Court held that a case belonging to the jurisdiction of the Supreme Court, on account of the interest a state has in the controversy, must be that in which the state is nominally or substantially the party, in fact.\textsuperscript{220} It was not enough that the state simply be affected. This was illustrated in the opinion, as stated by Justice Washington:

\begin{quote}
I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, must be a case, in which a State is either nominally, or substantially, the party. It is not sufficient, that a State may be consequentially affected.\textsuperscript{221}
\end{quote}

In considering the decisions of the Ellsworth Court in light of the framework utilized for this study, it is possible to initiate determination of a sort of baseline against which the judicial activist nature of later Courts can be compared. In determining legitimacy, Rebell and Block define a principle as “a statement establishing a right of an individual against the state or another individual; expressed as a general rule that should be enforced whenever applicable, regardless of social welfare consequences, except when it is outweighed by a countervailing principle,”\textsuperscript{222} and a “principle approach” as that coinciding “with the views of those who favor a limited judicial role within the separation-of-powers scheme.”\textsuperscript{223} In contrast, Rebell and Block define policy as a “statement concerning collective goals” for which “arguments consider the relative importance or desirability of particular social goals, and/or the relative efficiency and desirability of particular methods for achieving such goals” that are “normally expressed in more specific terms than is a

\begin{flushright}
\textsuperscript{219} Id.  \\
\textsuperscript{220} Id.  \\
\textsuperscript{221} Id at 412.  \\
\textsuperscript{222} Id at 23.  \\
\textsuperscript{223} Id at 7.
\end{flushright}
principle, an in a particular context it may be subordinated to compelling policy claims that are determined to be better able to service collective goals more effectively,”224 and a broader policy approach as one that “would be consistent with the view of those who accept more substantial judicial ‘intrusions’ into the policy-making domains of the other branches.”225 However, during the course of their research, Rebell and Block found that it was necessary to distinguish a new category, which they termed “principle/policy balancing,” which was defined as a “statement based on a general principle that may be enforced only after consideration is given to a limited number of specific policy factors, relevant under defined circumstances; it precludes consideration of a broader range of other policy factors which are not relevant to these circumstances.”226

In this case, as evidenced by the rule and approach set forth above, the Ellsworth Court appears to solidly employ a principle approach. The rule was expressed generally, and did not consider the desirability of specific social goals or methods of reaching same. Further, articulation of the rule in light of the case, lent itself toward a favored limitation in the role of the judiciary in the separation of powers scheme. On the other segment of legitimacy determination, Rebell and Block define interest representation as “the extent to which the parties for whom lawyers speak are sufficiently representative of all those interests likely to be affected by a court order.”227 Although the primary focus of analysis within the framework will rely on the principle/policy dichotomy, it may also be informative, in certain cases, to consider interest representation. To that end, it will be considered here, primarily for purposes of baseline-setting with regard to the comprehensive legitimacy segment. When considered in light of the elements of minority classification of plaintiffs, class action status, multipolarity, and public law advocacy as defined by Rebell and Block, it can be determined that the legitimacy of the Court’s actions during this time was also not undermined by litigation and decision burdened by a narrow group of litigants speaking only for their interests that did not relate to the needs of the majority of citizens who could potentially be affected by the decision. The case did not involve minority plaintiffs that were alleging discrimination based on that status, class action parties, or public advocacy representation. With regard to multipolarity, the case did involve more than two total

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224 Id at 24.
225 Id at 7.
226 Id at 24.
227 Id at 9.
parties, however, as acknowledged by Rebell and Block, such cases do not always lead to a wide variety of substantive issues. As in the cases heard by the Ellsworth Court, multipolar involvement still, most times, results in bipolar articulation and argument of the issues. In future sections, the interest representation element of legitimacy will be discussed only where it presents particular importance to the analysis.

The Marshall Court Era (1801-1835)

A very significant era during Court history was that led by Chief Justice John Marshall, as the Court decided several landmark cases during that time in many different areas, and Eleventh Amendment jurisprudence was not immune from this phenomenon. Although Chief Justice Marshall wrote a number of well-known decisions specifically involving the Eleventh Amendment, several others also inform this study, as he “read into our constitutional law a concept of federalism that magnified national at the expense of state power.”  

Chief Justice Marshall took part in several characteristic defenses of federal authority. One such example was his opinion in United States v. Peters. In that case, a federal district court judge in Pennsylvania, Peters, decided in opposition to a previous Pennsylvania court in the same situation. The legislature of that state acted to prevent enforcement of a Peters’ opinion by having the state take ownership of the money and certificates involved. That decision of the district court was not enforced, and a motion for writ of mandamus was filed to require enforcement, followed by Peters’ assertion that the actions of the legislature prevented such enforcement. It was at that point that the writ was taken to the Supreme Court.

Chief Justice Marshall opined that a state legislature could neither determine the jurisdiction of the courts, nor annul their judgments. He also stated that the suit was not a violation of the Eleventh Amendment, as the case was neither commenced, nor prosecuted against, a state. In the opinion awarding the writ of mandamus requiring enforcement of the federal district court’s decision, he continued on to explain:

The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of

228 Cohens v Virginia, 19 US 264 (1821).
229 United States v Peters, 9 US 115 (1809).
230 Peters, 9 US 115.
231 Id.
the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested.\textsuperscript{232}

In another case, the Court in \textit{Martin v. Hunter’s Lessee}\textsuperscript{233} used jurisdiction granted to it by Section 25 of the Judiciary Act of 1789\textsuperscript{234} to reverse the decision of the Court of Appeals of Virginia. That Act granted the Court appellate jurisdiction from the final decision of the highest state court having jurisdiction over a subject, where alleged that a law of the state is in violation of the Constitution, treaty, or law of the United States. Several states, most notably Virginia, condemned this Section as an unconstitutional use for the federal judiciary to usurp state power.

During the War for American Independence, Virginia enacted legislation confiscating property of the loyalists. The case involved land in Virginia held by a British subject who lived in England, which another person claimed title to under the laws of Virginia providing for the confiscation of lands of British subjects following the American Revolutionary War. The Court determined that the land belonged to the British subject, or his heirs, and that his title was protected by the Jay Treaty of 1794 (which protected Loyalist holdings).\textsuperscript{235} \textit{Martin} arose when the Court issued a writ of error to the Virginia Court of Appeals, which refused to obey this order of the Court.

At issue in \textit{Martin} was whether the Court had jurisdiction to hear a case on appeal from the State court. The Court stated, in part:

\textit{[I]t is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to}

\textsuperscript{232} Id at 139.
\textsuperscript{233} \textit{Martin v Hunter's Lessee}, 14 US 304 (1816).
\textsuperscript{234} Judiciary Act of 1789 1 Stat § 73 (1789) (Judiciary Act).
\textsuperscript{235} \textit{Fairfax's Devissee v Hunter's Lessee}, 11 US 603 (1813).
the acts of the other co-ordinate departments of state sovereignty.\textsuperscript{236}

The decision in Martin not only provoked considerable criticism of the Court, but also marked a milestone in the history of federal judicial supremacy. But for this opinion, the Supremacy Clause of the United States Constitution would have lost much of its consequence, as states would not have been bound by a federal constitutional standard in conformity of laws.\textsuperscript{237}

The Court was provided with a chance to address the criticisms emanating from the \textit{Martin} decision, via the decision in \textit{Cohens v. Virginia}.\textsuperscript{238} In 1802, the District of Columbia was authorized by an act of Congress to conduct a lottery. However, there was a law enacted by the Virginia legislature that prohibited the sale of lottery tickets, unless the lottery was authorized by state law. Brothers P.J. and M.J. Cohen, proceeded to sell District of Columbia lottery tickets in the state of Virginia, which violated the laws of that state. State authorities tried and convicted the Cohens, and fined the brothers one hundred dollars. Further, the authorities declared themselves to be the final arbiters of disputes between the state and the national government.

The Cohens appealed the case to the Supreme Court under Section 25,\textsuperscript{239} and argued that Congress had established the lottery, and the Virginia law was unconstitutional because it was in conflict with a law of Congress. Virginia claimed that the Court did not have jurisdiction to hear the case, and doing so would be an enormous setback to state sovereignty and, conversely, a large expansion of national government power.\textsuperscript{240}

Virginia limited their arguments to questions of jurisdiction, the first of which was, since the state was the defendant, the suit was barred by the Eleventh Amendment. The second argument was that the Court could not issue a writ of error to a state court. In a unanimous decision, the Court held that it had jurisdiction to review state criminal proceedings, and Chief Justice Marshall wrote that the Court was bound to hear all cases involving constitutional questions, and said jurisdiction was not dependent upon the identity of the parties involved in the case. The Court, in addressing the argument related to the Eleventh Amendment, stated:

\begin{quote}
If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted
\end{quote}

\textsuperscript{236} \textit{Hunter's Lessee}, 14 US at 344.
\textsuperscript{237} Id.
\textsuperscript{238} \textit{Cohens}, 19 US 264.
\textsuperscript{239} Judiciary Act of 1789 1 Stat § 73.
\textsuperscript{240} \textit{Cohens}, 19 US 264.
against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State.\textsuperscript{241}

With regard to the argument that the Court could not issue a writ of error to a state court, Marshall reiterated the holding of \textit{Martin}, thus applying the concept of law established within, upholding the grant of such jurisdiction in § 25.\textsuperscript{242} Finally, after establishing that the Court did, in fact, have jurisdiction over the matter, the Court declared the lottery ordinance a local matter, concluding that the Virginia court was correct to fine the Cohens for violating Virginia law.\textsuperscript{243}

There were cases surrounding \textit{Cohens} that also built on the frustrations of those supporting state’s rights.\textsuperscript{244} Prior to \textit{Cohens}, in \textit{McCulloch v. Maryland}, the Court held constitutional Congress’ creation of the Bank of the United States, and held unconstitutional a State of Maryland tax on that bank.\textsuperscript{245} Several states avowed that they disagreed with the decision, and indicated that they would accordingly continue to impose taxes on the bank, most notably, the State of Ohio. Ohio declared its intention to collect a $50,000 tax owed to it by the bank, leading the bank to bring suit in federal court, enjoining the Ohio state auditor from this action. However, the state deployed officers to the Chillicothe, Ohio branch of the bank, which seized over $120,000 of the bank’s money. In further court proceedings, the state Treasurer and auditor were directed to return $100,000 to the bank, plus interest monies. The Treasurer refused to comply with this action, leading the court to appoint officials to seize the treasury key from him and recapture the funds. The state officials involved in this case made an appeal to the Supreme Court.

At issue before the Court was whether the federal court had jurisdiction to hear the suit, and provided Chief Justice Marshall with another opportunity to defend the federal judiciary. Marshall indicated that there were two questions requiring resolution. The first was whether the act of Congress had created federal jurisdiction. This issue was resolved with little difficulty, as the Court found that a federal statute, utilized in \textit{Osborn v. Bank of the United States}, providing that the bank be “made… capable in law… to sue and be sued… in all State Courts having

\begin{itemize}
\item \textsuperscript{241} Id at 409.
\item \textsuperscript{242} Judiciary Act of 1789 1 Stat § 73.
\item \textsuperscript{243} \textit{Cohens}, 19 US 264.
\item \textsuperscript{244} Id.
\item \textsuperscript{245} \textit{McCulloch v Maryland}, 17 US 316 (1819).
\end{itemize}
competent jurisdiction, and in any Circuit Court of the United States”\textsuperscript{246} provided clear authorization for federal court jurisdiction. In the 6-to-1 decision of \textit{Osborn}, the Court held that that the circuit court properly ruled against the Ohio officials and that the Eleventh Amendment is limited to suits in which a state is a party of record.\textsuperscript{247} Since a suit against the state was prevented by the Eleventh Amendment, the Court noted that the officers of the state must be those sued by the bank, and thus they were "incontestably liable for the full amount of the money."\textsuperscript{248} The second question was whether Congress, in fact, had power to create such jurisdiction. The Court concluded, that as a result of the bank being created by federal law, an action that arose pertaining to it arose under federal law, as well.\textsuperscript{249} This decision was supported \textit{Bank of the United States v. Planter’s Bank} (a companion case to \textit{Osborn}) which also allowed the bank to bring suit, in federal court, against a bank chartered by a state.\textsuperscript{250} This was held despite the fact that the state, as a stockholder, was part-owner of the bank being sued.

In 1828, as part of the case of \textit{Governor of Georgia v. Madrazo}, the rule that the state must be a party of record was somewhat broadened.\textsuperscript{251} In that case, the Governor of Georgia was sued by Madrazo, a Spanish subject, to obtain possession of a cargo of slaves or the proceeds from their sale. The Court held that the Eleventh Amendment applied "where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character."\textsuperscript{252} As such, the Court held that in cases where the claim was made against the Governor of Georgia in his capacity as Governor (and thus made upon him officially, rather than personally), that the State may be considered the party of record, and for that reason, the suit could not be maintained.\textsuperscript{253}

In furtherance of the first shift of the legal concept initiated by the Ellsworth Court related to Eleventh Amendment interpretation and legal reasoning involved therein, the legal concept continued to evolve throughout those cases decided by the Marshall Court. That rule of law evolved during the era, primarily as a result of generalization based upon the adjudication of additional cases in the area of law. Although the ideas surrounding eleventh amendment

\textsuperscript{246} \textit{Osborn v Bank of the United States}, 22 US 738 at 817 (1824).
\textsuperscript{247} \textit{Osborn}, 22 US 738.
\textsuperscript{248} Id at 868.
\textsuperscript{249} \textit{McCulloch}, 17 US 316.
\textsuperscript{250} \textit{The Bank of the United States v Planter’s Bank of Georgia}, 22 US 904 (1824).
\textsuperscript{251} \textit{Governor of Georgia v Madrazo}, 26 US 110 (1828).
\textsuperscript{252} Id at 123-24.
\textsuperscript{253} Id.
jurisprudence and states’ rights began to grow stronger roots during this period, and some predictability was taking place with regard to decision-making (indicating a move toward the second stage), the legal concept, at this point, was still primarily ensconced in the first stage of Levi’s legal reasoning due to the continuing development of the concept.

With regard to the principle/policy dichotomy, although the decisions of this Court began to foreshadow those policy-driven decisions that would come in later years, the decisions of the Marshall Court were still primarily based in the principle camp. Although Marshall’s decisions typically exhibited a tendency toward a strong concept of federalism, most times at the expense of states’ rights, each decision was still based in law and general rule establishing rights of individuals (and the federal judiciary) against states (and other entities), rather than making decisions based upon social welfare consequences. Thus, even though the decisions of the Marshall Court might contemporarily be seen as inconsistent with those favoring a limited judicial role in the separation-of-powers scheme, the actions taken by the Court at that time did not amount to inappropriate judicial intrusions into the policy-making domains of other branches, but rather were appropriate assertions of existing law.

The Taney Court Era (1836-1864)

The active Marshall Court was followed by that of Chief Justice Roger Brooke Taney, who exhibited a somewhat more limited view regarding the powers of the federal government. In other cases involving banks, related to those decided by the Marshall Court, the Taney Court held that a bank could be sued by a citizen of another state in federal court, even though the state was a stockholder or a sole owner. The argument utilized in these cases, *Bank of Kentucky v. Wister* and *Briscoe v. Bank of Kentucky* centered around the observation of the distinction between a corporation and its incorporators, thus allowing the suits due to the suit not being against the state, per se, but against the corporation in which it has an interest. For instance, in *Briscoe v. Bank of Kentucky*, Kentucky authorized a state owned and operated bank to issue bank notes. The bank provided Briscoe with the notes (which circulated as currency), in exchange for a promissory note. Briscoe ultimately failed to repay, which resulted in the bank suing him.

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254 *Bank of Kentucky v Wister*, 27 US 123 (1829) (decided under Marshall Court, but included in this section due to its similarity in nature to corresponding case law).
256 Id.
Briscoe asserted that the bank (and as such, Kentucky), had violated the Constitutional provision of Article I, Section 10 stating:

[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. 257

The Court reasoned:

[u]nder its charter the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers; and can no more transcend them than any other banking institution. The state, as a stockholder, bears the same relation to the bank as any other stockholder. 258

In other words, the Court rejected the argument forwarded by Briscoe, as the clause prohibiting the bills applied to notes that were issued indirectly through a corporation, and the bank in question issued said notes on its own credit, as opposed to that of the state.

The Court addressed the concept of consent (cases in which the States consented to suit against themselves) with the case of Beers v. Arkansas. In Beers, the plaintiff brought suit against the State of Arkansas, to recover interest due on bonds issued by the State, which had not paid according to the terms of the contract. While the case was pending in Circuit Court, the Arkansas legislature passed an Act providing that “in every case in which… proceedings had been instituted to enforce… collection of any… bonds issued by the State, or… interest… before any judgment… should be rendered, the bonds should be produced and filed in the office of the clerk and not withdrawn until final determination of the proceedings.” 259 The Act continued on to state that “in every case in which any… proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity,… require the original… bonds to be produced and filed; and if that were not done, and the bonds filed and left to remain filed, the court should… dismiss the… proceeding.” 260 Upon being ordered to pay his bonds pursuant to this Act, the plaintiff failed to do so. Therefore, the case was dismissed.

258 Briscoe, 36 US at 327.
259 Beers, 61 US at 528.
260 Id at 528.
Beers appealed the case to the Supreme Court, on the grounds that the action taken by the State violated the Contracts Clause of the United States Constitution. The Court broadly held that the State consent to suit was voluntary, and a State could withdraw its consent, even if it did so subsequent to commencement of the proceedings. In making this decision, the Court stated:

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.\(^{261}\)

At the beginning of its era, the Taney Court exhibited the predictability in decision-making characterized by the second stage of legal reasoning. For instance, in *Briscoe*, the decision of the Court turned on whether suit against the entity in question, in fact, constituted a suit against the state. This consideration was consistent with the case law that came before, as well as the language of the amendment itself. However, disintegration of the concept, more characteristic of the third stage of legal reasoning began to develop in the Court’s consideration of Beers, toward the end of the Taney era. In decisions such as *Beers*, questioning of the original concept began to evolve, as interpretations to the constitutional language began to come into play. Although the language of the Eleventh Amendment does not refer to consent expressly as potentially impacting the protection afforded by it, the Court began to read into the case law established principles of jurisprudence that waiver of privilege would permit a suit against the state under the Eleventh Amendment, and similarly, a state could rescind such voluntary consent, even if such rescinding occurred subsequent to the initiation of the proceedings.

When considered in light of the principle/policy dichotomy, the Taney Court can possibly be viewed as falling along both the principle and principle/policy balancing approaches, correlating respectively with the beginning and end of the era detailed above. At the beginning of the era, the Taney Court utilized more of a principle approach. However, as it moved toward the end of the era, the Court effectively weighed a type of social goal when taking into account the ability of the state to waive or rescind waiver of certain claims by individuals, and thus could

\(^{261}\) Id at 529.
potentially be viewed as taking into account limited policy considerations in making its ultimate principle-based decision.

**The Chase Court Era (1864-1873)**

Chief Justice Salmon Portland Chase took reins of the Court just as the Civil War was coming to a close, placing him in a similar place as that of Chief Justice Jay, in that he was taking on the new and different nation that emerged from that war. The Court under Chief Justice Chase, in a very short term of nine years, declared several federal statutes unconstitutional and invalidated many more state statutes, exhibiting a tendency toward judicial activism that had not been seen in some time. This also served to escalate tension between the Court and Congress. The majority of the cases heard by the Chase Court involved the constitutionality of war legislation, taxes, reconstruction, and state regulations, and some of its caseload did specifically address Eleventh Amendment issues, which are discussed in more detail below.

In 1868, we saw one of many expansions, and thus continued disintegration of the first shift of the legal concept, of the application of the Eleventh Amendment. In *Cowles v. Mercer County*, it was held that state political subdivisions were open to suit in federal court despite the protections afforded by the Eleventh Amendment.\(^{262}\) In deciding this case, the Court did not expressly mention the Eleventh Amendment; however, it would have implications for many cases to come, particularly those advancing arm of the state issues. In the case, Cowles, a citizen of New York and an out-of-state bondholder, brought suit against the supervisors of Mercer County in Illinois. The case explored whether the Board of Supervisors for Mercer County could be sued by citizens of states outside its home state of Illinois, in federal court. At issue was the applicability of Illinois Statutes (which in one section determined the corporate nature of the entity, and in another stated that actions may be commenced in the Circuit Court of that County against that entity) and interpretation by the Supreme Court of Illinois (which construed that those sections excluded suit anywhere outside of that court). The Illinois statute conferred jurisdiction on a particular state court for such suits, however, it did not explicitly mention the jurisdiction of the national courts.\(^{263}\)

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\(^{262}\) *Cowles v Mercer County*, 74 US 118 (1869).

\(^{263}\) Id.
Mercer County filed a motion to dismiss the case for want of jurisdiction against the New York citizen based upon those statutes and the Illinois court’s interpretation of them. However, the motion was overruled, and the County appealed the case to the Supreme Court. The Court found that the Board of Supervisors was, in fact, a corporation, created by the Illinois legislature, and stated that:

[i]t has never been doubted that a corporation, all the members of which reside in the State creating it, is liable to suit upon its contracts by the citizens of other States; but it was for many years much controverted whether an allegation in a declaration that a corporation defendant was incorporated by a State other than that of the plaintiff, and established within its limits, was a sufficient averment of jurisdiction.\textsuperscript{264}

The Court opined that the power of an entity to contract with citizens of other States implied a corresponding liability to those citizens, and no limitation within statute can defeat the jurisdiction provided by the Constitution. As such, the Court affirmed the decision of the Circuit Court, and ultimately held that political subdivisions did not enjoy protection from suit in federal courts.\textsuperscript{265}

In \textit{Davis v. Gray}, another influential case in the history of the Eleventh Amendment, the Court once again considered the idea of whether or not the presence of a state as a party of record was a criterion on which applicability of the Eleventh Amendment should turn.\textsuperscript{266} In the case, railroads meeting certain qualifications were issued certificates granting lands to them. Following the issuance of these certificates, the legislature of Texas determined that some of those lands were officially relinquished to the State, and allowed resale of the lands granted to outside parties. As the appointed receiver of one of the railroads impacted by this decision, Gray brought suit against Texas officials for injunctive relief from interference with the land grants given to the railroads. The State argued that the timetable requirements within the agreements had not been met, however, the Court noted that the state itself had rendered performance of the requirements impossible (as the lack of progress in construction was due primarily to the Civil War).\textsuperscript{267}

\textsuperscript{264} Id. at 121.
\textsuperscript{265} Id.
\textsuperscript{266} \textit{Davis v Gray}, 83 US 203 (1872).
\textsuperscript{267} Id.
In reliance on Osborn, the Court resolved that the suit was one against the State, and dismissed the suit. As the primary portion of its rationale for that decision, the Court cited the following principles from that case:

1. A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.  
2. Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.  
3. In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.”

Further, the Court again noted that an unconstitutional state law cannot legitimize the act of one of its officers.

The Chase Court exhibited both principle and policy based approaches during its era. In opining that the power of an entity to contract with citizens implied a corresponding liability to those citizens, even if that entity was a political subdivision of a state, the Court considered the relative importance of a particular social issue as part of its decision-making process. Such an interpretation can also be seen as moving outside the actual text of the protection afforded by the Eleventh Amendment, furthering this assessment. However, the Chase Court also showed a tendency toward principle-based approaches, when deciding cases such as Davis, which relied heavily on principles established in previous Eleventh Amendment case law, which also happened to limit the amount of judicial intrusion into certain affairs of the state.

The Waite Court Era (1874-1888)

One of the hardest working Courts in history, that under Chief Justice Morrison Remick Waite considered many different types of cases, including state business practice laws. With regard to those decisions, the Court primarily held that states had the authority to regulate businesses affected by the public interest, and in later years left the implication that businesses

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268 Osborn, 22 US 738.
270 Id at 203.
not affected by the public interested could not be regulated. In fact, the Court held that if they were so regulated, enacting regulation could be contrary to the due process clause, essentially granting that corporations were protected by the Fourteenth Amendment. The Waite Court had many decisions based on interpretation of the due process, contract, and commerce clauses, and in the course of those decisions, it heard several cases directly related to the Eleventh Amendment. Those cases are discussed in detail below.

In 1876, with the case of *Board of Liquidation v. McComb*, the Court enforced an obligation within a statute impairing it, after invalidating that statute. In the case, the State of Louisiana had issued bonds with the purpose of consolidating debt. In doing so, it made an offer to exchange them for 60 cents per dollar with its creditors. Subsequently, Louisiana utilized some of these bonds to liquidate the debt of the Louisiana Levee Company at face value. This action violated the pledges made during the original creation of the bonds with regard to specific limitations set for their use. In addition, the action caused a significant value decrease of the bonds.

As a result, a bondholder sought an injunction against the Board of Liquidation to cease issuance of the bonds to any more of the State’s creditors. Upon an argument that the suit was barred as one against the State, the Court responded that it was not. In doing so, the Court stated:

> [o]n this branch of the subject the numerous and well-considered cases heretofore decided by this court leave little to be said. . . . [I]t has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. . . . In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.

In other words, the Court held that the Board of Liquidation was to stop issuing the bonds to creditors of the State of Louisiana, and instead only issue them to the bondholders under the original Act.

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271 *Board of Liquidation v McComb*, 92 US 531 (1875).
272 Id at 531.
273 Id at 541 (citing *Davis*, 83 US 203; *Osborn*, 22 US 738.).
In 1882, the Court decided *United States v. Lee*, in which it found federal officers personally subject to suit for official acts.\(^{274}\) Even though this suit pertained to federal officers, it is still considered a key case in suits against state officers. The case was one in ejectment brought against federal officers, occupying the estate of General Robert E. Lee, by his heirs. The officers were occupying the estate based upon a deed obtained at a tax sale. At issue were taxes that were left unpaid because Lee was leading the Army of Virginia during the Civil War. The heirs of Lee were challenging the tax sale, primarily due to the fact that the federal government refused to accept an offer by a third party to provide payment of the back taxes.\(^{275}\)

The government filed a motion to dismiss the suit, based on the idea that the suit was one against the United States. The Court determined that the suit was against the officers of the government, rather than against the government as such, and as a result, it could not maintain an assertion of immunity. In its reasoning, the Court stated that there was “abundant evidence in the decisions of this [C]ourt that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.”\(^{276}\) The Court reiterated that an unconstitutional Act does not immunize the actions of a state official. In bolstering that argument, the Court noted that an assertion by a state officer that such an act is constitutional should not simply be accepted without some sort of inquiry.

Three more bond-related cases decided in 1883 determined that the Eleventh Amendment afforded protection to a State and its officers. Those cases were *Louisiana v. Jumel*,\(^{277}\) *New Hampshire v. Louisiana*,\(^{278}\) and *Cunningham v. Macon and Brunswick Railroad*.\(^{279}\) First, in *Jumel*, a citizen of Louisiana brought suit to compel the state treasurer to utilize a fund that had been created under an earlier version of the Louisiana constitution for payment of bonds.\(^{280}\) The later version of the constitution abolished the provision in question. The Court ruled that the suit was against a State, and thus in violation of the Eleventh Amendment. In addition, the Court stated that the remedy sought would “require the Court to… supervise the conduct of all persons

\(^{274}\) *United States v Lee*, 106 US 196 (1882).
\(^{275}\) Id.
\(^{276}\) Id at 207-208.
\(^{277}\) *Louisiana v Jumel*, 107 US 711 (1883).
\(^{278}\) *New Hampshire v Louisiana*, 108 US 76 (1883).
\(^{279}\) *Cunningham v Macon and Brunswick Railroad Company*, 109 US 446 (1883).
charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal, and interest were paid in full.”

Second, in New Hampshire v. Louisiana, several New Hampshire citizens held Louisiana-issued bonds. Operating under the assumption that these individuals could not sue the State of Louisiana in federal court, the bondholders turned the bonds over to the State of New Hampshire, which agreed to bring the suit for its citizens. Ultimately, the Court held that the Eleventh Amendment bars suits brought against a state by another state for the purposes of solely acting as an agent for its citizens. However, this decision would effectively be overruled in 1904, when the Court held in a similar case that when citizens assign their bonds to the State, that State, as absolute owner, can then bring suit against the bond-issuing State in the Supreme Court.

Third, in Cunningham, the State of Georgia loaned funds to a railroad, on which it foreclosed when the railroad defaulted on interest payments. Following the foreclosure, the Governor of the State sold the property to State itself. After the sale took place, the several bondholders challenged the sale, as well as how the bonds were being dispensed of, and alleged that a set of the bondholders were entitled to payment of some type. The Court held that the State of Georgia was an indispensable party, and affirmed the dismissal of the previous court, citing that the State could not be sued in federal court under the Eleventh Amendment.

Cunningham is also referred to many times as a case that infers that officer liability is available in specialized cases. This is the case even though the suit itself disallowed the suit of officers of the State. The explanation for such references is due to a statement made during the course of the opinion that there is a certain class of officers that may be sued for personal wrongs absent authority. The Court reasoned that “in these cases… he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.”

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280 Jumel, 107 US 711.
281 Id at 727.
283 South Dakota v North Carolina, 192 US 286 (1904).
284 Cunningham, 109 US 446.
285 Id.
286 Id at 452.
In a significant portion of the late-1800’s Eleventh Amendment jurisprudence, the court heard the Virginia Coupon Cases, which were related to legislation enacted by Virginia, which authorized “coupons of the funded debt of the State to be received in payment of debts, dues, and demands due the State, and to subsequent legislation practically forbidding the receipt of the coupons in present payment of dues and taxes.” Altogether, the Virginia Coupon Case controversy consisted of eight cases. The cases included one submitted on December 1, 1884 (Pleasants v. Greenhow), five argued together on March 20-25, 1885 (Poindexter v. Greenhow, White v. Greenhow, Chaffin v. Taylor, Carter v. Greenhow, and Moore v. Greenhow), one argued on March 25-26, 1885 (Allen v. Baltimore & Ohio Railroad) and one argued on March 26-27, 1885 (Marye v. Parsons).

The cases in this controversy were initially brought to enforce state debts, although these cases were approached somewhat distinctly from those of other states. Similar to some cases already mentioned, Virginia issued bonds with coupons that could be utilized to pay state taxes. After doing so, the Virginia legislature passed a law that stated that all taxes had to be paid with currency. Still, various individuals provided the coupons in lieu of monetary payment for their state taxes, which the officers would not accept pursuant to the new law, at which point, the officers seized property of the individual.

For instance, in the case of Poindexter v. Greenhow, after Poindexter attempted to pay with coupons, the tax collector would not accept them and seized a desk from the business of Poindexter. Poindexter brought suit against Greenhow, for the value of his desk, but the original court found against Poindexter. At that time, Poindexter appealed the case to the Supreme Court.

The primary question at issue before the Court was whether the federal courts could compel a State, through suits against state officers, to carry out originally agreed upon contracts

\[\text{287} \ Virginia \ Coupon \ Cases, \ 114 \ US \ 269, \ 269 \ (1884).\]
\[\text{288} \ Pleasants \ v \ Greenhow, \ 114 \ US \ 323 \ (1885).\]
\[\text{289} \ Poindexter \ v \ Greenhow, \ 114 \ US \ 270 \ (1885).\]
\[\text{290} \ White \ v \ Greenhow, \ 114 \ US \ 307 \ (1885).\]
\[\text{291} \ Chaffin \ v \ Taylor, \ 114 \ US \ 309 \ (1885).\]
\[\text{292} \ Carter \ v \ Greenhow, \ 114 \ US \ 317 \ (1885).\]
\[\text{293} \ Moore \ v \ Greenhow, \ 114 \ US \ 338 \ (1885) \ (\text{a petition for mandamus to compel defendant to receive coupons in payment of a tax as a merchant, which was denied by the circuit court of Richmond, which was affirmed}).\]
\[\text{294} \ Allen \ v \ Baltimore \ and \ Ohio \ Railroad \ Company, \ 114 \ US \ 311 \ (1885).\]
\[\text{295} \ Marye \ v \ Parsons, \ 114 \ US \ 325 \ (1885).\]
\[\text{296} \ Poindexter, \ 114 \ US \ 270.\]
that allowed citizens to pay taxes with coupons. The Court differentiated between a State and the Government by describing the former as "an ideal person, intangible, invisible, immutable" and the latter as "an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation." The Court also reasoned that the state officers could not, in order to seize property, rely on legislation infringing upon the previously agreed upon contracts. Ultimately, the Court held that the new statute violated the Contract Clause of the Constitution, and ordered all seized property returned to its rightful owner. White v. Greenhow, Chaffin v. Taylor, and Allen v. Baltimore & Ohio Railroad were very similar cases in which bondholders, after having their property seized for what the state deemed delinquent taxes because they attempted to pay them with coupons from the state bonds, were successful in their damages suits against officers of the State. They were also decided on the same line of reasoning.

On the other hand, in Carter v. Greenhow, Pleasants v. Greenhow, and Marye v. Parsons, the bondholders were unsuccessful in their suits. In these cases, the bondholders asserted claims to compel the officers to accept the coupons as payment. This is distinguished from those in the previous cases who were bringing suit to invalidate the new State law that impaired the obligation of the State to accept the coupons as payment. In deciding the cases, the Court delineated in Carter v. Greenhow that:

[i]n any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it.

In another contract case involving the Eleventh Amendment, the Court decided the case of Hagood v. Southern. In a case very similar to the Virginia Coupon Cases above, involving

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297 Id at 290.
299 Chaffin, 114 US 309.
300 Allen, 114 US 311.
301 Carter, 114 US 317.
302 Pleasants, 114 US 323.
303 Marye, 114 US 325.
304 Carter, 114 US at 322.
305 Hagood v Southern, 117 US 52 (1886).
South Carolina rather than Virginia, a South Carolina citizen attempted to have the Court compel a State officer to accept the bond scrip issued to him in lieu of taxes, pursuant to a previous agreement, which had been repudiated. Although the Court found the repudiation to be violative of the Contracts Clause of the Constitution, the Court also reasoned that the Eleventh Amendment prohibited the federal courts from compelling the state tax collector to accept the scrip instead of money tax payment.\textsuperscript{306}

In the case of \textit{In re Ayers}, an extension of the Virginia Coupon Controversy, the Court affirmed the idea that, in some cases, state officers may be sued for personal wrongs.\textsuperscript{307} Personal wrongs, as detailed in that case, included those official actions that were allegedly endorsed by unconstitutional law. It is important to note, however, that this affirmation was made while the Court found that the suit against the state officer was barred by the Eleventh Amendment.

\textit{In re Ayers} came before the Supreme Court on a writ of habeas corpus after Ayers, the Attorney General of Virginia, was jailed for contempt.\textsuperscript{308} As mentioned earlier, in the \textit{Virginia Coupon Cases},\textsuperscript{309} the Court had found Virginia laws allowing the tax collector to seize property of those individuals attempting to pay their taxes with coupons unconstitutional. Following those cases, an act was passed by the Virginia legislature directing each locality to provide a list of all taxpayers who had tendered coupons, at which point, the attorney general (or another Commonwealth attorney) was to institute suits against those individuals for their due taxes.

Subsequent to the Virginia Coupon Cases, the plaintiffs in \textit{Ayers} had purchased coupons on England’s open market to re-sell them to citizens of Virginia. Those individuals brought suit against Ayers for injury to the value of said coupons through acts contrary to the contract clause. The lower federal court ordered Ayers to desist from bringing suit pursuant to the new act. Ayers responded by bringing suit against a railroad for tax-collection purposes, insisting that the lower federal court did not have proper jurisdiction to enjoin acts such that he was bound to perform by the state.\textsuperscript{310}

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\begin{itemize}
\item \textsuperscript{306} Id.
\item \textsuperscript{307} \textit{In re Ayers}, 123 US 443 (1887).
\item \textsuperscript{308} Id.
\item \textsuperscript{309} \textit{Poindexter}, 114 US 270.
\item \textsuperscript{310} \textit{Ayers}, 123 US 443.
\end{itemize}
Under the *Poindexter* line of cases, individuals actually paying their taxes with coupons would arguably have been entitled to injunctive relief. However, the plaintiffs in this case, as British owners of coupons with resale intentions, obviously did not contend that they had, in fact, paid taxes with the coupons. In making the *Ayers* decision, the Court avoided *Poindexter* by noting that the *Poindexter* Court had merely held that granting of the coupons was sufficient action to forestall the seizure of property (rather than expressly stating that the coupons were sufficient for payment of taxes).

In delivering the opinion of the Court, Justice Matthews considered the prior Eleventh Amendment case law in detail, and determined that the Court would look beyond the nominal parties in order to determine the applicability of the Eleventh Amendment. The Court held that there was a clear basis of distinction between prior case law, namely *Poindexter*, and the immediate case. Although *Ayers* appears to be a reversal of *Poindexter*, in actuality, that may not necessarily be the case. Even though both cases involved an unconstitutional state statute and the actions of a state officer attempting to carry it out, *Poindexter* involved collection of damages resulting from those actions. No such damages were at issue in *Ayers*, as the plaintiffs were aiming to simply protect their investment (as in *Hagood v. Southern*). The distinction rested in the basis that although enjoining an officer’s acts was essential to force specific performance of a contract with a state, the state was the real party, since the only remedy was in contract. As a result, such suits were excluded under the terms of the Eleventh Amendment.

During this period, the Waite Court appeared to go through both the first and second stages of legal reasoning, first with decisions continuing the development of a legal concept and second with cases showing a predictability of application. The Waite Court primarily fell in the principle-based approach domain, even though some of the cases would serve as part of the background and reasoning utilized in later policy decisions by the Court. In 1890, Eleventh

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311 *Poindexter*, 114 US 270.
312 *Ayers*, 123 US 443.
313 *Poindexter*, 114 US 270.
314 *Ayers*, 123 US 443.
315 *Poindexter*, 114 US 270.
316 Id.
317 *Ayers*, 123 US 443.
318 *Hagood*, 117 US 52.
Amendment jurisprudence experienced a momentous shift, after nearly a century of little consequence with regard to Eleventh Amendment jurisprudence. At that time, the Supreme Court heard another case that expanded the interpretation of the Amendment. The case was *Hans v. Louisiana*, in which a citizen of Louisiana sued his home state to recover unpaid interest on bonds, and it is discussed further below.319

**Transitional Evolution**

This period is marked by doctrinal impacts in Eleventh Amendment jurisprudence, indicating a transition in the Court’s interpretation of the Amendment from diversity jurisdiction to sovereign immunity. It is during this time that extensive development of exceptions, as well as the primary shifts in constitutional interpretation, took place. With regard to the broader concept of overall federalism, this period exhibited greater cooperation between the state and federal governments, though toward the end of the period, the balance of power had shifted more toward the federal government due to increased regulation. The Court eras included in this section are those of Chief Justices Fuller, White, Hughes, Stone, Vinson, and Warren.

**The Fuller Court Era (1888-1910)**

The Court of Chief Justice Melville Weston Fuller, in its early years, began to set new limits on state power. It built on the decisions of the Waite Court, in that they coupled vested rights with the due process clause, essentially establishing a substantive limitation upon the power of the state. In consideration of the Eleventh Amendment specifically, the Fuller Court provided two of the landmark decisions in the area. These decisions, as well as the other Eleventh Amendment cases of the Fuller Court, are discussed below.

