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A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine With Federalism Principles

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A NARROW ELEVENTH AMENDMENT IMMUNITY FOR POLITICAL SUBDIVISIONS: RECONCILING THE ARM OF THE STATE DOCTRINE WITH FEDERALISM PRINCIPLES

INTRODUCTION

The eleventh amendment to the United States Constitution provides that federal jurisdiction does not extend to suits by private parties against the state.1 This is so even when the state is not the party of record, provided that the state is the real party in interest.2 Thus, the amendment may bar a suit against a state officer3 or an apparently local governmental entity.4

1. The eleventh amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Although the language of the amendment only bars federal jurisdiction over suits by a citizen of a foreign state or nation, the Supreme Court has consistently held that the eleventh amendment bars suits by a citizen against his own state. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); see Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 280 (1973); Parden v. Terminal Ry., 377 U.S. 184, 186 (1964); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

2. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 326, 373, 377 (1824), Chief Justice Marshall construed the eleventh amendment as barring suit only when the state was the party of record. The Chief Justice, however, later recanted and held that the eleventh amendment barred a suit against the Governor of Georgia. See Governor of Ga. v. Sundry Afr. Slaves, 26 U.S. (1 Pet.) 84, 93-94 (1828). Courts thereafter have applied the eleventh amendment whenever the state is the real party in interest. See Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); In re Ayers, 123 U.S. 443, 505-06 (1887); Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); Hand v. San Jacinto Junior College, 519 F.2d 273, 278-79 (5th Cir. 1975); George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 179-80 (1st Cir. 1974).

3. See, e.g., Cory v. White, 457 U.S. 85, 91 (1982) (reaffirming the holding in Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937), that the eleventh amendment bars suits against state officers unless the officials are alleged to be acting against federal or state law); Edelman v. Jordan, 415 U.S. 651, 668-69 (1974) (eleventh amendment bars suits against state officials that seek retroactive monetary relief that will be paid with state funds); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462-64 (1945) (eleventh amendment bars actions against state officials when it seeks a monetary recovery from the state).

Eleventh amendment immunity has drawn criticism as being undemocratic, anachronistic and contrary to the constitutional principle of the supremacy of federal law. Hence, it is not surprising that the Supreme Court has created several exceptions to the eleventh amendment bar.

One such exception is the "arm of the state doctrine," which distinguishes between political subdivisions and arms of the state. A political subdivision is a local governmental entity that is in some ways distinct from the state, but that nevertheless exercises a "slice of state power." Although suits against a political subdivision implicate the state's sovereign power, a political subdivision has no eleventh amendment immunity. An arm of the state, by contrast, is a governmental entity that is

5. See Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) ("The Eleventh Amendment ... undoubtedly runs counter to modern democratic notions of the moral responsibility of the State.").

6. See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3178 (1985) (Brennan, J., dissenting) (the Supreme Court has used the eleventh amendment to expand aggressively the scope of sovereign immunity "[i]n an era when sovereign immunity has been generally recognized ... as an anachronistic and unnecessary remnant of a feudal legal system") (citations omitted).

7. See id. at 3154 (eleventh amendment doctrine "is inconsistent with the essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land").

8. See id. at 3153-54, 3155 n.8. For a detailed analysis of the exceptions to the eleventh amendment, see infra text accompanying notes 80-138.


10. See Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 442 (5th Cir. 1985) (local autonomy indicates that the governmental entity is a political subdivision), cert. denied, 106 S. Ct. 797 (1986); Harden v. Adams, 760 F.2d 1158, 1163 (11th Cir. 1985) (lack of financial autonomy indicates that the entity is a political subdivision), cert. denied, 106 S. Ct. 530 (1985); Moore v. Tangipahoa Parish School Bd., 594 F.2d 489, 493-94 (5th Cir. 1979) (power to levy and collect taxes from which judgments can be paid indicates that the entity is a political subdivision); MacKey v. Stanton, 586 F.2d 1126, 1131 (7th Cir. 1978) (performance of duties at a local level indicates that the entity is a political subdivision), cert. denied, 444 U.S. 882 (1979).

11. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979); see Mount Healthy City School Dist. v. Doyle, 429 U.S. 274, 280-81 (1977) (a local school board is a political subdivision even though it receives a significant amount of state funding and is subject to some state guidance on educational policies); City of Trenton v. New Jersey, 262 U.S. 182, 185-86 (1923) (Trenton is a political subdivision of the state exercising state governmental powers); City of Worcester v. Worcester Consol. St. Ry., 196 U.S. 539, 549 (1905) (a municipality exercises a portion of the state's power) (quoting United States v. Railroad Co., 84 U.S. (17 Wall.) 322, 329 (1873)); see also Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1099 (1983) (states and their political subdivisions perform similar governmental functions that deserve similar protections).

12. See supra note 11.

so closely related to the state that it receives eleventh amendment protection.14

Municipalities and counties epitomize the political subdivision.15 Other local governmental entities, however, are not as easily categorized.16 On two occasions the Supreme Court has relied on a balancing test to determine whether different entities are instrumentalities of the state entitled to eleventh amendment immunity, or political subdivisions subject to suit.17 The Court, however, has yet to articulate the reason a political subdivision's embodiment of the state's sovereign power is insufficient to merit eleventh amendment protection.

Recent Supreme Court developments provide the background for a reevaluation of the arm of the state doctrine. In Pennhurst State School & Hospital v. Halderman18 and Atascadero State Hospital v. Scanlon,19 the

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14. See, e.g., Fincher v. Florida Dep't of Labor, 798 F.2d 1371, 1371-72 (11th Cir. 1986) (Florida Unemployment Appeals Commission is an arm of the state); Clark v. Tarrant County, 798 F.2d 736, 743-45 (5th Cir. 1986) (Tarrant County Adult Probation Department is an arm of the state); Martinez v. Board of Educ., 748 F.2d 1393, 1396 (10th Cir. 1984) (under New Mexico law, local school boards are arms of the state).


