did not bar suits against the states under federal question jurisdiction [13] and did not in any case reach suits against a state by its own citizens.[14]

In *Osborn v. Bank of the United States*,[15] the Court, again through Chief Justice Marshall, held that the Bank of the United States [16] could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the state itself. This ruling embodied two principles, one of which has survived and one of which the Marshall Court itself soon abandoned. The latter holding was that a suit is not one against a state unless the state is a named party of record.[17] The former holding, the primary rationale through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and consequently can derive no protection from an unconstitutional statute of a state.[18]

---

[13] "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." 19 U.S. at 382–83.

[14] "If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." 19 U.S. at 412.

[15] 22 U.S. (9 Wheat.) 738 (1824).

[16] The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

[17] 22 U.S. at 850–58. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, *see* id. at 857–58. *But compare* id. at 849. The holding was repudiated in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a state "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." *In re* Ayers, 123 U.S. 443, 487 (1887).

[18] 22 U.S. at 858–59, 868. For the flowering of the principle, *see Ex parte* Young, 209 U.S. 123 (1908).