During this time, the Court entertained an ever-increasing number of suits against state officers attempting to carry out allegedly unconstitutional state laws. In a landmark case of the era, *Hans v. Louisiana*, the Court once again expanded immunity for the states, upholding a State’s assertion of Eleventh Amendment immunity outside the literal context of the amendment. *Hans* was an action, emanating from the Louisiana bond controversy discussed earlier, brought

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in the Circuit Court of the United States against the State of Louisiana by Hans, a Louisiana

citizen.\textsuperscript{320} As mentioned above, the State of Louisiana issued bonds by legislative act passed on
January 24, 1874, to which coupons were affixed, by which interest on the bonds was to be
collected when due. Hans brought suit against the state as a bondholder attempting to recover
the interest due on January 1, 1890.\textsuperscript{321}

At first glance, the Eleventh Amendment did not seem to be a factor in this suit, as the
text of the Amendment did not serve to bar suits against states by their own citizens. In addition,
the text appeared to only extend to those suits brought on the basis of diversity jurisdiction,
rather than those arising under the federal Constitution or laws. However, after\textit{Hans}, the
Eleventh Amendment landscape would emerge quite different.

Although taxes to cover the interest on the bonds were “levied, assessed, and collected,”
Louisiana had adopted a new constitution in 1879, which suspended payment of interest on said
state bonds, as provided for by state law in 1874.\textsuperscript{322} Hans asserted that the taxes were being used
to provide for general expenses of the State, rather than being paid to the bondholders, and
contended that the 1874 amendment constituted a contract between the State and the
bondholders, thus leading to his filing suit in a Louisiana Circuit Court in 1884. Upon a citation
being served on the Governor, the state’s Attorney General answered that the state could not be
sued without its permission, and thus the case should be dismissed due to lack of jurisdiction.
That assertion was sustained by a United States Circuit Court, which was then appealed by Hans
to the United States Supreme Court.\textsuperscript{323}

Justice Bradley, in delivering the opinion of the Court, noted that the Eleventh
Amendment did not speak to the matter of a State being sued by its own citizens. Further, the
Court questioned the decision in\textit{Chisholm v. Georgia} through essentially accepting the
dissenting opinion of Justice Iredell in that case, whom Bradley noted:

\textquote{contended that it was not the intention to create new and unheard of remedies by
subjecting sovereign States to actions at the suit of individuals (which he

\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id at 3.
\textsuperscript{323} Id.
conclusively showed was never done before), but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.”

Justice Bradley continued on to note that the decision in Chisholm had a great effect upon the Country, and that “any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented by the great defenders of the Constitution while it was on its trial before the American people.” He quoted several utterances by said defenders, including Alexander Hamilton’s view, as expressed in The Federalist, number 81 (echoing that of Justice Iredell), that Article III, section 2, paragraph 1 of the United States Constitution did not allow a State to be sued by citizens of another state in Federal Courts. Taking such opinions together, the Court in Hans, effectively overruled the decision in Chisholm, essentially deeming that, not only could a state not be sued by a citizen of another state in the federal courts, it could also not be sued by one of its own citizens in the federal courts, minus consent. Thus, although the Court did not indicate that the Eleventh Amendment, per se, prohibited the suit, the opinion is an indication of the expansion of the reach of the Eleventh Amendment.

It should be stated that much of the broad immunity granted by this decision was all but carved out in decisions to come. These included holdings determining that citizens could sue state officials to prevent them from carrying out unconstitutional state policies and that Congress had the power, via the Fourteenth Amendment, to abrogate immunity to protect constitutional rights, among others. However, Eleventh Amendment jurisprudence saw another shift in the 1990’s, in a series of decisions from the Rehnquist Court reinforcing state immunity. All of these issues will be addressed at later points of this manuscript.

The case of North Carolina v. Temple is somewhat similar to that of Hans, in that a citizen of North Carolina brought suit against the State auditor of North Carolina. As in Hans, the suit was held to be a suit against the State, rather than the state officer in question. As such, the Court noted that if the State officer had acted unconstitutionally or beyond his statutory

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324 Id at 12.
325 Id at 12.
326 North Carolina v Temple, 134 US 22 (1890).
authority, relief could be granted via injunction to order the officer to cease unconstitutional actions. However, no relief could be afforded if the request required affirmative action on the part of the State or if state property was at issue. Following this line of cases, most all cases appearing before the Court against officers of a state were held not only as being within the jurisdiction of the Court, but typically in favor of petitioners.  

Also in 1890, the Court again took up the issue of whether political subdivisions of a state, such as counties and cities, enjoyed the protection afforded by the Eleventh Amendment. In *Lincoln County v. Luning*, which was an action on bonds and coupons, arriving before the United States Supreme Court as a judgment initially rendered in error by the United States Circuit Court against the county, which appealed the judgment to the Court. As stated in the opinion, as written by Justice Brewer, the primary question was regarding the proper jurisdiction of the Circuit Court, which was challenged on the grounds that first, as an integral part of the state, the county could not, under the Eleventh Amendment, be sued in federal court, and second, that suit was prevented in the circuit court, as the act under which the bonds were issued provided for litigation with exclusive jurisdiction in a named court of the state in which that litigation could take place. In reliance on opinion from *Osborn* and *Ayers,* among others, the Court stated that “jurisdiction was limited only in respect to those cases in which the state is a real, if not a nominal, defendant, and while the county is territorially a part of the state, yet politically it is also a corporation created by, and with such powers as are given to it by, the state.” The Court further noted that the Constitution of the State of Nevada explicitly provided for the liabilities of its counties to suit. With respect to the second challenge, the Court also opined that previous case law was decisive on the issue. As written by Chief Justice Chase in *Cowles v. Mercer County*:

> [b]ut it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the circuit courts of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois

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327 Id.
328 *Lincoln County v Luning*, 133 US 529 (1890).
329 Id at 530.
331 *Ayers*, 123 US 443.
332 *Luning*, 133 US at 530.
333 Id.
is exempted from liability to suit in national courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other states implies liability to suit by citizens “[b]ut it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the circuit courts of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in national courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the Constitution. We cannot doubt the constitutional right of the defendant in error to bring suit in the circuit court of the United States upon the obligations of the County of Mercer against the plaintiff in error. And we find no error in the judgment of that court.”

Accordingly, the Court also found no error in the rulings of the circuit court in *Lincoln County v. Luning*, ultimately and consistently holding that such bodies were able to be sued in federal courts, where a federal question was involved.

The Court once again took up the issue of suits against State officers, specifically with respect to such suits being within the proper jurisdiction of the Court, first in 1890 with the case of *McGahey v. Virginia* and then in 1891 with *Pennoyer v. McConnaughy*. In *McGahey v. Virginia*, yet another example of a controversy related to the certain tax-receivable coupons attached to bonds of the state of Virginia, the Court declared that an individual who tendered tax coupons (such as in Poindexter) is:

entitled to be free from molestation in person or goods on account of such taxes, debts, dues, or demands, and may vindicate such right in all lawful modes of redress -- by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defense to a suit brought against him for his taxes or the other claims standing against him.

The Court continued on to state that:

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334 *Cowles*, 74 US at 122.
335 *Luning*, 133 US 529; see *Chicot County v Sherwood*, 148 US 529 (1893).
337 *Pennoyer v McConnaughy*, 140 US 1 (1891).
[n]o conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed without wholly overruling that rendered in the *Virginia Coupon Cases* and disregarding many of the rulings in other cases, which we should be very reluctant to do. To the extent here announced, we feel bound to yield to the authority of the prior decisions of this Court, whatever may have been the former view of any member of the Court.  

As evidenced by this case, immunity does not render contracts unenforceable, nor does it exempt, or otherwise impact, the operation of contracts under the Contracts Clause.

*Pennoyer v. McConnaughy* saw a California citizen who brought suit against Oregon state officials (which comprised the board of land commissioners), for the purpose of enjoining the sale of swamp land to which the plaintiff claimed title.  

An act of the Oregon legislature had provided for the ability of the board to sell, under certain conditions, parcels of swamp land. Such conditions included provision of a down payment and a promise to drain the land. Pursuant to that statute, when meeting the state conditions within ten years of the transaction, the individual to whom the land was sold would receive a patent for the land.

In the case at hand, the plaintiff had obtained his land rights through an original purchaser, thus assuming the responsibilities for paying the balance due, as well as the other conditions of the sale. However, following the original transaction, but prior to provision of the down payment, another Oregon statute was enacted that effectively dissolved all outstanding certificates under this program. As a result of the outstanding down payment on the effective date of that statute, the state forfeited the land purchaser’s rights to the state. Thus, the plaintiff brought suit as a violation of the contracts clause, seeking an injunction on the sale of the land.

Ultimately, following the overruling of two demurrers based on Eleventh Amendment immunity claims, the Supreme Court held that the State was not the real party in interest. This was primarily due to the fact that the statute in question was deemed unconstitutional, thus indicating that the defendants had acted of their own volition. In making this decision, the Court relied heavily on dicta from *Osborn*, *Davis*, *McComb*, *Cunningham*, and *Ayers*.

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339 Id at 684-685.
341 Id.
342 Id.
343 *Osborn*, 22 US 738.
344 *Davis*, 83 US 203.
While the Court did distinguish between suits seeking affirmative relief (compelling officers to act in a manner violative of state law) and those seeking preventing relief (enjoining an officer from acting pursuant to an unconstitutional state law), the Court specified that the basic concept behind the opinion was well-settled law, stating:

But the general doctrine of Osborn v. Bank of the United States that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution and would work irreparable damage and injury to him has never been departed from. On the contrary, the principles of that case have been recognized and enforced in a very large number of cases. 348

In another case in the line of officer suits, In re Tyler found the sheriff of a South Carolina county detained by federal marshals due to an injunction issued that prevented him from interfering with property by levying excessive and illegal taxes. 349 The petition to the Court was via a writ of habeas corpus by the sheriff, alleging that he had been wrongfully detained. The property in question, belonging to a railroad, was held by a receiver, under which all of the property of the railroad was placed for care and management, and protected by injunction. In delivering its opinion, the Court cited its decision in Pennoyer and others, holding that the suit was not against the state (referring specifically to the mention that where suit is brought against defendants who claim to act as officers of a state, and commit acts of injury to the plaintiff under color of an unconstitutional statute to recover money or property unlawfully taken by them in behalf of the state or for compensation for damages, such as suit is not within the intent of the Eleventh Amendment), and further noted, detectably frustrated, “it is unnecessary to retravel the ground so often traversed by this Court in exposition and application of the Eleventh Amendment.” 350

The Court deemed that the levies assessed were excessive, and made in large part on property other than that of the defendants in the warrants, thus effectively obstructing the

345 McComb, 92 US 531.
346 Cunningham, 109 US 446.
347 Ayers, 123 US 443.
348 Pennoyer, 140 US at 12.
349 In re Tyler, 149 US 164 (1893).
350 Id at 190.
operation of the railroad. The court reasoned further that the legality of the unpaid amount was in dispute by the receiver, and that identical taxation had previously been held illegal. As the sheriff requested the release of the property from seizure or a yield to the order of the court, and the Court noted that previous opinions in *Lee*, *New Hampshire v. Louisiana*, *Ayers*, *Hans*, and *McGahey* rendered unnecessary any further discussion on potential applicability of the Eleventh Amendment to the case at hand, the writ for habeas corpus was denied.

In 1894, a series of railroad rate cases began, eventually leading to the Court’s landmark decision in *Ex Parte Young*. *Reagan v. Farmers’ Loan and Trust Co.* began this line of cases, in which the primary allegations were that the setting of rates by States deprived railroads of property minus due process of law, thus constituting Fourteenth Amendment violations. In *Reagan*, suit was brought by a trustee against a railroad and its commissioners, to enjoin enforcement of such rates and regulations and the state attorney general from suing for penalties related to noncompliance.

The Court reasoned the state had no pecuniary interest in the matter at hand, rather holding just a governmental interest instead. The Court also indicated that an injunction of this sort would not require satisfaction from the state treasury, and distinguished between the level of state impact of injunctions on collection of rates versus those prohibiting collection of taxes (which were acceptable). There was also note of a statute, which expressly provided that an injured railroad could bring suit against the commission in a Travis County, Texas court of competent jurisdiction. As the statute did not state specifically that it must be a state court, the Court reasoned that federal suit must be allowed. In sustaining the decision of the lower federal court to grant an injunction against the attorney general and the railroad commission, the Court denied that the Eleventh Amendment prohibited cases against state officers where the state had no pecuniary or property interest. This case further distinguished the liability of a State officer acting pursuant to the general laws of the state from that under a specific unconstitutional law.

351 *Lee*, 106 US 196.
352 *New Hampshire*, 108 US 76.
353 *Ayers*, 123 US 443.
356 *Ex Parte Young*, 209 US 123.
358 Id.
In other words, the Court would not necessarily enjoin a state officer from performing a general duty simply because it was an alleged unconstitutional act, but it would do so if an unconstitutional law imposed a special duty on said officer.359

In Scott v. Donald, the Court once again confirmed the idea that suits against State Officers were not prohibited by the Eleventh Amendment. In the immediate case, officers of the state of South Carolina had acquired property via action under an unconstitutional statute.360 In reliance on Tyler,361 as well as the several other cases where the issue had been addressed that essentially disposed of the question of whether the suit was, in fact, against the state of South Carolina, the Court affirmed the concept that “where a suit is brought against defendants, who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the state.”362

As evidenced through this line of cases, suit is not ordinarily barred against a state official to restrain that official from commission of a wrong, even though the government may be so restrained. This rule was also applied in Tindal v. Wesley, in which suit was brought by a New York citizen against officers of South Carolina, to recover property located in South Carolina. While the plaintiff purchased said property from the state, the defendants had taken possession after an attempt by the plaintiff to pay for the property in revenue bond scrip no longer honored by the state.363 The original jury found for the plaintiff, to whom the federal marshal was directed by the lower court to deliver possession of the property.364

The Secretary of State and another State official (the defendants) noted that they held the property on behalf of the state, for a public purpose, with no personal right, title or interest in the property. Relying on this rationale, they maintained that the suit was, in fact, against the state. The Court found that the officials in question did have possession (and thus an action for

359 Reagan, 154 US 362 (earlier cases involved in determining this distinction include Poindexter, 114 US 270; Pennoyer, 140 US 1; Allen, 114 US 311; and In re Tyler, 149 US 164).
360 Scott v Donald, 165 US 58 (1897).
361 Tyler, 149 US 164.
362 Scott, 165 US at 68-70.
363 Tindal v Wesley, 167 US 204 (1897).
364 Id.
ejectment existed), based primarily on reasoning that “from the statutes of South Carolina that
the Secretary of State has charge of all of the property of the state the care and custody of which
is not otherwise provided for by law.” 365

In what the Court deemed the leading case in the area, Lee lent the basis for the finding
that where there is an assertion by the defendant that his act is lawful pursuant to state
authorization, and the state is not a party, the Court must assume he can prove the facts
asserted. 366 The Court noted that, as a result of many prior cases heard, “the settled doctrine…
wholly precludes the idea that a suit against individuals to recover possession of real property is
a suit against the state simply because the defendant holding possession happens to be an officer
of the state and asserts that he is lawfully in possession on its behalf.” 367

In another case that closely followed the decision in Reagan, the Court heard another
railroad rate case in Smyth v. Ames. 368 In that case, stockholders of a railroad company, who
were citizens of Nebraska, brought suit against state officials to enjoin railroad ratemaking under
an alleged unconstitutional statute. The Court found that the State of Nebraska was not the real
party in interest, and “the suits are not against the state, but against certain individuals charged
with the administration of a state enactment, which, it is alleged, cannot be enforced without
violating the constitutional rights of the plaintiffs.” 369 In reliance on previous decisions such as
Pennoyer, 370 Tyler, 371 Scott, 372 and Tindal, 373 the Court made a point of, once again, iterating the
fact that the concept is “settled doctrine of this Court that a suit against individuals for the
purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to
the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the
amendment.” 374

In a departure from the holdings of Reagan 375 and Smyth, 376 the Court in Fitts v. McGhee
(another in the railroad rates line of cases, in which an injunction had been obtained by a lower

366 Lee, 106 US 196.
367 Tindal, 167 US at 221.
368 Smyth v Ames, 169 US 466 (1898).
369 Id at 518.
370 Pennoyer, 140 US 1.
371 Tyler, 149 US 164.
372 Scott, 165 US 58.
373 Tindal, 167 US 204.
374 Smyth, 169 US at 518-520.
federal court to restrain the state attorney general from enforcing a law alleged to be unconstitutional), developed a novel test to determine whether a suit was against the state officer as an individual, or, in fact, against the state itself. In *Fitts*, railroads sued the Alabama Governor and attorney general in challenge of a statute fixing the maximum toll rates for crossing bridges of the Tennessee River. If toll operators overcharged an individual, the statute permitted those individuals to collect penalties via private civil action against the operator. The Court found that the named state officials had no connection to the collection of the penalties and that naming them was simply an effort to test constitutionality of the statute. In making that determination, the Justice Harlan wrote for the Court:

> [t]here is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrongs. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land, for whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this Court for final determination.

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376 *Smyth*, 169 US 466.
378 Id.
379 Id.
380 Id at 529-530.
As the Court determined the case was ultimately against the State, and as firmly established through previous case law, a state could not (without its consent) be sued in federal court by one of its own citizens, the suit could not be maintained in federal court pursuant to the Eleventh Amendment. This decision, and related dicta leading to the state versus state officer distinction, would ultimately undergo further examination in *Ex Parte Young*, which will be discussed in detail in a later section.\(^{381}\)

In 1900, the Court considered *Smith v. Reeves*, another suit in which it heard a case initiated in a lower federal court by receivers for a railroad against a state official, in this case the state treasurer of California, seeking to recover taxes assessed against and paid by the railroad, the Atlantic & Pacific Railroad Company.\(^{382}\) A state statute provided for the ability to sue the state treasurer in state courts to recover illegally collected taxes. However, the suit was filed in federal court, and although the state had consented to suit in state courts, it had not given its consent to be sued in federal courts. The Court ultimately ruled that it was a suit against the state, and thus could not be maintained in federal court, as a state does not consent to suit in federal court simply by consenting to suit in the courts of its own creation. Further, the railroad at issue was chartered by Congress, thus effectively expanding the scope of the Eleventh Amendment to prevent a federal corporation from suing a state in federal courts.\(^{383}\) The Court provided the following rationale regarding this interpretation:

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\text{[w]e deem it unnecessary to repeat or enlarge upon the reasons given in *Hans v. Louisiana* why a suit brought against a state by one of its citizens was excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States. They apply equally to a suit of that character brought against the state by a corporation created by Congress. Such a suit cannot, consistently with the Constitution, be brought within the cognizance of a circuit court of the United States without the consent of the state. It could never have been intended to exclude from federal judicial power suits arising under the Constitution or laws of the United States when brought against a state by private individuals or state corporations, and at the same time extend such power to suits of like character brought by federal corporations against a state without its consent.}\(^{384}\)
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\(^{381}\) *Ex Parte Young*, 209 US 123.
\(^{382}\) *Smith v Reeves*, 178 US 436 (1900).
\(^{383}\) Id.
\(^{384}\) Id at 448-449.
In another Nebraska railroad rate case, *Prout v. Starr*, the Nebraska attorney general was inhibited from enforcing a rate law against the Union Pacific Railroad, which claimed the railroad was deprived of property without due process of law. While the basic idea of immunity and the previous holdings regarding the doctrine were recognized, the Court in *Prout* observed that:

[i]t would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress… all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.

In other words, it was reasoned that the Eleventh Amendment did not take away the power held by the federal courts to enforce other parts of the constitution, such as the Fourteenth Amendment or the Commerce Clause.

The Court decided *Chandler v. Dix* in 1904, which was another opportunity to define the ability of states to confine consent to suit by individuals to their own state courts. The case was an effort by the plaintiff to restrain the auditor general from assessing taxes, pursuant to alleged unconstitutional law, on property held by the plaintiff. The Court found the auditor general and the county treasurer claimed no interest in the land, and as the state’s title appeared to be the only one injured, the state was deemed a necessary party to the action. As such, the Court held that the suit could not be maintained, as the state did not explicitly consent to suit in federal court. Although a state statute did provide the procedure for actions to set aside tax sales to be brought in state courts, as well as the officials serving as necessary parties to such actions, the Court determined that it could not interpret the statute as permitting suits in federal court, as express language was not present to that end.

*Gunter v. Atlantic Coast Line Railroad* saw yet another suit against a county treasurer, who was authorized under state law to defend actions involving taxes. In *Gunter*, South

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385 *Prout v Starr*, 188 US 537 (1903).
386 Id at 543.
387 *Chandler v Dix*, 194 US 590 (1904).
388 Id.
389 *Gunter v Atlantic Coast Line Railroad Company*, 200 US 273 (1906).
Carolina challenged the railroad’s claim to an exemption from state taxes. The exemption at issue had been challenged in federal court in 1873, and at that time was upheld by the Court, who enjoined the State from taxing the railroad. Upon an attempt by the State to again tax the railroad, Atlantic sought another injunction. The Court necessarily had to determine whether the state waived its immunity in the previous litigation. If it had not, any judgment rendered would necessarily involve the state, and the suit would not be able to be maintained, pursuant to the Eleventh Amendment. However, the Court held that the state had voluntarily submitted to the jurisdiction of the federal courts during the prior litigation, through substitution of itself as the real defendant in a suit initially brought against taxing officials, rather than the state itself. The Court ruled that, in general, "where a state voluntarily becomes a party to a cause and submits its rights for judicial determination it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." 

In *Mississippi Railroad Commission v. Illinois Central Railroad*, several residents of the town of Magnolia presented a petition to the Mississippi Railroad Commission. The residents were requesting that the railroad company stop certain trains at the Magnolia station, as they felt they were “entitled to have these trains make regular stops at that point, and they stated their belief that it was for the best interest of the public, as well as the town, to have the passenger trains named make regular stops at the town.” The railroad commission issued an order requiring two of the three requested trains to stop at the town.

Prior to obeying the order, the Illinois Central Railroad brought suit to enjoin enforcement of the order. Upon filing, a temporary injunction was issued, which was later dissolved. The Illinois Central Railroad appealed to the circuit court, stating that the corporation was created under the laws of Illinois, while the railroad commission was created by the State of Mississippi, and that the trains in question were interstate mail trains provided for by Congress that needed to be fast enough to adequately provide for interstate passengers and mail. The circuit court reversed the original holding, and found for the railroad.

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390 Id.
391 *Humphrey v Pegues*, 3 US 244 (1872).
392 *Gunter*, 200 US at 284.
394 Id at 337.
Upon appeal to the Supreme Court, the primary question presented was the validity of the order of the commission with respect to the Federal Constitution. The Court held the order of the commission to be “improper and illegal, and not merely an incidental interference with the interstate commerce of the company.” Further, the Court indicated that the suit was not a suit against the State, and sustained the originally awarded injunction.

The above cases involving state officers eventually led to the landmark case of *Ex Parte Young*. To present day, the historic decision in *Ex Parte Young* serves as one of the available methods for a plaintiff to litigate against a state in federal court, without running afoul of the Eleventh Amendment. *Ex Parte Young* was another in the long line of cases pertaining to state legislation to control the power of railroads. In this 1908 case, railway shareholders sought an injunction to prevent the attorney general of Minnesota and the state railway commission members from enforcing criminal sanctions for the violation of rate caps (in response to new legislation in Minnesota mandating a rail freight cap against the railway in which they held shares), pending adjudication of the claim of the railroad that the caps amounted to an unconstitutional taking under the Fifth Amendment. The federal court issued the injunction, and the state appealed, indicating that the injunction against the state officer was, in fact, against the state, and thus violated the Eleventh Amendment.

The primary issue in *Ex Parte Young* was whether the Eleventh Amendment prevented federal courts from enjoining enforcement of alleged unconstitutional criminal statutes by state officers, pending adjudication by the federal court as to the claim’s unconstitutionality. In holding that the federal courts may enjoin such enforcement by state officers when the federal court has obtained jurisdiction over the matter prior to the initiation of enforcement proceedings, the Court effected a less than popular, but historic decision. Reasoning that no state can grant authority to enforce an unconstitutional statute (therefore any action by a state officer to do so is not pursuant to state authority and not an act of the state), and thus deeming it unreasonable to

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396 Id at 345.
397 Id.; see *McNeill v Southern Railway*, 202 US 543 (1906).
398 *Ex Parte Young*, 209 US 123.
399 Id.
400 Id.
401 Id.
ask the railroad to violate the law and risk criminal penalties, the Court found against, Young, the Minnesota attorney general, and awarded prospective relief only.\textsuperscript{402}

This decision shaped and still provides one of the three exceptions to sovereign immunity. The \textit{Ex Parte Young} exception holds that, pending the alleged violation of law did not occur entirely in the past, sovereign immunity does not bar actions in federal court against individual state officers in their official capacity, when the relief sought is (1) declaratory judgment that there is currently a violation of federal law by the state officer, and (2) injunction forcing conformity of the state officer’s conduct to federal law.\textsuperscript{403} In recent years, we have seen the Court effect limitations on this exception, which will be discussed as they arise within the context of the case law review.

Throughout the years, scholars and Supreme Court Justices alike, have criticized the \textit{Ex Parte Young} decision as “an obvious fiction,” due to its consequence of creating a arbitrary distinction between a state and its officers.\textsuperscript{404} The argument utilized in this line of thought is typically that when suit is brought against a state officer to enjoin enforcement of a state policy, the state is actually the real party in interest, and to indicate otherwise would effectively appear to be a fictitious claim that the officer is simply stripped of state authority for purposes of Eleventh Amendment applicability. Regardless of this argument, the doctrine continues to serve as a primary exception for purposes of the Eleventh Amendment, and likely will for some time given its seemingly indispensable contribution to the federal scheme of government.

Following the advent of \textit{Ex Parte Young}, the majority of actions brought against state officers followed the outcome of that decision. A number of cases against state officers that were not considered suits against a state were decided upon the basis that the state officers in question were acting beyond the statutory authority granted them. One such case was \textit{Scully v. Bird}, in which a suit was filed against an officer of one state by citizens of another, in order to restrain the state officer from improperly enforcing a state statute.\textsuperscript{405} In that case, an injunction was sought against the Michigan Dairy and Food Commissioner, who is alleged to have injured appellants by affecting the sale and reputation of products they manufactured. The federal district court reasoned that previous case law was conclusive against the jurisdiction of a court of equity over

\begin{footnotes}
\item[402] Id.
\item[403] Id.
\item[404] \textit{Coeur d’Alene Tribe}, 521 US at 270.
\item[405] \textit{Scully v Bird}, 209 US 481 (1908).
\end{footnotes}
such matters, and thus, on its own motion, the court determined that the suit was, in fact, a suit against Michigan pursuant to the Eleventh Amendment, and dismissed the bill.\textsuperscript{406}

The case was then appealed to the Supreme Court. The Court reasoned that the state officer was, in fact, acting as a private citizen of the state, but under cover of his office. As the Court determined the Commissioner was acting beyond his statutory authority, the Court deemed the claim not to be a suit against the state, but a valid exercise of jurisdiction. As such, the Court reversed the decision of the lower court.\textsuperscript{407}

Following \textit{Ex Parte Young}, there were also several cases in which the Court granted immunity under the Eleventh Amendment and disallowed the corresponding suits. One such suit was that of \textit{Murray v. Wilson Distilling Company}.\textsuperscript{408} In \textit{Murray}, a State-established and state-operated system of marketing liquor in South Carolina had been conveyed to the counties for control.\textsuperscript{409} In order to effect this transfer, a State Dispensary Commission (made up of five members, to be appointed by the Governor) was created, which was charged with the duty to “close out the entire business and property of the state Dispensary except real estate, and including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liability at the earliest date practicable.”\textsuperscript{410} The Commission required that all claims made against the State system be verified by the original books and witnesses. However, some companies were unwilling to adhere to the requirements as set forth by the Commission. Those companies brought suit under diversity jurisdiction, requesting an injunction to prevent disposal of the funds by the Commission until their claims were paid.\textsuperscript{411}

This led to the awarding of temporary restraining orders, with the banks to which the commission had deposited dispensary funds also made defendants (and thus enjoined from paying out such funds). Subsequent hearings took place on the matter, which continued the temporary restraining orders until final determination. Following submission, but prior to the court’s decision regarding rules to show cause, the South Carolina legislature passed two statutes

\begin{footnotesize}
\item[406] Id.
\item[407] Id.; see \textit{Atchison, Topeka & Santa Fe Railroad Company v Denver and New Orleans Railroad Company}, 110 US 667 (1884) (reversed the lower court decision); \textit{Greene v Louisville & Interurban Railroad Company}, 244 US 499 (1917) (The Court held that the state officer being sued was acting outside of his statutorily granted authority).
\item[408] \textit{Murray}, 213 US 151.
\item[409] Id.
\item[410] Id at 160.
\item[411] Id.
\end{footnotesize}
relating directly to the State Dispensary Fund. The first effectively increased the compensation
of the commission by directing certain sales and payments out of the fund of a certain judgment
for damages. The second directed the commission to pay $15,000 to the State Treasury, which
the commissioners refused to do, citing the injunction they were under. This amount was to be
used for expenses relating to criminal prosecutions for laws relating to the “late institution of the
State Dispensary.”412 This refusal prompted the State Attorney General to begin proceedings to
compel compliance, in which the Supreme Court of South Carolina noted that the governing
statutes “made the state the purchaser of the liquors bought for consumption, and therefore that
those who had sold the liquor to the State Dispensary had contracted with the state, and with the
state alone; that all the assets and property of the dispensary belonged to the state, and that the
commissioners appointed to wind up and liquidate its affairs were state officers, entrusted with a
public duty on behalf of the state.”413 Thus, the court held that the circuit court did not have
proper jurisdiction to enjoin the commissioners, as state officers, from carrying out their duties as
directed. Following subsequent hearings and actions, the district court again granted the
injunction and a Federal Circuit Court affirmed that decision upon appeal, at which point, the
Supreme Court issued a writ of certiorari.414

The Court determined that the underlying question in the case was whether the suits were,
in essence, suits against the state (and thus beyond jurisdiction of the circuit court due to express
prohibition by the Eleventh Amendment). Noting “it is apparent that the purchases which were
made by the state officers or agents, of liquor for consumption in South Carolina, were purchases
which were made by the state for its account, and, therefore, that the relation of debtor and
creditor arose from such transactions between the state and the persons who sold the liquor,” the
Court overruled the decision of the lower courts. Leading to this decision was the determination
by the Court that they could not sustain the exercise of jurisdiction by the circuit court, “without
in effect deciding that the state can be compelled, by compulsory judicial process, to perform a
contract obligation.”415 Within dicta was an effort to detail that a state does not waive its
immunity simply because it participates in what might be considered a non-governmental action,
and “such interpretation could only be warranted if exacted by the most express language, or by

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412 Id at 165.
413 Id at 166.
414 Id.
415 Id at 168.
such overwhelming implications from the text as would leave no room for any other reasonable
construction.”416

The decision of the Fuller Court in *Hans* demonstrated a major disintegration in the legal
concept as it was recognized at the time, and gave way for the later case law in the era to initiate
yet another shift in Constitutional interpretation embodied by Eleventh Amendment
jurisprudence. As the Fuller Court moved through cases in the era, it appeared as though
Eleventh Amendment jurisprudence might be able to reside in the second stage of legal reasoning
for some time, as suits involving issues such as state officers and consent were largely
experiencing a period of clear applicability of the legal concept. That is, until *Ex Parte Young*
was heard, from which another decision was made by the Court that would serve to question the
framework of the overall concept. The advent of *Ex Parte Young* allowed for another shift in the
legal concept, and many cases to follow would then apply the rule established in that case, setting
the stage for another foray into the comfort of the Levi’s second stage.

A view of the Fuller Court, primarily because of the two major decisions in *Hans* and *Ex
Parte Young*, is that of one utilizing a more policy-based approach, and thus perceived by some
as intruding into domains outside its own. In making the two far-reaching decisions, first in
*Hans*, which effectively overruled Chisholm and reached outside the literal text of the Eleventh
Amendment in the decision that not only could a state not be sued by citizens of another state,
but it also could not be sued by its own citizens (thus, expanding the text of the Amendment to
apply not just to those cases brought under diversity jurisdiction, but also those arising under the
federal Constitution or laws), and second, in *Ex Parte Young*, which ultimately created the
exception that pending the alleged violation of law did not occur entirely in the past, sovereign
immunity does not bar actions in federal court against individual state officers in their official
capacity, when the relief sought is (1) declaratory judgment that there is currently a violation of
federal law by the state officer, and (2) injunction forcing conformity of the state officer’s
conduct to federal law, the Fuller Court actively contributed to major changes in the landscape of
Eleventh Amendment jurisprudence.

416 Id at 171.
Although the Court under Chief Justice Edward Douglass White is primarily remembered for its impact on antitrust cases, that Court also served in the evolution of the Eleventh Amendment. A couple of years following Murray, the Court, under Chief Justice White, once again considered the concept explained at the end of the previous section, although the focus of the issue had changed somewhat. In Hopkins v. Clemson Agricultural College, one Supreme Court case in the area of higher education, the Court examined the applicability of immunity to a public corporation carrying out state business. That case considered the liability of Clemson Agricultural College (a State college of South Carolina) for damaging adjacent lands, by diverting the flow of water thereon, through construction of a dike.\footnote{Hopkins v Clemson Agricultural College of South Carolina, 221 US 636 (1911).} The embankment was intended to protect the lands of the college from overflow of the Seneca River, however, its effect was to narrow the channel of the river so as to create a rapid current across the Plaintiff’s land. The current destroyed the natural bank, washed away the rich soil of the land, and effectively ruined the property for agricultural use. The Plaintiff brought suit for damages, removal of the dike, and restoration of the property to its previous condition.\footnote{Id. (In developing this reasoning, the Court relied on several previous cases, including Cunningham, 109 US 446; Temple, 134 US 22; Jumel, 107 US 711; Pennoyer, 140 US 1; In re Ayers, 123 US 443; Hans, 134 US 1; Harkrader v Wadley, 172 US 148 (1898); Hagood, 117 US 52; and Louisiana ex Rel New York Guaranty & Indemnity Company v Steele, 134 US 230 (1890)).}

The College denied the allegations, asserting that they did not own the land nor any other in connection with the institution, and that the construction of the dike was authorized by the state and simply built by the College as a public agent on land possessed by the state. As such, the case was heard solely on grounds of jurisdiction, and was ultimately dismissed. Upon appeal, the Supreme Court of South Carolina affirmed the decision of the lower court, and the suit was then carried to the U.S. Supreme Court. In considering the extension of immunity, the Court reasoned:

> With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent, it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh Amendment has been held to apply not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the state's power of taxation, or to pay out its money in
his possession on the state's obligations, or to execute a contract, or to do any affirmative act which affects the state's political or property rights. But immunity from suit is a high attribute of sovereignty -- a prerogative of the state itself -- which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law unless they are to be put above the law.\footnote{Id at 642-643.}

The Court noted that denial of the hearing for the Plaintiff was based solely on the reasoning that, even if the college had destroyed the farm, the court did not retain jurisdiction over a public agent. The Court explained further that if the state had expressly granted authority to the College to take or damage the Plaintiff’s land without compensation, liability would have been substituted for the attempted exemption by the Constitution. But, in reality, no such act existed, and the state did not expressly grant immunity from suit to the College. In fact, the statute effected the contrary, creating an entity whose right to use the property was tied to provisions related to the possibility of suit in its corporate name.\footnote{Id.}

In examining previous case law, the Court pointed out that most of the similar cases were actually actions for torts committed not by the public corporation itself, but rather by officers of the law. In the immediate case, however, the Plaintiff was not seeking to hold the college liable for actions of its officers, but instead the college itself for its own corporate act in constructing a dike, essentially rising to the level of a physical taking of Plaintiff’s land. The Court ultimately reversed the ruling of the lower courts, finding that the public corporation did not enjoy an extension of the state’s immunity for purposes of the suit. However, it was also held that State property could not be affected by any court proceeding without consent by the State, and as such, Plaintiff’s request for removal of the dike could not be allowed.\footnote{Id.}

Several cases brought against state officers, that were not considered suits against states, were decided on the basis that the officers were acting pursuant to an alleged or actual unconstitutional statute. \textit{Truax v. Raich} was one such case, in which the Eleventh Amendment did not provide for immunity due to the unconstitutionality of the statute under which the state officer...
was acting. Raich, an Austrian native, was employed by Truax at a restaurant. There were nine employees of the restaurant, seven of whom were not native born citizens or qualified electors. In the state of Arizona, where Raich lived and worked, an anti-alien labor law was passed, which provided that no employer with over five employees could employ less than 80% United States electors or native born citizens.

Following the election at which the act passed, Truax informed Raich that, solely because of the terms of that act, he would be discharged from employment. In response, Raich filed a bill with the federal district court against Truax claiming that he was being denied equal protection of the laws under the Fourteenth Amendment. The Attorney General of Arizona and the County Attorney were also named defendants. The latter two individuals were included in the suit, as it was noted they would be the ones disciplining the employer should he not comply with the terms of the act. The bill sought to enjoin the enforcement of the law as unconstitutional. The defendants moved that the suit be dismissed, due to the fact it was against the unconsenting State of Arizona. The district court denied the motion to dismiss and granted an injunction against preventing the defendants from enforcing the act. The case was appealed to the United States Supreme Court. The Court found that the law was an unconstitutional violation of the Fourteenth Amendment, and that the suit was not one against the state, as the state officers were acting pursuant to an unconstitutional statute. Thus, the Court affirmed the decision of the lower court.

There have also been occasions when immunity did not extend when suits are brought against state officers who have willfully and negligently disregarded state laws. In Johnson v. Lankford, suit was brought personally by a citizen of Massachusetts against a state bank commissioner to recover damages for the loss of the bank deposit of the Plaintiff. Plaintiff alleged that the Commissioner’s failure to safeguard the assets of the bank amounted to willful and negligent disregard of his duties under state law. The federal district court held the action not to be one against the state, and dismissed the suit upon the motion to dismiss by defendants that the claim was in violation of the Eleventh Amendment. The case was then appealed to the Supreme Court. The Court found the action was not one against the state, but rather one personally against the state

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422 Truax v Raich, 239 US 33 (1915).
423 Id.
424 Id.
officer for his willful and negligent behavior, and the lower court did properly retain jurisdiction due to diversity of citizenship. As such the Court reversed and remanded the suit for further proceedings.  

In 1919, the Court again decided a case in the realm of higher education. *Cavanaugh v. Looney* was a suit brought against University of Texas Board of Regents and the Texas Attorney General to enjoin condemnation proceedings under a Texas Act. Appellants alleged the act was unconstitutional. They further maintained that filing of the petition would cause irreparable damage due to the impounding of their land (and resulting cloud of title and prevention of sale prior to conclusion of the proceedings).

The University of Texas is a state institution of higher education, under the immediate control of its Regents, which were Gubernatorial appointees. The act in question provided the Regents, through district court proceedings, with the authority to purchase or condemn certain lands as they deemed necessary for campus development or other university purposes. The lands at issue in the immediate case were twenty-six acres owned and maintained as a residence by appellants. The Regents were unsuccessful in efforts to purchase the land, so they intended to meet with the Attorney General to initiate condemnation proceedings. At that time, the appellants instead initiated this proceeding, seeking to restrain the threatened action.

Appellants alleged that the act (which provided that if agreement could not be reached with the owners for purchase, the Regents were to file such a petition with the Attorney General) was in conflict with both state and federal Constitutional law, because it delegated power to the Regents to determine which property is necessary (forbidding inquiry by the court on this determination), it did not allow for inquiry into damages to the remainder where only a portion of the track is taken, and it allowed the state to acquire property under fee simple title (which could subsequently be sold). The federal district court refused to enjoin enforcement of the act, and the lower court decision was affirmed upon appeal to the Supreme Court. The Court noted that it was settled doctrine that state officers who threaten proceedings to enforce an

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426 *Johnson v Lankford*, 245 US 541 (1918).
427 Id.
429 Id.
unconstitutional act violating the federal constitution may be enjoined by a federal court of
equity from doing so, however, “no such injunction ‘ought to be granted unless in a case
reasonably free from doubt’ and when necessary to prevent great and irreparable injury.” In
addition to reasoning which included the lack thereof in the facts of the case, the Court further
indicated that, when considering the allegations of loss and damage in connection with
establishing laws of eminent domain, the claims seemed unlikely.