16. Compare Holley v. Lavine, 605 F.2d 638, 643-44 (2d Cir. 1979) (County Department of Social Services not entitled to eleventh amendment protection), cert. denied, 446 U.S. 913 (1980) with Carey v. Quern, 588 F.2d 230, 233-34 (7th Cir. 1978) (director of Cook County Department of Public Aid is an officer of an arm of the state and therefore benefits from the state's eleventh amendment immunity); Jackson Sawmill Co. v. United States, 580 F.2d 302, 302, 308 (8th Cir. 1978) (Illinois Toll Highway Authority is a state agency entitled to eleventh amendment protection), cert. denied, 439 U.S. 1070 (1979) with Miller-Davis Co. v. Illinois State Toll Highway Auth., 567 F.2d 323, 330 (7th Cir. 1977) (Illinois State Toll Highway Authority not protected by eleventh amendment); Travelers Indem. Co. v. School Bd. of Dade County, 666 F.2d 505, 507 (11th Cir.) (school board not entitled to eleventh amendment protection), cert. denied, 459 U.S. 834 (1982) with Harris v. Tooele County School Dist., 471 F.2d 218, 220 (10th Cir. 1973) (school district receives eleventh amendment protection).


Court clarified the federalism principles behind two other important exceptions to the state's eleventh amendment immunity.\textsuperscript{20} Although these cases did not rule on any questions concerning the eleventh amendment immunity of political subdivisions,\textsuperscript{21} their impact on eleventh amendment doctrine has potentially far reaching ramifications.\textsuperscript{22}

This Note applies federalism principles to the arm of the state doctrine, and thereby develops a modified interpretation of the suability of political subdivisions that protects the state's sovereignty without interfering with the federal judiciary's role in interpreting and enforcing the protections of federal law. Part I reviews the Supreme Court cases on political subdivisions and demonstrates that political subdivisions possess elements of state sovereignty. Part II undertakes an analysis of eleventh amendment doctrine and concludes that exceptions to the eleventh amendment generally apply only when federally protected rights are at stake. In this way the eleventh amendment minimizes the infringement on state sovereignty. The arm of the state doctrine, however, applies even when federally protected rights are not at stake. Part III concludes that the arm of the state doctrine also should be narrowly tailored to assure the vindication of federally secured rights with minimal infringement on the state's sovereignty. Accordingly, this Note concludes that political subdivisions should receive eleventh amendment protection from actions that do not raise substantive questions of federal law.

I. The State and Its Political Subdivisions

The Supreme Court has decided only three cases on the eleventh amendment immunity of political subdivisions. The first case, \textit{Lincoln County v. Luning},\textsuperscript{23} was a diversity action.\textsuperscript{24} Plaintiffs, citizens of California and Germany, brought suit in federal circuit court alleging that the defendant, Lincoln County, Nevada, had failed to make payments on


\textsuperscript{21} In \textit{Pennhurst}, the Supreme Court addressed the question of whether relief could be granted against the defendant county officials on the basis of state law alone. 465 U.S. at 123-24. The Court, however, did not decide the issue of the county officials' eleventh amendment immunity. \textit{Id.} at 123-24 n.34. Instead, the Court dismissed the action against the county officials on the ground that any relief granted against them could not be justified under the doctrine of pendent jurisdiction since such relief would be only partial and incomplete. \textit{Id.} at 124. The Court concluded that such ineffective enforcement of state law would not advance the policies of efficiency, convenience and fairness that support the doctrine of pendent jurisdiction. \textit{Id.} Nevertheless, the Court indicated that if faced with the eleventh amendment question, it might be willing to grant eleventh amendment protection to county officials when the judgment would require payments from the state treasury. \textit{See id.} at 123-24 n.34.

\textsuperscript{22} See \textit{infra} text accompanying notes 133-59.

\textsuperscript{23} 133 U.S. 529 (1890).

\textsuperscript{24} See \textit{Vincent v. Lincoln County}, 30 F. 749, 749 (C.C.D. Nev. 1887) (action for amount due on county bonds issued pursuant to a state statute), \textit{aff'd sub nom. Lincoln County v. Luning}, 133 U.S. 529, 533-34 (1890).
its bonds. The County challenged the court's jurisdiction, contending that the County was an integral part of the state and therefore was under the eleventh amendment's umbrella. The Supreme Court, however, ruled that because the County was a corporate entity, its relationship to the state was too remote to afford eleventh amendment protection.

Lincoln County stood for eighty-six years as the sole Supreme Court ruling on the eleventh amendment immunity of political subdivisions. In 1977, the Court broke its silence with Mount Healthy City School District v. Doyle. In contrast to Lincoln County, Mount Healthy was based on federal question jurisdiction. The plaintiff, an untenured teacher, claimed that the School Board's refusal to rehire him violated his first and fourteenth amendment rights. The District Court for the Southern District of Ohio found that the state had waived its immunity and the Sixth Circuit affirmed. The Supreme Court, however, considered the issue of waiver secondary to the threshold question of whether the School Board was "an arm of the State partaking of the State's Eleventh Amendment immunity," or a "political subdivision to which the Eleventh Amendment does not extend." In making this determination the Court looked to the nature of the entity under state law as evidenced by a balance of three factors: (1) whether state law categorized the School Board as an independent entity; (2) the degree to which the state controlled the Board's policies; and (3) the degree of state funding relative to the Board's power to raise its own funds. The Court found that under state law the Board was an independent entity with extensive powers to issue bonds and levy taxes. Thus, despite a significant level of state funding and some state control over board policies, the Court concluded that the state's eleventh amendment immunity did not extend to the School Board.

The Court returned to the political subdivision question in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency. Like Mount Healthy, Lake Country also arose under the Court's federal question jurisdiction. Tahoe area property owners claimed that the Tahoe Plan-
ning Agency, an interstate agency created by compact between California and Nevada, was following policies that had destroyed their property in violation of the fifth and fourteenth amendments. The Court of Appeals for the Ninth Circuit held that the eleventh amendment protected the agency from suit in federal court. The Supreme Court reversed, finding that the agency did not enjoy the special constitutional protection of the states. The Court again employed the Mount Healthy balancing test, but identified four new factors: (1) express provisions allocating responsibility for judgments; (2) the ratio of state to local members on the agency’s governing board; (3) whether the entity’s primary functions are traditionally state or local; and (4) the history of litigation between the state and the entity.

Viewed together, Lake Country and Mount Healthy identify two subsets of factors relevant to the definition of a political subdivision. The first subset relates to whether the state, in creating the entity, intends that the entity partake of the state’s immunity. This grouping includes the state’s categorization of the entity as either an independent entity or an arm of the state, and the state’s litigation behavior toward the entity. The second subset relates to whether the structure of the entity and its relationship to the state indicate that the entity exercises policy-making powers free from state control. Express provisions making the state liable for judgments against the entity and extensive state funding evince state control. By contrast, an entity’s authority to levy taxes and issue bonds without obligating the state indicates that the entity is independent.

