The States Can Wait: The Immediate Appealability of Orders Denying Eleventh Amendment Immunity

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The Eleventh Amendment of the United States Constitution prohibits federal courts from taking jurisdiction over suits brought against a state by citizens of other states or of foreign nations.¹ According to the Supreme Court, the amendment embodies a broad constitutional principle of state sovereign immunity.² The correct characterization of this immunity, however, remains unclear. Is it a right not to stand trial or is it merely a defense to liability?

This question becomes important when a state tries to appeal immediately from a denial of a motion to dismiss on Eleventh Amendment immunity grounds. A state will seek immediate review of such an interlocutory order because a reversal would dispose of the case and save the cost of lengthy proceedings in the trial court. Unfortunately for states, federal law generally prohibits immediate appellate review of interlocutory orders.³ Because appeals from interlocutory orders can create piecemeal litigation, the Supreme Court has consistently held that the final judgment rule prohibits immediate review of an interlocutory order unless it is a "collateral order."

Under the collateral order exception to the final judgment rule, a state may appeal immediately from a denial of a motion to dismiss on Eleventh Amendment immunity grounds only if the immunity gives the state a right not to stand trial. If it gives the state merely a defense to liability, the state must await final judgment before appealing.

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¹ The full text 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." US Const, Amend XI.

² *Hans v Louisiana*, 134 US 1, 13-15 (1890). See generally David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 S Ct Rev 149.

³ 28 USC § 1291 (1988) (final judgment rule).

The Supreme Court has not decided whether Eleventh Amendment immunity is a right not to stand trial or just a defense to liability.⁴ It has held, however, that some personal immunities represent a right not to stand trial. According to the Court, double jeopardy immunity, Speech or Debate Clause immunity, and absolute and qualified immunity for public officials each exist to protect individuals from the burdens of litigation.⁵ For this reason, the Court characterizes each of these immunities as a right not to stand trial, and therefore allows immediate appellate review of a denial of a motion to dismiss based on any one of these immunities.

Lower courts currently divide over whether this case law controls the issue of Eleventh Amendment immunity. Most of the lower courts believe that it does. They find no relevant distinction between Eleventh Amendment immunity and personal immunities. One court, however, disagrees and argues that none of the policy concerns that justify immediate appealability in the personal immunity context exist in the Eleventh Amendment immunity context. It has held that the Eleventh Amendment does not give the states a right to avoid trial.

This Comment attempts to resolve the question of immediate appealability by examining the proper characterization of Eleventh Amendment immunity. It concludes that Eleventh Amendment immunity serves merely as a defense to liability. For this reason, a state should not be allowed to appeal immediately from a denial of a motion to dismiss on Eleventh Amendment immunity grounds.

Section I of this Comment surveys the two bodies of case law relevant to this issue. First, it outlines the requirements for appellate jurisdiction, discussing both the final judgment rule and the collateral order doctrine. Then it reviews the characteristics of Eleventh Amendment immunity. Section II describes what happens when these two bodies of case law meet by discussing two cases that illustrate the competing approaches taken by the lower courts. Section III addresses the Supreme Court's personal immunity decisions and concludes that these decisions should not apply to Eleventh Amendment immunity.

⁴ To date, all Supreme Court cases construing the amendment have involved state parties that had appealed from an adverse judgment and so the Court has not had the opportunity to resolve this question.

⁵ *Abney v United States*, 431 US 651, 662 (1977) (double jeopardy); *Helstoski v Meador*, 442 US 500, 507-08 (1979) (Speech or Debate Clause immunity); *Nixon v Fitzgerald*, 457 US 731, 742-43 (1982) (absolute immunity); *Mitchell v Forsyth*, 472 US 511, 526-27 (1985) (qualified immunity of public officials).

Section IV proposes the proper characterization of Eleventh Amendment immunity. By examining three aspects of Eleventh Amendment jurisprudence, this Section suggests that Eleventh Amendment immunity does little more than protect state treasuries from paying compensatory judgments. For this reason, this Section concludes that the immunity is properly considered a defense to liability and not a right to avoid trial.

I. THE DOCTRINAL FRAMEWORK

In large part, the dispute over the proper characterization of Eleventh Amendment immunity reflects a growing tension between appellate jurisdiction and Eleventh Amendment case law. On the one hand, the Court has tried to minimize interlocutory appeals of court orders by beefing up the final judgment rule⁶ and limiting the scope of the collateral order doctrine.⁷ On the other hand, the Court has expanded the scope of Eleventh Amendment immunity by making it more difficult for private citizens to sue states.

A. Appellate Jurisdiction in the Federal Courts

1. The final judgment rule.

The question at issue in this Comment typically arises when a state is sued and moves to dismiss, claiming immunity under the Eleventh Amendment. If the trial court denies the motion and the state files an immediate appeal, an appellate court's jurisdiction depends on the requirements of the final judgment rule. Title 28, section 1291 grants appellate courts jurisdiction over "all final decisions."⁸ Although the precise definition is unclear, courts agree that a "final decision" by a district court "leaves nothing for the court to do but execute the judgment."⁹ Any order that disposes of the case on the merits (for example, an order granting summary judgment or an order dismissing the case) qualifies as a final decision. Generally, an order that does not make a final determination on the merits does not qualify. Under this rule, if a party does not

⁶ The rule provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." 28 USC § 1291. See also *Coopers & Lybrand v Livesay*, 437 US 463, 477 (1978) ("the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291").

⁷ See, for example, *Cohen v Beneficial Industrial Loan Corporation*, 337 US 541, 546-47 (1949).

⁸ 28 USC § 1291.

⁹ *Catlin v United States*, 324 US 229, 233 (1945).

like an order issued by a district court, but the order does not dispose of the action, the party must wait for a decision on the merits before appealing.

This rule protects litigants and the courts from the costs of piecemeal litigation. Underlying the rule is the judgment that allowing piecemeal appeals would impose greater social costs than forcing litigants to proceed to the end of a case, only to find out that it need never have been litigated or that it must be litigated all over again.¹⁰

Of course the benefits of immediate appeals from interlocutory rulings do sometimes strongly outweigh their costs. For this reason, the final judgment rule does not absolutely bar immediate review of interlocutory rulings; there are some statutory exceptions.¹¹ But because the requirements for each of these exceptions are so stringent, the exceptions are unavailable to most litigants¹²—including states appealing from a denial of Eleventh Amendment immunity.

2. The collateral order doctrine.

Although the Supreme Court did not have to recognize any exceptions beyond those contained in statutes, it did. In the 1949 case of *Cohen v Beneficial Industrial Loan Corporation*,¹³ the Court carved a narrow exception to the final judgment rule called the “collateral order doctrine.” In *Cohen*, the Court determined that there was a “small class” of district court decisions which, although not the last possible order, involved a right separable from and collateral to the rights asserted in the action, and which were too important to be denied review and too independent to force the party involved to wait until final adjudication.¹⁴ Appellate courts can exercise their jurisdiction over appeals from such “collateral orders.”

Under the collateral order doctrine, an appellate court can assert jurisdiction over an intermediate order only if it satisfies a three-pronged test.¹⁵ First, the order must conclusively determine the disputed question; second, it must resolve a question com-

¹⁰ See Richard A. Posner, *Economic Analysis of Law* 550-53 (Little Brown, 3d ed 1986).

