



10-1981

Patsy v. Florida Board of Regents

Lewis F. Powell Jr.

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Dick - I was asked when we lunched together on Thursday (8/13) whether there are particular Qs that I'd like to see the Court consider.

Whether exhaustion of state ^{administrative} remedies is a prerequisite to §1983 suit, is such a question. Wilwooding was a summary reversal w/out argument, & in my view is wrongly decided.

Here CA5 has considered this Q en banc with 17 judges, including some of the best, disagreeing with Wilwooding.

Do you think we could properly reach this Q if we grant? Could issue be easily avoided if we

PRELIMINARY MEMORANDUM

Summer List 11, Sheet 1

No. 80-1874 CFX

PATSY

V.

BOARD OF REGENTS OF FLORIDA

Cert to CA5 (en banc) (Roney; Rubin, Kravitch and Hatchett dissenting) (17-7 decision)

Federal/Civil

Timely
(Extension)

SUMMARY: Petr argues that the CA improperly required her to exhaust state administrative remedies in order to bring a §1983 action.

FACTS and DECISIONS BELOW: Petr is employed as a secretary at Florida International University, a state institution. She brought this §1983 action in SD Fla, alleging that the University

I would GUR for reconsideration in light of the statute. Both parties recognize ^{that} its ^{is} relevance (though they disagree about what its relevance is).

Denny

See Dick's memo. of 8/25, responding to my Q

We might reach the exhaustion issue, but this is doubtful.

11th Amend. issue is probably dispositive, as only the Bd of Regents, a state agency, is sued.

Also the claim is a violation of Title VII rights, & Petr did not comply with its grant (e.g. on 11th Amend)? pre-suit requirements.

17-7

made it a practice to seek out members of minority groups to hire and promote and that it segregated its personnel files according to race and sex. She alleged that she was denied several promotions for which she was qualified, and concluded that the University had violated the Equal Protection Clause by discriminating against her on the basis of race and sex. She asked the DC to order that she be promoted to the next available position for which she was qualified, or to award her \$50,000 in actual and punitive damages.

Resp, which is responsible for the operation of all state universities in Florida, moved to dismiss on a number of grounds. The DC (Gonzalez) granted the motion on the ground that petr had failed to exhaust her administrative remedies.

A panel of the CA (Godbold, Reavley and Anderson) reversed, stating that exhaustion of administrative remedies is not a prerequisite in §1983 actions. The panel relied upon Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973). The panel refused to consider resp's alternative arguments that it was not a "person" within the meaning of §1983 and that the 11th Amendment barred the suit, since they were not presented to the DC.

The CA granted rehearing en banc, and concluded that exhaustion should be required in certain instances. Judge Roney wrote for himself and Judges Coleman, ✓ Brown, ✓ Ainsworth, ✓ Godbold, ✓ Charles Clark, Gee, Tjoflat, Hill, Fay, Garza, Henderson, Reavley, Politz, Anderson, ✓ Randall, and Tate. He began by noting

that exhaustion of administrative remedies normally is required before a federal court will decide a case on the merits. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The advantages of exhaustion are particularly great when a federal court is asked to review state action, since considerations of federalism counsel restraint in such circumstances. The majority acknowledged that language in many of this Court's cases states that exhaustion of administrative remedies is not required in §1983 suits. In tracing the origins of this rule, however, the ✓ CA concluded that the Court had left room for the development of an exhaustion requirement.

The majority recognized that Monroe v. Pape, 365 U.S. 167 (1961), held that state judicial remedies need not be exhausted by a §1983 plaintiff. Monroe was followed by McNeese v. Board of Education, 373 U.S. 668 (1963), which held that plaintiffs attempting to challenge racially discriminatory practices in a school district were not required to exhaust state administrative remedies. The Court cited Monroe for the proposition that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." 373 U.S. at 671. It went on to state, however, that yes ✓ the administrative remedy was inadequate. Id. at 674-54. The CA stated that the traditional exhaustion requirement is inapplicable when the administrative remedy is inadequate. Therefore, McNeese does not necessarily support the proposition that the traditional rule never should be applied in §1983 cases. The CA found further support for its view in Barry v. Barchi, 443

U.S. 55 (1979), in which the Court stated that a §1983 plaintiff did not have to exhaust state remedies. The basis of the plaintiff's challenge was that the administrative remedy provided by the state was inadequate. The Court relied upon this factor to excuse his failure to exhaust, rather than a blanket no-exhaustion rule. The CA also relied upon Gibson v. Berryhill, 411 U.S. 564 (1973) which also stated that exhaustion is not required when a §1983 plaintiff challenges the adequacy of the administrative remedy itself.

The CA admitted that language appears in many of the Court's opinions stating a categorical rule that administrative remedies need not be exhausted. It distinguished all of these cases, however, either by stating that the language was dictum, because judicial rather than administrative remedies were at issue, or by stating that failure to exhaust would have been excused under the traditional exhaustion doctrine because the administrative remedies were inadequate. The CA also cited Justice Rehnquist's dissent from denial of certiorari in City of Columbus v. Leonard, 443 U.S. 905 (1979) (Burger, C.J. and Blackmun, J. concurring), which expressed the view that the exhaustion doctrine in §1983 cases deserved re-examination. The CA concluded that this Court's cases left open the question whether exhaustion of administrative remedies could be required in §1983 actions

The Court then considered the purposes of §1983, relying upon Monroe v. Pape, which stated that the statute was passed to override certain inconsistent state laws, to provide a federal remedy where state law was inadequate, and to provide a federal

remedy where the state remedy was available in theory but not in practice. 365 U.S. at 173-74. Requiring exhaustion is consistent with the second and third purposes, since it would require federal intervention only when state remedies were inadequate. Furthermore, state administrative proceedings "carry no res judicata or collateral estoppel baggage into federal court." Therefore, requiring exhaustion would not preclude federal protection of federally created rights. In addition, the CA identified five policy considerations favoring an exhaustion requirement: 1.) better allocation of judicial resources; 2.) assurance that the action complained of is final, rather than the result of a subordinate official's decision; 3.) incentives for states to create adequate administrative remedies for the vindication of constitutional rights; 4.) reliance by litigants upon the administrative process, which is generally simpler, speedier and less expensive; 5.) considerations of comity and federalism.

The CA then prescribed minimum standards which an administrative remedy must meet before exhaustion should be required. The remedy must include: 1.) an orderly system of review or appeal; 2.) relief that is more or less commensurate with the claim; 3.) relief that is available within a reasonable period of time; 4.) procedures that are fair and unburdensome; 5.) the possibility of interim relief in appropriate cases. If these standards are met, a court must consider the particular administrative scheme, and balance the nature of the interest the plaintiff seeks to protect against the values served by the

exhaustion doctrine to determine if the plaintiff should be required to exhaust. Because the record contained no information about the operation of the grievance procedure available to petr, the CA remanded the case for the DC to consider the adequacy of the remedy.

Judge Rubin filed a dissent, joined by Judges Vance, Frank Johnson, Hatchett and Sam Johnson. He cited 11 cases in which the Court has stated that exhaustion of administrative remedies is not required in §1983 cases. In particular, he relied upon Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam). There, the Court summarily reversed a CA decision requiring exhaustion of available administrative remedies. Judge Rubin also noted that §1983 was enacted because Congress had little faith in the remedies available under state law. Therefore, it is incongruous to argue that it intended that state administrative remedies be exhausted.

Am
ill
considered
opinion

But
this
in a
century
later

Judge Kravitch filed a short dissent, arguing that the question of exhaustion was foreclosed by this Court's previous opinions. She concluded that the CA was not free to adopt an exhaustion requirement on its own.

Judge Hatchett filed a lengthy dissent, joined by Judges Rubin, Vance, Frank Johnson and Thomas Clark. He argued that the Court's language regarding exhaustion has been unequivocal. In Monroe, the Court's holding on exhaustion of judicial remedies was based on a purpose of §1983 not discussed by the CA majority -- to provide a remedy that is "supplementary to the state remedy". 365 U.S. at 183. The majority did not discuss this

separate purpose of §1983. Although the majority cited from Justice Rehnquist's dissent in City of Columbus, which suggested that Monroe's holding on this point should be re-examined, those arguments were simply statements in a dissenting opinion. The cases extending Monroe's holding to administrative remedies are consistent with this rationale. In Damico v. California, 389 U.S. 416 (1967) (per curiam), the Court explicitly stated that administrative remedies need not be exhausted. In so doing, it rejected Justice Harlan's argument in dissent that McNeese did not require this result because the remedy in McNeese was inadequate. Judge Hatchett concluded that Damico showed that the majority's view of McNeese has been rejected by the Court. Subsequent cases have relied upon Damico in holding that exhaustion is not required. In particular, Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam), refused to require a state prisoner filing a §1983 action to exhaust available administrative remedies. The Court stated that requiring exhaustion might be futile, but stated: "In any event, resort to these remedies is unnecessary in light of [Monroe, McNeese, and Damico]." Id. at 640. See also King v. Smith, 392 U.S. 309, 312 n.4 (1968); Wilwording v. Swenson, supra; Carter v. Stanton, 405 U.S. 669 (1972). Although the majority relied upon Gibson v. Berryhill, 411 U.S. 564 (1973), which suggested that a §1983 plaintiff might be required to exhaust state remedies if the state begins an administrative proceeding against him before he commences his action, two post-Gibson cases reiterate the no-exhaustion rule: Steffel v. Thompson, 415 U.S. 452, 472-73

(1974); Ellis v. Dyson, 421 U.S. 426 (1975). Furthermore, the Court in Barry v. Bianchi, 443 U.S. 55 (1979), did not retreat from the flat no-exhaustion rule.

Judge Hatchett also argued that the overall purpose of §1983 was to create federal protection for federally created rights, so that citizens would not be forced to rely upon the states for protection. The majority's exhaustion requirement is inconsistent with that purpose. Since Congress did not include an exhaustion requirement, the court should not supply one. There are a number of policy arguments in favor of a no-exhaustion rule, including the danger of discouraging litigants from pursuing their rights by erecting numerous procedural barriers, the necessity of time-consuming hearings to determine the adequacy of a particular remedy, the unavailability of costs and attorney fees in state administrative proceedings, the unavailability of class actions, and the friction that may develop when federal judges evaluate the adequacy of a state remedy.

CONTENTIONS: Petr, represented by the ACLU Foundation, argues that the CA's decision conflicts with the decisions of this Court cited in the dissenting opinions, and suggests that summary reversal may be in order. She also argues that the recent passage of the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247 (May 23, 1980), codified in pertinent part at 42 U.S.C. §1997e, indicates that Congress has approved of the Court's refusal to require exhaustion of administrative remedies in §1983 suits. The Act allows a DC in which a prisoner's §1983

suit is pending to continue the case for 90 days while the prisoner exhausts available state administrative remedies, if those remedies are consistent with standards promulgated by the Attorney General. According to petr, the legislative history of the Act reveals that Congress believed that legislation was necessary to allow DCs to impose an exhaustion requirement in §1983 suits. This indicates that Congress was aware of this Court's cases in this area and approved of the no-exhaustion requirement in all types of cases except prisoner's lawsuits. Petr notes that in Jenkins v. Brewer, No. 80-5116 (2/23/81), the Court GVR'd for reconsideration in light of the Act after it had granted cert to decide whether a prisoner should be required to exhaust administrative remedies. She suggests that the Court may wish to take the same action here. Although the CA's decision was issued after the passage of the Act, there is no indication that it was aware of the Act.

Finally, petr argues that resp bore the burden of showing that the administrative remedy was adequate. Since the CA found the record to be silent on this point, petr should prevail. In any event, the remedy clearly is inadequate, since it provides for review ultimately by the state's Director of Personnel and its Human Rights Commission. Neither has the authority to order resp to grant her relief. The Human Rights Commission may file a lawsuit, but is not required to do so. McNeese stated that a similar procedure was inadequate.

Resp states that the case is not ripe for review, because the DC has not yet decided whether petr will be required to

exhaust. In addition, the DC has not addressed its 11th Amendment argument, which is dispositive of this case. It argues that there is no real conflict with the prior decisions of this Court, for the reasons given by the CA's majority. The 1980 statute is inapplicable, because petr is not a prisoner, and Congress was concerned only with prisoners' suits. Resp also contends that an adequate remedy exists under Title VII, and that there should be no separate cause of action under §1983 in such circumstances. Petr should not be allowed to circumvent the administrative procedures of Title VII.

Petr replies that the exhaustion issue is ripe for review. If exhaustion of administrative remedies is not required by §1983, the CA's remand violates that statute. She points out that resp's discussion of the 1980 Act states that Congress believed that legislation was necessary to allow DCs to require exhaustion in prisoners' cases. Finally, she states that the 11th Amendment argument was not decided by the CA. Even if the Amendment is applicable here, petr seeks injunctive relief. Therefore, the suit still may be maintained. Quern v. Jordan, 440 U.S. 332 (1979); Supreme Court of Virginia v. Consumers Union 446 U.S. 719 (1980). Petr states that the Title VII argument was not raised below.

DISCUSSION: Both sides are attempting to press a number of red herrings upon the Court. The CA did not decide whether the administrative remedy is adequate, and I believe that the Court should decline petr's invitation to do so. Similarly, the 11th Amendment and Title VII arguments should be addressed by the DC

and CA before this Court steps in. Unlike resp, I believe that the [✓]exhaustion issue is ripe for decision. As petr points out, if exhaustion may never be required, the remand will be a waste of time.

The dissenting opinions demonstrate (and the majority admits) that the CA's holding conflicts with a number of this Court's statements. If the Court is not interested in re-examining this issue, it would seem that summary reversal is appropriate. On the other hand, the careful and thorough consideration of the question by the entire CA may indicate that the Court should take a closer look. The CA, however, does not discuss the 1980 legislation. That legislation may indicate that Congress has considered the Court's statements on exhaustion of administrative remedies and intends that exhaustion should be required only in the cases specified. If so, the dispute is at an end. I think it would be a better use of the Court's time for the CA to examine this legislation before this Court decides its effect upon this case. Therefore, I recommend that the case be GVR'd for reconsideration in light of §7 of the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247.

There is a response, along with a reply.

8/4/81

Dean

Opns in petn

08/25/81

Deny

See my notes
on Cert. memo
attached.

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Patsy v. Board of Regents, No. 80-1874 CFX

In your hand-written notes on this cert memo, you asked for my judgment on whether the exhaustion question could properly be reached. I believe that it could, but there are tremendous obstacles not fully developed in the pool memorandum. For the reasons stated below, I still recommend a denial. I begin, however, with the statutory question noted in the original memo.

Like the memo writer, I initially recommended that the decision of CA5 be remanded for reconsideration in light of the enactment of 42 U.S.C. §1997e. That statute explicitly creates an exhaustion requirement for certain actions brought, by the government, on behalf of institutionalized persons. It bears on the case, if at all, as an indication of congressional intent on the exhaustion question. It therefore provides no bar to the consideration of that question. The argument for a remand was to use the Court's resources most effectively. That concern can of course be overridden where there is a powerful reason to want to take the case.

After looking at the papers, I find the 11th Amendment issue more troublesome. Petitioner asks for both monetary and injunctive relief. The suit for monetary relief--which would

RESPONSE RECEIVED
The response makes clear that this Court has not always been sensitive to the 11th Amendment concerns held dispositive in Pugh. Here, however, the issue has been raised. I am troubled that as much turns on a pleading error. Patsy could have sued the members of the Board without 11th Amendment problems. Perhaps form should not be so exalted. But Pugh seems controlling.
11-12 RF
Andrew

apparently come from the State's treasury--is almost certainly barred by under Edelman v. Jordan, 415 U.S. 641 (1974). (If I appear to be hedging slightly, I am. CA5 did not reach the 11th Amendment issue, so there is no factual record of the University's financial relationship with the State.) Edelman does not bar suits against named State officials for injunctive relief. But petitioner here seems not to have named any State officials. She sued only the "Board of Regents of the State of Florida, a Body Corporate, for and on behalf of, Florida International University." This could well be a pleading error of the first importance. In Alabama v. Pugh, 438 U.S. 781, 782 (1978), this Court held that the 11th Amendment barred suit against "the Alabama Board of Corrections." See id. at 782 ("There can be no doubt that suit against the State and its Board of Corrections is barred by the 11th Amendment.")

It is possible, I suppose, to argue that no 11th Amendment issue is before the Court, because none was decided by CA5. It could be left to the remand to decide the State law question whether the defendant Board of Regents is an arm of the State for 11th Amendment purposes. But the question does not seem much in doubt. Also, the 11th Amendment question is plainly jurisdictional, and I would question the propriety either of ignoring it or of considering it after the exhaustion question--another possibility for getting to exhaustion, if the Court wants to do so badly enough. It is settled that this Court could reach the jurisdictional issue, even though it was not considered below. See Edelman v. Jordan, supra, 415 U.S. at 667.

CA5 didn't
reach

Finally, another problem should probably be noted.

Respondent raises a significant question whether this case is not subject to the exhaustion requirements of Title VII. Section 1983 creates no substantive rights. The civil rights asserted by plaintiff thus seem to be rights arising under the Civil Rights Act. If so, there is a question--not briefed or decided below--whether she was not obliged to begin her action through the EEOC process. This is another jurisdictional question.

In sum, to answer your question: The exhaustion question could be reached if the Court were insistent, but there are many obstacles. I would still recommend that the petition should be denied. If petitioner somehow surmounts these obstacles in the lower courts, this Court will get another chance at a later date.

Sims (Petr)

§ 1997a relied on heavily.

Franker (Ant AG of Fla)

Only State leg. may waive
11th Amend. Will have to be decided on ^{remained} _{& argued}

Issue was briefed in CA before
the Panel - but not before en banc
court.

St/him (2 yrs) would be tolled
during adm. proceeding. (Tomanio)

(With 1988 on books, few lawyers
will voluntarily pursue adm
remedies)

Agree that 11th Amend issue is
a "cloud" over this case.

If Fla loses here, it will still
litigate the 11th Amend.

80-1874

Patry (Exhaustive Adv. Remedies.

En banc: 17 to 6. Majority included
Brown, Ainsworth, Godbold, Charles
Clark, Kravitch, Politz, Randall,
& Anderson, etc.)

Merits: Affirm

Monroe modified Monroe
McNee

1. Our case (Monroe/Wilwording)

2. § 1997

3. Policy considerations - rational
system of
justice

4. # Purpose of § 1983 not applicable

5. A rational system of justice

Remand on 11th Amend

Jurisdictional

Bd of Regents of St of Fla - only parties

Not even injunctive relief
against the State.

Ex parte Young rationale

"stripping doctrine": Officials who
act unconstitutionally are "stripped"
of auth.

See Adair Pugh

Rev

No. 80-1874

Patsy v. Bd. of Regents

Conf. 3/5/82

The Chief Justice *Passed;*

Seventeen CJS judges read our cases and
laying down no inflexible rule. This is CJ's
view.

When adm. remedies are available, they
should be exhausted

Justice Brennan

Rev

Morale est. principle of no exhaustion, &
it has been followed uniformly.

Also 3/1997 confirms this

x x x

11th amend no problem. Bd of Regents
is a body corporate & is not the State

Justice White

Rev.

Agree with WJB.

Bd / Regents is not the State. If
it were, 11th amend would even bar
injunctive.

11th issue has been waved (How?)

Justice Marshall Rev.

Agree with W9 B

Justice Blackmun Rev

If stare decisis is applied, must
~~reverse~~.

Now Congress has embraced Monroe
11th Amend - no merit. Cf Ala v Pugh
Bd may be independent of State
- is like a state appeal.

Sov. Immunity has been weighed

Justice Powell

Vacate on 11th Amend issue.

On merits, I'd affirm.

See ^{my} notes

Justice Rehnquist

Rev. (tentative)

11th Amend issue not here.

But doesn't agree with Bryan that it can be waived by counsel.

We don't know enough about the status of Board to decide whether it is in effect the State.

Enactment of 5/1997 can be read as endorsing ~~out~~ out cases.

Disapproves of the rule that exhaustion is not required - but it is the law.

Justice Stevens

Rev.

Agrees with LFP as to ~~undesirability~~ undesirability of present situation but Court has "painted itself into a corner" on this.

Congress should resolve "the mess"

Justice O'Connor

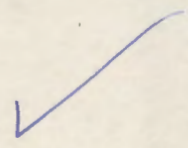
Rev.

There should be an ~~exhausted~~ exhaustion requirement, ^{but} in view of cases & 5/1997 we have ~~no~~ little option to remedy the situation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 8, 1982



RE: No. 80-1874 Patsy v. Board of Regents

Dear Chief:

Thurgood has agreed to take on the opinion for
the Court in the above.

Sincerely,

The Chief Justice

cc: The Conference

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 9, 1982

80-1874 Patsy v. Board of Regents

Dear Chief:

I will be glad to write a dissent in this case.

Sincerely,

The Chief Justice

lfp/ss

March 9, 1982

80-1874 Patsy v. Board of Regents

Dear Chief:

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Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1982

Re: No. 80-1874 - Patsy v. Board of Regents of Florida

Dear Lewis:

You and I seem to be alone in this case. Will
you take on a dissent?

Regards,

WPB

Justice Powell

lfp/ss 03/15/82

Patsy Case

Talk to David about obtaining information through the Library that will enable a comparison of 1983 cases filed with DC's in fiscal 1981 compared to those filed the year that Monroe v. Pape was decided and filed the year Wilwording was decided.

Also was it not Justice Holmes who said that the "Life of the law is experience"?

April 13, 1982

LEVI GINA-POW

To: David Levi

From: LFP, JR.

Subject: 80-1874 Patsy v. Board of Regents

No doubt the Court opinion in this case will rely, as petitioner argued, on the enactment by Congress of 42 U.S.C. §1997 that provides for exhaustion of remedies by state prisoners but only where the state adopt^s intrusive "minimum standards" for administrative review. The Attorney General has adopted regulations, as required by the statute. I don't have these at hand, but I believe either the statute or the regulations permit a prisoner to sue under Section 1983 if the administrative process extends beyond some specified time (e.g. 90 days).

Section 1997 f requires the Attorney General to report to Congress. I suggest that you request the library to obtain a copy of any reports made by the AG to the Congress.

Also, ask the library to inquire - perhaps through the administrative office or Justice Department or both - whether any statistics are available as to the number of states that have adopted the standards required by the Attorney General, and whether there has been any lessening of the filing of 1983 state prisoner petitions.

It may be too early for any dependable statistics
(perhaps none at all), but we might check.

LFP, Jr.

April 13, 1982

LEVI GINA-POW

To: David Levi

From: LFP, JR.

Subject: 80-1874 Patsy v. Board of Regents

No doubt the Court opinion in this case will rely, as petitioner argued, on the enactment by Congress of 42 U.S.C. §1997 that provides for exhaustion of remedies by state prisoners but only where the state adopt intrusive "minimum standards" for administrative review. The Attorney General has adopted regulations, as required by the statute. I don't have these at hand, but I believe either the statute or the regulations permit a prisoner to sue under Section 1983 if the administrative process extends beyond some specified time (e.g. 90 days).

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It may be too early for any dependable statistics
(perhaps none at all), but we might check.

LFP, Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 14, 1982

Re: No. 80-1874 Patsy v. Board of Regents

Dear Thurgood:

Although I voted for the result which your opinion reaches at Conference, I have some difficulty with your treatment of the Eleventh Amendment issues in the opinion, and will await any separate writing that may be forthcoming. As a last resort, I may write separately myself.

Sincerely,

WM

Justice Marshall

Copies to the Conference

*Dear Thurgood,
In due time, I will
circulate a dissent.*

May 14, 1982

80-1874 Patsy v. Board of Regents

Dear Thurgood:

In due time, I will circulate a dissent.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 17, 1982

RE: No. 80-1874 Patsy v. Board of Regents of the
State of Florida, et al.

Dear Thurgood:

I join your opinion. Would you, however, please
add the attached statement at the foot of your opinion.

Sincerely,

Bill

Justice Marshall

cc: The Conference

No. 80-1874 Georgia Patsy v. Board of Regents of the State
of Florida, etc.

I join the Court opinion. I continue to adhere, however, to my view that the Eleventh Amendment is not a defense for the reasons stated in my dissent in Employees v. Department of Public Health and Welfare, 411 U.S. 279, 309-324 (1973). See also Edelman v. Jordan, 415 U.S. 651, 687 (1974).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

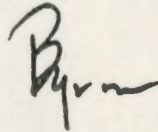
May 17, 1982

Re: 80-1874 - Patsy v. Florida

Dear Thurgood,

Although I voted to reverse, I shall await the dissent. In any event, I may well write indicating that the no exhaustion of administrative remedies rule does not necessarily mean that a defendant in an administrative enforcement proceeding may enjoin and sidetrack that proceeding by resorting to a §1983 action in federal court.

Sincerely yours,



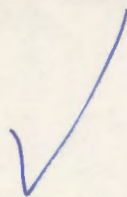
Justice Marshall

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



May 19, 1982

No. 80-1874 Patsy v. Board of Regents of the State of Florida

Dear Thurgood,

I will await the additional writing in this case before finally deciding whether to join the Court's opinion.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Z. F. P.

9 will dissent
(Dissent circulated 5/29)

From: **Justice Marshall**

Circulated: **MAY 14 1982**

Recirculated: _____

1st DRAFT

Reviewed
5/16

SUPREME COURT OF THE UNITED STATES

No. 80-1874

Dissent

GEORGIA PATSY, PETITIONER *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U. S. C. § 1983. Petitioner Georgia Patsy filed this action, alleging that her employer, Florida International University (FIU), had denied her employment opportunities solely on the basis of her race and sex. By a divided vote, the United States Court of Appeals for the Fifth Circuit found that petitioner was required to exhaust “adequate and appropriate” administrative remedies, and remanded the case to the District Court to consider the adequacy of the administrative procedures. *Patsy v. Florida International University*, 634 F. 2d 900 (CA5 1981) (en banc). We reverse the decision of the Court of Appeals.

I

Petitioner alleges that even though she is well-qualified and has received uniformly excellent performance evaluations from her supervisors, she has been rejected for more than thirteen positions at FIU.¹ She further claims that

¹ Because this case is here on a motion to dismiss, we accept as true the factual allegations in petitioner’s amended complaint. In her initial complaint, petitioner named FIU as the defendant. Relying on *Byron v. Uni-*

FIU has unlawfully filled positions through intentional discrimination on the basis of race and sex. She seeks declaratory and injunctive relief or, in the alternative, damages.²

The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy v. Florida International University*, 612 F. 2d 946 (CA5 1980). The full court then granted respondent's petition for rehearing and vacated the panel decision.

The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required, and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is avail-

versity of Florida, 403 F. Supp. 49 (ND Fla. 1975), the District Court granted FIU's motion to dismiss, holding that the Board of Regents and not the individual university had the capacity to sue and be sued under Florida law. The District Court granted petitioner leave to amend her complaint.

²Petitioner requested the District Court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." Record 47. Petitioner also requested that the District Court "order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein." Record 48.

able within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required. *Id.*, at 912-913. The Court of Appeals remanded the case to the District Court to determine whether exhaustion would be appropriate in this case.

II

At the outset, we address the contention that the Eleventh Amendment bars even the injunctive and declaratory relief sought in this complaint.³ Respondent Board of Regents

³The Eleventh Amendment defense was not raised in the District Court; it was briefed to the panel on appeal, but was not included in the brief on rehearing en banc. In this Court, the defense was not briefed, but respondent asserted it in its response in opposition to the petition for certiorari. At oral argument, the state attorney general stated that this Court should affirm the Court of Appeals solely on the exhaustion holding. However, he also stated that the Eleventh Amendment was still an issue in this case, and he admitted that even if we affirmed the Court of Appeals, the case would be remanded for consideration of the adequacy of the administrative procedures, thus subjecting respondent to further proceedings in the District Court.

We have held that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised at any point in the proceedings, and that waiver of this defense will not be lightly inferred from the State's litigation strategy. *Edelman v. Jordan*, 415 U. S. 651, 678 (1974). See *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459 (1945). We have never addressed the question whether the Eleventh Amendment defense can be raised, neglected, and then reargued at the whim of the person raising this defense. Certainly, permitting this practice would greatly increase the uncertainty and potential for wasted litiga-

suggests that, as a state corporation, it should be viewed as the State itself for purposes of the Eleventh Amendment. It relies on *Alabama v. Pugh*, 438 U. S. 781 (1978), where this Court held that the Eleventh Amendment bars a suit brought directly against the State and its Board of Corrections, even when only declaratory and injunctive relief is requested.⁴ However, it is well-settled that the Eleventh Amendment does not bar actions against state officials or state corporations when the plaintiff is not seeking monetary relief that must be paid from public funds in the state treasury. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911); *Ex Parte Young*, 209 U. S. 123 (1908).⁵

In *Hopkins*, *supra*, this Court squarely decided that a

tion already inherent in the rule that the defense can be raised at any time. In any event, our Eleventh Amendment precedents are clear, and a remand is not required to determine unanswered questions of fact or state law, at least with respect to the injunctive and declaratory relief requested. Thus, we need not address the procedural question posed by respondent's perplexing litigation strategy.

⁴The issue decided in *Alabama v. Pugh*, 438 U. S. 781 (1978)—whether a state agent *is* the State for purposes of the Eleventh Amendment and thus cannot be brought into court for any reason absent a waiver of sovereign immunity—is distinct from the question addressed in *Edelman v. Jordan*, 415 U. S. 651, 662–669 (1974)—whether the Eleventh Amendment forbids a suit against a state agent because the suit seeks to impose a damage award that must be paid out of funds in the state treasury. See also *Quern v. Jordan*, 440 U. S. 332 (1979). Here, we decide the first question, and hold that respondent is not the State in the sense intended in *Alabama v. Pugh*.

⁵Consistent with this theory, we have heard numerous suits requesting injunctive or declaratory relief against state universities or boards of regents or trustees, without discussing a possible Eleventh Amendment bar. See *e. g.*, *Board of Regents v. Tomanio*, 446 U. S. 478 (1978) (§ 1983 action); *University of California Board of Regents v. Bakke*, 438 U. S. 265, 287 (1978) (POWELL, J., announcing the judgment of the Court) (“decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment”) (citing *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950), *Sweatt v. Painter*, 339 U. S. 629 (1950), *Sipuel v. Board of Regents*, 332 U. S. 631 (1948), and *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938));

state corporate body such as respondent was not entitled to the full immunity accorded the State by the Eleventh Amendment.⁶ There, the petitioner sued the state college, claiming that the college and its board of trustees had committed both a tort and an unconstitutional taking of his property. The respondent college argued that the Eleventh Amendment barred the suit. Framing the issue as “whether a public corporation can avail itself of the State’s immunity from suit,” 221 U. S., at 642, the Court rejected this defense with respect to the college and its board of trustees, established by the State as a “body corporate.”⁷

The Court recognized that “[w]ith the exception named in the Constitution, every State has absolute immunity from suit,” and cannot be sued in any court without its consent. *Ibid.* The Court also noted that even when the State is not named as the party defendant, the Eleventh Amendment applies when the suit is, in reality, one against the State. The Court then reasoned:

“But immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own

Board of Regents v. Roth, 408 U. S. 564 (1972) (§ 1983 action).

⁶The Courts of Appeals have been virtually unanimous in allowing suits for declaratory or injunctive relief against state universities or their boards. See, e. g., *Gay Student Services v. Texas A & M University*, 612 F. 2d 160 (CA5 1980); *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F. 2d 1196 (CA1 1979). Cf. *Skehan v. Board of Trustees*, 590 F. 2d 470 (CA3 1978). However, they have divided on whether monetary relief can be awarded against these entities, depending on whether they have funds independent of the state treasury or on whether the State has waived its immunity. Compare *SONI v. Board of Trustees*, 513 F. 2d 347 (CA6 1975) and *Goss v. Jacinto Junior College*, 588 F. 2d 96 (CA5 1979), with *Jagnandan v. Giles*, 538 F. 2d 1166 (CA5 1976).

⁷The state charter establishing the college and its board of trustees is in relevant part remarkably similar to that of the Board of Regents in this case, see note 9, *infra*. See *Hopkins v. Clemson Agricultural College*, 221 U. S. 637, 638–639 (1911).

torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. . . . The whole frame and scheme of the political institutions of this country, state and Federal, protest against extending to any agent the sovereign's exemption from legal process." *Id.*, at 642-642.

After discussing cases in which the Court had uniformly denied Eleventh Amendment immunity to public officials,⁸ the Court considered whether public corporations should receive similar treatment:

It is said, however, that, in the cases referred to, the officers were held liable to suit because in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the State. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the State itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty. In *County of Lincoln v. Luning*, 133 U. S. 529, 530, the Court . . . held that the Eleventh Amendment was limited to those cases in which the State is the real party, or party on the record, but that counties were corporations which might be sued. . . .

Corporate agents or individual officers of the State

⁸The cases cited and discussed by the Court included *Ex Parte Young*, 209 U. S. 123 (1908), *Tindal v. Wesley*, 167 U. S. 204 (1897); and *United States v. Lee*, 106 U. S. 196 (1882).

stand in no better position than officers of the General Government. . . ." *Id.*, at 644-645 (citations omitted).

The Court went on to recognize that agents of the State, whether corporate or individual, might have defenses not available to private corporations or individuals, but these defenses serve to prevent ultimate liability or recovery, and are not barriers to initiating the litigation. The *Hopkins* Court thus approached the application of the Eleventh Amendment to a state university and board of trustees, established as a "body corporate" of the State, in the same manner it had approached this defense in cases involving other state officials or corporations: the Eleventh Amendment was not a bar to the suit as long as the suit did not seek damages that must be paid out of public funds in the state treasury and did not seek to restrain the state agent from obeying a constitutional command of the State. *Id.*, at 644.

This approach is consistent with that taken in our more recent cases. For example, in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658 (1978), this Court addressed whether municipal corporations were "persons" within the meaning of § 1983. In holding that they were, the Court found it significant that the Congress which enacted the predecessor to § 1983 recognized that "there was no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State." *Id.*, at 682. See also *Mount Healthy City School District Board of Education v. Doyle*, 429 U. S. 274, 280-281 (1977) (local school board, like a municipal corporation, not entitled to Eleventh Amendment immunity). Cf. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 400-401 (1979) (agency created by a compact between two States with congressional approval not necessarily entitled to the same immunity as the States themselves).

Here, as in *Hopkins*, respondent Board of Regents is a "body corporate with all the powers of a body corporate."

Fla. Stat. § 240.205.⁹ Furthermore, under Fla. Stat. § 20.15, respondent Board of Regents is designated as “the director of the Division of Universities,” one of five divisions of the Department of Education, while the directors of the other divisions are appointed by the Commissioner of Education. As a result, the Board of Regents stands in the same position as a state official, not only because it is a corporate agent by virtue of its status as a “body corporate,” but also because the corporate body itself is designated as the *director* of a subdivision of the Department of Education, a position generally held by an individual official.

Finding that respondent is entitled to no more immunity than a state official means only that it may be sued for unconstitutional or unauthorized actions, as long as the plaintiff is not seeking monetary relief that must be paid out of the state treasury. See *Edelman v. Jordan*, 415 U. S. 651 (1974). As we noted earlier, petitioner sought injunctive and declaratory relief, and only requested damages in the alternative. See note 2, *supra*. Clearly, the Eleventh Amendment does not bar this suit with respect to the injunctive and declaratory relief.

⁹Section 240.205 provides in full:

“The Board of Regents is hereby created as a body corporate with all the powers of a body corporate for all the purposes created by, or that may exist under, the provisions of this chapter or laws amendatory hereof and shall:

- (1) Have a corporate seal.
- (2) Elect a corporate secretary.
- (3) Have and employ a staff attorney and other authorized personnel.
- (4) Have power to contract and be contracted with, to sue and be sued, and to plead and be impleaded in all courts of law and equity.
- (5) Receive donations.
- (6) Make purchases of real and personal property and contract for the sale and disposal of same, but the title to all real property, however acquired, shall be vested in the Board of Trustees of the Internal Improvement Trust Fund and shall be transferred and conveyed by it.”

It is inappropriate to consider at this time whether an award of monetary relief would be permissible under *Edelman*, since there are unresolved questions of fact and state law with respect to this issue. It is unclear whether the State has waived its sovereign immunity with respect to actions against respondent.¹⁰ If the State has not waived such immunity, it is unclear whether a judgment against the Board must be paid out of the State treasury.¹¹ These unsettled questions should be decided by the District Court on remand should it find that petitioner is entitled to recover, and should it further consider awarding monetary relief. The question whether the Eleventh Amendment bars a damage award is one of ultimate relief not of jurisdiction, once it is established that respondent may be sued at least with respect to the request for injunctive relief. See *Hopkins v. Clemson Agricultural College*, 221 U. S., at 648.

III

The question whether exhaustion of administrative remedies should ever be required in a § 1983 action has prompted vigorous debate and disagreement. See, *e. g.*, Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Note, 41 U. Chi. L. Rev. 537 (1974). Our resolution of this issue, however, is made much easier

¹⁰ See, *e. g.*, Fla. Stat. § 240.205(4) (respondent authorized "to sue and be sued, and to plead and be impleaded in all courts of law and equity"); Fla. Stat. § 240.213 (respondent may secure liability insurance, and immunity is waived to the extent of the insurance); Fla. Stat. § 240.215 (respondent may pay costs of civil actions against board members or employees and may procure insurance to cover such losses or expenses). The application of these provisions to actions in federal courts and to actions not involving tort liability is unclear.

¹¹ The Board has certain funds not derived from the State that are exempt from deposit with the state treasury. See Fla. Stat. §§ 240.277, 240.781.

because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions.

Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not “fully” consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese v. Board of Education*, 373 U. S. 668, 671-673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry v. Bachi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 574 (1973); *Carter v. Stanton*, 405 U. S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U. S. 249, 251 (1971); *Houghton v. Shafer*, 392 U. S. 639, 640 (1968); *King v. Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico v. California*, 389 U. S. 416 (1967). Cf. *Fair Assessment in Real Estate Association v. McNary*, — U. S. —, — (1981); *id.*, at — (BRENNAN, J., concurring in the judgment); *Steffel v. Thompson*, 415 U. S. 452, 473 (1974) (“[w]hen federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights”). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression.

IV

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals’ exhaustion rule, which

was based on *McKart v. United States*, 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 695-701 (1978), we articulated four factors that should be considered. Two of these factors—whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent—are particularly relevant to our decision today.¹² Both concern legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the parameters of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.¹³

¹² The other factors discussed in *Monell*—whether the decisions in question constituted a departure from prior decisions and whether overruling these decisions would frustrate legitimate reliance on their holdings—do not support overruling these decisions. *McNeese* was not a departure from prior decisions—this Court had not previously addressed the application of the exhaustion rule to § 1983 actions. Overruling these decisions might injure those § 1983 plaintiffs who had foregone or waived their state administrative remedies in reliance on these decisions.

¹³ Congressional intent is important in determining the application of the exhaustion doctrine to cases in which federal administrative remedies are available, as well as to those in which state remedies are available. Of course, exhaustion is required where Congress provides that certain administrative remedies shall be exclusive. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consist-

Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.

A

In determining whether our prior decisions misconstrued the meaning of § 1983, we begin with a review of the legislative history to § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983.¹⁴ Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. As we recognized in *Mitchum v. Foster*, 407 U. S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100

ent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the particular federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress. See *McKart v. United States*, 395 U. S. 185, 193-195 (1969). With state administrative remedies, the focus is not so much on the role assigned to the state agency, but the role of the state agency becomes important once a court finds that deferring its exercise of jurisdiction is consistent with statutory intent.

¹⁴Some of the debates relating to § 2, which created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, aimed primarily at the Ku Klux Klan, are also relevant to our discussion of § 1.

U. S. 339, 346 (1879)), “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”

At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

“The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.” Cong. Globe, 42d Cong., 1st Sess. 476 (1871) (hereinafter Globe).

See also *id.*, at 332 (Rep. Hoar); *id.*, at 375 (Rep. Lowe); *id.*, at 448–449 (Rep. Butler); *id.*, at 459 (Rep. Coburn).¹⁵

¹⁵ Opponents of the bill also recognized this purpose and complained that the bill would usurp the States’ power, centralize the government and perhaps ultimately destroy the States. See, *e. g.*, Globe 337, 338 (Rep. Whitthorne); *id.*, at 352 (Rep. Beck); *id.*, at 361 (Rep. Swann); *id.*, at 365 (Rep. Arthur); *id.*, at 385 (Rep. Lewis); *id.*, at 429, 431 (Rep. McHenry);

The 1871 Congress intended § 1 to “throw open the doors of the United States courts” to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, Globe 376 (Rep. Lowe), and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary. For example, Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that the bill was similar in principle to an earlier act upheld by this Court in *Prigg v. Pennsylvania*, 16 Pet. 539 (1842):

“[T]he Supreme Court decided . . . that it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress.*” Globe 692 (emphasis added).

Similarly, Representative Elliott viewed the issue as whether “the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domiciled.” *Id.*, at 389 (emphasis added). See, e. g., *id.*, at 459 (Rep. Coburn); *id.*, at 807 (Rep. Garfield); *id.*, at 609 (Sen. Pool); Globe App. 141 (Rep. Shanks).¹⁶

id., at 454 (Rep. Cox); *id.*, at 510, 511 (Rep. Eldridge); Cong. Globe, 42d Cong., 1st Sess., App. 46 (Rep. Kerr) (hereinafter Globe App.); *id.*, at 216 (Sen. Thurman); *id.*, at 243 (Sen. Bayard).

¹⁶ Opponents criticized this provision on this very ground. For example, Rep. Storm lamented:

“[Section one] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.”