39. Id. at 394-95.
40. Id. at 396. The Ninth Circuit reasoned that the Tahoe Regional Planning Authority was an agency of the compacting states and therefore immune from suits brought without their consent. Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1359-60 (9th Cir. 1977), aff’d in part and rev’d in part sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The court noted that the interstate compact creating the planning authority referred to the planning authority as a political subdivision of both compacting states for the purposes of suit. Id. at 1362. Nevertheless, the court concluded that this provision did not amount to a waiver of eleventh amendment immunity. Id.
42. See id. at 400-01 & n.19.
43. See id. at 401-02.
45. See id. at 224-25.
46. See id.
47. See id.
48. See id. at 225-28.
51. See id. at 226.
These cases reveal that under the Supreme Court's balancing test a political subdivision may be independent from the state in some respects, while in other respects it may embody the state's sovereignty. For example, in *Mount Healthy* the Court ruled that the School Board was a political subdivision even though it was subject to some state control, both directly through general state supervision of policy, and indirectly through dependence on a significant amount of state funding. The Second Circuit, applying the *Mount Healthy-Lake Country* balancing test, found a governmental entity to be a political subdivision even though the state controlled the policies of the entity, and the acts giving rise to the suit against the entity were conducted pursuant to a state mandate. These cases illustrate that suits against a political subdivision can offend the state's sovereignty.

Other Supreme Court cases have concluded that political subdivisions exercise state power in performing their local governmental functions. Moreover, the Supreme Court has consistently held that the acts of a political subdivision are state acts for purposes of the contracts clause, the equal protection clause, the due process clause and the Bill of Rights as incorporated through the fourteenth amendment. Thus, the present doctrine creates an apparent contradiction: a political subdivi-

52. See supra notes 10 & 11.
53. 429 U.S. at 280-81.
54. Holley v. Lavine, 605 F.2d 638, 643-45 (2d Cir. 1979), cert. denied, 446 U.S. 913 (1980). In *Holley*, the county social service district denied plaintiff Holley a portion of the benefits she had been receiving under the Aid to Families with Dependent Children Program. *Id.* at 640-41. In denying plaintiff these benefits the social service district was carrying out the provisions of section 131—k of the New York Social Services Law. *Id.* at 641 & n.2.
55. See *City of Trenton v. New Jersey*, 262 U.S. 182, 185-86 (1923) (City of Trenton exercises governmental powers of the state); *City of Worcester v. Worcester Consol. St. Ry.*, 196 U.S. 539, 549 (1904) ("[A] municipal corporation is not only a part of the State but is a portion of its governmental power. 'It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State.' ") (quoting United States v. Railroad Co., 84 U.S. (17 Wall.) 322, 329 (1873)); *Railroad Co. v. County of Otoe*, 83 U.S. (16 Wall.) 667, 676 (1872) ("Counties, cities and towns . . . are instruments of the State, created to carry out its will. . . . [T]he State through them . . . [does] indirectly what it might do directly.").
sion is charged with the responsibilities of a sovereign state for purposes of the state action doctrine, yet is denied the state's mantle of immunity for purposes of the eleventh amendment. To date, however, the Supreme Court has neither justified this contradiction, nor protected the state from the infringement on state sovereignty that suits against political subdivisions permit.

Recent Supreme Court cases have relied on the federalism concerns underlying the eleventh amendment to limit other eleventh amendment exceptions to situations involving issues of federal law. Part II of this Note suggests that courts can resolve the inconsistencies in the arm of the state doctrine by extending the same federalism principles to suits against political subdivisions.

II. FEDERALISM PRINCIPLES BEHIND THE ELEVENTH AMENDMENT

The Supreme Court has repeatedly held that the eleventh amendment imposes the fundamental principle of sovereign immunity as a limit on the grant of judicial authority in article III of the Constitution. To a degree, however, this interpretation is inconsistent with the essential function of the federal courts in the interpretation and enforcement of federal law. For this reason, sovereign immunity generally, and the eleventh amendment specifically, have been criticized as undemocratic and anachronistic.

Seeking to balance the tension between federal concerns and state sovereignty, the Court has relied on federalism principles to limit the reach of the eleventh amendment. The doctrine of waiver and abrogation, two well-established exceptions to the eleventh amendment, must be construed narrowly to maintain "the fundamental constitutional balance between the Federal Government and the States"; Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 102-06 (1984) (the doctrine of Ex parte Young, which permits federal courts to award prospective injunctive relief against state officers whose official acts violate the Constitution, balances the need to vindicate federal rights against the eleventh amendment immunity of the states). See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3145-46 (1985) (the doctrines of waiver and abrogation, two well-established exceptions to the eleventh amendment, must be construed narrowly to maintain "the fundamental constitutional balance between the Federal Government and the States"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 102-06 (1984) (the doctrine of Ex parte Young, which permits federal courts to award prospective injunctive relief against state officers whose official acts violate the Constitution, balances the need to vindicate federal rights against the eleventh amendment immunity of the states).


61. See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3145-46 (1985) (the doctrines of waiver and abrogation, two well-established exceptions to the eleventh amendment, must be construed narrowly to maintain "the fundamental constitutional balance between the Federal Government and the States"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 102-06 (1984) (the doctrine of Ex parte Young, which permits federal courts to award prospective injunctive relief against state officers whose official acts violate the Constitution, balances the need to vindicate federal rights against the eleventh amendment immunity of the states).


64. See supra note 5.

65. See supra note 6.
ereign immunity, the Court has recognized several exceptions to the eleventh amendment,66 of which the arm of the state doctrine is one.67 The key to understanding the purpose of the arm of the state doctrine lies in understanding the role it plays in striking a balance between competing state and federal interests. This, in turn, requires a thorough analysis of eleventh amendment doctrine.