¹¹ See, for example, 28 USC § 1292 (1988) (providing for immediate appeals from district court orders granting or dissolving injunctions and appointing receivers); 28 USC § 1651 (1988) (providing for writs of mandamus).

¹² See Comment, *Immediate Appealability of Minimum Contact Defenses: How Far Does the Cohen Doctrine Extend?*, 63 Tulane L Rev 913, 916 (1989).

¹³ 337 US 541.

¹⁴ *Id.* at 546.

¹⁵ *Coopers & Lybrand*, 437 US at 468.

pletely separate from the merits of the action; and third, it must be effectively unreviewable on appeal from the final judgment.¹⁶ As the collateral order doctrine has evolved, the third prong has become the most important.

Under the current formulation of the collateral order doctrine, the crucial issue is whether the order affects a right that cannot be vindicated on appeal from a final judgment. If not, the appellate court has no jurisdiction over an immediate appeal from that order. Because most orders affect rights that can be vindicated on appeal from a final judgment, the collateral order doctrine gives defendants little hope that an appellate court will hear an appeal from an interlocutory order. In fact, there have probably been as many law review articles written about the doctrine as cases allowing appeals based on it.¹⁷

Despite the narrow scope of the collateral order doctrine, the Supreme Court has allowed immediate appeals from orders denying a motion to dismiss based on some personal immunities. For example, the Court has allowed an interlocutory appeal from an order denying a defendant double jeopardy immunity,¹⁸ and from an order denying Speech or Debate Clause immunity.¹⁹ It also has held that denials of both qualified and absolute immunity for public officials (both personal immunities) are immediately appealable.²⁰ In each of these cases the Court allowed an immediate appeal because the essence of each immunity defense was an "entitlement not to be forced to litigate."²¹ Obviously, courts cannot vindicate such an entitlement if the defendant must wait until after the litigation to appeal. Thus, when a trial court rejects a defense that constitutes a right not to stand trial, the defendant can appeal from that decision immediately.

Unfortunately for defendants, very few defenses amount to a right not to stand trial, and the Supreme Court has limited the use of the collateral order doctrine to cases where that right is clearly

¹⁶ *Id.*

¹⁷ Luther T. Munford, *Dangers, Toils, and Snares: Appeals Before Final Judgment*, 15 *Litigation* 18 (Spring 1989).

¹⁸ *Abney*, 431 US at 662; US Const, Amend V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

¹⁹ *Helstoski*, 442 US at 507-08; US Const, Art I, § 6 ("for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place").

²⁰ *Nixon*, 457 US at 742-43; *Mitchell*, 472 US at 526-27.

²¹ *Mitchell*, 472 US at 527.

at stake.²² Apparently, the Court believes that unless it limits the range of defenses that can be described as a right not to stand trial, the collateral order doctrine would swallow the final judgment rule. The Court has been especially sensitive to this in recent years, repeatedly declining to characterize various defenses as rights not to stand trial.²³

Two cases are particularly noteworthy. One involves a claim of immunity from process;²⁴ and one involves a jurisdictional defense.²⁵ According to the Court, these defenses provide a defendant only with the right not to be subject to the binding judgment of a particular forum and not a right to avoid trial in that forum.²⁶ As will be discussed in Section IV, these two cases provide a helpful framework for determining whether the Eleventh Amendment represents a right not to stand trial.

B. Eleventh Amendment Immunity

While the Court has taken a very narrow view of the collateral order doctrine, it has taken an expansive view of Eleventh Amendment immunity. The Eleventh Amendment protects states from suits by private citizens in federal courts. Drafted in order to overturn the controversial Supreme Court opinion in *Chisholm v Georgia*,²⁷ the text of the Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any

²² Other orders that have passed the *Cohen* test include orders directing the defendant to pay costs of notice in a class action, *Eisen v Carlisle & Jacquelin*, 417 US 156 (1974), and orders denying a motion to proceed in forma pauperis, *Roberts v District Court*, 339 US 844 (1950). See Comment, *The Immediate Appealability of Rule 11 Sanctions*, 59 Geo Wash L Rev 683, 692 (1991).

²³ These include a denial of a motion to quash a subpoena duces tecum, *United States v Ryan*, 402 US 530 (1971); orders refusing to certify a class, *Coopers & Lybrand*, 437 US at 468-69; and orders denying a motion to disqualify an attorney, *Richardson-Merrell Inc. v Koller*, 472 US 424 (1985); *Firestone Tire & Rubber v Risjord*, 449 US 368 (1981). One commentator has described the collateral order doctrine as a "dying doctrine." Munford, 15 Litigation at 19 (cited in note 17).

²⁴ *Van Cauwenberghe v Biard*, 486 US 517, 526-27 (1988).

²⁵ *Catlin*, 324 US at 236.

²⁶ *Van Cauwenberghe*, 486 US at 526-27.

²⁷ 2 US (2 Dal) 419 (1793). *Chisholm's* holding—that a state could be held liable, without its consent, by a citizen of another state or a citizen of a foreign country—shocked the states and, in response, they passed the Eleventh Amendment to reinstate the original meaning of Article III. *Hans*, 134 US at 11, 15 (1890) ("the cognizance of suits [against the states] . . . was not contemplated by the Constitution when establishing the judicial power of the United States"); Charles Warren, *The Supreme Court in United States History* 93-101 (Little Brown, 1922). A number of commentators have criticized the theory that the Eleventh Amendment reinstated the original Article III meaning. See, for example, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*,

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.”²⁸ Later, the Court moved beyond the language of the amendment to hold that the federal judicial power did not extend even to a suit by a citizen against his own state.²⁹ In this manner, the Eleventh Amendment is said to reinstate the general view before *Chisholm*—that a state could not be sued without its consent.³⁰

Two competing policy considerations underlie Eleventh Amendment doctrine. The first concerns the proper relationship between the federal and state governments. Eleventh Amendment doctrine has developed on the premise that the states entered the union with their sovereignty intact.³¹ Their sovereignty limits the judicial power of the federal government such that private plaintiffs cannot sue a state in federal court unless the state has consented—either explicitly or in the “plan of the convention” (that is, to the extent each of the states may have given up some sovereignty as a condition of entering the Union).³²

Competing against state sovereignty, however, is a second policy concern: protecting individual rights. Since the Civil War Amendments, a major premise of the federal system is that the federal government will protect individuals against abusive state governments.³³ A broad constitutional principle of state sovereign immunity would make this very difficult. It would prevent federal jurisdiction over cases brought by private citizens against states even where states had violated federal constitutional rights.

83 Colum L Rev 1889, 1895-1920 (1983). The Supreme Court, however, continues to embrace it. See *Edelman v Jordan*, 415 US 651, 662 (1974).

²⁸ US Const, Amend XI.

²⁹ *Hans*, 134 US at 1. See also Currie, 1984 S Ct Rev at 149 (cited in note 2) (contending that the Court was influenced by the “spirit” of the amendment).

³⁰ See Gibbons, 83 Colum L Rev at 1894-95 (cited in note 27) (describing the legal literature that has presented this view).