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal court jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. See, *e. g.*, Globe 321 (Rep. Stroughton) (“[t]he State authorities and local courts are unable or unwilling to check the evil or punish the criminals”); *id.*, at 374 (Rep. Lowe) (“the local administrations have been found inadequate or unwilling to apply the proper corrective”); *id.*, at 459 (Rep. Coburn); *id.*, at 609 (Sen. Pool); *id.*, at 687 (Sen. Shurz); *id.*, at 691 (Sen. Edmunds); Globe App. 185 (Rep. Platt).¹⁷ Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the fact-finding processes of state institutions. See, *e. g.*, Globe 320 (Testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) (“[t]he defect lies not so much with the courts as with the juries”); *id.*, at 394 (Rep. Rainey); Globe App. 311 (Rep. Maynard). This Congress

Globe App. 86.

See also Globe 416 (Rep. Biggs) (“for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding”); *id.*, at 337 (Rep. Whitthorne); *id.*, at 373 (Rep. Archer); Globe App. 216 (Sen. Thurman).

¹⁷ This view was expressed in the Presidential message urging the passing of corrective legislation. See Globe 244 (“That the power to correct these evils is beyond the control of State authorities I do not doubt.”) (Message of Pres. Grant). The inability of state authorities to protect constitutional rights was also expressed in the findings of the House Judiciary Committee, which had been directed to investigate the situation. See *id.*, at 320. The resolution introduced by Senator Sherman instructing the Senate Judiciary Committee to report a bill expressed a similar view. See Globe App. 210 (state “courts are rendered utterly powerless by organized perjury to punish crime”).

believed that federal courts would be less susceptible to local prejudice and to the existing defects in the fact-finding processes of the state courts. See, *e. g.*, Globe 322 (Rep. Stoughton); *id.*, at 459 (Rep. Coburn).¹⁸ This perceived defect in the States' fact-finding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior fact-finding ability of the relevant administrative agency. See, *e. g.*, *McKart v. United States*, 395 U. S., at 192-196.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe v. Pape*, 365 U. S. 167, 183 (1961) ("[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). For example, Senator Thurman noted:

"I object to [§ 1], first, because of the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of." Globe App. 216.

¹⁸ Opponents viewed the bill as a declaration of mistrust for state tribunals. See, *e. g.*, Globe 360 (Rep. Swann); *id.*, at 397 (Rep. Rice); *id.*, at 454 (Rep. Cox); Globe App. 216 (Sen. Thurman). Representative McHenry found particularly offensive the removal of the fact-finding function from the local institutions. See Globe 429.

See also Globe 578, 694-695 (Sen. Edmunds); *id.*, at 334 (Rep. Hoar); *id.*, at 514 (Rep. Farnworth); Globe App. 85 (Rep. Bingham) (“[a]dmitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?”).

This legislative history supports the conclusion that our prior decisions, holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983, did not misperceive the statutory intent: it seems fair to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act. We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here. Congress addressed the question of exhaustion under § 1983 when it recently enacted 42 U. S. C. § 1997e (1976 ed., Supp. IV). The legislative history to § 1997e provides strong evidence of congressional intent on this issue.

B

The Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), was enacted primarily to ensure that the United States Attorney General has “legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons.” Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980) (Conf. Rep.). In § 1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not

generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law. Witnesses testifying before the subcommittee that drafted the bill discussed the decisions of this Court holding that exhaustion was not required. See, *e. g.*, Hearings on H.R. 2439 and H.R. 5791 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 20 (1977) (1977 Hearings); *id.*, at 47; *id.*, at 69, 77; *id.*, at 323; Hearings on H.R. 10 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 48 (1979) (1979 Hearings). During these hearings, Representative Kastenmeier, Chairman of this subcommittee, stated:

"Another thing that I think requires some discussion within the committee, and is a point of argument, . . . is whether there ought to be an exhaustion of remedies requirement.

. . . In fact, I think it has been pointed out that if [we] were to require it, particularly in 1983, that would constitute regression from the current state of the law. It would set the law back, because presently it is clearly held, that is the Supreme Court has held, that in 1983 civil rights suits the litigant need not necessarily fully exhaust State remedies." 1977 Hearings, at 57-58.

See also *id.*, at 272 (Rep. Drinan) (Rep. Railsback "grounds his bill on doing something which the Supreme Court has consistently refused to do, namely require exhaustion of reme-

dies"); 1979 Hearings 26 (Rep. Kastenmeier) (adopting § 1997e "was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983").

The debates over adopting an exhaustion requirement also reflect this understanding. See, *e. g.*, 124 Cong. Rec. H3370 (May 1, 1978) (Rep. Volkmer and Rep. Kastenmeier); *id.*, at H4624 (May 25, 1978) (Rep. Ertel); *id.*, at H7481 (July 28, 1978) (Rep. Wiggins) ("it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action"); 125 Cong. Rec. H3641 (May 23, 1979) (Rep. Butler) ("[u]nder existing law there is no requirement that a complainant first ask the State prison system to help him"). With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures. See, *e. g.* Conf. Rep. 9; 124 Cong. Rec. H3358 (May 1, 1978) (Rep. Kastenmeier); *id.*, at H3358, H3365 (Rep. Railsback); *id.*, at H4621 (May 25, 1978) (Rep. Kastenmeier); *id.*, at H4624 (Rep. Ertel); *id.*, at H7477 (July 28, 1978) (Rep. Kastenmeier); *id.*, at H7480-H7481 (Rep. Butler); *id.*, at H7481 (Rep. Ertel). Implicit in this decision is Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits.

A judicially imposed exhaustion requirement would also be inconsistent with the extraordinarily detailed exhaustion scheme embodied in § 1997e. Section 1997e carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective. The exhaustion requirement is expressly limited to § 1983 actions brought by an adult convicted of a crime. 42 U. S. C. § 1997e(a)(1) (1976 ed., Supp. IV).¹⁹ Section 1997e(b)(1) in-

¹⁹ Representative Kastenmeier explains why juveniles were not included

structs the Attorney General to “promulgate minimum standards for the development and implementation of a plain, speedy, and effective system” of administrative remedies, and § 1997e(b)(2) specifies certain minimum standards that must be included.²⁰ A court may require exhaustion of administrative remedies only if “the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).” § 1997e(a)(2). Before exhaustion may be required, the court must further conclude that it “would be appropriate and in the interests of justice.” § 1997e(a)(1).²¹ Finally, in those

in § 1997e:

“I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in [§ 1997e] was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of [§ 1997e], that it should also extend to juveniles was rejected.” 1979 Hearings 26.

²⁰ Section 1997e(b)(2) provides:

The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.”

²¹ The Committee Reports state that Congress did not intend that every § 1983 action brought by an adult prisoner in institutions with appropriate

§ 1983 actions meeting all the statutory requirements for exhaustion, the district court may not dismiss the case, but may only “continue such case for a period of not to exceed ninety days in order to require exhaustion.” *Ibid.* This detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases.

Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. See, *e. g.*, Conf. Rep. 9; H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 4 (1979); 1979 Hearings 4 (Rep. Railsback); 124 Cong. Rec. H3354 (May 1, 1978) (Rep. Railsback); 125 Cong. Rec. H3637 (May 23 1979) (Rep. Drinan); 126 Cong. Rec. H3497 (May 12, 1980) (Rep. Kastenmeier). To further this purpose, Congress yielded primary jurisdiction over certain § 1983 claims to state prisons only on the condition that these prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

In sum, the exhaustion provisions of the Act make sense, and are not superfluous, only if exhaustion could not be required before its enactment and if Congress intended to carve out a narrow exception to this no-exhaustion rule.

grievance procedures be delayed pending exhaustion:

“It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to [§ 1983] raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system.” Conf. Rep. 15.

See also H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 25 (1979); S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).

The legislative history to § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

C

Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts;²² would further the goal of comity and improve federal-state relations by postponing federal court review until after the state administrative agency had passed on the issue;²³ and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.

As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. See ———, *supra*. Furthermore, as the debates over incorporating the exhaustion requirement in § 1997e demonstrate, the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the as-

²² Of course, this burden alone is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U. S. 336, 344 (1976); *United Steelworkers v. Bouligny*, 382 U. S. 145, 150-151 (1965). In any event, it is by no means clear that judicial discretion to impose an exhaustion requirement in § 1983 actions would lessen the case-load of the federal courts, at least in the short run. See ——— and n. 27, *infra*.

²³ The application of these federalism principles to actions brought pursuant to § 1983 has prompted criticism by several commentators. See, e. g., Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25 Loyola L. Rev. 659 (1979); Note, 39 N.Y.U. L. Rev. 838 (1964).

sumptions underlying many of them.²⁴ The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable. Cf. *Diamond v. Chakrabarty*, 447 U. S. 303, 317 (1980); *United Steelworkers v. Bouligny*, 382 U. S. 146, 150, 153 (1965).

Beyond these difficult policy issues that must be resolved in deciding *whether* to require exhaustion, there are equally difficult questions concerning the design and scope of an exhaustion requirement. These questions include how to define those categories of § 1983 claims in which exhaustion might be desirable; how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted;²⁵ what tolling requirements and time

²⁴ For example, there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy. See, e. g., 1977 Hearings 263-264; *id.*, at 232-233; Note, 68 Colum. L. Rev. 1201, 1207 (1968). Similarly, there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise, and over whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that state and local agencies can serve. See, e. g., Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 23 (1980); Note, 68 Colum. L. Rev. 1201, 1208 (1968). Finally, it is uncertain whether the present "free market" system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a *McKart*-type standard under which plaintiffs have no initial choice. See, e. g., Note, 8 Ind. L. Rev. 565 (1975). Cf. 1977 Hearings 21, 34, 51; Hearings on S.1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 442 (1977).

²⁵ Section 1997e resolved this problem by directing the Attorney General to promulgate minimum standards and to establish a procedure by which prison administrative remedies could be reviewed and certified. § 1997e(b) & (c). If a procedure has not been certified, the court is directed to compare the procedure with the Attorney General's standards

limitations should be adopted;²⁶ what is the res judicata and collateral estoppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.²⁷

and to continue the case pending exhaustion only if the procedure is in substantial compliance with the standards of the Attorney General. § 1997e(a)(2).

²⁶ Unless the doctrine that statutes of limitations are not tolled pending exhaustion, see *Board of Regents v. Tomanio*, 446 U. S. 478 (1980), were overruled, a judicially imposed exhaustion requirement might result in the effective repeal of § 1983. Congress avoided this problem in § 1997e by directing the court to merely continue the case for a period not to exceed 90 days.

²⁷ The initial bill proposing to include an exhaustion requirement in § 1997e provided:

“Relief shall not be granted by a district court in an action brought pursuant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available.” H.R. 5791, 95th Cong., 1st Sess. (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, e. g., 1977 Hearings 34-35, 51, 164-165, 169-170, 263-264, 323; 1979 Hearings 48-49.

The very variety of claims, claimants, and state agencies involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted § 1997, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondents and adopted by the Court of Appeals. See note 27, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.

V

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed and remanded for proceedings consistent with this opinion.

It is so ordered.

changes
PP. 2, 3-15, 29, 30
Footnotes renumbered

Essence of demand
in that Requests
must be treated as a "state

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Official-14

The more authority a Bd has
the less 11th Amend immunity - 10-14

A State that has right to
sue & be sued does not become
a "juristic" entity unprotected by the 11th

2nd DRAFT

From: Justice Marshall

Circulated: _____

Recirculated: JUN 01 1982

SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER v. BOARD OF
REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U. S. C. § 1983. Petitioner Georgia Patsy filed this action, alleging that her employer, Florida International University (FIU), had denied her employment opportunities solely on the basis of her race and sex. By a divided vote, the United States Court of Appeals for the Fifth Circuit found that petitioner was required to exhaust "adequate and appropriate" administrative remedies, and remanded the case to the District Court to consider the adequacy of the administrative procedures. *Patsy v. Florida International University*, 634 F. 2d 900 (CA5 1981) (en banc). We reverse the decision of the Court of Appeals.

I

Petitioner alleges that even though she is well-qualified and has received uniformly excellent performance evaluations from her supervisors, she has been rejected for more than thirteen positions at FIU.¹ She further claims that

¹ Because this case is here on a motion to dismiss, we accept as true the factual allegations in petitioner's amended complaint. In her initial complaint, petitioner named FIU as the defendant. Relying on *Byron v. Uni-*

FIU has unlawfully filled positions through intentional discrimination on the basis of race and sex. She seeks declaratory and injunctive relief or, in the alternative, damages.²

The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy v. Florida International University*, 612 F. 2d 946 (CA5 1980). The full court then granted respondent's petition for rehearing and vacated the panel decision.

The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required, and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is avail-

versity of Florida, 403 F. Supp. 49 (ND Fla. 1975), the District Court granted FIU's motion to dismiss, holding that the Board of Regents and not the individual university had the capacity to sue and be sued under Florida law. The District Court granted petitioner leave to amend, and she amended her complaint to name the Board of Regents "on behalf of" FIU.

²Petitioner requested the District Court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." Record 47. Petitioner also requested that the District Court "order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein." Record 48.

able within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required. *Id.*, at 912-913. The Court of Appeals remanded the case to the District Court to determine whether exhaustion would be appropriate in this case.

II

At the outset, we address the contention that the Eleventh Amendment bars even the injunctive and declaratory relief sought in this complaint.³ Because this case is here on a mo-

³The Eleventh Amendment defense was not raised in the District Court; it was briefed to the panel on appeal, but was not included in the brief on rehearing en banc. In this Court, the defense was not briefed, but respondent asserted it in its response in opposition to the petition for certiorari. At oral argument, the state attorney general stated that this Court should affirm the Court of Appeals solely on the exhaustion holding. However, he also stated that the Eleventh Amendment was still an issue in this case, and he admitted that even if we affirmed the Court of Appeals, the case would be remanded for consideration of the adequacy of the administrative procedures, thus subjecting respondent to further proceedings in the District Court.

We have held that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised at any point in the proceedings, and that waiver of this defense will not be lightly inferred from the State's litigation strategy. *Edelman v. Jordan*, 415 U. S. 651, 678 (1974). See *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459 (1945). We have never addressed the question whether the Eleventh Amendment defense can be raised, neglected, and then reargued at the whim of the person raising this defense. Certainly, permitting this practice would greatly increase the uncertainty and potential for wasted litigation.

tion to dismiss, we are reviewing the Eleventh Amendment misuse in a most unique posture. The merits of petitioner's allegations have not even been adjudicated, and, of course, no court has considered what form of relief, either injunctive, declaratory, or monetary, might be awarded. Petitioner's request for relief is broad enough to encompass equitable relief which is prospective only in its application. As a result, we address only the question whether the Board of Regents should be viewed as the State itself so that it cannot be held accountable in federal court for any of its actions, and we express no opinion on whether the Eleventh Amendment bars certain forms of the relief requested by petitioner.

Respondent Board of Regents suggests that, as a state corporate body, it should be viewed as the State itself for purposes of the Eleventh Amendment. It relies on *Alabama v. Pugh*, 438 U. S. 781 (1978), where this Court held that the Eleventh Amendment bars a suit brought directly against the State and its Board of Corrections, even when only declaratory and injunctive relief is requested.⁴ However, it is well-settled that the Eleventh Amendment does not necessarily bar actions against state officials or state bodies corpo-

tion already inherent in the rule that the defense can be raised at any time. In any event, our Eleventh Amendment precedents are clear, and a remand is not required to determine unanswered questions of fact or state law, at least with respect to the (relief prospective) requested. Thus, we need not address the procedural question posed by respondent's perplexing litigation strategy.

⁴The issue decided in *Alabama v. Pugh*, 438 U. S. 781 (1978)—whether a state agent is the State for purposes of the Eleventh Amendment and thus cannot be brought into court for any reason absent a waiver of sovereign immunity—is distinct from the question addressed in *Edelman v. Jordan*, 415 U. S. 651, 662-669 (1974)—whether the Eleventh Amendment forbids a suit against a state agent because the suit seeks to impose a retroactive award that must be paid out of funds in the state treasury. See also *Quern v. Jordan*, 440 U. S. 332 (1979). Here, we decide the first question, and hold that respondent is not the State in the sense intended in *Alabama v. Pugh*.

rate and politic when the plaintiff is not seeking retroactive relief that must be paid from public funds in the state treasury. See, e. g., *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U. S. 274 (1977); *County of Lincoln v. Luning*, 133 U. S. 529 (1890); *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911); *Ex Parte Young*, 209 U. S. 123 (1908).⁵

In *Hopkins*, *supra*, this Court decided that a state corporate body such as respondent was not entitled to the full sovereign immunity accorded the State.⁶ There, the petitioner

⁵ Consistent with this theory, we have heard numerous suits requesting injunctive or declaratory relief against state universities or boards of regents or trustees, without discussing a possible Eleventh Amendment bar. See e. g., *Board of Regents v. Tomanio*, 446 U. S. 478 (1978) (§ 1983 action); *University of California Board of Regents v. Bakke*, 438 U. S. 265, 287 (1978) (POWELL, J., announcing the judgment of the Court) ("decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment") (citing *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950), *Sweatt v. Painter*, 339 U. S. 629 (1950), *Sipuel v. Board of Regents*, 332 U. S. 631 (1948), and *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938)); *Board of Regents v. Roth*, 408 U. S. 564 (1972) (§ 1983 action). Of course, the fact that other state officials may have been named in some of these suits is irrelevant to the federal court's ability to award even prospective relief against the State itself. See *Alabama v. Pugh*, 438 U. S. 781 (1978).

⁶ The dissent's attempt to distinguish *Hopkins* on the ground that the Court there inaccurately treated the State's sovereign immunity defense as an Eleventh Amendment issue when the action had been initiated in state and not federal court is unpersuasive. The *Hopkins* Court addressed the sovereign immunity issue as though it had been raised in federal court under the Eleventh Amendment, and persuasively explained why a state college and its board of regents, established as a body corporate, was not shielded by the full immunity accorded to the State. The fact that the State's defense in that case is more accurately viewed as a "pure" sovereign immunity question, and not one arising under the Eleventh Amendment, does not make the decision a "non-precedent" nor does it invalidate the analysis. We have often relied on cases discussing the sovereign immunity of the Federal Government when deciding Eleventh Amendment issues. See, e. g., *Tindal v. Wesley*, 167 U. S. 204, 213 (1897); *Florida Dept. of State v. Treasure Salvors, Inc.*, — U. S. —, — n.20 (1982).

? Answer

7

sued the state college, claiming that the college and its board of trustees had committed both a tort and an unconstitutional taking of his property. The respondent college argued that the State's sovereign immunity barred the suit. Framing the issue as "whether a public corporation can avail itself of the State's immunity from suit," 221 U. S., at 642, the Court rejected this defense with respect to the college and its board of trustees, established by the State as a "body corporate."⁷

The Court recognized that "[w]ith the exception named in the Constitution, every State has absolute immunity from suit," and cannot be sued in any court without its consent. *Ibid.* The Court also noted that even when the State is not named as the party defendant, the Eleventh Amendment applies when the suit is, in reality, one against the State. The Court then reasoned:

"But immunity from suit is a high attribute of sover-

Similarly, the analysis employed by the *Hopkins* Court should be viewed as strong precedent for Eleventh Amendment cases presenting precisely the same issue. Several recent lower courts have cited or relied on *Hopkins* when addressing the application of the Eleventh Amendment to boards of regents. See, e. g., *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F. 2d 1196 (CA1 1979); *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345 (CA9 1981).

The dissent's further claim that *Hopkins* was overruled *sub silentio* by *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981), is misplaced. *Florida Dept of Health* was an unargued summary reversal, which did not even cite or discuss the *Hopkins* decision. Furthermore, *Florida Dept of Health* addressed only the question whether a plaintiff could recover retroactive relief from the petitioner—an issue we do not decide with respect to the Board of Regents in this case. The prospective relief awarded by the Court of Appeals in that case was not even considered by this Court. See note 13, *infra*.

⁷The state charter establishing the college and its board of trustees is in relevant part remarkably similar to that of the Board of Regents in this case, see note 10, *infra*. See *Hopkins v. Clemson Agricultural College*, 221 U. S. 637, 638-639 (1911).

eighty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. . . . 'The whole frame and scheme of the political institutions of this country, state and Federal, protest' against extending to any agent the sovereign's exemption from legal process." *Id.*, at 642-643 (quoting *Poindexter v. Greenhow*, 114 U. S. 270, 191 (1885)).

After discussing cases in which the Court had uniformly denied Eleventh Amendment immunity to public officials,⁸ the Court considered whether public corporations should receive similar treatment:

It is said, however, that, in the cases referred to, the officers were held liable to suit because in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the State. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the State itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty. In *County of Lincoln v. Luning*, 133 U. S. 529, 530, the Court . . . held that

⁸The cases cited and discussed by the Court included *Ex Parte Young*, 209 U. S. 123 (1908), *Tindal v. Wesley*, 167 U. S. 204 (1897); and *United States v. Lee*, 106 U. S. 196 (1882).

the Eleventh Amendment was limited to those cases in which the State is the real party, or party on the record, but that counties were corporations which might be sued. . . .

Corporate agents or individual officers of the State stand in no better position than officers of the General Government. . . ." *Id.*, at 644-645 (citations omitted).

The Court went on to recognize that agents of the State, whether corporate or individual, might have defenses not available to private corporations or individuals, but these defenses serve to prevent ultimate liability or recovery, and are not barriers to initiating the litigation. *Id.*, at 645-646. The *Hopkins* Court thus approached the application of the Eleventh Amendment to a state university and board of trustees, established as a "body corporate" of the State, in the same manner it had approached this defense in cases involving other state officials or corporations: the Eleventh Amendment was not a bar to the suit as long as the suit did not seek to impose a retroactive award against the State itself and did not seek to restrain the state agent from obeying a constitutional command of the State. *Id.*, at 644.

This approach is consistent with that taken in our more recent cases.⁹ For example, in *Monell v. New York City*

⁹The Courts of Appeals have been virtually unanimous in allowing suits for declaratory or injunctive relief against state universities or their boards. See, e. g., *Lee v. Board of Regents of State Colleges*, 441 F. 2d 1257 (CA7 1971); *Gay Student Services v. Texas A & M University*, 612 F. 2d 160 (CA5 1980); *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F. 2d 1196 (CA1 1979). Cf. *Skehan v. Board of Trustees*, 590 F. 2d 470 (CA3 1978). *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345 (CA9 1981) and *Ronwin v. Shapiro*, 657 F. 2d 1071 (CA9 1981), cited by the dissent to the contrary, *post*, at —, n. 4, are distinguishable. Each of these cases involved requests for monetary relief, and the courts addressed only the question whether *Edelman v. Jordan*, *supra*, precluded such relief. The Courts of Appeals have divided on whether monetary relief can be awarded, depending on whether they

Old note 6
w/ additions

?

almost
unanimous

Dept. of Social Services, 436 U. S. 658 (1978), this Court addressed whether municipal corporations were “persons” within the meaning of § 1983. In holding that they were, the Court found it significant that the Congress which enacted the predecessor to § 1983 recognized that “there was no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State.” *Id.*, at 682. See also *Mount Healthy City School District Board of Education v. Doyle*, *supra*, (local school board, like a municipal corporation, not entitled to Eleventh Amendment immunity). Cf. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 400–401 (1979) (agency created by a compact between two States with congressional approval not necessarily entitled to the same immunity as the States themselves).

Here, as in *Hopkins*, respondent Board of Regents is a “body corporate with all the powers of a body corporate.” Fla. Stat. § 240.205.¹⁰ The State has thus established the

have funds independent of the state treasury or on whether the State has waived its immunity. Compare *SONI v. Board of Trustees*, 513 F. 2d 347 (CA6 1978) and *Goss v. Jacinto Junior College*, 588 F. 2d 96 (CA5 1979) with *Jagnandan v. Giles*, 538 F. 2d 1166 (CA5 1976).

¹⁰ Section 240.205 provides in full:

“The Board of Regents is hereby created as a body corporate with all the powers of a body corporate for all the purposes created by, or that may exist under, the provisions of this chapter or laws amendatory hereof and shall:

- (1) Have a corporate seal.
- (2) Elect a corporate secretary.
- (3) Have and employ a staff attorney and other authorized personnel.
- (4) Have power to contract and be contracted with, to sue and be sued, and to plead and be impleaded in all courts of law and equity.
- (5) Receive donations.
- (6) Make purchases of real and personal property and contract for the sale and disposal of same, but the title to all real property, however acquired, shall be vested in the Board of Trustees of the Internal Improvement Trust Fund and shall be transferred and conveyed by it.”

Board of Regents as a corporate agent, a juristic person, with the capacity to "sue and be sued, and to plead and be impleaded, in all courts of law and equity," *ibid.*, and with corporate powers not bestowed on other departments, divisions, or agencies of the State. This separate corporate and juristic status sets the Board of Regents apart from the supervising boards of the other divisions of the State Department of Education, none of which enjoy a similar status. See, *e. g.*, Fla. Stat. § 240.305; § 242.331; § 229.85; § 231.545; § 233.07. Although the Board of Regents performs many supervising functions over the Division of Universities similar to those performed by boards in other subdivisions of the Department of Education, it has the privilege of engaging in corporate activities and is responsible for numerous employment and other decisions, which have no counterpart in the other divisions of the Department of Education.¹¹ The Board of Regents, and not the local universities, is the legal entity which the State has authorized to sue and be sued. See *Byron v. University of Florida*, 403 F. Supp. 49, 54 (ND Fla 1975).

¹¹ For example the Board of Regents performs functions performed by local school boards, established as bodies corporate, within the Divisions of Public Schools and Vocational Education. See, *e. g.*, Fla. Stat. § 230.21; § 235.02; § 235.05; § 237.071; § 237.081. Similarly, Board of Regents performs functions performed by the individual community colleges and their boards of trustees, established as bodies corporate, within the Division of Community Colleges. See, *e. g.*, Fla. Stat. § 240.313; § 240.315; § 240.319.

Furthermore, the power granted to the Board of Regents "to sue and be sued, and to plead and be impleaded, in all courts of law and equity," Fla. Stat. § 240.205(4), is unparalleled in its breadth when compared to other provisions relating to the Department of Education, including those relating to local school boards and boards of the community colleges. See, *e. g.*, Fla. Stat. § 230.21; § 240.315; § 242.331. It is also broader than § 402.34, which we found insufficient to waive immunity with respect to retroactive relief in *Florida Dept. of Health v. Florida Nursing Home Assn.*, 450 U. S. 141 (1981). Of course, we express no opinion whether § 240.205(4) is broad enough to encompass a waiver of immunity from retroactive liability. See *infra*, at notes 14 and 15.

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As a result of its unique status, the Board of Regents has often appeared in federal court, as both a *plaintiff* and defendant without raising any Eleventh Amendment objection. See, e. g., *Board of Regents v. Califano*, 586 F. 2d 451 (CA5 1978); *Megill v. Board of Regents*, 541 F. 2d 1073 (CA5 1976); *Sherman v. Board of Regents*, 451 F. 2d 572 (CA5 1971).

Of course, the State could have structured this particular division of the Department of Education in a manner similar to that chosen for its other divisions, thus entitling the Board of Regents to claim that the State's Eleventh Amendment immunity enabled it to avoid all accountability in federal court. For example, in the Community Colleges division, the Community College Coordinating Board performs only those supervising and coordinating functions performed by the Board of Regents—it does not enjoy separate corporate status and has not been granted many of the privileges bestowed upon the Board of Regents, including the power to sue and be sued in all courts of law and equity. See Fla. Stat. § 240.305; § 240.311. Each individual college within that division is “an independent, separate, legal entity,” § 240.313, with its own local board of trustees, which is established as a “body corporate” and retains autonomous status and responsibilities. With the Division of Universities, however, the State has chosen not to endow the individual local universities with separate corporate existence or with the authority to sue and be sued with respect to the type of issue presented here, vesting that authority in the separate juristic, corporate body which is the Board of Regents. See, e. g. *Byron v. University of Florida*, *supra*, at 54. It was this very structure chosen by the State which led petitioner to name the Board of Regents in this suit. Initially, petitioner named FIU, the individual university by whom she was employed, as the defendant in this action. Because the State had provided that the Board of Regents was the appropriate legal entity with the capacity to litigate, the District Court dismissed the individual university, and the Board of

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Regents was named as the defendant "on the behalf of" FIU. See note 1, *supra*.

Another aspect of State law sets the Board of Regents apart from the boards governing other divisions of the Department of Education. Under Fla. Stat. § 20.15, respondent Board of Regents is designated as "the director of the Division of Universities," one of five divisions of the Department of Education, while the directors of the other divisions are appointed by the Commissioner of Education. As a result, the Board of Regents stands in the same position as a state official, not only because it is a corporate agent by virtue of its status as a "body corporate," but also because the corporate body itself is designated as the *director* of a subdivision of the Department of Education, a position generally held by an individual official.

The dissent argues that allowing this Board of Regents to be sued for prospective injunctive relief under the analysis employed to allow suits against state officials when sued in their official capacity announces "a new doctrine" with wide-ranging implications.¹² The dissent asserts two primary

¹² None of the cases cited by the dissent have held or even implied that the Eleventh Amendment forbids a federal court from awarding prospective equitable relief against a state corporate body, created as a juristic entity with the authority to sue and be sued in all courts of law and equity. *Great Northern Ins. Co. v. Read*, 322 U. S. 47 (1944), involved a suit brought against the Insurance Commissioner seeking the recovery of insurance taxes; *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459 (1944), and *Kennecott Copper Corp. v. Tax Comm'n*, 327 U. S. 573 (1946) involved suits brought against the department of treasury or the tax commission, and state officials in their official capacity, seeking a tax refund; and *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), where the Eleventh Amendment was found not to prohibit the action, was a personal-injury damage action brought against a state-owned railroad. Similarly misplaced is the dissent's reliance on *Bragg v. Board of Public Instruction*, 36 So. 2d 222 (Fla. 1948), which held only that the fact that a state agent is a corporate body does not necessarily waive the State's immunity from tort liability. We express no opinion on whether the State has waived its immunity from retroactive liability with respect to the Board of Regents.

The more
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complaints: that this decision exposes all "instrumentalities of the State itself to suit in federal court," *post*, at 11, and that they "may be sued for damages on the fiction that their segregated assets are not the State's," *id.*, at 12. Although these concerns would be legitimate if presented by this decision, such is simply not the case. The dissent premises its arguments on the assumption that this particular board is indistinguishable from any "state welfare board, highway department or any other agency, board or department of a state." *Post*, at 9. As we noted earlier, however, the Board of Regents is accorded a unique status under Florida law, which distinguishes it from the supervising boards of the other divisions of the Department of Education, from most state agencies, and, of course, from the state departments and their divisions. It is established as a body corporate, a separate juristic entity, with the capacity to sue and be sued in all courts of law and equity. In so establishing the Board of Regents, the State has displaced a large portion of the litigating capacity that might otherwise be enjoyed by the individual universities within the state system. As a result, when a professor, an employee, or a student has a complaint against an individual university, the State has designated the Board of Regents as the appropriate party to be named "on behalf of" the individual university. Similarly, if an individual university or a division of a university desires to litigate a claim, the Board of Regents brings the action "on behalf of" that entity, and may do so in federal court. See, *e. g.*, *Board of Regents v. Califano*, *supra*. The dissent proffers no principled reason for treating this particular corporate agent of the State, which acts as the director of the Division of Universities, differently than the individual directors of the other divisions would be treated when sued in their official capacity.

Furthermore, nothing in our decision today implies that

See *infra*, at — and notes 14 & 15. However, it is clear that some immunity from tort liability has been waived by virtue of Fla. Stat. § 240.213.

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this Board of Regents, much less some other agency or state department, may be held liable for damages in federal court. In finding that the Board of Regents should be treated as a state official when sued in his official capacity for purposes of the Eleventh Amendment, we hold only that it may be sued for unconstitutional or unauthorized actions insofar as the plaintiff seeks prospective relief as a remedy. The dissent's fears that this holding opens the door for awarding damages that must be paid from state funds is misplaced. As is demonstrated by our numerous decisions which consider whether certain forms of relief may be awarded against a state official when sued in his official capacity, the fact that a state agent may be held accountable in federal court for unconstitutional or unauthorized actions does not answer the question whether retroactive relief may be awarded. See, e. g., *Edelman v. Jordan*, *supra*.¹⁸

Because this case is here on a motion to dismiss, it is inappropriate to consider at this time whether anything other than an award for prospective relief is permissible. There

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¹⁸ For this reason, the dissent's reliance on *Florida Dept. of Health v. Florida Nursing Home Assn*, 450 U. S. 141 (1981) (per curiam, summary reversal) is also misplaced. In that case, we addressed only that portion of the ruling of the Court of Appeals which held that retroactive relief could be awarded against the state agency because it was a "body corporate . . . [with] the power to sue and be sued in action ex contractu but not in torts," Fla. Stat. § 402.34, and because it had "agreed to recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in, and administration of, the Title XIX Medicaid Program," 450 U. S., at 149. In addition to awarding retroactive relief, the Court of Appeals opinion had invalidated an agency regulation because it was inconsistent with federal law, and had rejected the agency's argument that the Eleventh Amendment prohibited the district court from directing the state agency to submit a plan for reimbursing the plaintiff in accordance with the requirements of the Medicaid statute. See *Florida Nursing Home Assn v. Page*, 616 F. 2d 1355, 1361-1362 (CA5 1980). That portion of the Court of Appeals decision was not even considered by this Court. See 450 U. S., at 149, n. 2.

are unresolved questions of fact and state law with respect to whether the Eleventh Amendment serves to bar other forms of relief under the rationale of *Edelman*. It is unclear whether the State has waived its sovereign immunity with respect to actions for damage awards against respondent.¹⁴ If the State has not waived such immunity, it is unclear whether a judgment against the Board must be paid out of the State treasury.¹⁵ These unsettled questions should be decided by the District Court on remand should it find that petitioner is entitled to recover, and should it further consider awarding retroactive monetary relief. The question whether the Eleventh Amendment bars such an award is one of ultimate relief not of jurisdiction, once it is established that respondent may be sued at least with respect to the request for injunctive relief. See *Hopkins v. Clemson Agricultural College*, 221 U. S., at 648.

III

The question whether exhaustion of administrative remedies should ever be required in a § 1983 action has prompted vigorous debate and disagreement. See, e. g., Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Note, 41 U. Chi. L. Rev. 537 (1974).

¹⁴ See, e. g., Fla. Stat. § 240.205(4) (respondent authorized "to sue and be sued, and to plead and be impleaded in all courts of law and equity"); Fla. Stat. § 240.213 (respondent may secure liability insurance, and immunity is waived to the extent of the insurance); Fla. Stat. § 240.215 (respondent may pay costs of civil actions against board members or employees and may procure insurance to cover such losses or expenses). Whether these provisions waive the State's immunity from damage awards in actions not involving tort liability is unclear, and should be decided by the lower courts in the first instance.

¹⁵ The Board has certain funds not derived from the State that are exempt from deposit with the state treasury. See Fla. Stat. §§ 240.277, 240.781.

Our resolution of this issue, however, is made much easier because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions.

Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not “fully” consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese v. Board of Education*, 373 U. S. 668, 671–673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry v. Bachi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 574 (1973); *Carter v. Stanton*, 405 U. S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U. S. 249, 251 (1971); *Houghton v. Shafer*, 392 U. S. 639, 640 (1968); *King v. Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico v. California*, 389 U. S. 416 (1967). Cf. *Fair Assessment in Real Estate Association v. McNary*, — U. S. —, — (1981); *id.*, at — (BRENNAN, J., concurring in the judgment); *Steffel v. Thompson*, 415 U. S. 452, 473 (1974) (“[w]hen federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights”). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression.

IV

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals' exhaustion rule, which was based on *McKart v. United States*, 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 695-701 (1978), we articulated four factors that should be considered. Two of these factors—whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent—are particularly relevant to our decision today.¹⁶ Both concern legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the parameters of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.¹⁷

¹⁶ The other factors discussed in *Monell*—whether the decisions in question constituted a departure from prior decisions and whether overruling these decisions would frustrate legitimate reliance on their holdings—do not support overruling these decisions. *McNeese* was not a departure from prior decisions—this Court had not previously addressed the application of the exhaustion rule to § 1983 actions. Overruling these decisions might injure those § 1983 plaintiffs who had foregone or waived their state administrative remedies in reliance on these decisions.

¹⁷ Congressional intent is important in determining the application of the exhaustion doctrine to cases in which federal administrative remedies are available, as well as to those in which state remedies are available. Of course, exhaustion is required where Congress provides that certain ad-

Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.

A

In determining whether our prior decisions misconstrued the meaning of § 1983, we begin with a review of the legislative history to § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983.¹⁸ Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions

ministrative remedies shall be exclusive. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the particular federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress. See *McKart v. United States*, 395 U. S. 185, 193-195 (1969). With state administrative remedies, the focus is not so much on the role assigned to the state agency, but the role of the state agency becomes important once a court finds that deferring its exercise of jurisdiction is consistent with statutory intent.

¹⁸Some of the debates relating to § 2, which created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, aimed primarily at the Ku Klux Klan, are also relevant to our discussion of § 1.

by state power. As we recognized in *Mitchum v. Foster*, 407 U. S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U. S. 339, 346 (1879)), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"

At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

"The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 476 (1871) (hereinafter *Globe*).

See also *id.*, at 332 (remarks of Rep. Hoar); *id.*, at 375 (remarks of Rep. Lowe); *id.*, at 448-449 (remarks of Rep. Butler); *id.*, at 459 (remarks of Rep. Coburn).¹⁹

¹⁹ Opponents of the bill also recognized this purpose and complained that the bill would usurp the States' power, centralize the government and perhaps ultimately destroy the States. See, e. g., *Globe* 337, 338 (remarks of

The 1871 Congress intended § 1 to “throw open the doors of the United States courts” to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, Globe 376 (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary. For example, Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that the bill was similar in principle to an earlier act upheld by this Court in *Prigg v. Pennsylvania*, 16 Pet. 539 (1842):

“[T]he Supreme Court decided . . . that it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress.*” Globe 692 (emphasis added).

Similarly, Representative Elliott viewed the issue as whether “the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domiciled.” *Id.*, at 389 (emphasis added). See, e. g., *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 807 (remarks of Rep. Garfield); *id.*, at 609 (remarks of Sen. Pool); Globe App. 141 (remarks of Rep. Shanks).²⁰

Rep. Whitthorne); *id.*, at 352 (remarks of Rep. Beck); *id.*, at 361 (remarks of Rep. Swann); *id.*, at 365 (remarks of Rep. Arthur); *id.*, at 385 (remarks of Rep. Lewis); *id.*, at 429, 431 (remarks of Rep. McHenry); *id.*, at 454 (remarks of Rep. Cox); *id.*, at 510, 511 (remarks of Rep. Eldridge); Cong. Globe, 42d Cong., 1st Sess., App. 46 (remarks of Rep. Kerr) (hereinafter Globe App.); *id.*, at 216 (remarks of Sen. Thurman); *id.*, at 243 (remarks of Sen. Bayard).

²⁰ Opponents criticized this provision on this very ground. For exam-

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal court jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. See, *e. g.*, Globe 321 (remarks of Rep. Stroughton) (“[t]he State authorities and local courts are unable or unwilling to check the evil or punish the criminals”); *id.*, at 374 (remarks of Rep. Lowe) (“the local administrations have been found inadequate or unwilling to apply the proper corrective”); *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 609 (remarks of Sen. Pool); *id.*, at 687 (remarks of Sen. Shurz); *id.*, at 691 (remarks of Sen. Edmunds); Globe App. 185 (remarks of Rep. Platt).²¹ Of primary importance to the exhaustion question was the

ple, Rep. Storm lamented:

“[Section one] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.” Globe App. 86.

See also Globe 416 (remarks of Rep. Biggs) (“for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding”); *id.*, at 337 (remarks of Rep. Whitthorne); *id.*, at 373 (remarks of Rep. Archer); Globe App. 216 (remarks of Sen. Thurman).

²¹ This view was expressed in the Presidential message urging the passing of corrective legislation. See Globe 244 (“That the power to correct these evils is beyond the control of State authorities I do not doubt.”) (Message of Pres. Grant). The inability of state authorities to protect constitutional rights was also expressed in the findings of the House Judiciary Committee, which had been directed to investigate the situation. See *id.*, at 320. The resolution introduced by Senator Sherman instructing the Senate Judiciary Committee to report a bill expressed a similar view. See Globe App. 210 (state “courts are rendered utterly powerless by organized perjury to punish crime”).

mistrust that the 1871 Congress held for the fact-finding processes of state institutions. See, *e. g.*, Globe 320 (Testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) (“[t]he defect lies not so much with the courts as with the juries”); *id.*, at 394 (remarks of Rep. Rainey); Globe App. 311 (remarks of Rep. Maynard). This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the fact-finding processes of the state courts. See, *e. g.*, Globe 322 (remarks of Rep. Stoughton); *id.*, at 459 (remarks of Rep. Coburn).²² This perceived defect in the States’ fact-finding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior fact-finding ability of the relevant administrative agency. See, *e. g.*, *McKart v. United States*, 395 U. S., at 192–196.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe v. Pape*, 365 U. S. 167, 183 (1961) (“[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked”). For example, Senator Thurman noted:

“I object to [§ 1], first, because of the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the

²² Opponents viewed the bill as a declaration of mistrust for state tribunals. See, *e. g.*, Globe 360 (remarks of Rep. Swann); *id.*, at 397 (remarks of Rep. Rice); *id.*, at 454 (remarks of Rep. Cox); Globe App. 216 (remarks of Sen. Thurman). Representative McHenry found particularly offensive the removal of the fact-finding function from the local institutions. See Globe 429.

Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of." Globe App. 216.

See also Globe 578, 694-695 (remarks of Sen. Edmunds); *id.*, at 334 (remarks of Rep. Hoar); *id.*, at 514 (remarks of Rep. Farnworth); Globe App. 85 (remarks of Rep. Bingham) ("[a]dmitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?").

This legislative history supports the conclusion that our prior decisions, holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983, did not misperceive the statutory intent: it seems fair to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act. We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here. Congress addressed the question of exhaustion under § 1983 when it recently enacted 42 U. S. C. § 1997e (1976 ed., Supp. IV). The legislative history to § 1997e provides strong evidence of congressional intent on this issue.

B

The Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), was enacted primarily to ensure that the United States Attorney General

has "legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons." Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980) (Conf. Rep.). In § 1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law. Witnesses testifying before the subcommittee that drafted the bill discussed the decisions of this Court holding that exhaustion was not required. See, *e. g.*, Hearings on H.R. 2439 and H.R. 5791 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 20 (1977) (1977 Hearings); *id.*, at 47; *id.*, at 69, 77; *id.*, at 323; Hearings on H.R. 10 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 48 (1979) (1979 Hearings). During these hearings, Representative Kastenmeier, Chairman of this subcommittee, stated:

"Another thing that I think requires some discussion within the committee, and is a point of argument, . . . is whether there ought to be an exhaustion of remedies requirement.

. . . In fact, I think it has been pointed out that if [we] were to require it, particularly in 1983, that would constitute regression from the current state of the law. It

would set the law back, because presently it is clearly held, that is the Supreme Court has held, that in 1983 civil rights suits the litigant need not necessarily fully exhaust State remedies." 1977 Hearings, at 57-58.

See also *id.*, at 272 (remarks of Rep. Drinan) (Rep. Railsback "grounds his bill on doing something which the Supreme Court has consistently refused to do, namely require exhaustion of remedies"); 1979 Hearings 26 (remarks of Rep. Kastenmeier) (adopting § 1997e "was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983").

The debates over adopting an exhaustion requirement also reflect this understanding. See, *e. g.*, 124 Cong. Rec. H3370 (May 1, 1978) (remarks of Rep. Volkmer and Rep. Kastenmeier); *id.*, at H4624 (May 25, 1978) (remarks of Rep. Ertel); *id.*, at H7481 (July 28, 1978) (remarks of Rep. Wiggins) ("it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action"); 125 Cong. Rec. H3641 (May 23, 1979) (remarks of Rep. Butler) ("[u]nder existing law there is no requirement that a complainant first ask the State prison system to help him"). With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures. See, *e. g.* Conf. Rep. 9; 124 Cong. Rec. H3358 (May 1, 1978) (remarks of Rep. Kastenmeier); *id.*, at H3358, H3365 (remarks of Rep. Railsback); *id.*, at H4621 (May 25, 1978) (remarks of Rep. Kastenmeier); *id.*, at H4624 (remarks of Rep. Ertel); *id.*, at H7477 (July 28, 1978) (remarks of Rep. Kastenmeier); *id.*, at H7480-H7481 (remarks of Rep. Butler); *id.*, at H7481 (remarks of Rep. Ertel). Implicit in this decision is Congress' conclusion that the no-exhaustion rule should be left

standing with respect to other § 1983 suits.

A judicially imposed exhaustion requirement would also be inconsistent with the extraordinarily detailed exhaustion scheme embodied in § 1997e. Section 1997e carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective. The exhaustion requirement is expressly limited to § 1983 actions brought by an adult convicted of a crime. 42 U. S. C. § 1997e(a)(1) (1976 ed., Supp. IV).²³ Section 1997e(b)(1) instructs the Attorney General to “promulgate minimum standards for the development and implementation of a plain, speedy, and effective system” of administrative remedies, and § 1997e(b)(2) specifies certain minimum standards that must be included.²⁴ A court may require exhaustion of ad-

²³ Representative Kastenmeier explains why juveniles were not included in § 1997e:

“I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in [§ 1997e] was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of [§ 1997e], that it should also extend to juveniles was rejected.” 1979 Hearings 26.

²⁴ Section 1997e(b)(2) provides:

The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including al-

ministrative remedies only if “the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).” § 1997e(a)(2). Before exhaustion may be required, the court must further conclude that it “would be appropriate and in the interests of justice.” § 1997e(a)(1).²⁵ Finally, in those § 1983 actions meeting all the statutory requirements for exhaustion, the district court may not dismiss the case, but may only “continue such case for a period of not to exceed ninety days in order to require exhaustion.” *Ibid.* This detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases.

Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. See, *e. g.*, Conf. Rep. 9; H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 4 (1979); 1979 Hearings 4 (remarks of Rep. Railsback); 124 Cong. Rec. H3354 (May 1, 1978) (remarks of Rep. Railsback); 125 Cong. Rec. H3637 (May 23 1979) (remarks of Rep. Drinan); 126 Cong. Rec. H3497 (May 12, 1980) (remarks of Rep. Kastenmeier). To further this

leged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.”

²⁵ The Committee Reports state that Congress did not intend that every § 1983 action brought by an adult prisoner in institutions with appropriate grievance procedures be delayed pending exhaustion:

“It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to [§ 1983] raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system.” Conf. Rep. 15.

See also H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 25 (1979); S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).

purpose, Congress yielded primary jurisdiction over certain § 1983 claims to state prisons only on the condition that these prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

In sum, the exhaustion provisions of the Act make sense, and are not superfluous, only if exhaustion could not be required before its enactment and if Congress intended to carve out a narrow exception to this no-exhaustion rule. The legislative history to § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

C

Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts;²⁶ would further the goal of comity and improve federal-state relations by postponing federal court review until after the state administrative agency had passed on the issue;²⁷ and would enable

²⁶ Of course, this burden alone is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U. S. 336, 344 (1976); *United Steelworkers v. Bouligny*, 382 U. S. 145, 150-151 (1965). In any event, it is by no means clear that judicial discretion to impose an exhaustion requirement in § 1983 actions would lessen the case-load of the federal courts, at least in the short run. See — and n. 31, *infra*.

²⁷ The application of these federalism principles to actions brought pursuant to § 1983 has prompted criticism by several commentators. See, e. g.,

the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.

As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. See ———, *supra*. Furthermore, as the debates over incorporating the exhaustion requirement in § 1997e demonstrate, the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them.²⁸ The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable. Cf. *Diamond v. Chakrabarty*, 447 U. S. 303, 317 (1980); *United Steelworkers v. Bouligny*, 382 U. S. 146, 150, 153 (1965).

Beyond the policy issues that must be resolved in deciding whether to require exhaustion, there are equally difficult questions concerning the design and scope of an exhaustion

Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25 Loyola L. Rev. 659 (1979); Note, 39 N.Y.U. L. Rev. 838 (1964).

²⁸ For example, there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy. See, e. g., 1977 Hearings 263-264; *id.*, at 232-233; Note, 68 Colum. L. Rev. 1201, 1207 (1968). Similarly, there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise, and over whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that state and local agencies can serve. See, e. g., Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 23 (1980); Note, 68 Colum. L. Rev. 1201, 1208 (1968). Finally, it is uncertain whether the present "free market" system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a *McKart*-type standard under which plaintiffs have no initial choice. See, e. g., Note, 8 Ind. L. Rev. 565 (1975). Cf. 1977 Hearings 21, 34, 51; Hearings on S.1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 442 (1977).

requirement. These questions include how to define those categories of § 1983 claims in which exhaustion might be desirable; how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted;²⁹ what tolling requirements and time limitations should be adopted;³⁰ what is the res judicata and collateral estoppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.³¹

The very variety of claims, claimants, and state agencies

²⁹ Section 1997e resolved this problem by directing the Attorney General to promulgate minimum standards and to establish a procedure by which prison administrative remedies could be reviewed and certified. § 1997e(b) & (c). If a procedure has not been certified, the court is directed to compare the procedure with the Attorney General's standards and to continue the case pending exhaustion only if the procedure is in substantial compliance with the standards of the Attorney General. § 1997e(a)(2).

³⁰ Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, see *Board of Regents v. Tomanio*, 446 U. S. 478 (1980), a judicially imposed exhaustion requirement might result in the effective repeal of § 1983. Congress avoided this problem in § 1997e by directing the court to merely continue the case for a period not to exceed 90 days.

³¹ The initial bill proposing to include an exhaustion requirement in § 1997e provided:

"Relief shall not be granted by a district court in an action brought pursu-

involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted § 1997, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondents and adopted by the Court of Appeals. See note 31, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.

V

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed and remanded for proceedings consistent with this opinion.

It is so ordered.

ant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available." H.R. 5791, 95th Cong., 1st Sess. (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, *e. g.*, 1977 Hearings 34-35, 51, 164-165, 169-170, 263-264, 323; 1979 Hearings 48-49.

changes:
pp. 3-15 of 2d draft deleted & footnotes renumbered
other changes:
pp: 3, 4, 16, 19, 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell ✓
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

Recirculated: JUN 03 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER v. BOARD OF
REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U. S. C. § 1983. Petitioner Georgia Patsy filed this action, alleging that her employer, Florida International University (FIU), had denied her employment opportunities solely on the basis of her race and sex. By a divided vote, the United States Court of Appeals for the Fifth Circuit found that petitioner was required to exhaust "adequate and appropriate" administrative remedies, and remanded the case to the District Court to consider the adequacy of the administrative procedures. *Patsy v. Florida International University*, 634 F. 2d 900 (CA5 1981) (en banc). We reverse the decision of the Court of Appeals.

I

Petitioner alleges that even though she is well-qualified and has received uniformly excellent performance evaluations from her supervisors, she has been rejected for more than thirteen positions at FIU.¹ She further claims that

¹ Because this case is here on a motion to dismiss, we accept as true the factual allegations in petitioner's amended complaint. In her initial complaint, petitioner named FIU as the defendant. Relying on *Byron v. Uni-*

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FIU has unlawfully filled positions through intentional discrimination on the basis of race and sex. She seeks declaratory and injunctive relief or, in the alternative, damages.²

The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy v. Florida International University*, 612 F. 2d 946 (CA5 1980). The full court then granted respondent's petition for rehearing and vacated the panel decision.

The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required, and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is avail-

versity of Florida, 403 F. Supp. 49 (ND Fla. 1975), the District Court granted FIU's motion to dismiss, holding that the Board of Regents and not the individual university had the capacity to sue and be sued under Florida law. The District Court granted petitioner leave to amend, and she amended her complaint to name the Board of Regents "on behalf of" FIU.

²Petitioner requested the District Court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." Record 47. Petitioner also requested that the District Court "order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein." Record 48.

able within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required. *Id.*, at 912-913. The Court of Appeals remanded the case to the District Court to determine whether exhaustion would be appropriate in this case.

II

The question whether exhaustion of administrative remedies should ever be required in a § 1983 action has prompted vigorous debate and disagreement. See, *e. g.*, Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Note, 41 U. Chi. L. Rev. 537 (1974). Our resolution of this issue, however, is made much easier because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions.

Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not "fully" consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese v. Board of Education*, 373 U. S. 668, 671-673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry v. Bachi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 574 (1973); *Carter v. Stanton*, 405

U. S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U. S. 249, 251 (1971); *Houghton v. Shafer*, 392 U. S. 639, 640 (1968); *King v. Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico v. California*, 389 U. S. 416 (1967). Cf. *Fair Assessment in Real Estate Association v. McNary*, — U. S. —, — (1981); *id.*, at — (BRENNAN, J., concurring in the judgment); *Steffel v. Thompson*, 415 U. S. 452, 473 (1974) (“[w]hen federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights”). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression.

III

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals’ exhaustion rule, which was based on *McKart v. United States*, 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978), we articulated four factors that should be considered. Two of these factors—whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent—are particularly relevant to our decision today.³ Both concern

³ The other factors discussed in *Monell*—whether the decisions in ques-

legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the parameters of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.⁴ Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative

tion constituted a departure from prior decisions and whether overruling these decisions would frustrate legitimate reliance on their holdings—do not support overruling these decisions. *McNeese* was not a departure from prior decisions—this Court had not previously addressed the application of the exhaustion rule to § 1983 actions. Overruling these decisions might injure those § 1983 plaintiffs who had foregone or waived their state administrative remedies in reliance on these decisions.

⁴ Congressional intent is important in determining the application of the exhaustion doctrine to cases in which federal administrative remedies are available, as well as to those in which state remedies are available. Of course, exhaustion is required where Congress provides that certain administrative remedies shall be exclusive. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the particular federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress. See *McKart v. United States*, 395 U. S. 185, 193–195 (1969). With state administrative remedies, the focus is not so much on the role assigned to the state agency, but the role of the state agency becomes important once a court finds that deferring its exercise of jurisdiction is consistent with statutory intent.

remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.

A

In determining whether our prior decisions misconstrued the meaning of § 1983, we begin with a review of the legislative history to § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983.⁵ Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. As we recognized in *Mitchum v. Foster*, 407 U. S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U. S. 339, 346 (1879)), “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”

At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing § 1, Congress

⁵ Some of the debates relating to § 2, which created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, aimed primarily at the Ku Klux Klan, are also relevant to our discussion of § 1.

assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

“The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.” Cong. Globe, 42d Cong., 1st Sess. 476 (1871) (hereinafter *Globe*).

See also *id.*, at 332 (remarks of Rep. Hoar); *id.*, at 375 (remarks of Rep. Lowe); *id.*, at 448-449 (remarks of Rep. Butler); *id.*, at 459 (remarks of Rep. Coburn).⁶

The 1871 Congress intended § 1 to “throw open the doors of the United States courts” to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, *Globe* 376 (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts not-

⁶ Opponents of the bill also recognized this purpose and complained that the bill would usurp the States’ power, centralize the government and perhaps ultimately destroy the States. See, e. g., *Globe* 337, 338 (remarks of Rep. Whitthorne); *id.*, at 352 (remarks of Rep. Beck); *id.*, at 361 (remarks of Rep. Swann); *id.*, at 365 (remarks of Rep. Arthur); *id.*, at 385 (remarks of Rep. Lewis); *id.*, at 429, 431 (remarks of Rep. McHenry); *id.*, at 454 (remarks of Rep. Cox); *id.*, at 510, 511 (remarks of Rep. Eldridge); Cong. *Globe*, 42d Cong., 1st Sess., App. 46 (remarks of Rep. Kerr) (hereinafter *Globe App.*); *id.*, at 216 (remarks of Sen. Thurman); *id.*, at 243 (remarks of Sen. Bayard).

withstanding any provision of state law to the contrary. For example, Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that the bill was similar in principle to an earlier act upheld by this Court in *Prigg v. Pennsylvania*, 16 Pet. 539 (1842):

“[T]he Supreme Court decided . . . that it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress.*” Globe 692 (emphasis added).

Similarly, Representative Elliott viewed the issue as whether “the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domiciled.” *Id.*, at 389 (emphasis added). See, e. g., *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 807 (remarks of Rep. Garfield); *id.*, at 609 (remarks of Sen. Pool); Globe App. 141 (remarks of Rep. Shanks).⁷

⁷Opponents criticized this provision on this very ground. For example, Rep. Storm lamented:

“[Section one] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.” Globe App. 86.

See also Globe 416 (remarks of Rep. Biggs) (“for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding”); *id.*, at 337 (remarks of Rep. Whitthorne); *id.*, at 373 (remarks of Rep. Archer); Globe App. 216 (remarks of Sen. Thurman).

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal court jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. See, *e. g.*, Globe 321 (remarks of Rep. Stroughton) (“[t]he State authorities and local courts are unable or unwilling to check the evil or punish the criminals”); *id.*, at 374 (remarks of Rep. Lowe) (“the local administrations have been found inadequate or unwilling to apply the proper corrective”); *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 609 (remarks of Sen. Pool); *id.*, at 687 (remarks of Sen. Shurz); *id.*, at 691 (remarks of Sen. Edmunds); Globe App. 185 (remarks of Rep. Platt).⁸ Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the fact-finding processes of state institutions. See, *e. g.*, Globe 320 (Testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) (“[t]he defect lies not so much with the courts as with the juries”); *id.*, at 394 (remarks of Rep. Rainey); Globe App. 311 (remarks of Rep. Maynard). This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the fact-finding processes of the state courts. See, *e. g.*, Globe 322 (remarks of Rep. Stoughton);

⁸ This view was expressed in the Presidential message urging the passing of corrective legislation. See Globe 244 (“That the power to correct these evils is beyond the control of State authorities I do not doubt.”) (Message of Pres. Grant). The inability of state authorities to protect constitutional rights was also expressed in the findings of the House Judiciary Committee, which had been directed to investigate the situation. See *id.*, at 320. The resolution introduced by Senator Sherman instructing the Senate Judiciary Committee to report a bill expressed a similar view. See Globe App. 210 (state “courts are rendered utterly powerless by organized perjury to punish crime”).

id., at 459 (remarks of Rep. Coburn).⁹ This perceived defect in the States' fact-finding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior fact-finding ability of the relevant administrative agency. See, *e. g.*, *McKart v. United States*, 395 U. S., at 192-196.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe v. Pape*, 365 U. S. 167, 183 (1961) ("[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). For example, Senator Thurman noted:

"I object to [§ 1], first, because of the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of." *Globe App. 216*.

See also *Globe* 578, 694-695 (remarks of Sen. Edmunds); *id.*, at 334 (remarks of Rep. Hoar); *id.*, at 514 (remarks of Rep.

⁹Opponents viewed the bill as a declaration of mistrust for state tribunals. See, *e. g.*, *Globe* 360 (remarks of Rep. Swann); *id.*, at 397 (remarks of Rep. Rice); *id.*, at 454 (remarks of Rep. Cox); *Globe App. 216* (remarks of Sen. Thurman). Representative McHenry found particularly offensive the removal of the fact-finding function from the local institutions. See *Globe* 429.

Farnworth); Globe App. 85 (remarks of Rep. Bingham) (“[a]dmitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?”).

This legislative history supports the conclusion that our prior decisions, holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983, did not misperceive the statutory intent: it seems fair to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act. We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here. Congress addressed the question of exhaustion under § 1983 when it recently enacted 42 U. S. C. § 1997e (1976 ed., Supp. IV). The legislative history to § 1997e provides strong evidence of congressional intent on this issue.

B

The Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), was enacted primarily to ensure that the United States Attorney General has “legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons.” Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980) (Conf. Rep.). In § 1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially

imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law. Witnesses testifying before the subcommittee that drafted the bill discussed the decisions of this Court holding that exhaustion was not required. See, *e. g.*, Hearings on H.R. 2439 and H.R. 5791 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 20 (1977) (1977 Hearings); *id.*, at 47; *id.*, at 69, 77; *id.*, at 323; Hearings on H.R. 10 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 48 (1979) (1979 Hearings). During these hearings, Representative Kastenmeier, Chairman of this subcommittee, stated:

"Another thing that I think requires some discussion within the committee, and is a point of argument, . . . is whether there ought to be an exhaustion of remedies requirement.

. . . In fact, I think it has been pointed out that if [we] were to require it, particularly in 1983, that would constitute regression from the current state of the law. It would set the law back, because presently it is clearly held, that is the Supreme Court has held, that in 1983 civil rights suits the litigant need not necessarily fully exhaust State remedies." 1977 Hearings, at 57-58.

See also *id.*, at 272 (remarks of Rep. Drinan) (Rep. Railsback "grounds his bill on doing something which the Supreme Court has consistently refused to do, namely require exhaustion of remedies"); 1979 Hearings 26 (remarks of Rep. Kastenmeier) (adopting § 1997e "was resisted as a possible en-

croachment on civil liberties; that is to say, in the free, unimpeded resort to 1983").

The debates over adopting an exhaustion requirement also reflect this understanding. See, *e. g.*, 124 Cong. Rec. H3370 (May 1, 1978) (remarks of Rep. Volkmer and Rep. Kastenmeier); *id.*, at H4624 (May 25, 1978) (remarks of Rep. Ertel); *id.*, at H7481 (July 28, 1978) (remarks of Rep. Wiggins) ("it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action"); 125 Cong. Rec. H3641 (May 23, 1979) (remarks of Rep. Butler) ("[u]nder existing law there is no requirement that a complainant first ask the State prison system to help him"). With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures. See, *e. g.* Conf. Rep. 9; 124 Cong. Rec. H3358 (May 1, 1978) (remarks of Rep. Kastenmeier); *id.*, at H3358, H3365 (remarks of Rep. Railsback); *id.*, at H4621 (May 25, 1978) (remarks of Rep. Kastenmeier); *id.*, at H4624 (remarks of Rep. Ertel); *id.*, at H7477 (July 28, 1978) (remarks of Rep. Kastenmeier); *id.*, at H7480-H7481 (remarks of Rep. Butler); *id.*, at H7481 (remarks of Rep. Ertel). Implicit in this decision is Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits.

A judicially imposed exhaustion requirement would also be inconsistent with the extraordinarily detailed exhaustion scheme embodied in § 1997e. Section 1997e carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective. The exhaustion requirement is expressly limited to § 1983 ac-

tions brought by an adult convicted of a crime. 42 U. S. C. § 1997e(a)(1) (1976 ed., Supp. IV).¹⁰ Section 1997e(b)(1) instructs the Attorney General to “promulgate minimum standards for the development and implementation of a plain, speedy, and effective system” of administrative remedies, and § 1997e(b)(2) specifies certain minimum standards that must be included.¹¹ A court may require exhaustion of administrative remedies only if “the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).” § 1997e(a)(2). Before exhaustion may be required, the court must further conclude that it “would be appropriate and in the interests of justice.” § 1997e(a)(1).¹² Finally, in those

¹⁰ Representative Kastenmeier explains why juveniles were not included in § 1997e:

“I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in [§ 1997e] was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of [§ 1997e], that it should also extend to juveniles was rejected.” 1979 Hearings 26.

¹¹ Section 1997e(b)(2) provides:

The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.”

¹² The Committee Reports state that Congress did not intend that every

§ 1983 actions meeting all the statutory requirements for exhaustion, the district court may not dismiss the case, but may only “continue such case for a period of not to exceed ninety days in order to require exhaustion.” *Ibid.* This detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases.

Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. See, *e. g.*, Conf. Rep. 9; H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 4 (1979); 1979 Hearings 4 (remarks of Rep. Railsback); 124 Cong. Rec. H3354 (May 1, 1978) (remarks of Rep. Railsback); 125 Cong. Rec. H3637 (May 23 1979) (remarks of Rep. Drinan); 126 Cong. Rec. H3497 (May 12, 1980) (remarks of Rep. Kastenmeier). To further this purpose, Congress yielded primary jurisdiction over certain § 1983 claims to state prisons only on the condition that these prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

In sum, the exhaustion provisions of the Act make sense, and are not superfluous, only if exhaustion could not be required before its enactment and if Congress intended to

§ 1983 action brought by an adult prisoner in institutions with appropriate grievance procedures be delayed pending exhaustion:

“It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to [§ 1983] raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system.” Conf. Rep. 15.

See also H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 25 (1979); S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).

carve out a narrow exception to this no-exhaustion rule. The legislative history to § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

C

Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts;¹³ would further the goal of comity and improve federal-state relations by postponing federal court review until after the state administrative agency had passed on the issue;¹⁴ and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.

As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. See ———, *supra*. Furthermore, as the debates over incorporating the exhaustion requirement in § 1997e demonstrate, the relevant policy considerations do not invariably point in one direction, and

¹³ Of course, this burden alone is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U. S. 336, 344 (1976); *United Steelworkers v. Bouligny*, 382 U. S. 145, 150-151 (1965). In any event, it is by no means clear that judicial discretion to impose an exhaustion requirement in § 1983 actions would lessen the caseload of the federal courts, at least in the short run. See ——— and n. 18, *infra*.

¹⁴ The application of these federalism principles to actions brought pursuant to § 1983 has prompted criticism by several commentators. See, e. g., Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25 Loyola L. Rev. 659 (1979); Note, 39 N. Y. U. L. Rev. 838 (1964).

there is vehement disagreement over the validity of the assumptions underlying many of them.¹⁵ The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable. Cf. *Diamond v. Chakrabarty*, 447 U. S. 303, 317 (1980); *United Steelworkers v. Bouligny*, 382 U. S. 146, 150, 153 (1965).

Beyond the policy issues that must be resolved in deciding whether to require exhaustion, there are equally difficult questions concerning the design and scope of an exhaustion requirement. These questions include how to define those categories of § 1983 claims in which exhaustion might be desirable; how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted;¹⁶ what tolling requirements and time limitations

¹⁵ For example, there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy. See, e. g., 1977 Hearings 263-264; *id.*, at 232-233; Note, 68 Colum. L. Rev. 1201, 1207 (1968). Similarly, there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise, and over whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that state and local agencies can serve. See, e. g., Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 23 (1980); Note, 68 Colum. L. Rev. 1201, 1208 (1968). Finally, it is uncertain whether the present "free market" system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a *McKart*-type standard under which plaintiffs have no initial choice. See, e. g., Note, 8 Ind. L. Rev. 565 (1975). Cf. 1977 Hearings 21, 34, 51; Hearings on S.1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 442 (1977).

¹⁶ Section 1997e resolved this problem by directing the Attorney General to promulgate minimum standards and to establish a procedure by which prison administrative remedies could be reviewed and certified. § 1997e(b) & (c). If a procedure has not been certified, the court is di-

should be adopted;¹⁷ what is the res judicata and collateral estoppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.¹⁸

rected to compare the procedure with the Attorney General's standards and to continue the case pending exhaustion only if the procedure is in substantial compliance with the standards of the Attorney General. § 1997e(a)(2).

¹⁷ Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, see *Board of Regents v. Tomanio*, 446 U. S. 478 (1980), a judicially imposed exhaustion requirement might result in the effective repeal of § 1983. Congress avoided this problem in § 1997e by directing the court to merely continue the case for a period not to exceed 90 days.

¹⁸ The initial bill proposing to include an exhaustion requirement in § 1997e provided:

"Relief shall not be granted by a district court in an action brought pursuant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available." H. R. 5791, 95th Cong., 1st Sess. (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, e. g., 1977 Hearings 34-35, 51,

The very variety of claims, claimants, and state agencies involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted § 1997, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondents and adopted by the Court of Appeals. See note 18, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.¹⁹

164-165, 169-170, 263-264, 323; 1979 Hearings 48-49.

¹⁹ The question was posed from the bench at oral argument whether the Eleventh Amendment might bar this suit on the ground that the Board of Regents is an arm of the State for purposes of the Eleventh Amendment. Tr. of Oral Arg. 20. Cf. *Alabama v. Pugh*, 438 U. S. 781 (1978). Compare *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911) with *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981). The District Court dismissed this action on the pleadings, and no Eleventh Amendment issue had been raised. The Board of Regents first raised this issue in its brief to the original panel on appeal, but did not argue it in its brief on rehearing en banc. Neither the original panel nor the en banc court addressed this issue. Although the State mentioned a possible Eleventh Amendment defense in its response in opposition to the petition for certiorari, it did not brief the issue or press it at oral argument. Indeed, the state attorney general urged that we affirm the Court of Appeals solely on its exhaustion holding. Tr. of Oral Arg. 24, 27.

We have noted that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised by the State for the first time on appeal. *Edelman v. Jordan*, 415 U. S. 651, 678 (1974). However, because of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdic-

IV

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed and remanded for proceedings consistent with this opinion.

It is so ordered.

tional in the sense that it must be raised and decided by this Court on its own motion. Cf. *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U. S. 274, 279 (1977). Where, as here, the Board of Regents expressly requested that we address the exhaustion question and not pass on its potential Eleventh Amendment immunity, and, as a consequence, the parties have not briefed the issue, we deem it appropriate to address the issue that was raised and decided below and vigorously pressed in this Court. Nothing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. The District Court is in the best position to address in the first instance the competing questions of fact and state-law necessary to resolve the Eleventh Amendment issue, and at this stage it has the discretion to permit amendments to the pleadings that might cure any potential Eleventh Amendment problems.

PP. 16, 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: **JUN 18 1982**

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER *v.* BOARD OF
REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U. S. C. § 1983. Petitioner Georgia Patsy filed this action, alleging that her employer, Florida International University (FIU), had denied her employment opportunities solely on the basis of her race and sex. By a divided vote, the United States Court of Appeals for the Fifth Circuit found that petitioner was required to exhaust "adequate and appropriate" administrative remedies, and remanded the case to the District Court to consider the adequacy of the administrative procedures. *Patsy v. Florida International University*, 634 F. 2d 900 (CA5 1981) (en banc). We reverse the decision of the Court of Appeals.

I

Petitioner alleges that even though she is well-qualified and has received uniformly excellent performance evaluations from her supervisors, she has been rejected for more than thirteen positions at FIU.¹ She further claims that

¹ Because this case is here on a motion to dismiss, we accept as true the factual allegations in petitioner's amended complaint. In her initial complaint, petitioner named FIU as the defendant. Relying on *Byron v. Uni-*

FIU has unlawfully filled positions through intentional discrimination on the basis of race and sex. She seeks declaratory and injunctive relief or, in the alternative, damages.²

The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy v. Florida International University*, 612 F. 2d 946 (CA5 1980). The full court then granted respondent's petition for rehearing and vacated the panel decision.

The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required, and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is avail-

versity of Florida, 403 F. Supp. 49 (ND Fla. 1975), the District Court granted FIU's motion to dismiss, holding that the Board of Regents and not the individual university had the capacity to sue and be sued under Florida law. The District Court granted petitioner leave to amend, and she amended her complaint to name the Board of Regents "on behalf of" FIU.

²Petitioner requested the District Court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." Record 47. Petitioner also requested that the District Court "order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein." Record 48.

able within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required. *Id.*, at 912-913. The Court of Appeals remanded the case to the District Court to determine whether exhaustion would be appropriate in this case.

II

The question whether exhaustion of administrative remedies should ever be required in a § 1983 action has prompted vigorous debate and disagreement. See, *e. g.*, Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Note, 41 U. Chi. L. Rev. 537 (1974). Our resolution of this issue, however, is made much easier because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions.

Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not "fully" consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese v. Board of Education*, 373 U. S. 668, 671-673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry v. Bachi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 574 (1973); *Carter v. Stanton*, 405

U. S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U. S. 249, 251 (1971); *Houghton v. Shafer*, 392 U. S. 639, 640 (1968); *King v. Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico v. California*, 389 U. S. 416 (1967). Cf. *Steffel v. Thompson*, 415 U. S. 452, 473 (1974) (“[w]hen federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights”). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression.

III

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals’ exhaustion rule, which was based on *McKart v. United States*, 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978), we articulated four factors that should be considered. Two of these factors—whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent—are particularly relevant to our decision today.³ Both concern

³ The other factors discussed in *Monell*—whether the decisions in question constituted a departure from prior decisions and whether overruling these decisions would frustrate legitimate reliance on their holdings—do not support overruling these decisions. *McNeese* was not a departure from prior decisions—this Court had not previously addressed the applica-

legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.⁴ Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.

A

In determining whether our prior decisions misconstrued

tion of the exhaustion rule to § 1983 actions. Overruling these decisions might injure those § 1983 plaintiffs who had foregone or waived their state administrative remedies in reliance on these decisions.

⁴ Congressional intent is important in determining the application of the exhaustion doctrine to cases in which federal administrative remedies are available, as well as to those in which state remedies are available. Of course, exhaustion is required where Congress provides that certain administrative remedies shall be exclusive. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress. See *McKart v. United States*, 395 U. S. 185, 193-195 (1969). With state administrative remedies, the focus is not so much on the role assigned to the state agency, but the role of the state agency becomes important once a court finds that deferring its exercise of jurisdiction is consistent with statutory intent.

the meaning of § 1983, we begin with a review of the legislative history to § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983.⁵ Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. As we recognized in *Mitchum v. Foster*, 407 U. S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U. S. 339, 346 (1879)), “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”

At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

“The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be

⁵ Some of the debates relating to § 2, which created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, aimed primarily at the Ku Klux Klan, are also relevant to our discussion of § 1.

power to call into courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 476 (1871) (hereinafter *Globe*).

See also *id.*, at 332 (remarks of Rep. Hoar); *id.*, at 375 (remarks of Rep. Lowe); *id.*, at 448-449 (remarks of Rep. Butler); *id.*, at 459 (remarks of Rep. Coburn).⁶

The 1871 Congress intended § 1 to "throw open the doors of the United States courts" to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, *Globe* 376 (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary. For example, Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that the bill was similar in principle to an earlier act upheld by this Court in *Prigg v. Pennsylvania*, 16 Pet. 539 (1842):

"[T]he Supreme Court decided . . . that it was the sol-

⁶ Opponents of the bill also recognized this purpose and complained that the bill would usurp the States' power, centralize the government and perhaps ultimately destroy the States. See, e. g., *Globe* 337, 338 (remarks of Rep. Whitthorne); *id.*, at 352 (remarks of Rep. Beck); *id.*, at 361 (remarks of Rep. Swann); *id.*, at 365 (remarks of Rep. Arthur); *id.*, at 385 (remarks of Rep. Lewis); *id.*, at 429, 431 (remarks of Rep. McHenry); *id.*, at 454 (remarks of Rep. Cox); *id.*, at 510, 511 (remarks of Rep. Eldridge); Cong. *Globe*, 42d Cong., 1st Sess., App. 46 (remarks of Rep. Kerr) (hereinafter *Globe App.*); *id.*, at 216 (remarks of Sen. Thurman); *id.*, at 243 (remarks of Sen. Bayard).

emn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress.*" Globe 692 (emphasis added).

Similarly, Representative Elliott viewed the issue as whether "the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domiciled." *Id.*, at 389 (emphasis added). See, *e. g.*, *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 807 (remarks of Rep. Garfield); *id.*, at 609 (remarks of Sen. Pool); Globe App. 141 (remarks of Rep. Shanks).⁷

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal court jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights.

⁷ Opponents criticized this provision on this very ground. For example, Rep. Storm lamented:

"[Section one] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning." Globe App. 86.

See also Globe 416 (remarks of Rep. Biggs) ("for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding"); *id.*, at 337 (remarks of Rep. Whitthorne); *id.*, at 373 (remarks of Rep. Archer); Globe App. 216 (remarks of Sen. Thurman).

See, *e. g.*, Globe 321 (remarks of Rep. Stroughton) (“[t]he State authorities and local courts are unable or unwilling to check the evil or punish the criminals”); *id.*, at 374 (remarks of Rep. Lowe) (“the local administrations have been found inadequate or unwilling to apply the proper corrective”); *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 609 (remarks of Sen. Pool); *id.*, at 687 (remarks of Sen. Shurz); *id.*, at 691 (remarks of Sen. Edmunds); Globe App. 185 (remarks of Rep. Platt).⁸ Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the fact-finding processes of state institutions. See, *e. g.*, Globe 320 (Testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) (“[t]he defect lies not so much with the courts as with the juries”); *id.*, at 394 (remarks of Rep. Rainey); Globe App. 311 (remarks of Rep. Maynard). This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the fact-finding processes of the state courts. See, *e. g.*, Globe 322 (remarks of Rep. Stoughton); *id.*, at 459 (remarks of Rep. Coburn).⁹ This perceived defect in the States’ fact-finding processes is particularly rele-

⁸ This view was expressed in the Presidential message urging the passing of corrective legislation. See Globe 244 (“That the power to correct these evils is beyond the control of State authorities I do not doubt.”) (Message of Pres. Grant). The inability of state authorities to protect constitutional rights was also expressed in the findings of the House Judiciary Committee, which had been directed to investigate the situation. See *id.*, at 320. The resolution introduced by Senator Sherman instructing the Senate Judiciary Committee to report a bill expressed a similar view. See Globe App. 210 (state “courts are rendered utterly powerless by organized perjury to punish crime”).

⁹ Opponents viewed the bill as a declaration of mistrust for state tribunals. See, *e. g.*, Globe 360 (remarks of Rep. Swann); *id.*, at 397 (remarks of Rep. Rice); *id.*, at 454 (remarks of Rep. Cox); Globe App. 216 (remarks of Sen. Thurman). Representative McHenry found particularly offensive the removal of the fact-finding function from the local institutions. See Globe 429.

vant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior fact-finding ability of the relevant administrative agency. See, e. g., *McKart v. United States*, 395 U. S., at 192-196.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe v. Pape*, 365 U. S. 167, 183 (1961) ("[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). For example, Senator Thurman noted:

"I object to [§ 1], first, because of the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of." *Globe App.* 216.

See also *Globe* 578, 694-695 (remarks of Sen. Edmunds); *id.*, at 334 (remarks of Rep. Hoar); *id.*, at 514 (remarks of Rep. Farnworth); *Globe App.* 85 (remarks of Rep. Bingham) ("[a]dmitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?").

This legislative history supports the conclusion that our prior decisions, holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983, did not misperceive the statutory intent: it seems fair

to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act. We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here. Congress addressed the question of exhaustion under § 1983 when it recently enacted 42 U. S. C. § 1997e (1976 ed., Supp. IV). The legislative history to § 1997e provides strong evidence of congressional intent on this issue.

B

The Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), was enacted primarily to ensure that the United States Attorney General has "legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons." Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980) (Conf. Rep.). In § 1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law. Witnesses testifying before the subcommittee that drafted the bill discussed

the decisions of this Court holding that exhaustion was not required. See, *e. g.*, Hearings on H.R. 2439 and H.R. 5791 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 20 (1977) (1977 Hearings); *id.*, at 47; *id.*, at 69, 77; *id.*, at 323; Hearings on H.R. 10 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 48 (1979) (1979 Hearings). During these hearings, Representative Kastenmeier, Chairman of this subcommittee, stated:

“Another thing that I think requires some discussion within the committee, and is a point of argument, . . . is whether there ought to be an exhaustion of remedies requirement.

. . . In fact, I think it has been pointed out that if [we] were to require it, particularly in 1983, that would constitute regression from the current state of the law. It would set the law back, because presently it is clearly held, that is the Supreme Court has held, that in 1983 civil rights suits the litigant need not necessarily fully exhaust State remedies.” 1977 Hearings, at 57–58.

See also *id.*, at 272 (remarks of Rep. Drinan) (Rep. Railsback “grounds his bill on doing something which the Supreme Court has consistently refused to do, namely require exhaustion of remedies”); 1979 Hearings 26 (remarks of Rep. Kastenmeier) (adopting § 1997e “was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983”).

The debates over adopting an exhaustion requirement also reflect this understanding. See, *e. g.*, 124 Cong. Rec. H3370 (May 1, 1978) (remarks of Rep. Volkmer and Rep. Kastenmeier); *id.*, at H4624 (May 25, 1978) (remarks of Rep. Ertel); *id.*, at H7481 (July 28, 1978) (remarks of Rep. Wiggins) (“it is settled law that an exhaustion of administrative remedies is

not required as a precondition of maintaining a 1983 action"); 125 Cong. Rec. H3641 (May 23, 1979) (remarks of Rep. Butler) ("[u]nder existing law there is no requirement that a complainant first ask the State prison system to help him"). With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures. See, e. g. Conf. Rep. 9; 124 Cong. Rec. H3358 (May 1, 1978) (remarks of Rep. Kastenmeier); *id.*, at H3358, H3365 (remarks of Rep. Railsback); *id.*, at H4621 (May 25, 1978) (remarks of Rep. Kastenmeier); *id.*, at H4624 (remarks of Rep. Ertel); *id.*, at H7477 (July 28, 1978) (remarks of Rep. Kastenmeier); *id.*, at H7480-H7481 (remarks of Rep. Butler); *id.*, at H7481 (remarks of Rep. Ertel). Implicit in this decision is Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits.

A judicially imposed exhaustion requirement would also be inconsistent with the extraordinarily detailed exhaustion scheme embodied in § 1997e. Section 1997e carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective. The exhaustion requirement is expressly limited to § 1983 actions brought by an adult convicted of a crime. 42 U. S. C. § 1997e(a)(1) (1976 ed., Supp. IV).¹⁰ Section 1997e(b)(1) in-

¹⁰ Representative Kastenmeier explains why juveniles were not included in § 1997e:

"I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in [§ 1997e] was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of [§ 1997e], that it

structs the Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy, and effective system" of administrative remedies, and § 1997e(b)(2) specifies certain minimum standards that must be included.¹¹ A court may require exhaustion of administrative remedies only if "the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." § 1997e(a)(2). Before exhaustion may be required, the court must further conclude that it "would be appropriate and in the interests of justice." § 1997e(a)(1).¹² Finally, in those § 1983 actions meeting all the statutory requirements for ex-

should also extend to juveniles was rejected." 1979 Hearings 26.

¹¹ Section 1997e(b)(2) states:

The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution."

¹² The Committee Reports state that Congress did not intend that every § 1983 action brought by an adult prisoner in institutions with appropriate grievance procedures be delayed pending exhaustion:

"It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to [§ 1983] raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not

haustion, the district court may not dismiss the case, but may only "continue such case for a period of not to exceed ninety days in order to require exhaustion." *Ibid.* This detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases.

Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. See, *e. g.*, Conf. Rep. 9; H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 4 (1979); 1979 Hearings 4 (remarks of Rep. Railsback); 124 Cong. Rec. H3354 (May 1, 1978) (remarks of Rep. Railsback); 125 Cong. Rec. H3637 (May 23 1979) (remarks of Rep. Drinan); 126 Cong. Rec. H3497 (May 12, 1980) (remarks of Rep. Kastenmeier). To further this purpose, Congress provided for the deferral of the exercise of federal jurisdiction over certain § 1983 claims only on the condition that the state prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

In sum, the exhaustion provisions of the Act make sense, and are not superfluous, only if exhaustion could not be required before its enactment and if Congress intended to carve out a narrow exception to this no-exhaustion rule. The legislative history to § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

appropriately be continued for resolution by the grievance resolution system." Conf. Rep. 15.