A. The General Rule: The Eleventh Amendment Embodies State Sovereign Immunity

Relying on the precept that the eleventh amendment embodies state sovereign immunity, the Court has construed the amendment liberally.68 This construction often has resulted in the extension of eleventh amend-

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66. See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3145-46 (1985); id. at 3154, 3155 n.8 (Brennan, J., dissenting) (the Supreme Court's eleventh amendment doctrine of state sovereign immunity "has led to the development of a complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 102 (1984) (the Ex parte Young doctrine is an important exception to the eleventh amendment immunity of the state); see also C. Jacobs, The Eleventh Amendment and Sovereign Immunity 155 (Contributions in American History No. 19, 1972) (the tension between sovereign immunity and fundamental constitutional precepts accounts for the inconsistencies in eleventh amendment doctrine); Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139, 158-66 (1977) (although eleventh amendment embodies aspects of sovereign immunity, eleventh amendment doctrine diverges from the principles of sovereign immunity as is necessary to promote federalism); Chemerinsky, State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman, 12 Hastings Const. L.Q. 643, 643 (1985) (although eleventh amendment doctrine tends to immunize state governments from federal jurisdiction, the Supreme Court has developed a number of ways to circumvent this broad immunity when necessary to enforce the Constitution and federal laws); Note, The Limits of Federal Judicial Power over the States: The Eleventh Amendment and Pennhurst II, 26 B.C.L. Rev. 947, 956-63 (1985) [hereinafter Limits of Federal Judicial Power] (Supreme Court interpretation of the eleventh amendment reflects a tension between state autonomy and federal supremacy).

67. See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3155 n.8 (1985) (Brennan, J., dissenting) (although Justice Brennan did not use the arm of the state terminology, he stated that the rule permitting suits against local governmental units "permit[s] suits that would appear to be barred by any thoroughgoing interpretation of the Eleventh Amendment as a bar to exercise of the federal judicial power in suits against states"); Comment, The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism, 1979 Duke L.J. 1042, 1042-49 (describing the denial of eleventh amendment immunity to political subdivisions as an exception).

68. See C. Jacobs, supra note 66, at 107-10 (discussing expansive Supreme Court interpretation of the eleventh amendment to provide for state sovereign immunity); Baker, supra note 66, at 153-62 (by interpreting the eleventh amendment as a bar to a suit by citizens against their own states, the Supreme Court goes beyond the text of the amendment to preserve the states' traditional immunity); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 522 (1978) (since the courts conclude that all state sovereign immunity derives from the eleventh amendment, they occasionally state that the only way to effectuate the amendment is to disregard its express language); Limits of Federal Judicial Power, supra note 66, at 961 (courts have interpreted the eleventh amendment as a broad grant of state sovereign immunity, which extends beyond the literal terms of the amendment).
ment protection far beyond the amendment’s restrictive language. For instance, although the language of the amendment only bars suits in law or equity brought by citizens of another state or by foreign citizens or subjects, the Court has held that the eleventh amendment protects a state from suits in admiralty, suits by a foreign state, and suits by its own citizens.

The doctrine of waiver also illustrates this liberal construction. The language of the eleventh amendment is clearly jurisdictional: by its terms it withdraws jurisdiction that article III expressly grants to federal courts. Federal courts, as courts of limited subject matter jurisdiction, may not exceed this jurisdiction even upon the request of the parties. Nevertheless, as with sovereign immunity, the Supreme Court permits the states to waive their eleventh amendment immunity and consent to suit in federal court. A state may waive its immunity by statute or by constitutional provision. The Court, however, will find a waiver only when indicated by “express language” or “overwhelming implications

69. See supra note 1.
70. See Ex parte New York, 256 U.S. 490, 498 (1921); see generally Fletcher, supra note 11, at 1078-83 (tracing the history of federal jurisdiction over admiralty suits against states).
73. Article III, § 2, cl. 1 reads in pertinent part: “The judicial Power shall extend . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects.” The eleventh amendment parallels this language: “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.” See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3170 (1985) (Brennan, J., dissenting) (marking on the “congruence of language”). The Court has recognized “that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.” Edelman v. Jordan, 415 U.S. 651, 678 (1974); C. Jacobs, supra note 66, at 107.
75. It is a longstanding principle that a sovereign may waive its immunity and consent to suit. See Briscoe v. Bank of Ky., 36 U.S. (11 Pet.) 207, 252 (1837); Cohens v. Virginia, 19 U.S. (6 Wheat.) 120, 171 (1821); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 131, at 1043 (5th ed. 1984) [hereinafter Prosser & Keeton]; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 2-9 (1963) (discussing the early English legal principles governing the King's consent to suit).
Participation in a federally funded program also can effectuate a waiver, but only when the appropriating statute clearly conditions participation in the program on a state's consent to suit in federal court. Not surprisingly, these rules severely restrict the number of waivers.

B. Exceptions to State Sovereign Immunity

Despite this broad interpretation of the eleventh amendment, the Court has long recognized the need for exceptions when federally protected rights are at stake. These exceptions have grown concurrently with the growth of federal question jurisdiction.

1. Appellate Jurisdiction

Although article III gives Congress the power to grant federal courts original jurisdiction over suits presenting a federal question, Congress did not create federal question jurisdiction until 1875. Prior to that date most original federal question jurisdiction lay exclusively with the

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80. Article III provides in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . .

U.S. Const. art. III §§ 1-3. The grant of jurisdiction in cases "arising under" the Constitution, laws and treaties of the United States is generally referred to as federal question jurisdiction. See C. Wright, The Law of Federal Courts § 17, at 90 (4th ed. 1983). Although the original jurisdiction of the Supreme Court is self-executing, id. at 33, article III does not grant the Supreme Court original jurisdiction in federal question cases. Under article III, only the congressionally ordained "inferior Courts" may exercise original federal question jurisdiction. See U.S. Const. art. III, §§ 1 & 2. In 1789 Congress established inferior courts with both appellate and original jurisdiction, but did not confer original federal question jurisdiction. See Judiciary Act of 1789, ch. 20, 1 Stat. 73. Thus, the first Congress established the principle that under article III Congress has the discretion to grant or withhold original federal question jurisdiction. The Supreme Court has consistently affirmed this principle. See Palmore v. United States, 411 U.S. 389, 400-01 (1973); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Sheldon v. Sill, 49 U.S. (8 How.) 453, 461 (1850); Cary v. Curtis, 44 U.S. (3 How.) 265, 277 (1845).

81. See Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. Congress previously exercised its power to grant original federal question jurisdiction in 1801, but repealed the
state courts. When federally protected rights were at issue, however, the Supreme Court had jurisdiction to take appeals from the state court of last resort.