³¹ The Supreme Court recently reaffirmed this view in *Blatchford v Native Village of Noatuk and Circle Village*, 111 S Ct 2578, 2581 (1991). See also *Welch v Texas Dep’t of Highways and Public Transportation*, 483 US 468, 472 (1987).

³² *Principality of Monaco v Mississippi*, 292 US 313, 328-29 (1934). In other situations, of course, states can be compelled to defend themselves in federal court. See US Const, Art III, § 2 (allowing federal jurisdiction over controversies between states).

³³ Congress can abrogate the immunity pursuant to its powers under section 5 of the Fourteenth Amendment. *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976) (“We think that Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”).

Current Eleventh Amendment doctrine reflects a compromise between these two competing considerations. In order to protect proper federal-state relations, the Court defines the immunity as a limitation on the reach of the federal judicial power. So defined, Eleventh Amendment immunity looks like a type of jurisdictional bar, and the Court has referred to it as one.³⁴

In order to vindicate federal rights, the Court has shaped Eleventh Amendment doctrine in two ways. First, the Court has held that Congress can abrogate the immunity under the powers given to it by § 5 of the Fourteenth Amendment.³⁵ Apparently, although the Eleventh Amendment limits judicial power, it does not equally limit legislative power. The immunity does not bar Congressional attempts to create and vindicate federal rights so long as Congress clearly indicates in the text of the statute an intention to abrogate the states' immunity.

Second, the Court has created the *Ex parte Young*³⁶ fiction, allowing plaintiffs to avoid Eleventh Amendment immunity by naming a state official as a defendant rather than the state itself. The *Young* fiction says that whenever a state official tries to enforce an unconstitutional statute he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."³⁷ Therefore, any suit against him to enjoin his enforcement of an unconstitutional statute is a suit against the individual state officer and, more importantly, not a suit against the state.³⁸ Although for some time before *Young*, the Court had recognized actions for damages against state officials

³⁴ See *Edelman*, 415 US at 678 ("the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"). It has some of the characteristics of a subject-matter jurisdiction bar. For example, failure to raise it as a defense does not result in waiver, and a state can raise it even in a collateral attack on a judgment for want of jurisdiction. See Currie, 1984 S Ct Rev at 168 (cited in note 2). However, it also has some characteristics of a personal jurisdiction bar. For instance, the state can waive the immunity. See *Clark v Barnard*, 108 US 436, 447-48 (1883).

³⁵ *Fitzpatrick*, 427 US at 456.

³⁶ 209 US 123 (1908).

³⁷ *Id* at 160.

³⁸ Thus, *Young* created the anomalous result that the official's conduct qualified as state action for Fourteenth Amendment purposes, but not for the purposes of the Eleventh Amendment.

in tort,³⁹ *Young* was the first case in which the Court recognized a "general basis for prospective relief against state officials."⁴⁰

Perhaps because the *Young* fiction threatened to reduce sovereign immunity merely to a matter of form,⁴¹ the Court limited its scope. In *Edelman v Jordan*,⁴² the Court barred suits of "private parties seeking to impose a liability which must be paid from public funds in the state treasury." Under *Edelman*, sovereign immunity protects the state if the suit against it essentially looks to recover money from the state.⁴³ The Court explained that the Eleventh Amendment allows suits seeking prospective relief, such as injunctions, but does not allow suits seeking retrospective relief, which the Court defined as compensation for past injury to be paid out of the state treasury.

By cutting back on the scope of the *Young* fiction, the Supreme Court gave a heightened deference to federalism concerns. Still, *Edelman* did not completely discount the concern for individual rights. It very much represents a compromise solution. Under *Edelman*, the Amendment protects states from paying compensatory judgments, but it allows suits to enjoin states from engaging in unconstitutional conduct.

II. WHEN THE FINAL JUDGMENT RULE MEETS THE COLLATERAL ORDER DOCTRINE

Courts have disagreed over what happens when the Eleventh Amendment meets the collateral order doctrine. Perhaps because Eleventh Amendment jurisprudence insufficiently guides the

³⁹ For example, a citizen could sue to recover specific property wrongfully seized by state officials. *Osborn v Bank of the United States*, 22 US (9 Wheat) 738 (1824) (ordering the return of a large sum of money seized from the bank and kept separately in a trunk).

⁴⁰ Peter Low and John Jeffries, *Federal Courts and The Law of Federal State Relations* 814 n a (Foundation, 1989).

⁴¹ Until *Edelman*, one might have considered sovereign immunity as a merely procedural hurdle—having no effect unless the plaintiff names the state, regardless of whether the state is the real party in interest. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L J 1425, 1479 (1987) (prior to *Edelman*, sovereign immunity could have been construed as simply a matter of politeness).

⁴² 415 US at 663.

⁴³ William Fletcher has described the *Edelman* doctrine as follows: "*Edelman* thus suggests that the modern version of *Ex parte Young* consists of three interrelated propositions: Prospective prophylactic injunctive relief against individual state officers is permitted; retroactive relief that compensates a plaintiff for harm already done is prohibited; and monetary awards against state officers that 'must inevitably come from the state treasury' are prohibited." William A. 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, 1120 (1983), citing *Edelman*, 415 US at 665.

proper characterization of the immunity,⁴⁴ courts have split over whether it gives the states a right not to stand trial or whether it is a defense to liability. Disagreement over this issue has led some lower courts to divide over whether a denial of a motion to dismiss is immediately appealable as a collateral order. The majority position, first articulated by the Second Circuit in *Minotti v Lensink*, holds that the immunity gives the states a right not to stand trial. The minority position, as articulated by the First Circuit in *Libby v Marshall*, holds that the immunity merely gives the states a defense to liability.

A. The Majority View: *Minotti v Lensink*

The first case to raise the issue of immediate appealability of a denial of Eleventh Amendment immunity was *Minotti v Lensink*.⁴⁵ *Minotti*, a former Connecticut state employee, had brought an action for damages under § 1983 naming the Acting Commissioner of the Department of Mental Retardation as the sole defendant.⁴⁶ *Minotti* alleged that employees of the Connecticut Department of Mental Retardation had tried to involve him in an attempt to defraud the United States and had fired him because he refused to participate. The Commissioner moved to dismiss on Eleventh Amendment immunity grounds. Holding that Connecticut had waived its immunity, the district court denied the motion to dismiss. The Commissioner appealed. The Second Circuit held that an immediate appeal from such an order was appropriate.⁴⁷

The Second Circuit did not draw from Eleventh Amendment precedents for this holding. Instead, the court relied on the Supreme Court's personal immunity decisions, in particular *Mitchell v Forsyth*,⁴⁸ where the Court held that a denial of a government official's claim of qualified immunity is immediately appealable under the collateral order doctrine. In *Minotti*, the Second Circuit equated Eleventh Amendment immunity with the qualified immunity for government officials at issue in *Mitchell*. The court reasoned that "the essence of the [Eleventh Amendment] immunity is the possessor's right not to be haled into court—a right that cannot be vindicated after trial."⁴⁹ For that reason, the Second Circuit

⁴⁴ See note 4 and accompanying text.

⁴⁵ 798 F2d 607 (2d Cir 1986).