See also H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 25 (1979); S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).

C

Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts;¹³ would further the goal of comity and improve federal-state relations by postponing federal court review until after the state administrative agency had passed on the issue;¹⁴ and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.

As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. See 4-5 and n. 4, *supra*. Furthermore, as the debates over incorporating the exhaustion requirement in § 1997e demonstrate, the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them.¹⁵ The very difficulty of

¹³ Of course, this burden alone is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U. S. 336, 344 (1976); *United Steelworkers v. Bouligny*, 382 U. S. 145, 150-151 (1965). In any event, it is by no means clear that judicial discretion to impose an exhaustion requirement in § 1983 actions would lessen the caseload of the federal courts, at least in the short run. See 17-18 and n. 18, *infra*.

¹⁴ The application of these federalism principles to actions brought pursuant to § 1983 has prompted criticism by several commentators. See, e. g., Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25 Loyola L. Rev. 659 (1979); Note, 39 N. Y. U. L. Rev. 838 (1964).

¹⁵ For example, there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy. See, e. g., 1977 Hearings 263-264; *id.*, at 232-233; Note, 68 Colum. L. Rev. 1201, 1207 (1968). Similarly, there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise, and over whether the symbolic and institutional

these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable. Cf. *Diamond v. Chakrabarty*, 447 U. S. 303, 317 (1980); *United Steelworkers v. Bouligny*, 382 U. S. 146, 150, 153 (1965).

Beyond the policy issues that must be resolved in deciding *whether* to require exhaustion, there are equally difficult questions concerning the design and scope of an exhaustion requirement. These questions include how to define those categories of § 1983 claims in which exhaustion might be desirable; how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted;¹⁶ what tolling requirements and time limitations should be adopted;¹⁷ what is the *res judicata* and collateral es-

function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that state and local agencies can serve. See, e. g., Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 23 (1980); Note, 68 Colum. L. Rev. 1201, 1208 (1968). Finally, it is uncertain whether the present "free market" system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a *McKart*-type standard under which plaintiffs have no initial choice. See, e. g., Note, 8 Ind. L. Rev. 565 (1975). Cf. 1977 Hearings 21, 34, 51; Hearings on S.1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 442 (1977).

¹⁶ Section 1997e resolved this problem by directing the Attorney General to promulgate minimum standards and to establish a procedure by which prison administrative remedies could be reviewed and certified. § 1997e(b) & (c). If a procedure has not been certified, the court is directed to compare the procedure with the Attorney General's standards and to continue the case pending exhaustion only if the procedure is in substantial compliance with the standards of the Attorney General. § 1997e(a)(2).

¹⁷ Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, see *Board of Regents v. Tomanio*, 446 U. S. 478 (1980), a judicially imposed exhaustion requirement might result in the effective repeal of § 1983. Congress avoided this problem in § 1997e by di-

toppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.¹⁸

The very variety of claims, claimants, and state agencies involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule.

recting the court to merely continue the case for a period not to exceed 90 days.

¹⁸The initial bill proposing to include an exhaustion requirement in § 1997e provided:

"Relief shall not be granted by a district court in an action brought pursuant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available." H. R. 5791, 95th Cong., 1st Sess. (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, e. g., 1977 Hearings 34-35, 51, 164-165, 169-170, 263-264, 323; 1979 Hearings 48-49.

After full debate and consideration of the various policy arguments, Congress adopted § 1997, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondents and adopted by the Court of Appeals. See note 18, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.¹⁹

¹⁹ The question was posed from the bench at oral argument whether the Eleventh Amendment might bar this suit on the ground that the Board of Regents is an arm of the State for purposes of the Eleventh Amendment. Tr. of Oral Arg. 20. Cf. *Alabama v. Pugh*, 438 U. S. 781 (1978). Compare *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911), with *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981). The District Court dismissed this action on the pleadings, and no Eleventh Amendment issue had been raised. The Board of Regents first raised this issue in its brief to the original panel on appeal, but did not argue it in its brief on rehearing en banc. Neither the original panel nor the en banc court addressed this issue. Although the State mentioned a possible Eleventh Amendment defense in its response in opposition to the petition for certiorari, it did not brief the issue or press it at oral argument. Indeed, the assistant state attorney general urged that we affirm the Court of Appeals solely on its exhaustion holding. Tr. of Oral Arg. 24, 27.

We have noted that “the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar” that it may be raised by the State for the first time on appeal. *Edelman v. Jordan*, 415 U. S. 651, 678 (1974). However, because of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion. Cf. *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U. S. 274, 279 (1977). Where, as here, the Board of Regents expressly requested that we address the exhaustion question and not pass on its potential Eleventh Amendment immunity, and, as a consequence, the parties have not briefed the issue, we deem it appropriate to address the issue that was raised and decided below and vigorously pressed in this Court. Nothing in this opinion precludes the Board of Regents from raising its Eleventh Amendment

IV

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed and remanded for proceedings consistent with this opinion.

It is so ordered.

claim on remand. The District Court is in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the Eleventh Amendment issue, and at this stage it has the discretion to permit amendments to the pleadings that might cure any potential Eleventh Amendment problems.

Changes at 7, 13-16

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: 5/29/82

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SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, dissenting.

The Court holds that the Board of Regents of the State of Florida, a state instrumentality, is subject to suit in federal court notwithstanding the bar of the Eleventh Amendment. The Court reaches this conclusion through an unprecedented—and far reaching—expansion of the holding in *Ex Parte Young*, 209 U. S. 123 (1908). As I consider the Court's holding a serious departure from established constitutional doctrine, this dissent addresses primarily the Eleventh Amendment issue.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting *en banc*. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I The Eleventh Amendment

A

In this "reverse discrimination" action, petitioner, an employee of the Florida International University, brought suit

under 42 U. S. C. § 1983 against the Board of Regents of the State of Florida.¹ She did not name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief.² The Board filed a motion to dismiss arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that as an instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.⁴

¹ As the Court notes, see *ante*, at —, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

² Petitioner sought a declaratory judgment "declaring that the Plaintiff has suffered from acts of discrimination." In addition, she asked the court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." She requested such further equitable and injunctive relief as the court deems appropriate. App. 38-40.

³ 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."

The Eleventh Amendment is jurisdictional in nature, and the defense of the Amendment may be raised for the first time on appeal. See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.")

⁴ "As a corporate state agency and component of state government, the [Board] operates with state funds, directs the [State University System],

And it asserted that there had been no waiver. Although the Board of Regents was created as a body corporate with power "to sue and be sued . . . to plead and be impleaded in all courts of law and equity," Fla. Stat. § 240.042(1), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.⁶ In

and is local neither in character nor operation. As the 'arm of the state' which manages the Division of Universities of the Department of Education, it is clearly part of the state for Eleventh Amendment purposes." Brief at 18.

The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor, approved by three members of the Cabinet, and confirmed by the Senate. Fla. Stat. 240.207. The chief administrative officer of the Board is the Chancellor, who serves by appointment of the Board.

The Board has general supervisory authority over the State University System. Fla. Stat. 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. § 240.209.

The Board is an agency of the State of Florida. Fla. Stat. § 216.011. See *Relyea v. State*, 385 So. 2d 1378 (Fla. App. 1980). The Board may claim the defense of sovereign immunity in suits under state law. See *id.*

Numerous courts of appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345, 1349 (CA9 1981); *Brennan v. University of Kansas*, 451 F. 2d 1287 (CA10 1971); *Ronwin v. Shapiro*, 657 F. 2d 1071 (CA9 1981).

⁶See *Florida Dept of Health v. Florida Nursing Home*, 450 U. S. 147, 150 (1981); *Petty v. Tennessee-Missouri Bridge Commn*, 359 U. S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred . . . And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); *Great Northern Insurance Co. v. Read*, 322 U. S. 47, 54. See *Bragg v. Board of Public Instruction*, 36 So.

reply, petitioner argued that whether the statute creating the Board amounted to a waiver—and petitioner believed that it did—the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief at 3-4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies.⁵ The panel held that there was no exhaustion requirement in § 1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that § 1983 plaintiffs must exhaust available and reasonable administrative remedies. 634 F. 2d 900 (CA5 1981). Again the court did not consider the Board's Eleventh Amendment defense.

The Eleventh Amendment question was first raised before this Court in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court. Again petitioner argued that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"—*e. g.*, from gifts and bequests—rather than from the State Treasury. These arguments were repeated at oral argument.⁶

As the Court acknowledges, the Eleventh Amendment question is jurisdictional and must be confronted at the outset. See *ante*, at —.

2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort").

⁶Tr. of Oral Argument 25-28, 40-41.

B

In interpreting the Eleventh Amendment, the Court has sought to accommodate both the principle of sovereign immunity embodied in the Amendment and the states' duty to obey—and the federal courts to enforce—federal law. Thus, it is well established that the State is not “divested of its immunity ‘on the mere ground that the case is one arising under the Constitution or laws of the United States.’” *Parden v. Terminal R. Co.*, 377 U. S. 184, 186 (1964), quoting, *Hans v. Louisiana*, 134 U. S. 1, 10 (1890).⁷ It also is settled that when a State itself is not named as a party to the suit, the Amendment nevertheless applies if the State is the real party in interest. See *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459 (1945).⁸

On the other hand, the Court has not interpreted the Amendment to bar federal court jurisdiction when the State has consented to suit,⁹ or to bar review by this Court of an

⁷ In *Hans* the Court also held that the Amendment bars suits brought against an unconsenting State by its own citizens, although by its terms the Amendment does not apply to this situation. Cf. *Monaco v. Mississippi*, 292 U. S. 313 (1934) (Eleventh Amendment applies to federal suits against an unconsenting state by a foreign nation). By contrast, the Amendment has not been applied to suits against a State brought by another State or by the United States. *North Dakota v. Minnesota*, 263 U. S. 365 (1923); *United States v. Mississippi*, 380 U. S. 128 (1965).

⁸ In *Ford Motor* the plaintiff sued the Department of Treasury of the State of Indiana, and the three officials—the Governor, Treasurer, and Auditor—who constituted the Board of the Department of Treasury. The plaintiff sought a refund of gross income taxes paid to the department. Suit was brought in federal District Court. The Court held that the suit was barred by the Eleventh Amendment. The plaintiff was seeking a refund from the state not a personal judgment against the individual officials: “[W]hen the action is in essence one for the recovery of money from the state, the state is the real party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.” 323 U. S., at 464. See *Edelman v. Jordan*, *supra*, at 663; *Great Northern Life Insurance Co. v. Read*, 322 U. S. 47 (1944).

⁹ See *Clark v. Barnard*, 108 U. S. 436, 447 (1883); *Parden v. Terminal*

action brought against the State in *state* court.¹⁰ Congress may lift the bar of the Amendment when exercising powers granted to it by § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Counties and municipalities may not claim immunity under the Amendment. *Lincoln County v. Luning*, 133 U. S. 529 (1890); *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274, 279-281 (1977). And under *Ex parte Young*, 209 U. S. 123 (1908), a federal court may order state officials to obey federal law in the future.¹¹

Application of these settled principles to the present case is straightforward. This is an action under § 1983, and Congress has not removed the bar of the Eleventh Amendment

R. Co., 377 U. S. 184 (1964).

¹⁰See *Smith v. Reeves*, 178 U. S. 436, 445 (1900); *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, 57 (1944); *Chandler v. Dix*, 194 U. S. 590, 592 (1904). The Court's assumption of jurisdiction in *University of California Board of Regents v. Bakke*, 438 U. S. 265 (1978), a case originating in *state* court, thus provides no support for today's decision. For the same reason, the Court's reliance upon *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911), is misplaced. See *infra*.

¹¹Under the theory, some would say fiction, of *Ex parte Young*, the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, . . . he is . . . stripped of his official or representative character." *Id.*, at 159. On this analysis, a prospective injunction requiring the official to conform his future behavior to federal law, does not require anything of the State and therefore does not bring the Eleventh Amendment to bear. The granting of retroactive relief, on the other hand, would require the official to take action in his official capacity. Thus, if the official is required to pay damages from state funds, the State is directly affected. See *Edelman v. Jordan*, *supra*. Similarly, retroactive *injunctive* relief may require the official to take action in his official capacity and also would be barred by the Eleventh Amendment. Cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). Of course, in addition to prospective injunctive relief, a plaintiff may seek damages from the individual officer in his personal capacity. See *Scheuer v. Rhodes*, 416 U. S. 232, 237-238 (1974).

in such actions. See *Quern v. Jordan*, 440 U. S. 332 (1979). Petitioner seeks relief from the Board of Regents of the State of Florida, an instrumentality or agency of the State. The Board is not a local political body but bears responsibility for the State university system as a whole. Cf. *Mt. Healthy Bd. of Ed. v. Doyle*, *supra*. Petitioner's argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court. See, e. g., *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981).¹² Similarly, petitioner's suggestion that the Eleventh Amendment does not apply to equitable claims against a state is incorrect. See *Cory v. White*, — U. S. — (1982).

Thus, unless the rule in *Ex parte Young*, *supra*, is extended beyond any previous decision of this Court, the Eleventh Amendment bars this suit. The theory in *Ex parte Young*, *supra*, has no application to the State itself or to an instrumentality of the State. If petitioner had sued the individual members of the Board, her claim for damages against them would not have been barred by the Eleventh Amendment. Nor would her claim for equitable relief have been barred to the extent it were limited to future conduct. But petitioner did not sue the members of the Board. She sued only the Board itself, an arm of the State of Florida. Moreover, the ~~principal~~ relief sought by petitioner would impose—

principal

¹² In *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981), the Court of Appeals for the Fifth Circuit found that the Florida Department of Health and Rehabilitative Services had consented to suit. The court based its finding of waiver, in part, on the fact that the Department was a "body corporate" with the capacity to "sue and be sued" under state law. Fla. Stat. Ann. § 402.34. This Court reversed holding that a general waiver of sovereign immunity does not amount to a waiver of the Eleventh Amendment. See *id.*, at 150. See note 5, *supra*.

Without distinguishing *Florida Dept of Health*, *supra*, the Court leaves open the question of whether the Board has consented to suit. See *ante*, at 9 & n. 10.

in the alternative—an affirmative duty on the Board to promote her to the next available position of comparable status to those to which she had applied, or would “require the [Board] to pay to [petitioner] the sum of \$500,000 as actual and exemplary damages.” App., 39. See n. 3, *ante*.

One would have thought that *Ex parte Young* was simply irrelevant in these circumstances. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State—or an agency of the State—cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state’s own coffers. Whether the damages come directly from the State’s general fund or from some other State fund, the money is no less the State’s. Indeed, direct application of *Ex parte Young* to the State and its instrumentalities would read the Eleventh Amendment out of the Constitution. If the bar of the Amendment is lifted merely upon the naming of a State board, commission, agency or corporation—opening the way to damages as well as to injunctive relief—then the Amendment no longer would afford constitutionally prescribed protection to the states.

C

Despite the weight of these considerations, the Court concludes that this action is not barred by the Eleventh Amendment. Indeed, the Court undertakes to apply *Ex parte Young* to the Board of Regents itself. Relying upon the decision in *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911), the Court reasons that the Board of Regents, as a body corporate, is no different from a state official. The Court attempts to bolster this novel conclusion by observing that under Florida law the Board of Regents is termed the “director” of the Division of Universities. The Court concludes that, just as in *Ex parte Young*, the Board of Regents “may be sued for unconstitutional or unauthorized actions, as

long as the plaintiff is not seeking monetary relief that must be paid out of the state treasury." *Ante*, at 8.

The Court's conclusion is supported neither by reason nor precedents of this Court. As indicated above, the rationale of *Ex parte Young* does not apply to a State or State instrumentality. The State cannot be "stripped" of its own authority. Moreover, if the Board of Regents is a State agency—and it clearly is—then its assets are also those of the State's. Yet the Court's decision exposes the Board's assets to a damage award on the double fiction that the Board is really an "official" and that its separate assets somehow belong to this fictitious being rather than to the State. On such a theory, a state welfare board, highway department or any other agency, board or department of a state with any separate funds or income could be sued for damages. Such a conclusion is at odds with the Court's holding in *Kennecott Copper Corp. v. Tax Commn*, 327 U. S. 573 (1946), that the segregated funds of the State Tax Commission were State monies subject to the Eleventh Amendment.

Nor does the Board of Regents' corporate status under state law support the Court's holding. State governments consist in major part of a variety of boards, commissions, agencies, and corporations. These State entities are no less instruments of the State because they may be vested under state law with the power to contract, to sue and be sued. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See *Great Northern Insurance Co. v. Read*, 322 U. S. 47; *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454 (1945); *Kennecott Copper Corp. v. State Tax Commn*, 327 U. S. 572 (1946).

Thus, in *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), the Court assumed that a state owned railroad—as an instrumentality of the State—was immune from suit in federal court absent a waiver. The railway in *Parden* was authorized to operate "as though it were an ordinary common

carrier." 377 U. S. 185. It performed services for profit and had contracts and agreements with various labor organizations. It was "indisputably a common carrier . . . engaging in interstate commerce." *Id.*, at 185. No suggestion was made that as a State body, with separate funds, the railroad was no longer an instrumentality of the State but was merely a State official. And just last term the Court held that the Florida Department of Health, a "body corporate" under State law was immune from suit. *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981). Cf. *Alabama v. Pugh*, 438 U. S. 781 (1978) ("There can be no doubt . . . that suit against the State and its Board of Corrections is barred by the Eleventh Amendment"). The Court's conclusion that corporate status converts a State body into a State official, subject to suit, cannot be reconciled with these well established precedents.

D

I am unaware of any prior decision of this Court that supports the Court's application of *Ex parte Young* to State instrumentalities. *Hopkins v. Clemson College*, *supra*, relied upon so heavily by the Court, is simply irrelevant. In that case suit was brought against a state college *in state court* to recover damages caused by the college's construction of a dyke. The state courts held that the college was protected from suit by the state law of sovereign immunity. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case.¹³ It was clear before *Hopkins* that the Eleventh

¹³The state college recognized that there was no Eleventh Amendment question. In its brief it noted: "It is difficult to see how either Section 2 of Article III, of the Constitution of the United States or the Eleventh amendment has any application to the inquiry whether a suit by a citizen of a State in its own Courts is a suit against that State. That seems to be purely a question of local law to be determined by the State Court." Brief at 20.

Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in *state* court. See note 10, *supra*. However the holding in *Hopkins* may be viewed, no Eleventh Amendment question was presented to the Court.¹⁴ It therefore is no surprise that the opinion has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state agency in federal court. If the case could be viewed as standing for the proposition that state agencies may be sued as if they were state officials, the case long since has been overruled *sub silentio* by subsequent decisions. See *Florida Dept of Health v. Florida Nursing Home Assn*, *supra*. *Hopkins* does not deserve the pride of place given to it by the majority.¹⁵ It is in fact a non-precedent.

The Court today simply announces a new doctrine, one that exposes the instrumentalities of the State itself to suit in federal court.¹⁶ After today's decision, state boards and

¹⁴ *Hopkins* has been viewed primarily as standing for a principle of agency law. See *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682, 694 (1949) ("agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal"); *Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado*, 356 F. 2d 599, 601 n. 1 (CA10 1966).

¹⁵ The irrelevance of *Hopkins* is further indicated by the fact that the College's activities in that case were viewed as proprietary in nature:

"[T]his is not an action against the College for a tort committed in the prosecution of any governmental function. The fee was in the State, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the College, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. 221 U. S., at 647.

Cf. *Employees v. Department of Public Health and Welfare*, 411 U. S. 279 (1973) (distinguishing *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), on the basis that *Parden* concerned State proprietary activity).

¹⁶ The Court suggests that in prior decisions the Court has permitted suit against State Boards of Regents. See *ante*, at 5. Yet in none of these

commissions may be sued for injunctive relief. The Court also holds that such bodies may be sued for damages on the fiction that their segregated assets are not the State's.¹⁷ The Court's extension of *Ex parte Young* to the State itself destroys the rationale of that decision. It also undermines the careful balance worked out in this sensitive area of the law.

suits was the jurisdictional issue posed as it is here. Thus, for example, in *University of California Board of Regents v. Bakke*, 438 U. S. 265 (1978), the Eleventh Amendment issue was not present because the case was here on petition to the California Supreme Court. See note 5, *supra*. And in each of the other cases cited by the Court, the plaintiff had the good sense to name other defendants in addition to the particular state board. See, e. g., *Board of Regents v. Tomanio*, 446 U. S. 478 (1978); *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950).

The Court also argues that the courts of appeals are split on the question of whether damages can be awarded against state universities. Yet the two cases cited by the Court to demonstrate a split on this question do not support the Court's assertion. In *SONI v. Board of Trustees*, 513 F. 2d 347 (CA6 1975) the court found that the Board of Trustees had waived its immunity to suit, while in *Goss v. Jacinto Junior College*, 588 F. 2d 96, 98-99 (CA5 1979) the court reasoned that the particular junior college was similar to a county or municipality, an "independent 'political subdivision' as a matter of Texas statutory and common law." The Court suggests as well that the courts of appeals are agreed that injunctive relief may be awarded against state universities and state boards of regents. Again the cases cited provide little support for the Court's assertion. In *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F. 2d 1196, 1201 (CA1 1979), the court held that individual members of the Board of Regents might be sued for prospective injunctive relief. It did not hold, as the Court implies, that the University itself might be sued. Rather, it accepted "the University's identification with the state." And in *Gay Student Services v. Texas A & M University*, 612 F. 2d 160, 165 (CA5 1980), it is unclear that the court held more than that officials of the University could be sued for injunctive relief. Unlike the situation in those two cases, petitioner sued *only* the Board of Regents. Numerous courts of appeals have held state board of regents to be immune from suit in federal court by reason of the Eleventh Amendment. See n. 4, *supra*.

¹⁷ Whether a State board, like a State official, may claim good faith immunity is not clear but of substantial significance. See *Owen v. City of Independence*, 445 U. S. 622 (1980).

The decision is simply wrong. The Court should dismiss the suit on the basis of the Eleventh Amendment.

II Exhaustion of Remedies

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeals' persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in §1983 suits. Other Courts of Appeals have adopted a similar rule. See *e. g.*, *Eisen v. Eastman*, 421 F. 2d 560 (CA2 1969); *Secret v. Brierton*, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to §1983 actions. It found that the prior decisions of this Court did not clearly decide the question.¹⁸ See *Barry v. Barchi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 575 n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by §1983.

I agree with the Court of Appeals' opinion. The requirement that a §1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, (1908) (opinion of Justice Holmes). The rule rests on sound considerations. It does not defeat federal court jurisdiction, it merely defers it.¹⁹ It permits the states to correct

¹⁸ "[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1274 (1977).

¹⁹ Cf. *Fair Assessment in Real Estate v. McNary*, — U. S. —, — (1982) (BRENNAN, J., concurring) (exhaustion requirement in §1983 cases can be justified by "a somewhat lesser showing . . . where . . . we are concerned not with the displacement of the §1983 remedy, but with the defer-

violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See *Younger v. Harris*, 401 U. S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources.²⁰ In 1961, the year that *Monroe v. Pape*, 365 U. S. 167 (1961), was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U. S. Courts 238 (1961). In 1981, over 30,000 such suits were commenced.²⁰ Annual Report of the Director of The Administrative Office of the U. S. Courts 63, 68 (1981). Such a dramatic increase in litigation imposes a heavy burden on the federal courts to the detriment of all federal court litigants, including those whose constitutional rights in fact have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion requirement in § 1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See *McNeese v. Board of Education*, 373 U. S. 668 (1963). Other decisions speak to the question in an off-hand and conclusory fashion. See *Damico v. California*, 389 U. S. 416 (1967) (unargued per curiam). Moreover, a categorical no-exhaustion rule would seem inconsistent with the decision in *Younger v. Harris*, 401 U. S. 37 (1971), prescribing

ral of federal court consideration pending exhaustion of the state administrative process").

²⁰ Of the approximately 30,000 civil rights suits filed in fiscal year 1981, 15,639 were filed by state prisoners under § 1983. The remainder involved a variety of civil rights suits. See *Parratt v. Taylor*, 451 U. S. 527, 554 n. 13 (1981) (POWELL, J., concurring).

ing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, *Younger* would seem to suggest the appropriateness of exhaustion. Cf. *Gibson v. Berryhill*, 411 U. S. 564, 574-575 (1973). Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no exhaustion rule with indications of congressional intent. Finding nothing on point *directly* in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to begin civil rights actions on behalf of institutionalized persons. § 1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See § 1997c. In addition, in § 1997e, the Act sets forth an exhaustion requirement for § 1983 claims brought by adult prisoners.

On the basis of the exhaustion provision in § 1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a general no exhaustion rule. The irony in this reasoning should be obvious. The concern that prompted the Department of Justice to support, and the Congress to adopt, § 1997e was the vast increase in § 1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 11% of the total federal district court docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal court liti-

gation. It was primarily this problem that prompted enactment of § 1997e.

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorize the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained § 1997e as follows:

"In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures *before the Attorney General can become involved pursuant to [the Act].*" Congressional Record S1713, February 26, 1980.²¹

Senator Bayh, the author of the Act, described the exhaustion provision in similar terms:

"[I]n the event of a prison inmate's rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or

²¹ Senator Hatch offered the same explanation on several other occasions in the course of the debate. See Congressional Record S4293, April 29, 1980 ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); Congressional Record S4626, May 6, 1980 ("Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

class of inmates would have to pursue all of their administrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act]." Congressional Record S1859, February 27, 1980.

In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in § 1983 actions. Also revealing as to the limited purpose of § 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

"No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S.1983, 96th Congress, 1st Session.

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies—subject to well developed exceptions—is firmly established in virtually every area of the law. This is dictated in § 1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

Substantially Rewritten
Pages 5-13 are new
1-4, 15-17

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 9 1982**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER *v.* BOARD OF
REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, dissenting.

The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional. I consider this holding to be a serious departure from established constitutional doctrine.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting *en banc*. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I. The Eleventh Amendment¹

A

In this "reverse discrimination" action, petitioner, an em-

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."

ployee of the Florida International University, brought suit under 42 U. S. C. § 1983 against the Board of Regents of the State of Florida.² She did not name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief. See *ante*, at —, n. 2. The Board filed a motion to dismiss arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that as an

² As the Court notes, see *ante*, at —, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

³ The Court repeatedly has held that the defense of the Eleventh Amendment may be raised for the first time on appeal. See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

The Board's brief on appeal was divided into three parts. Part III was devoted to the argument that "the Eleventh Amendment precludes subject matter jurisdiction over plaintiff's complaint." *Id.*, at 17. A lengthy statutory addendum was attached in support of the arguments advanced in this section of the brief. After the case was scheduled for rehearing en banc, the parties filed short—*e. g.* four and ten page—supplemental briefs to be considered in addition to the main briefs already submitted to the Court of Appeals. The supplemental briefs did not add to the discussion of the Eleventh Amendment issue. But the question was placed before the Court of Appeals en banc, as it had been placed before the panel, through the thorough discussion in the main briefs.

This Court's explanation for not addressing the Eleventh Amendment issue is that it was not considered below. See n. 19, *ante*. But contrary to the implication in the Court's explanation, the issue—as shown here—was urged by the Board and argued here.

instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.⁴ And it asserted that there had been no waiver. Although the Board of Regents was created as a body corporate with power "to sue and be sued . . . to plead and be impleaded in all courts of law and equity," Fla. Stat. § 240.042(1), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.⁵ In reply,

OMission |

⁴The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. § 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor. Fla. Stat. § 240.207. The Board has general supervisory authority over the State University System. Fla. Stat. § 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. § 240.209.

The Board is an agency of the State of Florida. Fla. Stat. § 216.011. See *Relyea v. State*, 385 So. 2d 1378 (Fla. App. 1980). It may claim the defense of sovereign immunity in suits under state law. See *ibid*.

Numerous courts of appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345, 1349 (CA9 1981); *Brennan v. University of Kansas*, 451 F. 2d 1287 (CA10 1971); *Ronwin v. Shapiro*, 657 F. 2d 1071 (CA9 1981).

⁵See *Florida Dept of Health v. Florida Nursing Home*, 450 U. S. 147, 150 (1981); *Petty v. Tennessee-Missouri Bridge Commn*, 359 U. S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred . . . And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); *Kennecott Cooper Corp. v. State Tax Commn*, 327 U. S. 573 (1946) (language in state statute providing for suit in "any court of competent jurisdiction" will not be understood as a waiver of the Eleventh Amendment); *Jagnandan v. Giles*, 538 F. 2d 1166, 1177 (CA5 1976). Cf. *Edelman v. Jordan*, 415 U. S. 651, 673 (1974) ("In deciding whether a state has waived its constitutional protection under the

petitioner argued that whether the statute creating the Board amounted to a waiver—and petitioner believed that it did—the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief at 3–4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in § 1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that § 1983 plaintiffs must exhaust available and reasonable administrative remedies. 634 F. 2d 900 (CA5 1981). Again the court did not consider the Board's Eleventh Amendment defense.

The Eleventh Amendment question was raised before this Court, at the first opportunity after the Court of Appeals' decision, in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was

Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'").

At oral argument here the Assistant Attorney General of Florida stated that the Florida legislature had not waived the Eleventh Amendment and had waived the defense of sovereign immunity "only in selected tort cases." Tr. at 26. See *Bragg v. Board of Public Instruction*, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort"); *Relyea v. State*, *supra* (Board of Regents retains defense of sovereign immunity); Fla. Stat. § 111.071(i)(b)(3) (provision for payment by the state of civil rights judgments against state officers—including judgments under 42 U. S. C. § 1983—does not waive sovereign immunity "or any other defense or immunity" to such lawsuits). Cf. *Long v. Richardson*, 525 F. 2d 74, 79 (CA6 1975) (state university's immunity from suit under state law disposes of Eleventh Amendment question).

an arm of the State and that it had not waived its immunity from suit in federal court.⁶ Again petitioner answered that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"—*e. g.*, from gifts and bequests—rather than from the State Treasury. These arguments were repeated at oral argument.⁷

B

The Court views the jurisdictional question presented by the Eleventh Amendment as if it were of little or no importance. Its entire discussion of the question is relegated to a conclusory note at the end of the opinion. See *ante*, at —, n. 19. The Court concedes that the Amendment and the bar of sovereign immunity are "jurisdictional," but only in the sense that the State may raise the claim at any point in the proceedings. The statement is then made that the Amendment is not jurisdictional "in the sense that it must be raised and decided by this Court on its own motion." *Ante*, at —, n. 19.⁸ The Court cites to no authority in support of this

⁶ See Reply Brief at 23 ("Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss [petitioner's] suit for lack of jurisdiction.").

The Court in note 19, *ante*, attaches importance to the Assistant Attorney General's statement at oral argument that the Board wanted the exhaustion issue decided. This must be viewed, however, in light of the Board's unsuccessful attempt to have this Court *first* decide the Eleventh Amendment issue. Moreover, a party's request—short of a binding waiver—cannot relieve this Court of its duty to resolve a jurisdictional question.

⁷ Tr. of Oral Argument 25–28, 40–41. At oral argument, the Board stated that the Eleventh Amendment question had not been addressed in its main briefs to this Court "because of the grant of certiorari." *Id.*, at 27.

⁸ In view of the Board's repeated efforts to raise the Eleventh Amend-

statement,⁹ and it would be surprising if any existed. The reason that the Eleventh Amendment question may be raised at any point in the proceedings is precisely because it places limits on the basic authority of federal courts to *entertain* suits against a state. The history and text of the Eleventh Amendment, the principle of sovereign immunity exemplified by it, and the well established precedents of this Court make clear that today's decision misconceives our jurisdiction and the purpose of this Amendment.

A basic principle of our constitutional system is that the federal courts are courts of limited jurisdiction. Their authority extends only to those matters within the judicial power of the United States as defined by the Constitution. In language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Article III, suits "commenced or prosecuted against one of the United States." When an Amendment to the Constitution

ment question, and its specific request that this Court vacate the decision of the Court of Appeals for lack of jurisdiction, see note 6 *supra*, it is hardly correct to say that the Court must now raise the question of jurisdiction on its own motion. Cf. *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975). In any event, "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274, 278 (1977).

⁹The Court cites, with a "compare" signal, to *Mt. Healthy City Board of Ed. v. Doyle*, 429 U. S. 274, 279 (1977). The *Mt. Healthy* Court in no way suggested that the Eleventh Amendment and the principle of sovereign immunity embodied in Article III were less than jurisdictional. Indeed, the Court found it necessary to resolve the Eleventh Amendment question in that case prior to reaching the merits.

On the contrary, the Court consistently has viewed the Amendment as jurisdictional. In *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975), the Court raised the question of the Eleventh Amendment even though the State had asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned this defense. Unlike the Board of Regents in this case, the State of Iowa had not advanced the defense in this Court. Even so, the *Sosna* Court raised and addressed the question. These precedents are ignored by the Court today.

states in plain language that “the judicial power of the United States shall not be construed to extend” to suits against a state, from what source does the Court today derive its jurisdiction? The Court’s “back-of-the-hand” treatment of this threshold issue offers no answer. Questions of jurisdiction and of the legitimate exercise of power are fundamental in our federal constitutional system.¹⁰

C

The Eleventh Amendment was adopted as a response to this Court’s assumption of original jurisdiction in a suit brought against the State of Georgia. *Chisolm v. Georgia*, 2 Dall. 419 (1793). Relying upon express language in Article III extending the judicial power to controversies between a State and Citizens of another State, the Court found that it had jurisdiction. The decision is said to have created a shock throughout the country. See *Hans v. Louisiana*, 134 U. S. 1, 11 (1890). The Amendment was adopted shortly thereafter, and the Court understood that it had been overruled: “the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state.” *Id.*, at 11.

In light of the history and wording of the Amendment, the Court has viewed the Amendment as placing explicit limits on the judicial power as defined by Article III. See *Nevada v. Hall*, 440 U. S. 410, 421 (1979). But more than that, and beyond the express provisions of the Amendment, the Court has recognized that the Amendment stands for a principle of

¹⁰ “Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court.” Wright and Miller, *Federal Practice and Procedure* § 3522.

sovereign immunity by which the grant of authority in Article III itself must be measured.¹¹ Thus, in *Hans v. Louisiana*, *supra*, the Court held that the federal judicial power did not extend to a suit against a nonconsenting State by one of its own citizens. Although the Eleventh Amendment by its terms does not apply to such suits, the Court found that the language of the Amendment was but an illustration of a larger principle: Federal jurisdiction over suits against a State, absent consent, "was not contemplated by the Constitution when establishing the judicial power of the United States." *Id.*, at 15.¹² See *Smith v. Reeves*, 178 U. S. 436 (1900).

Similarly, in *Ex Parte State of New York*, 256 U. S. 490 (1921), the Court found that despite the Eleventh Amendment's specific reference to suits in "law or equity," the principle of sovereign immunity exemplified by the Amendment would not permit the extension of federal admiralty jurisdiction over a nonconsenting State. The Court applied the same approach in *Monaco v. Mississippi*, 292 U. S. 313 (1934), in which the Court refused to take jurisdiction over a

¹¹ "[T]he Eleventh Amendment was introduced to clarify the intent of the Framers concerning the reach of the federal judicial power. . . . The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally . . ." *Employees v. Missouri Public Health Dept.*, 411 U. S. 279, 292-293 (1973) (MARSHALL, J., concurring).

¹² The *Hans* Court quoted at some length from the constitutional debates concerning the scope of Article III. In the eighty-first number of the *Federalist*, for example, Hamilton sought to dispel the suggestion that Article III extended federal jurisdiction over suits brought against one of the states: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." 134 U. S., at 13 (emphasis in original).

suit against a State by a foreign state. On its face, Article III provided jurisdiction over suits "between a State . . . and foreign States." Nor did the Eleventh Amendment specifically exempt the states from suit by a foreign state. Nevertheless, the Court concluded that the judicial power of the United States, granted by Article III, did not extend so far: "We think that Madison correctly interpreted Clause one of §2 of Article III of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State's consent but not otherwise." *Id.*, at 330.

In this case a resident of the State of Florida has sued a Board exercising a major function of the State's sovereign authority. As prior decisions have held, whether this case is viewed only under the Eleventh Amendment—with its explicit limitation on federal jurisdiction—or under Article III, the analysis must be the same. Absent consent, the "judicial power of the United States," as defined by Article III and the Eleventh Amendment, simply does not extend to suits against one of the States by a citizen of that State:¹³

"That a State may not be sued without its consent is a

¹³ Unlike other limitations on federal jurisdiction, the limitation imposed by the Eleventh Amendment and the doctrine of sovereign immunity may be waived by consent unequivocally expressed. This was the understanding of the doctrine at the time the Constitution was adopted, see note 11 *supra*, and the Court has interpreted the "judicial power of the United States" as used in the Eleventh Amendment and Article III accordingly. But the fact that the state or the United States may consent to federal jurisdiction, does not render the Eleventh Amendment or the doctrine of sovereign immunity embodied in Article III "quasi" jurisdictional. Quite simply, where there has not been consent, there is no jurisdiction. Cf. *United States v. Sherwood*, 312 U. S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit"); *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void.").

fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that 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 a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.*" *Ex Parte State of New York*, 256 U. S. 490 (1921) (emphasis added).

The Court does not distinguish these unquestioned precedents. They are wholly and inexplicably ignored. Quite simply the Court today disregards controlling decisions and the explicit limitation on federal court jurisdiction in Article III and the Eleventh Amendment. The Court does recognize that the Eleventh Amendment is jurisdictional "in the sense" that the State may raise the bar of the Amendment for the first time on appeal. Yet the Court misses the point of this statement. The reason that the bar of the Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional:

"The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued . . . in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454, 467 (1945).¹⁴

¹⁴ See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974); *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975); *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274,

Despite these precedents, and apparently because of an unexplained anxiety to reach the exhaustion issue decided by the Court of Appeals, this Court remands the issue of *its own* jurisdiction to the courts below.

D

I believe that the Eleventh Amendment question must be addressed and that the answer could hardly be clearer. This is an action under § 1983.¹⁵ Petitioner seeks relief from the Board of Regents of the State of Florida, a major instrumentality or agency of the State. Petitioner's argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court and is unsupported by State law. See, *e. g.*, *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981); note 5, *supra*. Similarly, petitioner's suggestion that the Eleventh Amendment does not bar her equitable claims against the Board must be rejected. The Amendment applies to suits "in law *and* equity." All suits against an unconsenting State—whether for damages or injunctive relief—are barred. See *Cory v. White*, — U. S.

278 (1977). The Court has consistently viewed the Eleventh Amendment question as jurisdictional. See *Great Northern Insurance Co. v. Read*, 322 U. S. 47, 51 (1944) ("A state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment") (emphasis added); *Monaco v. Mississippi*, *supra*, at 320 (Question is "whether this Court has jurisdiction to *entertain* a suit brought by a foreign State against a State without her consent").

¹⁵The states consented to a diminution of their sovereignty by ratifying the Fourteenth Amendment. In its exercise of the powers granted to it by § 5 of the Fourteenth Amendment, Congress may lift the bar of sovereign immunity. See *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Thus, if petitioner had brought this suit under Title VII of the Civil Rights Act of 1964, there would have been no jurisdictional problem. But petitioner did not do so, and the Court has held that Congress has not removed the bar of sovereign immunity in § 1983 actions. See *Quern v. Jordan*, 440 U. S. 332 (1979).

— (1982).¹⁶ Finally, the rule in *Ex parte Young*, 209 U. S. 123 (1908), permitting a federal court to order state officials to obey federal law in the future, is simply irrelevant to this case.¹⁷ Petitioner did not sue the members of the Board of

¹⁶ "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity." *Cory v. White*, — U. S. —, — (1982).

¹⁷ Under the theory of *Ex parte Young* the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, . . . he is . . . stripped of his official or representative character." *Id.*, at 159. The rationale of that decision has no application to suits against the State or its agencies. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State—or an agency of the State—cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state's own coffers—whether the damages come directly from the State's general fund or from some other State fund. See *Kennecott Copper Corp. v. Tax Commn*, 327 U. S. 573 (1946) (segregated funds of the State Tax Commission are State monies subject to the Eleventh Amendment).

Moreover, the fact that the Board is a corporate entity under state law does not permit application of the rule in *Ex parte Young* to the Board itself—as if the Board were an official. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981); *Great Northern Insurance Co. v. Read*, 322 U. S. 47; *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454 (1945); *Kennecott Copper Corp. v. State Tax Commn*, 327 U. S. 572 (1946).

Hopkins v. Clemson Agricultural College, 221 U. S. 636 (1911), is not to the contrary. In that case suit was brought against a state college in state court to recover damages caused by the college's construction of a dyke. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case. It was clear before *Hopkins* that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in state court. See *Chandler v. Dix*, 194 U. S. 590, 592 (1904). Cf. *University of California Board of Regents v. Bakke*, 438 U. S. 265

Regents. She sued the Board itself, an arm of the State of Florida.

In my view, the Eleventh Amendment—and the principle of sovereign immunity exemplified by the Amendment and embodied in Article III—clearly bars the suit in this case. The Court's refusal to address the question of its own jurisdiction violates well established precedents of this Court as well as the basic premise that federal courts are courts of limited jurisdiction. Even had the parties neglected to address the Eleventh Amendment question, it would have been our responsibility to consider it on our own motion. In fact, the question has been fully briefed to the Court of Appeals and raised in this Court. See note 8, *supra*. See *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975). I would dismiss this suit and vacate the decision of the Court of Appeals for lack of jurisdiction.