One year later, the Court reaffirmed its Hans v. Louisiana judgment in deciding Duhne v. New Jersey. Duhne, a New Jersey citizen, asked for leave to file a bill against the United States Attorney General and Commissioner of Internal Revenue, as well as the United States District Attorney for the District of New Jersey and the State of New Jersey to enjoin the above named from enforcing the Eighteenth Amendment to the United States Constitution, based upon the allegation that it was void from the beginning and thus formed no valid part of the Constitution. Defendants accordingly denied the existence of jurisdiction under which to hear the case. The Court again declared that it was settled doctrine that the “whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent.” This decision reiterated the expansion of the Eleventh Amendment beyond its literal text, in that it applied the scope of the Amendment to cover suits brought against states in federal court by their own citizens, rather than just those of other states.

The White Court entertained a number of interesting actions, including some in the higher education area. For the most part, those cases indicated continued presence in the second stage of judicial reasoning, as they relied heavily on settled doctrine and case law (even if that settled doctrine was novel and or policy-based at the time of its inception). While the White Court entertained a number of cases based primarily on unconstitutional actions, it mostly

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430 Id. (citing Ex Parte Young, 209 US 123; Western Union Telegraph Company v Andrews, 216 US 165 (1910); Home Telephone and Telegraph Company v Los Angeles, 211 US 265 (1908); Greene, 244 US 499; Truax, 239 US 33).
432 Id.; see Terrace v Thompson, 263 US 197 (1923); Hygrade Provision Co., Inc. v Sherman, 266 US 497 (1925); Massachusetts State Grange v Benton, 272 US 525 (1926); Hawks v Hamill, 272 US 525 (1926)).
434 Duhne v New Jersey, 251 US 311 (1920).
435 Id at 313; see Hans, 134 US 1; Temple, 134 US 22; California v Southern Pacific Company, 157 US 229 (1895); Fitts, 172 US 516.
remained outside of the policy-making arena. It is important to note, however, that this Court did delve a bit into the interest representation portion of the legitimacy concept, particularly with regard to the suspect class element, although the manner in which the Court considered the cases did not undermine the legitimacy of their doing so, as the Court did receive input on and considered the impact such a decision would have on other parties affected by such unconstitutional statutes and the officers acting in furtherance of them.

The Hughes Court Era (1930-1941)

The Court under Chief Justice Charles Evans Hughes is best known for its transformation from a perceived role as property rights defender to civil liberties protector. Chief Justice Hughes himself often served as a moderately conservative swing-vote on the Court, and the Court, under his leadership, helped to develop the modern notion of freedom of speech. Although not rising to the level of a primary case for purposes of this study, some decisions of the Court under Chief Justice William Howard Taft, between 1921 and 1930, are included as secondary cases in this portion of the analysis, as they served to inform many of the cases of the Hughes Court era.

The case of \textit{Sterling v. Constantin} \footnote{Sterling v Constantin, 287 US 378 (1932).} saw the doctrine of \textit{Ex Parte Young} \footnote{Ex Parte Young, 209 US 123.} applied to the Governor of a State. The action, which complainants brought to enjoin state officers of Texas from enforcing military or executive orders, under martial law, arose out of the attempts by said Texas authorities to regulate and restrict the production of petroleum from particular oil wells. An interlocutory injunction had been obtained from the federal district court, which restrained the enforcement of related limitations set forth by the Texas State Commission. \footnote{Id.}

In the case, the Governor issued a proclamation that certain counties, including those in which the properties of the complainants were located, were in a state of “insurrection, tumult, riot, and a breach of the peace.” \footnote{Id at 387.} As a result, the Governor declared a state of martial law in that territory, and directed the Brigadier General to take command of the situation, subject to the

\begin{footnotes}
\item 436 Sterling v Constantin, 287 US 378 (1932).
\item 437 Ex Parte Young, 209 US 123.
\item 438 Id.
\item 439 Id at 387.
\end{footnotes}
Governor’s orders as given through the Adjutant General. At that point, the Governor and Adjutant General were made parties to the proceeding, and an injunction was issued, primarily on the ground that the state officers had acted beyond their constitutional authority.

The case was appealed to the U.S. Supreme Court, which affirmed the decision. As part of the opinion, the Court reasoned:

The District Court had jurisdiction. The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief…. The Governor of the state, in this respect, is in no different position from that of other state officials…. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the state, deprive the court of jurisdiction.440

The Eleventh Amendment was again considered when the court took up the issues in State of Missouri v. Fiske.441 In that case, an injunction against the state of Missouri was sought to restrain the state from prosecuting proceedings in probate related to the estate of Sophie Franz. In 1898, Ehrhardt D. Franz passed away, and by way of his will, his property was left to his wife, Sophie Franz, for life, with the remainder to his ten children. In 1909, she transferred securities, some of which were from her husband’s estate, to trustees for the term of her life. The trust increased the value of the securities through stock dividends, the shares of which were exchanged at a later point for, and the value was increased again by, those of a successor corporation.442

The original claim in the suit was brought by one of the sons to determine his remainder interest, and to account for and secure said interest.443 As indispensable parties were not present, the bill was dismissed. However, an amended bill was filed, and certain of the other children of Franz were included. After much other related litigation, Sophie Franz died in 1930, and her estate landed in the probate court. Her executor did not include certain shares in the inventory of the state, based primarily on a decree of the federal district court, which determined the rights of

440 Id at 393.
441 Missouri v Fiske, 290 US 18 (1933).
442 Id.
443 Franz v Buder, 11 F2d 854 (1924).
the children mentioned above, and further that the share mentioned above (and their corresponding increase through dividends) were not income, but corpus of the estate of Ehrhardt Franz, and as such, Sophie Franz retained only a life interest.\textsuperscript{444}

Ultimately, the state entered a motion to dismiss the bill, based on the claim that it was a suit against the state, which had not consented to suit, and thus was in violation of the Eleventh Amendment. The District Court granted the motion, which was reversed upon appeal. The Circuit Court of Appeals held that the Eleventh Amendment was inapplicable, as the ancillary and supplemental bill was brought to prevent an interference with federal court jurisdiction. The Supreme Court then granted certiorari.\textsuperscript{445}

The Court held that a state may waive its immunity by appearing in a suit, however, an intervention in a suit limited to the state’s request that securities involved not be distributed by held until the state’s claim to them may be adjudicated in a proceeding brought by the state in its own court, would not amount to such an appearance as would subject the state to litigation in federal court.\textsuperscript{446} Further, the court reasoned that the Eleventh Amendment was an explicit limitation on judicial power, applying to equitable demands, as well as money judgments, and noted that a federal court cannot entertain a supplemental and ancillary bill against a state that has not consented nor appeared in the litigation, even if for the protection of its own decree.\textsuperscript{447} Finally, the Court held that a claim that a decree of a federal court regarding the adjudication of private party ownership estops the state (even if not a party) from later inheritance tax proceedings in its own court. The Court reversed the decision of the Circuit Court of Appeals, and remanded the case to the federal District Court directing it to dismiss the ancillary and supplemental bill.\textsuperscript{448}

In 1934, the Court once again expanded the reach of the Eleventh Amendment beyond its original text. In \textit{Principality of Monaco v. Mississippi}, the Court interpreted the amendment to also apply to suits against a state brought by a foreign state.\textsuperscript{449} Monaco had invoked original

\begin{footnotes}
\item[444] \textit{Fiske}, 290 US 18.
\item[445] Id.
\item[446] Id at 24-25.
\item[447] Id.
\item[448] Id at 29.
\item[449] \textit{Principality of Monaco v Mississippi}, 292 US 313 (1934).
\end{footnotes}
jurisdiction of the Supreme Court in a suit against Mississippi regarding defaulted state bonds.

In the 1830’s, Mississippi issued bonds, with principal and interest due 20-30 years after the date of issuance. Following the expiration date of the bonds, some bondholders felt that they could not force the state to pay and presented the bonds to Monaco as an absolute gift. It was at that point which Monaco asked leave to bring suit in the U.S. Supreme Court, in order to compel payment on the bonds. Mississippi contended that the suit was simply an attempt to sidestep the Eleventh Amendment by having Monaco sue the state, in lieu of the individual bondholders. As Mississippi had not consented to suit, it asserted that such an action was a violation of the Eleventh Amendment.  

Monaco maintained that the jurisdiction of the Supreme Court was clear under Article III, which contained no reference to the need for consent in such a situation. On the other hand, the Court referred to cases in which the Article granted jurisdiction, where consent to suit had always been required in cases where the United States was a party. Chief Justice Hughes, writing for the Court, opined:

> Manifestly we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that states of the Union, still possessing attributes of sovereignty, shall be immune from suits without their consent save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a state, without her consent, by a foreign state.  

After considering framer’s intent, the Court investigated the debates in the ratifying conventions, in hopes of finding guidance. Chief Justice Hughes continued on that:

> The debates in the Constitutional Convention do not disclose a discussion of this question. But Madison, in the Virginia Convention, answering objections to the ratification of the Constitution, clearly stated his view as to the purpose and effect of the provision conferring jurisdiction over controversies between states of the

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450 Id.
451 Id at 322-323.
Union and foreign states. That purpose was suitably to provide for adjudication in such cases if consent should be given, but not otherwise.\textsuperscript{452}

The Court determined that another rationale for not allowing suit of states by foreign states was that it would protect states from involvement in issues that should only be of national concern. Ultimately, the Court denied the request for leave to bring suit.\textsuperscript{453}

The Court again took up the issue of suits against state officers in \textit{Worcester County Trust Co. v. Riley}.\textsuperscript{454} In that case, an executor of a will brought a bill of interpleader against tax officials of California and Massachusetts. The bill alleged that both California and Massachusetts officials were asserting that the decedent was domiciled in both states at the time of his death. California officials were threatening to collect death taxes upon all of the decedent’s intangibles, which would be in excess of any tax due if the domicile was determined to be Massachusetts. Further, the Massachusetts officials were also asserting a right to collect the estate tax upon all of decedent’s intangibles.\textsuperscript{455}

The executor maintained that it was impossible, both in fact and in law, for the decedent to have been domiciled in both states at the time of his death, or for his estate to be subject to death taxes within each. The bill declared that the attempted method of collection was a potential deprivation of property minus due process of law and equal protection of the laws. The bill requested that the officials from both states interplead their respective claims, and that the court determine domicile, the amount of the tax, and to whom it was payable. Further, the bill called for the officials to be enjoined from other collection proceedings.\textsuperscript{456}

The officers from California moved to dismiss the complaint based upon the concepts that the suit was brought against the officers in their official capacity, and thus was in substance, a suit prohibited by the Eleventh Amendment. The District Court did not agree with this, and granted a temporary injunction from taking any action to assess the tax, at least until further

\textsuperscript{452} Id at 323.
\textsuperscript{453} Id.
\textsuperscript{454} \textit{Worcester County Trust Co. v Riley}, 302 US 292 (1937).
\textsuperscript{455} Id.
\textsuperscript{456} Id.
order. The Court of Appeals reversed that decision, holding that the suit was, in essence, an infringement on the Eleventh Amendment.\(^{457}\)

Upon appeal to the U.S. Supreme Court, the Court determined the primary question at issue to be whether the Federal Interpleader Act, § 24(26) of the Judicial Code as amended January 20, 1936, c. 13, § 1, 49 Stat. 1096, could be utilized to resolve the rival claims of two differing states, with each asserting the right to claim the death tax mentioned above. The Court noted that the Petitioner did not deny that a suit against individuals, affecting their action as state officers, can, in substance, be a suit against the state.\(^{458}\) Further noted, was that the Petitioner did not deny that generally suits to restrain actions of state officers can be successfully prosecuted only when the action is unconstitutional.\(^{459}\) The Court reasoned that the Eleventh Amendment does not preclude suits against wrongdoers merely because the complaining citizen asserts that the official’s acts are within an official authority not conferred by the state. Further, the Court pointed out that “this argument confuses the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall, with other types of action by state officers which, because it passes beyond the limits of a lawful authority, is within the reach of the federal judicial power, notwithstanding the Eleventh Amendment.”\(^{460}\)

The Court noted that, unlike the case in \textit{Ex Parte Young}\(^{461}\) (and those suits to follow), the immediate case was not founded on the unconstitutionality of a state statute and the state official’s action taken with regard to it. The Court ultimately affirmed the decision of the Court of Appeals, concluding that the Eleventh Amendment prohibited a suit by a decedent’s estate to establish proper state of domicile.\(^{462}\)

The Hughes Court once again found the federal judiciary placing itself in the role of policy-maker, as it extended the reach of the Eleventh Amendment outside its original text by interpreting the Amendment to also apply to suits against a state by a foreign state, in

\(^{457}\) Id.


\(^{460}\) \textit{Worcester County Trust}, 302 US at 298.

\(^{461}\) \textit{Ex Parte Young}, 209 US 123.

\(^{462}\) \textit{Worcester County Trust}, 302 US 292.
Principality of Monaco v. Mississippi. It was also during this time that the Court extended the reach of Ex Parte Young to include the Governor of a State as among the state officers against whom suit could be brought pending their actions extended beyond their constitutional authority. The remainder of the decisions of the Hughes Court were primarily principle-based.

The Stone Court Era (1941-1946)

Although best known for its war-time tenure and sharply divided bench, the Court under Chief Justice Harlan Fiske Stone did entertain cases that considered the applicability of the Eleventh Amendment in suits against state officers to recover taxes. There were three notable cases in that genre. Those cases were Great Northern Insurance Co. v. Read,463 Ford Motor Co. v. Department of Treasury,464 and Kennecott Copper Corp. v. State Tax Commission.465

In the first of those cases, Great Northern Insurance Co. v. Read, a foreign insurance company brought suit against the Oklahoma Insurance Commissioner, to recover payments made pursuant to a statute that levied a tax on premiums received by foreign insurance companies.466 The suit was brought in the federal district court of Oklahoma. The insurance company paid the tax with objection, after which it brought suit against the Commissioner. The insurance company asserted that the tax was discriminatory, particularly when compared with that for domestic companies, and as such, was in violation of the Fourteenth Amendment.467

Section 12665 of the 1931 Oklahoma Statutes, provided a procedure for recovery of wrongfully collected tax money, and consented to bring suit against the state only in its own courts. However, in light of the diversity of citizenship of the parties, the insurance company had selected federal courts as the venue of choice. The District Court refused the insurance company’s request for recovery of the funds, and the Court of Appeals affirmed that decision, upon which point, certiorari was granted by the Supreme Court.468

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464 Ford Motor Co. v Department of the Treasury, 323 US 459 (1945).
465 Kennecott Copper Corp. v State Tax Commission, 327 US 573 (1946).
466 Great Northern Life Insurance, 322 US 47.
467 Id.
468 Id.
The Court noted that the right of the insurance company to bring suit in federal court was dependent upon the nature of the parties to the suit (whether it was against an individual or the state of Oklahoma) and, if determined to be against the state, whether the state has consented to suit in federal court. The Court reasoned that the suit was, in fact, a suit against the state (rather than the Insurance Commissioner as an individual). Therefore, the state enjoyed immunity from suit in federal courts pursuant to the Eleventh Amendment. In considering the consent issue, the Court reasoned that:

The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts, and procedure. The immunity may, of course, be waived. When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found. The Oklahoma section in question, 12665, was enacted in 1915 as a part of a general amendment to then existing tax laws. This subdivision... is concerned with administrative review of boards of equalization and provides a complete procedure including review by the district and Supreme Court of Oklahoma,... which are given authority to affirm, modify or annul the action of the boards.... Furthermore, § 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of judgment to be returned, which is quite different in language, if not in effect, from the judgment a Federal court would render. It is clear to us that the legislature of Oklahoma was consenting to suit in its own courts only.\(^{469}\)

To that end, the Court vacated the ruling of the Court of Appeals, and remanded the issue to the district court to dismiss for want of jurisdiction.\(^{470}\)

In the second case, *Ford Motor Co. v. Department of Treasury of Indiana*, petitioner brought suit, against the Governor, Treasurer, and Auditor of Indiana, to obtain a refund of gross

\(^{469}\) Id at 53-55.
\(^{470}\) Id.
It was alleged that the taxes violated the commerce clause and Fourteenth Amendment. There existed a state statutory procedure for obtaining a refund, and the state had given its consent to be sued in its courts in such cases. However, Ford did not choose to bring suit in state court.

The District Court barred recovery, which the Court of Appeals affirmed. Then, the Supreme Court granted certiorari. In a similar manner to that in *Great Northern Insurance Co. v. Read*, the Court stated that the question before the Court again consisted of whether the suit was against an individual or the state of Indiana, and if determined to be against the state, whether the state had consented to suit in federal court. Very much relying on a similar rationale as that used in *Great Northern Insurance Co. v. Read*, the Court determined the case to be one against the state, and found that while the state may have waived its immunity from suit, there was “nothing to indicate authorization of such waiver by Indiana in the present proceeding.”

The Court noted the concession of the state that “if it is within the power of the administrative and executive officers of Indiana to waive the state’s immunity, they have done so in this proceeding.” The Court added that, even though the Attorney General was authorized to litigate, he was not authorized to waive Indiana’s immunity from suit. The Court ultimately held that when an action is, in essence, that for the recovery of funds from the state, the state is the real substantial party in interest, and is entitled to invoke its immunity from suit even though individual state officials may be the nominal defendants. As such, the Court vacated the decision of the Court of Appeals, and remanded the suit to the district court to dismiss with want for jurisdiction.

In the third of the recovery of taxes cases mentioned above, *Kennecott Copper Corp. v. State Tax Commission*, a nonresident taxpayer brought suit in federal court to recover taxes paid under protest. The suit was brought against the Utah State Tax Commission, as well as individuals making up the Commission. The District Court found for the plaintiff, and that

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472 Id.
473 *Great Northern Life Insurance*, 322 US 47.
475 Id at 467.
476 Id.
477 *Kennecott Copper*, 327 US 573.
decision was reversed, without prejudice, by the Court of Appeals, which cited it was a suit against a State without its consent. Then, the Supreme Court granted certiorari. 478

In the case, the petitioner mining companies were incorporated in New York and Nevada, although they conducted business in Utah, which imposed an additional tax on mining companies. The tax was administered by the above named State Tax Commission. Similar to the preceding cases, Utah law provided consent for individuals to bring suit against the state, an agency of the state, or an officer of the state, to recover taxes alleged to have been illegally imposed. The mining companies believed this consent to extend to suit in federal court. 479

In deciding the suit, the Court declared that the suit was, in essence, a suit against the state, and contrary to the opinion of the mining companies, the state of Utah had not consented to suit in federal courts. With regard to consent, the Court relied heavily on the decisions in Great Northern Insurance480 and Ford Motor Company,481 in stating that “clear declaration of a State’s consent to suit against itself in the federal court of fiscal claims is required.” 482 The Court affirmed the decision of the Court of Appeals, noting that the Utah statutes fell short of providing such a clear declaration.

The Eleventh Amendment decisions of the Stone Court served to further the concept of consent as applied to immunity, while relying heavily on preceding case law and doctrine to do so. In deciding these cases, the Stone Court showed predictability in reasoning, thus allowing for the legal concept determined in previous cases to be applied to the case at hand. Further, in determining that a state’s consent must take place through a clear declaration of same, the decisions of the Stone Court acted in concert with those favoring limited judicial intrusions and an overall limited judicial role within the separation-of-powers scheme.

478 Id.
479 Id.
480 Great Northern Life Insurance, 322 US 47.
482 Kennecott Copper, 327 US at 577.
The Vinson Court Era (1946-1953)

Chief Justice Fred Moore Vinson took over the leadership of the Court at a time in which it was sharply divided, politically and personally. In addition to his being credited with somewhat repairing this fracture, his Court also dealt with many difficult issues, including racial segregation, communism, labor unions, and oaths of loyalty. Also of note was that the landmark case of *Brown v. Board of Education* was underway, and pending rehearing, at the time of his death. During Chief Justice Vinson’s tenure, the Court did have the opportunity to address the Eleventh Amendment, with the early years of the 1950’s including cases that reaffirmed the *Ex Parte Young* doctrine, namely *Alabama Public Service Commission v. Southern Railway Co.* and *Georgia Railroad & Banking Co. v. Redwine*.\(^{483}\)

In *Alabama Public Service Commission*, appellee, Southern Railway Company, brought an action in federal district court to enjoin the enforcement of certain Alabama laws prohibiting discontinuance of specific railroad passenger service. The action was brought against the Alabama Public Service Commission and the Alabama Attorney General.\(^{484}\) Alabama Code required that discontinuance of any portion of railway service must be preceded by an application for a permit to abandon service, followed by the attainment of a permit to do so. Southern Railway Company applied for a permit to reduce their service, which was denied after hearing based upon the Commission’s stance that there still existed a public need for service and that the entity had not tried to reduce the losses through considering more economical means of operation. The Railway brought suit in federal court due to diversity of citizenship, asserting that forced operation of the trains at a loss was a violation of the Fourteenth Amendment. That court found in favor of the Railway, and enjoined the Alabama Public Service Commission from enforcement of its order, despite the appellants’ contention that the suit was, in fact, one against the state, prohibited by the Eleventh Amendment. The Alabama Public Service Commission appealed to the Supreme Court.\(^{485}\)

The Court reasoned that “[a]s adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is


\(^{484}\) Id.

\(^{485}\) Id.
not necessary for the protection of federal rights.” ⁴⁸⁶ The Court continued on to explain that they had “assumed throughout this opinion that the court below had jurisdiction, but hold that jurisdiction should not be exercised in this case as a matter of sound equitable discretion.” ⁴⁸⁷ The Court, as a result, reversed the decision of the district court.

While the foregoing was a somewhat vague adaptation of the reaffirmation of the Ex Parte Young doctrine, one need look no further than Georgia Railroad & Banking Co. v. Redwine for a clearer statement.⁴⁸⁸ In that case, the appellant railroad was incorporated by a Special Act of the Georgia General Assembly, which provided for an exemption from taxation. Almost a century later, the Georgia Constitution was amended to state that all previous exemptions from taxation granted in corporate charters were declared null and void. The State Revenue Commissioner, Redwine, tried to collect taxes pursuant to the new Constitution. The Railroad asserted that the taxes imposed on it were a violation of its charter, and removal of the exemption would violate the U.S. Constitution.⁴⁸⁹

As a result, appellant filed suit in Georgia courts to obtain an injunction from the assessment or collection of taxes not in agreement with its legislative charter. The complaint was dismissed on the grounds that Georgia had not consented to suit, and thus the action was unable to be maintained in state courts, and the United States Supreme Court denied appeal, as the Court determined it was not based on federal grounds. The Railroad then brought suit in a federal district court seeking a similar injunction. That court also dismissed the court as a suit against the state, to which the state had not consented, and thus found it to be in violation of the Eleventh Amendment. The case was then appealed to the U.S. Supreme Court.⁴⁹⁰

The Georgia Attorney General argued that “plain, speedy, and efficient” remedies were available in state courts and that the action was, in fact, an unconsented suit against the state.⁴⁹¹ In response to the first argument, the Court maintained that it could not “say that the remedies suggested by the Attorney General afford appellant the ‘plain, speedy and efficient remedy’

⁴⁸⁶ Id at 349.
⁴⁸⁷ Id at 350.
⁴⁸⁹ Id.
⁴⁹⁰ Id.
⁴⁹¹ Id at 302.
necessary to deprive the District Court of jurisdiction under 28 U.S.C. (Supp. IV) § 1341.”

With regard to the second argument, the Court stated:

In re Ayers… is not a contrary holding. In that case, complainant had not alleged that officers threatened to tax its property in violation of its constitutional rights. As a result, the Court held the action barred as one in substance directed at the State merely to obtain specific performance of a contract with the State. Since appellant seeks to enjoin appellee from a threatened and allegedly unconstitutional invasion of its property, we hold that this action against appellee as an individual is not barred as an unconsented suit against the State. The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority.

As such, the Court reversed and remanded the case to the District Court for further proceedings, as it did not address the merits of the claim upon its hearing.

In reaffirming the *Ex Parte Young* decision with its Eleventh Amendment case law, the Vinson Court effectively expanded the previous policy-based actions of the Fuller Court. However, from a legal reasoning standpoint, the Vinson Court applied previous case law to the decisions at hand, and did not decide cases in a manner that would indicate a disintegration of the concept as it was known at that time. The Vinson Court served to lend additional credence to the weight of the *Ex Parte Young* decision, and more solidly establish its place among the types of exceptions to the Eleventh Amendment.

The Warren Court Era (1953-1969)

While earlier Courts focused more on property rights, the Court under Chief Justice Earl Warren shifted that focus to personal rights, owning several landmark decisions in American jurisprudence, including many advocating equality in racial and political areas, as well as in criminal justice. The Warren Court recognized many personal rights, including a constitutional right to privacy. As mentioned above, the Warren Court was charged with the rehearing of *Brown v. Board of Education*, a decision which would best demonstrate Warren’s leadership. Contrary to the sharp 5-4 division upon the Vinson Court’s initial hearing of the case, the Warren

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492 Id at 303.
493 Id at 305-306.
Court ruled unanimously on the unconstitutionality of school segregation.\textsuperscript{494} The activism of the Warren Court, and its focus on personal rights, did not cease when it came to Eleventh Amendment immunity, as illustrated in the case law below.

In 1959, with \textit{Petty v. Tennessee-Missouri Bridge Commission}, the Court again considered the idea of waiver of immunity.\textsuperscript{495} In the case, the Petitioner’s husband was killed when the ferryboat, on which he was employed, sank. The ferry was operated by the Tennessee-Missouri Bridge Commission, which was created by interstate compact between Tennessee and Missouri, with the approval of Congress. Petitioner brought suit in Missouri federal District Court, upon which the court dismissed the suit, citing that the Commission, as a state agent, enjoyed immunity from such a suit. The Court of Appeals affirmed that decision, and subsequently, certiorari was granted by the Supreme Court.

Upon that appeal, the Court reversed the prior decision. The Court maintained that the State had waived its immunity from suit, by way of the compact creating the Commission, which contained a “sue and be sued” provision.\textsuperscript{496} The Court determined that Congress had approved such a clause under conditions that the states choosing to enter into the compact waived any immunity from suit they may otherwise enjoy.

In 1964, the Court decided the landmark case of \textit{Griffin v. County School Board of Prince Edward County}.\textsuperscript{497} In that case, instead of complying with the \textit{Brown v. Board of Education II} (1955)\textsuperscript{498} mandate, Prince Edward County in Virginia closed its public schools (pursuant to state law) and provided tuition and tax credits to private schools attended only by white children. As part of the arguments to the Court, the School Board contended that the suit was an action against the state, forbidden by the Eleventh Amendment, and thus should be dismissed. However, the complaint charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment to the United States Constitution, and it had been settled law since the decision in \textit{Ex Parte Young}, that suits against state and county officials

\begin{itemize}
\item \textsuperscript{494} 349 US 294 (1955).
\item \textsuperscript{495} \textit{Petty v Tennessee-Missouri Bridge Commission}, 359 US 275 (1959).
\item \textsuperscript{496} Id.
\item \textsuperscript{497} \textit{Griffin v County School Board of Prince Edward County}, 377 US 218 (1964).
\item \textsuperscript{498} \textit{Brown v Board of Education of Topeka II}, 349 US 294 (1955).
\end{itemize}
to enjoin them from invading rights granted by the Constitution, were allowable under the Eleventh Amendment.\footnote{Griffin, 377 US 218.}

That same year, in \textit{Parden v. Terminal Railway Company}, the Court held that by operating a railroad it knew to be subject to federal regulation under the Federal Employer’s Liability Act (FELA), Alabama waived its immunity.\footnote{Parden v Terminal R. Co., 377 US 184 (1964).} In examining FELA, the Court noted that it would be inconsistent for Congress to allow state-run railroad to be exempt from the FELA legislation, as doing so would leave a single class of workers unprotected by FELA. The \textit{Parden} court rejected Alabama’s claim that Congress could not subject states to suit under FELA in light of the Eleventh Amendment, finding that “the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.”\footnote{Id at 191.}

While it may appear to be a case relating to abrogation, \textit{Parden} was, in fact, decided on a finding of waiver. The Court held in the case that Congress had conditioned participation in interstate railroad activity on willingness to agree to FELA suits. In running a FELA-regulated railroad, Alabama necessarily must have intended to waive its immunity. As will be shown in later cases, it was clarified that Congress could only effect a \textit{Parden} waiver by expressly stating its intent to condition participation on a waiver of Eleventh Amendment immunity.\footnote{Id.; see Employees of the Department of Public Health & Welfare of Missouri \textit{v} Missouri Public Health \& Welfare of Missouri, 411 US 279 (1973); Welch, 483 US 468.}

In recent years, the Supreme Court has held that Congressional power to enforce the Fourteenth Amendment creates an exception to state immunity under the Eleventh Amendment. In other words, if a law is properly enacted under Section 5 of the Fourteenth Amendment, it can authorize suit by private individuals against states in federal court. However, this interpretation has long been the focus of several key Supreme Court cases, reflecting the noticeable tension between the power of Congress to adopt legislation and that of the Court to interpret the Constitution.

Although, historically the Court had taken a fairly narrow view of Congress’s enforcement power, the Court appeared to broaden that view in deciding \textit{Katzenbach v. Morgan} in 1966.\footnote{Katzenbach, 384 US 641.} In that case, the State of New York denied voting rights to individuals based on
illiteracy in English. The State Attorney General alleged that § 4(e) of the Voting Rights Act of 1965 could only be sustained if the Court determined the state’s requirement violated the Equal Protection Clause of the Fourteenth Amendment. Thus, the Court was charged with settling whether §5 of the Fourteenth Amendment allowed Congress to overturn state legislation minus a judicial determination that such legislation violated the Fourteenth Amendment.

The Court decided that, through adoption of legislation, Congress could forbid practices that were not unconstitutional, so long as the enactment was aimed at the remedy or prevention of constitutional violations. Further, the Court established that a congressional enactment under §5 of the Fourteenth Amendment is proper if it is "plainly adapted to that end" and consistent with "the letter and spirit of the constitution." With that decision, the Court upheld a provision within the Voting Rights Act, which prevented the states from utilizing literacy tests to determine voter eligibility, thereby permitting the Puerto Rican individuals bringing the suit to vote, notwithstanding proficiency in English.

The Court ultimately determined that the law in question was a valid exercise of enforcement power, as it was aimed at remedying what essentially amounted to state-sponsored discrimination. At that time, the decision was thought to stand for the proposition that Congress could itself expand the protections of the Fourteenth Amendment beyond the literal substantive reach of the Amendment. However, in recent years, case law has noted that the majority in Morgan utilized broad language that “could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in §1 of the Fourteenth Amendment.” The case law from later years will exhibit that the Court did not necessarily adhere to that interpretation.

When considering Congress’s exercise of its Commerce Clause power, the Court typically analyzes the resulting law as being in one of two different lines. The first of these is the potential authority of Congress to regulate States as States while the second typically concerns the authority of Congress to instruct States to implement a particular means of federal regulation. In 1968, the Court entertained a suit falling within the first category mentioned

504 Id at 651.
505 Id.
507 New York v United States, 505 US 144 (1992); see West v Anne Arundel County, Md., 137 F3d 752 (4th Cir. 1998).
above, named *Maryland v. Wirtz*, which was doomed to be overturned less than ten years later as one of many cases falling within this inconsistent line of analysis. 509

*Maryland v. Wirtz* saw the Court first hold that Congress was acting appropriately when subjecting the state governments to generally applicable laws, such as the FLSA. 510 In that case, Maryland (joined by 27 other states and a school district) brought suit against the Secretary of Labor to enjoin enforcement of the FLSA for purposes of determining applicability to state-operated schools and hospitals. The FLSA, as originally enacted, required employers to compensate, with minimum wages and overtime pay, employees engaged in “commerce or in the production of goods for commerce.” As amended in 1961, FLSA coverage was extended to include employees of “enterprises” engaged in such activities. Five years later, FLSA was again amended to include particular institutions, hospitals, and schools. At that time, it was also modified to the remove the exemption for states and their subdivisions, under the definition of employer.

The Plaintiffs argued the coverage expansions regarding enterprises and state-operated hospitals and schools were outside the authority of Congress pursuant to the Commerce Clause, and would violate the Eleventh Amendment, if applied to the states. They also asserted that, if the above arguments were not accepted, schools and hospitals (as enterprises) do not meet the statutory requirements with regard to their relationship with interstate commerce. In affirming the judgment of the district court, the Court held that the coverage regarding the “enterprise concept,” as well as that related to extension of FLSA to state-operated hospitals and schools. Finally, with regard to state immunity from suit and whether certain schools and hospital employees met the statutorily required relationship to commerce, the Court determined that it would be most appropriate to consider them “as occasion requires.” 511 The second line of cases mentioned above, under which it was determined that Congress could not enact laws that would direct the performance of executives or legislatures of states, would be addressed in a later case entitled *Printz v. United States*, which involved Congress’ enactment of the Brady Handgun Violence Prevention Act in 1993. 512

511 Id at 201.
The Warren Court is typically viewed as one of the most activist Courts in United States History. This perception of the Warren Court is due primarily to the tendencies of that court to dive head-first into social policy issues including the expansion of equal protection, voting rights, privacy rights, and criminal defendants’ rights. Although the Warren Court certainly brought its interest-representation tendencies and policy focus to bear during the process of making decisions that were based in Eleventh Amendment jurisprudence, such as in *Griffin, Parden, Katzenbach*, and *Wirtz*, the Warren Court cannot compare with the level of judicial activism with respect to Eleventh Amendment decisions, exhibited by Courts in later years. Those decisions will be discussed in more detail below.

**Contemporary Federalism and State Sovereignty**

This period is primarily characterized by continuing disputes over the nature of the federal system, the growth of unfunded federal regulations, increased concern about federal regulations, and ultimately a trend toward states’ rights from the federal judiciary. It is during this period that the Court has been the most active with regard to consideration, interpretation, and application of Eleventh Amendment immunity, as well as limiting the power of the federal government and narrowing interpretation of the commerce clause in favor of state rights. This period includes cases from both the Burger and Rehnquist Courts, for each of which the case law development is outlined below.

**The Burger Court Era (1969-1986)**

The Court under Chief Justice Warren Earl Burger took on cases involving racial desegregation, death penalty, and abortion issues, as well as those involving separation of powers and checks and balances between the branches of government. The Burger Court era was also more active than most of those previously with regard to Eleventh Amendment issues and development of the arm of the state doctrine. It also began to set the stage for the activist Court to follow, particularly in light of the introductions of the conservative-selected Justices Rehnquist and O’Connor as new appointees. The Eleventh Amendment decisions of the Burger Court are detailed below.
As discussed earlier, development of the arm of the state doctrine has come about through involving a number of different factors in the discussion. In a significant 10th Circuit appellate decision for purposes of this analysis, *Brennan v. University of Kansas*, the University of Kansas was granted immunity based primarily on the fact that the Kansas Supreme Court had previously held the public university was under state control. In the case, Brennan, a history professor at New York’s Long Island University, and Brown, a history professor at the University of Kansas, contracted with one another to work as co-editors in publication of the papers of an Italian statesman, which were to be published by the University Press of Kansas.

Both professors had traveled to Italy to edit papers contained in an archive, at which time, editorial differences arose and The University of Kansas notified Brennan that he had been terminated from involvement in the project. Upon Brennan’s refusal to surrender the work product in his possession, Brown obtained a search warrant from an Italian court. Searches took place of Brennan’s apartment and safety deposit box in Italy, and ultimately, his work product was confiscated. Brennan then returned to the United States and brought an action in federal District Court seeking recovery of that work product, damages over $10,000, and injunctive relief to prevent the University Press of Kansas from publishing his work product. The University Press and the University of Kansas filed motions to dismiss, both of which were successful.

Based on claims of error in that dismissal related to waiver of governmental immunity and immunity under the Eleventh Amendment, Brennan appealed the case. On the first issue, Brennan alleged misinterpretation of the statute. On the second issue, Brennan claimed that the lower court ruled incorrectly when determining the University Press and the University of Kansas to be arms of the State of Kansas.

With regard to the arm of the state question, the Court of Appeals explained that it needed to look to Kansas state law to determine whether the entities did, in fact, function as arms of the State. In doing so, the court noted the Kansas Supreme Court had considered, for some time, the state universities to be arms of the State. In looking toward state law, the court determined the university was deemed a state institution, that it was exclusively under control of the state, and its properties belong to the state, and that the issue was “purely and solely a matter

513 *Brennan v University of Kansas*, 451 F2d 1287 (10th Cir. 1971).
514 *Board of Regents v Hamilton*, 28 Kan 376 (1882).
of state and public control.” The Court further reasoned that this position had found support in the Kansas Supreme Court. With that, the Court maintained the University of Kansas, as well as the University Press (which was a state institution serving the state universities), were arms of the State and thus immune from suit in federal court minus consent of the State. As the court found that no consent by Kansas had been shown, it held that the entities were immune from suit in federal court, and affirmed the decision of the lower court. There have also been other cases that determined Universities to be arms of the State primarily due to the entity’s reference in state law, either statutory or constitutional. These include such cases as *Walstad v. University of Minnesota Hospitals* and *Prebble v. Brodrick.*

In another in the line of cases addressing implied immunity when a state engages in federally-regulated activities (where the regulation creates a private right of action), the Court neared a full overturn of *Parden* just nine years later in *Employees of the Department of Public Health & Welfare v. Missouri Public Health & Welfare of Missouri.* In that case, petitioners brought suit for damages and overtime pay due under the FLSA. The district court dismissed the action as barred by the Eleventh Amendment, due to being a suit to which the state of Missouri did not consent. The district court holding was affirmed by the Court of Appeals, upon which the case was taken to the Supreme Court.

The Court decided that if Congress wished to abrogate a state’s immunity, its intent in doing so must be clear. The Court ultimately rested its decision on the grounds that the issue at hand was unlike the for-profit railroad business as operated by Alabama in the *Parden* case. The Court distinguished *Parden* on the grounds that legislative history identified no congressional purpose to specifically deprive a state of its immunity to suit in federal court by employees of its nonprofit institutions (even though FLSA amendments extended statutory coverage to employees of the state), especially as there was no change by Congress to § 16(b) of FLSA. The Court’s overturn of *Parden* was thoroughly effected in a later case, *Welch v.*
Texas Department of Highways and Public Transportation, to be discussed in further detail below.\textsuperscript{522}

In 1974, the Court entertained another significant case in the history of Eleventh Amendment immunity, \textit{Edelman v. Jordan}, in which the Court explored the scope of exceptions to Eleventh Amendment immunity.\textsuperscript{523} In that case, the Plaintiff, Jordan, filed a class-action suit against Illinois state and county officials, alleging that those entities were administering federal aid under the program of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with federal laws and in violation of the Fourteenth Amendment. Jordan argued that the officials were not adhering to federally mandated time limits, resulting in aid reaching recipients later than required by law. In addition, the aid was not being paid retroactively to the date by which it was due. Jordan sought injunctive relief, requiring the state to award the retroactive remainder to those individuals who had not received their awards on time.