⁴⁶ *Id.* at 608.

⁴⁷ *Id.*

⁴⁸ 472 US 511 (1985).

⁴⁹ *Minotti*, 798 F2d at 608.

allowed the appeal.⁵⁰ Since *Minotti*, five other circuits have embraced its reasoning explicitly, and one has done so implicitly.⁵¹

B. The Minority View: *Libby v Marshall*

The First Circuit has taken a different approach to the problem and has reached the opposite result. In *Libby v Marshall*,⁵² the court held that a denial of a motion to dismiss on Eleventh Amendment immunity grounds was not immediately appealable as a collateral order. *Libby* arose out of a § 1983 class action suit brought by Massachusetts state prisoners against the Governor of Massachusetts and a number of other state officials. The district court denied a motion to dismiss on Eleventh Amendment immunity grounds. The state defendants, relying on *Mitchell*, argued that they should be able to appeal immediately.⁵³

The First Circuit disagreed. It began its opinion with the observation that the general concept of immunity contains no "talismanic significance" that invariably triggers a right to interlocutory appeal.⁵⁴ The personal immunity cases had merely shown that an immediate appeal would lie only if the underlying purpose of the Eleventh Amendment immunity gave the state defendants a right not to stand trial. Beyond that, the personal immunity cases were irrelevant.

The First Circuit distinguished the personal immunity issues in *Mitchell*, *Nixon*, and *Abney* from state sovereign immunity. The defendants in *Libby* had tried to claim immunity under the Eleventh Amendment by arguing that the inmates had sued them in

⁵⁰ *Minotti* was reaffirmed in *Eng v Coughlin*, 858 F2d 889, 894 (2d Cir 1988) ("Like qualified official immunity, Eleventh Amendment immunity, as a type of absolute immunity, embraces not only protection from liability but also protection from proceeding to trial."), in *United States v Yonkers Board of Education*, 893 F2d 498, 502 (2d Cir 1990) ("The denial of a motion to dismiss claims on grounds of Eleventh Amendment immunity, though technically an interlocutory decision, may be appealable . . . as a collateral order that is final within the meaning of [the final order doctrine].") and again in *Dube v State University of New York*, 900 F2d 587, 594 (2d Cir 1990) ("the denial of a motion to dismiss claims on absolute Eleventh Amendment Immunity is immediately appealable").

⁵¹ *Chrissy v Mississippi Dep't of Public Welfare*, 925 F2d 844, 848-49 (5th Cir 1991); *Kroll v Board of Trustees of University of Illinois*, 934 F2d 904, 906 (7th Cir 1991); *Schopler v Bliss*, 903 F2d 1373, 1376-78 (11th Cir 1990); *Loya v Texas Dep't of Corrections*, 878 F2d 860, 861 (5th Cir 1989); *Barnes v State of Missouri*, 960 F2d 63 (8th Cir 1992); *Durning v Citibank*, 950 F2d 1419 (9th Cir 1991); *Coakley v Welch*, 877 F2d 304, 305 (4th Cir 1989) (holding that the Eleventh Amendment issue was appealable as a collateral order without referring to *Mitchell* or *Minotti*).

⁵² 833 F2d 402, 405 (1st Cir 1987).

⁵³ *Id* at 403-04.

⁵⁴ *Id* at 405.

their official capacity (which was true) and that, as a result, the suit was really against the state. But since the suit was against the state, the state officials did not have to worry about being liable personally. For this reason, the First Circuit believed that the *Mitchell* concerns about distracting officials from their duties and deterring people from entering public service did not exist.

The court then examined the interests underlying the Eleventh Amendment immunity and argued that the Eleventh Amendment is not really an immunity at all. It is "analytically more akin to a bar for lack of subject matter jurisdiction than to a true immunity."⁵⁵ Since it is well settled that a district court's denial of a motion to dismiss on jurisdictional grounds is not a "final decision," and hence not immediately appealable as a collateral order, the court believed that a trial court's Eleventh Amendment ruling, to the degree it resembles a jurisdictional ruling, is not an appealable final decision.⁵⁶

In further support of this position, the court cited the *Young* fiction. The First Circuit believed that to say that the "essence of sovereign immunity is an immunity from trial itself, is to overlook the reality of the [*Young*] exception to the Eleventh Amendment."⁵⁷ The court recognized that whenever a *Young*-type case—a suit against an official in his official capacity to remedy a violation of federal law—is brought, the state still must bear the burden of litigation.⁵⁸ For example, in a *Young*-type case the state will still pay the cost of the litigation. The court believed, therefore, that Eleventh Amendment immunity does not protect the state from the burdens of trial.⁵⁹

Despite its lengthy analysis, the *Libby* opinion has failed to convince other courts that denials of motions to dismiss on Eleventh Amendment immunity grounds should not be immediately appealable.⁶⁰ As has been mentioned, since *Libby*, five circuits have

⁵⁵ Id at 406.

⁵⁶ Id at 406 n 5.

⁵⁷ Id at 406.

⁵⁸ Id.

⁵⁹ At this point the First Circuit's argument seems vulnerable. Apparently, the court believed that it could identify the purpose of the immunity by citing a case where it did not apply. If a case falls within a *Young*-type exception, technically the suit is not against the state and of course the parties can proceed to trial. In other words, *Young*-type cases do not show that a state can be called to trial in a federal court, if, by definition, *Young*-type suits are not against the state. As this Comment discusses in Section IV, this objection, though initially appealing, ignores the practical effects of the *Young* fiction. See Section IV.C.

⁶⁰ Two other courts have held that a denial of a motion to dismiss based on Eleventh Amendment immunity is not immediately appealable. *Corporate Risk Management Corp. v*

expressly followed *Minotti* and one circuit has done so implicitly.⁶¹ Yet faced with this rising tide of contrary authority, the First Circuit has held firm. In *Metcalf & Eddy v Puerto Rico Aqueduct and Sewer Authority*,⁶² the First Circuit stated that the other courts have failed to understand that "the mere incantation of the term [immunity], without reference to the nature and type of immunity involved, does not confer a right to an immediate appeal."⁶³ The First Circuit believes that the circuits that follow *Minotti* and equate the Eleventh Amendment immunity with personal immunities have failed to recognize the significant differences between Eleventh Amendment immunity and personal immunities.

III. A COMPARISON OF THE ELEVENTH AMENDMENT IMMUNITY WITH PERSONAL IMMUNITIES

The courts that have allowed states immediately to appeal denials of motions to dismiss on Eleventh Amendment grounds have relied almost exclusively on the rationale that the Supreme Court's personal immunity cases apply in the Eleventh Amendment immunity context. This Section discusses the personal immunity cases, and argues that *Libby* correctly distinguished them from the Eleventh Amendment immunity context.