II. Exhaustion of Remedies

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeal's persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in §1983 suits. Other Courts of Appeals have adopted a similar rule. See *e. g.*, *Eisen v. Eastman*, 421 F. 2d 560 (CA2 1969); *Secret v. Brierton*, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to §1983 actions. It found that the prior

(1978). Moreover, the *Hopkins* Court did not consider the college's activities in that case to be governmental. 221 U. S., at 647. In short, no Eleventh Amendment question was presented to the Court. The opinion in *Hopkins* has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state corporate agency in federal court. See *Florida Dept of Health v. Florida Nursing Home Assn*, *supra*; *Alabama v. Pugh*, 438 U. S. 781 (1978); *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964).

decisions of this Court did not clearly decide the question.¹⁸ See *Barry v. Barchi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 575 n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by § 1983.

I agree with the Court of Appeals' opinion. The requirement that a § 1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, (1908) (opinion of Justice Holmes). The rule rests on sound considerations. It does not defeat federal court jurisdiction, it merely defers it.¹⁹ It permits the states to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See *Younger v. Harris*, 401 U. S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that *Monroe v. Pape*, 365 U. S. 167 (1961), was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U. S. Courts 238 (1961). In 1981, over 30,000

¹⁸ "[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1274 (1977).

¹⁹ Cf. *Fair Assessment in Real Estate v. McNary*, — U. S. —, — (1982) (BRENNAN, J., concurring) (exhaustion requirement in § 1983 cases can be justified by "a somewhat lesser showing . . . where . . . we are concerned not with the displacement of the § 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process").

such suits were commenced.²⁰ Annual Report of the Director, 63, 68 (1981). The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal court litigants, including others who assert that their constitutional rights have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion requirement in § 1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See *McNeese v. Board of Education*, 373 U. S. 668 (1963). Other decisions speak to the question in an off-hand and conclusory fashion. See *Damico v. California*, 389 U. S. 416 (1967) (unargued *per curiam*). Moreover, a categorical no-exhaustion rule would seem inconsistent with the decision in *Younger v. Harris*, 401 U. S. 37 (1971), prescribing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, *Younger* would seem to suggest the appropriateness of exhaustion. Cf. *Gibson v. Berryhill*, 411 U. S. 564, 574-575 (1973). Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no exhaustion rule with indications of congressional intent. Finding nothing on point in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to begin civil rights actions on behalf of institutionalized persons. § 1997a. The Act also placed certain limits on

direct

²⁰ Of the approximately 30,000 civil rights suits filed in fiscal year 1981, 15,639 were filed by state prisoners under § 1983. The remainder involved a variety of civil rights suits. See *Parratt v. Taylor*, 451 U. S. 527, 554 n. 13 (1981) (POWELL, J., concurring).

the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See § 1997c. In addition, in § 1997e, the Act sets forth an exhaustion requirement but only for § 1983 claims brought by prisoners.

On the basis of the exhaustion provision in § 1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a *general* no exhaustion rule. The irony in this reasoning should be obvious. A principal concern that prompted the Department of Justice to support, and the Congress to adopt, § 1997e was the vast increase in § 1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over ~~41~~ 44% of the total federal district court docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal court litigation. It was primarily this problem that prompted enactment of § 1997e.²¹

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorize the At-

²¹ The exhaustion requirement in § 1997e only becomes effective if the Attorney General or a federal district court determines that the available prison grievance procedures comply with standards set forth in subsection (b) of § 1997e. As of this date, the Department of Justice has not certified the inmate grievance procedures of even a single state.

torney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained § 1997e as follows:

"In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures *before the Attorney General can become involved pursuant to [the Act]*." Congressional Record S1713, February 26, 1980.²

Senator Bayh, the author of the Act, decribed the exhaustion provision in similar terms:

"[I]n the event of a prison inmate's rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their adiminstrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act]." Congressional Record S1859, February 27, 1980.

In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in § 1983 actions. Also

² Senator Hatch offered the same explanation on several other occasions in the course of the debate. See Congressional Record S4293, April 29, 1980 ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); Congressional Record S4626, May 6, 1980 ("Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

revealing as to the limited purpose of § 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

"No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S.1983, 96th Congress, 1st Session.

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies—subject to well developed exceptions—is firmly established in virtually every area of the law. This is dictated in § 1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

Changes At
4, 9, 11, 12-16, 18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 17 1982**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER *v.* BOARD OF
REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, dissenting.

The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional. I consider this holding to be a serious departure from established constitutional doctrine.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting *en banc*. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I. The Eleventh Amendment¹

A

¹The 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."

In this “reverse discrimination” action, petitioner, an employee of the Florida International University, brought suit under 42 U. S. C. § 1983 against the Board of Regents of the State of Florida.² She did not name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief. See *ante*, at —, n. 2. The Board filed a motion to dismiss arguing that petitioner’s suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner’s appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that as an

² As the Court notes, see *ante*, at —, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

³ The Court repeatedly has held that the defense of the Eleventh Amendment may be raised for the first time on appeal. See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974) (“Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court”).

The Board’s brief on appeal was divided into three parts. Part III was devoted to the argument that “the Eleventh Amendment precludes subject matter jurisdiction over plaintiff’s complaint.” *Id.*, at 17. A lengthy statutory addendum was attached in support of the arguments advanced in this section of the brief. After the case was scheduled for rehearing en banc, the parties filed short—*e. g.* four and ten page—supplemental briefs to be considered in addition to the main briefs already submitted to the Court of Appeals. The supplemental briefs did not add to the discussion of the Eleventh Amendment issue. But the question was placed before the Court of Appeals en banc, as it had been placed before the panel, through the thorough discussion in the main briefs.

This Court’s explanation for not addressing the Eleventh Amendment issue is that it was not considered below. See n. 19, *ante*. But contrary to the implication in the Court’s explanation, the issue—as shown here—was urged by the Board and argued here.

instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.⁴ And it asserted that there had been no waiver. Although the Board of Regents was created as a body corporate with power "to sue and be sued . . . to plead and be impleaded in all courts of law and equity," Fla. Stat. § 240.042(1), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.⁵ In reply,

⁴The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. § 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor. Fla. Stat. § 240.207. The Board has general supervisory authority over the State University System. Fla. Stat. § 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. § 240.209.

The Board is an agency of the State of Florida. Fla. Stat. § 216.011. See *Relyea v. State*, 385 So. 2d 1378 (Fla. App. 1980). It may claim the defense of sovereign immunity in suits under state law. See *ibid*.

Numerous courts of appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345, 1349 (CA9 1981); *Brennan v. University of Kansas*, 451 F. 2d 1287 (CA10 1971); *Ronwin v. Shapiro*, 657 F. 2d 1071 (CA9 1981).

⁵See *Florida Dept of Health v. Florida Nursing Home*, 450 U. S. 147, 150 (1981); *Petty v. Tennessee-Missouri Bridge Commn*, 359 U. S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred . . . And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); *Kennecott Cooper Corp. v. State Tax Commn*, 327 U. S. 573 (1946) (language in state statute providing for suit in "any court of competent jurisdiction" will not be understood as a waiver of the Eleventh Amendment); *Jagnandan v. Giles*, 538 F. 2d 1166, 1177 (CA5 1976). Cf. *Edelman v. Jordan*, 415 U. S. 651, 673 (1974) ("In deciding whether a state has waived its constitutional protection under the

petitioner argued that whether the statute creating the Board amounted to a waiver—and petitioner believed that it did—the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief at 3-4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in § 1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that § 1983 plaintiffs must exhaust available and reasonable administrative remedies. 634 F. 2d 900 (CA5 1981). Again the court did not consider the Board's Eleventh Amendment defense.

The Eleventh Amendment question was raised before this Court, at the first opportunity after the Court of Appeals' decision, in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was

Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'").

At oral argument here the Assistant Attorney General of Florida stated that the Florida legislature had not waived the Eleventh Amendment and had waived the defense of sovereign immunity "only in selected tort cases." Tr. at 26. See *Bragg v. Board of Public Instruction*, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort"); *Relyea v. State*, *supra* (Board of Regents retains defense of sovereign immunity); Fla. Stat. § 111.071(i)(b)(4) (provision for payment by the state of civil rights judgments against state officers—including judgments under 42 U. S. C. § 1983—does not waive sovereign immunity "or any other defense or immunity" to such lawsuits). Cf. *Long v. Richardson*, 525 F. 2d 74, 79 (CA6 1975) (state university's immunity from suit under state law disposes of Eleventh Amendment question).

an arm of the State and that it had not waived its immunity from suit in federal court.⁶ Again petitioner answered that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"—*e. g.*, from gifts and bequests—rather than from the State Treasury. These arguments were repeated at oral argument.⁷

B

The Court views the jurisdictional question presented by the Eleventh Amendment as if it were of little or no importance. Its entire discussion of the question is relegated to a conclusory note at the end of the opinion. See *ante*, at —, n. 19. The Court concedes that the Amendment and the bar of sovereign immunity are "jurisdictional," but only in the sense that the State may raise the claim at any point in the proceedings. The statement is then made that the Amendment is not jurisdictional "in the sense that it must be raised and decided by this Court on its own motion." *Ante*, at —, n. 19.⁸ The Court cites to no authority in support of this

⁶See Reply Brief at 23 ("Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss [petitioner's] suit for lack of jurisdiction.").

The Court in note 19, *ante*, attaches importance to the Assistant Attorney General's statement at oral argument that the Board wanted the exhaustion issue decided. This must be viewed, however, in light of the Board's unsuccessful attempt to have this Court *first* decide the Eleventh Amendment issue. Moreover, a party's request—short of a binding waiver—cannot relieve this Court of its duty to resolve a jurisdictional question.

⁷Tr. of Oral Argument 25-28, 40-41. At oral argument, the Board stated that the Eleventh Amendment question had not been addressed in its main briefs to this Court "because of the grant of certiorari." *Id.*, at 27.

⁸In view of the Board's repeated efforts to raise the Eleventh Amend-

statement,⁹ and it would be surprising if any existed. The reason that the Eleventh Amendment question may be raised at any point in the proceedings is precisely because it places limits on the basic authority of federal courts to *entertain* suits against a state. The history and text of the Eleventh Amendment, the principle of sovereign immunity exemplified by it, and the well established precedents of this Court make clear that today's decision misconceives our jurisdiction and the purpose of this Amendment.

A basic principle of our constitutional system is that the federal courts are courts of limited jurisdiction. Their authority extends only to those matters within the judicial power of the United States as defined by the Constitution. In language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Article III, suits "commenced or prosecuted against one of the United States." When an Amendment to the Constitution

ment question, and its specific request that this Court vacate the decision of the Court of Appeals for lack of jurisdiction, see note 6 *supra*, it is hardly correct to say that the Court must now raise the question of jurisdiction on its own motion. Cf. *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975). In any event, "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274, 278 (1977).

⁹The Court cites, with a "compare" signal, to *Mt. Healthy City Board of Ed. v. Doyle*, 429 U. S. 274, 279 (1977). The *Mt. Healthy* Court in no way suggested that the Eleventh Amendment and the principle of sovereign immunity embodied in Article III were less than jurisdictional. Indeed, the Court found it necessary to resolve the Eleventh Amendment question in that case prior to reaching the merits.

On the contrary, the Court consistently has viewed the Amendment as jurisdictional. In *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975), the Court raised the question of the Eleventh Amendment even though the State had asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned this defense. Unlike the Board of Regents in this case, the State of Iowa had not advanced the defense in this Court. Even so, the *Sosna* Court raised and addressed the question. These precedents are ignored by the Court today.

states in plain language that "the judicial power of the United States shall not be construed to extend" to suits against a state, from what source does the Court today derive its jurisdiction? The Court's "back-of-the-hand" treatment of this threshold issue offers no answer. Questions of jurisdiction and of the legitimate exercise of power are fundamental in our federal constitutional system.¹⁰

C

The Eleventh Amendment was adopted as a response to this Court's assumption of original jurisdiction in a suit brought against the State of Georgia. *Chisolm v. Georgia*, 2 Dall. 419 (1793). Relying upon express language in Article III extending the judicial power to controversies between a State and Citizens of another State, the Court found that it had jurisdiction. The decision is said to have created a shock throughout the country. See *Hans v. Louisiana*, 134 U. S. 1, 11 (1890). The Amendment was adopted shortly thereafter, and the Court understood that it had been overruled: "the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state." *Id.*, at 11.

In light of the history and wording of the Amendment, the Court has viewed the Amendment as placing explicit limits on the judicial power as defined by Article III. See *Nevada v. Hall*, 440 U. S. 410, 421 (1979). But more than that, and beyond the express provisions of the Amendment, the Court has recognized that the Amendment stands for a principle of

¹⁰ "Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court." Wright and Miller, *Federal Practice and Procedure* § 3522.

sovereign immunity by which the grant of authority in Article III itself must be measured.¹¹ Thus, in *Hans v. Louisiana*, *supra*, the Court held that the federal judicial power did not extend to a suit against a nonconsenting State by one of its own citizens. Although the Eleventh Amendment by its terms does not apply to such suits, the Court found that the language of the Amendment was but an illustration of a larger principle: Federal jurisdiction over suits against a State, absent consent, “was not contemplated by the Constitution when establishing the judicial power of the United States.” *Id.*, at 15.¹² See *Smith v. Reeves*, 178 U. S. 436 (1900).

Similarly, in *Ex Parte State of New York*, 256 U. S. 490 (1921), the Court found that despite the Eleventh Amendment’s specific reference to suits in “law or equity,” the principle of sovereign immunity exemplified by the Amendment would not permit the extension of federal admiralty jurisdiction over a nonconsenting State. The Court applied the same approach in *Monaco v. Mississippi*, 292 U. S. 313 (1934), in which the Court refused to take jurisdiction over a

¹¹ “[T]he Eleventh Amendment was introduced to clarify the intent of the Framers concerning the reach of the federal judicial power. . . . The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally” *Employees v. Missouri Public Health Dept.*, 411 U. S. 279, 292–293 (1973) (MARSHALL, J., concurring).

¹² The *Hans* Court quoted at some length from the constitutional debates concerning the scope of Article III. In the eighty-first number of the *Federalist*, for example, Hamilton sought to dispel the suggestion that Article III extended federal jurisdiction over suits brought against one of the states: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.” 134 U. S., at 13 (emphasis in original).

suit against a State by a foreign state. On its face, Article III provided jurisdiction over suits "between a State . . . and foreign States." Nor did the Eleventh Amendment specifically exempt the states from suit by a foreign state. Nevertheless, the Court concluded that the judicial power of the United States, granted by Article III, did not extend so far: "We think that Madison correctly interpreted Clause one of § 2 of Article III of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State's consent but not otherwise." *Id.*, at 330.

In this case a resident of the State of Florida has sued a Board exercising a major function of the State's sovereign authority. As prior decisions have held, whether this case is viewed only under the Eleventh Amendment—with its explicit limitation on federal jurisdiction—or under Article III, the analysis must be the same. Absent consent, the "judicial power of the United States," as defined by Article III and the Eleventh Amendment, simply does not extend to suits against one of the States by a citizen of that State.¹³

"That a State may not be sued without its consent is a

¹³ Unlike other limitations on federal jurisdiction, the limitation imposed by the Eleventh Amendment and the doctrine of sovereign immunity may be waived by consent unequivocally expressed. This was the understanding of the doctrine at the time the Constitution was adopted, see note 11 *supra*, and the Court has interpreted the "judicial power of the United States" as used in the Eleventh Amendment and Article III accordingly. But the fact that the state or the United States may consent to federal jurisdiction, does not render the Eleventh Amendment or the doctrine of sovereign immunity embodied in Article III "quasi" jurisdictional. Quite simply, where there has not been consent, there is no jurisdiction. See *United States v. Sherwood*, 312 U. S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit"); *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void.").

fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that 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 a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.*" *Ex Parte State of New York*, 256 U. S. 490 (1921) (emphasis added).

The Court does not distinguish these unquestioned precedents. They are wholly and inexplicably ignored. Quite simply the Court today disregards controlling decisions and the explicit limitation on federal court jurisdiction in Article III and the Eleventh Amendment. The Court does recognize that the Eleventh Amendment is jurisdictional "in the sense" that the State may raise the bar of the Amendment for the first time on appeal. Yet the Court misses the point of this statement. The reason that the bar of the Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional:

"The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued . . . in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454, 467 (1945).¹⁴

¹⁴ See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974); *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975); *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274,

— (1982).¹⁶ Finally, the rule in *Ex parte Young*, 209 U. S. 123 (1908), permitting a federal court to order state officials to obey federal law in the future, is simply irrelevant to this case.¹⁷ Petitioner did not sue the members of the Board of

¹⁶ "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity." *Cory v. White*, — U. S. —, — (1982).

¹⁷ Under the theory of *Ex parte Young* the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, . . . he is . . . stripped of his official or representative character." *Id.*, at 159. The rationale of that decision has no application to suits against the State or its agencies. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State—or an agency of the State—cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state's own coffers—whether the damages come directly from the State's general fund or from some other State fund. See *Kennecott Copper Corp. v. Tax Commn.*, 327 U. S. 573 (1946) (segregated funds of the State Tax Commission are State monies subject to the Eleventh Amendment).

Moreover, the fact that the Board is a corporate entity under state law does not permit application of the rule in *Ex parte Young* to the Board itself—as if the Board were an official. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See *Florida Dept of Health v. Florida Nursing Home Assn.*, 450 U. S. 147 (1981); *Great Northern Insurance Co. v. Read*, 322 U. S. 47; *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454 (1945); *Kennecott Copper Corp. v. State Tax Commn.*, 327 U. S. 572 (1946).

Hopkins v. Clemson Agricultural College, 221 U. S. 636 (1911), is not to the contrary. In that case suit was brought against a state college in state court to recover damages caused by the college's construction of a dyke. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case. It was clear before *Hopkins* that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in state court. See *Chandler v. Dix*, 194 U. S. 590, 592 (1904). Cf. *University of California Board of Regents v. Bakke*, 438 U. S. 265

Regents. She sued the Board itself, an arm of the State of Florida.

In my view, the Eleventh Amendment—and the principle of sovereign immunity exemplified by the Amendment and embodied in Article III—clearly bars the suit in this case. The Court's refusal to address the question of its own jurisdiction violates well established precedents of this Court as well as the basic premise that federal courts are courts of limited jurisdiction. Even had the parties neglected to address the Eleventh Amendment question, it would have been our responsibility to consider it on our own motion. In fact, the question has been fully briefed to the Court of Appeals and raised in this Court. See note 8, *supra*. Cf. *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975). I would dismiss this suit and vacate the decision of the Court of Appeals for lack of jurisdiction.

II. Exhaustion of Remedies

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeal's persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in §1983 suits. Other Courts of Appeals have adopted a similar rule. See *e. g.*, *Eisen v. Eastman*, 421 F. 2d 560 (CA2 1969); *Secret v. Brierton*, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to §1983 actions. It found that the prior

(1978). Moreover, the *Hopkins* Court did not consider the college's activities in that case to be governmental. 221 U. S., at 647. In short, no Eleventh Amendment question was presented to the Court. The opinion in *Hopkins* has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state corporate agency in federal court. See *Florida Dept of Health v. Florida Nursing Home Assn*, *supra*; *Alabama v. Pugh*, 438 U. S. 781 (1978); *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964).

decisions of this Court did not clearly decide the question.¹⁸ See *Barry v. Barchi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 575 n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by § 1983.

I agree with the Court of Appeals' opinion. The requirement that a § 1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See *Eisen v. Eastman*, *supra*, at 567. The rule rests on sound considerations. It does not defeat federal court jurisdiction, it merely defers it.¹⁹ It permits the states to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See *Younger v. Harris*, 401 U. S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that *Monroe v. Pape*, 365 U. S. 167 (1961), was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U. S. Courts 238 (1961). In 1981, over 30,000 such suits were commenced.²⁰ Annual Report of the Direc-

¹⁸ "[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1274 (1977).

¹⁹ Cf. *Fair Assessment in Real Estate v. McNary*, — U. S. —, — (1982) (BRENNAN, J., concurring) (exhaustion requirement in § 1983 cases can be justified by "a somewhat lesser showing . . . where . . . we are concerned not with the displacement of the § 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process").

²⁰ Of the approximately 30,000 civil rights suits filed in fiscal year 1981,

tor, 63, 68 (1981). The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal court litigants, including others who assert that their constitutional rights have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion requirement in § 1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See *McNeese v. Board of Education*, 373 U. S. 668 (1963). Other decisions speak to the question in an off-hand and conclusory fashion without full briefing and argument. See *Wilwording v. Swenson*, 404 U. S. 249, 251 (1971) (unargued *per curiam*); *Damico v. California*, 389 U. S. 416 (1967) (unargued *per curiam*). Moreover, a categorical no-exhaustion rule would seem inconsistent with the decision in *Younger v. Harris*, 401 U. S. 37 (1971), prescribing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, *Younger* would seem to suggest the appropriateness of exhaustion. Cf. *Gibson v. Berryhill*, 411 U. S. 564, 574-575 (1973). Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no exhaustion rule with indications of congressional intent. Finding nothing directly on point in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to initiate civil rights actions on behalf

15,639 were filed by state prisoners under § 1983. The remainder involved a variety of civil rights suits. Annual Report of the Director of the Administrative Office of the U. S. Courts 63, 68 (1981). See *Parratt v. Taylor*, 451 U. S. 527, 554 n. 13 (1981) (POWELL, J., concurring).

of institutionalized persons. § 1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See § 1997c. In addition, in § 1997e, the Act sets forth an exhaustion requirement but only for § 1983 claims brought by prisoners.

On the basis of the exhaustion provision in § 1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a *general* no exhaustion rule. The irony in this reasoning should be obvious. A principal concern that prompted the Department of Justice to support, and the Congress to adopt, § 1997e was the vast increase in § 1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 8.6% of the total federal district court docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal court litigation. It was primarily this problem that prompted enactment of § 1997e.²¹

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of ade-

²¹The exhaustion requirement in § 1997e only becomes effective if the Attorney General or a federal district court determines that the available prison grievance procedures comply with standards set forth in subsection (b) of § 1997e. As of this date, the Department of Justice has not certified the inmate grievance procedures of even a single state.

quate state remedies, Congress wished to authorize the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained § 1997e as follows:

“In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures *before the Attorney General can become involved pursuant to [the Act].*” Congressional Record S1713, February 26, 1980.²²

Senator Bayh, the author of the Act, described the exhaustion provision in similar terms:

“[I]n the event of a prison inmate’s rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their administrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act].” Congressional Record S1859, February 27, 1980.

In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, and the particular question of prisoners’ suits, not

²² Senator Hatch offered the same explanation on several other occasions in the course of the debate. See Congressional Record S4293, April 29, 1980 (“Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined”); Congressional Record S4626, May 6, 1980 (“Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf”).

on the general question of exhaustion in § 1983 actions. Also revealing as to the limited purpose of § 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

"No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S.1983, 96th Congress, 1st Session.

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies—subject to well developed exceptions—is firmly established in virtually every area of the law. This is dictated in § 1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

I am authorized to state that CHIEF JUSTICE BURGER joins in Part II of this dissenting opinion.

3, 4

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 18 1982**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1874

GEORGIA PATSY, PETITIONER *v.* BOARD OF
REGENTS OF THE STATE OF FLORIDA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, dissenting.

The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional. I consider this holding to be a serious departure from established constitutional doctrine.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting *en banc*. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I. The Eleventh Amendment¹

A

¹The 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."

In this “reverse discrimination” action, petitioner, an employee of the Florida International University, brought suit under 42 U. S. C. § 1983 against the Board of Regents of the State of Florida.² She did not name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief. See *ante*, at —, n. 2. The Board filed a motion to dismiss arguing that petitioner’s suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner’s appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that as an

² As the Court notes, see *ante*, at —, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

³ The Court repeatedly has held that the defense of the Eleventh Amendment may be raised for the first time on appeal. See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974) (“Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court”).

The Board’s brief on appeal was divided into three parts. Part III was devoted to the argument that “the Eleventh Amendment precludes subject matter jurisdiction over plaintiff’s complaint.” *Id.*, at 17. A lengthy statutory addendum was attached in support of the arguments advanced in this section of the brief. After the case was scheduled for rehearing en banc, the parties filed short—*e. g.* four and ten page—supplemental briefs to be considered in addition to the main briefs already submitted to the Court of Appeals. The supplemental briefs did not add to the discussion of the Eleventh Amendment issue. But the question was placed before the Court of Appeals en banc, as it had been placed before the panel, through the thorough discussion in the main briefs.

This Court’s explanation for not addressing the Eleventh Amendment issue is that it was not considered below. See n. 19, *ante*. But contrary to the implication in the Court’s explanation, the issue—as shown here—was urged by the Board and argued here.

instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.⁴ And it asserted that there had been no waiver. Although the Board of Regents was created as a body corporate with power "to sue and be sued . . . to plead and be impleaded in all courts of law and equity," Fla. Stat. § 240.042(1), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.⁵ In reply,

⁴The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. § 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor. Fla. Stat. § 240.207. The Board has general supervisory authority over the State University System. Fla. Stat. § 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. § 240.209.

The Board is an agency of the State of Florida. Fla. Stat. § 216.011. See *Relyea v. State*, 385 So. 2d 1378 (Fla. App. 1980). It may claim the defense of sovereign immunity in suits under state law. See *ibid*.

Numerous courts of appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345, 1349 (CA9 1981); *Brennan v. University of Kansas*, 451 F. 2d 1287 (CA10 1971); *Ronwin v. Shapiro*, 657 F. 2d 1071 (CA9 1981).

⁵See e. g., *Florida Dept of Health v. Florida Nursing Home*, 450 U. S. 147, 150 (1981); *Petty v. Tennessee-Missouri Bridge Commn*, 359 U. S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred . . . And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); *Kennecott Cooper Corp. v. State Tax Commn*, 327 U. S. 573 (1946) (language in state statute providing for suit in "any court of competent jurisdiction" will not be understood as a waiver of the Eleventh Amendment); *Ford Motor Co., v. Department of Treasury*, 323 U. S. 459 (1945) (same); *Great Northern Life Insurance Co. v. Read*, 322 U. S. 47, 54 (1944) ("a clear declaration of the state's in-

4

petitioner argued that whether the statute creating the Board amounted to a waiver—and petitioner believed that it did—the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief at 3-4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in § 1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that § 1983 plaintiffs must exhaust available and reasonable administrative remedies. 634 F. 2d 900 (CA5 1981). Again the court did not consider the Board's Eleventh Amendment defense.

tention to submit its fiscal problems to other courts than those of its own creation must be found"); *Jagnandan v. Giles*, 538 F. 2d 1166, 1177 (CA5 1976). Cf. *Edelman v. Jordan*, 415 U. S. 651, 673 (1974) ("In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"). It is difficult to reconcile the Court's consistent requirement of an express waiver with the approach advocated by JUSTICE WHITE. See *ante*, at —, n.*.

At oral argument here the Assistant Attorney General of Florida stated that the Florida legislature had not waived the Eleventh Amendment and had waived the defense of sovereign immunity "only in selected tort cases." Tr. at 26. See *Bragg v. Board of Public Instruction*, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort"); *Relyea v. State*, *supra* (Board of Regents retains defense of sovereign immunity); Fla. Stat. § 111.071(i)(b)(4) (provision for payment by the state of civil rights judgments against state officers—including judgments under 42 U. S. C. § 1983—does not waive sovereign immunity "or any other defense or immunity" to such lawsuits). Cf. *Long v. Richardson*, 525 F. 2d 74, 79 (CA6 1975) (state university's immunity from suit under state law disposes of Eleventh Amendment question).

The Eleventh Amendment question was raised before this Court, at the first opportunity after the Court of Appeals' decision, in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court.⁶ Again petitioner answered that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"—*e. g.*, from gifts and bequests—rather than from the State Treasury. These arguments were repeated at oral argument.⁷

B

The Court views the jurisdictional question presented by the Eleventh Amendment as if it were of little or no importance. Its entire discussion of the question is relegated to a conclusory note at the end of the opinion. See *ante*, at —, n. 19. The Court concedes that the Amendment and the bar of sovereign immunity are "jurisdictional," but only in the sense that the State may raise the claim at any point in the proceedings. The statement is then made that the Amend-

⁶See Reply Brief at 23 ("Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss [petitioner's] suit for lack of jurisdiction.").

The Court in note 19, *ante*, attaches importance to the Assistant Attorney General's statement at oral argument that the Board wanted the exhaustion issue decided. This must be viewed, however, in light of the Board's unsuccessful attempt to have this Court *first* decide the Eleventh Amendment issue. Moreover, a party's request—short of a binding waiver—cannot relieve this Court of its duty to resolve a jurisdictional question.

⁷Tr. of Oral Argument 25-28, 40-41. At oral argument, the Board stated that the Eleventh Amendment question had not been addressed in its main briefs to this Court "because of the grant of certiorari." *Id.*, at 27.

ment is not jurisdictional "in the sense that it must be raised and decided by this Court on its own motion." *Ante*, at —, n. 19.⁸ The Court cites to no authority in support of this statement,⁹ and it would be surprising if any existed. The reason that the Eleventh Amendment question may be raised at any point in the proceedings is precisely because it places limits on the basic authority of federal courts to *entertain* suits against a state. The history and text of the Eleventh Amendment, the principle of sovereign immunity exemplified by it, and the well established precedents of this Court make clear that today's decision misconceives our jurisdiction and the purpose of this Amendment.

A basic principle of our constitutional system is that the federal courts are courts of limited jurisdiction. Their authority extends only to those matters within the judicial power of the United States as defined by the Constitution. In language that could not be clearer, the Eleventh Amend-

⁸ In view of the Board's repeated efforts to raise the Eleventh Amendment question, and its specific request that this Court vacate the decision of the Court of Appeals for lack of jurisdiction, see note 6 *supra*, it is hardly correct to say that the Court must now raise the question of jurisdiction on its own motion. Cf. *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975). In any event, "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274, 278 (1977).

⁹ The Court cites, with a "compare" signal, to *Mt. Healthy City Board of Ed. v. Doyle*, 429 U. S. 274, 279 (1977). The *Mt. Healthy* Court in no way suggested that the Eleventh Amendment and the principle of sovereign immunity embodied in Article III were less than jurisdictional. Indeed, the Court found it necessary to resolve the Eleventh Amendment question in that case prior to reaching the merits.

On the contrary, the Court consistently has viewed the Amendment as jurisdictional. In *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975), the Court raised the question of the Eleventh Amendment even though the State had asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned this defense. Unlike the Board of Regents in this case, the State of Iowa had not advanced the defense in this Court. Even so, the *Sosna* Court raised and addressed the question. These precedents are ignored by the Court today.

ment removes from the judicial power, as set forth in Article III, suits "commenced or prosecuted against one of the United States." When an Amendment to the Constitution states in plain language that "the judicial power of the United States shall not be construed to extend" to suits against a state, from what source does the Court today derive its jurisdiction? The Court's "back-of-the-hand" treatment of this threshold issue offers no answer. Questions of jurisdiction and of the legitimate exercise of power are fundamental in our federal constitutional system.¹⁰

C

The Eleventh Amendment was adopted as a response to this Court's assumption of original jurisdiction in a suit brought against the State of Georgia. *Chisolm v. Georgia*, 2 Dall. 419 (1793). Relying upon express language in Article III extending the judicial power to controversies between a State and Citizens of another State, the Court found that it had jurisdiction. The decision is said to have created a shock throughout the country. See *Hans v. Louisiana*, 134 U. S. 1, 11 (1890). The Amendment was adopted shortly thereafter, and the Court understood that it had been overruled: "the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state." *Id.*, at 11.

In light of the history and wording of the Amendment, the Court has viewed the Amendment as placing explicit limits on the judicial power as defined by Article III. See *Nevada*

¹⁰ "Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court." Wright and Miller, *Federal Practice and Procedure* § 3522.

v. *Hall*, 440 U. S. 410, 421 (1979). But more than that, and beyond the express provisions of the Amendment, the Court has recognized that the Amendment stands for a principle of sovereign immunity by which the grant of authority in Article III itself must be measured.¹¹ Thus, in *Hans v. Louisiana*, *supra*, the Court held that the federal judicial power did not extend to a suit against a nonconsenting State by one of its own citizens. Although the Eleventh Amendment by its terms does not apply to such suits, the Court found that the language of the Amendment was but an illustration of a larger principle: Federal jurisdiction over suits against a State, absent consent, “was not contemplated by the Constitution when establishing the judicial power of the United States.” *Id.*, at 15.¹² See *Smith v. Reeves*, 178 U. S. 436 (1900).

Similarly, in *Ex Parte State of New York*, 256 U. S. 490 (1921), the Court found that despite the Eleventh Amendment’s specific reference to suits in “law or equity,” the principle of sovereign immunity exemplified by the Amendment would not permit the extension of federal admiralty jurisdic-

¹¹ “[T]he Eleventh Amendment was introduced to clarify the intent of the Framers concerning the reach of the federal judicial power. . . . The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally” *Employees v. Missouri Public Health Dept.*, 411 U. S. 279, 292-293 (1973) (MARSHALL, J., concurring).

¹² The *Hans* Court quoted at some length from the constitutional debates concerning the scope of Article III. In the eighty-first number of the *Federalist*, for example, Hamilton sought to dispel the suggestion that Article III extended federal jurisdiction over suits brought against one of the states: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.” 134 U. S., at 13 (emphasis in original).

tion over a nonconsenting State. The Court applied the same approach in *Monaco v. Mississippi*, 292 U. S. 313 (1934), in which the Court refused to take jurisdiction over a suit against a State by a foreign state. On its face, Article III provided jurisdiction over suits “between a State . . . and foreign States.” Nor did the Eleventh Amendment specifically exempt the states from suit by a foreign state. Nevertheless, the Court concluded that the judicial power of the United States, granted by Article III, did not extend so far: “We think that Madison correctly interpreted Clause one of § 2 of Article III of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State’s consent but not otherwise.” *Id.*, at 330.

In this case a resident of the State of Florida has sued a Board exercising a major function of the State’s sovereign authority. As prior decisions have held, whether this case is viewed only under the Eleventh Amendment—with its explicit limitation on federal jurisdiction—or under Article III, the analysis must be the same. Absent consent, the “judicial power of the United States,” as defined by Article III and the Eleventh Amendment, simply does not extend to suits against one of the States by a citizen of that State.¹³

¹³ Unlike other limitations on federal jurisdiction, the limitation imposed by the Eleventh Amendment and the doctrine of sovereign immunity may be waived by consent unequivocally expressed. This was the understanding of the doctrine at the time the Constitution was adopted, see note 11 *supra*, and the Court has interpreted the “judicial power of the United States” as used in the Eleventh Amendment and Article III accordingly. But the fact that the state or the United States may consent to federal jurisdiction, does not render the Eleventh Amendment or the doctrine of sovereign immunity embodied in Article III “quasi” jurisdictional. Quite simply, where there has not been consent, there is no jurisdiction. See *United States v. Sherwood*, 312 U. S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit”); *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940) (“Consent alone gives jurisdiction to adjudge

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that 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 a suit brought by private parties against a State without consent given*: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ex Parte State of New York*, 256 U. S. 490 (1921) (emphasis added).

The Court does not distinguish these unquestioned precedents. They are wholly and inexplicably ignored. Quite simply the Court today disregards controlling decisions and the explicit limitation on federal court jurisdiction in Article III and the Eleventh Amendment. The Court does recognize that the Eleventh Amendment is jurisdictional "in the sense" that the State may raise the bar of the Amendment for the first time on appeal. Yet the Court misses the point of this statement. The reason that the bar of the Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional:

"The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued . . . in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first

against a sovereign. Absent that consent, the attempted exercise of judicial power is void.").

time in this Court.” *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454, 467 (1945).¹⁴

Despite these precedents, and apparently because of an unexplained anxiety to reach the exhaustion issue decided by the Court of Appeals, this Court remands the issue of *its own* jurisdiction to the courts below.

D

I believe that the Eleventh Amendment question must be addressed and that the answer could hardly be clearer. This is an action under § 1983.¹⁵ Petitioner seeks relief from the Board of Regents of the State of Florida, a major instrumentality or agency of the State. Petitioner’s argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court and is unsupported by State law. See, e. g., *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981); note 5, *supra*. Similarly, petitioner’s suggestion that the Eleventh Amendment does not

¹⁴ See *Edelman v. Jordan*, 415 U. S. 651, 678 (1974); *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975); *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U. S. 274, 278 (1977). The Court has consistently viewed the Eleventh Amendment question as jurisdictional. See *Great Northern Insurance Co. v. Read*, 322 U. S. 47, 51 (1944) (“A state’s freedom from litigation was established as a constitutional right through the Eleventh Amendment”) (emphasis added); *Monaco v. Mississippi*, *supra*, at 320 (Question is “whether this Court has jurisdiction to entertain a suit brought by a foreign State against a State without her consent”).

¹⁵ The states consented to a diminution of their sovereignty by ratifying the Fourteenth Amendment. In its exercise of the powers granted to it by § 5 of the Fourteenth Amendment, Congress may lift the bar of sovereign immunity. See *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Thus, if petitioner had brought this suit under Title VII of the Civil Rights Act of 1964, there would have been no jurisdictional problem. But petitioner did not do so, and the Court has held that Congress has not removed the bar of sovereign immunity in § 1983 actions. See *Quern v. Jordan*, 440 U. S. 332 (1979).

bar her equitable claims against the Board must be rejected. The Amendment applies to suits “in law or equity.” All suits against an unconsenting State—whether for damages or injunctive relief—are barred. See *Cory v. White*, — U. S. — (1982).¹⁶ Finally, the rule in *Ex parte Young*, 209 U. S. 123 (1908), permitting a federal court to order state officials to obey federal law in the future, is simply irrelevant to this case.¹⁷ Petitioner did not sue the members of the Board of

¹⁶ “It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity.” *Cory v. White*, — U. S. —, — (1982).

¹⁷ Under the theory of *Ex parte Young* the Eleventh Amendment does not bar suits against state officers because when a state officer “comes into conflict with the superior authority of [the] Constitution, . . . he is . . . stripped of his official or representative character.” *Id.*, at 159. The rationale of that decision has no application to suits against the State or its agencies. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State—or an agency of the State—cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state’s own coffers—whether the damages come directly from the State’s general fund or from some other State fund. See *Kennecott Copper Corp. v. Tax Commn*, 327 U. S. 573 (1946) (segregated funds of the State Tax Commission are State monies subject to the Eleventh Amendment).

Moreover, the fact that the Board is a corporate entity under state law does not permit application of the rule in *Ex parte Young* to the Board itself—as if the Board were an official. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See *Florida Dept of Health v. Florida Nursing Home Assn*, 450 U. S. 147 (1981); *Great Northern Insurance Co. v. Read*, 322 U. S. 47; *Ford Motor Co. v. Department of Treasury*, 323 U. S. 454 (1945); *Kennecott Copper Corp. v. State Tax Commn*, 327 U. S. 572 (1946).

Hopkins v. Clemson Agricultural College, 221 U. S. 636 (1911), is not to the contrary. In that case suit was brought against a state college in state court to recover damages caused by the college’s construction of a dyke. Although the Court discussed the Eleventh Amendment in some

Regents. She sued the Board itself, an arm of the State of Florida.

In my view, the Eleventh Amendment—and the principle of sovereign immunity exemplified by the Amendment and embodied in Article III—clearly bars the suit in this case. The Court's refusal to address the question of its own jurisdiction violates well established precedents of this Court as well as the basic premise that federal courts are courts of limited jurisdiction. Even had the parties neglected to address the Eleventh Amendment question, it would have been our responsibility to consider it on our own motion. In fact, the question has been fully briefed to the Court of Appeals and raised in this Court. See note 8, *supra*. Cf. *Sosna v. Iowa*, 419 U. S. 393, 396 n. 2 (1975). I would dismiss this suit and vacate the decision of the Court of Appeals for lack of jurisdiction.

II. Exhaustion of Remedies

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeal's persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in § 1983 suits. Other Courts of Appeals have adopted a similar rule. See *e. g.*,

detail, there was simply no Eleventh Amendment question in that case. It was clear before *Hopkins* that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in state court. See *Chandler v. Dix*, 194 U. S. 590, 592 (1904). Cf. *University of California Board of Regents v. Bakke*, 438 U. S. 265 (1978). Moreover, the *Hopkins* Court did not consider the college's activities in that case to be governmental. 221 U. S., at 647. In short, no Eleventh Amendment question was presented to the Court. The opinion in *Hopkins* has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state corporate agency in federal court. See *Florida Dept of Health v. Florida Nursing Home Assn*, *supra*; *Alabama v. Pugh*, 438 U. S. 781 (1978); *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964).

Eisen v. Eastman, 421 F. 2d 560 (CA2 1969); *Secret v. Brierton*, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to § 1983 actions. It found that the prior decisions of this Court did not clearly decide the question.¹⁸ See *Barry v. Barchi*, 443 U. S. 55, 63 n. 10 (1979); *Gibson v. Berryhill*, 411 U. S. 564, 575 n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by § 1983.

I agree with the Court of Appeals' opinion. The requirement that a § 1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See *Eisen v. Eastman*, *supra*, at 567. The rule rests on sound considerations. It does not defeat federal court jurisdiction, it merely defers it.¹⁹ It permits the states to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See *Younger v. Harris*, 401 U. S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that *Monroe v. Pape*, 365 U. S. 167 (1961), was decided, only

¹⁸ "[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1274 (1977).