The federal District Court found the Illinois state guidelines were not in concert with the federal statute, and ordered the state to adhere to the federal guidelines and return the aid that was erroneously withheld. Upon appeal, the officials argued that the order of retroactive payments was barred by the Eleventh Amendment, but the Court of Appeals still affirmed the decision of the district court, and the case was appealed to the Supreme Court. The Court was essentially charged with investigating if a federal court could require a state to reimburse such withholding of money from the citizens of a state, pending the order was to restore funds in the form of an injunction requiring the state to cease wrongful possession of those funds.\textsuperscript{524}

The Court held that participation in the program did not amount to a waiver by Illinois of its immunity under the Eleventh Amendment. The Court also held that the decision in \textit{Ex Parte Young} did not extend to suits for such retroactive payments by a state. Both decisions were criticized in dissent, and the impact of the case was limited by later case law allowing Congress to enforce powers pursuant to the Fourteenth Amendment and regulation of commerce.\textsuperscript{525} The first of those cases, \textit{Fitzpatrick v. Bitzer}, is detailed in the following section.\textsuperscript{526}

\textsuperscript{522} \textit{Welch}, 483 US 468.
\textsuperscript{523} \textit{Edelman}, 415 US 651.
\textsuperscript{524} Id.
\textsuperscript{526} \textit{Fitzpatrick}, 427 US 445.
Prior to Fitzpatrick, there were three more significant cases at the lower federal court levels for purposes of establishing arm of the state status in the areas of higher education. First, in Samuel v. University of Pittsburgh, three universities, Pennsylvania State University, Temple University, and University of Pittsburgh, were all found not to enjoy protection under the Eleventh Amendment. This was due primarily to the determination that “they function autonomously from the state and have been found to be persons under Section 1983.” In two 1975 Circuit court cases, it was also determined that community colleges do not enjoy the protection of Eleventh Amendment immunity, due to their status as political subdivisions. Those cases were Hostrop v. Board of Junior College Dist. No. 15 and Hander v. San Jacinto Junior College. These cases are distinguished from later Ninth Circuit cases in which California community colleges were determined to enjoy Eleventh Amendment immunity despite their local purpose in educating students, including Cerrato v. San Francisco Community College District and Mitchell v. Los Angeles Community College District.

In 1976, the Court took up the case of Fitzpatrick v. Bitzer, which established that Congress had the power to abrogate the states’ Eleventh Amendment immunity, if done pursuant to the Fourteenth Amendment. In that case, present and retired male State of Connecticut employees brought suit against Connecticut, alleging that the retirement benefit plan of the state discriminated against them on the basis of their sex. It was the contention of the plaintiffs that this discrimination was in violation of Title VII of the Civil Rights Act, which had been amended in 1972 to authorize suit against state governments for money damages in such situations for discrimination based on race, color, religion, sex, or national origin. In response, the State of Connecticut invoked its Eleventh Amendment immunity.

The District Court found that the plan was in violation of the Act and enjoined future violations. The Court of Appeals affirmed that decision. Both courts held that retroactive award of benefits was barred by the Eleventh Amendment, even though such award was specifically

528 Id at at 1128.
529 Hostrop v Board of Junior College Dist. No. 15, 523 F2d 569 (7th Cir. 1975).
530 Hander v San Jacinto Junior College, 519 F2d 273 (5th Cir. 1975); see Goss v San Jacinto Junior College, 588 F2d 96 (5th Cir. 1979); Parsons v Burns, 846 F Supp 1372 (W.D. Ark. 1993).
531 Cerrato v San Francisco Community College District, 26 F3d 968 (9th Cir. 1994).
532 Mitchell v Los Angeles Community College District, 861 F2d 198 (9th Cir. 1989).
authorized by Congress. In doing so, both courts relied on *Edelman*.\(^{534}\) The Supreme Court unanimously reversed the decision, in a decision written by Justice Rehnquist, holding that pursuant to §5 of the Fourteenth Amendment, Congress had the power to abrogate the states’ immunity, as the amendment was enacted expressly to limit the power of the states, in order to enforce civil rights guarantees against them.\(^{535}\)

Although the case was unanimously decided, Justice Stevens indicated, through one concurring opinion, his concern whether § 5 of the Fourteenth Amendment was an appropriate response to the Eleventh Amendment immunity defense submitted by Connecticut. Justice Stevens reasoned that the defense should have been rejected on a separate basis. He continued on to explain that the applicability of the Eleventh Amendment in the immediate situation was unsuitable, as any recovery by the plaintiffs would come not from the state treasury, but from pension trust assets. This decision sparked three very eventful decades of Eleventh Amendment jurisprudence, some of which will be explored in more detail in this section.

In another 1976 decision, the Supreme Court heard the case of *National League of Cities v. Usery*, which addressed (and ultimately struck down) certain provisions of a federal law extending minimum wage protection to municipal and state employees.\(^{536}\) In that case, the National League of Cities, in addition to several individual cities and states, brought suit to challenge amendments to the FLSA of 1938. Congress had passed amendments in 1974 that regulated minimum wage and overtime pay, to which the National League of Cities objected. The Court did recognize that the Commerce Clause authorized minimum wage laws for most employees, however, it held that the Tenth Amendment prohibited the federal government from dictating to states what must be paid to state employees. The Court explained that while the original FLSA specifically excluded the States and their political subdivisions from coverage, the broadened version extended minimum wage and maximum hour provisions to almost all public employees (including those employed by States, as well as those employed by the political subdivisions of the states).\(^{537}\)

This case informs the analysis in that a move seemed to be taking place away from considering sovereign immunity in the context of pure state immunity to congressional authority

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\(^{534}\) *Edelman*, 415 US 651.

\(^{535}\) *Fitzpatrick*, 427 US 445.

\(^{536}\) *National League of Cities*, 426 US 833.

\(^{537}\) Id.
to pursue causes of action against states and political subdivisions of states. But, in truth, with such a move, the Eleventh Amendment also becomes of less import. However, it is important to note that political subdivisions, although historically not sovereign, are currently becoming more indistinguishable from states, as they continue to take on functions performed by the states at the time that the Eleventh Amendment was adopted. In fact, most municipal corporations now enjoy the same constitutional authority to govern their territory in much the same way as states. Principles of federalism view both states and their political subdivisions much the same when it comes to Congress’ right to implement an agenda that may be contrary to that of the states. However, even with these and the many other changes indicating that the Eleventh Amendment jurisprudence indicating a distinction in nature between states and their political subdivisions, that jurisprudence seems trapped in Court interpretation and history.\textsuperscript{538}

Three years following \textit{Edelman v. Jordan}, the Court considered part II of the case of \textit{Milliken v. Bradley}, in which suit was brought against the Michigan Governor and Detroit school officials for the purpose of desegregating Detroit public schools.\textsuperscript{539} In \textit{Milliken I}, the Court determined that an inter-district remedy to address the issue (requiring that students from the Detroit District be bussed to suburban schools and vice versa) was impermissible minus a finding that the suburban schools actually contributed to the level of segregation, and remanded the case.\textsuperscript{540} Upon that remand, the trial court ordered that particular remedial and compensatory programs be implemented, with costs to be shared between the State and the Detroit School District.\textsuperscript{541} The State again appealed the case to the Supreme Court, charging that the requirement to fund half of the new programs amounted to an Eleventh Amendment violation.\textsuperscript{542}

In an opinion written by Chief Justice Burger, the Court rejected the state’s argument, holding that such prospective relief was not a violation of the Eleventh Amendment. This was held despite arguments that the funds necessary to fulfill the order would need to come from the state treasury and that the reason for finding the state liable for costs was due to a prior constitutional breach to maintain a desegregated school system. The case was distinguished from \textit{Edelman} on grounds that the order was prospective and the plaintiffs would not be personal

\textsuperscript{539} \textit{Milliken v Bradley II}, 433 US 267 (1977).
\textsuperscript{540} \textit{Milliken v Bradley I}, 418 US 717 (1974).
\textsuperscript{541} Id.
\textsuperscript{542} \textit{Milliken II}, 433 US 267.
beneficiaries of the monetary relief ordered for the state to pay. However, that distinction may prove somewhat inadequate, as little actual distinguishable difference can be seen. The point regarding prospective relief could also have been attributed to Edelman, in that the order in that case only compensated the plaintiffs for a continuing violation of federal law. Similarly, while the point regarding the origination of funds is accurate, it may be somewhat moot given the fact that it has been determined that a purpose of the Eleventh Amendment is protection of the state treasury from demands outside those of the legislature of the state.\textsuperscript{543}

In Lincoln County v. Luning, discussed earlier, the Court reserved judgment on whether a state could bestow its immunity on political subdivisions of the state, through express provisions limiting jurisdiction over counties to state courts. While the Court took quite a while to reach a decision on the issue, it finally arrived at one in 1977, with the case of Mt. Healthy City School District Board of Education v. Doyle.\textsuperscript{544} Doyle was an untenured teacher, employed by the Mt. Healthy City School Board. He had called a local radio station to transmit the content of a memorandum related to appearance and dress that had been circulated to particular teachers by the principal of the school where Doyle was employed, at which point the station adopted the issue as a news item. Following this, the School Board, based upon the superintendent’s recommendation, advised Doyle that he would not be rehired, citing a lack of professionalism. It had previously been alleged that Doyle was involved in an altercation with another teacher, an incident of swearing at students, an argument with employees of the school cafeteria, and incidents involving obscene gestures with female students. The supporting information in the non-renewal document included mention of the call to the radio station, as well as the incidents involving obscene gestures.\textsuperscript{545}

Doyle alleged that the non-renewal amounted to a violation of his First and Fourteenth Amendment rights, and brought an action in federal district court against the School Board for reinstatement and damages. The School Board argued that it was a state agency, immune from suit under the Eleventh Amendment, as it was created to perform state functions. The District Court rejected that argument on the ground that the state had waived that immunity for school

\textsuperscript{543} Id.
\textsuperscript{544} Doyle, 429 US 274.
\textsuperscript{545} Id.
boards by Ohio statute and case law, rather than under *Lincoln County* rationale. The Court of Appeals affirmed the decision of the District Court.\(^{546}\)

Upon appeal to the Supreme Court, the Court chose not to consider the idea of waiver, but rather the question of whether the entity was extended immunity to begin with, without which, a question a waiver would be unnecessary to consider. Ultimately, the Court determined that no such immunity was extended to the School Board, and that only states and agencies deemed “arms of the state” under state law would enjoy the protections of the Eleventh Amendment.\(^{547}\) In making this decision, the Court reasoned:

The issue here turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State’s Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law. Under Ohio law, the “State” does not include “political subdivisions,” and “political subdivisions” do include local school districts. Ohio Rev.Code Ann. § 2743.01 (Page Supp. 1975). Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev.Code Ann. § 3301.07 (Page 1972 and Supp. 1975), and receives a significant amount of money from the State. Ohio Rev.Code Ann. § 3317 (Page 1972 and Supp. 1975). But local school boards have extensive powers to issue bonds, Ohio Rev.Code Ann. § 133.27 (Page 1969), and to levy taxes within certain restrictions of state law. Ohio Rev.Code Ann. §§ 5705.02, 5705.03, 5705.192, 5705.194 (Page 1973 and Supp. 1975). On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.\(^{548}\)

As noted above, the Court essentially employed a test made up of three factors to address the State’s argument that the entity was an arm of the state, and thus should enjoy Eleventh Amendment immunity protection. The factors utilized by the Court to determine the entity’s nature, as either an arm of the state or a political subdivision, included the following: 1) what state law deems the entity to be; 2) the level of political and financial autonomy of the entity; and 3) whether the entity operates like a political subdivision.\(^{549}\) These prongs of analysis have developed further over time, but the factors above formed the basis from which many future

\(^{546}\) Id.
\(^{547}\) Id at 280.
\(^{548}\) Id at 280-281.
\(^{549}\) Id at 280.
decisions on the issue were derived. The Court’s analysis of the arm of the state doctrine and other cases involving the issue will be explored in more detail at later points in this study.

In 1978, the Court heard the case of *Hutto v. Finney*, in which challenges were brought regarding the conditions in the Arkansas prison system. Upon evaluation by the District Court of diet, sleeping arrangements, cell conditions, and prison guard behavior, it determined that the inmates were facing a “dark and evil world completely alien to the free world,” and as such, the conditions constituted cruel and unusual punishment. In the course of the decision, the court held that the Eleventh Amendment did not serve as a bar to an award of attorney’s fees, when those fees arose out of state officials’ bad faith failure to comply with the direction of the District Court. Even though the plaintiffs had sued the Alabama Department of Correction and its Commissioner for injunctive relief, the court decreed that the attorney’s fees were to be awarded, and “to be paid out of Department of Correction” funds. The Court of Appeals affirmed the decision of the District Court, and also attached additional attorney’s fees to cover the services for appeal.

Upon appeal, the Supreme Court considered legislative history in deciding whether there was sufficient congressional intent that the legislation in question abrogated the protections afforded by the Eleventh Amendment. Specifically, it considered whether 42 U.S.C. §1988 permitted the federal court to award attorney’s fees. It found the section provided for fees to be awarded, under certain civil rights claims, to the prevailing party. However, it did not include or exclude states, per se, as parties against whom attorney’s fees may be assessed. Following a review of the House and Senate reports on the legislation, the Court found that each contained express statements considering the award of attorney’s fees against states. Further, with regard to the Attorney General’s contention that the order should not have been aimed at the Department of Correction, the Court determined that:

> Although the Attorney General objects to the form of the order, no useful purpose would be served by requiring that it be recast in different language. We have previously approved directives that were comparable in their actual impact on the State without pausing to attach significance to the language used by the District

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551 Id at 681 (citing *Holt v Sarver II*, 309 F Supp 362 [1970]).
552 Id at 692.
553 Id.
The Court ultimately affirmed the prior decision, based primarily on the language of §1988 being applicable to all litigants (including states), as well as the clear intent from legislative history. Reliance on legislative history is somewhat in conflict with other decisions of the Court, as they required an express statement in the statute to warrant abrogation of immunity for the states. 555

Ten days following *Hutto*, the Court decided the case of *Alabama v. Pugh*. 556 In that case, inmates and former inmates of the Alabama Prison System brought suit against the Alabama, the Alabama Board of Corrections, and a number of prison administration officials. The inmates and former inmates alleged that the conditions of the prisons constituted cruel and unusual punishment, in violation of both the Eighth and Fourteenth Amendments. The District Court agreed with that allegation, and the Court of Appeals affirmed that decision.

Upon appeal to the Supreme Court, it was held that the State of Alabama could not be joined as a defendant without violating the Eleventh Amendment. This was held, even though the claim was a violation of the Eighth and Fourteenth Amendments (similar to that in *Hutto*), and even though 42 U.S.C. §1983 was the legislation upon which the claim was based. The Court stated that there could “be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.” 557 The Court continued on to note that “respondents do not contend that Alabama has consented to this suit, and it appears that no consent could be given under Art. I, § 14, of the Alabama Constitution, which provides that ‘the State of Alabama shall never be made a defendant in any court of law or equity.’” 558 Accordingly, the Court reversed the judgment in part and remanded the case to the Court of Appeals, for purposes of dismissal of the State of Alabama and the Alabama Board of Corrections from the suit. 559

554 Id at 436-437.
555 Id.; see *Pennhurst*, 465 US 89; *Scanlon*, 473 US 234; *Dellmuth*, 491 US 223; but see *Quern v Jordan*, 440 US 332 (1979) (citing legislative history regarding rationale that the intent of the Congress was not to have Section 1983 abrogate immunity under the Eleventh Amendment).
557 Id at 782.
558 Id at 782.
559 Id.
In 1979, the Court decided the case of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*.\(^{560}\) In that case, petitioners brought suit in federal district court alleging that the Tahoe Regional Planning Agency (TRPA), its executive officer, and members, adopted a land use ordinance that effectively destroyed the value of property belonging to Petitioners, in violation of the Fifth and Fourteenth Amendments. For purposes of background, TRPA was a bistate agency, created when Nevada and California entered into a compact to regulate and administer development in the Lake Tahoe Basin resort area, with a further purpose of conserving the area’s natural resources. Congress later consented to this compact. Petitioners, who were Basin property owners, sought equitable and monetary relief in the case. The District Court dismissed the complaint, on the grounds that an action for inverse condemnation could not be maintained, as TRPA had no authority to condemn the property and the individually named respondents were immune. The Court of Appeals partially reinstated the complaint, however, it held that the approval by Congress essentially transformed the compact into federal law, and as such, with regard to the §1983 claim, the respondents were acting pursuant to federal authority, rather than under color of state law. That court also held TRPA to be immune under the Eleventh Amendment (with the individual respondents both absolutely immune and qualifiedly immune, for conduct of a legislative character and executive action, respectively). The case was then taken up by the Supreme Court for further consideration.\(^ {561}\)

With regard to the first issue, the Court held that the facts of the case adequately characterized the respondent’s actions as under color of state law, and therefore, jurisdiction appropriately rested with §1343, making moot the question of whether an implied remedy existing for violation of the Fifth or Fourteenth Amendments. With regard to the Eleventh Amendment immunity issue, the Court deemed that it could not “accept such an expansive reading of the Eleventh Amendment,” as was utilized by the Court of Appeals.\(^ {562}\) In fact, the Court stated that it “consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a ‘slice of state power’.”\(^ {563}\)

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\(^{561}\) Id.

\(^{562}\) Id at 401.

\(^{563}\) Id at 401; see *Doyle*, 429 US 274; *Moor v County of Alameda*, 411 US 693 (1973); *Luning*, 133 US 529.
In order to determine the extent to which immunity applied for this unique entity, the Court analyzed the case using a range of factors. First, the Court considered the status of the entity as described in state law. The Court noted that both states involved in the compact had filed past briefs with the Court rejecting any intent on their part to extend immunity to TRPA, and further indicating that the entity was to be considered a political subdivision. In the actual language of the compact, the entity was referred to as a “separate legal entity” and a “political subdivision,” and only four of its members are appointed by the two states, while six of the ten members are appointed by cities and counties.\(^{564}\) Second, the Court considered the source of funding for the entity. Pursuant to the compact, the funding had to come from the counties, rather than States in question. Furthermore, the compact expressly provided that obligations of the entity were to not be binding on either state. Third, the purpose of the entity was noted. To that end, the Court reasoned that land use regulation is typically a local government function.

Finally, the Court took into account the origins of the entity and its authority to govern itself, in relation to the level of supervision and oversight provided by the States, stating that although the entity was originally created by the States, its rulemaking authority was not subject to State veto.\(^{565}\) In bolstering this argument, Justice Stevens, writing for the Court, stated “[i]ndeed, that TRPA is not, in fact, an arm of the state subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA.”\(^{566}\) For the foregoing reasons, the Court found that the entity was not immune from suit under the protections afforded by the Eleventh Amendment.\(^{567}\)

On the third primary issue in the case relating to immunity of the individual respondents, the Court reasoned, in reliance on \textit{Tenney v. Brandhove} \(^{568}\) that, “Congress, in enacting §1983 as part of the Civil Rights Act of 1871, could not have intended ‘to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here’.”\(^{569}\) As such, the Court held the state legislators to be

\(^{564}\) \textit{Lake Country Estates}, 440 US at 401.
\(^{565}\) Id.
\(^{566}\) Id at 402; see \textit{California v TRPA}, 516 F2d 215 (CA9 1975).
\(^{567}\) Id.
\(^{569}\) \textit{Lake Country Estates}, 440 US at 403.
absolutely immune for actions “in the sphere of legitimate legislative activity.” Ultimately, the Court of Appeals decision was affirmed in part and reversed in part.

The reach of the Eleventh Amendment was, once again, explored in 1979, with the case of *Nevada v. Hall*. The case was a personal injury claim brought by California residents in a California court against the State of Nevada, the state-agency University of Nevada, and the administrator of the estate of a former university employee charged with negligent behavior. The California residents were suing for damages for injuries arising from an automobile accident between their vehicle and a Nevada-owned vehicle of an employee on official business, in which the California residents suffered severe injuries and the driver of the other vehicle (the former University of Nevada employee) was killed. The accident occurred on a California highway.

The jurisdiction of the California court to require Nevada’s appearance was challenged by Nevada, which was rejected by the California Supreme Court. That decision reversed the decision of the trial court. Further, Nevada invoked, albeit also unsuccessfully, a statute, pursuant to its statutory waiver of immunity, limiting tort awards against the State to $25,000. Damages were awarded in the amount of $1,150,000, and judgment in favor of the respondents was affirmed on appeal.

At the time of this case, the question of whether a State could claim immunity from suit in the courts of another State was unanswered by the Supreme Court, and was also not answered in the Constitution. However, Nevada maintained that the question was implicitly answered in the understanding that sovereigns are not open to suit without their consent. The Court wrote that it was necessary to consider several items to determine whether that assertion was embodied in the Constitution, including “(1) the source and scope of the traditional doctrine of sovereign immunity; (2) the impact of the doctrine on the framing of the Constitution; (3) the Full Faith and Credit Clause; and (4) other aspects of the Constitution that qualify the sovereignty of the several States.”

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570 Id at 403.
572 Id.
573 Id.
574 Id at 414.
The Court, in the opinion written by Justice Stevens, held that no such federal rule of law existed, whether implicit or explicit. It held that the Eleventh Amendment speaks only to the power of the federal courts, and provides no foundation for the exercise of jurisdiction between states. With regard to potential implicit limitations, the Court noted:

ours is not a union of 50 wholly independent sovereigns. But these provisions do not imply that any one State’s immunity from suit in the courts of another State is anything other than a matter of comity. Indeed, in view of the Tenth Amendment’s reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers. … It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States -- and the power of the people -- in our Union.575

With that determination, the Court affirmed the decision of the California Court of Appeal that California courts were not barred (under any limitation on state sovereignty in the Constitution) from asserting jurisdiction over or entering judgment against Nevada.

In another 1979 decision, Quern v. Jordan,576 the Court heard a case involving a court order requiring state officials to notify welfare beneficiaries of the availability of past benefits, which was a sequel to Edelman. The defendants in the case were officials of the state, but the primary consideration at issue was the obligation of the State. The Court held that the Eleventh Amendment case law following Edelman did not impact the holding in that decision that §1983 did not abrogate states’ immunity. Further, the Court found that the modified notice considered by the Court of Appeals did not constitute a retroactive award requiring payment of funds from the state, but rather permissible prospective relief.577 With that, the Court affirmed the previous decision, stating that requirements of state officials to send notices that might assist individuals in determining eligibility for past welfare benefits, did not violate the Eleventh Amendment..

575 Id at 425-427.
577 Id.
In 1980, the Court decided a case entitled *Maher v. Gagne*, in which it was held that an award of fees was appropriate where the “plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorable to the plaintiff without adjudication.” As part of this decision, the Court considered the argument by petitioners that, pursuant to the Eleventh Amendment, a federal court was barred from awarding fees against a state in a statutory, non-civil-rights claim. The petitioner maintained that it was only within the power of Congress to authorize federal courts to award fees against States upon the exercise of its § 5 power to enforce substantive rights bestowed by the Fourteenth Amendment. In other words, that argument would seem to contend that the only appropriate assessment of fees would be in §1983 actions to vindicate rights under the Fourteenth Amendment, or enforce civil rights statutes enacted pursuant to §5 of that amendment. The Court ultimately held the Eleventh Amendment claim of the petitioner to be barred by its decision in *Hutto*, in which, as discussed earlier, the Court rejected an argument by the Arkansas Attorney General that §1988 language was not a sufficient bar to a state’s claim of immunity. In that case, the Court stated that it had “never viewed the Eleventh Amendment as barring such award, even in suit between States and individual litigants.” The Court continued on to state that:

> even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a State, Congress was clearly acing within its power under §5 of the Fourteenth Amendment in removing that barrier. Under §5, Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney’s fees to a person who prevails on a Fourteenth Amendment claim falls within the category of “appropriate” legislation. And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided.

The Court also cited the rationale utilized in the Court of Appeals decision that the fee awards “further the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important

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579 Id.
580 Id.
581 Id.
582 *Hutto*, 437 US 678.
584 Id at 132-133.
constitutional issues."  

With that, the Court found that such a fee award was an appropriate means by which to enforce Fourteenth Amendment substantive rights, and affirmed the previous decision.

In the 1981 case of *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, the Court again echoed the earlier holding in *Edelman*, stating “[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in federal courts.” In that case, an association of nursing homes in Florida, as well as a group of individual nursing homes from South Florida, brought suit in federal court arguing that a delay by the Department of Health, Education, and Welfare (HEW) of enforcement of a reimbursement requirement, was inconsistent with statutory directives. Suit was brought against the Secretary of HEW and the Florida Department of Health and Rehabilitative Services (DHRS), and retroactive, as well as prospective, relief was sought.

For purposes of background, the 1972 Congress had amended the Medicaid Program. As part of the changes, provisions were made that all nursing and immediate care facilities were to be reimbursed on a “cost related basis” by participating States, which is the reimbursement referred to above. The above amendment had an effective date of July, 1976, and effectively altered some previous arrangements established by the States. Regulations implementing this change were not promulgated until 1976, and resulted in the creation of a gap in reimbursement standards, as HEW would not enforce the cost related standard until 1978. As such, the retroactive relief sought was to be in the form of payment from the State in the amount of the difference between the previous flat-rate agreements and the new cost related standards, as passed by Congress.

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585 Id at 133 (citing *Gagne v Maher*, 594 F2d 336, 342 (1979)).
586 *Maher*, 448 US at 133.
588 Id.
589 Id at 148 (citing 86 Stat. 1426, 42 U.S.C. §a(a)(13)(E)).
590 Id.
The federal District Court held the regulations to be invalid, and such relief to be barred pursuant to the Eleventh Amendment. The Court of Appeals affirmed the decision that the regulations were invalid, but overturned the holding that retroactive relief was barred by the Eleventh Amendment, on the basis that the State had waived protection under the Eleventh Amendment due to being a “‘body corporate’ with the capacity to ‘sue and be sued’,” and through agreeing to be “recognized and abide to all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.” As mentioned above, the Supreme Court ultimately held that the Court of Appeals misapplied the standard for waiver of a State’s Eleventh Amendment immunity, and reversed the decision of that court.

In the 1982 decision of Cory v. White, two states (Texas and California) maintained a right to impose death taxes on the estate of Howard Hughes, each claiming to be the state of domicile at the time of his death. In this sequel to Texas v. California, the estate administrator brought suit in Federal District Court under the Federal Interpleader Act, in hopes of showing that state officials from each state were seeking the taxes based on inconsistent claims and requesting that the District Court adjudicate the domicile issue. On the basis of lack of subject matter jurisdiction (as failure to satisfy the diversity of citizenship requirement was noted), the District Court dismissed the action. The Court of Appeals reversed that decision, and found diversity to be present. Further, it found that the suit was barred by the Eleventh Amendment as a suit against two sovereign States, even though it was nominally brought against state officials.

In making that decision, the Court of Appeals relied in part on the concept that the decision in Edelman impliedly overturned that in Worcester County Trust. The Supreme Court did not agree with the Court of Appeals’ interpretation of a passage in Edelman that the reach of the Eleventh Amendment was limited to those actions “by private parties seeking to

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591 Florida Nursing Home Ass'n v Page, 616 F2d 1355 at 1363 (5th Cir. 1980).
592 Florida DHRS, 450 US 147.
595 Cory, 457 US 85.
596 Id.
impose a liability which must be paid from public funds in the state treasury.\textsuperscript{597} thus determining that the Eleventh Amendment did not serve as a bar to the suit as the interpleader plaintiff was only seeking prospective relief.\textsuperscript{598} The Court reasoned that although the Court in \textit{Edelman} did appropriately hold the suit to be against the State itself (as a judgment would be demanded from state funds), the decision did not hold that the Eleventh Amendment never applies unless a money judgment against the state treasury is sought.\textsuperscript{599} The Court determined that, on its terms, the:

Eleventh Amendment…clearly applies to a suit seeking an injunction, a remedy only available from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. \textit{Edelman} did not embrace, much less imply, any such proposition.\textsuperscript{600}

The Court also explained that “\textit{Edelman} did not hold that suits against state officers who are not alleged to be acting against federal or state law are permissible under the Eleventh Amendment if only prospective relief is sought,” and in order to effect that rationale, it would be necessary to overrule \textit{Worcester}.\textsuperscript{601} The Court noted its unwillingness to do so, and reversed the decision of the Court of Appeals.\textsuperscript{602}

In another 1982 case, \textit{Florida Department of State v. Treasure Salvors}, Inc., the Court determined the Eleventh Amendment did not bar a suit in admiralty against state officials for the return of artifacts discovered during the course of undersea exploration by the plaintiffs.\textsuperscript{603} Shortly following the discovery of the shipwreck of Nuestra Senora de Atocha (a 17\textsuperscript{th} Century Spanish galleon battered by a tropical hurricane) by Treasure Salvors, Inc., Florida claimed ownership of the find pursuant to state statute. Treasure Salvors, Inc. then entered into a contract with the Florida Division of Archives to conduct salvage operations on the wreck in exchange for 75 percent of the appraised value of the artifacts recovered.

\textsuperscript{597} \textit{Edelman}, 415 US at 663.
\textsuperscript{598} \textit{Cory}, 457 US 85.
\textsuperscript{599} Id at 90.
\textsuperscript{600} Id at 91.
\textsuperscript{601} \textit{Cory}, 457 US at 91.
\textsuperscript{602} Id.
\textsuperscript{603} \textit{Florida Department of State v Treasure Salvors, Inc.}, 458 US 670 (1982).
In the meantime, proceedings unrelated to the immediate case were taking place, in the form of *United States v. Florida.*\(^{604}\) In that case, litigation was taking place to determine the boundary to which the State had rights to natural resources within the Gulf of Mexico and the Atlantic Ocean. A final decree provided that ownership of the lands, minerals, and other natural resources in the area where the wreck was discovered belonged with the United States.\(^{605}\)

Upon learning the outcome of that case, Treasure Salvors, Inc. filed a complaint in Federal District Court seeking a declaration of title to the shipwreck. Following the latter of two favorable appellate decisions, Treasure Salvors, Inc. was granted a warrant to seize the artifacts from the Florida Division of Archives. Florida unsuccessfully challenged both the warrant itself, as well as the jurisdiction of the issuing court, and the Supreme Court granted certiorari.\(^{606}\)

At issue for consideration of the Court was whether the issuance of a property seizure warrant by the federal District Court was a violation of the Eleventh Amendment. In this case, the warrant was file against individual officers of the State of Florida. Further, although a contract for profit sharing existed between the Florida Division of Archives and Treasure Salvors, Inc., the Court found the contract did not validate the Florida Division of Archives’ refusal to surrender ownership of the artifacts pursuant to federal seizure warrant. Lastly, the Court held the federal District Court that initially heard the case actually lacked jurisdiction to adjudicate Florida’s interest in the artifacts, as they were actually within the jurisdiction of an altogether different District Court. Ultimately, the answer to the question at issue was in the negative, and the Court reversed, in part, and remanded the decision for jurisdictional violations.\(^{607}\)

In *Jackson v. Hayakawa,* the federal courts once again explored the concept of the arm of the state doctrine.\(^{608}\) Although it is not a Supreme Court decision, this case is particularly suited to inform this manuscript’s discussion of the doctrine, particularly in its relationship to higher education. The case involved the San Francisco State College’s Black Students’ Union (that initiated a student-faculty strike), which held a rally on campus to defy a University President-

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\(^{604}\) *United States v Florida,* 420 US 531 (1975).

\(^{605}\) *Treasure Salvors,* 458 US at 676 (citing *United States v Florida II,* 425 US 791 (1976)).

\(^{606}\) Id..

\(^{607}\) Id.

\(^{608}\) Id.
imposed ban. The President was S.I. Hayakawa, and the rally resulted in the arrest of approximately four hundred individuals. There were a number of actions filed seeking damages, and a class action was filed in 1972.\textsuperscript{609}

The third amendment complaint to the class action included claims such as unlawful discriminatory funding of the black student organizations, arrests, blacklisting, disciplinary proceedings, and interference in student elections, on which the federal District Court granted summary judgment to the defendants. Upon appeal, the appellate court affirmed that decision with regard to the claims of unlawful arrests, blacklisting, and discriminatory funding.\textsuperscript{610} On remand, the District Court dismissed the remaining claim, partly in reliance on Eleventh Amendment immunity, and the Plaintiffs again appealed the decision.

As part of the court’s analysis, it determined the most important question to be “the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.”\textsuperscript{611} This was in addition to a number of other factors, such as "performance by the entity of an essential government function, ability to sue or be sued, power to take property in its own name or in the name of the State, and corporate status of the entity."\textsuperscript{612} The court upheld the lower court’s decision that the College was a “dependent instrumentality of the state,” and thus did not have the autonomy to be considered independently liable.\textsuperscript{613} Ultimately, the court held the College (which later became San Francisco State University) to be an “arm of the state,” and found that since injunctive and declaratory relief were sought, that the district court mistakenly dismissed the defendants in their official capacity.\textsuperscript{614} The court utilized the following rationale in arriving at its decision:

To determine these factors, the court will look at the way state law treats the governmental entity…. The district court was correct in characterizing the California State College and the university system of which California State University at San Francisco is a part as dependent instrumentalities of the state. Although this court has not ruled upon the Eleventh Amendment status of the California State College and university system, the University of California and the Board of Regents are considered to be instrumentalities of the state for

\textsuperscript{609} Id.
\textsuperscript{610} Jackson v Hayakawa, 682 F2d 1344 (1982) (discussing Wong v Hayakawa, 464 F2d 1282 (9th Cir. 1972)).
\textsuperscript{611} Id.
\textsuperscript{612} Id at 1350 (quoting Hutchison v Lake Oswego School District no. 7, 519 F2d 961 at 966 (9th Cir. 1975)).
\textsuperscript{613} Id.
\textsuperscript{614} Id.
purposes of the Eleventh Amendment….As California cases indicate, California State Colleges and Universities have even less autonomy than the University of California….The law governing actions against state officials is more complex. The district court treated this case solely as an action for damages. The court correctly noted that Eleventh Amendment immunity extends to actions against state officers sued in their official capacities because such actions are, in essence, actions against the governmental entity of which the officer is an agent…. It has been clear since Ex Parte Young…that the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief.615

The Court again had the opportunity to investigate the Eleventh Amendment, as applied to higher education law, in Toll v. Moreno.616 On the facts of that case, the state-operated University of Maryland granted preferential treatment for in-state students for purposes of tuition and fees.617 In fact, even though upon a showing of domicile within the state, citizens and immigrant aliens were able to acquire in-state status, nonimmigrant aliens showing the same domicile status were ineligible to acquire such in-state status for purposes of tuition and fees. At issue in the case, was whether the in-state policy of the University was unconstitutional (per the Supremacy Clause), as it categorically denied to domiciled nonimmigrant aliens holding G-4 visas the same in-state status as enjoyed by the other classes.618

The Court ultimately held the policy was invalid under the Supremacy Clause. As part of the decision, the Court explored the issue of Eleventh Amendment immunity, as petitioners in the case maintained that, pursuant to the Eleventh Amendment, the District Court was precluded from ordering the University to pay refunds to various class members who would have obtained in-state status but for a stay issued by order of that court. The Court found the arguments of petitioners in that regard to be unpersuasive, and contrary to those arguments, found the order of the District Court not to be vacated when the Supreme Court vacated a Court of Appeals’ judgment affirming the District Court decision and remanding that case for reconsideration.619 As such, the Court found that the Eleventh Amendment did not preclude the order to the University to pay refunds to various G-4 aliens who would have obtained in-state status, but for

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615 Id.
617 Id.
618 Id.
the stay, pending appeal, particularly as the petitioners conceded that “in seeking a stay of that order, the University made the representation to the District Court that, in the event the 1976 order was ‘finally affirmed on appeal,’ it would make appropriate refunds.” As stated earlier, ultimately the Court affirmed the decision of the Court of Appeals, holding that the university’s policy of denying in-state status (to domiciled, nonimmigrant aliens holding visas) violated the Supremacy Clause.

In 1984, the plain rule of the Mt. Healthy decision, establishing that political subdivisions do not enjoy protection under the Eleventh Amendment, once again became uncertain. That ambiguity set in with the case of Pennhurst State School and Hospital v. Halderman, in which plaintiffs sought both monetary and injunctive relief for damages incurred as a result of conditions at the Pennhurst State School and Hospital. In the facts of the case, Halderman, a resident of the Pennhurst State School and Hospital (an institution for care of the mentally retarded), brought suit against the institution, select officials of the institution, various state and county officials, and the Department of Public Welfare of Pennsylvania, on the grounds that the conditions of the institution violated statutory, Pennsylvania Mental Health and Retardation Act of 1966, and Constitutional rights of the residents.

The District Court awarded injunctive relief based in part on the Pennsylvania Mental Health and Retardation Act provisions, and the Court of Appeals affirmed the decision of the lower court. In doing so, the Court of Appeals reasoned that since the Eleventh Amendment did not bar a federal court from granting prospective relief on the basis of federal claims against state officials, the same applied to pendent state law claims, and thus the court rejected the petitioners’ argument.

Upon appeal to the Supreme Court, the issue for consideration was whether a federal court, in fact, had the jurisdiction to award injunctive relief against state officials on the basis of state law. The Court ultimately held that the federal courts lacked the jurisdiction to enjoin the state institutions and officials on the basis of the state law and that, even though the federal

621 Doyle, 429 US 274.
622 Pennhurst, 465 US 89.
623 Id.
624 Id.
courts may hear federal claims against state officers, the federal courts may not hear pendent state law claims. The Court reasoned that:

[C]ontrary to the view implicit in decisions such as Greene v. Louisville & Interurban R. Co., ... neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment... We now hold that this principle applies as well to state law claims brought into federal court under pendent jurisdiction.

Later that year, there was a Sixth Circuit decision that spoke to arm of the state analysis. In that case, Hall v. Medical College, the court adopted another variation on the multi-factor tests used in application of the analysis, in order to determine whether the Eleventh Amendment protected the Medical College of Ohio. In that case, Hall had appealed from a summary judgment by the federal District Court, after it dismissed a civil rights action he brought against the Medical College of Ohio, based upon racial discrimination and violation of his constitutional due process. Hall sought damages, as well as reinstatement as a medical student of the College, following his dismissal for academic dishonesty.

The federal District Court held the Medical College of Ohio to be an arm of the state, and thus, Hall’s claim was barred under the Eleventh Amendment. That court based its arm of the state analysis on the two prongs of whether the entity, although carrying out a government function, enjoys substantial autonomy from the state, and to what extent the entity is financed by funds outside of the state treasury. In its consideration of the case, the Sixth Circuit based its Eleventh Amendment portion of the discussion on a nine-prong analysis, which it felt was more appropriate to consider the doctrine as applied to unique colleges and universities. Including the two factors considered by the District Court in their analysis, the nine factors identified by the Court of Appeals included: 1) the amount of autonomy enjoyed by the entity and the degree of autonomy the entity has over its operations; 2) to what extent the entity is financed by funds

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625 Id.
626 Id at 121.
627 Hall v Medical College, 742 F2d 299 (6th Cir. 1984).
628 Id.
outside of the state treasury; 3) the impact of a judgment on the state treasury; 4) whether the entity has funds or power to satisfy a judgment; 5) whether the agency is performing a proprietary or governmental function; 6) whether the entity has been separately incorporated; 7) whether it has the power to sue and be sued and to enter into contracts; 8) whether its property is immune from state taxation; and 9) whether the state has immunized itself from responsibility for the agency’s operations. Ultimately, based upon these factors, the court found Medical College of Ohio to be an arm of the state, and affirmed the decision of the District Court.