A. Personal Immunities and the Collateral Order Doctrine

The Supreme Court has held on four occasions that denials of certain immunities are immediately appealable. Those include a claim of immunity under the Double Jeopardy Clause, a claim of immunity under the Speech or Debate Clause, and claims of either

Solomon, 936 F2d 572 (6th Cir 1991) (unpublished disposition); *In re Coordinated Pre-trial Proceedings in the Petroleum Products Antitrust Litigation*, 928 F2d 1136 (9th Cir 1991) (unpublished disposition). These courts, however, denied appellate jurisdiction for reasons independent of the question of the proper characterization of the Eleventh Amendment immunity. In *Solomon*, the Sixth Circuit stated that the Eleventh Amendment gave the states a right not to stand trial, but it believed that the order did not conclusively determine the disputed question. For this reason the order failed to meet the first prong of the *Colten* doctrine. In *Petroleum Products*, the Ninth Circuit stated that because the question of Eleventh Amendment immunity arose as part of a counterclaim, the right not to stand trial was not at stake. It also suggested that the order was not final because the district court could reconsider the immunity question. In neither one of these cases did the court suggest that the Eleventh Amendment did not give states a right not to stand trial.

⁶¹ See note 51.

⁶² 945 F2d 10 (1st Cir 1991), cert granted by *Puerto Rico Aqueduct and Sewer Authority v Metcalf & Eddy, Inc.*, 112 S Ct 1290 (1992).

⁶³ *Id* at 14.

absolute or qualified immunity for a public official.⁶⁴ Each of these immunities confers a right not to stand trial because protecting the defendant from trial is necessary to achieve the underlying purpose of each immunity.

1. Double jeopardy.

In *Abney v United States*,⁶⁵ the Court considered the question of “whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of [§ 1291], and thus immediately appealable.”⁶⁶ Because the order denying the motion to dismiss did not dispose of the case on the merits, the Court focused on whether a denial of double jeopardy immunity fell within the collateral order exception of *Cohen*. According to the Court, “the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.”⁶⁷

In arriving at this conclusion, the Court stated that the immunity from double jeopardy assures an individual that he will not be forced “to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.”⁶⁸ The immunity acts as a shield from the psychological costs of an unnecessary trial. Quoting from Justice Black, the Court made plain that the immunity’s purpose

is that the State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁶⁹

In order to protect those interests, the Court characterized double jeopardy immunity as a right not to stand trial.

⁶⁴ See note 5.

⁶⁵ 431 US 651 (1977).

⁶⁶ *Id.* at 653.

⁶⁷ *Id.* at 660-61 (emphasis in original).

⁶⁸ *Id.* at 661.

⁶⁹ *Id.* at 661-62, quoting *Green v United States*, 355 US 184, 187-88 (1957).

2. Speech or Debate Clause immunity.

In *Helstoski v Meanor*,⁷⁰ the Court held that an ex-congressman could immediately appeal from a denial of a motion to dismiss an indictment based on immunity under the Speech or Debate Clause.⁷¹ The Court stated that the "reasoning undergirding [*Abney*] applies with particular force here."⁷² Just as double jeopardy immunity protects individuals from the burdens of trial, "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of the litigation's results but also from the burden of defending themselves.'"⁷³

The Speech or Debate Clause protects a legislator from exposure to questioning for acts done in either House.⁷⁴ The immunity was not the product of a desire to avoid private lawsuits, but rather to prevent the executive and judiciary from intimidating legislators.⁷⁵ Preventing this intimidation was necessary to preserve an independent legislature, and one way to prevent such intimidation was to shield congressmen from any questioning about their motivations during congressional debates. Although the underlying purposes of Speech or Debate Clause immunity are not identical to those of double jeopardy immunity, they are similar. While double jeopardy immunity protects against the actual anxiety of trial, Speech or Debate Clause immunity protects against the effects that anxiety over trial would have on the legislative process. Although protecting a congressman from the anxiety of trial is not the ultimate purpose of the immunity, it is crucial to achieving it. For that reason, the Court has characterized the immunity as a right not to stand trial.

3. Absolute immunity for public officials.

In *Nixon v Fitzgerald*,⁷⁶ the Court confronted the issue of whether it had jurisdiction over an appeal from a non-final order in which the district court had rejected the petitioner's claim of absolute immunity. Absolute immunity gives the government offi-

⁷⁰ 442 US 500 (1979).

⁷¹ The Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." US Const, Art I, § 6.

⁷² 442 US at 506.

⁷³ *Id* at 508, quoting *Dombrowski v Eastland*, 387 US 82, 85 (1967).

⁷⁴ *Id*.

⁷⁵ *United States v Johnson*, 383 US 169, 181-82 (1966).

⁷⁶ 457 US 731 (1982).

cial "inviolability" in civil cases for damages. Drawing on *Helstoski*, the Court held that the denial of the absolute immunity defense was immediately appealable.⁷⁷ Although the Court did not say so explicitly, the opinion makes clear that absolute immunity protects interests similar to those that the Speech or Debate Clause protects. It protects government officials from the burden of trial in order to improve governmental processes. Without absolute immunity, an executive might hesitate to use his discretion in ways that might hurt private individuals but that would benefit the public. The immunity protects the executive officer from the "apprehension" that his motives may become the subject of a civil suit.⁷⁸

4. Qualified immunity for public officials.

Qualified immunity shields government officials performing discretionary functions from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷⁹ In *Mitchell v Forsyth*,⁸⁰ one of the issues before the Court was whether qualified immunity for public officials gave the public official asserting it the right not to stand trial. In holding that qualified immunity did give the public official a right not to stand trial, the Court cited *Abney*, *Helstoski* and *Nixon*.

After concluding that the underlying interests of each immunity in those cases included protection from the burdens of trial, the Court considered whether qualified immunity could be characterized as a right not to stand trial. The Court stated that the underlying policy of qualified immunity was to protect the public interest by giving public officials the freedom to take official action "with independence and without fear of consequences."⁸¹ Because the threat of a lawsuit would inhibit officials' discretion, would distract them from their duties, and would deter people from entering public office, the only way to protect against these problems was to give the officials freedom from both the burdens of potential liability and the burdens of litigation at every stage of the proceed-

⁷⁷ Id at 742.

⁷⁸ Id at 744-45.

⁷⁹ *Harlow v Fitzgerald*, 457 US 800, 818 (1982).

⁸⁰ 472 US 511 (1985).

⁸¹ Id at 525, quoting *Harlow*, 457 US at 819.

ings.⁸² For that reason, the Court in *Mitchell* characterized qualified immunity as a right not to stand trial.

5. Other immunities.

Justice Brennan, who dissented from the judgment in *Mitchell*, warned that the Court ought to be particularly careful to examine the policies that underlie an immunity before determining whether it should be seen as a right not to stand trial.⁸³ Since *Mitchell*, the Court has recognized Brennan's concerns, refusing to extend immediate appealability to other immunities that have come before the Court. The Court has ignored bald claims of immunity from trial and has instead examined "the nature of the right asserted . . . to determine whether an essential aspect of the claim is the right to be free from the burdens of a trial."⁸⁴ With this concern in mind, courts have held that some types of immunities are not appealable. For example, denials of a motion to dismiss on grounds of state-action immunity in antitrust law have not been immediately appealable.⁸⁵ A claim of an immunity on the grounds of the Petition Clause of the First Amendment⁸⁶ has also been held not to be immediately appealable.⁸⁷ As these cases indicate, whether an immunity is a right not to stand trial will depend on the policy considerations that underlie the particular immunity.⁸⁸

B. Personal Immunities and Eleventh Amendment Immunity

The circuits that have followed *Minotti* have failed to recognize the way in which the rationale underlying personal immunities limits the applicability of those cases. The personal immunity cases only support the proposition that Eleventh Amendment immunity represents a right not to stand trial if it has the same underlying interests as the personal immunities. But double jeopardy,

⁸² Id at 525-26.