The Marshall Court, although not squarely confronting the issue, implied that the eleventh amendment did not bar such appellate jurisdiction even when the state was the defendant. In Cohens v. Virginia, the Court heard an appeal on a criminal conviction from the highest court of Virginia. The defendant based his appeal on an act of Congress. Chief Justice Marshall held that the case was within the appellate jurisdiction of the Court as set forth in the "arising under" clause of article III, section 2 of the Constitution. In reaching this conclusion, the Chief Justice placed great emphasis on the important role of the federal judiciary in the "preservation of the constitution and the laws of the United States."

Justice Marshall then addressed the eleventh amendment issue. After holding that a criminal defendant's petition for a writ of error was not a suit "commenced" or "prosecuted" against the state under the terms of the eleventh amendment, he held in the alternative that the suit was not within the amendment because it was not brought "by a citizen of another State, or by a citizen or subject of any foreign State." Although Cohens stands for the proposition that the eleventh amendment does not bar appellate jurisdiction of a suit by a citizen against his state, the Court did not clarify whether its holding would apply with equal force when the appeal was brought by a citizen or subject of another state or of a foreign state.

In Smith v. Reeves, the Court again addressed the question of whether a suit by a citizen against his state was within the appellate jurisdiction of the Supreme Court. When Smith reached the Court, however, it already had been firmly established that the eleventh amendment applied with equal force to suits by citizens and noncitizens. The Court stated that the state's eleventh amendment immunity was

subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any

statute the following year. See Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

82. C. Wright, supra note 80, § 1, at 4.
83. See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85-87.
84. 19 U.S. (6 Wheat.) 120 (1821).
85. Id. at 168-69.
86. Id.
88. 19 U.S. at 175.
89. Id. at 184-85.
90. 178 U.S. 436 (1900).
91. Id. at 445.
92. See id. at 446-47; Hans v. Louisiana, 134 U.S. 1, 10, 14-21 (1890).
action brought against it with its consent may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States.\(^9\)

The *Smith* Court had previously concluded that the state's consent to suit in state court was not a waiver of its eleventh amendment immunity.\(^9\) Therefore, *Smith* represents a clear statement of the rule that the eleventh amendment does not restrict the Supreme Court's appellate jurisdiction over suits against the state. Since *Smith*, the Supreme Court has exercised appellate jurisdiction over numerous suits by persons seeking to enforce federally protected rights against states.\(^9\) Nevertheless, because the states must waive their state law sovereign immunity before a suit may originate in state court, the states control an individual's ability to enforce his federally protected rights. This leads to inconsistent and fortuitous enforcement of federally secured rights.\(^9\)

In 1875 Congress expanded the original jurisdiction of the federal courts to include suits presenting questions of federal law.\(^9\) This corresponded to the expansion of federally secured rights through the enactment of the thirteenth, fourteenth and fifteenth amendments,\(^9\) and the Civil Rights Statutes of 1871.\(^9\) The confluence of new federally protected rights and increased federal jurisdiction exacerbated the friction between eleventh amendment immunity and the supremacy of federal law.\(^9\) It was in the aftermath of these developments that the Court

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94. See id.
96. The scope of state law sovereign immunity varies from state to state. Prosser and Keeton have found that the states fall into four groups. First, two states have retained total sovereign immunity. See Prosser & Keeton, *supra* note 75, § 131, at 1044. Second, approximately seven states effectively have abolished the immunity by creating administrative agencies to hear and determine claims against the state. *Id.* Third, a group of nine states have waived their immunity in a limited class of cases, the practical effect of which is to limit liability to motor vehicle cases. *Id.* at 1044-45. Fourth, about thirty states have adopted a general waiver of immunity. *Id.* at 1045. Consequently, the enforcement of federally protected rights in state courts is arbitrary and capricious.
97. See *supra* note 81.
98. See U.S. Const. amends. XIII, XIV, XV.
announced the doctrine of *Ex parte Young.*

2. *Ex parte Young*: Enjoining State Officers

In *Ex parte Young* the Supreme Court took a crucial step toward reducing the friction between the principles of the eleventh amendment and the supremacy of federal law. The case involved a suit by the stockholders of a group of railroads against the Attorney General of Minnesota. The stockholders sought to enjoin the Attorney General from enforcing a state statute which reduced the rates that railroads could charge within the state. The plaintiffs claimed that in acting pursuant to the statute the Attorney General had taken their property in violation of the due process and equal protection clauses of the fourteenth amendment. The Attorney General responded that the suit was in fact a suit against the state, and therefore that the eleventh amendment barred the action. The Court held that the eleventh amendment did not bar the suit because the alleged federal law violation stripped the officer of his official authority, thereby rendering him personally responsible for his conduct.

Justice Harlan issued a vigorous dissent. He argued that the true object of the suit was to tie the hands of the state. Accordingly, he concluded that the suit was effectively a suit against the state. Although *Ex parte Young* is still the rule, Justice Harlan’s argument clearly

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102. Id. Some commentators view the *Ex parte Young* doctrine as an exemplification of the principles of sovereign immunity. See Baker, *supra* note 66, at 155-58; Tribe, *Inter-governmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 Harv. L. Rev. 682, 687 (1976). This view emphasizes the similarities between the liability of state officers under *Ex parte Young* and the availability of writs against officers under the ancient English doctrine of sovereign immunity. See generally Jaffe, *supra* note 75, at 16-18 (discussing the early English law of sovereign immunity). While the ancient writ against officers permitted retrospective money damages against officers to reach the state’s treasury, *id.* at 17-18, relief under the doctrine of *Ex parte Young* is much more limited. See *infra* notes 102-17 and accompanying text. Consequently, this Note treats the *Ex parte Young* doctrine as an exception to the sovereign immunity principles that the eleventh amendment embodies.

103. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (“*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.”) (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)).
104. See *Ex parte Young,* 209 U.S. 123, 129 (1908).
105. See *id.* at 127-29.
106. See *id.* at 130-31.
107. See *id.* at 132.
108. See *id.* at 159-60.
109. *Id.* at 173-74.
110. *Id.* at 174.
states the reality: *Ex parte Young* is a fiction which creates an exception to the eleventh amendment immunity of the state.\(^\text{112}\)

Subsequent cases have refined the doctrine. It is now clear that *Ex parte Young* only applies to suits seeking prospective injunctive relief.\(^\text{113}\) Suits for prospective monetary relief are limited to those costs that are ancillary to the injunction.\(^\text{114}\) When a suit against an officer acting in his official capacity seeks to impose a retroactive liability that must be paid from state funds, the state is the real party in interest and the officer partakes of the eleventh amendment immunity.\(^\text{115}\) Furthermore, when the plaintiff relies solely on an alleged state law violation, *Ex parte Young* does not apply and the eleventh amendment shields the officer.\(^\text{116}\) This reveals the purpose of the *Ex parte Young* exception — to allow the federal courts to vindicate the supremacy of federal law.\(^\text{117}\)

### 3. Abrogation

The vindication of the supremacy of federal law is also the impetus behind the doctrine of abrogation. Under this doctrine, Congress can override the eleventh amendment when enacting legislation designed to enforce the substantive provisions of the fourteenth amendment.\(^\text{118}\) Courts will not find an abrogation, however, unless Congress makes "its intention unmistakably clear in the language of the statute."\(^\text{119}\)

These rules of interpretation have had severe consequences, as illus-
trated by their application to section 1983.120 Section 1983 is perhaps the most important of all the civil rights statutes121 because it provides sweeping legal and equitable remedies for deprivations of "any rights, privileges or immunities secured by the Constitution and laws."122 Nevertheless, in Edelman v. Jordan,123 the Supreme Court concluded that section 1983 did not abrogate the eleventh amendment.124 The reason for this conclusion is not readily apparent from the Edelman opinion. In the subsequent case of Quern v. Jordan,125 however, the Court stated three bases for the Edelman holding. First, section 1983 lacks explicit language evincing an intent to abrogate the eleventh amendment.126 Second, the legislative history does not focus directly on the issue of state liability.127 Third, denying abrogation does not render section 1983 "meaningless insofar as States are concerned."128 Hence, Edelman illustrates that abrogation is a very narrow exception to the eleventh amendment which plays only a limited role in securing federally protected rights.129

4. The Arm of the State Doctrine

The arm of the state doctrine first received judicial recognition in 1890.130 Its birth coincided with the same intensified frictions between the eleventh amendment and the supremacy clause that attended the announcement of Ex parte Young.131 Unlike the Ex Parte Young doctrine,

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121. See C. Wright, supra note 80, § 22A, at 119-21.
124. Id. at 674-78. In Quern v. Jordan, 440 U.S. 332, 340-45 (1979), the Supreme Court reaffirmed this aspect of the Edelman holding.
126. Id. at 345.
127. Id.
128. Id.
130. See Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (although the Court did not use the arm of the state terminology, it refused to extend eleventh amendment immunity to the county because the county's connection to the state was too remote).
131. Between 1875 and 1890 the Supreme Court struggled with the complex problems of federalism resulting from the widespread attempts by post-Reconstruction Southern
the arm of the state doctrine allows a substantial financial recovery against governmental entities.\textsuperscript{132}

Viewed in light of eleventh amendment doctrine, this potential for financial recovery reveals the importance of the arm of the state doctrine. As a practical matter, under \textit{Ex parte Young} a governmental entity may be enjoined any time its officers' actions violate federal law.\textsuperscript{133} A monetary judgment, however, is limited to those costs that are ancillary to enforcement of the injunction.\textsuperscript{134} Although a plaintiff may win substantial monetary relief in cases of waiver and abrogation, the Court has severely curtailed the availability of these options through strict rules of legislative interpretation.\textsuperscript{135} Further, despite a plaintiff's ability to sue in state court with the possibility of an appeal to the Supreme Court in the event of an improper interpretation of federal law,\textsuperscript{136} access to state courts is limited to instances in which there is a waiver of state law immunity.\textsuperscript{137} Consequently, when a monetary remedy is the only effective relief, federally protected rights often go unenforced and many plaintiffs are denied justice.\textsuperscript{138} The suability of political subdivisions alleviates this injustice and helps individuals vindicate their federal rights by allowing substantial financial recoveries against governmental entities that only marginally embody the state's sovereignty.

\begin{footnotesize}
\textsuperscript{132} Under the arm of the state doctrine, political subdivisions do not receive eleventh amendment protection. \textit{See supra} notes 9-17 and accompanying text. Moreover, in \textit{Monnell v. New York City Dep't of Social Services}, 436 U.S. 658, 690-91 & n.54 (1978), the Court held that political subdivisions are amenable to suits for money damages under section 1983 when their officers engage in unconstitutional acts pursuant to governmental custom, or in furtherance of an official governmental policy. \textit{See also} \textit{Minton v. St. Bernard Parish Sch. Bd.}, No. 85-3688, slip op. at 417 (5th Cir. Oct. 22, 1986) ("Louisiana school boards . . . are not entitled to eleventh amendment immunity to Section 1983 claims.").

\textsuperscript{133} \textit{See supra} notes 102-17 and accompanying text.

\textsuperscript{134} \textit{See supra} notes 113-15 and accompanying text.

\textsuperscript{135} \textit{See supra} notes 73-79, 118-29 and accompanying text.

\textsuperscript{136} \textit{See supra} notes 83-95 and accompanying text.

\textsuperscript{137} \textit{See supra} note 75.

\end{footnotesize}
III. Applying Federalism Principles to the Arm of the State Doctrine

This overview of eleventh amendment doctrine reveals that, aside from the arm of the state doctrine, the exceptions to the eleventh amendment are limited to situations in which federally protected rights are at stake.139 The narrowness of these exceptions assures the balance that federalism requires.

Mount Healthy and Lake Country involved questions of federal law.140 Hence, the application of the arm of the state doctrine in these cases was consistent with the policy of federalism underlying the Court's eleventh amendment doctrine. In Lincoln County v. Luning,141 however, the Supreme Court permitted a suit against a political subdivision despite the lack of a federal question.142 Courts have followed Lincoln County and have continued to distinguish between political subdivisions and arms of the state regardless of whether jurisdiction is based on diversity of citizenship143 or federal question.144

This practice is contrary to the balance of state and federal interests that inheres in the Supreme Court's eleventh amendment doctrine. In cases presenting federal questions, the arm of the state doctrine plays an important role in maintaining this balance by providing substantial financial remedies when federal rights are at issue.145 In a case based solely on diversity, however, there are no substantive federal rights in need of protection.146

Accordingly, political subdivisions should receive eleventh amendment protection from diversity suits. The primary justification for federal jurisdiction in diversity cases is to protect out-of-state citizens from state

139. See supra notes 80-129 and accompanying text.
140. See supra notes 29-30, 38-39 and accompanying text.
141. 133 U.S. 529 (1890).
142. See supra notes 23-27 and accompanying text.
145. See supra text accompanying notes 133-38.
146. In Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court held that state substantive law should be the governing law in diversity cases. Id. at 78-80. Although the Court has since permitted Congress and the courts to formulate rules for diversity cases that govern matters "falling within the uncertain area between substance and procedure," the Court has reaffirmed that state law must govern issues that are " 'substantive' in every traditional sense." See Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).
court bias. Admittedly, this type of bias is especially acute when an out-of-state citizen sues the state. Consequently, since an eleventh amendment immunity for political subdivisions in diversity cases denies out-of-state plaintiffs a federal forum, it is in conflict with the policy underlying diversity jurisdiction.