In 1985, with the case of *Atascadero State Hospital v. Scanlon*, the Court addressed the issue of what extent of declaration is necessary for Congress to abrogate Eleventh Amendment immunity of the States. In *Atascadero*, Scanlon (who had no sight in one eye and had Diabetes) brought suit against Atascadero State Hospital and the California Department of Mental Health in federal District Court, to recover compensatory, injunctive, and declaratory relief for denial of employment based on his physical handicap. Scanlon alleged that this action was in violation of §504 of the Rehabilitation Act of 1973, which states:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Further, §505 of the Act sets forth the applicable remedies as follows: “(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964… shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title” and “(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”

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629 Id at 302.
630 *Scanlon*, 473 US 234.
632 *Scanlon*, 473 US 234.
The District Court granted a motion to dismiss, on the ground that Scanlon’s claim was barred by the Eleventh Amendment. Ultimately (after initially affirming the decision of the District Court and upon remand from the Supreme Court), the Court of Appeals reversed its decision, holding the action not to be barred, due to the receipt of federal funds under the Act amounting to implicit consent on the part of the State. Upon appeal, the Supreme Court effectively affirmed the power of Congress to effectively amend the Constitution, albeit doing so in a significantly narrowed fashion. Even though there existed clear evidence of an intention on the part of Congress to provide a remedy for those receiving federal funds, the Court stated that it was:

incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty. It is also significant that, in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded. Although it is of course the duty of this Court "to say what the law is,"...it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power.... For these reasons, we hold -- consistent with Quern, Edelman, and Pennhurst II -- that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. 633

Eight years following the Court’s distinction between retrospective and prospective relief in Milliken II, 634 the Court again echoed that characteristic in the dictum within Green v. Mansour. 635 Green v. Mansour was a 1985 case brought against officials from the Michigan Department of Public Aid, alleging a violation of federal law with regard to distribution of Aid to Families with Dependent Children (AFDC) benefits. 636 The plaintiffs sought declaratory judgment, an injunction to prevent the continuing violation of federal law, and notice relief to allow the class to be provided with notice in order to take advantage of state administrative compensatory remedies.

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633 Id at 243-244.
635 Green, 474 US 64.
636 Id.
Following filing but prior to final determination of the case on the merits, Congress amended the statute in a manner that deemed injunctive relief moot (as state policy was accordingly brought into compliance with the new language), by adding language to the statute “to expressly require participating States to deduct child care expenses up to a specified amount.” 

The District Court held the remaining claims for declaratory and notice relief to be related solely to past violations, and as such, they were barred by the Eleventh Amendment as retrospective relief. The Court of Appeals affirmed that decision.

The Supreme Court also affirmed the decision of the lower courts, holding that the petitioners were not entitled to notice relief, nor was the award of declaratory judgment appropriate in the situation, as:

[t]he award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment. The...declaratory judgment is not available when the result would be a partial "end run" around our decision in Edelman v. Jordan.

In discussing the retrospective versus prospective relief issue in Green, the Court also effectively narrowed the scope of Ex Parte Young, so as to redefine the doctrine’s applicability only to pertain to those cases where the courts are utilized to remedy an ongoing violation of federal law. To that end, the Court stated:

Young...held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. We have refused to extend the reasoning of Young, however, to claims for retrospective relief. Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in Ex Parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or

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637 Id at 66.
638 Id.
639 Id at 73.
deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.\textsuperscript{640}

One year following \textit{Green}, the Court decided \textit{Papasan v. Allain}, in which dictum from the former became formal holding in the latter.\textsuperscript{641} The case involved conditions related to the setting aside of lands for public education, imposed by Congress upon Mississippi’s entry into the Union. Land grants to the state did not apply to specific lands (the state’s northern 23 counties) held by the Chickasaw Indian Nation. Subsequently, the Indian Nation surrendered the lands via a treaty to the United States. No lands for public schools were reserved from that sale, but Congress later provided for the reservation of lands in lieu of lands not reserved in the treaty, and for vesting of title of those lands in the State for the use of schools.\textsuperscript{642}

In 1856, with the permission of Congress, the Mississippi Legislature later sold those lands, and invested the proceeds in loans to railroads that, in turn, were destroyed in the Civil War. This effectively left nothing of the initial grant to ensure equal education in the Northern counties. Pursuant to two Mississippi statutes, the remaining lands were to be held in trust for public schools and “all expendable funds derived from…lands shall be credited to the school districts of the township in which such lands may be located.”\textsuperscript{643}

Due to the treatment effectively creating a disparity in the funding level provided for Chickasaw schools versus those in the rest of the State, local school officials and Chickasaw schoolchildren filed suit in federal District Court against various state officials. Two claims were made. First, it was alleged that the sale of the school lands and irresponsible investment of the proceeds amounted to a violation of the State’s fiduciary duty with regard to the education of the children. Second, it was alleged that the State violated the Equal Protection Clause of the Fourteenth Amendment in creating the disparity level between opportunity for education for those children in the Southern counties versus the Northern counties.\textsuperscript{644}

The District Court dismissed the claims, holding they were barred by the Eleventh Amendment, and the Court of Appeals affirmed the decision. Upon appeal, the Supreme Court

\textsuperscript{640} Id at 689-690.
\textsuperscript{642} Id.
\textsuperscript{644} \textit{Papasan}, 478 US 265.
dismissed the first claim as barred by the Eleventh Amendment, but, in reliance on *Ex Parte Young*, the second claim was upheld as a suit against state officers to prevent an ongoing violation of federal law. The primary distinction the Court made between the two claims was that the first was a request for retrospective relief, as “liability for past breach of trust,” 645 and the second was for prospective relief, as an “ongoing constitutional violation.” 646 In deciding the case in the manner it did, the Court effectively affirmed the dictum in *Green* that the only relevant question for purposes of an *Ex Parte Young* determination is when the act occurred. In the end, the Court vacated the judgment of the Court of Appeals, agreeing with the decision only insofar as it affirmed the dismissal of the breach of trust and related claims, and remanded the case to that court. 647

As evidenced above, conservative criticism of federal authority began in the days of the Burger Court, even though judicial activism with regard to states’ rights and Eleventh Amendment jurisprudence would not reach its height until the years of the Rehnquist Court. With cases such as *Edelman, National League of Cities, and Garcia*, a junior associate Justice named William H. Rehnquist, would see the door open on his opportunity to embark on a legacy of striking at federal power and employing states’ rights against social welfare legislation. Although not the most judicially active in history with regard to the Eleventh Amendment, the years of the Burger Court would amount to another shift in the legal concept that would carry on into the next era of the Supreme Court. The Burger Court considered many issues falling along the social policy continuum, including those related to workplace issues, education, individuals with disabilities, and civil rights claims, and it followed the lead of previous courts in that it continued to expand the reach of the Eleventh Amendment beyond its literal text by applying the legal concept within previous case law to that at hand. During this time, the Court also became more entrenched in the development of the arm of the state Doctrine, which will be analyzed in more detail in Chapter Five.

645 Id at 280.
646 Id at 282.
647 Id.
The Rehnquist Court Era (1986-2005)

In general, the Court under Chief Justice William Hubbs Rehnquist has been characterized by more conservative movement and decisions, although, the Court is sharply divided, particularly on issues such as the Eleventh Amendment. One interesting note is that the Rehnquist Court’s decisions with regard to the Eleventh Amendment do not necessarily reflect the typical ideals of a conservative, textualism-focused majority. This clandestine activism is surely a feature that will continue to define the Rehnquist Court’s Eleventh Amendment jurisprudence for some time to come, although with the end of this term, also comes the end of an era, quite literally. With 2005 bringing the resignation of Justice O’Connor and death of Chief Justice Rehnquist, the legal landscape of Eleventh Amendment immunity, as well as that in many other areas, remains uncertain. The Eleventh Amendment decisions of the Rehnquist Court are discussed below.

In the ongoing saga of the arm of the state doctrine, as applied to colleges and universities, the Seventh Circuit heard another case in 1987, *Kashani v. Purdue University*.⁶⁴⁸ In *Kashani*, financial autonomy and legal status were the two principle factors utilized to determine arm of the state status, and thus entitlement to immunity under the Eleventh Amendment. On the facts of the case, Kashani brought suit against Purdue University and select Purdue officials, alleging that he was terminated from its doctoral program in electrical engineering on the basis of his national origin as an Iranian. He sought monetary damages and reinstatement into the program.⁶⁴⁹

The District Court dismissed the monetary relief claims for lack of subject matter jurisdiction against the University and against the various officials in their official capacity on the basis that Purdue was entitled to the protection of the Eleventh Amendment, after which it similarly dismissed all claims for injunctive relief on the same ground. The Sixth Circuit affirmed that decision with respect to the claims against the university and all monetary claims against its officials. However, it reversed the dismissal for injunctive relief against the officials, as it held that injunctive relief of reinstatement is not barred under the Eleventh Amendment.⁶⁵⁰

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⁶⁴⁸ *Kashani v Purdue University*, 813 F2d 843 (7th Cir. 1987).
⁶⁴⁹ Id.
⁶⁵⁰ Id.
As part of its reasoning, the Seventh Circuit noted that political subdivisions are not shielded from suit pursuant to the Eleventh Amendment, and as such, the primary question at issue was whether Purdue University fell in that category. While the court noted that the vast majority of cases in this regard have found state universities to be protected by the Eleventh Amendment, it explained that:

courts reexamine the issue with regard to the facts of each case “because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning.” … However, given the great number of cases holding state universities to be instrumentalities of the state for Eleventh Amendment purposes, it would be an unusual state university that would not receive immunity. The analyses in these cases support our holding that Purdue is an instrumentality of the State of Indiana, enjoying its sovereign immunity.  

Until 1987, the mandates of Atascadero seemed to have been laid in solid ground, however that decision was also not immune to the inconsistency with which Eleventh Amendment jurisprudence has been wrought. That was the year in which Welch v. Texas Department of Highways and Public Transportation was decided, which also served to overturn, in part, the decision in Parden. In Welch, another suit under the Jones Act, a Texas Highways Department employee was injured while working on a dock operated by the Department. That employee filed suit against the Highway Department and the State of Texas.

The District Court held the action was barred by the Eleventh Amendment, and the Court of Appeals affirmed that decision. In doing so, the Court of Appeals recognized the opinion in Parden that state employees may bring such Federal Employer’s Liability Act (FELA) actions in federal court, but still found that decision to be inapplicable due to the failure of Congress to include “its intention unmistakably clear in the language of the statute.” Further, the Court of Appeals found that Texas did not consent to suit under the Act.

Ultimately, the Supreme Court affirmed the decision of the Court of Appeals. The Court, in a plurality opinion, held the rights extended to seaman via the Jones Act were insufficient to

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651 Id at 845 (citing United Carolina Bank v Board of Regents, 665 F2d 553 at 557 (5th Cir. 1982)).
652 Welch, 483 US 468.
653 Parden, 377 US 184.
654 Welch, 483 US 468.
655 Id at 471 (citing Scanlon, 473 US at 242.).
constitute a clear intention by Congress to abrogate the Eleventh Amendment immunity of the State of Texas. As the Jones Act simply extended FELA to seamen, this case was virtually indistinguishable from a primary concept in \textit{Parden}, discussed earlier, in that the Court held that Congress must make its intent clear in waiver of state immunity by federal statute. It is in that manner, of implied waivers, that the case overturned \textit{Parden}.\textsuperscript{656}

In a Fifth Circuit case dealing with the arm of the state issue, \textit{Lewis v. Midwestern State University}, the focus was primarily on three factors for the analysis.\textsuperscript{657} The case involved an individual, Lewis, who brought suit against Midwestern State University, as well as its Board of Regents and select university officials, to pursue claims of violations of federal civil rights and state law due to his treatment by the University. The District Court dismissed the claims, as they held the claims to be barred by the Eleventh Amendment, and the Fifth Circuit Court of Appeals affirmed that decision. As part of its reasoning, the Court of Appeals based their analysis of the University as an arm of the state on factors employed during its earlier case of \textit{United Carolina Bank v. Board of Regents}\textsuperscript{658} In that case, the court formulated an analysis based primarily on factors including “status of the university under state law, the degree of state control over the university, and whether a money judgment against the university would, because of the status of the university's funds, interfere with the fiscal autonomy of the state.”\textsuperscript{659} In applying those factors to the case at hand, the court similarly found the University to be an arm of the state, and affirmed the decision of the District Court.\textsuperscript{660}

In 1989, the Court decided the case of \textit{Dellmuth v. Muth}, in which plaintiffs brought suit under the Education of the Handicapped Act (EHA).\textsuperscript{661} The EHA provides a comprehensive scheme to ensure an appropriate and free public education for handicapped children. As part of the Act, provisions are made for the development of an individualized education program (IEP) for the child, and parents are guaranteed the right to challenge the appropriateness of that IEP via an administrative hearing with subsequent judicial review.\textsuperscript{662}

\textsuperscript{656}Id.
\textsuperscript{657} \textit{Lewis v Midwestern State University}, 837 F2d 197 (5th Cir. 1988).
\textsuperscript{658} \textit{United Carolina Bank}, 665 F2d 553.
\textsuperscript{659} \textit{Lewis}, 837 F2d at 198.
\textsuperscript{660} \textit{Id.; see Idoux v Lamar University System}, 817 F Supp 637 (1993).
\textsuperscript{661} \textit{Dellmuth}, 491 US 223.
\textsuperscript{662} Id.
Muth requested such a hearing to challenge the IEP created for his son. Prior to the hearing, Muth enrolled his son in a private school. Upon consideration by the hearing examiner, the IEP was found to be inappropriate, and a number of recommendations were made by the hearing examiner. The IEP was revised and subsequently declared appropriate by the examiner, as well as the Secretary of Education for Pennsylvania (more than one year later). While the hearings were taking place, Muth brought suit in federal District Court challenging the appropriateness of the IEP and the validity of the proceedings. Muth requested declaratory relief, injunctive relief, reimbursement for tuition, and attorney’s fees.\(^{663}\)

The District Court, finding procedural flaws in the administrative process, granted summary judgment as to those claims. On the remaining issues, the District Court found that Muth was entitled to reimbursement for tuition due to the procedural delays, held that the Commonwealth of Pennsylvania and the school district were jointly and severally liable, and awarded attorney’s fees (assessed jointly and severally against the Commonwealth and the school district). On the determination of joint and several liability, the District Court agreed with the contention of Muth that the EHA abrogated the Eleventh Amendment immunity of Pennsylvania. The Court of Appeals affirmed the decision.\(^{664}\)

The Supreme Court held the “statutory language of the EHA does not evince an unmistakably clear intention to abrogate the States’ constitutionally secured immunity from suit” and “the Eleventh Amendment bars respondent’s attempt to collect tuition reimbursement from the Commonwealth of Pennsylvania.”\(^{665}\) In making this determination, the Court reasoned that only textual statements were useful to determine the intent of Congress to abrogate, and stated “[l]est Atascadero be thought to contain any ambiguity, we reaffirm today that, in this area of the law, evidence of congressional intent must be both unequivocal and textual” and the evidence provided by Muth (including reference to States and their obligations in the Act, as well as those to private rights of judicial review and attorney’s fees awards), was found to be neither.\(^{666}\) “In particular,” the Court stated, “we reject the approach of the Court of Appeals, according to which, ‘[w]hile the text of the federal legislation must bear the evidence of such an intention, the

\(^{663}\) Id.
\(^{664}\) Id.
\(^{665}\) Id at 232.
\(^{666}\) Id at 230.
legislative history may still be used as a resourced in determining whether Congress’ intention to
lift the bar has been made sufficiently manifest.”667 As such, the Court reversed the decision of
the Court of Appeals, and remanded the case for further proceedings.

On the same day the Court decided Dellmuth, it decided another significant case in
Eleventh Amendment jurisprudence, Pennsylvania v. Union Gas Co., which expanded the
authority of Congress under the Interstate Commerce Clause to subject states to suits by private
parties.668 Union Gas was the last case, prior to 1996, that would address the issue of whether
Article I conferred upon Congress the authority to abrogate Eleventh Amendment immunity. In
the case, an environmental hazard was created by coal tar (a by-product from a nearby coal
gasification plant) seeping into a creek in Pennsylvania. The Environmental Protection Agency
(EPA) declared the site to be the Nation’s first Superfund site, which the Federal Government
and the State of Pennsylvania joined forces to clean up. The State was reimbursed by the Federal
Government for costs related to cleanup, and subsequently sued Union Gas Company under
§§104 and 106 of the Comprehensive Environmental Response, Compensation, and Liability Act
of 1980 (CERCLA) in order to recover those costs.669

Union Gas Company filed a third-party complaint against Pennsylvania asserting that the
State was liable as an “owner and operator” of the site under CERCLA §107(a).670 The District
Court dismissed the latter complaint based on the bar to the State’s liability established by the
Eleventh Amendment, and the Court of Appeals affirmed that decision, due to a finding of no
clear expression under CERCLA to hold States liable for money damages.

Originally, the Supreme Court granted certiorari, vacated the decision, and remanded it to
the Court of Appeals, based upon amendments to CERCLA made as part of the Superfund
Amendments and Reauthorization Act of 1986 (SARA). Upon remand, the Court of Appeals
arrived at the decision that the statute’s amended language provided a clear statement of
legislative intent to hold States liable for money damages under CERCLA, and further, that

667 Id at 230.
668 Union Gas, 491 US 1.
Congress held the authority to do so under the Commerce Clause. At that time, the case was again appealed to the Supreme Court.\textsuperscript{671}

In a four-justice plurality opinion, the Court affirmed the decision of the Court of Appeals. The Court held that the CERCLA and SARA language met the standards set by \textit{Atascadero} for unmistakably clear intent by Congress.\textsuperscript{672} In the opinion, the Court discussed whether the Commerce Clause confers authority upon Congress to abrogate the sovereign immunity of the states under the Eleventh Amendment. In doing so, the Court drew an analogy between powers granted to Congress under the Fourteenth Amendment and those under the Commerce Clause, and in the opinion of the Court, there is no distinction between the two. As such, the Court reasoned that the authority of Congress to regulate interstate commerce necessarily included the capacity to abrogate state sovereign immunity.\textsuperscript{673}

Also, on that day in 1989, the Court decided the case of \textit{Will v. Michigan Department of State Police}.\textsuperscript{674} Similar to \textit{Quern}, \textit{Will} was a statutory interpretation case, involving the exercise of powers by Congress under §5 of the Fourteenth Amendment. The primary distinction between \textit{Quern} and the immediate case is that the former was filed in federal court, while the latter was filed in state court.

In the facts of the case, Petitioner (Will) filed suits in state court under 42 U.S.C. §1983 against the Director and Department of State Police, alleging that he was denied a promotion based on circumstances related to his brother’s having been a student activist. The state court ruled in favor of Petitioner, finding both the Director and the Department of State Police to be “persons” under §1983 (which, as discussed earlier, provides that any person depriving another of constitutional rights under color of state law will be liable to that person). The State Court of Appeals vacated that judgment, holding the State not to meet the standard of “person” for purposes of §1983. The State Supreme Court agreed that the State was not a person under §1983, but also held that an individual acting in their official capacity is not a person under §1983.\textsuperscript{675}

\textsuperscript{671} Id.
\textsuperscript{672} Id.
\textsuperscript{673} Id.
\textsuperscript{675} Id.
Upon appeal to the Supreme Court, both the State and the state officer were held not to be persons for purposes of §1983. Once the Court determined the nature of those parties, the issue remaining was whether the decision in Quern needed to be reconsidered in light of the holding in Monell v. New York City Department of Social Services. Monell, a 1978 decision, ultimately held that municipalities were “persons” within the meaning of §1983. In reliance on the difference between state and local governments in the context of the Eleventh Amendment, the Court found that it would require more evidence as to the intentions of Congress to warrant such a decision. Further, the Court stated:

prior to Monell, the Court had reasoned that, if municipalities were not persons, then surely States also were not…. But it does not follow that, if municipalities are persons, then so are States. States are protected by the Eleventh Amendment, while municipalities are not, … and we consequently limited our holding in Monell "to local government units which are not considered part of the State for Eleventh Amendment purposes." … Conversely, our holding here does not cast any doubt on Monell, and applies only to States or governmental entities that are considered "arms of the State" for Eleventh Amendment purposes.

Just four days following the decisions in Dellmuth, Union Gas, and Will, the Court reached its decision in Missouri v. Jenkins. The case involved school desegregation in Kansas City, Missouri, in which the Kansas City, Missouri School District (KCMSD) was attempting to enhance the quality of its schools, as well as attract more white students to them. Various remedies to effect desegregation were granted against the State of Missouri, the nominally realigned KCMSD, and other defendants. The attorneys representing the plaintiff class requested attorney’s fees under the Civil Rights Attorney’s Fees Awards Act of 1976, in which the statutory language provides for "a reasonable attorney's fee as part of the costs." In making the award, the District Court accounted for the delay in compensation by utilizing the current market rates for calculation of the award, for the attorneys, as well as the other individuals contributing to the work on the case, such as paralegals, law clerks, and the like.

676 Id.
677 Monell v New York City Department of Social Services of the City of New York, 436 US 658 (1978).
678 Will, 491 US at 70.
679 Dellmuth, 491 US 223.
681 Will, 491 US 58.
The Supreme Court granted certiorari primarily to answer two questions. As stated by the Court, those questions were whether the Eleventh Amendment prohibited a fee award against the state to account for a delay in payment and if the fee award should compensate the work of those other than attorneys in the case by applying market rate for their work. \(^{684}\) Ultimately, the Court affirmed the decision, holding that neither was such an enhancement of compensation for a delay in payment prohibited by the Eleventh Amendment, nor did the District Court err in compensating the other individuals according to their market rates, rather than at the cost of services to the attorneys. \(^{685}\)

At this point, although this would later come somewhat into question, the Court still seemed solid in maintaining an interpretation of the Eleventh Amendment that did not compromise its appellate jurisdiction, even in cases involving unconsenting states. Take, for example, the case of \textit{McKesson Corporation v. Department of Alcoholic Beverages and Tobacco} in 1990. \(^{686}\) That case involved the constitutionality of a Florida statute imposing a liquor excise tax, which, under a new scheme, replaced previous preferences for “Florida-grown” products with “special rate reductions for certain… citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced there.” \(^{687}\)

\textit{McKesson Corporation} claimed the tax unfairly discriminated against them (as they did not qualify for rate reductions under the revised scheme), and violated the Commerce Clause of the United States Constitution. McKesson Corporation paid the taxes each month, but later filed an application with the Office of the Comptroller for the State of Florida seeking a refund. That application was denied, and McKesson Corporation brought suit in state court against the Office of the Comptroller, Department of Business Regulation, and Division of Alcoholic Beverages and Tobacco, seeking both declaratory and injunctive relief, as well as a refund for the excess taxes paid, pursuant to state statute. \(^{688}\)

The Florida Supreme Court affirmed the trial court decision awarding declaratory and injunctive relief, but refusing to order a tax refund. In doing so, the Florida Supreme Court

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\(^{684}\) Id.  
\(^{685}\) Id.  
\(^{687}\) Id at 23.  
\(^{688}\) Id.
stated that “the prospective nature of the rulings below was proper in light of the equitable considerations present in the case.” Upon appeal to the United States Supreme Court, the Court, in a unanimous opinion, reversed the lower courts’ denial of the requested retrospective relief. With regard to the Eleventh Amendment portion of the holding, the Court held that “the Eleventh Amendment… does not preclude the Supreme Court’s exercise of appellate jurisdiction over cases brought against States that arise from state courts,” and that “[t]his view has been implicit in the Court’s consistent practice and uniformly endorsed in its cases, including cases involving state tax refund actions brought in state court, for almost 170 years.”

The Court heard another Jones Act claim in 1990, with the case of Port Authority Trans-Hudson Corporation v. Feeney, reaching a similar decision to that in Petty (albeit by way of different rationale). Feeney involved an entity established as part of an interstate compact between New York and New Jersey. In the case, employees of Port Authority Trans-Hudson Corporation (PATH), which operated transportation facilities, brought suit in federal District Court alleging that they incurred injuries during their employment with PATH, in hopes of recovering damages pursuant to FELA.

The federal District Court dismissed the separate complaints on the ground that PATH enjoyed immunity and the suit was therefore barred by the Eleventh Amendment. The Court of Appeals reversed those decisions, holding that the suits were not barred by the Eleventh Amendment, due primarily to waiver of immunity by PATH through identical statutes of both states stating that the states consented to suit against PATH. The case was then appealed to the Supreme Court.

In answering the primary question of whether the Eleventh Amendment bars suits in federal court against entities created by compact between two states, the Court’s reasoning was more in line with that of Kennecott Copper and Ford Motor Company than Petty, in that

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689 Id at 26 (citing Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida v McKesson Corporation, et al., 524 S. 1000 [1988]).
690 Id at 18.
691 Port Authority Trans-Hudson Corporation v Feeney, 495 US 299 (1990).
693 Port Authority, 495 US 299.
694 Id.
695 Kennecott Copper, 327 US 573.
it first explored whether general statutory waivers imply a waiver in federal court. Ultimately, in reliance on Atascadero, the Court held there to exist an explicit waiver of immunity due to the express consent to suit in the language of the compact.

In Blatchford v. Native Village of Noatak, the Court explored Eleventh Amendment immunity as applied to Indian tribes. The facts of the case were as follows. Alaskan Native villages brought suit in federal District Court against a state official, hoping to recover funds allegedly owed under a revenue-sharing state statute. The District Court held that the suit against the state officials was barred by the Eleventh Amendment, and the Court of Appeals reversed that decision. The Court of Appeals first based its decision on the ground that immunity was abrogated by Congress under 28 U.S.C. §1362. However, upon reconsideration, the Court of Appeals reasoned otherwise, that the states do not enjoy immunity against suits by Indian tribes. Alaska sought review of that determination, and as such, the case was taken to the Supreme Court.

Upon that review, the Court held the Eleventh Amendment does serve as a bar to suit by Indian tribes against States, when the State has not consented to suit. In reliance on its decision in Principality of Monaco v. Mississippi, the Court found no compelling evidence that the intent of the Founders was to waive immunity with regard to Indian tribes, nor the “mutuality of… concession” that “makes the States’ surrender of immunity from suit by sister States plausible.” Further, the Court found that §1362 does not serve as a void to the Eleventh Amendment bar of suits by Indian tribes against unconsenting States, neither via a general delegation of federal government authority to Indian tribes, nor as an abrogation of immunity by Congress. Finally, the Court held that the Court of Appeals would need to address, on remand, the tribe’s argument that applicability of the Eleventh Amendment did not necessarily bar their

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697 Petty, 359 US 275.
698 Scanlon, 473 US 234.
699 Port Authority, 495 US 299.
701 Id.
702 Monaco, 292 US 313.
703 Blatchford, 501 US at 782.
claim for injunctive relief. For the foregoing reasons, the Court reversed the judgment of the Court of Appeals and remanded the case for further consideration.\textsuperscript{704}

Two years after the Court’s decisions in \textit{Union Gas}\textsuperscript{705} and \textit{Dellmuth},\textsuperscript{706} it decided \textit{Hilton v. South Carolina Public Railways Commission},\textsuperscript{707} in which it refused to overturn the decision in \textit{Parden}\textsuperscript{708} regarding the intention of Congress to abrogate immunity in FELA, even though there was no existence of express reference to a state or the level of specificity required in \textit{Dellmuth}. In the case, Hilton, an employee of South Carolina Public Railways Commission brought suit in state court against his state agency employer, to recover damages for negligence under FELA. The trial court dismissed the claim on the basis that FELA does not authorize recovery of damages against a state agency (even if that suit brought in a state forum). That court also acknowledged that \textit{Parden}, which had been interpreted by the Court to permit such actions, had been overruled by later decisions. The decision of the trial court was affirmed, upon appeal, by the South Carolina Supreme Court. The Supreme Court, in making its determination, stated that:

\begin{quote}
Congress has had almost 30 years in which it could have corrected our decision in \textit{Parden} if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. \textit{Stare decisis} has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for, in this instance, overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. This is so in the case before us.\textsuperscript{709}
\end{quote}

In response to that reasoning, the Court reversed and remanded the decision of the South Carolina Supreme Court.

In 1994, the Court took up the case of \textit{Hess v. Port Authority Trans-Hudson Corporation}, which served to resolve the remaining question from \textit{Feeney}, by denying the claim of PATH to immunity under the Eleventh Amendment.\textsuperscript{710} Two individuals injured in unrelated accidents while employed by PATH, a wholly owned subsidiary of the Port Authority of New York and

\textsuperscript{704} Id.
\textsuperscript{705} \textit{Union Gas}, 491 US 1.
\textsuperscript{706} \textit{Dellmuth}, 491 US 223.
\textsuperscript{708} \textit{Parden}, 377 US 184.
\textsuperscript{709} \textit{Hilton}, 502 US at 202.
\textsuperscript{710} \textit{Hess}, 513 US 30.
New Jersey, as discussed earlier in *Feeney*. The employees brought suit for personal injury claims under FELA. The District Court dismissed the suits, declaring that PATH was entitled to Eleventh Amendment immunity from suit in federal court.

In the Justice Ginsberg opinion for the Court, she noted that the question of immunity had not been addressed in Feeney, as immunity had been waived by consent in that case. However, such consent did not exist in this case. Further, unless there is good reason to believe that the States structured a Compact Clause entity to be cloaked with the immunity of said States, it is presumed by the Court than such an entity does not qualify for Eleventh Amendment immunity. This statement was made in reliance on the Court’s decision in *Lake Country Estates*.

Although PATH argued that there were indicators of immunity in this case, the Court noted that there were also indicators pointing away from establishment of immunity. Indicators in favor of the entity enjoying immunity, as argued by PATH, included provisions in law establishing state control over the commissioners of the authority, as well as state court decisions characterizing the entity as an agency of the States. In addition, the state legislatures were able to jointly augment the powers of PATH and specify the purposes to which additional funds may be dedicated. On the other hand, the states appropriate no funds to the entity, and any debts of the entity that may be incurred are not liabilities of the state. With regard to funding, the entity is not able to draw from the state tax revenues, pledge the credit of either state in the Compact, or impose charges on same. In other words, neither state would be responsible for a judgment against PATH.

Ultimately, even though the Court expressed its opinion that this was a complicated situation, it held the states’ control over PATH to be irrelevant, and accepted the vulnerability of the state treasury to be the most salient decision point for determination of extension of a state’s Eleventh Amendment immunity to an entity. Accordingly, the Court reversed the decision of the Court of Appeals. It should be mentioned that, in Justice O’Connor’s dissent, which was joined

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711 *Port Authority*, 495 US 299.
713 Id.
by Chief Justice Rehnquist and Justices Scalia and Thomas, noted concern was expressed that
the Court simply disregarded the multi-factor tests that have been utilized by the Court for
determination of arm of the state status in the past, in favor of a single criterion of vulnerability
of the state treasury.\footnote{\textit{Id}.}

In \textit{Sherman v. Curators of the University of Missouri}, Eighth Circuit revisited the issue of
colleges and universities as arms of the State.\footnote{\textit{Sherman v Curators of the University of Missouri}, 16 F3d 860 (8th Cir. 1994).} The court granted immunity after applying a
two-prong test of autonomy level and whether the funds required to pay an award would have to
come from the state.\footnote{\textit{Id}.} In the case, Sherman, an assistant professor of Journalism at the
University of Missouri was terminated after about four years of employment with the University.
Sherman then brought suit against the University (via its Curators) seeking damages for breach
of contract and promissory estoppel. The Curators filed a motion to dismiss the claims, based on
immunity granted to the University by the Eleventh Amendment, and the District Court
accordingly granted that motion and dismissed the suit.

Even though prior case law at the district court level held the University to be an arm of
the state, the case was remanded by the Eighth Circuit, as it required additional fact finding with
regard to autonomy, non-state revenues, and sources of funding. In fact, during the course of its
review of the case, the court only found one instance of an appellate court decision that a state
university was not extended the Eleventh Amendment immunity of that State.\footnote{\textit{Kovats v Rutgers}, 822 F2d 1303 (3d Cir. 1987).} With
particular attention focused on an allegation made by Sherman that state appropriations
accounted for just one-third of the budget for the University, and thus the University had access
to non-state funds to satisfy a judgment, the court stated that the:

\begin{quote}
university cannot create its own eleventh amendment immunity by structuring its
resources so as to pay all breach of contract damages out of state funds. Thus, the
question on remand is not whether the University chooses to pay contract
damages out of state funds, but whether a judgment against the University can be
paid from non-state funds under the University's discretionary control.\footnote{\textit{Sherman}, 16 F3d at 864-865.}
\end{quote}

Accordingly, the court reversed and remanded the case for further proceedings.
Finally, *Skehan v. State System of Higher Education* saw a state system of higher education in Pennsylvania analyzed with a multi-factor test.\(^{721}\) The court concluded the system was a state agency, which was entitled to protection under the Eleventh Amendment. The system was distinguished from the state-related and state-aided institutions in Pennsylvania (which were both found to exercise proprietary functions) due to the fact it performed essential governmental functions and objectives.\(^{722}\)

In the case, Skehan, a former untenured associate professor from Bloomsburg State College sought back pay from the Pennsylvania State System of Higher Education for claims related to an improper termination of employment some seventeen years prior. Prior claims in federal court had been unsuccessful due to the Eleventh Amendment bar. Upon the filing of this claim, the State System of Higher Education also asserted Eleventh Amendment immunity, with which the court agreed. Skehan then appealed to the Circuit Court, which also affirmed the decision of the federal District Court based on the reasoning presented above.

In what is arguably the decision representing the most substantial line of cases for application to public colleges and universities, if not Eleventh Amendment jurisprudence altogether, the Court in *Seminole Tribe v. Florida* expressly overruled *Pennsylvania v. Union Gas*.\(^{723}\) In *Seminole Tribe*, the Court reviewed an injunctive relief request under Indian Gaming Regulatory Act (IGRA) provisions, and effectively broadened the scope of applicable analysis through dicta. The facts of the case are as follows.

In 1988, the IGRA was passed by Congress, which required the states to negotiate with Indian tribes to create compacts to govern Indian gaming. If a state failed to enter into the negotiations as set forth by the statute, or negotiate in good faith, the tribes could bring suit against the State in federal court to compel negotiation. Ultimately, if the State still refused to enter into good faith negotiations, the matter, pursuant to the statute, would be referred to the Secretary of the Interior. In the passage of this statute, Congress had acted according to the power granted it under the portion of the Commerce Clause relating to commerce with Indians.\(^{724}\)

The Seminole Tribe of Florida had made such a request to enter into negotiations, for inclusion of gaming activities in a tribal state compact, to the State of Florida and its Governor

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\(^{721}\) *Skehan v. State System of Higher Education*, 815 F2d 244 (3rd Cir 1994).

\(^{722}\) Id.

\(^{723}\) Beckham, 27 Stetson L Rev (cited in note 10).

\(^{724}\) *Seminole Tribe*, 517 US 56.
Lawton Chiles. Upon the refusal of the State to enter into negotiations, the Seminole Tribe brought suit in federal District Court, pursuant to the statute mentioned above. Respondents moved to dismiss the claim, arguing the suit violated the immunity of the State from suit in federal court. The District Court denied that motion. However, the Court of Appeals reversed the decision of the District Court, holding that the Eleventh Amendment did, in fact, serve as a bar to the proceedings. The Supreme Court then granted certiorari. 725

The primary questions at issue were (1) whether the Eleventh Amendment prevented Congress from authorizing such suits by Indian tribes for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, and (2) if Ex Parte Young permits suits against the Governor of a State for prospective injunctive relief to enforce the good faith negotiation requirements of the Act. 726 In making its decision, the Court considered whether Congress had clearly expressed its intention to abrogate the State’s immunity, as well as if Congress acted pursuant to a valid exercise of power. On the first point, the Court determined that Congress did, in fact, unequivocally make clear its intention to abrogate the State’s immunity, and it did so in a clear statement of legislation. In considering the latter question regarding whether Congress acted pursuant to a valid exercise of power in passing the statute, the Court’s analysis became a bit more complicated.

The Court recognized very limited authority on which Congress had the power to abrogate a State’s immunity. One such constitutional provision was the Enforcement Clause of the Fourteenth Amendment, as noted in Fitzpatrick v. Bitzer. 727 It was at this point in the analysis where the Court’s previous decision in Union Gas was expressly overruled. The Court acknowledged that it had reached the decision in Union Gas without providing express rationale as to Congress’ abrogation of State sovereign immunity. 728

Ultimately, the Court affirmed the decision of the Court of Appeals, holding that the Eleventh Amendment prohibited Congress from abrogating a State’s immunity, even under an Article I power exclusive to Congress. Further, the Court held that the Ex Parte Young doctrine could not be used to enforce §2710(d)(3) of the IGRA against a state official, as the statute

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725 Id.
726 Id.
728 Seminole Tribe, 517 US 56.
provided remedial measures to enforce the statute. Of course, the 5-4 ruling was not made without strong dissent being present. In his dissent, Justice Stevens cautioned:

The importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy. There may be room for debate over whether, in light of the Eleventh Amendment, Congress has the power to ensure that such a cause of action may be enforced in federal court by a citizen of another State or a foreign citizen. There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear. As Justice Souter has convincingly demonstrated, the Court's contrary conclusion is profoundly misguided. Despite the thoroughness of his analysis, supported by sound reason, history, precedent, and strikingly uniform scholarly commentary, the shocking character of the majority's affront to a coequal branch of our Government merits additional comment.  

The Court in *Seminole Tribe* interpreted congressional authority under the Interstate Commerce Clause, and through rationale held Congress could not abrogate the states' Eleventh Amendment Immunity. This was due primarily to reasoning that the Eleventh Amendment was enacted subsequent to, and thus amended, the Interstate Commerce Clause. The resulting rationale advanced by the majority was congressional reliance on the Interstate Commerce Clause would not permit jurisdiction over states not consenting to suit in federal forums. The majority continued that a state official (acting in their official capacity) could not be sued for injunctive relief if the federal law on which a plaintiff relied provided other, more restrictive remedies. The significance of this decision for public colleges and universities will be primarily for those enjoying protection as arms of the state per the Eleventh Amendment. As the Court has implicitly recognized through case law, Congress still has the power to abrogate state immunity through statutes enacted pursuant to the Fourteenth Amendment, as it was

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729 *Seminole Tribe*, 517 US at 77-78.
730 517 US 56.
731 Id.
732 Id.
733 Id.
adopted following the Interstate Commerce Clause. However, this power, with regard to reach of legislation permitting suits against public colleges and universities, is susceptible to limitation by the decision in Seminole Tribe.\textsuperscript{735}

With 1997, came the case of City of Boerne v. Flores, which involved the scope of enforcement power held by Congress under §5 of the Fourteenth Amendment.\textsuperscript{736} The issue began when the Catholic Archbishop of San Antonio applied for a permit to enlarge a church in a neighborhood zoned for historic preservation in the City of Boerne, Texas. The permit was denied by local zoning authorities, which led to the Archbishop bringing suit against the City, alleging that denial of the permit constituted interference with the practice of a religious institution under the Religious Freedom Restoration Act of 1993 (RFRA).