¹⁹ Cf. *Fair Assessment in Real Estate v. McNary*, — U. S. —, — (1982) (BRENNAN, J., concurring) (exhaustion requirement in § 1983 cases can be justified by "a somewhat lesser showing . . . where . . . we are concerned not with the displacement of the § 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process").

270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U. S. Courts 238 (1961). In 1981, over 30,000 such suits were commenced.²⁰ Annual Report of the Director, 63, 68 (1981). The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal court litigants, including others who assert that their constitutional rights have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion requirement in § 1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See *McNeese v. Board of Education*, 373 U. S. 668 (1963). Other decisions speak to the question in an off-hand and conclusory fashion without full briefing and argument. See *Wilwording v. Swenson*, 404 U. S. 249, 251 (1971) (unargued *per curiam*); *Damico v. California*, 389 U. S. 416 (1967) (unargued *per curiam*). Moreover, a categorical no-exhaustion rule would seem inconsistent with the decision in *Younger v. Harris*, 401 U. S. 37 (1971), prescribing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, *Younger* would seem to suggest the appropriateness of exhaustion. Cf. *Gibson v. Berryhill*, 411 U. S. 564, 574-575 (1973). Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no exhaustion rule with indications of congressional intent. Finding nothing directly

²⁰ Of the approximately 30,000 civil rights suits filed in fiscal year 1981, 15,639 were filed by state prisoners under § 1983. The remainder involved a variety of civil rights suits. Annual Report of the Director of the Administrative Office of the U. S. Courts 63, 68 (1981). See *Parratt v. Taylor*, 451 U. S. 527, 554 n. 13 (1981) (POWELL, J., concurring).

on point in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to initiate civil rights actions on behalf of institutionalized persons. § 1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See § 1997c. In addition, in § 1997e, the Act sets forth an exhaustion requirement but only for § 1983 claims brought by prisoners.

On the basis of the exhaustion provision in § 1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a *general* no exhaustion rule. The irony in this reasoning should be obvious. A principal concern that prompted the Department of Justice to support, and the Congress to adopt, § 1997e was the vast increase in § 1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 8.6% of the total federal district court docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal court litigation. It was primarily this problem that prompted enactment of § 1997e.²¹

²¹ The exhaustion requirement in § 1997e only becomes effective if the Attorney General or a federal district court determines that the available prison grievance procedures comply with standards set forth in subsection (b) of § 1997e. As of this date, the Department of Justice has not certified

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorize the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained § 1997e as follows:

"In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures *before the Attorney General can become involved pursuant to [the Act]*." Congressional Record S1713, February 26, 1980.²²

Senator Bayh, the author of the Act, described the exhaustion provision in similar terms:

"[I]n the event of a prison inmate's rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their administrative remedies within the State law before the

the inmate grievance procedures of even a single state.

²² Senator Hatch offered the same explanation on several other occasions in the course of the debate. See Congressional Record S4293, April 29, 1980 ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); Congressional Record S4626, May 6, 1980 ("Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

Justice Department could intervene under the provisions of [the Act]." Congressional Record S1859, February 27, 1980.

In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in § 1983 actions. Also revealing as to the limited purpose of § 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

"No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S.1983, 96th Congress, 1st Session.

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies—subject to well developed exceptions—is firmly established in virtually every area of the law. This is dictated in § 1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

I am authorized to state that CHIEF JUSTICE BURGER joins in Part II of this dissenting opinion.

Powerful stuff!

*L.F.P.
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Draft: Patsy v. Board of Regents, No. 80-1874

Justice Powell, dissenting.

The Court holds that the Board of Regents of the State of Florida, a state instrumentality, is subject to suit in federal court notwithstanding the bar of the Eleventh Amendment. The Court reaches this conclusion

through a novel--and, to me, illogical--expansion of the holding in Ex Parte Young, 209 U.S. 123 (1908). The Court then rejects the rule of "flexible" exhaustion of state administrative remedies stated by the Court of Appeals for the Fifth Circuit, sitting en banc. Relying principally on the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997e (1976 ed., Supp. IV), the Court holds that any exhaustion requirement in §1983 suits would violate the intent of Congress. I disagree with both portions of the Court's holding and therefore dissent.

I. The Eleventh Amendment (David - select a proper type for this heading)
A

In interpreting the Eleventh Amendment, the Court has sought to accommodate both the principle of sovereign immunity embodied in the Amendment and the states' duty to obey--and the federal courts to enforce--federal law.¹ Thus, it is well established that the State

¹The 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."

The Amendment was adopted in response to the Court's decision in Chisholm v. Georgia, 2 Dall. 419 (1793). The
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is not "divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" Parden v. Terminal R. Co., 377 U.S. 184, 186 (1964), quoting, Hans v. Louisiana, 134 U.S. 1, 10 (1890).² And the Court has held that even when a State^{itself} is not named as a party to the suit, the Amendment nevertheless applies if the State is the real party in interest. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).³

This is common knowledge & we are "loaded" with F.R.'s

Court in Chisolm took original jurisdiction over an action to collect a debt brought by two citizens of South Carolina against the State of Georgia. The Court's decision "that a State was liable to suit by a citizen of another State or of a foreign country, literally shocked the Nation." Edelman v. Jordan, 415 U.S. 651, 662 (1974). The Eleventh Amendment was adopted five years later.

²In Hans the Court also held that the Amendment bars suits brought against an unconsenting State by its own citizens, although by its terms the Amendment does not apply to this situation. Cf. Monaco v. Mississippi, 292 U.S. 313 (1934) (Eleventh Amendment applies to federal suits against an unconsenting state by a foreign nation). By contrast, the Amendment has not been applied to suits against a State brought by another State or by the United States. North Dakota v. Minnesota, 263 U.S. 365 (1923); United States v. Mississippi, 380 U.S. 128 (1965).

³In Ford Motor the plaintiff sued the department of treasury of the State of Indiana, and the three officials--the Governor, Treasurer, and Auditor--who constituted the board of the department of treasury. The plaintiff sought a refund of gross income taxes paid to the department. Suit was brought in federal District Court. The Court held that the suit was barred by the Eleventh Amendment. The plaintiff was seeking a refund from the state not a personal judgment against the individual officials: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real party in interest and is entitled to invoke its sovereign immunity from suit even though individual

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On the other hand, the Court has not interpreted the Amendment to bar federal court jurisdiction when the State has consented to suit,⁴ or to bar review by this Court of an action brought against the State in state court.⁵ Counties and municipalities may not claim immunity

officials are nominal defendants." 323 U.S., at 464. See Edelman v. Jordan, supra, at 663 ("It is ... well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment ... The rule has evolved that suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944).

⁴See Clark v. Barnard, 108 U.S. 436, 447 (1883); Parden v. Terminal R. Co., 377 U.S. 184 (1964). See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation, 89 Harv. L. Rev. 682, 685 (1976) ("[U]nlike the identical reference to 'the judicial Power of the United States' in Article III--a power which cannot be expanded by legislation or by consent of the parties to a lawsuit--the language of the eleventh amendment has not been interpreted to prohibit a suit once a state has given its consent"). In addition, by ratifying the Fourteenth Amendment, the states consented to a diminution of their sovereignty. Thus, Congress may provide for suits against the States when exercising the powers granted to it by §5 of the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Quern v. Jordan, 440 U.S. 332 (1979).

⁵In Smith v. Reeves, 178 U.S. 436, 445 (1900), the Court noted that even if California had consented to suit only in its own courts, review would be available in this Court of any federal question:

"If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the State."

Accord Chandler v. Dix, 194 U.S. 590, 592 (1904); Great
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I think we can omit this, & merely cite case. We have more notes than a H.L.R. note!

under the Amendment. Lincoln County v. Luning, 133 U.S. 529 (1890). And under ~~the important decision in~~ Ex parte Young, 209 U.S. 123 (1908), a federal court may order state officials to obey federal law in the future.⁶

B

In this "reverse discrimination" action, petitioner brought suit under 42 U.S.C. §1983 against the Board of Regents of the State of Florida.⁷ She did not

Northern Life Ins. Co. v. Read, 322 U.S. 47, 57 (1944). The Court's assumption of jurisdiction in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), a case originating in state court, thus provides no support for today's decision. For the same reason, the Court's reliance upon Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), is misplaced. See infra.

⁶Under the theory, some would say fiction, of Ex parte Young, the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, ... he is ... stripped of his official or representative character." Id., at 159. On this analysis, a prospective injunction requiring the official to conform his future behavior to federal law, does not require anything of the State and therefore does not run afoul of the Eleventh Amendment. The granting of retroactive relief, on the other hand, would require the official to take action in his official capacity. Thus, if the official is required to pay damages from state funds, the State is directly affected. See Edelman v. Jordan, supra. Similarly, retroactive injunctive relief may require the official to take action in his official capacity and also would be barred by the Eleventh Amendment. Cf. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). Of course, in addition to prospective injunctive relief, a plaintiff may seek damages from the individual officer in his personal capacity. See Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974).

⁷As the Court notes, see ante, at ___, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her

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name the individual regents as defendants. She sued for \$500,000 in damages, and requested a declaratory judgment and injunctive relief.⁸ Under prior decisions of this Court, the appropriate Eleventh Amendment analysis of this case ~~would seem~~^{is} straightforward. This is an action under §1983, and ~~we have held that~~ Congress has not removed the bar of the Eleventh Amendment, ~~in such actions~~. See Quern v. Jordan, 440 U.S. 332 (1979). Petitioner seeks relief

from the Board of Regents of the State of Florida, an instrumentality or agency of the State.⁹ It does not

complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

⁸Petitioner sought a declaratory judgment "declaring that the Plaintiff has suffered from acts of discrimination." In addition, she asked the court to "[r]equire Defendant to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendant to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." She requested any further equitable and injunctive relief that the court deemed appropriate.

⁹The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor, approved by three members of the Cabinet, and confirmed by the Senate. Fla. Stat. 240.207. The chief administrative officer of the Board is the Chancellor, who serves by appointment of the Board.

The Board has general supervisory authority over the
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State University System. Fla. Stat. 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. §240.209.

The Board is an agency of the State of Florida. Fla. Stat. §216.011. See Relyea v. State, 385 So.2d 1378 (Fla. App. 1980) ("Florida Atlantic University, the Board of Regents and the Chancellor of the State University System are agencies and instrumentalities of the State of Florida."). Accord Greer v. Mathews, 409 So.2d 1105 (Fla. App. 1982). Cf. Byron v. University of Florida, 403 F. Supp. 49, 51 (N.D. Fla. 1975) ("It must be conceded that the University is a political instrumentality of the State of Florida."); Dacey v. Florida Bar, Inc., 414 F. 2d 195, 198 (CA5 1969) (state bar a state agency); Spangler v. Florida State Turnpike Authority, 106 So. 2d 421, 422 (1958) (Turnpike Authority a state agency even though its revenues derive primarily from tolls). The Board may claim the defense of sovereign immunity in suits at state law. See Relyea v. State, *supra*; State Bd. of Regents v. Yant, 360 So. 2d 99 (Fla. App. 1978).

Numerous Courts of Appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1349 (CA9 1981); Brennan v. University of Kansas, 451 F. 2d 1287 (CA10 1971); Ronwin v. Shapiro, 657 F. 2d 1071 (CA9 1981); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F. 2d 599 (CA10 1966); Jefferson County Pharmacy v. Abbott Laboratories, 656 F. 2d 92, 99 (CA5 1981), *cert granted on a different question*, U.S. (1982); Jagnandan v. Giles, 538 F. 2d 1166 (CA5 1976) (Board of Trustees of Mississippi State University); Skehan v. Board of Trustees of Bloomsburg State College, 590 F. 2d 470 (CA3 1978); Prebble v. Brodrick, 535 F. 2d 605 (CA10 1976) (University of Wyoming); Long v. Richardson, 525 F. 2d 74 (CA6 1974) (Memphis State University).

The majority argues that the Courts of Appeals are split on the question of whether damages can be awarded against state universities. Yet the two cases cited by the Court to demonstrate a split on this question do not support the Court's assertion. In SONI v. Board of Trustees, 513 F. 2d 347 (CA6 1975) the court found that the Board of Trustees had waived its immunity to suit, while in Goss v. Jacinto Junior College, 588 F. 2d 96, 98-99 (CA5 1979) the court reasoned that the particular junior college was similar to a county or municipality, an "independent 'political subdivision' as a matter of Texas statutory and common law." The Court suggests as well that the Courts of Appeals are agreed that injunctive relief may be awarded against state universities and state boards of regents. Yet again the cases cited provide

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Amendment by consenting to suit in federal court.¹⁰ Nor can it be argued persuasively that the Board of Regents is similar to those local governmental bodies as to which the Amendment does not extend. See Mt. Healthy Bd. of Ed. v.

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little support for the Court's assertion. In New England Patriots Football Club, Inc. v. University of Colorado, 592 F. 2d 1196, 1201 (CA1 1979), the court held that individual members of the Board of Regents might be sued for prospective injunctive relief. It did not hold, however, as the Court implies, that the University itself might be sued. Rather, it accepted "the University's identification with the state." And in Gay Student Services v. Texas A & M University, 612 F. 2d 160, 165 (CA5 1980), it is unclear that the court held more than that officials of the University could be sued for injunctive relief. Unlike the situation in those two cases, petitioner sued only the Board of Regents.

¹⁰The Board of Regents is incorporated and has the power "to contract and be contracted with, to sue and be sued, and to plead and be impleaded in all courts of law and equity." Section 240.205, Fla. Stat. In past cases the Court has cautioned against inferring a waiver of immunity on the basis of similar such provisions. "The conclusion that there has been a waiver of immunity will not be lightly inferred ... And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts." Petty v. Tennessee-Missouri Bridge Commn., 359 U.S. 275, 276-277 (1959). See Great Northern Insurance Co. v. Read, 322 U.S. 47, 54 ("When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts"). In the absence of "any clear indication that the state intended to consent to suit in federal courts," Ford Motor Co. v. Department of Treasury, 323 U.S. 454, 465 (1945), there is no basis for inferring a waiver of the Eleventh Immunity in this case. See Bragg v. Board of Public Instruction, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort"); Martin v. University of Louisville, 541 F. 2d 1171, 1175 n. 4 (CA6 1976) ("Other courts have construed similar 'sue and be sued' language in the grant of a corporate charter to a university not to create a waiver of sovereign immunity").

Doyle, 429 U.S. 274, 279-281 (1977); Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391, 401 (1979). The Board of Regents is not a local body but rather bears responsibility for the State university system as a whole. Cf. Goss v. Jacinto Junior College, 588 F. 2d 96d (CA5 1979).

In ~~short~~, ^Unless the rule in Ex parte Young, supra, is applicable, the Eleventh Amendment clearly bars suit. But the theory in Ex parte Young, supra, ~~would seem to have~~ ^{has} no application to the State itself or to an instrumentality of the State. ~~Of course, had petitioner sued the individual members of the Board, the theory in Ex parte Young, supra, would have applied, and petitioner's~~ ^{and individually,} ~~claim, at least as to declaratory relief, would not have been barred~~ ^{by Ex parte Young, as its rationale would not then have been applied.} ¹¹ In addition, petitioner could have sought damages from the individual members of the Board of Regents in their personal capacities.

But petitioner did not sue the members of the

¹¹Petitioner's injunctive relief may be retroactive to the extent that she asks the Board of Regents to appoint her to the next available position. Presumably, such an appointment would require an exercise of the state's authority. See note 3, supra.

Board, she sued the Board itself, an arm of the State of Florida. One would have thought that Ex parte Young was simply irrelevant in these circumstances. Although an individual official may be ~~thought to act~~ ^{viewed as acting} on his own and without State authority when acting against federal law,

the State--or, ^{an agency or} a department of the State--cannot act ~~as~~ ^{other than in its official State capacity.} anything other than the State. Similarly, ~~it is difficult~~

[^] ~~to consider~~ an action for damages against the state, or an ~~arm of the state,~~ ^{as} seeking damages ^{that must be paid} ~~which will not derive~~

from the state's own coffers. Whether the damages come directly from the State's general fund or from some other State fund, the money is no less the State's. Indeed, direct application of Ex parte Young to the State and its instrumentalities would read the Eleventh Amendment out of the Constitution. If the bar of the Amendment is lifted merely upon the naming of a State board, commission, agency or corporation--opening the way to damages as well as to injunctive relief--then the Amendment ^{no longer would} ~~affords~~ ^{the Constitutionally prescribed} ~~virtually no~~ protection to the states.

^C Despite the weight of these considerations, the

Court undertakes to apply Ex parte Young to the Board of

Regents itself. Relying upon the decision in Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), the Court reasons that the Board of Regents, as a body corporate, is no different from a state official. The Court attempts to bolster this ^{novel} conclusion by ^{observing} noting that under Florida law the Board of Regents is termed the "director" of the Division of Universities. The Court concludes that, just as in Ex parte Young, the Board of Regents "may be sued for unconstitutional or unauthorized actions, as long as the plaintiff is not seeking monetary relief that must be paid out of the state treasury."

What is this reference? → Ante, at 8.

The Court's conclusion ^{is supported neither by} ~~makes little sense and~~ ^{reason or not} finds ~~no support in~~ the precedents of this Court. As indicated above, the ^{rationale of} ~~theory in~~ Ex parte Young simply ^{does} ~~will~~ not ~~logically~~ apply to a State or State instrumentality. The State cannot be "stripped" of its own authority. Moreover, if the Board of Regents is a State agency--and it clearly is--then its assets are also those of the State's. Yet the Court's decision exposes the Board's assets to a damage award on the double fiction that the

Board is really an "official" and that its separate assets

somehow belong to this ^{fictitious} fictive being rather than to the

State. On such a theory, a state ^{board of education,} ~~toll commission or~~

~~highway department, state welfare~~ ^{any} ~~indeed any state body with separate sources of income, may~~ ^{could}

be sued for damages. In addition, such a conclusion is

at odds with the Court's holding in Kennecott Copper Corp.

v. Tax Commn, 327 U.S. 573 (1946), that the segregated

funds of the State Tax Commission were State monies

subject to the Eleventh Amendment.

Nor does the Board of Regents' corporate status

under state law support the Court's holding. State

governments ^{consist, in major part,} ~~are constituted~~ of a variety of boards,

commissions, agencies, and corporations. ^{These state entities} ~~The Board of~~

^{are} ~~Regents is~~ no less an instrument of the State because ^{they} ~~it~~

^{may be vested under state law} ~~is a legal entity~~ with the power to contract, to sue and

be sued. ⁵ ~~Indeed,~~ This Court repeatedly has held that a

provision in state law giving a state body the power "to

sue and be sued" does not support the inference that the

State thereby waives the Eleventh Amendment. See Great

Northern Insurance Co. v. Read, 322 U.S. 47; Ford Motor

Co. v. Department of Treasury, 323 U.S. 454 (1945);

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Kennecott Copper Corp. v. State Tax Commn, 327 U.S. 572

(1946). The ^{Court's} ~~majority's~~ conclusion that corporate status converts a State body into a State official, subject to suit, ~~would seem to contradict~~ ^{cannot be reconciled} these well established precedents.

Indeed, I am unaware of any prior decision of this Court ^{that} ~~which~~ supports the ^{Court's} ~~majority's~~ application of Ex parte Young to State instrumentalities. Hopkins v. Clemson College, supra, relied upon so heavily by the Court is simply irrelevant. In that case suit was brought against a state college in state court to recover damages caused by the college's construction of a dyke. The state courts held that the college was protected from suit by the state law of sovereign immunity. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case.¹² It

¹²The state college recognized that there was no Eleventh Amendment question. In its brief it noted: "It is difficult to see how either Section 2 of Article III, of the Constitution of the United States or the Eleventh amendment has any application to the inquiry whether a suit by a citizen of a State in its own Courts is a suit against that State. That seems to be purely a question of local law to be determined by the State Court." Brief at 20.

*David - these
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was clear before Hopkins that the Eleventh Amendment does not apply to bar review in this Court of any federal question presented in a suit against a State in state court. See note 5, supra. Indeed, were the question in Hopkins presented today, the Court undoubtedly would decline to review it: The state courts' holding that an action against the college could not be maintained because of sovereign immunity would be seen as an independent and adequate state law ground. See Georgia R. R. & Banking Co. v. Redwine, 335 U.S. 900 (1949). The fact remains that however the holding in Hopkins is stated, no Eleventh Amendment question was presented to the Court.¹³ It therefore is no surprise that the opinion has rarely been cited in the subsequent decisions of this Court.¹⁴ The

¹³It is no easy matter to state the holding in Hopkins. The decision antedated Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). It is likely that the Hopkins Court simply did not differentiate between the state law of sovereign immunity and the federal law of sovereign immunity embodied in the Eleventh Amendment. In Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F. 2d 599, 601 n. 1 (CA10 1966), the court viewed Hopkins as standing for a principle of agency law: "[N]either a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application,--the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction ..." Id., quoting 221 U.S., at 643.

Footnote(s) 14 will appear on following pages.

case does not deserve the pride of place given to it by the majority.¹⁵ *It is a non-precedent.*

Moreover, two recent decisions of this Court

count
¹⁴The decision in Hopkins was most recently cited in Larson v. Domestic & Foreign Corp., 337, U.S. 682 (1949). The majority in Larson relied upon Hopkins for the proposition that an "agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal." 337 U.S., at 694. Justice Frankfurter in his dissenting opinion included Hopkins with cases standing for the proposition that jurisdiction is barred when the plaintiff seeks an "interest in property which concededly belonged to the Government, or demanded relief calling for an assertion of what was unquestionably official authority." Id., at 710 & 729. The majority does not cite to any decision of this Court that relies upon Hopkins for the principle that a state instrumentality may be sued in federal court.

¹⁵Any reliance on Hopkins further must be tempered by the Court's view in Hopkins that it was not reviewing official action. Rather, it viewed the College's activity as proprietary in nature:

"[T]his is not an action against the College for a tort committed in the prosecution of any governmental function. The fee was in the State, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the College, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. 221 U.S., at 647.

In Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973), the Court distinguished the earlier Eleventh Amendment decision in Parden v. Terminal R. Co., 377 U.S. 184 (1964), on the basis that Parden concerned State proprietary activity: "Parden involved the railroad business which Alabama operated 'for profit.' ... Parden was in the area where private persons and corporations normally ran the enterprise." By contrast, the Employees Court found that the employment practices of state hospitals did not concern state proprietary activity. A similar distinction can be drawn between Hopkins and the present case involving the employment practices of a state educational institution.

The Court today

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cast ~~considerable~~ doubt on the majority's holding that state instrumentalities and corporate bodies may be treated as state "officials," subject to Ex parte Young.

In Alabama v. Pugh, 438 U.S. 781 (1978), the Court held that suit for injunctive relief against the State of Alabama and the Alabama Board of Corrections was barred by the Eleventh Amendment. The Court found that "[t]here can be no doubt ... that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit." Id.,

at 782. Under the rule announced today, however, there would be considerable doubt whether suit against the Board of Corrections could be dismissed. If the Board were ever treated by State law as a single unit--and undoubtedly such treatment easily could be found--it would be said that the Board was really an "official" at least subject to injunctive relief.

Similarly, in Parden v. Terminal R. Co., 377

U.S. 184 (1964), *the Court held that* ~~involving~~ *an* a state owned railroad, *the* ~~an instrumentality of the state~~ *- was immune* Court never indicated that a state corporation could be *from suit in federal court in federal court,* sued as an "official." The railway in Parden was *absent a waiver.*

David - if Parden held this, let's lead with a strong statement

authorized to operate "as though it were an ordinary common carrier." 377 U.S. 185. It performed services for profit and had contracts and agreements with various labor organizations. It was "indisputably a common carrier ... engaging in interstate commerce." Id., at 185.

Nonetheless, the Court considered that the railroad was immune from suit in federal court unless the State had waived its immunity. *no suggestion was made* The Court ~~did not suggest~~¹ that as a State body, with separate funds, the railroad was no longer an instrumentality of the State but was merely a State official.

In short, the Court's holding is supported neither by precedent nor logic.¹⁶ *Perhaps, perhaps,* It is understandable¹

that the Court should wish to *rescue* ~~help~~¹ the petitioner to *rescue* recover from what *appears to be* can only be termed a gross pleading

¹⁶The majority suggests that in prior decisions the Court has permitted suit against State Boards of Regents. See ante, at 5. Yet in none of these suits was the jurisdictional issue posed as it is here. Thus, for example, in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), the Eleventh Amendment issue was not present because the case was here on petition to the California Supreme Court. See note 5, supra. And in each of the other cases cited by the Court, the plaintiff had the good sense to name other defendants in addition to the particular state board. See, e. g., Board of Regents v. Tomanio, 446 U.S. 478 (1978); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

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~~Error~~ Yet the Court ^{simply in ~~error~~} remedies the ~~error~~ by announcing a

new doctrine, one that exposes the instrumentalities of the State itself to suit in federal court. After today's decision, state boards and commissions may be sued for

injunctive relief. ^{The decision also holds (?)} Indeed, the Court indicates that such

bodies may be sued for damages on the fiction that their

segregated assets are not the State's.¹⁷ The Court's new

^{extension} application of Ex parte Young to the State itself ^{undermines} ~~undoes~~ destroys the rationale of that decision. It also under the careful balance worked out in this ^{sensitive area} corner of the law, ^{leaving little substance} and leaves little standing to the Eleventh Amendment. I

would dismiss the suit, [or alternatively remand to the

Court of Appeals for consideration of the Eleventh

Amendment question.]

^{what is there to consider after this bomb-shell?}

If The decision is simply wrong. The Court should dismiss the suit on the Eleventh Amendment issue.

¹⁷ Whether a State board, like a State official, may claim good faith immunity is not clear. Cf. City of Independence

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In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in §1983 actions. ^{Also} Perhaps more revealing is

~~as to~~ ~~interaction~~ Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing: "No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." The bill was never reported out of committee.²¹

The requirement that plaintiffs exhaust available and adequate ~~state~~ administrative remedies--subject to well developed exceptions--is firmly established in virtually every area of the law. ~~I see no reason to deviate from this common sense rule in §1983 actions.~~ ¶ If the exhaustion question were properly before us, I would affirm the Court of Appeals.

^{in § 1983 actions}
This is dictated by common sense, as well as comity and federalism where adequate state adm. remedies ~~are~~ are available.

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RIDER2 GINA-POW

If petitioner had sued the individual members of the Board, ~~petitioner's~~^{her} claim for damages against them would not have been barred by the Eleventh Amendment~~13~~¹³. Nor would her claim for equitable relief to the extent it were limited to future conduct. But petitioner did not sue the members of the Board. She sued only the Board itself, an arm of the State of Florida. Moreover, the principle relief sought by petitioner would impose - in the alternative - an affirmative duty on the Board to promote her to the next available position of comparable status to those to which she had applied, or ~~"required"~~^{would} the [Board] to pay to [petitioner] the sum of \$500,000.00 as actual and exemplary damages." (David cite the complaint, and also say see n. 3 ante).

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1fp/ss 05/28/82

Rider A, p. 23 (Patsy)

PATSY23 SALLY-POW

The concern that prompted the Department of Justice to support, and the Congress to adopt, §1997(e) was the vast increase in §1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1982 was some 26%, resulting in a total of 16,000 (David, get correct figure) such suits filed in 1981 as compared with _____ in 1980. The 1981 total constituted ____% (David, figure it out, it's about 9%) of the total federal district court docket. Although most of these cases present frivolous claims, many are litigated through the Court of Appeals to this Court. The burden on the system fairly can be described as enormous with few if any benefits that would not be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal court litigation. It was primarily this problem that prompted enactment of §1997(e).

Moreover, it is clear from the legislative history that Congress simply was not addressing exhaustion problem in any general fashion. The concern focused on the prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorized the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear.

lfp/vde 05/27/82 RIDER A page10

RIDER2 GINA-POW

If petitioner had sued the individual members of the Board, petitioner's claim for damages against them would not have been barred by the Eleventh Amendment*13. Nor would her claim for equitable relief to the extent it were limited to future conduct. But petitioner did not sue the members of the Board. She sued only the Board itself, an arm of the State of Florida. Moreover, the principle relief sought by petitioner would impose - in the alternative - an affirmative duty on the Board to promote her to the next available position of comparable status to those to which she had applied, or "required the [Board] to pay to [petitioner] the sum of \$500,000.00 as actual and exemplary damages." (David cite the complaint, and also say see n. 3 ante).

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lfp/ss 05/28/82

Rider A, p. 23 (Patsy)

PATSY23 SALLY-POW

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Kastenmeier, the Court contends that Congress has endorsed a ^{general} no exhaustion rule. The irony in this reasoning should

be obvious. Undoubtedly the supporters of §1997e--

proponents of exhaustion--would be surprised to learn that

they somehow had instructed this Court to adopt a no exhaustion rule for all other §1983 claims. Moreover, it

is clear from the legislative history that Congress simply

was not addressing the exhaustion problem in any general

fashion when it enacted §1997e. Indeed, both sponsors of

the Act in the Senate viewed this section as placing a

limit on the Attorney General's power to intervene.

Senator Hatch co-sponsor of the Act, explained §1997e as

follows:

"In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures before the Attorney General can become involved pursuant to [the Act]." Congressional Record S1713, February 26, 1980.²⁰

²⁰ Senator Hatch offered the same explanation on several other occasions in the course of the debate. See Congressional Record S4293, April 29, 1980 ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); Congressional Record S4626, May 6, 1980 ("Section 7(D) further clarifies that the administrative grievance procedures established

Footnote continued on next page.

Senator Bayh, the author of the Act, decribed the exhaustion provision in similar terms:

"[I]n the event of a prison inmate's rights being alleged to be violated, [constitutional rights [are] alleged to be violated] then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their adiminstrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act]." Congressional Record S1859, February 27, 1980. ? ?

In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, not on the general question of exhaustion in §1983 suits. Indeed, Congress repeatedly has failed to enact legislation including a general no-exhaustion requirement such as the Court adopts today.²¹

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

²¹Citations

L.F.P.

df1 05/27/82

Draft: Patsy v. Board of Regents, No. 80-1874

Justice Powell, dissenting.

The Court holds that the Board of Regents of the State of Florida, a state instrumentality, is subject to suit in federal court notwithstanding the bar of the Eleventh Amendment. The Court reaches this conclusion

through a novel--and, to me, illogical--expansion of the holding in Ex Parte Young, 209 U.S. 123 (1908). The Court then rejects the rule of "flexible" exhaustion of state administrative remedies stated by the Court of Appeals for the Fifth Circuit, sitting en banc. Relying principally on the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997e (1976 ed., Supp. IV), the Court holds that any exhaustion requirement in §1983 suits would violate the intent of Congress. I disagree with both portions of the Court's holding and therefore dissent.

I The Eleventh Amendment

A

In this "reverse discrimination" action, petitioner, an employee of the Florida International University, brought suit under 42 U.S.C. §1983 against the Board of Regents of the State of Florida.¹ She did not

¹As the Court notes, see ante, at ___, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief.² The Board filed a motion to dismiss arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that as an instrumentality of the State, ^{the Board} it could not be subjected to suit in federal court absent a waiver of

²Petitioner sought a declaratory judgment "declaring that the Plaintiff has suffered from acts of discrimination." In addition, she asked the court to "[r]equire Defendant to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendant to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." She requested ~~any~~ ^{such} further equitable and injunctive relief that the court deemed appropriate.

³The 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."

The Eleventh Amendment is jurisdictional in nature, and the defense of the Amendment may be raised for the first time on appeal. See Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.")

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immunity.⁴ And it ^{asserted} suggested that ^{there had been} no waiver, ~~had been made~~.

Although the Board of Regents was created as a body corporate with power "to sue and be sued ... to plead and be impleaded in all courts of law and equity," Fla. Stat. §240.042(1), it ^{is} ~~was~~ well established that language such as this did not operate to waive the defense of the Eleventh Amendment.⁵ In reply, petitioner argued that whether the

⁴"As a corporate state agency and component of state government, the [Board] operates with state funds, directs the [State University System], and is local neither in character nor operation. As the 'arm of the state' which manages the Division of Universities of the Department of Education, it is clearly part of the state for Eleventh Amendment purposes." Brief at 18.

The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor, approved by three members of the Cabinet, and confirmed by the Senate. Fla. Stat. 240.207. The chief administrative officer of the Board is the Chancellor, who serves by appointment of the Board.

The Board has general supervisory authority over the State University System. Fla. Stat. 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. §240.209.

The Board is an agency of the State of Florida. Fla. Stat. §216.011. See Relyea v. State, 385 So.2d 1378 (Fla. App. 1980). The Board may claim the defense of sovereign immunity in suits at state law. See id.

Numerous Courts of Appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1349 (CA9 1981); Brennan v. University of Kansas, 451 F. 2d 1287 (CA10 1971); Ronwin v. Shapiro, 657 F. 2d 1071 (CA9 1981).

⁵See Florida Dept of Health v. Florida Nursing Home, ____ U.S. ____, ____ (1981); Petty v. Tennessee-
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statute creating the Board amounted to a waiver--and petitioner believed that it did--the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief at 3-4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in §1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that §1983 plaintiffs must exhaust available and reasonable administrative remedies. Again the court did not consider the Board's Eleventh

Missouri Bridge Commn, 359 U.S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred ... And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); Great Northern Insurance Co. v. Read, 322 U.S. 47, 54. See Bragg v. Board of Public Instruction, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort").

Amendment defense.

The Eleventh Amendment question was first raised before this Court in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court. Again petitioner argued that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"--e. g., from gifts and bequests--rather than from the State Treasury. These arguments were repeated at oral argument.⁶

As the Court acknowledges, the Eleventh Amendment question is jurisdictional and must be confronted at the outset. See ante, at ____.

⁶Tr. of Oral Argument 25-28, 40-41. The Court implies that the Board has been negligent in presenting its Eleventh Amendment defense. See ante, at ____, n. 3. Although the Board did not present the defense to the District Court, it briefed the question to the Court of Appeals and argued to this Court that the petition for writ of certiorari should not be granted because of this jurisdictional bar. Once the petition was granted, it is understandable that the State did not continue to press the defense in its main briefs to this Court.

In view of the record of its ~~stated~~ reliance on this defense, I would find no negligence. Even if the defense had never been raised, this Court has the authority to -- and should -- address it. ~~in view of its "jurisdictional" nature~~ Edelman, *supra*, at 678. See ante, n. 3.

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B

In interpreting the Eleventh Amendment, the Court has sought to accommodate both the principle of sovereign immunity embodied in the Amendment and the states' duty to obey--and the federal courts to enforce--federal law. Thus, it is well established that the State is not "divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" Parden v. Terminal R. Co., 377 U.S. 184, 186 (1964), quoting, Hans v. Louisiana, 134 U.S. 1, 10 (1890).⁷ *It also is settled* ~~And the Court has held that even~~ when a State itself is not named as a party to the suit, the Amendment nevertheless applies if the State is the real party in interest. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).⁸

⁷In Hans the Court also held that the Amendment bars suits brought against an unconsenting State by its own citizens, although by its terms the Amendment does not apply to this situation. Cf. Monaco v. Mississippi, 292 U.S. 313 (1934) (Eleventh Amendment applies to federal suits against an unconsenting state by a foreign nation). By contrast, the Amendment has not been applied to suits against a State brought by another State or by the United States. North Dakota v. Minnesota, 263 U.S. 365 (1923); United States v. Mississippi, 380 U.S. 128 (1965).

⁸In Ford Motor the plaintiff sued the department of treasury of the State of Indiana, and the three officials--the Governor, Treasurer, and Auditor--who

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On the other hand, the Court has not interpreted the Amendment to bar federal court jurisdiction when the State has consented to suit,⁹ or to bar review by this Court of an action brought against the State in state court.¹⁰ Congress may lift the bar of the Amendment when exercising powers granted to it by §5 of the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Counties and municipalities may not claim immunity under the Amendment. Lincoln County v. Luning, 133 U.S. 529 (1890); Mt. Healthy Bd. of Ed. v. Doyle, 429 U.S. 274, 279-281 (1977) And under Ex parte Young,

constituted the board of the department of treasury. The plaintiff sought a refund of gross income taxes paid to the department. Suit was brought in federal District Court. The Court held that the suit was barred by the Eleventh Amendment. The plaintiff was seeking a refund from the state not a personal judgment against the individual officials: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." 323 U.S., at 464. See Edelman v. Jordan, *supra*, at 663; Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944). ?

⁹See Clark v. Barnard, 108 U.S. 436, 447 (1883); Parden v. Terminal R. Co., 377 U.S. 184 (1964).

¹⁰See Smith v. Reeves, 178 U.S. 436, 445 (1900); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 57 (1944); Chandler v. Dix, 194 U.S. 590, 592 (1904). The Court's assumption of jurisdiction in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), a case originating in state court, thus provides no support for today's decision. For the same reason, the Court's reliance upon Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), is misplaced. See infra.

209 U.S. 123 (1908), a federal court may order state officials to obey federal law in the future.¹¹

Application of these settled principles to the present case is straightforward. This is an action under §1983, and Congress has not removed the bar of the Eleventh Amendment in such actions. See Quern v. Jordan, 440 U.S. 332 (1979). Petitioner seeks relief from the Board of Regents of the State of Florida, an instrumentality or agency of the State. The Board is not a local political body but bears responsibility for the State university system as a whole. Cf. Mt. Healthy Bd. of Ed. v. Doyle, supra. Petitioner's argument that the

¹¹Under the theory, some would say fiction, of Ex parte Young, the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, ... he is ... stripped of his official or representative character." Id., at 159. On this analysis, a prospective injunction requiring the official to conform his future behavior to federal law, does not require anything of the State and therefore does not bring the Eleventh Amendment to bear. The granting of retroactive relief, on the other hand, would require the official to take action in his official capacity. Thus, if the official is required to pay damages from state funds, the State is directly affected. See Edelman v. Jordan, supra. Similarly, retroactive injunctive relief may require the official to take action in his official capacity and also would be barred by the Eleventh Amendment. Cf. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). Of course, in addition to prospective injunctive relief, a plaintiff may seek damages from the individual officer in his personal capacity. See Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974).

statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court. See, e. g., Florida Dept of Health v. Florida Nursing Home Assn, ___ U.S. ___ (1981).¹² Similarly, petitioner's suggestion that the Eleventh Amendment does not apply to equitable claims against a state is incorrect. See Cory v. White, ___ U.S. ___ (1982).

Thus, unless the rule in Ex parte Young, supra, is ^{extended beyond any previous decision of this Court,} applicable, the Eleventh Amendment clearly bars this suit. ^{But} the theory in Ex parte Young, supra, has no application to the State itself or to an instrumentality of the State. ^{Certainly} if petitioner had sued the individual members of the Board, petitioner's claim, ^{at least as to declaratory relief,} would not have been ^{for damages against them}

¹²In Florida Dept of Health v. Florida Nursing Home Assn, ___ U.S. ___ (1981), the Court of Appeals for the Fifth Circuit found that the Florida Department of Health and Rehabilitative Services had consented to suit. The court based its finding of waiver, in part, on the fact that the Department was a "body corporate" with the capacity to "sue and be sued" under state law. Fla. Stat. Ann. §402.34. This Court reversed holding that a general waiver of sovereign immunity does not amount to a waiver of the Eleventh Amendment. See id., at ___. See note 5, supra.

Without distinguishing Florida Dept of Health, supra, the Court leaves open the question of whether the Board has consented to suit. See ante, at 9 & n. 10.

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Now would her claim for equitable
barred.¹³ In addition, petitioner could have sought
damages from the individual members of the Board of
Regents in their personal capacities.

But petitioner did not sue the members of the Board: she sued the Board itself, an arm of the State of Florida. One would have thought that Ex parte Young was simply irrelevant in these circumstances. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State--or an agency of the State--cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state's own coffers. Whether the damages come directly from the State's general fund or from some other State fund, the money is no less the State's. Indeed, direct application of Ex parte Young to the State and its instrumentalities would read the Eleventh Amendment out of the Constitution.

¹³ Petitioner's injunctive relief may be retroactive to the extent that she asks the Board of Regents to appoint her to the next available position. Presumably, such an appointment would require an exercise of the state's authority. See note 3, supra.

If the bar of the Amendment is lifted merely upon the naming of a State board, commission, agency or corporation--opening the way to damages as well as to injunctive relief--then the Amendment no longer would afford constitutionally prescribed protection to the states.

C

Despite the weight of these considerations, the Court concludes that this action is not barred by the Eleventh Amendment. Indeed, the Court undertakes to apply Ex parte Young to the Board of Regents itself. Relying upon the decision in Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), the Court reasons that the Board of Regents, as a body corporate, is no different from a state official. The Court attempts to bolster this novel conclusion by observing that under Florida law the Board of Regents is termed the "director" of the Division of Universities. The Court concludes that, just as in Ex parte Young, the Board of Regents "may be sued for unconstitutional or unauthorized actions, as long as the

plaintiff is not seeking monetary relief that must be paid out of the state treasury." Ante, at 8.

The Court's conclusion is supported neither by reason nor precedents of this Court. As indicated above, the rationale of Ex parte Young does not ~~logically~~ apply to a State or State instrumentality. The State cannot be "stripped" of its own authority. Moreover, if the Board of Regents is a State agency--and it clearly is--then its assets are also those of the State's. Yet the Court's decision exposes the Board's assets to a damage award on the double fiction that the Board is really an "official" and that its separate assets somehow belong to this fictitious being rather than to the State. On such a theory, a state ^{welfare board,} board of education, highway department or any other agency, board or department of a state with any separate sources ^{or} of income could be sued for damages. Such a conclusion is at odds with the Court's holding in Kennecott Copper Corp. v. Tax Commn, 327 U.S. 573 (1946), that the segregated funds of the State Tax Commission were State monies subject to the Eleventh Amendment.