⁸³ Id at 551 (Brennan dissenting). Although Justice Brennan expressed this in dissent, the rationale is consistent with the majority opinion's reasoning. See id at 525-26. Brennan's disagreement with the majority seems to have been only in the particular application of the principle.

⁸⁴ *Van Cauwenberghe v Biard*, 486 US 517, 525 (1988).

⁸⁵ *Huron Valley Hospital Inc. v City of Pontiac*, 792 F2d 563, 567-70 (6th Cir 1986). But see *Commuter Transportation Systems, Inc. v Hillsborough County Aviation Authority*, 801 F2d 1286, 1289-90 (11th Cir 1986).

⁸⁶ US Const, Amend I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for the redress of grievances.").

⁸⁷ *Segni v Commercial Office of Spain*, 816 F2d 344, 346 (7th Cir 1987).

⁸⁸ See text accompanying note 89.

Speech or Debate Clause, absolute, and qualified immunity are supported by different policy interests than Eleventh Amendment immunity.

Eleventh Amendment immunity concerns immunity for the *state*. In contrast, the policies underlying the personal immunities relate to the psychological strain that a lawsuit imposes on the official. These immunities protect against either the anxiety of trial (*Abney*) or the effects that the anxiety over trial would have on proper policymaking (*Helstoski*, *Nixon*, and *Mitchell*). But anxiety of the kind involved in the personal immunity context does not exist when an official faces no possibility of personal liability. As the Seventh Circuit has said in another context, when a state official is sued in his official capacity, he is not "on trial."⁸⁹ The First Circuit correctly reasoned, therefore, that the policy concerns in *Mitchell*—distraction from official duties and deterring public service—are largely irrelevant in the Eleventh Amendment immunity context.

Furthermore, the doctrine of state sovereign immunity did not develop out of a concern that state officials would somehow be distracted from their duties if the state is facing liability. As will be discussed in Section IV, the Amendment primarily protects the states from paying out compensatory judgments from their treasuries. It has little to do with protecting the state or its officers from the distractions of trial.

The personal immunity cases, therefore, do not apply to the Eleventh Amendment immunity context. By claiming otherwise, *Minotti* and its followers have separated the holdings of these cases from their underlying rationale. If the Eleventh Amendment immunity is in fact a right not to stand trial, it needs an independent justification. While none of the cases allowing such appeals has recognized this, the First Circuit has. In a sense, the First Circuit's view is more consistent with the rationale of the personal immunity cases because it recognizes the need to look at the underlying interests of an immunity before proclaiming that it includes the right not to stand trial.

⁸⁹ *Scott v Lacy*, 811 F2d 1153, 1153-54 (7th Cir 1987) (holding a denial of qualified immunity in a suit against a public official in his individual capacity appealable despite a simultaneous claim against the public official in his official capacity).

IV. CHARACTERIZING THE ELEVENTH AMENDMENT IMMUNITY

Although the Eleventh Amendment immunity may not protect the same interests as personal immunities, it may nevertheless protect interests that would still be compromised should a state be forced to go to trial. This Section asks whether an independent justification exists for allowing an immediate appeal from a denial of a motion to dismiss on Eleventh Amendment immunity grounds. Three areas of current Eleventh Amendment jurisprudence indicate that there is none: the history of the amendment; the notion that the Eleventh Amendment immunity resembles a jurisdictional bar; and the development of the *Young* fiction. Taken together, these elements suggest that requiring a state to wait until after trial to appeal an adverse ruling on its Eleventh Amendment claim would not defeat the policy underlying the Amendment.

A. The History of the Amendment

The history of the Eleventh Amendment does not automatically control current interpretation of its provisions. Nevertheless, to the extent that it sheds light on the characterization of Eleventh Amendment immunity, it suggests that the immunity represents only a defense to liability. Two episodes in the history of the Eleventh Amendment doctrine have been critical to defining the immunity. The first episode was the drafting of the amendment, and the second was the Supreme Court's decision in *Hans v Louisiana*. During both, the immunity developed to shield state treasuries from potentially crushing liabilities.

The states originally drafted the amendment in order to deprive federal courts of jurisdiction over suits against states by citizens of other states or by foreigners. After *Chisholm*, the states feared that they would be liable to British creditors and American Tories whose property the states had confiscated during the war. Two treaties that the United States had negotiated with the British at about that time further heightened the states' concerns.⁹⁰ In

⁹⁰ In the Treaty of Paris, the Americans had agreed that "creditors on either side, shall meet with no lawful impediment" to the recovery of prewar debts, Treaty of Paris, Art IV, Sep 3, 1783, 8 Stat 80, 82, and that the Congress would "earnestly recommend" that the states restore confiscated property, id, Art V, 8 Stat at 82. Because of the liabilities that such a treaty imposed, however, most of the states had refused to comply. John V. Orth, *The Judicial Power of the United States* 16-17 (Oxford, 1987).

Following *Chisholm*, another treaty, Jay's Treaty, Arts II, IV, Nov 19, 1794, 8 Stat 116, 117, 119-20, was negotiated. Like the Treaty of Paris, it provided for repayment of money

response, the states speedily ratified the amendment.⁹¹ Although there is some dispute as to whether the amendment changed the provisions of Article III or just restored its original meaning,⁹² it is clear that the purpose of creating the amendment was to protect the states from having to pay back war debts. The precipitating event was not doctrinal reasoning based on any abstract theory of the nature of Article III, but rather a very specific concern that the states would face liabilities that they could not, or would not, pay.

History confirms this very specific and restricted purpose of the amendment. Once the crisis over the Revolutionary War debts had passed, the Court gave the amendment very narrow scope.⁹³ And the Court did not take steps to strengthen the Eleventh Amendment immunity until the occasion of another major political crisis a hundred years later, also involving repudiation of debts—this time, those of the Old Confederacy.

At this second critical episode in Eleventh Amendment jurisprudence, the Court broadly read the amendment in order to protect the Southern states from paying debts owed on bonds that they had issued just before the Civil War. At this time, out-of-state bondholders were selling their rights to in-state citizens in order to

owed to English creditors, but the states still feared liability for Revolutionary War debts. Orth, *Judicial Power* at 17-18. This speeded ratification of the Eleventh Amendment. *Id.* at 20. The Amendment "put to rest fears that the national government . . . had any interest in enforcing against the states demands for payments in specie of Revolutionary War bills of credit." Gibbons, 83 Colum L Rev at 1934 (cited in note 27).

⁹¹ Orth, *Judicial Power* at 20 (cited in note 90). Gibbons explains that the Amendment originally included language that removed from its scope cases that arose under treaties made under the authority of the United States. This language was eventually eliminated. Gibbons, 83 Colum L Rev at 1933 (cited in note 27). Although Gibbons ultimately argues that the treaty language was surplusage given the language of the final amendment, the removal of that language does show the very specific political motivation behind the amendment. Congress was acutely aware of the nexus between the peace treaties and the proposed amendment. *Id.* at 1934-36.