Originally, the RFRA was enacted in response to previous Supreme Court case, Employment Division v. Smith, in which it was held that members of a Native American church were not exempt from Oregon’s narcotics laws when using peyote in church.\textsuperscript{737} The RFRA was meant to enhance the protection of the rights of citizens to free exercise of religion. The vehicle utilized by Congress to impose the rights within RFRA on the states was §5 of the Fourteenth Amendment, which provided Congress with the authority to enact legislation to ensure the substantive rights guaranteed by the remainder of the Fourteenth Amendment.\textsuperscript{738}

The federal District Court found against the Archbishop, and the Court of Appeals reversed that decision. Following that, the Supreme Court granted the City of Boerne’s request for certiorari. The primary question before the Court was whether Congress was appropriately enforcing the Fourteenth Amendment through passage of RFRA, or if, alternatively, Congress was reaching beyond the scope of its authority by placing substantive meaning with the amendment.\textsuperscript{739}

The Court held that Congress had, in fact, exceeded its authority under the Fourteenth Amendment, as it was effectively determining what amounted to a constitutional violation, a task

\textsuperscript{734} Beckham, 27 Stetson L Rev (cited in note 10).
\textsuperscript{735} Id.
\textsuperscript{736} Flores, 521 US 507.
\textsuperscript{737} Employment Division, Division of Human Resources of the State of Oregon v Smith, 485 US 660 (1988).
\textsuperscript{738} Flores, 521 US 507.
\textsuperscript{739} Id.
that was well within the power of the Court pursuant to the Constitution. According to Justice Kennedy’s majority opinion, the RFRA could not be:

considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.\textsuperscript{740}

Further, the Court found that there must be some showing of congruence and proportionality between the means used and the end to be achieved in enforcing the Fourteenth Amendment. In the end, the Court held that the RFRA ”contradicts vital principles necessary to maintain separation of powers and the federal balance,” and overturned the decision of the Court of Appeals (which held that the RFRA was constitutional).\textsuperscript{741}

In the 1997 decision of \textit{Idaho v. Coeur d’Alene Tribe of Idaho}, the Court again affirmed Eleventh Amendment immunity of States against suits in federal court by private parties.\textsuperscript{742} On the facts of the case, the Coeur d’Alene Tribe of Idaho brought suit against the State of Idaho, numerous state officials, and various state agencies, alleging ownership of submerged lands and banks along the Lake Coeur d’Alene and its tributaries (which included the Spokane River headwaters). The Coeur d’Alene Tribe sought a declaratory judgment establishing its entitlement to exclusive use, occupancy, and enjoyment of the lands, injunctive relief prohibiting the State from taking action in violation of the Coeur d’Alene Tribe’s rights to the lands, and a declaration of invalidity of laws, customs, and usages of the State claiming to regulate the lands.\textsuperscript{743}

The State responded to the claims by asserting its right to ownership of the lands, in addition to arguing that the suit was against the State, as such, and therefore was barred by the Eleventh Amendment. The federal District Court dismissed the complaint based upon the Eleventh Amendment, failure to state a claim upon which relief could be granted, and on the

\textsuperscript{740} Id at 532.
\textsuperscript{741} Id at 536.
\textsuperscript{742} \textit{Coeur d’Alene Tribe}, 521 US 261.
\textsuperscript{743} Id.
merits. The Court of Appeals affirmed the decision insofar as it barred all claims against the State, its agencies, and the title action on its officials, but allowed the declaratory and injunctive relief claims as they sought to preclude continuing violations of federal law. In yet another 5-4 opinion, the Supreme Court agreed with the State of Idaho, holding that the Eleventh Amendment did serve as a bar to the suit, even with regard to application of the *Ex Parte Young* Doctrine.\(^\text{744}\)

Also in 1997, the Court revisited the concept of the arm of the state doctrine, in *Regents of University of California v. Doe*.\(^\text{745}\) In this case, it was again in consideration of an institution of higher education that the determination was being made. In the case, Doe (who was a citizen of New York) sued the University of California for issues stemming from an employment contract. Doe alleged that the University had breached an agreement with him as it had agreed to hire him, but upon learning that he could not obtain a security clearance, it did not hire him for the laboratory work agreed upon.

The University of California argued it was immune from suit under the Eleventh Amendment, and as such, Doe’s claim was not sustainable. Doe, in turn, argued that the Eleventh Amendment did not apply, as the position was funded through a contract with the Department of Energy, and as such, the Department of Energy would be liable for any damages due to terms of the University’s agreement with the Department of Energy. The District Court relied on precedent to determine that the University of California was an arm of the state, and thus, immune from suit in federal court under the Eleventh Amendment. The Court of Appeals held liability for money judgments to be the most important factor in determining arm of the state status, and looking to the terms of the University’s agreement with the Department of Energy (which stated that the Department of Energy would be liable for any judgment against the University in fulfillment of performance on the Contract), that court reversed the decision of the District Court, and the decision was appealed to the Supreme Court.\(^\text{746}\)

The primary question at issue was whether the Eleventh Amendment still applied to state-run institutions of higher education, even if a judgment would not have to be paid by the state.

\(^{744}\) Id.


\(^{746}\) Id.
In deciding the case, the Court turned to the arm of the state doctrine to determine the status of the University for purposes of applicability of the Eleventh Amendment. In the opinion authored by Justice Stevens, the Court relied on Poindexter,^{747} Ayers,^{748} Smith,^{749} and Ford Motor Company^{750} in first noting the long-standing determination that the Eleventh Amendment pertains not just to actions where the State is actually named as a defendant, but also to certain state instrumentalities. The Court’s explanation then moved on to discuss the concept of when an instrumentality may invoke the immunity granted to the State. The Court reasoned that historically, their “cases have inquired into the relationship between the State and the entity in question,” and discussing that in making such an inquiry, it has “sometimes examined ‘the essential nature and effect of the proceeding’… and sometimes focused on the ‘nature of the entity created by state law’ to determine whether it should ‘be treated as an arm of the State.’”^{751}

In taking on the state treasury argument posed by Doe, the Court explained that no reasoning in its previous decisions “lends support to the notion that the presence or absence of a third party’s undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the state. The point was also discussed in light of previous decisions, such as the points made in Hess,^{752} Edelman,^{753} and Ford Motor Company^{754} that against whom a money judgment would be sustained is of considerable importance in establishing arm of the state status. The Court agreed with the dissent in the Court of Appeals that “it is the entity’s potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.”^{755}

In other words, the Court determined that the University could not be sued, regardless of Doe’s claim that the federal government would, in fact, be responsible for the judgment. Ultimately, the Court unanimously reversed the decision of the Court of Appeals, based primarily upon the reasoning that the

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^{747} Poindexter, 114 US 270.
^{748} Ayers, 123 US 443.
^{749} Reeves, 178 US 436.
^{750} Ford Motor Co., 323 US 459.
^{751} Doe, 519 US at 429 (citing Kennecott Copper, 327 US at 576; Doyle, 429 US at 280).
^{752} Hess, 513 US 30.
^{753} Edelman, 415 US 651.
^{754} Ford Motor Co., 323 US 459.
^{755} Doe, 519 US at 431.
“Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.”\textsuperscript{756}

The Court again ventured into the prospective-versus-retrospective-distinction arena, with the 1998 decision in \textit{Breard v. Greene}.\textsuperscript{757} At the time of \textit{Edelman}, the rule was fairly simply put that actions were allowed under Ex Parte Young so long as the nature of the remedy was not retrospective compensation for a past breach of duty and imposing such a judgment would not impact the state treasury. One gap that remained following that decision, however, was an indication as to whether all retrospective relief was protected under the Eleventh Amendment, or just that retrospective relief, which effectively amounted to an award of damages against the state necessarily resulting in a payment of said damages from the state treasury. Almost 25 years later, the Court in \textit{Breard} addressed that question.

In the case, Breard was convicted of the attempted rape and murder of Ruth Dickie, and was sentenced to execution in 1996. Breard, a citizen of Paraguay, filed a motion for habeas corpus in federal District Court, alleging a violation of the Vienna Convention on Consular Relations by the authorities who arrested him. This was after exhausting all state appellate remedies, and was based primarily due to his allegation that those authorities failed to inform him that he had a right to contact the Paraguayan Consulate upon arrest. Paraguay and its officials brought a separate suit in federal District Court, alleging that their rights had been similarly violated by the failure to inform Breard of his rights under the Vienna Convention, as well as the failure to notify Paraguay of Breard’s arrest, conviction, and sentence imposed. The Consul General of Paraguay also argued based upon a 42 U.S.C. §1983 claim.

The federal District Court found that Breard procedurally defaulted on the claim by not raising it during the state court proceedings, and the Court of Appeals affirmed that decision. With regard to the suit brought by Paraguay and its officials, it was found in federal district court that it lacked subject matter jurisdiction, as it could not bring its claims due to the Eleventh Amendment, as a continuing violation of federal law was not alleged. The Court of appeals also affirmed this decision. Paraguay also filed with the International Court of Justice (ICJ), alleging the violation of the Vienna Convention by the United States.

\textsuperscript{756} Id at 431.
The ICJ noted jurisdiction and issued an order stating that the United States should ensure that all possible steps were taken to avoid the execution of Breard pending finality of the proceeding in the matter.\footnote{758}{Id at 374.} At that time, Breard filed his petition for the writ of habeas corpus, as well as a stay application for enforcement of the ICJ’s order, with the Supreme Court. Paraguay also filed a motion to leave to file an original bill of complaint with the Court.\footnote{759}{Id.}

The primary question at issue was whether Breard and various diplomats of Paraguay could receive a stay of execution, as well as other relief, pursuant to the Vienna Convention on Consular Relations. In a per curiam opinion, the Court held that the exception established in \textit{Milliken II} regarding continuing violations did not apply.\footnote{760}{\textit{Milliken II}, 433 US 267.} As part of this reasoning, the Court stated:

As for Paraguay’s suits (both the original action and the case coming to us on petition for certiorari), neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions. The Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed. That Amendment’s ‘fundamental principle’ that ‘the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State’ was enunciated in \textit{Principality of Monaco v. Mississippi}.… Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights…we do not agree. The failure to notify the Paraguayan Consul occurred long ago, and has no continuing effect. The causal link present in \textit{Milliken} is absent in this case.\footnote{761}{Breard, 523 US at 377-378.}

With regard to the Consul General’s assertion, the Court found his claims not to be persuasive, as §1983 provides a cause of action to any "person within the jurisdiction" of the United States for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws," and neither does Paraguay constitute a “person” as defined in that Section,\footnote{762}{\textit{Moor}, 411 US at 699.} nor does it fall “within the jurisdiction” of the United States.\footnote{763}{Breard, 523 US at 378.} Further, the Court held that the Consul General, acting in his official capacity, has no more ability to proceed under that section than that of the country he represents, as any guarantees of the Vienna Convention

\footnote{758}{Id at 374.}
\footnote{759}{Id.}
\footnote{760}{\textit{Milliken II}, 433 US 267.}
\footnote{761}{Breard, 523 US at 377-378.}
\footnote{762}{\textit{Moor}, 411 US at 699.}
\footnote{763}{Breard, 523 US at 378.}
exist for Paraguay, rather than its individual officers.\textsuperscript{764} As such, the Court denied all of the claims presented. However, in three different dissents written by Justices Stevens, Ginsburg, and Breyer, the dissenters argued that the Court erred in not granting the stay applications and considering the merits of the case, each on somewhat differing grounds.

The year of 1998 also saw the Court’s involvement another admiralty case, in that of \textit{California v. Deep Sea Research}.\textsuperscript{765} In that case, Deep Sea Research, Inc. (DRS) had located a shipwreck and its cargo off of the California Cost. Upon DSR seeking rights to the wreckage and its cargo under federal admiralty jurisdiction, the State of California challenged DSR’s claim on the basis that the State actually held the rights under the Abandoned Shipwreck Act of 1987 (ASA).\textsuperscript{766} Pursuant to the ASA, title to abandoned shipwrecks is supposed to be transferred from the federal government to the state in whose submerged lands that wreck was located.\textsuperscript{767} California also cited its own public code, which stated that title to abandoned shipwrecks found off its coast vests with California.\textsuperscript{768}

Even though it maintained that DSR did not hold possession of the wreck, California claimed the federal action violated the rights of California under the Eleventh Amendment. In response, DSR stated that the ASA did not separate the federal courts from exclusive jurisdiction over admiralty and maritime matters under the United States Constitution, Article III, §2. Upon hearing the case, the federal District Court held that the State did not sufficiently demonstrate ownership under ASA. Further, the court found that ASA preempted the California public code section cited, issued a warrant for the arrest of the vessel, appointed DSR the custodian and salvor, and determined that it would stay adjudication until after the salvage operations had been finalized.\textsuperscript{769} The Court of Appeals affirmed the decision. The Supreme Court granted certiorari to address “whether a State's Eleventh Amendment immunity in an \textit{in rem} admiralty action depends upon evidence of the State's ownership of the \textit{res}, and to consider the related questions whether the \textit{Brother Jonathan} is subject to the ASA and whether the ASA preempts § 6313.”\textsuperscript{770}

\textsuperscript{764} Id.
\textsuperscript{766} Shipwreck Act of 1987 (ASA) 102 Stat § 432 (1987).
\textsuperscript{767} Id.
\textsuperscript{770} Id at 500-501.
In a unanimous decision by the Supreme Court, it held that although precedent supported the idea that, in a limited manner, the Eleventh Amendment served as a bar in cases based upon admiralty disputes about property in the State’s possession, this case was distinguished because the State did not actually have possession of the property in question, nor did the federal government. As such, the Eleventh Amendment was inapplicable, and due to several outstanding insurance claims made on the wreck, the Court remanded the case for further consideration on the issue of whether the wreck was truly abandoned.

Also in 1998, the Court took up the concept of removal, as applied to the Eleventh Amendment, in the case of Wisconsin Department of Corrections v. Schacht. In the case, Schacht brought a suit in state court against the Wisconsin Department of Corrections (Department) and several employees of the Department, alleging his dismissal from employment violated federal civil rights laws and the Constitution. Suit was brought against the employees in their official capacity.

Upon successful removal of the case to federal court by the Department and its employees, they filed an answer raising a defense that the claims were barred by the Eleventh Amendment. The federal District Court dismissed the claims against the Department and its employees in their official capacity. The Court of Appeals concluded the initial removal of the case to federal court was improper, as the federal courts are deprived of removal jurisdiction with the presence of even one claim being subject to the Eleventh Amendment bar. The case was taken to the Supreme Court, where the primary question at issue was whether a state or its actors serving as party to a lawsuit that has claims arising under federal law, may remove a case from state court to federal court when even portion of those claims are subject to Eleventh Amendment immunity.

The Court determined, in a unanimous opinion, that such a case could, in fact, be removed. In the opinion, as written by Justice Breyer, the Court held that even though an Eleventh Amendment bar to a plaintiff’s claims against a defendant-state may apply and deem certain claims beyond the power of the federal courts to decide, the State could still remove the

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772 Id.
773 Id.
case to federal court for consideration of the non-barred claims. This assertion was demonstrated in the Court’s concluding statement that “a State’s proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim,” however the Court continued on to state that such a “circumstance does not destroy removal jurisdiction over the remaining claims in the case before us. A federal court can proceed to hear those claims, and the District Court did not err in doing so.” 774 As such, the Court vacated the decision of the Court of Appeals and remanded the case for further proceedings.

The expansion significance of both *Seminole Tribe* and *Flores* was very much reiterated when the Supreme Court announced three confirmatory decisions at the end of the 1998-99 term, together affectionately deemed the *Alden* Trilogy. The first of those was *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*. 775 In that opinion, it was stated the *Flores* standards must be applied in determining whether an abrogation attempt was conducted pursuant to Section 5 of the Fourteenth Amendment. The facts of the case are as follows. Following the amendment of patent laws to abrogate state sovereign immunity, College Savings Bank filed a patent infringement suit against Florida Prepaid Postsecondary Education Expense Board. Florida Prepaid Postsecondary Education Expense Board was a state entity, and as such, asked that the suit be dismissed and the Act deemed unconstitutional, based on the decision in *Seminole Tribe*. The United States also intervened and joined College Savings Bank to assert and defend the constitutionality of the statute.

The federal District Court denied the motion to dismiss, and the United States Court of Appeals affirmed, determining that Congress had clearly expressed its intent to abrogate immunity for patent infringement suits and properly had the power to do so. The United States Court of Appeals for the Federal Circuit, in affirming, expressed the view that Congress had clearly expressed its intent to abrogate the states’ immunity from suit in federal court for patent infringement, and that Congress had the power under 5 to do so. Therefore, at issue for the Supreme Court to decide was whether abrogation of state immunity, as in the Patent and Plant Variety Protection Remedy Clarification Act, was valid legislative activity. In reliance on *Flores*, the Court held the statute could not be sustained as legislation appropriately enacted to enforce the promises of the Due Process Clause of the Fourteenth Amendment. The Court

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774 Id at 392-393.
775 119 S Ct 2199 (1999).
reasoned that there was no doubt regarding the intention of Congress to abrogate the States’ immunity from patent infringement with enactment of the statute. Further, the Court explained that neither the Patent Clause, nor the Patent Clause provides Congress with the authority to abrogate immunity in patent infringement instances. With that said, the Court reversed the decision of the Court of Appeals.776

In discussing the authority granted to Congress under the Fourteenth Amendment to pass appropriate legislation to protect parties from deprivation of property minus due process, the Court noted that this was not enough to permit abrogation in this case, and that the only showing that might justify such an effort would be a consistent pattern of state patent violations with the lack of legal remedies to rectify such situations. The Court determined that no such showing was offered by College Savings Bank, and the language within the Act was overly broad. As such, the Court reversed the decision of the Court of Appeals, thus dismissing College Savings Bank’s suit and accordingly declaring the offending components of the and Plant Variety Protection Remedy Clarification Act unconstitutional.777

This decision, as with the majority of those involving the Eleventh Amendment, was a 5-4 decision. The majority in this case, reflecting that similar majority from most other Eleventh Amendment cases during the tenure of the Rehnquist Court, was made up of Chief Justice Rehnquist, and Justices O’Connor, Scalia, Kennedy, and Thomas. The consistent group of dissent in such decisions is made up of Justices Stevens, Souter, Ginsburg, and Breyer.

The second decision of the Alden Trilogy was College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,778 in which the Court held the doctrine of implied waiver was inapplicable within the context of sovereign immunity. Argued on the same day in 1999 as Florida Prepaid, and correspondingly decided on the same day as that case later that year, this case serves as a second phase of the previously discussed case of Florida Prepaid. The facts at hand are as follows. College Savings Bank, a bank chartered in New Jersey, markets and sells certificates of deposit designed specifically to finance college costs. Florida Prepaid, the Florida state entity mentioned earlier, administers a tuition prepayment program.

776 Id.
777 Id.
778 527 US 666.
In addition to the original patent infringement action, College Savings Bank also brought suit alleging that Florida Prepaid violated the Lanham Act by making misstatements about its tuition savings plans in annual reports and brochures, which was an action supported by the Trademark Remedy Clarification Act (TRCA) that subjects states to suits brought under the Lanham Act §43(a) for false and misleading advertising. The federal District Court granted Florida Prepaid’s motion to dismiss on immunity grounds, and in doing so, it rejected arguments of College Savings Bank and the United States that Florida Prepaid waived its immunity, pursuant to constructive waiver theory, through participation in interstate administration and marketing of its program after the TRCA was clear that the activity would subject it to suit. It also rejected arguments made regarding the validity of Congress’s abrogation of the state’s immunity in the TRCA, due to its being enacted pursuant to the Due Process Clause of the Fourteenth Amendment. The Third Circuit Court of Appeals affirmed that decision.

The primary questions at issue for consideration of the Supreme Court were whether the TRCA permitted suits against states, through a constitutionally permissible abrogation of state immunity, for misrepresentations of their product offerings, and whether the TRCA permitted suits against states for such misrepresentations by effectively operating as a waiver of immunity upon engagement by states of activities under the Lanham Act. In deciding the case, the Court determined the answer to each question to be resolved in the negative. In another 5-4 opinion, this time written by Justice Scalia, the Court held that it did not have jurisdiction to entertain suits, such as this, involving action against an arm of the state, as it had been determined that Florida Prepaid was. The opinion continued on to state that the state’s immunity was not validly abrogated by the TRCA, nor was it voluntarily waived by the state through participation in interstate commerce activities. As such, the Court affirmed the decision of the Court of Appeals. In doing so, it also expressly overruled the decision in Parden, stating:

[w]e think that the constructive waiver experiment of Parden was ill conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, Parden broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of Parden to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, Parden stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of

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779 Parden, 377 US 184.
780 College Savings Bank, 527 US 666.
781 Id.
constitutional law. Today, we drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.\(^{782}\)

Justice Breyer authored the dissenting opinion, expressing primarily that Congress has the authority, under Article I, to abrogate a state’s immunity where necessary and proper. Justice Stevens wrote a separate dissenting opinion, although also joining that of Justice Breyer. Justice Stevens’ opinion explained that the case had been:

argued and decided on the basis of assumptions that may not be entirely correct. Accepting them, arguendo, the judgment of the Court of Appeals should be reversed for the reasons set forth in J[ustice] B[reyer]’s dissent, which I have joined. I believe, however, that the importance of this case and the two other “states rights” cases decided today merits this additional comment.\(^{783}\)

Justice Stevens continued on to note his concerns that the Court was required to presume that Florida Prepaid was an arm of the State of Florida, due to its activities related to educational programs of the State, and that he felt that “present-day assumptions about the status of the doctrine of sovereign immunity in the 18\(^{th}\) century” required rethinking.\(^{784}\) He discussed that the acting of doing business or making a profit, is, in fact, a form of property, and as such, “deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause.”\(^{785}\) Justice Stevens also pointed out that the alleged violation of the Lanham Act that determined by the majority to not sufficiently amount to a deprivation of property, was an issue not relevant to the issue raised. He noted that the “validity of a congressional decision to abrogate sovereign immunity in a category of cases does not depend on the strength of the claim asserted in a particular case within that category,” and that “instead, the decision depends on whether Congress had a reasonable basis for concluding that abrogation was necessary to prevent violations that would otherwise occur.”\(^{786}\) In concluding this point, Justice Stevens remarked that “[g]iven the presumption of validity that supports all federal statutes, I believe the Court must shoulder the burden of demonstrating why the judgment of the Congress of the United States should not command our respect. It has not done so.”\(^{787}\)

\(^{782}\) Id at 680.
\(^{783}\) Id at 691.
\(^{784}\) Id at 692.
\(^{785}\) Id at 693.
\(^{786}\) Id at 693.
\(^{787}\) Id at 693.
Finally, in the last of the three cases included in the Alden Trilogy, the Court held in the aptly named *Alden v. Maine*\(^{788}\) that the States’ immunity from federal claims was neither limited nor conferred by the Eleventh Amendment. In Alden, a group of probation officers brought suit against the State of Maine, their employer, alleging that Maine had violated provisions of the FLSA. They were seeking compensation and liquidated damages. The District Court dismissed the suit, based primarily upon *Seminole Tribe*. Then, the group of probation officers again brought suit against Maine, alleging the violations of FLSA, this time in state court. The state trial court dismissed the case, based upon principles of immunity. The Maine Supreme Court affirmed that decision on appeal. Upon appeal to the United States Supreme Court, the Court held that the “powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA.”\(^{789}\)

While *Seminole Tribe*\(^{790}\) affected only suits brought in federal court, some statutes, such as the FLSA, provide for suits by employees to enforce statutory rights in state and federal court. However, the Alden Court rejected this enforcement option, stating “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts.”\(^{791}\) In other words, it was stated that the principles of sovereign immunity applicable to federal claims against the States in federal court were equally applicable to federal claims against those states in state court.\(^{792}\) Further, in deciding the case, the Court effectively dismissed the significance of the literal text of the Eleventh Amendment, which refers to the power of the federal courts only under Article III. The Court stated that:

> [t]o rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity since the discredited decision in *Chisholm*…. [W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is `to strain the Constitution and the law to a construction never imagined or dreamed of.”\(^{793}\)

\(^{789}\) Id at 712.
\(^{790}\) *Seminole Tribe*, 517 US 56.
\(^{791}\) *Alden*, 527 US at 712.
\(^{792}\) Id.
\(^{793}\) *Alden*, 527 US at 730.
Taken together, *Seminole Tribe* and *Alden* indicate that individuals lack a judicial forum in which to file damage suits against states, particularly when the case of action was created by Congress pursuant to its powers under Article I.\(^{794}\)

In 2000, again addressing federal employment law, *Kimel v. Florida Board of Regents*,\(^{795}\) affirmed the standard from *Florida Prepaid*.\(^{796}\) In the case, a group of faculty and librarians from The Florida State University (FSU) brought suit against the Florida Board of Regents for alleged violations by FSU due to fiscal actions taken in violation of the ADEA that had a disparate impact on the pay of certain older employees. The Florida Board of Regents moved to dismiss the action on grounds that it was barred by the Eleventh Amendment. The District Court denied the motion of the Florida Board of Regents, determining that Congress had appropriately expressed its intent to abrogate state immunity in the ADEA, and accordingly, that enactment of the ADEA was a proper exercise of congressional authority, pursuant to the Eleventh Amendment. The Court of Appeals, however, held the ADEA did not, in fact, abrogate the Eleventh Amendment immunity extended to the State of Florida.\(^{797}\)

The Supreme Court held the ADEA\(^{798}\) did not validly abrogate states’ Eleventh Amendment immunity from suit by private individuals.\(^{799}\) The ADEA was enacted in order to protect individuals at least 40 years of age by prohibiting “arbitrary age discrimination in employment.”\(^{800}\) When originally enacted, the language of the ADEA did not include states within the definition of “employer.”\(^{801}\) However, it was later amended to include states and their political subdivisions. The ADEA of 1967 makes it unlawful for a private employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual...because of such individual's age."\(^{802}\) In 1974, Congress extended the ADEA’s substantive requirements to the states.
The *Kimel* Court cautioned that Congress cannot abrogate Eleventh Amendment immunity by redefining the states’ legal obligations with respect to age discrimination.\(^{803}\) In order to determine whether Congress validly abrogated the states’ sovereign immunity from ADEA suits, the *Kimel* Court applied a two-part test. Justice O’Connor, writing for the majority, noted Congress must first have made its intention to abrogate immunity “unmistakably clear in the language of the statute.”\(^{804}\) She continued on to note that “the plain language of [the ADEA] clearly demonstrates Congress’ intent to subject the States to suit for money damages at the hands of individual employees.”\(^{805}\) She also noted the statute must have utilized a valid exercise of power in abrogating state sovereign immunity.\(^{806}\) While it was recognized that extension of the ADEA to the states was within the Article I powers of Congress, under *Seminole Tribe*, abrogation of state sovereign immunity cannot come at the hands of Article I alone.\(^{807}\) In order to determine the possibility of valid abrogation, the Court looked to the “congruence and proportionality” test of *Flores*.\(^{808}\) As a result, it considered unconstitutional age discrimination under the Equal Protection Clause, reaffirming “age is not a suspect classification,”\(^{809}\) and stating “age classifications, unlike governmental conduct based on race or gender, cannot be characterized as ‘so seldom relevant to the achievement of any legitimate state interest that law grounded in such considerations are deemed to reflect prejudice and antipathy’.”\(^{810}\)

It was ultimately concluded in *Kimel* that states may discriminate on the basis of age without violating the Equal Protection Clause so long as the use of age as a factor is “rationally related to a legitimate state interest.”\(^{811}\) The *Kimel* Court declared that the ADEA “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”\(^{812}\) As the Court found that “Congress never identified any pattern of age discrimination whatsoever that rose to

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\(^{803}\) 528 US 62.

\(^{804}\) Id at 73.

\(^{805}\) Id at 74.

\(^{806}\) Id at 78.

\(^{807}\) 517 US 56.

\(^{808}\) *Kimel*, 528 US at 82-83.

\(^{809}\) Id at 83.

\(^{810}\) Id at 83 (quoting *Cleburne*, 473 US 432).

\(^{811}\) 528 US at 83.

\(^{812}\) Id at 86.
the level of constitutional violation,” it held invalid the ADEA’s abrogation of state sovereign immunity.

In another foray into the area of state immunity in 2001, the Supreme Court held, in *Board of Trustees of University of Alabama v. Garrett*, that in enacting the ADA, Congress also had not validly abrogated the states’ sovereign immunity from suits by private parties. Garrett, Director of Nursing for the University of Alabama, was forced to take a substantial leave from her work after being diagnosed with breast cancer. However, when she returned to work, she was informed by her supervisor that she would have to relinquish her positions. Similarly, an individual named Ash, who was a security officer for the Alabama Department of Youth services, had requested modification of his employment duties due to his chronic asthma. His request was not granted, and evaluation of his employment performance declined. Both individuals filed discrimination suits against their employers, seeking money damages under the ADA. The ADA prohibits employers, including States, from discrimination "against a qualified individual with a disability because of that disability... in regard to... terms, conditions, and privileges of employment." The District Court dismissed both cases on the grounds that the language in the ADA is beyond the authority of Congress to abrogate States' immunity. The Court of Appeals reversed the decision of the District Court.

Similar to *Kimel*, the Court’s analysis considered whether the Equal Protection Clause could support the abrogation of immunity. In reliance on *Cleburne v. Cleburne Living Ctr., Inc.*, Chief Justice Rehnquist, in writing for the majority, reaffirmed disability was not a “quasi-suspect” classification for purposes of the Fourteenth Amendment. The Court proceeded on to conduct a rational basis review, and concluded Congress did not have sufficient evidence of patterned unconstitutional discrimination.

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813 Id at 89.
814 Id at 91.
815 *Garrett*, 531 US 356.
817 *Garrett*, 531 US at 374, n.9.
819 Id.
820 473 US 432.
821 *Garrett*, 531 US at 367.
822 Id at 370.
Title I of the ADA\textsuperscript{823} prohibits employers from discriminating against qualified, disabled individuals. As opposed to the ADEA,\textsuperscript{824} the ADA expressly states a “state shall not be immune under the Eleventh Amendment.”\textsuperscript{825} In Garrett, the Court held the Eleventh Amendment was a bar to suits in federal court for money damages under the ADA, and as such, the state of Alabama could not be forced to pay damages to its employees for failure to comply with the Act.\textsuperscript{826} The Court ultimately concluded “even if it were possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in City of Boerne” and the “accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.”\textsuperscript{827}

A related view is also proffered regarding the outcome of this case.\textsuperscript{828} In this view, although the rational basis test is used by the legislature for disability and age classifications, a heightened level of scrutiny should be utilized when state officials use “animus” and “stereotypes” to make individual decisions.\textsuperscript{829} Accordingly, differing by the case at hand, distinct levels of scrutiny would be used with rational basis for legislative classifications and heightened scrutiny for individualized determinations.\textsuperscript{830} As a result, Congress might be able to abrogate a state’s sovereign immunity due to a stricter scrutiny possibly resulting in constitutional violations requiring action under Section 5 of the Fourteenth Amendment.\textsuperscript{831}

In 2002, the Court decided another ADEA-related Eleventh Amendment case, in Raygor \textit{v. Regents of the University of Minnesota}.\textsuperscript{832} Initially, in the proceedings, complaints were filed by individuals named Raygor and Goodchild in federal District Court against the Board of Regents of the University of Minnesota, alleging violation of the ADEA and a state law discrimination act. The state law is based upon the federal supplemental jurisdiction statute,

\begin{itemize}
\item \textsuperscript{823} ADA, 42 USC §12101.
\item \textsuperscript{824} ADEA, 29 USC § 621.
\item \textsuperscript{825} ADA, 42 USC §12101 at 12202.
\item \textsuperscript{826} Garrett, 531 US 356.
\item \textsuperscript{827} Id at 372.
\item \textsuperscript{828} HLRA, 114 Harv L Rev (cited in note 124).
\item \textsuperscript{829} Id at 2148.
\item \textsuperscript{830} Id.
\item \textsuperscript{831} Id at 2148-2149.
\item \textsuperscript{832} Raygor \textit{v Regents of the University of Minnesota}, 534 US 533 (2002).
\end{itemize}
which states that limitations periods on supplemental claims toll while they are pending in federal court, as well as 30 days following dismissal.

The complaints allegedly originated from an instance when the University attempted to compel the individuals to accept early retirement. Each of them refused to accept the offer, after which their jobs were reclassified in tandem with salary reductions. The District Court ultimately dismissed the cases on Eleventh Amendment grounds, and the claims were withdrawn from federal appeal following the decision in *Kimel* that the ADEA did not validly abrogate the immunity of the states. The petitioners thereafter re-filed their claims in state court, and respondent asserted that the claims were barred by a state statute of limitations. Further maintained by the respondents was that federal supplemental jurisdiction did not toll the limitations period due to the fact that the federal District Court did not have jurisdiction over the ADEA-specific claims.

The State District Court dismissed the suit on those grounds, however, the state appellate court reversed that decision. Again reversing the decision, the State Supreme Court held that, when applied to nonconsenting state defendants, §1367 was unconstitutional. Upon arrival at the United States Supreme Court, the primary question for consideration was whether the tolling provision of the federal supplemental jurisdiction statute applied to claims filed against nonconsenting states in federal court. Ultimately, the Court answered that question in the negative, holding that the University of Minnesota and its Board of Regents did not consent to suit in federal court, and the statute does not toll on state law claims that are dismissed pursuant to the Eleventh Amendment.

Later in 2002, the Court decided another in the line of waiver cases, *Lapides v. Board of Regents*, indicating that voluntary appearance in federal court, does serve to waive a state’s immunity under the Eleventh Amendment.833 The case deemed this to be so, even if the lawyer making the appearance does not have the authority to waive that immunity. Lapides, a Georgia State University System professor, alleged violations of state tort law and §1983 against the University System of Georgia Board of Regents, as well as university officials in both official

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and personal capacities. Lapides’ claims were based on documents placed in his personnel file, including allegations of sexual harassment.

The defendants joined in removing the case to federal District Court, at which point, they sought dismissal of the suit. The State acknowledged that, via a state statute, sovereign immunity was waived for actions in state court. However, it contended that immunity still applied in federal court under the Eleventh Amendment. The federal District Court held that, upon removal to federal court, the State of Georgia had, in fact, waived that immunity. In contrast, the Court of Appeals found that, due to vagueness of state law regarding the level of authority held by the State Attorney General to waive such immunity, even post-removal, the State still had the legal right to assert immunity. Upon certiorari grant by the Supreme Court, the primary question at issue before the court was whether a state waived its immunity under the Eleventh Amendment upon removal of a case from state to federal court. In a unanimous opinion, the Court held this was the case, and concluded that the voluntary removal of the action by university officials invoked the jurisdiction of the federal courts and thus constituted a waiver of sovereign immunity with respect to those state law claims for which immunity was waived in the state court.

Also in 2002, yet another significant expansion of the reach of the Eleventh Amendment became apparent in the case of Federal Maritime Commission v. South Carolina Ports Authority, in which the Court extended immunity of the states to administrative actions before federal agencies.834 This, of course, is outside the literal text of the amendment. In the facts of the case, South Carolina Maritime Services, Inc., requested the South Carolina State Ports Authority (SCSPA) grant it permission to berth a cruise ship from the SCSPA’s facilities in Charleston, South Carolina. It had made such a request in the number of five times, each time denied by the SCSPA on the grounds that the primary mission of the vessel was gambling.

Maritime Services, Inc. then filed a complaint with the Federal Maritime Commission (FMC), alleging that by denying their request, SCSPA violated the provisions of the Shipping Act of 1984. Maritime Services, Inc. sought an injunctive and monetary relief. The complaint was then passed sent to an administrative law judge who dismissed the claim after finding that

the SCSPA was entitled to immunity under the Eleventh Amendment, as an arm of the state. The FMC reversed that decision, based on their conclusion that that type of immunity applied only to judicial tribunals, not those of the executive branch variety. The Fourth Circuit Court of Appeals reversed that decision, and the case was taken to the Supreme Court.\(^\text{835}\)

The Court held the Eleventh Amendment did bar a federal agency from adjudicating the complaint of a private party against a nonconsenting state, as determined by the Administrative Law Judge in the initial proceedings of the case, and echoed by the Court of Appeals at a later point of the proceedings. In the 5-4 opinion, the Court suggested the states were immune based on presumption, as they were not subject to private suits in administrative adjudications upon adoption of the Constitution. In explaining this further, the Court noted that “[a]lthough the Framers likely did not envision the intrusion on state sovereignty at issue in today's case, we are nonetheless confident that it is contrary to their constitutional design, and therefore affirm the judgment of the Court of Appeals.”\(^\text{836}\)

In 2002, the Court revisited the concept of the *Ex Parte Young* Doctrine, in deciding *Verizon Maryland, Inc. v. Public Service Commission of Maryland*. In the case, Verizon brought suit in federal District Court against the Public Commission of Maryland, alleging that the Commissioners in their official capacities, had violated the Telecommunications Act of 1996.\(^\text{837}\)

The Act was designed to foster competition within local telephone markets, and effectively bars companies from challenging agency enforcements of contracts in federal court. As stated by the Court:

> the Act imposed various obligations on incumbent local exchange carriers (LECs), including a duty to share their networks with competitors….When a new entrant seeks access to a market, the incumbent LEC must "provide . . . interconnection with" the incumbent's existing network, and the carriers must then establish "reciprocal compensation arrangements" for transporting and terminating the calls placed by each others' customers.\(^\text{838}\)

The suit originated as a dispute between Verizon and WorldCom regarding whether Internet Service Providers should be considered local traffic, despite the inherent nature of the

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\(^{835}\) Id.

\(^{836}\) Id at 769.

\(^{837}\) Act of 1996 47 USC § 251

services connecting customers to distant sites. The disputes led to impacts upon interconnection agreement obligations between the two, and the Public Service Commission ultimately found in favor of WorldCom. At such time, Verizon brought suit against the Commissioners, as mentioned above, as they required reciprocal compensation for the calls from the Internet Service Providers, a stance that Verizon maintained was in violation of the Act.  

The District Court dismissed the case (finding no basis for federal jurisdiction), and the Fourth Circuit Court of Appeals affirmed that decision. The Court of Appeals did so by reasoning that the Public Service Commission had not waived its immunity simply through voluntary participation in the regulatory scheme under the Act, and further held that suit was not allowed under the *Ex Parte Young* doctrine against the individual Commissioners. Upon arrival at the next level, the Court found it irrelevant whether the Public Service Commission had waived its immunity, and further held that the case could proceed pursuant to the *Ex Parte Young* exception. The Court reasoned that:

> [i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."…Here, Verizon sought injunctive and declaratory relief, alleging that the Commission's order requiring payment of reciprocal compensation was preempted by the 1996 Act and an FCC ruling. The prayer for injunctive relief -- that state officials be restrained from enforcing an order in contravention of controlling federal law -- clearly satisfies our "straightforward inquiry."  

In other words, the Court found that the request for injunctive relief by Verizon to enforce an order against state officials who were allegedly violating controlling federal law, was not barred by the Eleventh Amendment, and that the *Ex Parte Young* remedy is available when a detailed set of remedies is not provided. With that, the Court vacated the decision of the Court of Appeals, and remanded for further proceedings. The outcome was an 8-0 decision, with Justice O’Connor taking no part in the decision, and it represented a very atypical defeat for state immunity.

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839 Id.
840 Id at 645 (citing *Coeur d'Alene Tribe*, 521 US at 296).
In what was likely the most significant case of 2003, the Court then heard *Nevada Department of Human Resources v. Hibbs*. Hibbs was an employee of the Nevada Department of Human Resources, to which he sought leave to care for his wife under the FMLA, which entitles employees to take up to 12 weeks of unpaid leave annually in order to care for a spouse at the onset of a serious health condition. Hibbs’ wife was recovering from injuries sustained in a serious automobile accident. Hibbs was granted the full 12 weeks of leave by the Department of Human Resources, to be used as he saw fit between May and December of that year. As of October of that year, Hibbs had exhausted the leave granted him, and was informed by the Department of Human Resources that he must return to work as of a certain date. Upon failing to return to work on the specified date, Hibbs was terminated. Hibbs then brought suit against the Department of Human Resources and two of its officials, in federal District Court, seeking monetary damages. He brought said suit pursuant to FMLA language creating a right of action to seek both monetary and equitable relief “against any employer (including a public agency) in any Federal or State court of competent jurisdiction,’ … should that employer ‘interfere with, restrain, or deny the exercise of’ FMLA rights.” The District Court resolved that the Hibbs’ claim was barred by the Eleventh Amendment, and the Court of Appeals reversed that decision. The Supreme Court then granted certiorari to resolve differences among the Courts of Appeals in deciding whether individuals may bring suit against States for money damages in such cases.