The circumstances surrounding the passage of the eleventh amendment, however, reveal that the diversity policies must yield. The eleventh amendment was adopted in response to a series of cases that were brought against states under the state-citizen diversity clause of article III. These cases posed two threats to state sovereignty. First, they raised the potential for significant state financial liability. Second, they permitted federal judicial review of state policies on the sequestration of Tory property and the disposition of public lands. Clearly, these cases presented a strong possibility of bias against the out-of-state plaintiffs. Nevertheless, the eleventh amendment was intended to bar these actions. Therefore, the adoption of the eleventh amendment indicates

147. See Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.") (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938)); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 37, 50 (1809) ("However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."); C. Wright, supra note 80, § 23 (citing fear of state court prejudice as the traditional justification and discussing other justifications); Note, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 492 (1928) (author: Judge Henry J. Friendly).

148. See Edelman v. Jordan, 415 U.S. 651, 660-62 (1974); Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 291 (1973) (Marshall, J., concurring); C. Jacobs, supra note 66, at 64-67; 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3524, at 118-19 (2d ed. 1984) [hereinafter Federal Practice and Procedure]; Fletcher, supra note 11, at 1054-63; Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and The History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1430-31 (1975). State-citizen diversity jurisdiction refers to the jurisdictional grant contained in art. III, § 2, cl. 1. See Fletcher, supra note 11, at 1035. Prior to the passage of the eleventh amendment, seven state-citizen diversity cases naming six states as defendants were before the Supreme Court. See C. Jacobs, supra note 66, at 43. Two of these cases are unreported, and with the exception of Chisholm v. Georgia, 2 U.S. (2 Dall.) 363 (1793), the reports of the others are fragmentary. See C. Jacobs, supra note 66, at 43; see, e.g., Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 349 (1791) (order awarding commission to examine witnesses in Holland conditioned on naming of commissioners). Professor Clyde Jacobs provides a detailed secondary account of the factual setting and the legal issues involved in these cases. See C. Jacobs, supra note 66, at 43-64.

149. See J. Goebel, 1 History of the Supreme Court of the United States 734 (1971); 1 C. Warren, The Supreme Court in United States History 99 (rev. ed. 1932); Nowak, supra note 148, at 1434.

150. See C. Jacobs, supra note 66, at 70-71; Gibbons, supra note 100, at 1920-23; Nowak, supra note 148, at 1434, 1437-1441.

that the need to protect state funds and state policies from federal judicial interference outweighs the need for an impartial forum in diversity cases.

Political subdivisions often may receive significant state funding and frequently may carry out important state policies.\(^\text{152}\) Moreover, they are charged with the responsibility of a sovereign state for purposes of the state action doctrine.\(^\text{153}\) Nevertheless, political subdivisions receive no eleventh amendment protection.\(^\text{154}\) This denial of eleventh amendment protection is justified in federal question cases by the need to enforce federally protected rights.\(^\text{155}\) However, by allowing a political subdivision to be sued in diversity on the same showing as when federal questions are at issue, the courts undermine the delicate balance of state and federal interests that the eleventh amendment achieves. Consequently, political subdivisions should be entitled to eleventh amendment immunity in diversity cases, and the courts should dismiss diversity suits brought against state or local governmental entities without reaching the question of whether the entity is a political subdivision or an arm of the state.

To implement this proposed revision it is necessary to modify the Mount Healthy-Lake Country test for eleventh amendment immunity. As the law currently stands, the threshold question in determining the eleventh amendment immunity of a governmental entity is whether the entity is an arm of the state or a political subdivision.\(^\text{156}\) Under the reinterpretation proposed in this Note, the threshold question should be whether the basis of jurisdiction is diversity of citizenship or federal question. If jurisdiction is based solely on diversity of citizenship, the entity should generally receive eleventh amendment protection and the case should be dismissed.\(^\text{157}\) If, on the other hand, the basis of jurisdiction is federal question, the Mount Healthy-Lake Country balancing test should apply. When the balancing test reveals that the entity is an arm of the state, the eleventh amendment protection should apply. As the law currently stands, the threshold question in determining the eleventh amendment immunity of a governmental entity is whether the entity is an arm of the state or a political subdivision.\(^\text{156}\) Under the reinterpretation proposed in this Note, the threshold question should be whether the basis of jurisdiction is diversity of citizenship or federal question. If jurisdiction is based solely on diversity of citizenship, the entity should generally receive eleventh amendment protection and the case should be dismissed.\(^\text{157}\) If, on the other hand, the basis of jurisdiction is federal question, the Mount Healthy-Lake Country balancing test should apply.

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\(^{152}\) See supra notes 28-54 and accompanying text.

\(^{153}\) See supra notes 56-60 and accompanying text.

\(^{154}\) See supra note 13 and accompanying text.

\(^{155}\) See supra text accompanying notes 133-38.

\(^{156}\) See supra note 33 and accompanying text.

\(^{157}\) Political subdivisions generally receive some state funding and are normally subject to some state control. See supra notes 28-55 and accompanying text. It would be unwise, however, to state an overly rigid rule. A court might someday confront a governmental entity that does not receive any state funding and is not subject to any state control. In such a case it might be wise to create an exception to the proposed blanket immunity for governmental entities sued in diversity. Even in this extreme case, however, there are two considerations weighing in favor of eleventh amendment protection. First, the entity would still be considered a state actor for purposes of the contracts clause, the equal protection clause, the due process clause and the Bill of Rights as incorporated through the fourteenth amendment. See supra notes 56-60. Second, in performing a local governmental function the governmental entity exercises state powers. See supra note 55.
state, the entity should receive eleventh amendment protection.  
However, when the balancing test reveals that the entity is a political subdivision, the eleventh amendment should not bar the exercise of federal jurisdiction.