⁹² See Gibbons, 83 Colum L Rev at 1893-94 (cited in note 27). See also Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U Pa L Rev 515, 516 n 8 (1977). Field makes the observation that the Court's view of the doctrine in this way raises two concerns. First, it is by no means clear what the original intent of the framers was. *Id.* at 527-35. Second, Field believes that the Court has misread Article III as imposing sovereign immunity as a constitutional requirement on the federal government, as opposed to simply leaving unimpaired the common law requirement of sovereign immunity that antedates the Constitution. Based on the latter view, Field believes that sovereign immunity is "subject to modification or even abandonment by processes short of constitutional amendment." *Id.* at 538. It could be said, however, that the structure of Article III is such that by limiting federal judicial power, it preserves for the states their original sovereign immunity.

⁹³ See, for example, *Cohens v Virginia*, 19 US (6 Wheat) 264, 412 (1821); *Osborn v Bank of the United States*, 22 US (9 Wheat) 738 (1824); Orth, *Judicial Power* at 7 (cited in note 90). But see *Governor of Georgia v Madrazo*, 26 US (1 Pet) 110, 124 (1828).

circumvent the Eleventh Amendment. Both the President and Congress believed that forcing the Southern States to pay the bonds could cripple the states' economies and touch off a national crisis. The President made it clear to the Supreme Court that he would not enforce any judicial decree ordering the states to pay on the bonds. With the prospect of such a constitutional crisis looming, the Court decided *Hans*, which extended the states' protection against lawsuits to suits by in-staters.⁹⁴

Both the circumstances surrounding the drafting of the amendment and those surrounding the dramatic expansion of its scope in 1890 show that the animating force of the immunity is the need to protect states from crushing liabilities. Although there may be some dispute over whether the immunity's protection extends to all liabilities, its history suggests that protecting the states from the burdens of trial was never a consideration.

B. The Eleventh Amendment as a Jurisdictional Bar

Writing for the majority in *Edelman*, Justice Rehnquist stated that Eleventh Amendment immunity "sufficiently partakes of the nature of a jurisdictional bar" that failure to raise it as a defense at trial does not result in waiver.⁹⁵ Viewing the Eleventh Amendment as a jurisdictional bar has important implications for determining whether the Eleventh Amendment immunity is a right not to stand trial.

The Eleventh Amendment is analytically akin to a jurisdictional bar because the current doctrine describes the immunity as a limitation of the judicial power under Article III. In a 1973 concurring opinion,⁹⁶ Justice Marshall stated that Article III was the root of the constitutional impediment to the exercise of federal judicial power to entertain a case by a private individual against a state.⁹⁷ According to Marshall, the issue addressed by Eleventh

⁹⁴ Orth, *Judicial Power* at 8 (cited in note 90).

⁹⁵ *Edelman v Jordan*, 415 US 651, 678 (1974).

⁹⁶ *Employees of the Department of Public Health and Welfare of Missouri v Department of Public Health and Welfare*, 411 US 279, 287 (1973) (Marshall concurring).

⁹⁷ According to Marshall:

[D]espite the narrowness of the language of the [Eleventh] Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and "it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain suits brought by private parties against a state without consent given . . . not even one brought by its own citizens because of the fundamental rule of which the Amendment is but an exemplification."

Id. at 292 (Marshall concurring), quoting *Ex parte New York*, 256 US 490, 497 (1921).

Amendment immunity is not the general immunity of the states from private suit, but rather the susceptibility of the states to suit before federal tribunals. When characterized as a limitation of the power of the federal judiciary, Eleventh Amendment immunity seems quite similar to a jurisdictional bar.

At first glance, it may seem that dragging a party before a tribunal that is powerless to bind the party to its judgment might create the kind of damage that could not be vindicated after trial.⁹⁸ Nevertheless, this type of situation arises whenever a party challenges a court's jurisdiction, and the Court has consistently held that a denial of a motion to dismiss for lack of jurisdiction is not immediately reviewable. For example, in *Catlin v United States*,⁹⁹ the Court stated that a denial of a motion to dismiss, "even when the motion is based on jurisdictional grounds, is not immediately reviewable." In *Van Cauwenberghe v Biard*,¹⁰⁰ the Court characterized both claims of lack of subject matter jurisdiction and claims of a lack of personal jurisdiction as "the right not to be subject to a binding judgment of the court."

Van Cauwenberghe provides some explanation for this view of jurisdictional defenses. In *Van Cauwenberghe*, the Court had to determine whether an order denying a motion to dismiss based on an extradited person's claim that he was immune from process was immediately appealable. The petitioner had been extradited to the United States on charges of wire fraud. While in the United States, some angry investors in one of his deals that went sour filed a civil suit against him. The petitioner argued that since he was in the United States solely because of extradition, he was immune from civil suit. The district court denied the motion and the petitioner appealed. Citing *Cohen* and *Mitchell*, the Court of Appeals dismissed the appeal for lack of jurisdiction. The Supreme Court affirmed.¹⁰¹

The Court considered whether the assertion that a court lacks personal jurisdiction because of immunity from service of process entails the right not to stand trial. The Court concluded that it did not. The due process considerations that underlie the exercise of personal jurisdiction protect a person only from being subject to

⁹⁸ See, for example, *Marx v Government of Guam*, 866 F2d 294 (9th Cir 1989). Where foreign sovereign immunity is involved, one factor that the courts often consider is the indignity of bringing a sovereign before a tribunal powerless to adjudicate the claim.

⁹⁹ 324 US 229, 236 (1945).

¹⁰⁰ 486 US 517, 527 (1988).

¹⁰¹ *Id* at 517-19.

the binding judgment of a forum with which he has no meaningful ties. These considerations do not create a right not to stand trial. The Court explained that "petitioner's challenge to the District Court's exercise of personal jurisdiction because he is immune from civil process should be characterized as the right not to be subject to a binding judgment of the court."¹⁰² Further, "[b]ecause the right not to be subject to a binding judgment may be effectively vindicated following final judgment, . . . the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order."¹⁰³ *Van Cauwenberghe* shows that the purpose of a jurisdictional defense is to prevent a party from being bound by a judgment of a forum that has no authority to enforce it. It is not meant to spare a party the burdens of litigation.

To the extent the Eleventh Amendment is like a jurisdictional bar, therefore, it should be characterized as a right not to be bound by a federal judgment. Thus, an interlocutory order denying that right should not be immediately appealable.

C. The *Young* Fiction

It may be argued, however, that the Eleventh Amendment has an underlying policy that is different from mere jurisdictional limitations. Words like jurisdiction and immunity are, after all, just labels. Ultimately, courts must determine whether immunity from trial is an animating force or not.¹⁰⁴ As a result, they must determine the interests that trigger the bar. One way to do this is to analyze the *Young* fiction.

To what extent is the *Young* fiction useful as a gauge of the underlying interests of the Eleventh Amendment immunity? In most cases involving Eleventh Amendment immunity, the party suing the state will name a state official in the complaint rather than the state alone. Plaintiffs rarely name the state as a defendant. Thus the central question in Eleventh Amendment doctrine is whether the state is the real party in interest. By looking at the answer to this question, it is possible to determine the underlying policy of the immunity.