In deciding the case, the Court first looked into its prior decisions. Citing *Garrett*, *Kimel*, *College Savings Bank*, *Seminole Tribe*, and *Hans*, the Court reiterated its previous holding that the “Constitution does not provide for federal jurisdiction over suits against nonconsenting states.” It did make reference to the abrogation exception, and found that Congress patently intended to abrogate the immunity of the States with the enactment of FMLA.

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842 Id.
843 Id at 724-725 (citing 29 U.S.C. §§ 2617(a)(2) and 2615(a)(1)).
844 Id.
845 *Garrett*, 531 US 356.
846 *Kimel*, 528 US 62.
847 *College Savings Bank*, 527 US 666.
848 *Seminole Tribe*, 517 US 56.
850 *Hibbs*, 538 US at 726.
It then considered the validity of that exercise. The Court found that Congress acted within its authority granted by §5 of the Fourteenth Amendment, as it enacted “prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”\(^{851}\) This finding was evidenced in the Court’s statement that the “States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §5 legislation.”\(^{852}\)

Ultimately, in a 6-3 decision, written by Chief Justice Rehnquist, the Court held that state employees may, in fact, recover monetary damages in federal court for the failure of a State to comply with FMLA family-care provisions. Justices Scalia, Kennedy, and Thomas were among the dissenters. In Justice Kennedy’s dissent, he noted the decision conflicted with the Court’s prior decision in Garrett that the authority of Congress’ is only appropriately exercised on those occasions where transgressions have been found by the State. Justice Scalia’s dissent supported this opinion, as he advanced a guilty-by-association theory, as he indicated that, although some private employers were found to have engaged in sex-based discrimination, at no point had the State of Nevada been proven to have acted in violation of the Fourteenth Amendment.

The following year in 2004, the Court decided a case in which it held a consent decree (entered into by the State of Texas in a Medicaid case) not to be enforceable by the federal court, as the Court found the decree not to violate the Eleventh Amendment. The case was Frew v. Hawkins.\(^{853}\) Participants in the Medicaid program, of which the State of Texas is one, are mandated to meet specific federal requirements. One such requirement that the State must have for children is an Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. This case originated when suit was brought against the Texas Health and Human Services Commission and the Texas Department of Health, as well as the Commissioners of each, the Texas Medicaid Director, and staff members from the Department of Health (all of which were within Governor George W. Bush’s administration).\(^{854}\)

\(^{851}\) Id. at 727-728.
\(^{852}\) Id. at 735.
\(^{854}\) Id.
The plaintiffs sought injunctive relief, alleging that the program in Texas did not meet the standards of the federal requirements, due to assertions that the program “did not ensure eligible children would receive health, dental, vision, and hearing screens; failed to meet annual participation goals; and gave eligible recipients inadequate notice of available services”… and was lacking “proper case management and corrective procedures and did not provide uniform services throughout Texas.” The state agencies asserted an Eleventh Amendment immunity defense, and the cases were dismissed by the federal District Court on same, as to the state agencies. However, the state officers were still parties to the suit. Furthermore, the court certified an EPSDT services class made up of more than one million children. Following negotiations, the parties entered into a consent decree, which required state officials to implement many specific provisions.

Two years later, the plaintiffs filed an enforcement action in federal District Court, alleging that the state officials were not complying with certain aspects of the decree. The State officials denied any negligence or wrongdoing, and asserted that the decree was unenforceable under the Eleventh Amendment, as the violations of the decree did not also constitute violations of the Medicaid Act. In other words, Texas asserted that since there had been no violation of federal law, no suit could be maintained in federal court. The District Court held that certain consent decree provisions had been violated, and as such, rejected the state’s arguments related to the Eleventh Amendment. The State officials appealed, and the Court of Appeals reversed the decision, agreeing with Texas that enforcement of the decree was barred by the Eleventh Amendment. The Supreme Court then granted certiorari, primarily to resolve a conflict between the Circuit Courts’ differences on enforcement of similar consent decrees.

In the unanimous, Justice Kennedy-authored opinion, the Court overturned the decision of the Court of Appeals, and found that enforcement of the consent decree did not constitute a violation of the Eleventh Amendment. In arguing the case, petitioners maintained that such enforcement would violate the Eleventh Amendment because 1) the State “waived its Eleventh Amendment immunity in the course of litigation,” and 2) “enforcement is permitted under the

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855 Id. at 434.
856 Id.
857 Id.
principles of *Ex Parte Young*. The argument regarding waiver went unaddressed by the Court, as the Court agreed that the decree was enforceable under *Ex Parte Young*. The Court continued in its analysis to review the reach of the Eleventh Amendment in concert with the rules related to consent decrees. Ultimately, as stated above, the Court found that states waive immunity granted to them under the Eleventh Amendment when entering into a consent decree under federal law in federal court, and it is not necessary for a State to breach federal law in order for suit regarding a breach of the consent agreement to be allowed in federal court.

Finally, in May 2004, the Court decided the case of *Tennessee v. Lane*, which revisited the ADA versus the Eleventh Amendment. Lane, a paraplegic, alleged that, due to the lack of an elevator in the County Courthouse, he was forced to crawl up stairs to the second floor when compelled to appear to answer a set of criminal charges. On the instance of a subsequent court appearance, Lane refused to crawl up the stairs again (or to be carried up the stairs by officers), and as a result, he was arrested and jailed for failing to appear. Similarly, Jones, another individual involved in the suit who was also a paraplegic (along with a court reporter), asserted that she had been unable to gain entry to several courthouses, causing her to lose work and prohibiting her from participation in the judicial process. Lane and Jones brought suit against the State of Tennessee, alleging a violation of Title II of the ADA, seeking money damages and equitable relief. Title II of the ADA provides that persons who have been impacted by discrimination under the terms of the ADA, can seek damages, including those sought against States.

The State of Tennessee answered that it was immune from suit under the ADA, pursuant to the protections afforded it by the Eleventh Amendment. In support of this argument, the State cited *Garrett*, in which it was held by the Court that Congress had acted beyond the reach of the authority granted it when allowing citizens the right to sue states for disability discrimination causes under the Fourteenth Amendment. The Court arrived at the judgment in that case after

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858 Id at 436.
859 Id.
860 *Lane*, 541 US 509.
861 Id.
determining that there was not enough evidence of disability discrimination by the States to justify a waiver of immunity under the Fourteenth Amendment through Title I of the ADA.\textsuperscript{862}

The federal District Court denied the motion to dismiss asserted by the State. The Sixth Circuit Court of Appeals affirmed the decision of the lower court, based primarily on the fact that the claims asserted were grounded in violations of due process and thus were not barred by the Eleventh Amendment. The Supreme Court then granted certiorari.\textsuperscript{863}

The Court, in a 5-4 opinion authored by Justice Stevens, found that there was sufficient demonstration by Congress regarding the issues faced by disabled persons. In doing so, the Court stated that:

\begin{quote}
[g]iven the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least. Just last Term in \textit{Hibbs}, we approved the family care leave provision of the FMLA as valid §5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct….We explained that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in \textit{Garrett} or \textit{Kimel}, both of which concerned legislation that targeted classifications subject to rational basis review.” Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications. And in any event, the record of constitutional violations in this case -- including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services -- far exceeds the record in \textit{Hibbs}.\textsuperscript{864}
\end{quote}

As such, the Court ultimately concluded that Title II of the ADA validly abrogated state immunity under the Eleventh Amendment. One very interesting aspect of this case, is that the makeup of the 5-4 majority was strikingly different in comparison to the lineup in other cases. The majority in this case was made up of Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer. In most cases regarding the Eleventh Amendment, the five-Justice majority of Chief

\textsuperscript{862} Id.
\textsuperscript{863} Id.
\textsuperscript{864} Id at 528-529.
Justice Rehnquist, and Justices O’Connor, Scalia, Kennedy, and Thomas is firmly seated in the state-rights side of the argument. However, in this case, O’Connor served in her long-perceived role as swing-vote, abandoning her conservative colleagues and enabling the traditional liberal dissent to prevail in upholding disability rights claims.  

With general public perception of the Court attaching activism to the liberal bloc, as opposed to the strict textualism typically associated with the conservative side, eleventh amendment jurisprudence, particularly that of the Rehnquist Court, presents an interesting enigma. The text of the Eleventh Amendment does not refer to suits filed against a state by its own citizens and only applies to suits filed in federal court. However, regardless of the text or the original intent of the Amendment, since 1996, the Court has effectively extended absolute sovereign immunity to states in both state and federal courts. In doing so, the Court protected states from suit by citizens of other states, as well as their own. With decisions such as Seminole Tribe, the Alden Trilogy, and Kimel, as well as many to follow, the Rehnquist Court has done much to earn its characterization as a judicially active, states’-rights advocate. The decisions in those cases essentially allowed states to forego compliance with federal laws requiring good faith negotiation with Native American tribes regarding gambling operations, fair treatment of employees (under both the FLSA and ADEA), and protection from patent infringement.

In devising a relatively consistent pattern of decision-making when it came to the Eleventh Amendment, it would appear, on the face, that the “conservative” majority in such decisions was employing a rather clear principled approach of predictable second-stage legal reasoning. However, viewing the Rehnquist Court Eleventh Amendment majority in this manner is much like making the convenient mistake of neglecting to notice the wool in the cloak of the proverbial wolf. In continuing the expansion of the long-ago implemented trend of atextual interpretation of the Eleventh Amendment, and adding to that a tendency to dabble into the relative importance or desirability of particular social goals, and means by which to accomplish same, most notably through intrusions into the policy-making domains of the legislative branch in the name of states’ rights, the “conservative” majority of the Rehnquist Court has turned the tables on the liberal bloc through a not so apparent to all, but quite concerted, attempt to pilfer its activist reputation.

865 Id.
As noted in the last case investigated in this section, this enigmatic behavior exhibited by the “conservative” Justices of a judically-active, yet still predictable states’ rights-driven, pattern of decision-making may be experiencing some growing pains, and could quite possibly be on the verge of another foray into the third stage disintegration of the legal concept. However, even that assessment is, at best, uncertain, as the close of the 2004-05 term of the Rehnquist Court brought with it some very unexpected occurrences. For some time, the American public has been anticipating a vacancy on the Supreme Court in the form of the retirement of Chief Justice Rehnquist, whose health was ailing. In true form, the steadfast Chief Justice defiantly rejected such claims and informed the public that he would, in fact, remain on the Court. In contrast, the sure-to-be replacement in the event of his never-to-happen resignation, Justice O’Connor, announced her resignation instead. Ironically, even in light of his assured announcement, the Chief Justice’s health ultimately gave way, bringing an end to his illustrious career in September of 2005.

Although the vacancies may not change the actual political makeup of the Court, due to the characteristics of the political landscape external to it and the inevitable conservative choices to fill the voids, the introduction of two seemingly like-minded novel appointments might not effect themselves in quite that manner. Although one might be able to reasonably predict a similar stance on social issues, upcoming decisions related to Eleventh Amendment immunity may not enjoy the same predictability.
CHAPTER 5
ELEVENTH AMENDMENT IMMUNITY: ARM OF THE STATE ANALYSIS

As mentioned in earlier Chapters, in this world of specialized entities and privatized traditional state functions, we must consider what it is that actually constitutes a state for purposes of the Eleventh Amendment. This consideration necessarily points toward the arm of the state doctrine, as one reason a federal court may find that an entity is not protected under Eleventh Amendment immunity is because it falls outside the status of an arm of the state. For purposes of this type of analysis, state entities are classified as either an arm of the state or a political subdivision, with political subdivisions historically not enjoying governmental immunity due primarily to their level of autonomy from the state.

The tests used to determine the status of entities for purposes of the Eleventh Amendment have become increasingly more elaborate and complex. This complexity is due primarily to the increased emphasis on privatization, revenue sharing, and decentralization by the states, the expansion of state services, and the emergence of specialized agencies and positions created by the states. It has become increasingly more difficult to immediately categorize state entities as either arms of the state or political subdivisions, so the tests reflect that difficulty. In resolving the difficulties presented in this effort, federal courts have resorted to employing a balancing test to determine applicability of Eleventh Amendment immunity. This test is fact intensive and technical, and uses an ever-increasing range of factors.

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866 Lynch and DeFrancis, 44 Boston Bar Journal (cited in note 22).
868 Doyle, 429 US 274.
Arm of the State Analysis Generally

In reviewing the case law, one can view the extent to which the range of factors, mentioned above, has grown. While courts seemingly apply the test in an inconsistent manner between factors, there does appear to be a primary grouping of categories from which factors for analysis are selected. In addition, most courts, particularly with regard to Colleges and Universities, apply the factors on a case by case basis to determine whether or not an institution meets the standards of an arm of the state.

Although cases existed, both at the Supreme Court level and below, that historically applied tests similar to those now falling under the umbrella of the arm of the state analysis, the case at the Supreme Court level most typically credited as the catalyst for the ever-growing range of factors was the case of Mt. Healthy. For instance, prior to Mt. Healthy, the Court considered such precursor concepts at real substantial party in interest to determine instrumentality of the State decisions. However, the Court in Mt. Healthy applied a three-prong test. Those factors, used to determine whether the entity was an arm of the state or a political subdivision, included the following: 1) what state law deems the entity to be; 2) the level of political and financial autonomy of the entity; and 3) whether the entity operates like a political subdivision.\footnote{869}{Doyle, 429 US at 280.}

In another shaping Supreme Court case involving an arm of the state analysis, the Court added more factors to the equation in \textit{Lake Country Estates}.\footnote{870}{Lake Country Estates, 440 US 391.} In that case, the Court measured the entity’s potential arm of the state status along several factors, including: 1) how the entity is described in State law and the documents of its creation; 2) how governing members of the entity are appointed; 3) the source of funding for the entity; 4) whether the function of the entity is one traditionally resting with local government or State government; 5) whether the State retains a veto power over the entity, and 6) whether the entity’s obligations are binding on the State.\footnote{871}{Id.} These prongs of analysis have evolved over time, and the decision points on the factors have also gotten much more complex with time. However, the factors above formed the basis from which many future decisions on the issue were derived.
The case law in this area is not easily reconciled, due to the case-by-case nature of the analysis and the multitude of factor combinations any given court could utilize. In addition, the

Table 1. Range of Factors Utilized in Arm of the State Analyses

<table>
<thead>
<tr>
<th>Factor</th>
<th>Description</th>
<th>Example(s) of Case(s) Considering the Factor</th>
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</thead>
<tbody>
<tr>
<td>State Treasury Impact</td>
<td>Will a judgment against the entity be satisfied out of or otherwise impact the State treasury? What is the degree of funding received by the entity from the State?</td>
<td>Hess v. Port Authority Trans-Hudson Corp.; Jackson v. Hayakawa; Lake Country Estates, Inc. v. Tahoe Regional Planning Agency; Kashani v. Purdue University; Lincoln County v. Luning; Mitchell v. Los Angeles Community College District; Mt. Healthy City School District Board of Education v. Doyle; Osborn v. Bank of the United States; Pennhurst State School and Hospital v. Halderman; Regents of the University of California v. Doe</td>
</tr>
<tr>
<td>Access to Non-State Funds</td>
<td>In the event of a judgment against the entity, does the entity have access to non-state funds that can be utilized to satisfy the judgment? Does the entity have authority to generate its own revenue through issuance of bonds, levying taxes, or some other method?</td>
<td>Kovats v. Rutgers; Sherman v. Curators of the University of Missouri; Regents of the University of California v. Doe; Mt. Healthy City School District Board of Education v. Doyle; Hess v. Port Authority Trans-Hudson Corp.</td>
</tr>
<tr>
<td>Treatment Under State Law</td>
<td>How does statute/case law/compact/agreement define, describe, or categorize the entity? Is the entity expressly deemed an arm of the state, instrumentality of the state, or political subdivision? Are employees of the entity considered state employees? Is the entity subject to state procurement requirements? Is the entity subject to open records laws of the state? Does the entity have a state oversight board? Is the entity immune from taxation?</td>
<td>Regents of the University of California v. Doe; Hess v. Port Authority Trans-Hudson Corp.; Mt. Healthy City School District Board of Education v. Doyle, Lincoln County v. Luning, Brennan v. University of Kansas; Walstad v. University of Kansas; Prebble v. Brodrick</td>
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<tr>
<td>Level of Autonomy</td>
<td>How subject is the entity to control by the state? What is the degree of autonomy from the state enjoyed by the entity? What is the degree of supervision over the entity by the State? Has the State impliedly or expressly waived or preserved power of the entity? What is the level of state control over the entity’s fiscal affairs?</td>
<td>Hess v. Port Authority Trans-Hudson Corp.; Mt. Healthy City School District Board of Education v. Doyle, Brennan v. University of Kansas; Pennhurst State School and Hospital v. Halderman</td>
</tr>
<tr>
<td>Function of Entity</td>
<td>Does the entity perform central governmental functions? Is the function of the entity determined to be proprietary or governmental? Does the entity operate like a political subdivision? How are members of the entity appointed?</td>
<td>Mt. Healthy City School District Board of Education v. Doyle; Jackson v. Hayakawa; Mitchell v. Los Angeles Community College Dist.; Brennan v. University of Kansas; Hess v. Port Authority Trans-Hudson Corp.</td>
</tr>
<tr>
<td>Corporate Status</td>
<td>Is the entity separately incorporated? What is the corporate status of the entity?</td>
<td>Jackson v. Hayakawa; Mitchell v. Los Angeles Community College Dist.; Hall v. Medical College</td>
</tr>
<tr>
<td>Power to Sue and Be Sued</td>
<td>Does the entity possess the power to sue and be sued?</td>
<td>Jackson v. Hayakawa; Mitchell v. Los Angeles Community College Dist.; Hall v. Medical College</td>
</tr>
<tr>
<td>Ability to Enter Into Contracts</td>
<td>Does the entity have authority to enter into contracts under its own name or that of the State? What is the ability of the entity to hold property in its own name?</td>
<td>Jackson v. Hayakawa; Mitchell v. Los Angeles Community College Dist.; Hall v. Medical College</td>
</tr>
<tr>
<td>State Immunity from Responsibility</td>
<td>Has the state immunized itself from any responsibility with regard to operations of the entity?</td>
<td>Mt. Healthy City School District Board of Education v. Doyle; Hall v. Medical College</td>
</tr>
<tr>
<td>Focus of Entity</td>
<td>Is the focus/mission/purpose of the entity primarily on statewide or local concerns? What is the geographic scope of the operations of the entity?</td>
<td>Lake Country Estates, Inc. v. Tahoe Regional Planning Agency</td>
</tr>
</tbody>
</table>
factors currently utilized, as well as those that are continuously created at the lower court level, are numerous. They also tend to overlap across broad categories. Further complicating the issue, the factors inherently contain a myriad of ways in which they could be applied. With that said, there does seem to be some general consensus at this point that at least one or more of the factors in Table 1 above (or some variation thereof) should be used to guide any decision made with regard to whether a particular agency qualifies as an arm of the state.

Table 1 provides a sample of factors investigated during such analyses, as well as example cases (tending toward those at the Supreme Court level, unless particularly suited to or necessary for description of the factor), rather than an exhaustive list of exact items. This is primarily due to the ever-changing and ever-increasing nature of this type of scrutiny. Over the years of development, the factors have been used individually, blended and classified in a broader category, or even disregarded altogether. Some of the items included in Table 1 are used less often than others, or they may be grouped together with several others for purposes of analysis. Of course, the court may also determine yet another factor or factors to include, or another way to consider the factors already in use. This differs greatly between the lower courts hearing the cases, and is not approached much differently at the Supreme Court level, which also experiences inconsistency with regard to application.

While the Supreme Court jurisprudence regarding arm of the state analysis has been somewhat limited in comparison, the lower courts have been particularly active in the development of the doctrine. In general, the arm of the state factors utilized by the lower courts can be grouped into five broad categories, including 1) the impact on the state treasury in the instance of a judgment against the state; 2) how state law defines the entity; 3) the degree of state control over the entity; 4) the authority enjoyed by the entity, including fiscal autonomy, and 5) the nature of the functioning of the entity. However, it is at that point where the similarities end.

Although the factors used may fall within these broad categories, the tests utilized at the federal Circuit Court level typically range from two to seven-factor tests, although, this has changed throughout development of the doctrine. At the Circuit Court level, the factors may not necessarily reflect the factors established by the Court in *Mt. Healthy*,\(^{872}\) or even those in *Lake*.

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\(^{872}\) *Doyle*, 429 US 274.
Country Estates, but many times, at least a combination of some of the factors from those decisions apply, potentially differing in the weight situated with each. The phenomenon becomes even more exaggerated at the federal District Court level, as those courts attempt to reconcile the countless factors available to them. Ultimately, this leads to unpredictability, at best, for those litigating Eleventh Amendment cases in federal court. Table 2, below, provides a description of the types of arm of the state tests utilized at the Circuit Court level.

As indicated in Table 2, the First Circuit considers the most factors in making its determination, in contrast with the Second Circuit, which now uses the fewest. In the past, the Second Circuit had been known to utilize those factors set forth in Lake Country. However, over time, application of those six factors has dwindled to just the two indicated above, at least insofar as the court has applied the test to institutions of higher education.

As with the development in the Second Circuit, the Third Circuit also has changed its application over time. In previous years, the Third Circuit applied the nine-factor test, which it unveiled in Urbano v. Board of Managers of N.J. State Prison. Those nine factors included: 1) state law and case law definition of the status and nature of the entity; 2) the impact of a judgment against the entity on the State treasury; 3) whether the entity had the power or funds necessary to satisfy a judgment; 4) whether the entity performed a proprietary or governmental function; 5) the level of autonomy from the State enjoyed by the entity, with regard to its operations; 6) the incorporation status of the entity; 7) the power of the entity to sue and be sued, as well as the power to enter into contracts in its own name; 8) whether the immunity enjoyed immunity from taxation; and 9) whether the State had immunized itself from responsibility over the operations of the entity. As evidenced above, the Third Circuit has now moved toward a three-factor test, including: 1) the source of funding for the entity; 2) the status of the entity under State law; and 3) the entity’s level of autonomy from the State.

873 Lake Country Estates, 440 US 391.
874 Puerto Rico Ports Auth. v M/V Manhattan Prince, 897 F2d 1 (1st Cir. 1990).
876 Pikulin v City University of New York, 176 F3d 598 (2d Cir. 1999).
877 Urbano v Board of Managers of N.J. State Prison, 415 F2d 247 (3rd Cir. 1969).
878 Id.
Table 2. Arm of the State Tests in the U.S. Circuit Courts of Appeals

<table>
<thead>
<tr>
<th>U.S. Circuit*</th>
<th>Categories Included in the Arm of the State Test</th>
</tr>
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<tbody>
<tr>
<td>First Circuit</td>
<td>1) How is the entity referenced in local law and case law;</td>
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<tr>
<td></td>
<td>2) Would a judgment be satisfied from the state treasury;</td>
</tr>
<tr>
<td>(Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)</td>
<td>3) Does the entity perform proprietary or governmental functions;</td>
</tr>
<tr>
<td></td>
<td>4) What is the entity’s degree of autonomy from the State;</td>
</tr>
<tr>
<td></td>
<td>5) Does the entity have the authority to sue and be sued and enter into contracts;</td>
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<tr>
<td></td>
<td>6) Is the entity’s property immune from taxation; and</td>
</tr>
<tr>
<td></td>
<td>7) Has the State insulated or immunized itself from responsibility for the entity’s operations?</td>
</tr>
<tr>
<td>Second Circuit</td>
<td>1) To what extent would the State be responsible for satisfying a judgment against the entity; and</td>
</tr>
<tr>
<td>(Connecticut, New York, Vermont)</td>
<td>2) What is the degree of supervision exercised by the State over the entity?</td>
</tr>
<tr>
<td>Third Circuit</td>
<td>1) What is the source of funding, and would satisfaction of a judgment come from the State treasury;</td>
</tr>
<tr>
<td>(Delaware, New Jersey, Pennsylvania, Virgin Islands)</td>
<td>2) What is the status of the entity under state law; and</td>
</tr>
<tr>
<td></td>
<td>3) What is the degree of autonomy from state regulation enjoyed by the entity?</td>
</tr>
<tr>
<td>Fourth Circuit</td>
<td>1) Would the state treasury be responsible for satisfaction of a judgment;</td>
</tr>
<tr>
<td>(Maryland, North Carolina, South Carolina, Virginia, West Virginia)</td>
<td>2) Does the entity exercise a significant degree of autonomy from the State;</td>
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<tr>
<td></td>
<td>3) Is the entity focused primarily on local or statewide concerns; and</td>
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<tr>
<td></td>
<td>4) How is the entity treated by the State courts?</td>
</tr>
<tr>
<td>Fifth Circuit</td>
<td>1) Do state law and case law characterize the entity as an arm of the state;</td>
</tr>
<tr>
<td>(Louisiana, Mississippi, Texas)</td>
<td>2) What is the source of funds for the entity;</td>
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<tr>
<td></td>
<td>3) What is the degree of local autonomy enjoyed by the entity;</td>
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<td></td>
<td>4) Is the entity concerned primarily with local, rather than Statewide issues;</td>
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<tr>
<td></td>
<td>5) Does the entity have the authority to sue and be sued in its own name; and</td>
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<td></td>
<td>6) Does the entity have the right to hold and use property?</td>
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<tr>
<td>Sixth Circuit</td>
<td>1) Would the State be responsible for a judgment against then entity;</td>
</tr>
<tr>
<td>(Kentucky, Michigan, Ohio, Tennessee)</td>
<td>2) How is the entity defined in state law;</td>
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<tr>
<td></td>
<td>3) What is the level of control exerted by the State on the entity; and</td>
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<tr>
<td></td>
<td>4) What is the source of funding for the entity?</td>
</tr>
<tr>
<td>Seventh Circuit</td>
<td>1) Would a judgment against the entity deplete the State treasury;</td>
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<tr>
<td>(Illinois, Indiana, Wisconsin)</td>
<td>2) Does the entity have the authority to sue and be sued in its own name;</td>
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<tr>
<td></td>
<td>3) Does the entity perform an essential governmental function or a proprietary function; and</td>
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<tr>
<td></td>
<td>4) Does the entity enjoy a substantial amount of political independence from the State?</td>
</tr>
<tr>
<td>Eighth Circuit</td>
<td>1) What are the powers and characteristics of the entity under State law;</td>
</tr>
<tr>
<td>(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)</td>
<td>2) What is the relationship between the entity and the State, including its autonomy from the State and the degree of control over its own operations; and</td>
</tr>
<tr>
<td></td>
<td>3) Would a judgment against the entity flow from the state treasury?</td>
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<tr>
<td>Ninth Circuit</td>
<td>1) Would a judgment be satisfied from the state treasury;</td>
</tr>
<tr>
<td>(Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington)</td>
<td>2) Does the entity perform central governmental functions;</td>
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<td></td>
<td>3) Does the entity have the authority to sue and be sued;</td>
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<td></td>
<td>4) Does the entity have power to take property in its own name or just that of the State; and</td>
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<tr>
<td></td>
<td>5) What is the corporate status of the entity?</td>
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<tr>
<td>Tenth Circuit</td>
<td>1) What is the level of State control over the entity;</td>
</tr>
<tr>
<td>(Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)</td>
<td>2) What is the designation of the entity under State law;</td>
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<tr>
<td></td>
<td>3) What are the State court interpretations of its law;</td>
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<td></td>
<td>4) What is the level of fiscal independence from the State enjoyed by the entity; and</td>
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<tr>
<td></td>
<td>5) What is the liability of the State treasury for any judgments against the entity?</td>
</tr>
<tr>
<td>Eleventh Circuit</td>
<td>1) How is the entity defined in State law;</td>
</tr>
<tr>
<td>(Alabama, Florida, Georgia)</td>
<td>2) What degree of control does the State maintain over the entity;</td>
</tr>
<tr>
<td></td>
<td>3) What is the source of funds for the entity; and</td>
</tr>
<tr>
<td></td>
<td>4) Who is responsible for judgments against the entity?</td>
</tr>
<tr>
<td>D.C. Circuit</td>
<td>1) How is the entity characterized in State law;</td>
</tr>
<tr>
<td>(Washington, D.C.)</td>
<td>2) What is the liability of the State treasury for judgments against the entity?</td>
</tr>
<tr>
<td></td>
<td>3) What is the source of funds for the entity;</td>
</tr>
<tr>
<td></td>
<td>4) Does the entity have the authority to generate its own funds, such as through issuance of bonds;</td>
</tr>
<tr>
<td></td>
<td>5) What degree of control does the State maintain over the entity; and</td>
</tr>
<tr>
<td></td>
<td>6) What is the source of funds for the entity?</td>
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</tbody>
</table>

*Bold indicates Circuit Headquarters
In developing the test in the Fourth Circuit, the Court of Appeals indicated that, even though it set forth four factors, the inquiry was “not necessarily limited to” those factors. In making that statement, the court did not provide any additional clarification. The Fifth and Sixth Circuits utilize six and four factor tests, respectively, with the Sixth Circuit indicating that it holds out consideration of the State Treasury factor as more weighty, due to precedent. The Seventh, Eighth, and Ninth Circuits apply tests containing differing combinations of the broad categories mentioned above.

Historically, the Tenth Circuit applied a two-factor test, however, it reconsidered the issue recently, coming up with a new method of evaluation, resulting in the factors listed in Table 2 above. The Eleventh Circuit has consistently applied the four-factor test above for some time, and the D.C. Circuit utilized a six-factor test based in large part upon Lake Country. In analyzing the cases, there does not appear to be a clear trend with regard to moving toward a single test for all Circuits. What is clear, however, is that consistent growth and increasing combinations of factors for analysis is likely. Although some of the factors are used by all circuits and the Supreme Court, such as the State Treasury Factor, the courts continue to differ in their methods of analysis.

Arm of the State Analysis Specific to Higher Education Case Law

The information above is particularly important when investigated in its relation to public institutions of higher education. Such institutions have, for the most part, been favorably adjudicated to enjoy Eleventh Amendment immunity as arms of the State. To

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880 Ram Ditta v Maryland National Capital Park & Planning Commission, 822 F2d 456, 457 (4th Cir. 1987).
881 McDonald v Board of Miss. Levee Commissioners, 832 F2d 901 (5th Cir. 1987); see Richardson v Southern University, 118 F3d 450 (5th Cir. 1997).
882 S.J. v Hamilton County, 374 F3d 416 (6th Cir. 2004).
883 Benning v Board of Regents of Regency Univs., 928 F2d 775 (7th Cir. 1991).
884 Gorman v Easley, 257 F3d 738 (8th Cir. 2001); see Trevelen v University of Minnesota, 73 F3d 816 (8th Cir. 1996); Hadley v North Ark. Cnty. Tech. Coll., 76 F3d 1437 (8th Cir. 1996); Greenwood v Ross, 778 F2d 448 (8th Cir. 1985).
885 Mitchell v. Los Angeles, 861 F2d 198.
886 Unified Sch. Dist. No. 480 v Epperson, 583 F2d 1118 (10th Cir. 1978).
888 Tuveson v Florida Governor's Council on Indian Affairs, Inc., 734 F2d 730 (11th Cir. 1984); see Miccosukee Tribe of Indians of Florida v Florida State Athletic Commission, 226 F3d 1226 (11th Cir. 2000).
that end, they can rely on stare decisis to avoid re-determination of that issue (pending the circumstances behind that decision have not experienced substantial alteration).

Such alterations may include anything from operational to organizational structure modifications. As the issue is well-established to be considered on a case-by-case basis (due to the wide variety of finance, origin, and governance structures inherent in university systems), such a change (for instance, the addition or subtraction of a governing board or other oversight body) can have very far-reaching implications for the level of immunity enjoyed by the institution.\textsuperscript{890}

When applying the arm of the state doctrine to determine whether a public institution is protected under the Eleventh Amendment, an institution can be entitled to protection if the state is the “real party in interest.”\textsuperscript{891} This element is particularly important in the comparison of public universities to public community colleges. As community colleges have typically been viewed as political subdivisions, and thus not reflecting the State as being the real party in interest, they have historically not enjoyed the level of immunity protection provided to those entities that have been deemed arms of the state. Further, although this study is primarily focused on the Eleventh Amendment jurisprudence of the Supreme Court, it is necessary to consider the lower courts in this discussion, as the majority of the development of the arm of the state doctrine has occurred at that level. For that reason, it is also extremely difficult to arrive at concrete determinations or solutions regarding the issue.

A number of multi-factor tests have been used to apply the arm of the state analysis to public colleges and universities. In \textit{Sherman v. Curators of the University of Missouri}, the court granted immunity after the two-prong test of autonomy level and whether the funds required to pay an award would have to come from the state.\textsuperscript{892} In another situation, however, Clemson Agriculture College (now Clemson University) was denied immunity due to its funding sources, power to enter into contracts, power to buy and hold property, power to sue and be sued, and ability to accept gifts in its own name.\textsuperscript{893}

\textsuperscript{890} Beckham, 27 Stetson L Rev (cited in note 10).
\textsuperscript{891} Cosgrove, Grundy, and Heffernan, 16 JC & UL at 155 (cited in note 147).
\textsuperscript{892} 16 F3d 860 (8th Cir 1994).
\textsuperscript{893} Hopkins, 221 US 636.
While the autonomy of a university from the state may endanger a claim to immunity, there have been cases where universities with constitutionally recognized autonomy have been granted immunity. The University of Minnesota was protected due to the language of the state constitution deeming it an instrumentality of the state.\textsuperscript{894} The University of Wyoming received a similar grant of immunity based upon statutory language describing the institution.

\textit{Skehan v. State System of Higher Education} saw a state system of higher education in Pennsylvania analyzed with a multi-factor test.\textsuperscript{895} The court concluded the system was a state agency, which was entitled to protection under the Eleventh Amendment. The system was distinguished from the state-related and state-aided institutions in Pennsylvania (which were both found to exercise proprietary functions) due to the fact it performed essential governmental functions and objectives.\textsuperscript{896}

As evidenced by the instances above, it is necessary to periodically consider the elements behind these decisions to determine the current status of the arm of the state doctrine, as applied to public institutions of higher education. Although, the entire range of categories and factors was discussed in the general section, there are certain categories that are of more major implication when related to public institutions of higher education. These include the impact on the State treasury and source of funding, the reference to the entity under state law, the level of state control exerted on the institution, the level of autonomy enjoyed by the institution, and the state versus local purposes of the institution.

First and foremost, a review with regard to the current status of the State Treasury factor must take place. As in many cases, this has effectively been the primary, if not the only, decision point necessary to the analysis, its application to public institutions of higher education is particularly significant.\textsuperscript{897} Discussion of the state treasury factor must be informed by the Court’s decision in \textit{Regents of the University of California v. Doe}.\textsuperscript{898} In that case, the Court acknowledged that even though a judgment would be satisfied out of the State Treasury, the essential point is the potential legal liability of the entity, rather than simply its ability (or lack thereof) to require a third party to satisfy a judgment awarded against it. In other words, even

\begin{footnotes}
\footnotetext{894} Walstad, 442 F2d 634.
\footnotetext{895} 815 F2d 244 (3rd Cir 1994).
\footnotetext{896} Id.
\footnotetext{897} Hess, 513 US 30.
\footnotetext{898} Doe, 519 US 425.
\end{footnotes}
though a third party may indemnify a state entity, the Eleventh Amendment still serves to protect the State from liability for the actions of that state entity.

With regard to the State treasury, public institutions of higher education pose an interesting case in point. There is a wide-ranging differential between such institutions, as some are completely dependent upon state appropriations for their existence, while others are able to supplement, to a great extent, their appropriated funds with those from other sources. In turn, many universities are very much subject to state rules, regulations, and restrictions on those funds, while others enjoy considerable autonomy. This has led to distinctly different treatment of those institutions in the courts. 899 However, even in cases where the State treasury factor is not met in the manner to warrant treatment as an arm of the state, institutions may still be able to argue, based on other factors, that they are correctly placed under that umbrella.

One such factor is the institution’s treatment under State law. As public institutions typically have references in State law to the status of employees, procurement requirements, policies regarding open records laws or sunshine law requirements, taxes, and the like, this determination can be quite influential to the decision. In addition, if the entity is subject to oversight by a central governing board (such as a University System Board of Governors or Board of Regents) or some other state oversight body (such as a State Education Department or Education Board), and thus, realizes an impact on its control of the institution, courts may find that element enough to meet the demands of an arm of the state. 900 This is particularly true if other elements are also met.

Further, if there is mention regarding individual incorporation of the entity, it may also factor into the decision. 901 A factor closely related to this review of control, and as such, often combined with it in analyses of the issue, an institution’s autonomy from the State also very much impacts its ability to claim status as an arm of the state. 902 One other major factor that is typically a given when it public institutions are being considered is that of state or local purpose. As education is typically viewed as a matter of statewide value, even at the university level, the

899 Sherman, 16 F3d 860; see Kashani, 813 F2d 843; Kovats, 822 F2d 1303.
900 Seibert v State of Oklahoma ex rel The University of Oklahoma Health Sciences Center, 867 F2d 591 (10th Cir. 1989).
901 University of Rhode Island v Chesterton, 2 F3d 1200 (1st Cir. 1993).
902 Id.
courts usually come down on the side of the university meeting this standard in arm of the state analyses.

Although there are specialized cases in which a public institution may not be extended immunity through arm of the state status, this type of determination is rare. However, as mentioned earlier, since this still approached by the courts on a case-by-case basis, it is imperative for public institutions of higher education, and the legal teams and administrators within, to remain aware and cautious in this area of Eleventh Amendment jurisprudence. This is particularly significant if the institution’s circumstances change in one of the major areas listed above.
CHAPTER 6

SUMMARY AND CONCLUSIONS

The direction of this study was to identify and clarify the development of Eleventh Amendment jurisprudence and its corresponding arm of the state doctrine. The process of examination was enabled by two distinct functions of inquiry. First, an historical overview of the evolution of eleventh amendment immunity was presented. Next, the contemporary legal status of public institutions of higher education along the immunity continuum was assessed through an analysis of the arm of the state doctrine in light of the previously discussed evolution. Chapter Six revisits the methodology and procedures of the study, extrapolates conclusions from the analysis and synthesis of relevant case law, suggests guidelines for administrative practice, and identifies issues warranting further investigation.

Summary of Methodology and Procedures

The primary basis for conducting this research was an historical-legal approach and reasoning by analogy. A historical overview of the evolution of the Eleventh Amendment, as well as its specific relationship to public institutions of higher education, was presented, and case law evidencing this relationship was examined. Historically, judges have viewed the law through the eyes of their predecessors, thus continually adapting legal principles to the changing needs of society. This concept of perpetual transformation represents the driving force behind the evolution of the issue at hand, and generates the need for further investigation.

The first research question addressed the historic evolution of Eleventh Amendment immunity in federal courts. An historical overview of the Eleventh Amendment was presented, and case law evidencing this evolution was examined. This took place through the use of the

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primary and secondary sources mentioned above. Accordingly, the constitutional theory underlying Eleventh Amendment jurisprudence was explored, followed by an in-depth analysis of the case law contributing to the sovereign immunity doctrine. A chronology of the federal case law tied to Eleventh Amendment jurisprudence, as well as the types of claims, was detailed and analyzed. The first section outlines the advantages and disadvantages of these decisions, explores the Court’s recent abrogation doctrine and various legislative alternatives, and investigates other remedies available to those hoping to pursue an Eleventh Amendment cause of action.