Although *Lincoln County* represents precedent to the contrary, it was decided while eleventh amendment doctrine was in its infancy. Thus it predates the modern understanding of the federalism principles that govern exceptions to eleventh amendment immunity. Moreover, *Lincoln County* provides no compelling reason for denying political subdivisions eleventh amendment immunity in diversity cases. The *Lincoln County* Court relied primarily on the County's status as a corporation. While incorporation may have indicated independence in 1890, today, agencies that are clearly state instrumentalities are nevertheless incorporated. Furthermore, the modern Supreme Court test of political subdivision status has never considered incorporation a relevant criterion. Indeed, the Court recently held that the eleventh amendment bars a suit against a state corporate agency. In sum, *Lincoln County* presents no serious obstacle to a reinterpretation of the arm of the state doctrine.

There is a related line of Supreme Court cases which hold that political subdivisions are citizens of the state for diversity purposes. Although the test for citizenship is similar to the test for eleventh amendment immunity, the Supreme Court's citizenship opinions have not addressed

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158. See supra notes 33-43 and accompanying text.
159. See id.
160. Lincoln County v. Luning, 133 U.S. 529 (1890), was decided ninety-two years after the adoption of the eleventh amendment, and eighteen years before *Ex parte Young*, 209 U.S. 123 (1908).
161. See supra notes 62-138 and accompanying text for a discussion of the federalism principles underlying the exceptions to the eleventh amendment.
162. 133 U.S. at 530.
164. See supra notes 28-43 and accompanying text.
167. See Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973); Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 437 & n.2 (5th Cir. 1985), cert. denied, 106 S. Ct. 797 (1986); Adden v. Middlebrooks, 688 F.2d 1147, 1150 (7th Cir. 1982). The test for whether a governmental entity is a citizen of the state considers the following factors: (1) whether the entity exercises corporate powers; (2) whether the entity has the power to levy taxes to pay adverse judgments; (3) whether the entity has the power to issue bonds and whether those bonds create an obligation on the part of the
the eleventh amendment question.\textsuperscript{168} Therefore the citizenship cases do not impede a reinterpretation of the eleventh amendment immunity of political subdivisions.\textsuperscript{169}

An immunity for political subdivisions in diversity cases does not render this citizenship principle obsolete. Although political subdivisions exhibit characteristics of states, they are also distinct from the state in certain ways.\textsuperscript{170} When a political subdivision is sued in diversity without the consent of the state, it is appropriate to give recognition to the political subdivision's embodiment of state sovereignty by extending eleventh amendment protection. Naturally, the ultimate purpose of an immunity for political subdivisions is to protect the state. Hence, the state should have the power to waive the political subdivision's immunity. When a state waives a political subdivision's immunity there is no infringement on state sovereignty, and therefore, there is no reason to emphasize the subdivision's state characteristics. Consequently, in the event of a waiver it will be appropriate to treat a political subdivision as a citizen for diversity purposes.

The analysis of eleventh amendment immunity in cases based solely on diversity is equally applicable to pendent and ancillary state claims raised in federal question cases. Federalism considerations require that the eleventh amendment bar actions against political subdivisions based on state law claims that are pendent or ancillary to a valid federal law claim.\textsuperscript{171} Federal jurisdiction in these cases is based on considerations of judicial economy, convenience and fairness to litigants.\textsuperscript{172} The Supreme Court has held that these policy considerations cannot override the eleventh amendment.
enth amendment. Moreover, plaintiffs do not need pendent and ancillary jurisdiction to assure a federal forum for their federal claims because they can split their claims between federal and state court, or can choose to forego their state claims. Hence, federal jurisdiction over pendent or ancillary state claims is not necessary to vindicate federally protected rights. Nevertheless, federal jurisdiction over pendent or ancillary state claims infringes on state sovereignty to the same degree as federal jurisdiction over state claims based solely on diversity.

CONCLUSION

Although political subdivisions are independent from the state in certain respects, they nevertheless exercise a part of the state's sovereign power. Political subdivisions have no eleventh amendment protection even though they may receive significant state funding and may be subject to state supervision of policy. Furthermore, political subdivisions are charged with the responsibilities of a sovereign state for purposes of the state action doctrine. Thus, suits brought against political subdivisions in federal court do offend the state's sovereignty, even though such suits fall within a clearly established exception to the eleventh amendment.

Recent Supreme Court cases indicate that the other exceptions to the eleventh amendment are narrowly tailored to insure the vindication of federal rights with minimal infringement on the state's sovereignty. In keeping with this principle, the Supreme Court has limited the exception encompassed by the Ex parte Young doctrine to suits involving questions of federal law. The arm of the state doctrine also should be narrowly tailored. Accordingly, political subdivisions should receive eleventh amendment protection.

174. See id. at 122. If plaintiffs split their state and federal claims between state and federal courts respectively, the state court may enter judgment first. In this situation principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) may bar the plaintiffs from litigating their federal claims. See generally R. Smith, Pennhurst v. Halderman: The Eleventh Amendment, Erie and Pendent State Law Claims, 34 Buffalo L. Rev. 227, 275-81 (1985) (discussing the effect of a state court judgment on a pending federal proceeding if plaintiffs follow Pennhurst and split their claims between federal and state courts). Under res judicata, a final judgment on the merits precludes the parties from stating claims in a second proceeding that were raised in the prior proceeding. Allen v. McCurry, 449 U.S. 90, 94 (1980). Under collateral estoppel, a decision on an issue of law or fact may preclude a party to the action who has had a full and fair opportunity to litigate the issue from relitigating that issue in a second suit. Id. at 94-95. These rules apply even when the first proceeding is in state court and the second proceeding is in federal court. Id. at 94-96.

Res judicata and collateral estoppel apply with equal force in section 1983 actions. See Migra v. Warren City School Dist., 465 U.S. 75, 83-85 (1984) (res judicata); Allen, 449 U.S. at 103-04 (collateral estoppel). Thus a prior state court judgment could prevent a plaintiff who has split his claims from enforcing his federal rights. Nevertheless, a plaintiff can avoid this consequence and assure a federal forum for the enforcement of his federal rights by proceeding first with the federal claim in federal court, see Migra, 465 U.S. at 84-85 & n.7, or by foregoing his state claim entirely, see Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 121 (1984).
amendment protection from actions that do not raise substantive questions of federal law.

Anthony J. Harwood