In *Edelman*, the Court attempted to develop a way to determine whether a state was the real party in interest. The plaintiffs sued Illinois officials claiming that they had illegally delayed

¹⁰² Id at 526-27.

¹⁰³ Id at 527.

¹⁰⁴ *Lutz v Secretary of the Air Force*, 944 F2d 1477, 1482 (9th Cir 1991).

processing applications for a federal assistance program. The result, according to the plaintiffs, was to deny payments to the eligible claimants during the delay.¹⁰⁵ The Court held that the plaintiffs could sue for injunctive relief requiring the state to process the applications.¹⁰⁶ However, it denied the plaintiffs' request for an order requiring the state officials to pay them money that had been wrongfully withheld.¹⁰⁷ Such money payments were barred because "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself . . . than it does the prospective injunctive relief awarded in *Ex Parte Young*."¹⁰⁸ Under this rule, the Eleventh Amendment allows suits that seek prospective relief but does not allow suits that seek compensation for past injury that will be paid from the state treasury.

The Court tightly defined the type of relief that invokes Eleventh Amendment immunity. Under the *Edelman* standard the Eleventh Amendment bars only those suits in which plaintiffs seek an award equivalent to a damages award.¹⁰⁹ Even forms of equitable relief that have a concrete but ancillary effect on the state treasury will not make the state the real party in interest.¹¹⁰ Under this standard, the Eleventh Amendment truly operates as an immunity in only a very narrow sense. It protects states only from paying out compensatory judgments.

The *Edelman* decision represents the Court's attempt to reconcile the Eleventh Amendment immunity with other constitutional rights and privileges. By drawing a distinction between prospective and retrospective relief in order to determine whether the Eleventh Amendment immunity is triggered, *Edelman* provides a clear way to determine when the concerns for state sovereignty outweigh other constitutional considerations. The sovereignty interest that the distinction between prospective and retrospective relief protects is the states' interest in being free from paying com-

¹⁰⁵ 415 US at 653-59.

¹⁰⁶ *Id.* at 664.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 665.

¹⁰⁹ This explanation of the *Young* fiction as modified by *Edelman* can account for all cases except those in which a private individual sues a state directly and names the state as the party in the complaint. In such a case the retrospective/prospective distinction is irrelevant and the Eleventh Amendment bars the suit. As a practical matter, however, such a situation never arises.

¹¹⁰ *Edelman*, 415 US at 668.

pensatory judgments from their treasuries. So conceived, *Edelman* reveals a core interest of the immunity—protecting the state fisc.¹¹¹

Nevertheless, protecting the state treasury from compensatory judgments may not be the only interest underlying Eleventh Amendment immunity. In *Pennhurst State School and Hospital v Halderman*,¹¹² the Court held that the Eleventh Amendment barred a suit in which the plaintiff sought injunctive relief that would force state officials to comply with *state* law. In *Pennhurst*, the Court explained that the *Young* fiction gives federal courts a way to hold state officials responsible to the “supreme authority of the United States.”¹¹³ Where there is no violation of a federal right, the Court reasoned, there is no need for this fiction. If the plaintiff does not allege that the state officials have violated federal law, the Eleventh Amendment bars even injunctive relief that poses no threat to the state treasury. Under this conception, Eleventh Amendment immunity apparently protects states from liability even when their state treasuries may not be at risk.

Although in *Pennhurst* the Court expanded Eleventh Amendment immunity beyond cases where the state fisc was threatened, implicit in the Court’s rationale is a conception of the Eleventh Amendment immunity as a right not to be bound by a federal judgment rather than as a right not to appear before a federal tribunal. The Court focused on the *effect* that a federal judgment would have on the state in determining whether the Eleventh Amendment immunity protected the state.¹¹⁴ And nowhere did the Court characterize the immunity as an immunity from suit.

As the Eleventh Amendment immunity doctrine has developed, the concerns of federalism have come to outweigh other interests in only a very narrow context. State sovereign immunity outweighs other interests, according to *Edelman* and *Pennhurst*,¹¹⁵ only when a federal judgment would force a state to pay damages from its treasury or would force its officials to comply with its own

¹¹¹ In fact, the core interest may be even more narrow. In *Milliken v Bradley*, 433 US 267, 288-90 (1977), the Court ordered a state to spend money from the state treasury in order to finance remedial programs to counteract the effect of past segregation. It is difficult to reconcile *Milliken* with *Edelman*. But *Milliken* suggests that *Edelman* is limited to cases where the defendant seeks compensation for a past wrong.

¹¹² 465 US 89 (1984).

¹¹³ *Id.* at 102.

¹¹⁴ *Id.* at 113-14 (discussing judicial intervention in terms of the effect the injunction would have on the state, and not the effect the trial would have on the state).

¹¹⁵ See also *Green v Mansour*, 474 US 64, 68 (1985). In *Green*, the Court seemed to embrace the type of balancing approach that it initiated in *Pennhurst*.

laws.¹¹⁶ In either case, the state's interest can be vindicated on appeal from a final judgment. Consequently, the immunity seems like a defense to liability rather than a right not to stand trial.

When a district court denies a motion to dismiss on Eleventh Amendment immunity grounds, the state will incur litigation costs that it may not recoup on appeal. But that kind of hardship has never been sufficiently compelling to warrant an immediate appeal.¹¹⁷ Any error in a district court's order may promote delay and the additional expenditure of judicial and private funds, but such a hardship cannot warrant immediate review. Otherwise, a party would be entitled to an immediate appeal any time he faced an adverse ruling. The interests of judicial efficiency must outweigh this interest.¹¹⁸ That is the concern at the heart of the final judgment rule.

CONCLUSION

Although the Supreme Court has recently shown more deference to states' rights by strengthening the Eleventh Amendment immunity, the Court still confines the immunity's scope to a discrete area of interest—when a suit threatens the state fisc or when a suit seeks to force a state official to comply with state law. With this in mind, the position taken by the First Circuit in *Libby* seems more consistent with current jurisprudence surrounding the Eleventh Amendment and the collateral order doctrine. The history and theory of the Eleventh Amendment show that the interests underlying the immunity would not be compromised should the state be forced to litigate. Because a state would not have to worry about paying a compensatory judgment until after trial, the immunity is properly considered a defense to liability.

A claim that the Eleventh Amendment creates an immunity from suit ignores the way that the Supreme Court has restricted the operation of the Eleventh Amendment in the federal system. Shaped by a compromise between states' rights and individual rights, Eleventh Amendment immunity reflects the tension between those concerns. While the immunity undoubtedly protects the states, the precise nature of this protection does not justify ex-

¹¹⁶ *Pennhurst*, 465 US at 104-06.

¹¹⁷ See *Hutto v Finney*, 437 US 678, 694-98 (1978).

¹¹⁸ See *Lauro Lines v Chasser*, 490 US 495, 498 (1989), quoting *Richardson-Merrell Inc. v Koller*, 472 US 424, 436 (1985) ("The possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress. . .").

cepting the states from the requirements of the final judgment rule.