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Nor does the Board of Regents' corporate status under state law support the Court's holding. State governments consist in major part of a variety of boards, commissions, agencies, and corporations. These State entities are no less instruments of the State because they may be vested under state law with the power to contract, to sue and be sued. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See Great Northern Insurance Co. v. Read, 322 U.S. 47; Ford Motor Co. v. Department of Treasury, 323 U.S. 454 (1945); Kennecott Copper Corp. v. State Tax Commn, 327 U.S. 572 (1946).

Thus, in Parden v. Terminal R. Co., 377 U.S. 184 (1964), the Court assumed that a state owned railroad--as an instrumentality of the State--was immune from suit in federal court absent a waiver. The railway in Parden was authorized to operate "as though it were an ordinary common carrier." 377 US. 185. It performed services for profit and had contracts and agreements with various labor organizations. It was "indisputably a common carrier ... engaging in interstate commerce." Id., at 185. No

suggestion was made that as a State body, with separate funds, the railroad was no longer an instrumentality of the State but was merely a State official. And just last term the Court held that the Florida Department of Health, a "body corporate" under State law was immune from suit. Florida Dept of Health v. Florida Nursing Home Assn, ____ U.S. ____ (1981). Cf. Alabama v. Pugh, 438 U.S. 781 (1978) ("There can be no doubt ... that suit against the State and its Board of Corrections is barred by the Eleventh Amendment"). The Court's conclusion that corporate status converts a State body into a State official, subject to suit, cannot be reconciled with these well established precedents. ?

D

I am unaware of any prior decision of this Court that supports the Court's application of Ex parte Young to State instrumentalities. Hopkins v. Clemson College, supra, relied upon so heavily by the Court is simply irrelevant. In that case suit was brought against a state college in state court to recover damages caused by the college's construction of a dyke. The state courts held that the college was protected from suit by the state law

of sovereign immunity. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case.¹⁴ It was clear before Hopkins that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in state court. See note 5, supra. However the holding in Hopkins is stated, no Eleventh Amendment question was presented to the Court.¹⁵ It therefore is no surprise that the opinion has

¹⁴The state college recognized that there was no Eleventh Amendment question. In its brief it noted: "It is difficult to see how either Section 2 of Article III, of the Constitution of the United States or the Eleventh amendment has any application to the inquiry whether a suit by a citizen of a State in its own Courts is a suit against that State. That seems to be purely a question of local law to be determined by the State Court." Brief at 20.

¹⁵It is no easy matter to state the holding in Hopkins. Normally the Court would not review a state court decision holding the state immune from suit brought under state tort law. Review would be barred not by the Eleventh Amendment, but because the holding on sovereign immunity would be seen as an independent and adequate state law ground. See Georgia R. R. & Banking Co. v. Redwine, 335 U.S. 900 (1949). Of course, the decision in Hopkins antedated Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). It is likely that the Hopkins Court simply did not differentiate between the state law of sovereign immunity and the federal law of sovereign immunity embodied in the Eleventh Amendment. In Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F. 2d 599, 601 n. 1 (CA10 1966), the court viewed Hopkins as standing for a principle of agency law: "[N]either a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application,--the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction ..." Id., quoting 221 U.S., at 643.

David: Have 9 gone to far?
The Eleventh Amendment ^{17.} is no bar to ^{by this Court} has never been cited for the proposition that a state agency ~~is~~ being sued in federal court.

~~rarely been cited in the subsequent decisions of this~~

Court.¹⁶

If in fact the case ^{could be viewed as} does stand for the

proposition that ^{ago} state ^{agencies} corporate bodies may be sued as ^{as if they were} state

officials, the case ^{has} long since ^{discredited.} been ^{overruled.} See

Florida Dept of Health v. Florida Nursing Home Assn, ____

U.S. ____ (1981). ^{Hopkins} The case does not deserve the pride of

place given to it by the majority.¹⁷ It is ^{in fact} a non-

[?]
¹⁶The decision in Hopkins was most recently cited in Larson v. Domestic & Foreign Corp., 337, U.S. 682 (1949). The Court in Larson relied upon Hopkins for the proposition that an "agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal." 337 U.S., at 694. Justice Frankfurter in his dissenting opinion included Hopkins with cases standing for the proposition that jurisdiction is barred when the plaintiff seeks an "interest in property which concededly belonged to the Government, or demanded relief calling for an assertion of what was unquestionably official authority." Id., at 710 & 729. The Court does not cite to any Supreme Court decision that relies upon Hopkins for the principle that a state instrumentality may be sued in federal court.

¹⁷ ^{The irrelevance of} Any reliance on Hopkins further ^{is evidenced by the} must be tempered by the Court's view in Hopkins that it was not reviewing official action. Rather, it viewed the College's activity as proprietary in nature. ^{fact that the College's activities were viewed as proprietary in nature.}

"[T]his is not an action against the College for a tort committed in the prosecution of any governmental function. The fee was in the State, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the College, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. 221 U.S., at 647.

In Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973), the Court distinguished the
Footnote continued on next page.

Wouldn't a simple cite to Employees suffice?

precedent.

~~In short, the Court's holding is supported~~

~~neither by precedent nor logic.~~¹⁸ The Court announces a

earlier Eleventh Amendment decision in Parden v. Terminal R. Co., 377 U.S. 184 (1964), on the basis that Parden concerned State proprietary activity: "Parden involved the railroad business which Alabama operated 'for profit.' ... Parden was in the area where private persons and corporations normally ran the enterprise." By contrast, the Employees Court found that the employment practices of state hospitals did not concern state proprietary activity. A similar distinction can be drawn between Hopkins and the present case involving the employment practices of a state educational institution.

¹⁸The ~~majority~~^{Court} suggests that in prior decisions the Court has permitted suit against State Boards of Regents. See ante, at 5. Yet in none of these suits was the jurisdictional issue posed as it is here. Thus, for example, in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), the Eleventh Amendment issue was not present because the case was here on petition to the California Supreme Court. See note 5, supra. And in each of the other cases cited by the Court, the plaintiff had the good sense to name other defendants in addition to the particular state board. See, e. g., Board of Regents v. Tomanio, 446 U.S. 478 (1978); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

~~The majority~~^{Court} also argues that the Courts of Appeals are split on the question of whether damages can be awarded against state universities. Yet the two cases cited by the Court to demonstrate a split on this question do not support the Court's assertion. In SONI v. Board of Trustees, 513 F. 2d 347 (CA6 1975) the court found that the Board of Trustees had waived its immunity to suit, while in Goss v. Jacinto Junior College, 588 F. 2d 96, 98-99 (CA5 1979) the court reasoned that the particular junior college was similar to a county or municipality, an "independent 'political subdivision' as a matter of Texas statutory and common law." The Court suggests as well that the Courts of Appeals are agreed that injunctive relief may be awarded against state universities and state boards of regents. Yet Again the cases cited provide little support for the Court's assertion. In New England Patriots Football Club, Inc. v. University of Colorado, 592 F. 2d 1196, 1201 (CA1 1979), the court held that individual members of the Board of Regents might be sued for prospective injunctive relief. It did not hold, however, as the Court implies, that the University itself might be sued. Rather, it accepted "the University's identification with the state." And in Gay Student Services v. Texas A & M University, 612 F. 2d 160, 165 (CA5 1980), it is unclear that the court held more than

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new doctrine, one that exposes the instrumentalities of the State itself to suit in federal court. After today's decision, state boards and commissions ~~at least~~ may be sued for ~~of~~ ^{affirmative} injunctive relief. The decision also holds that such bodies may be sued for damages on the fiction that their segregated assets are not the State's.¹⁹ The Court's ~~extension~~ ^{extension} of Ex parte Young to the State itself destroys the rationale of that decision. It also undermines the careful balance worked out in this sensitive area of the law, leaving little substance to the Eleventh Amendment.

The decision is simply wrong. The Court should dismiss the suit on the basis of the Eleventh Amendment.

II Exhaustion of Remedies

Seventeen judges joined in the Court of Appeal's persuasive opinion in this case adopting a rule of "flexible" exhaustion of administrative remedies in §1983

that officials of the University could be sued for injunctive relief. Unlike the situation in those two cases, petitioner sued only the Board of Regents. Numerous Courts of Appeals have held state board of regents to be immune from suit in federal court by reason of the Eleventh Amendment. See note ___, supra.

¹⁹ Whether a State board, like a State official, may claim good faith immunity is not clear but of substantial significance. See Owen v. City of Independence, ___ U.S. ____.

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Draft: Patsy v. Board of Regents, No. 80-1874

Justice Powell, dissenting.

The Court holds that the Board of Regents of the State of Florida, a state instrumentality, is subject to suit in federal court notwithstanding the bar of the Eleventh Amendment. The Court reaches this conclusion

PATSY2A SALLY-POW

through an unprecedented - and far reaching ~~expansion~~ ⁶ -
expansion of the holding in Ex Parte Young, 209 U.S. 123
(1908). As I consider the Court's holding a serious
departure from established constitutional doctrine, this
dissent addresses primarily the Eleventh Amendment issue.

Apparently the Court was anxious to reach the
exhaustion issue in §1983 cases, and devoted relatively less
attention to the constitutional question. I dissent also

from the Court's rejection of the rule of "flexible"
exhaustion of state administrative remedies developed and
stated persuasively by the Court of Appeals for the Fifth
Circuit, sitting en banc. In disagreeing with the 17 judges
of the Court of Appeals who adopted the flexible exhaustion
principle, this Court places ^{mis}~~primary~~ reliance

~~The Court does~~

an unprecedented -- and far reaching --

through a ~~novel and, to me, illogical~~--expansion of the

holding in Ex Parte Young, 209 U.S. 123 (1908). The Court

then rejects the rule of "flexible" exhaustion of state

administrative remedies stated by the Court of Appeals for

the Fifth Circuit, sitting en banc. Relying principally

on the Civil Rights of Institutionalized Persons Act, 42

U.S.C. §1997e (1976 ed., Supp. IV), the Court holds that

any exhaustion requirement in §1983 suits would violate

the intent of Congress. ~~I disagree with both portions of~~

~~the Court's holding and therefore dissent.~~

I The Eleventh Amendment

A

In this "reverse discrimination" action, petitioner, an employee of the Florida International University, brought suit under 42 U.S.C. §1983 against the Board of Regents of the State of Florida.¹ She did not

¹As the Court notes, see ante, at ____, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief.² The Board filed a motion to dismiss arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that as an instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of

²Petitioner sought a declaratory judgment "declaring that the Plaintiff has suffered from acts of discrimination." In addition, she asked the court to "[r]equire Defendant to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendant to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." She requested such further equitable and injunctive relief as the court deems appropriate.

³The 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."

The Eleventh Amendment is jurisdictional in nature, and the defense of the Amendment may be raised for the first time on appeal. See Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.")

immunity.⁴ And it asserted that there had been no waiver.

Although the Board of Regents was created as a body corporate with power "to sue and be sued ... to plead and be impleaded in all courts of law and equity," Fla. Stat. §240.042(1), it is well established that language such as this did not operate to waive the defense of the Eleventh Amendment.⁵ In reply, petitioner argued that whether the

⁴"As a corporate state agency and component of state government, the [Board] operates with state funds, directs the [State University System], and is local neither in character nor operation. As the 'arm of the state' which manages the Division of Universities of the Department of Education, it is clearly part of the state for Eleventh Amendment purposes." Brief at 18.

The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor, approved by three members of the Cabinet, and confirmed by the Senate. Fla. Stat. 240.207. The chief administrative officer of the Board is the Chancellor, who serves by appointment of the Board.

The Board has general supervisory authority over the State University System. Fla. Stat. 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. §240.209.

The Board is an agency of the State of Florida. Fla. Stat. §216.011. See Relyea v. State, 385 So.2d 1378 (Fla. App. 1980). The Board may claim the defense of sovereign immunity in suits under state law. See id.

Numerous Courts of Appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1349 (CA9 1981); Brennan v. University of Kansas, 451 F. 2d 1287 (CA10 1971); Ronwin v. Shapiro, 657 F. 2d 1071 (CA9 1981).

⁵See Florida Dept of Health v. Florida Nursing Home, ____ U.S. ____, ____ (1981); Petty v. Tennessee-
Footnote continued on next page.

statute creating the Board amounted to a waiver--and petitioner believed that it did--the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief at 3-4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in §1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that §1983 plaintiffs must exhaust available and reasonable administrative remedies. Again the court did not consider the Board's Eleventh

Missouri Bridge Commn, 359 U.S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred ... And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); Great Northern Insurance Co. v. Read, 322 U.S. 47, 54. See Bragg v. Board of Public Instruction, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort").

Amendment defense.

The Eleventh Amendment question was first raised before this Court in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court. Again petitioner argued that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"--e. g., from gifts and bequests--rather than from the State Treasury. ~~These~~ These arguments were repeated at oral argument.⁶

As the Court acknowledges, the Eleventh Amendment question is jurisdictional and must be confronted at the outset. See ante, at ____.

B

In interpreting the Eleventh Amendment, the Court has sought to accommodate both the principle of

⁶Tr. of Oral Argument 25-28, 40-41.

sovereign immunity embodied in the Amendment and the states' duty to obey--and the federal courts to enforce--federal law. Thus, it is well established that the State is not "divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" Parden v. Terminal R. Co., 377 U.S. 184, 186 (1964), quoting, Hans v. Louisiana, 134 U.S. 1, 10 (1890).⁷ It also is settled that when a State itself is not named as a party to the suit, the Amendment nevertheless applies if the State is the real party in interest. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).⁸

⁷In Hans the Court also held that the Amendment bars suits brought against an unconsenting State by its own citizens, although by its terms the Amendment does not apply to this situation. Cf. Monaco v. Mississippi, 292 U.S. 313 (1934) (Eleventh Amendment applies to federal suits against an unconsenting state by a foreign nation). By contrast, the Amendment has not been applied to suits against a State brought by another State or by the United States. North Dakota v. Minnesota, 263 U.S. 365 (1923); United States v. Mississippi, 380 U.S. 128 (1965).

⁸In Ford Motor the plaintiff sued the Department of Treasury of the State of Indiana, and the three officials--the Governor, Treasurer, and Auditor--who constituted the Board of the Department of Treasury. The plaintiff sought a refund of gross income taxes paid to the department. Suit was brought in federal District Court. The Court held that the suit was barred by the Eleventh Amendment. The plaintiff was seeking a refund from the state not a personal judgment against the individual officials: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real party in interest and is entitled to invoke its

Footnote continued on next page.

On the other hand, the Court has not interpreted the Amendment to bar federal court jurisdiction when the State has consented to suit,⁹ or to bar review by this Court of an action brought against the State in state court.¹⁰ Congress may lift the bar of the Amendment when exercising powers granted to it by §5 of the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Counties and municipalities may not claim immunity under the Amendment. Lincoln County v. Luning, 133 U.S. 529 (1890); Mt. Healthy Bd. of Ed. v. Doyle, 429 U.S. 274, 279-281 (1977) And under Ex parte Young, 209 U.S. 123 (1908), a federal court may order state officials to obey federal law in the future.¹¹

sovereign immunity from suit even though individual officials are nominal defendants." 323 U.S., at 464. See Edelman v. Jordan, *supra*, at 663; Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944).

⁹See Clark v. Barnard, 108 U.S. 436, 447 (1883); Parden v. Terminal R. Co., 377 U.S. 184 (1964).

¹⁰See Smith v. Reeves, 178 U.S. 436, 445 (1900); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 57 (1944); Chandler v. Dix, 194 U.S. 590, 592 (1904). The Court's assumption of jurisdiction in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), a case originating in state court, thus provides no support for today's decision. For the same reason, the Court's reliance upon Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), is misplaced. See *infra*.

¹¹Under the theory, some would say fiction, of Ex parte Young, the Eleventh Amendment does not bar suits
Footnote continued on next page.

Application of these settled principles to the present case is straightforward. This is an action under §1983, and Congress has not removed the bar of the Eleventh Amendment in such actions. See Quern v. Jordan, 440 U.S. 332 (1979). Petitioner seeks relief from the Board of Regents of the State of Florida, an instrumentality or agency of the State. The Board is not a local political body but bears responsibility for the State university system as a whole. Cf. Mt. Healthy Bd. of Ed. v. Doyle, supra. Petitioner's argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous

against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, ... he is ... stripped of his official or representative character." Id., at 159. On this analysis, a prospective injunction requiring the official to conform his future behavior to federal law, does not require anything of the State and therefore does not bring the Eleventh Amendment to bear. The granting of retroactive relief, on the other hand, would require the official to take action in his official capacity. Thus, if the official is required to pay damages from state funds, the State is directly affected. See Edelman v. Jordan, supra. Similarly, retroactive injunctive relief may require the official to take action in his official capacity and also would be barred by the Eleventh Amendment. Cf. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). Of course, in addition to prospective injunctive relief, a plaintiff may seek damages from the individual officer in his personal capacity. See Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974).

decisions of this Court. See, e. g., Florida Dept of Health v. Florida Nursing Home Assn, ____ U.S. ____ (1981).¹² Similarly, petitioner's suggestion that the Eleventh Amendment does not apply to equitable claims against a state is incorrect. See Cory v. White, ____ U.S. ____ (1982).

Thus, unless the rule in Ex parte Young, supra, is extended beyond any previous decision of this Court, the Eleventh Amendment bars this suit. The theory in Ex parte Young, supra, has no application to the State itself or to an instrumentality of the State. If petitioner had sued the individual members of the Board, her claim for damages against them would not have been barred by the Eleventh Amendment. Nor would her claim for equitable relief have been barred to the extent it were limited to

¹²In Florida Dept of Health v. Florida Nursing Home Assn, ____ U.S. ____ (1981), the Court of Appeals for the Fifth Circuit found that the Florida Department of Health and Rehabilitative Services had consented to suit. The court based its finding of waiver, in part, on the fact that the Department was a "body corporate" with the capacity to "sue and be sued" under state law. Fla. Stat. Ann. §402.34. This Court reversed holding that a general waiver of sovereign immunity does not amount to a waiver of the Eleventh Amendment. See id., at _____. See note 5, supra.

Without distinguishing Florida Dept of Health, supra, the Court leaves open the question of whether the Board has consented to suit. See ante, at 9 & n. 10.

future conduct. But petitioner did not sue the members of the Board. She sued only the Board itself, an arm of the State of Florida. Moreover, the principle relief sought by petitioner would impose--in the alternative--an affirmative duty on the Board to promote her to the next available position of comparable status to those to which she had applied, or would "require the [Board] to pay to [petitioner] the sum of \$500,000 as actual and exemplary damages." App., 39. See n. 3, ante.

One would have thought that Ex parte Young was simply irrelevant in these circumstances. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State--or an agency of the State--cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state's own coffers. Whether the damages come directly from the State's general fund or from some other State fund, the money is no less the State's. Indeed, direct application of Ex parte Young to the State and its instrumentalities

would read the Eleventh Amendment out of the Constitution.

If the bar of the Amendment is lifted merely upon the naming of a State board, commission, agency or corporation--opening the way to damages as well as to injunctive relief--then the Amendment no longer would afford constitutionally prescribed protection to the states.

C

Despite the weight of these considerations, the Court concludes that this action is not barred by the Eleventh Amendment. Indeed, the Court undertakes to apply Ex parte Young to the Board of Regents itself. Relying upon the decision in Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), the Court reasons that the Board of Regents, as a body corporate, is no different from a state official. The Court attempts to bolster this novel conclusion by observing that under Florida law the Board of Regents is termed the "director" of the Division of Universities. The Court concludes that, just as in Ex parte Young, the Board of Regents "may be sued for unconstitutional or unauthorized actions, as long as the

plaintiff is not seeking monetary relief that must be paid out of the state treasury." Ante, at 8.

The Court's conclusion is supported neither by reason nor precedents of this Court. As indicated above, the rationale of Ex parte Young does not apply to a State or State instrumentality. The State cannot be "stripped" of its own authority. Moreover, if the Board of Regents is a State agency--and it clearly is--then its assets are also those of the State's. Yet the Court's decision exposes the Board's assets to a damage award on the double fiction that the Board is really an "official" and that its separate assets somehow belong to this fictitious being rather than to the State. On such a theory, a state welfare board, highway department or any other agency, board or department of a state with any separate funds or income could be sued for damages. Such a conclusion is at odds with the Court's holding in Kennecott Copper Corp. v. Tax Commn, 327 U.S. 573 (1946), that the segregated funds of the State Tax Commission were State monies subject to the Eleventh Amendment.

Nor does the Board of Regents' corporate status under state law support the Court's holding. State governments consist in major part of a variety of boards, commissions, agencies, and corporations. These State entities are no less instruments of the State because they may be vested under state law with the power to contract, to sue and be sued. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See Great Northern Insurance Co. v. Read, 322 U.S. 47; Ford Motor Co. v. Department of Treasury, 323 U.S. 454 (1945); Kennecott Copper Corp. v. State Tax Commn, 327 U.S. 572 (1946).

Thus, in Parden v. Terminal R. Co., 377 U.S. 184 (1964), the Court assumed that a state owned railroad--as an instrumentality of the State--was immune from suit in federal court absent a waiver. The railway in Parden was authorized to operate "as though it were an ordinary common carrier." 377 US. 185. It performed services for profit and had contracts and agreements with various labor organizations. It was "indisputably a common carrier ... engaging in interstate commerce." Id., at 185. No

suggestion was made that as a State body, with separate funds, the railroad was no longer an instrumentality of the State but was merely a State official. And just last term the Court held that the Florida Department of Health, a "body corporate" under State law was immune from suit. Florida Dept of Health v. Florida Nursing Home Assn, ____ U.S. ____ (1981). Cf. Alabama v. Pugh, 438 U.S. 781 (1978) ("There can be no doubt ... that suit against the State and its Board of Corrections is barred by the Eleventh Amendment"). The Court's conclusion that corporate status converts a State body into a State official, subject to suit, cannot be reconciled with these well established precedents.

D

I am unaware of any prior decision of this Court that supports the Court's application of Ex parte Young to State instrumentalities. Hopkins v. Clemson College, supra, relied upon so heavily by the Court, is simply irrelevant. In that case suit was brought against a state college in state court to recover damages caused by the college's construction of a dyke. The state courts held

that the college was protected from suit by the state law of sovereign immunity. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case.¹³ It was clear before Hopkins that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in state court. See note 5, supra. However the holding in Hopkins ^{may be viewed,} ~~is stated,~~ no Eleventh Amendment question was presented to the Court.¹⁴ It therefore is no surprise that the opinion has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state agency in federal court. If the case could be viewed as standing for the proposition that state agencies may be

¹³The state college recognized that there was no Eleventh Amendment question. In its brief it noted: "It is difficult to see how either Section 2 of Article III, of the Constitution of the United States or the Eleventh amendment has any application to the inquiry whether a suit by a citizen of a State in its own Courts is a suit against that State. That seems to be purely a question of local law to be determined by the State Court." Brief at 20.

¹⁴Hopkins has been viewed primarily as standing for a principle of agency law. See Larson v. Domestic & Foreign Corp., 337 U.S. 682, 694 (1949) ("agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal"); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F. 2d 599, 601 n. 1 (CA10 1966).

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decisions.*

sued as if they were state officials, the case long since
has been overruled. See Florida Dept of Health v. Florida
Nursing Home Assn, ____ U.S. ____ (1981). Hopkins does not
deserve the pride of place given to it by the majority.¹⁵

It is in fact a non-precedent.

today simply
The Court announces *today* a new doctrine, one
that exposes the instrumentalities of the State itself to
suit in federal court.¹⁶ After today's decision, state

¹⁵The irrelevance of Hopkins is further indicated by
the fact that the College's activities in that case were
viewed as proprietary in nature:

"[T]his is not an action against the College for
a tort committed in the prosecution of any
governmental function. The fee was in the
State, but the corporation, as equitable owner,
was in possession, use and enjoyment of the
property. For protecting the bottom land the
College, for its own corporate purposes and
advantage, constructed the dyke. In so doing it
was not acting in any governmental capacity.
The embankment was in law similar to one which
might have been built for private purposes by
the plaintiff on the other side of the river.
221 U.S., at 647.

Cf. Employees v. Department of Public Health and
Welfare, 411 U.S. 279 (1973) (distinguishing Parden v.
Terminal R. Co., 377 U.S. 184 (1964), on the basis that
Parden concerned State proprietary activity).

¹⁶The Court suggests that in prior decisions the
Court has permitted suit against State Boards of Regents.
See ante, at 5. Yet in none of these suits was the
jurisdictional issue posed as it is here. Thus, for
example, in University of California Board of Regents v.
Bakke, 438 U.S. 265 (1978), the Eleventh Amendment issue
was not present because the case was here on petition to
the California Supreme Court. See note 5, supra. And in
each of the other cases cited by the Court, the plaintiff
had the good sense to name other defendants in addition to
the particular state board. See, e. g., Board of Regents
Footnote continued on next page.

boards and commissions may be sued for injunctive relief.

The Court also holds that such bodies may be sued for damages on the fiction that their segregated assets are not the State's.¹⁷ The Court's extension of Ex parte Young to the State itself destroys the rationale of that decision. It also undermines the careful balance worked out in this sensitive area of the law.

v. Tomanio, 446 U.S. 478 (1978); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

The Court also argues that the courts of appeals are split on the question of whether damages can be awarded against state universities. Yet the two cases cited by the Court to demonstrate a split on this question do not support the Court's assertion. In SONI v. Board of Trustees, 513 F. 2d 347 (CA6 1975) the court found that the Board of Trustees had waived its immunity to suit, while in Goss v. Jacinto Junior College, 588 F. 2d 96, 98-99 (CA5 1979) the court reasoned that the particular junior college was similar to a county or municipality, an "independent 'political subdivision' as a matter of Texas statutory and common law." The Court suggests as well that the courts of appeals are agreed that injunctive relief may be awarded against state universities and state boards of regents. Again the cases cited provide little support for the Court's assertion. In New England Patriots Football Club, Inc. v. University of Colorado, 592 F. 2d 1196, 1201 (CA1 1979), the court held that individual members of the Board of Regents might be sued for prospective injunctive relief. It did not hold, as the Court implies, that the University itself might be sued. Rather, it accepted "the University's identification with the state." And in Gay Student Services v. Texas A & M University, 612 F. 2d 160, 165 (CA5 1980), it is unclear that the court held more than that officials of the University could be sued for injunctive relief. Unlike the situation in those two cases, petitioner sued only the Board of Regents. Numerous Courts of Appeals have held state board of regents to be immune from suit in federal court by reason of the Eleventh Amendment. See note ___, supra.

¹⁷ Whether a State board, like a State official, may claim good faith immunity is not clear but of substantial significance. See Owen v. City of Independence, ___ U.S. ___.

The decision is simply wrong. The Court should dismiss the suit on the basis of the Eleventh Amendment.

II Exhaustion of Remedies

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeal's persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in §1983 suits. Other Courts of Appeals have adopted a similar rule. See e. g., Eisen v. Eastman, 421 F. 2d 560 (CA2 1969); Secret v. Brierton, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to §1983 actions. It found that the prior decisions of this Court did not clearly decide the question.¹⁸ See Barry v. Barchi, 443 U.S. 55, 63 n. 10 (1979); Gibson v. Berryhill, 411 U.S. 564, 575 (1973). And it concluded that the

¹⁸"[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." Developments in the Law--Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1274 (1977).

exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by §1983.

I agree with the Court of Appeals' opinion. The requirement that a §1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See Prentis v. Atlantic Coast Line Co., 211 U.S. 210, (1908) (opinion of Justice Holmes). The rule rests on sound considerations. It does not defeat federal court jurisdiction, it merely defers it.¹⁹ It permits the states to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See Younger v. Harris, 401 U.S. 37 (1971).

~~Now~~ Perhaps most significantly, the rule conserves

¹⁹Cf. Fair Assessment in Real Estate v. McNary, U.S. _____, (Brennan, J., concurring) (exhaustion requirement in §1983 cases can be justified by "a somewhat lesser showing ... where .. we are concerned not with the displacement of the §1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process").

→ Moreover, and highly relevant to the effective functioning of the over-burdened federal court system,

and supplements scarce judicial resources. ~~The need for~~

~~such conservation has become increasingly evident.~~ -In

1961, the year that Monroe v. Pape, 365 U.S. 167 (1961),

was decided, only 270 civil rights actions were begun in

federal district court. Annual Report of the Director

1961, at 238. In 1981, over 16,000 such suits were

lfp/ss 05/28/82

Rider A, p. 1 (Patsy)

commenced. Annual Report of the Director 1981, at 63 &

PATSY1 SALLY-POW

75. Such a dramatic increase in litigation imposes a

David: Perhaps we should add a footnote along these lines:

heavy burden on the federal courts to the detriment of all

federal court litigants, including those whose constitutional rights in fact have been infringed.

The Court argues that past decisions of the

* Of the approximately 30,000 civil rights suits Court categorically hold that there is no exhaustion

filed in fiscal year 1981, 16,000 (use exact figures) were requirement in §1983 suits. But as the Court of Appeals

filed by state prisoners under §1983. The remainder demonstrates, and as the Court recognizes, many of these

involved a variety of civil rights suits. decisions can be explained as applications of traditional

exceptions to the exhaustion requirement. See McNeese v.

Board of Education, 373 U.S. 668 (1963). Other decisions

speak to the question in an offhand and conclusory

fashion. See Damico v. California, 389 U.S. 416 (1967).

Moreover, ~~a categorical exhaustion rule would be~~ at the last footnote (in 16

in my dissent inconsistent with the decision in Younger v. Harris, 401

in Parratt. Lets cite

it if you think it useful

U.S. 37 (1971), prescribing abstention when state court proceedings are pending. At least where administrative proceedings are pending, Younger would seem to suggest the appropriateness of exhaustion. Cf. Gibson v. Berryhill, 411 U.S. 564 (1973). Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no exhaustion rule with indications of congressional intent. Finding ^{? nothing} little on point in the history of the Civil Rights Act itself, the Court ^{places primary reliance on the} turns to the more recent Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 et seq. (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to begin civil rights actions on behalf of institutionalized persons. §1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See §1997c. In addition, in §1997e, the Act sets forth an exhaustion requirement for §1983 claims brought by adult prisoners.

On the basis of the exhaustion provision in §1997e, and remarks primarily by Representative

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

MAY 23 1982

Circulated: _____

Recirculated: _____

FIRST DRAFT

7

Patsy v. Board of Regents, No. 80-1874.

Justice Powell, dissenting.

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"simply")

The Court holds that the Board of Regents of the State of Florida, a state instrumentality, is subject to suit in federal court notwithstanding the bar of the Eleventh Amendment. The Court reaches this conclusion through an unprecedented--and far reaching--expansion of the holding in Ex Parte Young, 209 U.S. 123 (1908). As I consider the Court's holding a serious departure from established constitutional doctrine, this dissent addresses primarily the Eleventh Amendment issue.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting en banc. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 et seq. (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I The Eleventh Amendment

A

In this "reverse discrimination" action, petitioner, an employee of the Florida International University, brought suit under 42 U.S.C. §1983 against the Board of Regents of the State of Florida.¹ She did not

¹As the Court notes, see ante, at _____, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner
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name the individual regents as defendants. She sued for \$500,000 in damages, and for injunctive and other equitable relief.² The Board filed a motion to dismiss arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.³ It argued that

also claimed that she had been discriminated against on the basis of her sex.

²Petitioner sought a declaratory judgment "declaring that the Plaintiff has suffered from acts of discrimination." In addition, she asked the court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of \$500,000 as actual and exemplary damages." She requested such further equitable and injunctive relief as the court deems appropriate. App. 38-40.

³The 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."

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as an instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.⁴ And it asserted that there had been no waiver.

The Eleventh Amendment is jurisdictional in nature, and the defense of the Amendment may be raised for the first time on appeal. See Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.")

⁴"As a corporate state agency and component of state government, the [Board] operates with state funds, directs the [State University System], and is local neither in character nor operation. As the 'arm of the state' which manages the Division of Universities of the Department of Education, it is clearly part of the state for Eleventh Amendment purposes." Brief at 18.

The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. 240.2011. The Board consists of the Commissioner of Education and twelve citizens appointed by the Governor, approved by three members of the Cabinet, and confirmed by the Senate. Fla. Stat. 240.207. The chief administrative officer of the Board is the Chancellor, who serves by appointment of the Board.

The Board has general supervisory authority over the State University System. Fla. Stat. 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. Fla. Stat. §240.209.

The Board is an agency of the State of Florida. Fla. Stat. §216.011. See Relyea v. State, 385 So.2d 1378 (Fla. App. 1980). The Board may claim the defense of sovereign immunity in suits under state law. See id.

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Although the Board of Regents was created as a body corporate with power "to sue and be sued ... to plead and be impleaded in all courts of law and equity," Fla. Stat. §240.042(1), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.⁵ In reply, petitioner argued that whether the statute creating the Board amounted to a waiver--and petitioner believed that it did--the Eleventh Amendment simply was irrelevant to the equitable claims she had

Numerous courts of appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Eleventh Amendment. See, e. g., Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1349 (CA9 1981); Brennan v. University of Kansas, 451 F. 2d 1287 (CA10 1971); Ronwin v. Shapiro, 657 F. 2d 1071 (CA9 1981).

⁵See Florida Dept of Health v. Florida Nursing Home, 450 U.S. 147, 150 (1981); Petty v. Tennessee-Missouri Bridge Commn, 359 U.S. 275, 276-277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred ... And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); Great Northern Insurance Co. v. Read, 322 U.S. 47, 54. See Bragg v. Board of Public Instruction, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort").

lodged against the State. See Reply Brief at 3-4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in §1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. 612 F. 2d 946 (CA5 1980). The Court of Appeals, sitting en banc, reversed holding that §1983 plaintiffs must exhaust available and reasonable administrative remedies. 634 F. 2d 900 (CA5 1981). Again the court did not consider the Board's Eleventh Amendment defense.

The Eleventh Amendment question was first raised before this Court in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court. Again petitioner argued that at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"--e. g., from gifts and bequests--

rather than from the State Treasury. These arguments were repeated at oral argument.⁶

As the Court acknowledges, the Eleventh Amendment question is jurisdictional and must be confronted at the outset. See ante, at ____.

B

In interpreting the Eleventh Amendment, the Court ~~has~~ ^{decisions have} sought to accommodate both the principle of sovereign immunity embodied in the Amendment and the states' duty to obey--and the federal courts to enforce--federal law. Thus, it is well established that the State is not "divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" Parden v. Terminal R. Co., 377 U.S. 184, 186 (1964), quoting, Hans v. Louisiana, 134 U.S. 1, 10 (1890).⁷ It also is settled that when a State itself

⁶Tr. of Oral Argument 25-28, 40-41.

⁷In Hans the Court also held that the Amendment bars suits brought against an unconsenting State by its own citizens, although by its terms the Amendment does not apply to this situation. Cf. Monaco v. Mississippi, 292 U.S. 313 (1934) (Eleventh Amendment applies to federal suits against an unconsenting state by a foreign nation). By contrast, the Amendment has not been applied to suits

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is not named as a party to the suit, the Amendment nevertheless applies if the State is the real party in interest. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).⁸

On the other hand, the Court has not interpreted the Amendment to bar federal court jurisdiction when the State has consented to suit,⁹ or to bar review by this Court of an action brought against the State in state court.¹⁰ Congress may lift the bar of the Amendment when

against a State brought by another State or by the United States. North Dakota v. Minnesota, 263 U.S. 365 (1923); United States v. Mississippi, 380 U.S. 128 (1965).

⁸In Ford Motor the plaintiff sued the Department of Treasury of the State of Indiana, and the three officials--the Governor, Treasurer, and Auditor--who constituted the Board of the Department of Treasury. The plaintiff sought a refund of gross income taxes paid to the department. Suit was brought in federal District Court. The Court held that the suit was barred by the Eleventh Amendment. The plaintiff was seeking a refund from the state not a personal judgment against the individual officials: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." 323 U.S., at 464. See Edelman v. Jordan, *supra*, at 663; Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944).

⁹See Clark v. Barnard, 108 U.S. 436, 447 (1883);
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Footnote(s) 10 will appear on following pages.

exercising powers granted to it by §5 of the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Counties and municipalities may not claim immunity under the Amendment. Lincoln County v. Luning, 133 U.S. 529 (1890); Mt. Healthy Bd. of Ed. v. Doyle, 429 U.S. 274, 279-281 (1977) And under Ex parte Young, 209 U.S. 123 (1908), a federal court may order state officials to obey federal law in the future.¹¹

Parden v. Terminal R. Co., 377 U.S. 184 (1964).

¹⁰See Smith v. Reeves, 178 U.S. 436, 445 (1900); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 57 (1944); Chandler v. Dix, 194 U.S. 590, 592 (1904). The Court's assumption of jurisdiction in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), a case originating in state court, thus provides no support for today's decision. For the same reason, the Court's reliance upon Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), is misplaced. See infra.

¹¹Under the theory, some would say fiction, of Ex parte Young, the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, ... he is ... stripped of his official or representative character." Id., at 159. On this analysis, a prospective injunction requiring the official to conform his future behavior to federal law, does not require anything of the State and therefore does not bring the Eleventh Amendment to bear. The granting of retroactive relief, on the other hand, would require the official to take action in his official capacity. Thus, if the official is required to pay damages from state funds,

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Application of these settled principles to the present case is straightforward. This is an action under §1983, and Congress has not removed the bar of the Eleventh Amendment in such actions. See Quern v. Jordan, 440 U.S. 332 (1979). Petitioner seeks relief from the Board of Regents of the State of Florida, an instrumentality or agency of the State. The Board is not a local political body but bears responsibility for the State university system as a whole. Cf. Mt. Healthy Bd. of Ed. v. Doyle, supra. Petitioner's argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court. See, e. g., Florida Dept of Health v. Florida Nursing Home Assn, 450 U.S. 147 (1981).¹² Similarly, petitioner's suggestion that the

the State is directly affected. See Edelman v. Jordan, supra. Similarly, retroactive injunctive relief may require the official to take action in his official capacity and also would be barred by the Eleventh Amendment. Cf. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). Of course, in addition to prospective injunctive relief, a plaintiff may seek damages from the individual officer in his personal capacity. See Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974).

Footnote(s) 12 will appear on following pages.

Eleventh Amendment does not apply to equitable claims against a state is incorrect. See Cory v. White, ___ U.S. ___ (1982).

Thus, unless the rule in Ex parte Young, supra, is extended beyond any previous decision of this Court, the Eleventh Amendment bars this suit. The theory in Ex parte Young, supra, has no application to the State itself or to an instrumentality of the State. If petitioner had sued the individual members of the Board, her claim for damages against them would not have been barred by the Eleventh Amendment. Nor would her claim for equitable relief have been barred to the extent it were limited to future conduct. But petitioner did not sue the members of

¹²In Florida Dept of Health v. Florida Nursing Home Assn, 450 U.S. 147 (1981), the Court of Appeals for the Fifth Circuit found that the Florida Department of Health and Rehabilitative Services had consented to suit. The court based its finding of waiver, in part, on the fact that the Department was a "body corporate" with the capacity to "sue and be sued" under state law. Fla. Stat. Ann. §402.34. This Court reversed holding that a general waiver of sovereign immunity does not amount to a waiver of the Eleventh Amendment. See id., at 150. See note 5, supra.

Without distinguishing Florida Dept of Health, supra, the Court leaves open the question of whether the Board has consented to suit. See ante, at 9 & n. 10.

the Board. She sued only the Board itself, an arm of the State of Florida. Moreover, the principle relief sought by petitioner would impose--in the alternative--an affirmative duty on the Board to promote her to the next available position of comparable status to those to which she had applied, or would "require the [Board] to pay to [petitioner] the sum of \$500,000 as actual and exemplary damages." App., 39. See n. 3, ante.

One would have thought that Ex parte Young was simply irrelevant in these circumstances. Although an individual official may be viewed as acting on his own and without State authority when acting against federal law, the State--or an agency of the State--cannot act other than in its official State capacity. Similarly, an action for damages against the state, or an arm of the state, seeks damages that must be paid from the state's own coffers. Whether the damages come directly from the State's general fund or from some other State fund, the money is no less the State's. Indeed, direct application of Ex parte Young to the State and its instrumentalities would read the Eleventh Amendment out of the Constitution. If the bar of the Amendment is lifted merely upon the naming of a State board, commission, agency or

corporation--opening the way to damages as well as to injunctive relief--then the Amendment no longer would afford constitutionally prescribed protection to the states.

C

Despite the weight of these considerations, the Court concludes that this action is not barred by the Eleventh Amendment. Indeed, the Court undertakes to apply Ex parte Young to the Board of Regents itself. Relying upon the decision in Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), the Court reasons that the Board of Regents, as a body corporate, is no different from a state official. The Court attempts to bolster this novel conclusion by observing that under Florida law the Board of Regents is termed the "director" of the Division of Universities. The Court concludes that, just as in Ex parte Young, the Board of Regents "may be sued for unconstitutional or unauthorized actions, as long as the plaintiff is not seeking monetary relief that must be paid out of the state treasury." Ante, at 8.