The second research question examined the development of the arm of the state doctrine, particularly as it related to public institutions of higher education. An overview of the development of the doctrine was presented, and case law evidencing this evolution was examined. As in the first section, primary and secondary resources were used for this analysis, and specific development of Eleventh Amendment case law specific to higher education, and how public institutions of higher education are impacted by the arm of the state doctrine was investigated. As judges have historically aimed to view the law through the eyes of their predecessors and legal principles continue to be retested and adapted to the changing needs of society, American jurisprudence is shaped. This continual process takes place through an interpretation of the facts in light of a re-examination of the law. Through focusing on such methods, this analysis sought to develop a comprehensive understanding of the relationship between the arm-of-the-state doctrine and public institutions of higher education, as well as the direction of case law which continues to shape the area.

The body of knowledge gathered through the above research questions provides the basis for the conclusions of the study, which will serve to develop an understanding of the legal implications of the relationship between Eleventh Amendment immunity and public institutions of higher education. Utilizing Levi’s three-phase sequence of legal reasoning, this section will examine the legal principles addressing the application of the Eleventh Amendment, specifically as they relate to public institutions of higher education. As stated by Levi:

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen
between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.  

At this point, judicial reasoning based on prior example may be lacking appropriateness in certain instances, due to the increase in exceptions to the legal concept, and new questions evolve regarding appropriateness and viability of applying previous decisions to the current application of the legal concept. As Cardozo wrote, “Cases do not unfold their principles for the asking… The instance cannot lead to a generalization till (sic) we know it as it is.” Investigating the research questions in this analysis allowed for exploration and development of an understanding of the legal implications of the relationship between Eleventh Amendment immunity and public institutions of higher education.

In the conceptual framework embraced for the conduct of this research, Rebell and Block examine judicial activism in the realm of educational policymaking. Judicial activism is a construct developed to explain increased intervention by the federal courts in social policy realms, including education, which had previously been almost the exclusive purview of the individual states. Rebell and Block explain the theory as “judicial involvement in the enforcement, if not in the creation, of basic rights” that can be “attributed to the expansion of government activities in the welfare state era,” which “has simultaneously led to an increase in regulations with concomitant judicial review, and to an easing of traditional limitation of court jurisdiction (e.g., standing rules and doctrines of justiciability).”

The framework constructed by Rebell and Block is divided into two primary areas, namely legitimacy and capacity. For purposes of the study, legitimacy is defined as being the proper role of the Court as set forth in the separation of powers language within the Constitution. As stated by Rebell and Block, “to the extent that courts decide issues in terms of ‘principles,’ they are acting within the proper sphere of judicial decision making”… and “to the extent that they decide issues in terms of ‘policies,’ they are, according to the critics, intruding into the legislative or executive domain.”

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905 Id.
907 Rebell and Block, Educational Policy Making (cited in note 153).
908 Wilson-Patton, A Legal Study of the Florida ESOL Consent Decree (cited in note 154).
909 Rebell and Block, Educational Policy Making at 3-4 (cited in note 153).
910 Id.
911 Id at 23.
Rebell and Block define a principle as a “statement establishing a right of an individual against the state or another individual; expressed as a general rule that should be enforced whenever applicable, regardless of social welfare consequences, except when it is outweighed by a countervailing principle.”912 The authors developed this further by stating that a strict principle approach “coincides with the views of those who favor a limited judicial role within the separation-of-powers scheme; a broader ‘policy’ approach would be consistent with the view of those who accept more substantial judicial ‘intrusions’ into the policy-making domains of the other branches [of government].”913 With regard to policy, Rebell and Block defined the concept as “a statement concerning collective goals,”914 and noted that:

policy arguments consider the relative importance or desirability of particular social goals, and/or the relative efficiency and desirability of particular methods for achieving such goals. A policy statement is normally expressed in more specific terms than is a principle, and in a particular context it may be subordinated to compelling policy claims that are determined to be better able to serve collective goals more effectively.915

The other factor included in the broad category of legitimacy in the study by Rebell and Block was the level of interest representation, which they defined as “the extent to which the parties for whom lawyers speak are sufficiently representative of all those interests likely to be affected by a court order.”916 In furtherance of this concept, Rebell and Block note that in courts participating in deliberations impacting policy, the “legitimacy of their actions is clearly undermined… if a limited number of litigants speak only for their particular interests and the courts receive no direct input concerning the perspectives or needs of the majority of citizens who might be affected by a wide-ranging decree.917 For reasons associated with Rebell and Block’s study conclusions, as well as appropriateness to this study, the present researcher focused primarily on the legitimacy portion of the framework, with particular emphasis on the principle/policy dichotomy, as the determination of whether the Court was acting in the proper role or sphere of responsibility served to better inform the direction of this study with regard to the scheme of judicial activism investigated than did the remaining constructs.

912 Id at 23.
913 Id at 7.
914 Id at 24.
915 Id at 24.
916 Id at 9.
917 Id at 9.
Through an examination of such related scholarly critique and analysis, the present researcher explored the case law of Eleventh Amendment immunity, in consideration of the judicial activism framework. Through combining the applicable portions of Rebell and Block’s theoretical framework with that of related commentary, it was possible to examine the impact of the judiciary and the construct of judicial activism within the development of higher education policy. The investigation also served to guide and develop the expansion analysis of Eleventh Amendment immunity within the federal courts. Further, the analysis helped to inform the investigation of the relationship between Eleventh Amendment immunity and public institutions of higher education. In doing so, the application of the construct as it related to this study was incorporated into and considered in development of the conclusions.

Conclusions

Following a thorough review of reported decisions, the analysis and synthesis of case law applicable to Eleventh Amendment immunity and the arm of the state doctrine has yielded the following conclusions within the delineated framework of this body of research:

Research Question 1:

What has been the historic evolution of Eleventh Amendment immunity in federal courts?

- The Eleventh Amendment was seldom utilized for protection in arguments before the Court between 1835 and 1864. However, following the Civil War, the number of such cases appearing before the Court began to increase.
- Eleventh Amendment immunity has evolved from an interpretation of diversity jurisdiction to that of state sovereign immunity, ultimately serving to strengthen the status of the state in the federal scheme through judicially-active decisions of the Supreme Court. The actual text of the Eleventh Amendment simply prevents citizens from bringing diversity cases in federal courts against states. However, through atextual interpretation and broad construction, particularly in recent years, the Supreme Court has expanded the reach of the Amendment, and thus the scope of state sovereign immunity, much further than the text provides.
• As ratified during the initial evolutionary period of its historic origins and foundations, the Eleventh Amendment is widely accepted as a response to the Supreme Court’s decision in *Chisholm v. Georgia*, which held that private citizens of one state were able to sue another unconsenting state in federal court, pursuant to Article III of the Constitution, which grants diversity jurisdiction to the federal courts to hear cases between a State and citizens from another State. However, even following the ratification of the Eleventh Amendment, a number of cases were still filed by private citizens against states, but under federal question jurisdiction rather than diversity jurisdiction, based primarily on the reasoning that Eleventh Amendment immunity would not apply if a state was sued by its own citizen in federal court. This type of case makes up the majority of those cases entertained by the Courts during the first evolutionary period.

• During the middle transitional evolutionary period, the type of cases brought under federal question jurisdiction by a citizen against its own state in federal court came to a close due to the Court’s decision in *Hans v. Louisiana*. By reasoning that the passage of the Eleventh Amendment was not necessarily an attempt to amend the original makeup of the Constitution, but rather one to overturn a specific decision that wrongfully applied the tenets within, it was the decision in Hans that enabled the Court to proceed with interpretation beyond that of the literal text of the Eleventh Amendment and thus address the issue from a sovereign immunity perspective. In other words, the issue became whether Article III of the Constitution abrogated state sovereign immunity, and as such, the Court decided it had not. Also decided during this period of evolution was another case providing an exception to immunity, *Ex Parte Young*. The *Ex Parte Young* doctrine holds the Eleventh Amendment does not bar actions in federal court against individual state officers when those actions are seeking a declaratory judgment that the officer is currently violating federal law and an injunction forcing that officer to conform to that federal law. This is of particular importance to institutions of higher education, as in cases of ongoing institutional violation of federal law, the *Ex Parte Young* doctrine allows federal courts to issue an injunction against an individual university administrator to discontinue the violation.
In the last evolutionary period of contemporary federalism and state sovereignty, remaining questions, not addressed by *Hans*, still existed related to abrogation. The first was whether Congress could, in fact, abrogate the immunity of a state through statute, in order to specifically allow a citizen to sue a state in federal court. Another was whether the Eleventh Amendment, which prohibited Congress from abrogating the immunity of a state in federal courts, also extended to that state’s own courts. The first of those questions was ultimately answered in *Seminole Tribe*, which overturned the decision in *Union Gas* (in which the Court found that Commerce Power was so broad as to require Congress’s ability to abrogate immunity), through holding that as the Eleventh Amendment was ratified following passage of the Constitution and thus Article I (under which the Indian Commerce Clause is found), the Amendment served as a limitation on the authority of Congress to waive a state’s immunity under that Article. The Court held that Congress’s authority to abrogate states’ immunity is limited to its enforcement authority under the Fourteenth Amendment, thus resulting in the contemporary phenomenon of litigants wishing to sue a state finding a basis for federal legislation under the Fourteenth Amendment on which to pursue their claim and defeat the Eleventh Amendment defense that will inevitably be proffered by the state. Of course, one year later in *Flores*, the court placed significant limitations on the authority of Congress to abrogate based upon the Fourteenth Amendment enforcement power. In that case, the Court held that the powers of Congress under §5 are limited to enforcement of the actual guarantees of the Fourteenth Amendment (Equal Protection of the laws, Due Process, and the Privileges or Immunities of national citizenship). In doing so, it declared that, in order to be a valid exercise of Fourteenth Amendment enforcement power, specific findings must be made by Congress that the state violated the Constitution. Further, the resulting legislation must be a proportionate response to the violation. Further, in *Kimel* and *Garrett*, the Court determined that Congress had not validly abrogated the state’s immunity for purposes of the ADEA and ADA, respectively. However, in true form to the ever-changing nature of the application of the Eleventh Amendment, as recently as in *Hibbs* and *Lane*, the Court held that Congress did, in fact, have the power to abrogate a state’s immunity for
purposes of the FMLA and Title II of the ADA, respectively.

In reference to the second question above, the Court held in *Alden v. Maine*, that the same principles behind the rationale in *Hans* would prevent Congress from abrogating a state’s immunity in its own courts without consent. Interestingly, as it did in Hans, the Court acknowledged that the text of the Eleventh Amendment does not, in fact, prohibit such suits, but relied on a proposition that sovereign immunity, as a concept, is fundamental to constitutional design and therefore is not open to abrogation by Congress. Later, in *Federal Maritime Commission v. South Carolina State Ports Authority*, the Court also utilized a similar rationale to extend this protection to proceedings before federal agencies, as well.

- Although the Court has certainly experienced shifts in interpretation of legal concept throughout the application of the Eleventh Amendment, it had appeared to become firmly ensconced in the second stage of legal reasoning, due to the level of predictability of the Rehnquist Court in its application of the Amendment and its interpretation of same toward a states’ rights end. However, as has been the case with this particular area of law, it appears as though there may be another shift on the horizon into the third state disintegration of the legal concept. The Court had already begun to find contrary to its states’ rights pursuit, in cases such as *Hibbs* and *Lane*, and with two vacancies on the Court, the future landscape of the application of Eleventh Amendment immunity is, at best, uncertain.

- In devising a relatively consistent pattern of decision-making with respect to the Eleventh Amendment, it would appear, at first glance that the “conservative” majority in such decisions was employing a rather clear principled approach of predictable, non-activist behavior. However, in facilitating the continued expansion of the long-ago implemented trend of atextual interpretation of the Eleventh Amendment, along with a tendency to dabble into the relative importance or desirability of particular social goals and means by which to accomplish same (most notably through intrusions into the policy-making domains of the legislative branch, primarily backed by a states’ rights agenda), the current Court has exhibited increasingly dynamic judicially active behavior.
• As the number of Eleventh Amendment-related cases being brought for or against institutions of higher education continue to rise, it is of particular importance for administrators, faculty, and legal counsel to remain aware of the implications that the Amendment may present. In the majority of cases, as long as an institution can be determined to be an arm of the state, it will likely enjoy immunity from lawsuit, pending the situation does not fall within one of the following exceptions to that protection: abrogation by Congress, waiver, or the Ex Parte Young doctrine.

• Most public institutions of higher education currently enjoy protection under Eleventh Amendment immunity, and thus plaintiffs may not collect monetary damages against them in federal court. However, university personnel should remain aware that injunctive relief may be sought (for instance, allowing a former faculty member to enjoin a product of his from being published) and some actions may still be pursued in state court instead if a similar state law exists. For instance, some of the actions that could be taken by faculty members to pursue discrimination claims against their state universities include suing the institutions for injunctive relief for ADA or ADEA claims or pursuing those same claims to state court avenues, pursuing monetary damages through the Equal Employment Opportunity Commission (EEOC) working on behalf of the individual faculty member, negotiating built-in protections (such as binding arbitration) into a collective bargaining agreement, and lobbying state legislatures to waive the state’s immunity with regard to certain claims. As illustrated in this manuscript, just some of the wide array of laws that have been or may become impacted by the Eleventh Amendment are as follows: the Age Discrimination in Employment Act, the Equal Pay Act, the False Claims Act, the Copyright Act, the Americans with Disabilities Act, the Fair Labor Standards Act, Titles VI and VII of the Civil Rights Act of 1964, and the Family Medical Leave Act.

• Even when well-versed regarding the current legal landscape, it is imperative that administrators, faculty, and legal counsel remain similarly informed as to actions that might be taking place outside of case law that could potentially impact the liability of institutions of higher education. For instance, even though recent Supreme Court decisions have held public institutions to be immune from certain federal intellectual property laws, there are many times that bills are introduced in Congress to eliminate
the protection enjoyed by institutions in this area. Particularly during times of Congress’s reauthorization of the Higher Education Act, such attempts can be numerous. Higher education lobbying groups are typically involved in negotiations on such bills, and will thus provide advocacy for institutions of higher education, but it is still very important for university personnel to stay abreast of the negotiations, should any change to the law occur. Particularly with regard to intellectual property, given the explosion in the use of technology on the campus, university administrators must ensure that public, fair, and comprehensive provisions and policies are established and appropriately published, not only in catalog form, but also in course materials and employment information. This is also true for contracts (either individual or collective bargaining versions) and faculty handbooks, which should include clear information as to processes related to ownership of work product and criteria for reviews and promotion. University policies and governance processes may also need to be strengthened to ensure that issues for which institutions formerly relied on enforcement through federal law are adequately addressed.

Research Question 2:

What has been the development of the arm of the state doctrine, particularly in its application to public institutions of higher education?

- One of the most significant areas of the relationship between higher education and the Eleventh Amendment is in development of the arm of the state doctrine. A number of multi-factor tests have been used to apply the arm of the state analysis to public colleges and universities. While the autonomy of a university from the state may endanger a claim to immunity, there have been cases where universities with constitutionally recognized autonomy have been granted immunity.

- With regard to the arm of the state doctrine, public institutions of higher education, for the most part, have been favorably adjudicated to enjoy Eleventh Amendment immunity as arms of the State. To that end, they can rely on stare decisis to avoid redetermination of that issue (pending the circumstances behind that decision have not experienced substantial alteration). Such alterations may include anything from operational to organizational structure modifications. As the issue is well-established
to be considered on a case-by-case basis (due to the wide variety of finance, origin, and governance structures inherent in university systems), such a change (for instance, the addition or subtraction of a governing board or other oversight body) can have very far-reaching implications for the level of immunity enjoyed by the institution.

- The tests utilized to determine whether an entity qualifies as an arm of the state or, rather, a political subdivision, have become increasingly more elaborate and complex. This complexity is due primarily to the increased emphasis on privatization, revenue sharing, and decentralization by the states, the expansion of state services, and the emergence of specialized agencies and positions created by the states. It has become increasingly more difficult to immediately categorize state entities as either arms of the state or political subdivisions, so the tests reflect that difficulty. In resolving the difficulties presented in this effort, federal courts have resorted to employing a balancing test to determine applicability of Eleventh Amendment immunity. This test is fact intensive and technical, and uses an ever-increasing range of factors.

- While the Supreme Court still relies heavily its own precedent for arm of the state determination, it does consider each instance on a case by case basis. The case law in this area is not easily reconciled, due to the case-by-case nature of the analysis and the multitude of factor combinations any given court could utilize. Further, the Supreme Court’s consideration of arm of the state is not as developmentally active as that at the lower federal court level. As such, it was necessary to consider case law at the latter level for purposes of the Arm the State portion of the analysis. The factors currently utilized, as well as those that are continuously created, at the lower court level are numerous. They also tend to overlap across broad categories. Further complicating the issue, the factors inherently contain a myriad of ways in which they could be applied. Currently, the factors utilized at the lower federal court level range from two to seven factors of analysis (and at times have been up to nine or more), but can generally be placed into the following five broad categories: 1) the impact on the state treasury in the instance of a judgment against the state; 2) how state law defines the entity; 3) the degree of state control over the entity; 4) the authority enjoyed by
the entity, including fiscal autonomy, and 5) the nature of the functioning of the entity.

- When applying the arm of the state doctrine to determine whether a public institution is protected under the Eleventh Amendment, an institution can be entitled to protection if the state is the real party in interest. This element is particularly important in the comparison of public universities to public community colleges. As community colleges have typically been viewed as political subdivisions, and thus not reflecting the State as being the real party in interest, they have historically not enjoyed the level of immunity protection provided to those entities that have been deemed arms of the state.

- As evidenced by the instances above, it is necessary to periodically consider the elements behind these decisions to determine the current status of the arm of the state doctrine, specifically as applied to public institutions of higher education. Although, the entire range of categories and factors was discussed in the general section, there are certain categories that are of more major implication when related to public institutions of higher education. These include the impact on the State treasury and source of funding, the reference to the entity under state law, the level of state control exerted on the institution, the level of autonomy enjoyed by the institution, and the state versus local purposes of the institution.

- The Court’s awareness of federalism and the delicate balance in federal-state relations is evident in what is probably the most important of the criteria utilized in the arm of the state analysis, that is, the denial of federal jurisdiction over those cases by individuals for whom damages would be satisfied out of the state treasury. This relates back all the way to an original force behind ratification of the Amendment, in that the states, at the time, were concerned regarding outstanding financial obligations stemming from debts incurred during the Revolutionary War, and desired to remain protected from suits brought under Article III.

- The pursuit of for-profit endeavors and privatization of certain components of state universities may impact the coverage and applicability of Eleventh Amendment immunity that such institutions have historically enjoyed protection under. Such alteration of the balance between public versus private entity may impact a particular
public institution of higher education’s placement along the arm of the state continuum, and thus may inadvertently remove the defense of Eleventh Amendment immunity as an option. It is imperative for such issues to be considered by university administrators in the decision-making process.

- As public institutions of higher education continue to strive for more autonomy in their operations and governance structures continually experience transformational change, even the slightest modification may have quite a detrimental impact on the arm of the state status of the institution. If such an alteration impacts one of the five primary categories mentioned above, particularly the state treasury factor, the institution may be unknowingly opening itself up to liability. It is imperative that university personnel remain aware of the impacts that such changes may have, and weigh the benefits versus disadvantages inherent in the decision.

**Recommendations for Further Study**

The following issues arose from the conduct of this study, and merit further consideration:

- An exhaustive examination of the *Ex Parte Young* Doctrine, as specifically applied to public institutions of higher education at lower federal court levels, should be conducted. As the immediate study focused primarily on Supreme Court-level decisions, such an examination would serve useful, when combined with the information gathered in this study, to provide a comprehensive understanding of the development and application of the *Ex Parte Young* Doctrine.

- Similarly, an extensive investigation of waiver in Eleventh Amendment immunity, as specifically applied to public institutions of higher education at lower federal court levels, should be conducted. Again, as the immediate study focused primarily on Supreme Court-level decisions, such information would prove useful when combined with the information gathered during this study, to develop an overall understanding and comprehension of waiver in Eleventh Amendment immunity at all court levels.

- Detailed research at the federal Circuit Court level should take place, with a primary focus on institutions of higher education, with regard to the evolution of the arm of
the state doctrine and decisional factors associated with it. Although investigation of
the arm of the state doctrine was a significant portion of this study, the scope of the
study limited the detail to which analysis could take place regarding the evolution of
the arm of the state doctrine in any particular federal circuit court. When combined
with the information included in this study, such an analysis would serve complete
the comprehensive understanding of consistency and development of applicability
within the doctrine.

- Empirical research and analysis of the individual decisional behavior of one or more
Supreme Court Justices involved in Eleventh Amendment cases in higher education
should be conducted. Through methods, such as utilizing systematically coded
judicial opinions, trends with regard to a particular Justice’s record, predictability, or
judicially-active conduct, could be ascertained, explored, and compared with that of
other Justices. As Eleventh Amendment immunity continues to evolve, such analysis
could serve to be very useful in anticipating a potential shift in the legal concept.

- An investigation similar to this study of the evolution and expansion of Eleventh
Amendment immunity, but with particular emphasis on community colleges or K-12
education, should take place. Although this study focused primarily on the Eleventh
Amendment as it applied to higher education, the implications of the related case law
do not rest just in that area. As noted in the study, the Eleventh Amendment also
remains inextricably tied to other sectors of education, particularly when considering
the arm of the state status as it related to political subdivisions. Such studies are
necessary for educators to fully comprehend all aspects of Eleventh Amendment
immunity in the field of education.
APPENDIX A

DEFINITION OF TERMS

**Abrogate** – “To annul, cancel, revoke, repeal, or destroy. To annul or repeal an order or rule issued by a subordinate authority; to repeal a former law by legislative act, or by usage.” 918

**Adjudication** – “The legal process of resolving a dispute.” 919

**Admiralty Law (Maritime Law)** – “That which the Congress has enacted or the Federal courts, sitting in admiralty, or in the exercise of their maritime jurisdiction, have declared and would apply…. That system of law which particularly relates to marine commerce and navigation, to ships and shipping, to seamen, to the transportation of personal and property by sea, and to marine affairs generally.” 920

**Affirm** – “To ratify, uphold, approve, make firm, confirm, establish, reassert…. In the practice of appellate courts, to affirm a judgment, decree, or order, is to declare that it is valid and right and must stand as rendered below; to ratify and reassert it; to concur in its correctness and confirm its efficacy.” 921

**Animus** – “Mind; Soul; intention; disposition; design; will; that which informs the body.” 922

**Appellant** – “The party who takes an appeal from one court or jurisdiction to another. Used broadly or nontechnically, the term includes one who sues out a writ of error.” 923

**Appellee** – “The party in a cause against whom an appeal is taken; that is, the party who has an interest adverse to setting aside or reversing the judgment. Sometimes also called the

918 Black, Black's at 8.
919 Id at 42.
920 Id at 969.
921 Id at 59.
922 Id at 87.
923 Id at 97.
respondent. It should be noted that a party’s status as appellant or appellee does not necessarily bear any relation to his status as plaintiff or defendant in the lower court.”

**Arbitrary** – “In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone.”

**Arm of the State** – “alter ego” of the state, determined by application of a number of factors determining whether a state’s “eleventh amendment immunity extends to a particular entity.”

**Array** – “The whole body of persons summoned to serve as jurors, from which the final trial jury is selected. Also, the list of jurors impaneled.”

**Case Law** – “The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law. It includes the aggregate of reported cases that interpret statutes, regulations, and constitutional provisions.”

**Cause of Action** – “The fact or facts which give a person a right to judicial redress or relief against another.”

**Certiorari** – “To be informed of. A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear.”

**Complainant** – “One who applies to the courts for legal redress by filing complaint (i.e. plaintiff). Also, one who instigates prosecution or who prefers accusation against suspected person.”

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924 Id at 98.
925 Id at 104.
926 *College Savings Bank*, 527 US 666.
927 Black, *Black’s* at 109.
928 Id at 216.
929 Id at 221.
930 Id at 228.
931 Id at 285.
Congress – “Formal meeting of delegates or representatives. The Congress of the United States was created by Article I, Section 1, of the Constitution, adopted by the Constitutional Convention on September 17, 1787, providing that ‘All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.’ The first Congress under the Constitution met on March 4, 1789, in the Federal Hall in New York City. The membership then consisted of 20 Senators and 59 Representatives.”

Constitutional Law – “(1) The branch of the public law of a nation or state which treats of the organization, powers and frame of government, the distribution of political and governmental authorities and functions, the fundamental principles which are to regulate the relations of government and citizen, and which prescribes generally the plan and method according to which the public affairs of the nation or state are to be administered. (2) That department of the science of law which treats of constitutions, their establishment, construction and interpretation, and of the validity of legal enactments as tested by the criterion of conformity to the fundamental law. (3) A constitutional law is one which is consonant to, and agrees with, the constitution; one which is not in violation of any provision of the constitution of the particular state.”

Court of Equity – “A court which has jurisdiction in equity, which administers justice and decides controversies in accordance with the rules, principles, and precedents of equity, and which follows the forms and procedure of chancery; as distinguished from a court have the jurisdiction, rules, principles, and practice of the common law. Equity courts have been abolished in all states that have adopted the Rules of Civil Procedure; law and equity actions having been merged procedurally into a single form of civil action.”

Criminal Sanctions – “Punishments attached to convictions of crimes such as fines, restitution, probation and sentences.”

Damages – “A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another…. Damages may be compensatory or punitive according to whether they are awarded as the measure of actual loss.

932 Id at 301.
933 Id at 311.
934 Id at 356.
935 Id at 374.
suffered or as punishment for outrageous conduct and to deter future transgressions. Nominal damages are awarded for the vindication of a right where no real loss or injury can be proved. Generally, punitive or exemplary damages are awarded only if compensatory or actual damages have been sustained.”

**Declaratory Judgment** – “Statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded.”

**Defendant** – “The person defending or denying; the party against whom relief or recovery is sought in an action or suit or the accused in a criminal case.”

**Demurrer** – “An allegation of a defendant, which, admitting the matters of fact alleged by complaint or bill (equity action) to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that, for some reason apparent on the face of the complaint or bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer. The formal mode of disputing the sufficiency in law of the pleading of the other side. In effect, it is an allegation that, even if the facts as stated in the pleading to which objection is taken be true, yet their legal consequences are not such as to put the demurring party to the necessity of answering them or proceeding further with the cause.”

**Dicta** – “Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court’s opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent.”

**Diversity of Citizenship (Diversity Jurisdiction)** – “A phrase used with reference to the jurisdiction of the federal courts, which, under U.S. Const. Art. III, §2, extends to cases between citizens of different states, designating the condition existing when the party on one side of a lawsuit is a citizen of one state, and the party on the other side is a citizen of another state, or

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936 Id at 390.
937 Id at 409.
938 Id at 419.
939 Id at 432-433.
940 Id at 454.
between a citizen of a state and an alien. The requisite jurisdictional amount must, in addition, be met.”

Due Process Clause – “Two such clauses are found in the U.S. Constitution, one in the 5th Amendment pertaining to the federal government, the other in the 14th Amendment which protects persons from state actions. There are two aspects: procedural, in which a person is guaranteed fair procedures and substantive which protects a person’s property from unfair governmental interference or taking. Similar clauses are in most state constitutions.”

Due Process of Law – “Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.”

Due Process Rights – “All rights which are of such fundamental importance as to require compliance with due process standards of fairness and justice. Procedural and substantive rights of citizens against government actions that threaten the denial of life, liberty, or property.”

Ejectment – “At common law, this was the name of a mixed action… which lay for the recovery of the possession of land, and for damages for the unlawful detention of its possession…. The common law action for ejectment has been materially modified by statute in most states and may come under the title of action to recover possession of land, action for summary process, action for eviction, or forcible entry and detainer action. Ejectment is an action to restore possession of property to the person entitled to it. Not only must the plaintiff establish a right to possession in himself, but he must also show that the defendant is in wrongful possession. If the defendant has only trespassed on the land, the action is for trespass.”

Eleventh Amendment – “The Amendment to the U.S. Constitution, added in 1798, which provides that the judicial power of the U.S. shall not extend to any suit in law or equity,

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941 Id at 477.
942 Id at 500.
943 Id at 500.
944 Id at 501.
945 Id at 516-517.
commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." 946

**Eminent Domain** – “The power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character…. The Constitution limits the power to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken. The process of exercising the power of eminent domain is commonly referred to as “condemnation,” or “expropriation.” 947

**Equitable Relief** – “That species of relief sought in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance instead of money damages.” 948

**Estop** – “To stop, bar, or impede; to prevent; to preclude.” 949

**Estoppel** – “means that party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly…. A principle that provides that tan individual is barred from denying or alleging a certain fact or state facts because of that individual’s previous conduct, allegation, or denial.” 950

**Ex Parte** – “On one side only; by or for one party; done for, in behalf of, or on the application of one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested. Ex parte, in the heading of a reported case, signifies that the name following is that of the party upon whose application the case is heard.” 951

**Explicit** – “Not obscure or ambiguous, having no disguised meaning or reservation.” 952

**Express** – “Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference.” 953

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946 Id at 521.
947 Id at 523.
948 Id at 539.
949 Id at 551.
950 Id at 551.
951 Id at 576.
952 Id at 579.
953 Id at 580.
Federal Courts – “The courts of the United States (as distinguished from state, county, or city courts) as created either by Art. III of U.S. Const., or by Congress.”

Habeas Corpus – “The name given to a variety of writs…having for their object to bring a party before a court or judge….The primary function of the writ is to release from unlawful imprisonment. The office of the writ is not to determine prisoner’s guilt or innocence, and only issue which it presents is whether prisoner is restrained of his liberty by due process.”

Immunity – “Freedom or exemption from penalty, burden, or duty.”

Implied – “This word is used in law in contrast to express; i.e. where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.”

Injunction – “A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A prohibitive, equitable remedy issued or granted by a court at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter from doing some act which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law.”

In personam action – “Against the person. Action seeking judgment against a person involving his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property (i.e. in rem).”

In rem action – “A technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be in personam. In rem proceedings encompass any action brought against person in which essential purpose of suit is to determine title to or affect interests in specific property located within territory over which court has jurisdiction.”

954 Id at 610-611.
955 Id at 709.
956 Id at 751.
957 Id at 754.
958 Id at 784.
959 Id at 791.
960 Id at 793.
Interlocutory – “Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.”

Interlocutory Injunction – “Interlocutory injunctions are those issued at any time during the pendency of the litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the time that the court will be in a position to either grant or deny permanent relief on the merits.”

Interpretation – “The art or process of discovering and ascertaining the meaning of a statute, will, contract, or other written document. The discovery and representation of the true meaning of any signs used to convey ideas.”

Judicial Activism – A construct developed to explain increased intervention by the federal courts in social policy realms, including education, that had previously been almost the exclusive purview of the individual states; “Judicial involvement in the enforcement, if not in the creation, of basic rights” that can be “attributed to the expansion of government activities in the welfare state era,” which “has simultaneously led to an increase in regulations with concomitant judicial review, and to an easing of traditional limitation of court jurisdiction (e.g., standing rules and doctrines of justiciability).”

Jurisdiction – “A term of comprehensive import embracing ever kind of judicial action. It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties.”

Jurisprudence – “The philosophy of law, or the science which treats of the principles of positive law and legal relations.”

Justiciable – “Matter appropriate for court review.”

Litigation – “A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law.”
Mandamus – “We command. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been legally deprived…. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.”

Manifest Oppression – “Evident” “act of cruelty, severity, unlawful exaction, or excessive use of authority…. The misdemeanor committed by a public officer, who under color of his office, wrongfully inflicts upon any person any bodily harm, imprisonment, or other injury.”

Occupy – “To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in; to take or hold possession. Actual use, possession, and cultivation.”

Patent – “A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals. The instrument by which a state or government grants public lands to an individual. A grant of right to exclude others from making, using or selling one’s invention and includes right to license others to make, use or sell it.”

Patent Infringement – “The unauthorized making, using or selling of an invention covered by a valid claim of a patent during the term or extended term of the patent.”

Pendent Jurisdiction – “A principle applied in federal courts that allows state created causes of action arising out of the same transaction to be joined with a federal cause of action even if diversity of citizenship is not present.”

Per Curiam Opinion – “By the court. A phrase used to distinguish an opinion of the whole court from an opinion written by any one judge. Sometimes it denotes an opinion written
by the chief justice or presiding judge, or to a brief announcement of the disposition of a case by court not accompanied by a written opinion.”

**Petitioner** – “One who presents a petition to a court, officer, or legislative body. The one who starts an equity proceeding or the one who takes an appeal from a judgment. In legal proceedings commenced by petition, the person against whom action or relief is prayed, or who opposed the prayer of the petition, is called the respondent.”

**Plaintiff** – “A person who brings an action; the party who complains or sues in a civil action and is so named on the record. A person who seeks remedial relief for an injury to rights; it designates a complainant…. The prosecution in a criminal case.”

**Plurality Opinion** – “An opinion of an appellate court in which more justices join than in any concurring opinion (though not a majority of the court) is a plurality opinion as distinguished from a majority opinion in which a larger number of the justices on the panel join than not.”

**Precedent** – “An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.”

**Promissory Estoppel** – “That which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promise, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise. Elements of a promissory estoppel are a promise clear and unambiguous in its terms, reliance by the party to whom the promise is made, with that reliance being both reasonable and foreseeable, and injury to the party asserting the estoppel as a result of his reliance.”

**Prospective** – “In the future; looking forward; contemplating the future.”

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976 Id at 1136.
977 Id at 1146.
978 Id at 1150.
979 Id at 1154.
980 Id at 1176.
981 Id at 1214.
982 Id at 1222.
Regulations – “Such are issued by various governmental departments to carry out the intent of the law. Regulations are not the work of the legislature and do not have the effect of law in theory. In practice, however, because of the intricacies of judicial review of administrative action, regulations can have an important effect in determining the outcome of cases involving regulatory activity.”

Relief – “Deliverance from oppression, wrong, or injustice. In this sense, it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, injunction, or the reformation or rescission of a contract.”

Remand – “To send back. The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some other further action.”

Remedy – “The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.”

Removal of causes – “The transfer of a case from one court to another; e.g. from one state court to another, or from state court to federal court. Commonly used of the transfer of jurisdiction and cognizance of an action commenced but not finally determined, with all further proceedings therein, from one trial court to another trial court. More particularly, the transfer of a cause of action, before trial or final hearing thereof, from a state court to the United States District Court, under 28 U.S.C.A. §1441 et seq.”

Res – “In civil law, a thing; and object.”

Respondent – “In equity practice, the party who makes an answer to a bill or other proceeding in equity. In appellate practice, the party who contends against an appeal; the party against whom the appeal is taken, i.e. the appellee. In the civil law, one who answers or is security for another.”

983 Id at 1286.
984 Id at 1292.
985 Id at 1293.
986 Id at 1294.
987 Id at 1296.
988 Id at 1304.
989 Id at 1312.
Retrospective – “Looking backward; contemplating what is past; having reference to a state of things existing before the act in question.”

Reverse – “To overthrow, vacate, set aside, make void, annul, repeal, or revoke; as, to reverse a judgment, sentence or decree of a lower court by an appellate court, or to change to the contrary or to a former condition.”

Right – “As a noun, and taken in an abstract sense, means justice, ethical correctness, or consonance with the rules of law or the principles of morals. As a noun, and taken in a concrete sense, a power, privilege, faculty, or demand, inherent in one person and incident upon another. As an adjective, the term … means just, morally correct, consonant with ethical principles or rules of positive law.”

Right of Action – “The right to bring suit; a legal right to maintain an action, growing out of a given transaction or state of facts and based thereon. Right of action pertains to remedy and relief through judicial procedure.”

Seizure – “The act of taking possession of property, e.g. for a violation of law or by virtue of a judgment.”

Sovereign Immunity – “A judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that “the King can do no wrong,” it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment. The immunity from certain suits in federal court granted to states by the Eleventh Amendment to the United States Constitution.”

Stare Decisis – “To abide by, or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb settled point.”

Statute – “A formal written enactment of a legislative body, whether federal, state, city, or county.”

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990 Id at 1317.
991 Id at 1319.
992 Id at 1323-1324.
993 Id at 1325.
994 Id at 1359.
995 Id at 1396.
996 Id at 1406.
997 Id at 1410.
Statutory – “Relating to a statute; created or defined by a statute; required by a statute; conforming to a statute.”

Stay of Execution – “The stopping or arresting of execution on a judgment, that is, of the judgment-creditor’s right to issue execution, for a limited period. This is given by statute in many jurisdictions, as a privilege to the debtor, usually on his furnishing bail for the debt, costs, and interest. Or it may take place by agreement of the parties. Term may also refer to the stopping of the execution of capital punishment, commonly to permit further appeals by defendant.”

Supreme Court – “An appellate court existing in most of the states. In the federal court system, and in most states, it is the highest appellate court or court of last resort. Supreme Court of the United States – The U.S. Supreme Court comprises the Chief Justice of the United States of such number of Associate Justices as may be fixed by Congress. Under that authority, and by virtue of the act of June 25, 1948, the number of Associate Justices is eight.”

Unconstitutional – “That which is contrary to or in conflict with a constitution.”

Venire – “To appear in court. The group of citizens from whom a jury is chosen in a given case. Sometimes used as the name of the writ for summoning a jury, more commonly called a venire facias.”

Writ – “A written judicial order to perform a specified act, or giving authority to have it done, as in a writ of mandamus or certiorari, or as in an original write for instituting an action at common law.”

Writ of Certiorari – “An order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court. If the writ is denied, the court refuses to hear the appeal and, in effect, the judgment below stands unchanged. If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it up to the higher court which has used its discretion to hear the appeal. In the U.S. Supreme Court, a

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998 Id at 1411.
999 Id at 1413.
1000 Id at 1440.
1001 Id at 1525.
1002 Id at 1556.
1003 Id at 1608.
review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore.”

Writ of Error – “A writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, in order that examination may be made of certain errors alleged to have been committed, and that the judgment may be reversed, corrected, or affirmed, as the case may require.”

Yield – “To give up, relinquish, or surrender.”

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1004 Id at 1609.
1005 Id at 1610.
1006 Id at 1616.
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BIOGRAPHICAL SKETCH

Krista Michele Mooney is the daughter of Dr. Dennis Mooney and Mrs. Mary Mooney, and was born in Tallahassee, Florida in 1973. She began her collegiate career as a full-scholarship gymnast at Auburn University, ultimately earning a Bachelor of Arts in Psychology and Juris Doctor from The Florida State University in 1995 and 1998, respectively. While an undergraduate student, she was affiliated with Alpha Delta Pi sorority and served as Captain of the FSU Varsity Cheerleaders, a sport in which she thrice earned All-American honors, and was selected as Most Valuable and Most Dedicated for her contribution to the overall success of the team and its Top-5 national ranking throughout her involvement (1992-1995).

While in law school, she was the first two-term President of the Student Bar Association, Founder of the Presidents’ Council, Chief Judge for the Student Judicial Lower Court, Fifth Circuit Lieutenant Governor of Student Bar Associations for the American Bar Association/Law Student Division, and a Supreme Court Certified Legal Extern with the Leon County Attorney’s Office. She was also involved in numerous other leadership roles, honoraries, and student organizations. Commencing during her third year of law school, under then Dean Paul Lebel, she was employed as the Director of Alumni Development for the FSU College of Law.

In Fall of 1999, she began the Ph.D. program in Higher Education. During the first two years of that program, she held Hardee Center fellowships with the Florida Board of Regents and MGT of America, Inc. For the remainder of the program, she worked full-time, first, for MGT of America, Inc., second, as part of the Guardian ad Litem Transition Team within the Office of the State Courts Administrator under the Supreme Court of Florida, and third, in Academic and Student Affairs for the Board of Governors of the State University System of Florida.