The Court's conclusion is supported neither by reason nor precedents of this Court. As indicated above, the rationale of Ex parte Young does not apply to a State

or State instrumentality. The State cannot be "stripped" of its own authority. Moreover, if the Board of Regents is a State agency--and it clearly is--then its assets are also those of the State's. Yet the Court's decision exposes the Board's assets to a damage award on the double fiction that the Board is really an "official" and that its separate assets somehow belong to this fictitious being rather than to the State. On such a theory, a state welfare board, highway department or any other agency, board or department of a state with any separate funds or income could be sued for damages. Such a conclusion is at odds with the Court's holding in Kennecott Copper Corp. v. Tax Commn, 327 U.S. 573 (1946), that the segregated funds of the State Tax Commission were State monies subject to the Eleventh Amendment.

Nor does the Board of Regents' corporate status under state law support the Court's holding. State governments consist in major part of a variety of boards, commissions, agencies, and corporations. These State entities are no less instruments of the State because they may be vested under state law with the power to contract, to sue and be sued. This Court repeatedly has held the Eleventh Amendment to bar suit against such state

corporate agencies. See Great Northern Insurance Co. v. Read, 322 U.S. 47; Ford Motor Co. v. Department of Treasury, 323 U.S. 454 (1945); Kennecott Copper Corp. v. State Tax Commn, 327 U.S. 572 (1946).

Thus, in Parden v. Terminal R. Co., 377 U.S. 184 (1964), the Court assumed that a state owned railroad--as an instrumentality of the State--was immune from suit in federal court absent a waiver. The railway in Parden was authorized to operate "as though it were an ordinary common carrier." 377 U.S. 185. It performed services for profit and had contracts and agreements with various labor organizations. It was "indisputably a common carrier ... engaging in interstate commerce." Id., at 185. No suggestion was made that as a State body, with separate funds, the railroad was no longer an instrumentality of the State but was merely a State official. And just last term the Court held that the Florida Department of Health, a "body corporate" under State law was immune from suit. Florida Dept of Health v. Florida Nursing Home Assn, 450 U.S. 147 (1981). Cf. Alabama v. Pugh, 438 U.S. 781 (1978) ("There can be no doubt ... that suit against the State and its Board of Corrections is barred by the Eleventh Amendment"). The Court's conclusion that corporate status

converts a State body into a State official, subject to suit, cannot be reconciled with these well established precedents.

D

I am unaware of any prior decision of this Court that supports the Court's application of Ex parte Young to State instrumentalities. Hopkins v. Clemson College, supra, relied upon so heavily by the Court, is simply irrelevant. In that case suit was brought against a state college in state court to recover damages caused by the college's construction of a dyke. The state courts held that the college was protected from suit by the state law of sovereign immunity. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case.¹³ It was clear before Hopkins that the Eleventh Amendment did not apply

¹³The state college recognized that there was no Eleventh Amendment question. In its brief it noted: "It is difficult to see how either Section 2 of Article III, of the Constitution of the United States or the Eleventh amendment has any application to the inquiry whether a suit by a citizen of a State in its own Courts is a suit against that State. That seems to be purely a question of local law to be determined by the State Court." Brief at 20.

to bar review in this Court of any federal question presented in a suit against a State in state court. See note 10, supra. However the holding in Hopkins may be viewed, no Eleventh Amendment question was presented to the Court.¹⁴ It therefore is no surprise that the opinion has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state agency in federal court. If the case could be viewed as standing for the proposition that state agencies may be sued as if they were state officials, the case long since has been overruled sub silencio by subsequent decisions. See Florida Dept of Health v. Florida Nursing Home Assn, supra. Hopkins does not deserve the pride of place given to it by the majority.¹⁵ It is in fact a non-

¹⁴Hopkins has been viewed primarily as standing for a principle of agency law. See Larson v. Domestic & Foreign Corp., 337 U.S. 682, 694 (1949) ("agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal"); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F. 2d 599, 601 n. 1 (CA10 1966).

¹⁵The irrelevance of Hopkins is further indicated by the fact that the College's activities in that case were viewed as proprietary in nature:

"[T]his is not an action against the College for a tort committed in the prosecution of any
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precedent.

The Court today simply announces a new doctrine, one that exposes the instrumentalities of the State itself to suit in federal court.¹⁶ After today's decision, state

governmental function. The fee was in the State, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the College, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. 221 U.S., at 647.

Cf. Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973) (distinguishing Parden v. Terminal R. Co., 377 U.S. 184 (1964), on the basis that Parden concerned State proprietary activity).

¹⁶The Court suggests that in prior decisions the Court has permitted suit against State Boards of Regents. See ante, at 5. Yet in none of these suits was the jurisdictional issue posed as it is here. Thus, for example, in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), the Eleventh Amendment issue was not present because the case was here on petition to the California Supreme Court. See note 5, supra. And in each of the other cases cited by the Court, the plaintiff had the good sense to name other defendants in addition to the particular state board. See, e. g., Board of Regents v. Tomanio, 446 U.S. 478 (1978); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

The Court also argues that the courts of appeals are split on the question of whether damages can be awarded against state universities. Yet the two cases cited by

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boards and commissions may be sued for injunctive relief. The Court also holds that such bodies may be sued for damages on the fiction that their segregated assets are not the State's.¹⁷ The Court's extension of Ex parte

the Court to demonstrate a split on this question do not support the Court's assertion. In SONI v. Board of Trustees, 513 F. 2d 347 (CA6 1975) the court found that the Board of Trustees had waived its immunity to suit, while in Goss v. Jacinto Junior College, 588 F. 2d 96, 98-99 (CA5 1979) the court reasoned that the particular junior college was similar to a county or municipality, an "independent 'political subdivision' as a matter of Texas statutory and common law." The Court suggests as well that the courts of appeals are agreed that injunctive relief may be awarded against state universities and state boards of regents. Again the cases cited provide little support for the Court's assertion. In New England Patriots Football Club, Inc. v. University of Colorado, 592 F. 2d 1196, 1201 (CA1 1979), the court held that individual members of the Board of Regents might be sued for prospective injunctive relief. It did not hold, as the Court implies, that the University itself might be sued. Rather, it accepted "the University's identification with the state." And in Gay Student Services v. Texas A & M University, 612 F. 2d 160, 165 (CA5 1980), it is unclear that the court held more than that officials of the University could be sued for injunctive relief. Unlike the situation in those two cases, petitioner sued only the Board of Regents. Numerous courts of appeals have held state board of regents to be immune from suit in federal court by reason of the Eleventh Amendment. See n. 4, supra.

¹⁷ Whether a State board, like a State official, may claim good faith immunity is not clear but of substantial significance. See Owen v. City of Independence, 445 U.S. 622 (1980).

Young to the State itself destroys the rationale of that decision. It also undermines the careful balance worked out in this sensitive area of the law.

The decision is simply wrong. The Court should dismiss the suit on the basis of the Eleventh Amendment.

II Exhaustion of Remedies

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeal's persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in §1983 suits. Other Courts of Appeals have adopted a similar rule. See e. g., Eisen v. Eastman, 421 F. 2d 560 (CA2 1969); Secret v. Brierton, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to §1983 actions. It found that the prior decisions of this Court did not clearly decide the question.¹⁸ See Barry v.

¹⁸"[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." Developments in the Law--Section 1983 and Federalism, 90

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Barchi, 443 U.S. 55, 63 n. 10 (1979); Gibson v. Berryhill, 411 U.S. 564, 575 n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by §1983.

I agree with the Court of Appeals' opinion. The requirement that a §1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See Prentis v. Atlantic Coast Line Co., 211 U.S. 210, (1908) (opinion of Justice Holmes). The rule rests on sound considerations. It does not defeat federal court jurisdiction, it merely defers it.¹⁹ It permits the states to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to

Harv. L. Rev. 1133, 1274 (1977).

¹⁹Cf. Fair Assessment in Real Estate v. McNary, U.S. _____, _____ (1982) (Brennan, J., concurring) (exhaustion requirement in §1983 cases can be justified by "a somewhat lesser showing ... where .. we are concerned not with the displacement of the §1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process").

review state action or supersede state proceedings. See Younger v. Harris, 401 U.S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that Monroe v. Pape, 365 U.S. 167 (1961), was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U.S. Courts 238 (1961). In 1981, over 30,000 such suits were commenced.²⁰ Annual Report of the Director of The Administrative Office of the U.S. Courts 63, 68 (1981). Such a dramatic increase in litigation imposes a heavy burden on the federal courts to the detriment of all federal court litigants, including those whose constitutional rights in fact have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion

²⁰Of the approximately 30,000 civil rights suits filed in fiscal year 1981, 15,639 were filed by state prisoners under §1983. The remainder involved a variety of civil rights suits. See Parratt v. Taylor, 451 U.S. 527, 554 n. 13 (1981) (POWELL, J., concurring).

requirement in §1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See McNeese v. Board of Education, 373 U.S. 668 (1963). Other decisions speak to the question in an offhand and conclusory fashion. See Damico v. California, 389 U.S. 416 (1967) (unargued per curiam). Moreover, a categorical no-exhaustion rule would seem inconsistent with the decision in Younger v. Harris, 401 U.S. 37 (1971), prescribing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, Younger would seem to suggest the appropriateness of exhaustion. Cf. Gibson v. Berryhill, 411 U.S. 564, 574-575 (1973). Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no exhaustion rule with indications of congressional intent. Finding nothing on point in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 et seq. (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to begin civil

rights actions on behalf of institutionalized persons. §1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See §1997c. In addition, in §1997e, the Act sets forth an exhaustion requirement for §1983 claims brought by adult prisoners.

On the basis of the exhaustion provision in §1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a general no exhaustion rule. The irony in this reasoning should be obvious. The concern that prompted the Department of Justice to support, and the Congress to adopt, §1997e was the vast increase in §1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 11% of the total federal district court docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not be

available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal court litigation. It was primarily this problem that prompted enactment of §1997e.

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorize the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained §1997e as follows:

"In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures before the Attorney General can become involved pursuant to [the Act]."
 Congressional Record S1713, February 26, 1980.²¹

²¹Senator Hatch offered the same explanation on several other occasions in the course of the debate. See Footnote continued on next page.

Senator Bayh, the author of the Act, described the exhaustion provision in similar terms:

"[I]n the event of a prison inmate's rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their administrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act]." Congressional Record S1859, February 27, 1980.

In short, in enacting the Civil Rights of Institutionalized Act Congress was focussing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in §1983 actions. Also revealing as to the limited purpose of §1997e is Congress' consistent refusal

Congressional Record S4293, April 29, 1980 ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); Congressional Record S4626, May 6, 1980 ("Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

"No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S.1983, 96th Congress, 1st Session.

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies--subject to well developed exceptions--is firmly established in virtually every area of the law. This is dictated in §1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.



U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

June 1, 1982

Ms. Sara Sonet
Research Librarian
Supreme Court of the United States
Washington, D.C. 20543

Dear Ms. Sonet:

Thank you for your letter of May 26, 1982, inquiring about the status of the program established by 42 U.S.C. Section 1997(e) relating to inmate grievance procedures.

Section 1997(e), enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act, requires the Attorney General to promulgate minimum standards for inmate grievance procedures and to establish a method of certifying such procedures upon the application of states and political subdivisions. Pursuant to the directive in Section 1997(e), the Department, after thorough study and review, promulgated standards for inmate grievance procedures and established a certification method on October 1, 1981. Those standards and the procedure for certification may be found at 28 C.F.R. Part 40.

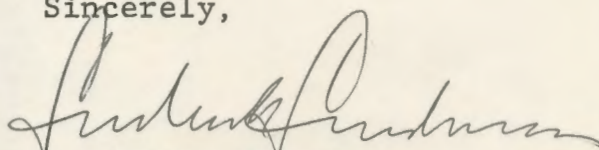
On October 27, 1981, the State of Wyoming submitted the first application for certification under the standards. The Department reviewed Wyoming's application and advised the appropriate officials of a number of deficiencies in the application materials. Wyoming submitted additional materials in support of its application in March of 1982 in order to correct these deficiencies. The Department is in the process of reviewing the additional submission.

To date, Colorado and New Mexico are the only other jurisdictions that have submitted applications for certification of their inmate grievance procedures. Colorado's application was submitted by letter dated April 1, 1982 and is currently under review. New Mexico submitted its application by letter dated May 25, 1982; that application has just been received.

You also ask whether the Attorney General has submitted to Congress the report required by 42 U.S.C. Section 1997(f). That Section, also a part of the Civil Rights of Institutionalized Persons Act, requires the Attorney General to report to Congress on the discharge of certain duties imposed on the Department under the Act relating to the review of complaints of mistreatment made by persons confined in state or local institutions such as prisons and jails. In March of 1982, the Attorney General submitted the first report required by Section 1997(f) to Congress; a copy is enclosed. You will note that nothing in Section 1997(f) requires the Attorney General to include in the report a summary of his activities related to the processing of applications for certification of inmate grievance procedures and, accordingly, no such summary is contained in the report.

I hope this answers your questions. Please do not hesitate to contact me if further information is needed.

Sincerely,

A handwritten signature in dark ink, appearing to read "Frederick Friedman", written in a cursive style.

Frederick Friedman
Special Assistant to the
Associate Attorney General

Enclosure

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

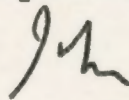
June 4, 1982

Re: 80-1874 - Patsy v. Florida

Dear Thurgood:

Although I was content with your Eleventh Amendment analysis, I am still with you on your most recent circulation.

Respectfully,



Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1982

Re: No. 80-1874 - Patsy v. Board of Regents of Florida

Dear Thurgood:

On the understanding that the two minor changes that I have suggested will be made, I am glad to join your recirculation of June 3.

Sincerely,

H.A.B.
—

Justice Marshall

cc: The Conference

lfp/ss 06/08/82

MEMORANDUM

TO: David DATE: June 8, 1982
FROM: Lewis F. Powell, Jr.

80-1874 Patsy v. Board of Regents

I find your revised draft of June 7 totally persuasive until we come to the final section of Part I (subpart D, as relettered by me, pp. 14-18, inclusive).

To this point, you have stated the case, and then demonstrated by an impressive array of authorities, well presented, that the Eleventh Amendment issue is jurisdictional in the most fundamental sense, except only that a state may consent to be sued. As I have indicated in marginal notes, the quotations from prior decisions seem controlling. If the cases themselves - i.e., the issue presented and the holding of the Court - are consistent with these quotations, I suggest making the language in the Eleventh Amendment section of the opinion (Part I) more positive. I have suggested some language that I am sure you can improve.

Subpart D (commencing at the bottom of p. 14) addresses the arguments of petitioner as to why the Eleventh Amendment is not a bar. I do not have TM's opinion with me, and the truth is I have not read it since the Eleventh Amendment issue was relegated to a footnote. I will try to read it tomorrow. But if my understanding is correct, the arguments you address in Subpart D are the petitioner's and

are not relied upon in TM's revised opinion. This should be made explicit at the outset of Subpart D. You might commence along the following lines:

"As the Court itself offers no answer to the reason and force of its prior decisions, I turn now to the arguments advanced by petitioners. It bears repeating, that both parties have addressed this issue and it was fully aired at the oral argument. See supra, at ____." (David cite general page references to the oral argument).

As I read Subpart D, I become less certain as to its central thrust. The two specific arguments referred to on page 15 are petitioner's claims of waiver and that the Amendment does not bar equitable claims. You dispatch each of these arguments in a sentence rather unpersuasively. The draft did address the waiver issue on page 4 as a part of the statement of the case and position of parties. Is it desirable, David, simply to assert, in a brief sentence for each, these two grounds on which petitioner relies, and move the argument of these issues - including footnotes - to Subpart D? And do we make the point explicitly anywhere that the requirement of our cases is "consent", and this cannot be implied. It can be accomplished only by explicit action. There is a great deal of excellent language on this, particularly for the immunity of the United States.

The greater part of Subpart D is devoted to Ex parte Young. Did petitioner rely on it? As I dictate this memorandum, I see that your reliance on the Eleventh

Amendment is the principal answer to the equitable relief claim, although I do think this is not made as clearly as it can be.

In sum, Subpart D as now written seems a weak ending. It is appropriate to conclude an opinion by advancing - and knocking down - arguments of the losing party. But the principal "knocking" on the waiver or consent issue is on p. 4.

After you have read this memo, we can talk about this.

L.F.P., Jr.

SS

MEMORANDUM

TO: David DATE: June 8, 1982
FROM: Lewis F. Powell, Jr.

80-1874 Patsy v. Board of Regents

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After you have read this memo, we can talk about this.

L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

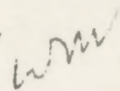
June 9, 1982

Re: No. 80-1874 Patsy v. Board of Regents of the
State of Florida

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1982

Re: No. 80-1874 - Patsy v. Bd. of Regents of Florida

Dear Lewis:

Please show me as joining Part II of your dissenting opinion. You may add at the end something like:

"I am authorized to state that Chief Justice Burger joins in Part II of this dissenting opinion."

Regards,

WRB

Justice Powell

[80-1874 ; RE JUNE 10, 1982]

David —

Disappointing —
but perhaps helpful
long term.



David - Have ~~added~~

Supreme Court of the United States
Washington, D. C. 20543

added
this?

✓

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1982

RE: 80-1874 - Patsy v. Board of Regents of the State
of Florida

(Due down on
Monday)

Dear Lewis:

I join Part II of your dissent. Through inadvertence my
June 10 memo to you did not go to the Conference.

Regards,

WRB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

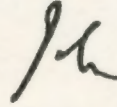
May 21, 1982

Re: 80-1874 - Patsy v. Board of Regents
of Florida

Dear Thurgood:

Please join me.

Respectfully,



Justice Marshall

Copies to the Conference

May 26, 1982

Mr. Fred Friedman
Special Assistant to the Associate
Attorney General
Department of Justice
Washington, DC 20530

Dear Mr. Friedman,

I am interested in ascertaining the status of the program established by 42 U.S.C. 1997(e). As we have discussed, this section provides for review and possible certification by the Attorney General of procedures established by state correctional facilities to review prisoner grievances.

Specifically, I would like to know which states have submitted procedures for review by the Attorney General. Has the Attorney General certified the procedures of any of those state correctional facilities as submitted? Has the Attorney General submitted a report to Congress describing the status of his activities per 42 U.S.C. 1997(f)? If so, may I obtain a copy of this report?

Thank you so much for your patience during our numerous telephone conversations. I would deeply appreciate your prompt response to this request.

Yours sincerely,

Sara Sonet
Research Librarian

REPORT OF THE ATTORNEY GENERAL TO CONGRESS REGARDING
ACTIVITIES INITIATED PURSUANT TO THE CIVIL RIGHTS
OF INSTITUTIONALIZED PERSONS ACT, 42 U.S.C. §1997

(As required by 42 U.S.C. §1997(f))

I. Introduction

The Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 (hereinafter referred to as the Act), was enacted in May, 1980. It authorizes the Attorney General to initiate or to intervene in equitable actions against public institutions in which he has reasonable cause to believe there is a systematic pattern or practice of flagrant or egregious violations of the affected persons' constitutional or federal statutory rights. This report will provide Members of Congress with the criteria by which actions are initiated pursuant to the Act, the details surrounding actions initiated under the Act in fiscal year 1981, and information concerning the progress made in federal institutions toward meeting promulgated standards for such institutions or constitutionally guaranteed minima. It is submitted in accord with the reporting requirements of 42 U.S.C. §1997(f).

II. Criteria for Review of Complaints and for the Initiation of Investigations

(a) Nature of the Allegations

Determine the severity and scope of the allegations, including the exigency of the circumstances presented, e.g., are life threatening emergencies or abuses implicated; how large a class of persons are involved. Make a judgment concerning whether a claim authorized by Public Law 96-247 is presented.

(b) Evaluate the Allegations in Light of Decisional Law

Review appropriate decisional law to determine whether the courts have addressed the issues presented by the complaint. Determine whether the Special Litigation Section has pursued similar claims in the past; whether the issue is novel or complex; and whether, although the issues may be well settled in the decisional law, enforcement actions are common.

(c) Potential Alternative Resolutions

Ascertain, if possible, whether the complainant has private resources, or retained private or public interest counsel. Determine whether the assistance available to the complainant is adequate to address the issues raised by the complaint. Assess whether there are, reasonably available, administrative or other means that are likely to offer speedy relief.

(d) Geographic Location

Determine whether the Special Litigation Section has other cases or matters pending in the jurisdiction from which the complaint has come and assess the likely impact that a new investigation may have on those matters or cases.

(e) Relationship of the Complaint to Section Priorities

From time to time, the Special Litigation Section staff will review, in consultation with the Assistant Attorney General's office, its litigation priorities. In each instance, a decision must be made as to whether a particular complaint falls within those priorities. To the extent that it does not, it must then be determined whether there are specific, unusual factors that nevertheless justify further action.

(f) Resource Allocation

Make a preliminary judgment about the time, effort and resources the complaint, if investigated, will likely consume. For example, how many lawyers and support staff will be required to conduct the investigation and for what period? How much travel is required? What need will there be for use of consultants? How active are other pending cases and matters in the office?

2. Review of Particular Complaint

(a) Upon receipt of a complaint, the above-criteria shall be applied to it, and an initial determination shall be made with respect to its merits.

(b) In the event that the complaint, on its face, appears meritorious there shall be additional efforts made to obtain preliminary verification of the allegation from public sources, existing files or other persons known to the Division or identified in the complaint.

(c) If the complaint is without merit or otherwise fails to satisfy the Division's criteria, the complainant shall be so notified and the matter closed.

3. Investigation Memorandum

(a) If, on the basis of the review and application of criteria, there is a need for a statutory investigation, a memorandum shall be prepared. It must, at a minimum, review the complaint, applying the criteria specified above, describe the independent verification and corroboration obtained, and suggest methods and timeframes for conducting an investigation.

(b) The memorandum shall be written to the Section Chief, after review by the appropriate Deputy. It shall be accompanied by proposed notice letters and, where appropriate, by FBI investigation requests.

4. Section Chief Review

(a) Upon receipt of the investigation memorandum, the Section Chief shall review promptly the recommendation.

(b) If the Chief agrees with the recommendation, he or she shall forward it to the Assistant Attorney General in accordance with the provisions set forth below. The Chief may request additional information, require other modification of the proposal, or disapprove the recommendation.

5. Assistant Attorney General Review

(a) In the event that the Section Chief recommends commencement of an investigation, he or she shall forward this recommendation, together with the investigation memorandum and the proposed notice letters, to the Assistant Attorney General for Civil Rights.

(b) The Assistant Attorney General shall review the recommendation and may approve the recommendation by signing the proposed notice letters, may disapprove by explanatory memorandum stating briefly the reasons therefor, or may require such modification or additional information as is deemed necessary.

6. Commencing an Investigation

When approved, the investigation is begun officially by forwarding a notice letter, return-receipt requested, to the appropriate state or local officials. No investigation shall begin for seven days from the date of receipt of such notice by the officials. The notice to federal officials required by the Act shall also be sent at this time.

7. Conduct of the Investigation

(a) The attorney assigned to conduct the investigation shall endeavor to enlist the cooperation of state or local authorities. The attorney shall make reasonable and timely requests for access to the institution(s), for documents and for such other information as may be necessary, and shall conduct the investigation generally in a professional and courteous manner.

(b) The investigation may, as necessary, include site visits by the attorney, by FBI agents or by professional consultants retained for this purpose. It may also include a review of pertinent documents, interviews with residents of the facility or other members of the public with relevant information, and such other standard investigatory techniques as may be appropriate.

(c) Attorneys shall make reasonable efforts, in accordance with their case load and work assignments, to assure that the investigation is conducted and completed promptly.

8. Completion of the Investigation

Upon the completion of the investigation, the attorney shall review all the information obtained and apply to it the criteria set forth in Standard 1, above.

(a) If the evidence is insufficient to justify recommending further action, the attorney shall so advise the Section Chief and shall prepare an appropriate letter, for the Assistant Attorney General's signature, which notifies the state or local authorities that the matter has been closed.

(b) If there is evidence of flagrant or egregious conditions that appear to result in legal violations, the attorney shall so advise the Section Chief and shall prepare

a letter, for the Assistant Attorney General's signature, which notifies the state or local authorities of the alleged conditions, the supporting facts and the minimum remedial measures necessary. In matters involving jails or prisons, the views of the Federal Bureau of Prisons shall be sought and considered.

(c) The notice letters referred to in (a) and (b) above shall be reviewed by the Section Chief, who may modify them or request additional information and then forward them to the Assistant Attorney General for signature.

(d) The Assistant Attorney General shall sign, modify, request additional information or take such other action as is appropriate.

9. Discussions with State or Local Officials

(a) In the event that a letter is sent notifying state or local officials that violations may exist, the attorney shall then enter into good-faith discussions concerning the institution's response to the allegations and shall consider whatever remedial measures are proposed. If state officials so desire, the attorney shall endeavor to assist the institution in obtaining information about potential federal funds that may be available to help correct the alleged problems.

(b) Where such negotiations result in a mutually satisfactory resolution of the alleged problems, the attorney will propose a consent decree or other enforceable order to the state or local officials for their signature.

(c) Where such negotiations fail to achieve a satisfactory resolution, the attorney will proceed with the requirements set forth below concerning the filing of a civil action.

10. Initiation of Civil Action

(a) Where negotiations fail to produce a mutually satisfactory result, the attorney may submit the standard memorandum in justification for initiating a lawsuit, accompanied by a proposed complaint and certificate for the Attorney General's signature.

(b) The justification memorandum shall, in addition to the standard required items, review compliance with this procedure, discuss the negotiations with state officials and stress

flagrant and egregious conditions believed to have gone uncorrected. In matters involving prisons or jails the views expressed by the Federal Bureau of Prisons shall be set forth in the justification memorandum.

(c) The memorandum must be reviewed and approved by the Section Chief, who shall forward approved recommendations to the Assistant Attorney General. If the Assistant Attorney General approves filing the case, it shall be forwarded to the Attorney General or Deputy Attorney General, as appropriate, for review and approval.

(d) The complaint must be: (1) signed personally by the Attorney General; (2) accompanied by the statutorily required certificate signed personally by the Attorney General; (3) filed no sooner than 49 days after receipt by state officials of the Completion of Investigation Letter required by Section 8, above.

11. Conduct and Resolution of Suits

Suits filed pursuant to the Act and these operational procedures shall proceed in accordance with the same standards applicable to other suits initiated by the Civil Rights Division. In matters involving jails or prisons, positions shall be developed in consultation with the Federal Bureau of Prisons.

12. Intervention Under the Act

(a) In situations where the Division is requested or desires to intervene in an ongoing suit involving the conditions in a public institution, the same review, investigation and memoranda required in other cases where the Division intervenes are applicable. In addition, the following conditions must be met:

(1) In evaluating a case for intervention, the criteria set forth in Section 1 above shall be applied;

(2) In matters involving jails or prisons, the views of the Federal Bureau of Prisons shall be sought and considered.

(3) The complaint in intervention must be signed personally by the Attorney General and must be accompanied by the statutorily required certificate, also signed personally by the Attorney General.

(4) At least 15 days prior to filing the complaint in intervention, a letter must be sent to the appropriate state or local officials, advising them of the proposed intervention, the legal violations believed to exist, the facts supporting these allegations and minimum measures believed necessary to correct the violations. This letter may be signed by the Assistant Attorney General or such other official as the Attorney General may designate. The notice to federal officials required by the Act shall be sent at this time.

(b) Once approved and filed, suits in intervention shall be conducted and resolved in accordance with the same standards applicable to other suits intervened in by the Civil Rights Division.

Since the enforcement of this Act has not yet reached the point where federal financial and technical assistance to the state or other entities has been discussed, ^{*}/ we are unable to provide descriptions of such assistance as required by Section 8(4).

*/ In the proposed consent decree with Defendants in Santana v. Collazo (D. P.R.) prior to our intervention under 42 U.S.C. 1997, the federal government offered to provide expert consultation on the appropriate mechanisms which should be used to facilitate gradual closing of the isolation unit of the subject juvenile facilities; since the consent decree was never entered, these services were not utilized. The federal government also offered to provide technical assistance to evaluate the individualized needs of each juvenile for placement outside of defendant facilities; Puerto Rican officials declined this offer in 1979.

III. Actions Initiated in Fiscal Year 1981

Section 8 of the statute requires specified information concerning all actions instituted pursuant to the Act. That information follows.

To date, no case has been initiated under the Act. However, the following actions occurred during the fiscal year:

1. On October 15, 1980, we notified Mr. Steven R. Reid, Chairman of the Dauphin County Board of Prisons, and other appropriate officials of our intent to investigate allegations of unconstitutional practices and conditions in the Dauphin County Prison, Harrisburg, Pennsylvania. This investigation was initiated after receipt of allegations of brutality by correctional officers, inadequate medical and psychiatric services, inadequate access to courts and legal materials, and egregious conditions of confinement. After evaluating the data collected during the investigation, we concluded that no further action was warranted. The Department advised Mr. Reid on August 4, 1981 that the investigation was being closed.
2. On November 5, 1980, we formally advised Governor David Treen of our intent to investigate conditions and treatment at East Louisiana State Hospital and Feliciana Forensic Facility in Jackson, Louisiana. The investigation was based in part on a series of newspaper articles describing seriously substandard living conditions at the two facilities, including several recent deaths among patients, lack of care, inadequate staffing, brutality and filthy conditions. The investigation has thus far included tours of the facilities by Department attorneys and an ~~expert~~ consultant, meetings with state officials

to discuss recent steps taken to improve services and physical conditions, and review of institutional records. The Department is continuing to evaluate the facts gathered in this investigation.

3. On November 7, 1980, we notified Governor Harry Hughes and other state officials of our intent to investigate conditions and treatment provided to the mentally retarded residents of Rosewood Center, Owings Mills, Maryland. The Department received a written complaint in May, 1980 alleging that residents of Rosewood were confined in an environment that failed to provide necessary habilitative services; that residents were needlessly institutionalized; that residents were subjected to physical abuse; and that Rosewood was short of crucial staff. The investigation has included meetings with state officials and client advocacy groups, tours of the institution on several occasions, once with an expert consultant, and review of numerous institutional and state documents. We are presently evaluating the collected information.
4. On November 14, 1980, we notified Governor Hugh Carey and appropriate corrections officials of our intent to investigate Attica Prison, Attica, New York. Previously, a number of inmate complaints alleging inadequate conditions of confinement, including the special housing unit were forwarded to the Department by the Honorable John T. Curtin, U.S. District Judge for the Western District of New York. We reviewed the complaints and found them to be a sufficient basis on which to initiate an investigation under the Act. We are continuing to evaluate the data already collected by the Federal Bureau of Investigation on this matter.
5. On December 3, 1980, we notified Governor Lee Sherman Dreyfus and state correctional officials of our intent to investigate the Wisconsin prison system. The Department had previously received a number of inmate complaints alleging unconstitutional conditions within the state prison facilities. Our investigation has thus far focused particularly

on the areas of environmental health and safety, and medical care delivery. An expert consultant has visited the facilities and is preparing a report based upon his observations of the prison, and review of institutional documents.

6. On December 3, 1980, we notified Mayor Kevin H. White and other Boston city officials of our intent to investigate conditions of confinement at Deer Island House of Corrections, Boston, Massachusetts. This action was based upon receipt of citizen correspondence and newspaper articles which alleged unconstitutional conditions of confinement at the facility, including inadequate physical facilities, medical care and overcrowding. We are continuing to evaluate information on this facility gathered by the FBI at our request.
7. On December 12, 1980, we notified Governor Richard Thornburgh and other state correctional officials of our intent to investigate Western State Correctional Institution, Pittsburgh, Pennsylvania. On the basis of prior inmate correspondence, the Federal Bureau of Investigation obtained requested information concerning the conditions of confinement. On August 5, 1981, we advised Governor Thornburgh that our investigation indicated deficiencies primarily in the areas of medical and mental health care. We recommended a number of corrective measures including assessment of professional staffing needs, plans for training medical personnel, and provision of appropriate services and housing to mentally ill inmates. We have subsequently received a number of plans designed by state correctional officials to correct the identified deficiencies. We are reviewing these plans.
8. On December 15, 1980, we notified Governor Richard L. Thornburgh and state juvenile officials of our intent to investigate the Youth Development Center, Cornwell Heights, Pennsylvania. Our investigation was based upon information contained in reports on the facility by public interest groups which documented deficiencies in services and conditions of confinement. These deficiencies included inadequate educational and rehabilitative services as well as substandard living facilities. The investigation has included tours of the facility, including one by an expert consultant, and a review of documents from the institution. We are continuing to evaluate the information received.

9. On February 24, 1981, we notified Governor John D. Rockefeller IV and other state officials of our intent to investigate the West Virginia Industrial School for Boys in Pruntytown, West Virginia. We had previously received a report prepared by a citizens group which indicated significant deficiencies in services provided to juveniles confined in the facility. We had also received information that residents had been abused by staff at Pruntytown. Our investigation has focused on the physical conditions, educational and programmatic services, and the degree to which the institution protects the juveniles from harm. We have toured the facility, and are reviewing documents provided by the state.
10. On March 23, 1981, we notified Governor Frank White and state health officials of our intent to investigate Benton Services Center Nursing Home in Benton, Arkansas. The action was initiated on the basis of a written complaint which alleged that the physical environment at the facility was inadequate; that large groups of residents, especially mentally retarded and mentally ill residents, received no program services at all; that there were staff deficiencies; and that patient abuse had occurred. Thus far, we have toured the facility with an expert consultant and are reviewing other factual data concerning the facility. We are awaiting receipt of the consultant's report on his findings.
11. On March 23, 1981, we notified Governor Robert Graham and state health officials of our intent to investigate South Florida State Hospital, Hollywood, Florida. Our investigation was initiated on the basis of a citizen complaint and newspaper articles which suggested serious deprivations of constitutional rights due to alleged staffing shortages, lack of treatment programs, inadequate physical environment and instances of physical abuse of residents. Our investigation has thus far included a tour of the institution, and a review of institutional records and plans for improvement. On August 5, 1981, we advised Governor Graham of our finding that Florida officials have prepared extensive remedial plans to address deficiencies in the operation of South Florida State Hospital. Initial

legislative proposals based upon these plans were to be finalized in Fall, 1981 for submission to the State Legislature. Based upon the thoughtful formulation of these plans and their submission to the legislature for action, we propose to delay further investigation pending the result of legislative action.

12. On July 13, 1981, we notified Governor James R. Thompson and other state officials of our intent to investigate Dixon Development Center, Dixon, Illinois. We had previously received information which alleged that conditions at the facility were substandard; that staffing was deficient; that some residents of the facility had been abused; that habilitation services were inadequate; and that some residents were receiving inappropriate medications. Division attorneys have toured the facility and consulted with groups of interested citizens. The investigation is continuing.

Through rather unique circumstances, the Department intervened in Santana v. Collazo, Civil Action No. 75-1187 (D. P.R.) under the Act on January 27, 1981. The United States previously participated as plaintiff-intervenor in this case from December 6, 1976 to September 11, 1980 when it was dismissed by the Court. In its order of dismissal, however, the Court granted the Attorney General the opportunity to subsequently move to intervene pursuant to Section 5(c) of the Civil Rights of Institutionalized Persons Act. The pre-filing requirements of the Act were deemed to have been met by the facts obtained through discovery and trial evidence, and exchanged during lengthy negotiations which had earlier resulted in three proposed consent decrees. Trial concluded in July, 1981. Post-trial briefs were submitted in October, 1981.

IV. Federal Institutions

Section 8(5) of the Act requires the Attorney General to report on the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

The federal prison system is operated by the Bureau of Prisons (BOP) which has taken a number of steps to meet such standards and protect constitutional rights. To date, twelve federal prisons have been accredited by the Commissioner on Accreditation for Corrections (CAC); three other BOP facilities are candidates for accreditation and are awaiting final audit or full hearing before the Commission. The goal of the federal prison system, as set forth in its current Five Year Plan (1981-1985) is that all federal correctional facilities will be:

1) accredited by the Commission on Accreditation for Corrections, and 2) meet the Federal Standards for Prisons and Jails, issued by the Department of Justice. The Bureau is on schedule in meeting this goal. Since 1978, the Bureau has initiated the year long accreditation process in 5 to 12 of its facilities each year. Additionally, for those institutions which have already been accredited, a year long re-accreditation process must be undertaken every third year.

In 1981, the federal prison system began an internal audit, the Standards Compliance Review project, to insure that its program managers incorporate the CAC correctional standards into their institution's basic policy directives and procedural guidelines. Where the Review indicated that such inclusion was not occurring, plans of actions were developed to revise policy. The information gathered by this internal audit permits the Bureau to identify areas where standards are not currently being met. In this way, deficiencies in policies, procedures or resources may be corrected in order to obtain accreditation for the facility.

The Bureau has launched a serious, well planned effort to bring its prisons into compliance with professional correctional standards. Based upon its efforts since 1978, the Bureau has made considerable progress toward meeting standards and guaranteeing minimal constitutional protections.

Similar progress has been made at St. Elizabeth's Hospital, Washington, D.C., which is operated by the Department of Health and Human Services. The hospital, which serves approximately 3,000 persons with psychiatric disorders, is accredited by the Joint Commission on Accreditation of Hospitals (JCAH) which requires compliance with specific standards set forth in the JCAH Consolidated Standards for Psychiatric Hospitals and Standards for Community Mental Health Care. St. Elizabeth's Hospital has taken additional steps to provide for the constitutional rights of its patient population by establishing an internal Patient Advocate's Office. This office is charged with the responsibility of operating a complaint system to assist in problem resolution and monitoring a variety of hospital reports to assure appropriate action on alleged violation of patient rights, as well as responsibility to educate hospital staff about the rights of patients.

V. Conclusion

The enforcement activities of the Civil Rights Division under the Civil Rights of Institutionalized Persons Act are proceeding deliberately in accord with the requirements imposed by Congress in the Act. Conciliation with state and local officials is being stressed, in an effort to achieve reform where necessary without resort to litigation. This conciliatory approach, which accords with the intent of Congress in drafting the Act, has already begun to bear fruit. The Division will continue in the days ahead to seek out and resolve all violations of the civil rights of institutionalized persons under the Act.

lfp/ss 05/26/82

MEMORANDUM

TO: David DATE: May 26, 1982
FROM: Lewis F. Powell, Jr.

80-1874 Patsy v. Board of Regents

I have read your draft of 5/25 (immunity issue only), and am impressed and convinced. I do have a couple of general observations, and then a few questions.

1. It is not easy to follow the organization of your argument. My impression also is that there is a certain amount of repetition. The footnotes reflect enormous research and capacity to organize and use the product of research. But, as you reread this, eliminate all or parts of notes that are truly marginal.

2. I suggest that we restructure your draft generally along the lines we would write an opinion for the Court, as you did when you revised Hydrolevel. This would mean, generally, that after identifying the parties, you would summarize Patsy's claim; state respondent's answer to it; and state the holding of CA5 noting that it did not address the Eleventh Amendment issue even though it had been argued. This would constitute Part I. Perhaps Part II could be a summary of the general principles applicable to the Eleventh Amendment cases, and then use some of your wonderfully strong and persuasive language to the effect that these principles control this case. Perhaps in a Part IV you could then address - and demolish - TM's treatment of

the immunity issue. Of course the foregoing is merely a suggested rough outline. You are better than I am at organizing an opinion.

3. It is not clear to me what TM did rely on in rejecting the Eleventh Amendment argument. Various points appear in your draft, but they seem to be addressed in a random fashion. My guess is that this results from the way TM gave the immunity issue the back of his hand.

4. I identify questions that occurred to me in reading your draft:

(a) What is the basis for the alleged waiver, and what is the Florida Attorney General's answer? My recollection is that he denied emphatically that the state had waived anything. If TM didn't rely on waiver, should we address it? Perhaps note his non-reliance and quote the Attorney General.

(b) In view of the overwhelming authorities - including statutes - that you cite for the view that the Board of Regents is an agency of the state, is this conceded? If TM largely ignored it (as I recall), perhaps we should say that although not relied upon, Florida law and overwhelming authority, made clear that the Board is a state agency.

(c) In this connection, does the Court cite any of the cases you assemble on page 7? If not, we should point this out. You distinguish convincingly the one case TM relies on.

(d) Is there a need for clarification as to the Court's position with respect to funds of the Board of Regents that do not come from the state treasury?

* * * * *

Although this memorandum may sound negative, I am in fact very positive about the persuasiveness of the draft, and the compelling force of the authorities you cite and the reasons you give.

L.F.P., Jr.

ss

DAVID GINA-POW May 27, 1982

To: David
From: LFP, Jr.
Subject: 80-1874 - Patsy

The revised draft of 5/27 looks great.

I have suggested a rider for pp. 10-11, that puts into somewhat sharper focus what petitioner is really claiming.

My only other suggestion relates to the discussion of Hopkins that commences at the bottom of page 15 and runs through 17, with elaborate notes. My impression is that we give Hopkins a "place of pride" greater than it deserves. I would not change what you have written in the text, with the possible exception noted in the margin on page 17. My concern is that the elaborate footnotes may be read as "protesting too much". I would not say, for example, that it is "no easy matter to state the holding in Hopkins" (n. 15). This substracts something from our textual statement that the case simply is not in point.

Could we not say in a note that Hopkins has been viewed primarily as standing for a principle of agency law, and cite Hamilton Manufacturing Co. and perhaps Larson? I would be inclined to omit from note 16 the quote from Frankfurter's dissent. Indeed, in light of changes I suggest in the text I would omit footnote 16 altogether.

When you work ~~these~~ these minor changes out, lets move it to a Chamber's draft so we can get it in print. We can deliver Part II to the print shop when it also is ready.

LFP, Jr.

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LFP, Jr.

June 1, 1982

80-1074 Patsy v. Board of Regents

Dear Thurgood:

As you have made substantial changes in your opinion for the Court, my dissent also will have to be revised.

It may be two or three days before I can recirculate.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference