justified in terms of the comparable objective of protecting community. Indeed, when the community is dissolved, it would anomalous to make the divorced husband's future losses community property.[33] Article 2334 is merely the result of "pressures on behalf of married women in the early part of this century, followed by a belated 'compomise' provision with reference to the husband."[34] The husband's equal protection argument is perhaps clearest where both he and his wife are injured in the same accident and are then divorced. Under the *Chambers* result the wife retains all of her damages and half of the husband's.

The *Talley* approach alleviated the inequitable result of a strict application of the codal provision to the husband's losses accruing after divorce. Hopefully, the *Chambers* result as "clarified" by the per curiam opinion will not be understood to have disturbed the *Talley* approach,[35] and Louisiana courts will continue to distribute damages between the husband and the community on the basis of the loss each suffers.

JEAN F. DEV. ALLAIN

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—THE LAST STRAW IN JUDICIAL ABDICATION

Plaintiff shipowner contracted with the state of India for the transportation of grain to India. In the contract India expressly waived its sovereign immunity as to any disputes that might arise under the terms of the agreement and consented to be sued in the courts of the United States. Plaintiff subsequently sued in federal district court, alleging delays of its vessels by India. The court dismissed plaintiff's suit after receiving a formal written suggestion from the Department of State that India was entitled to sovereign immunity. The Second Circuit affirmed the dismissal, *holding* that once the Department of State has given a formal suggestion of immunity, the court is without jurisdiction to decide a case between a foreign sovereign and a United States citizen. *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971).

In the United States the doctrine of sovereign immunity[1] is a

[33] 259 La. at —, 249 So. 2d at 906 (Tate, J., dissenting).
[34] Morrow, *supra* note 6, at 25.
[35] 259 La. at —, 249 So. 2d at 907 (Barham, J., dissenting).

[1] Two conflicting concepts of sovereign immunity exist today. According to the classical or absolute theory, a sovereign cannot, without its consent, be sued in the courts of another sovereign. The newer or restrictive theory draws a distinction between acts *jure gestionis* (private acts) and *jure imperii* (public acts), and only recognizes immunity with regard to the latter.

principle of substantive law[2] developed solely by the Supreme Court. In the first significant review of this doctrine the Supreme Court held that the courts of the United States may not assume jurisdiction of disputes involving armed public vessels of a foreign sovereign.[3] The decision rested upon the equal dignity of all sovereign states.[4] Although this case and its underlying rationale is often considered the classic statement of the absolute theory of sovereign immunity,[5] the Court did not determine whether the doctrine was applicable to other types of property until its decision one hundred years later in *Berizzi Brothers Co. v. The Pesaro.*[6] In *Berizzi* the Supreme Court held that the doctrine of sovereign immunity applied to merchant ships owned and operated by foreign governments,[7] thereby effectively adopting the absolute theory of sovereign immunity. Since *Berizzi* is the latest case in which the Court considered the question of sovereign immunity for a government's commercial acts,[8] the absolute theory apparently remains the law today.[9]

The Supreme Court subsequently adopted a new basis for granting sovereign immunity by holding a certification by the Department of State that a foreign state was entitled to immunity conclusive of that issue in the courts.[10] Furthermore, the Supreme Court asserted that the courts should not grant immunity when the Department of State has refused to offer a suggestion of immunity, because the courts cannot allow an immunity on new grounds that the executive has not seen fit to recognize.[11] With its pre-eminence in determining sovereign immunity clearly recognized, the Department of State articulated an official policy for

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[2] *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).

[3] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). A significant aspect of *The Schooner Exchange* is that the Court did not declare that the suggestion of immunity by the Department of State precluded the Court from inquiring into title of the property.

[4] *Id.* at 137.

[5] *See, e.g.*, García-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 Va. L. Rev. 335, 339-40 (1956).

[6] 271 U.S. 562 (1926).

[7] When the Supreme Court adopted the absolute theory, its position was contrary to that taken by the Department of State. In response to the Italian ambassador's request for immunity, the Department had said that government-owned ships engaged in commerce were not entitled to immunity. 2 G. Hackworth, Digest of International Law 437 (1941).

[8] In Mexico v. Hoffman, 324 U.S. 30 (1945), this question was excluded from the decision. 324 U.S. at 35 n.1.

[9] *See* García-Mora, *supra* note 5, at 343. *But see* Restatement (Second) of Foreign Relations Law of the United States § 69, Reporter's Notes, at 211 (1965) [hereinafter cited as Restatement].

[10] *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943). Five years earlier in Compania Espanola De Navegacion Maritima v. The Navemar, 303 U.S. 68, 74 (1938), the Court enunciated this new basis, although in dictum.

[11] Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

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granting immunity. In the "Tate letter"[12] the Department proclaimed its intention to abandon the absolute theory of immunity and henceforth to follow the restrictive theory in considering requests by foreign governments for a grant of immunity.[13] This pronouncement by the Department of State circumvented the *Berizzi* decision.[14] Initially, the Department adhered to the literal language of the Tate letter.[15] However, it appears that the Department of State is not firmly committed to the Tate letter doctrine, for it has not applied the restrictive theory in many cases[16] when it might well have done so.[17]

The Department of State's announced espousal of the restrictive theory of sovereign immunity, coupled with the principle that Department suggestions are binding upon the courts, could have moved the United States into the group of progressive states[18] that follow the restrictive theory—a more realistic approach to the problems and disputes arising from the extensive commercial trading activities in which almost all modern governments engage.[19] However, the principle that Department of State suggestions of immunity are conclusive upon the courts and the Department's irregular adherence to the Tate letter doctrine of restrictive immunity have resulted in an absurd state of affairs clearly illustrated by *Isbrandtsen*. Notwithstanding India's agreement to waive its sovereign immunity as to any disputes arising under the charter

[12] Letter of Acting Legal Adviser, Jack B. Tate, to Acting Attorney General, Philip B. Perlman, May 19, 1952, *found in* 26 Dep't State Bull. 984 (1952).

[13] *See generally* Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 Am. J. Int'l L. 93 (1953).

[14] In the only Supreme Court case dealing with sovereign immunity since the issuance of the Tate letter, the Court used language indicating at least acquiescence in the Department of State's adoption of the restrictive theory. *See* National City Bank v. Republic of China, 348 U.S. 356, 360-61 (1955). *Accord*, Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 Nw. U.L. Rev. 109, 113-14 (1961). *But cf.* Comment, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 Vill. L. Rev. 583, 589-99 (1968).

[15] *See, e.g., In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 313 (D.D.C. 1960); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 685 (S.D.N.Y. 1955).

[16] *See, e.g.*, Rich v. Naviera Vacuba, 295 F.2d 24 (4th Cir. 1961); Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

[17] For an evaluation of the Department of State's observance of the Tate letter doctrine see Dobrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 Va. L. Rev. 1 (1968); Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 Am. J. Int'l L. 790 (1960); Comment, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 Mich. L. Rev. 1142 (1962).

[18] For a list of states following the restrictive theory, see Timberg, *supra* note 14, at 118 n.28. *See generally* J. Sweeney, The International Law of Sovereign Immunity (1963).

[19] *See generally* S. Sucharitkal, State Immunities and Trading in International Law (1959).

party between it and Isbrandtsen Tankers, Inc., the court still felt bound by the Department of State's suggestion of immunity and dismissed the case.

The illogical *Isbrandtsen* decision demands a re-evaluation by the courts of the relative roles of the judiciary and the Department of State in questions of sovereign immunity. The courts have regarded the Department of State's decisions as unassailable, refusing to inquire into the circumstances under which the suggestions were made. However, the doctrine of immunity does not specifically derive from the Constitution, but instead is based upon policy considerations sanctioned by the Supreme Court.[20] A doctrine judicially created may be judicially modified as present circumstances reveal that the Department of State is not the proper agency to decide questions of sovereign immunity.[21]

The existence or non-existence of an express waiver of immunity is a legal issue requiring judicial resolution.[22] In *Isbrandtsen*, the court considered the waiver issue subsumed by the Department of State's suggestion of immunity. The court contended that the embarrassment that might result to our government from a judicial denial of immunity when the executive had recommended the contrary might be just as severe when there was a contractual waiver of immunity as when there had been no such waiver. Any subsequent embarrassment that may arise would be caused solely by the executive's unwise recommendation of immunity in a situation where immunity was clearly unwarranted, and not, as the court implies, by judicial impairment of the Department of State's role in the conduct of foreign affairs. The Restatement (Second) of Foreign Relations Law of the United States takes the position that a state may waive immunity by agreement with a private party.[23] Although no cases have applied this rule, the courts should not hesitate to do so in the future. There is no reason why a foreign

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20 National City Bank v. Republic of China, 348 U.S. 356, 358-59 (1955).

21 The critics of the Department of State's involvement in the area are numerous. *See* Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 Harv. L. Rev. 608 (1954); Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. Pa. L. Rev. 451, 469-79 (1956); Franck, *The Courts, The State Department, and National Policy: A Criterion for Judicial Abdication*, 44 Minn. L. Rev. 1101 (1960); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168 (1946). A deputy legal adviser of the Department of State has even admitted that the Department is ill-suited to decide sovereign immunity cases and that such judgments can be decided more satisfactorily by the judiciary. Belman, *New Departures in the Law of Sovereign Immunity*, 1969 Am. Soc'y Int'l L. Proc. 182, 184.

22 *See generally* J. Brierly, The Law of Nations 271-76 (1963); Cohn, *Waiver of Immunity*, 34 Brit. Y.B. Int'l L. 260 (1958).

23 Restatement § 70(1) comment *a*, at 218-19.

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state should not be bound by an agreement with a private party to waive immunity as to any disputes that might arise between the contracting parties. The foreign state could not justly complain that its sovereign rights were violated when a United States court assumed jurisdiction over the case, for the court would merely be effectuating the contractual stipulation as to the forum for disputes. By permitting the Department of State to override the express waiver of immunity, the *Isbrandtsen* court perpetuates an unnecessary legal anachronism.

Recognizing that there existed "interests beyond those of a purely legal concern" in cases involving foreign governments, the court in *Isbandtsen* stressed possible international repercussions from a decision against a foreign government.[24] This apprehension by the court is merely a restatement of the courts' traditional rationale for conclusively accepting the Department of State's immunity suggestion, which is that the judiciary must not embarrass the executive in the conduct of foreign relations.[25] One commentator trenchantly declared that this is "one of the most overrated arguments in the annals of American legal history."[26] The courts of other countries have successfully adjudicated disputes involving foreign governments without executive interference, and no catastrophical international repercussions have resulted.[27]

Whether judicial abdication of responsibility to determine whether immunity is warranted will in fact bring about any improvement in international relations is debatable.[28] The Department of State is singularly ill-equipped to render impartial decisions on whether a state should be granted immunity. The executive's legal inquiry is unavoidably tainted by reference to a political evaluation of the litigants. Consequently, the Department of State is markedly subjective in its final determinations and indulges in widespread abuse of discretion by frequently bowing to the whims and caprices of foreign governments.[29] The judiciary, applying

24 446 F.2d at 1200.

25 *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943); United States v. Lee, 106 U.S. 196, 209 (1882).

26 R. Lillich, The Protection of Foreign Investments 26 (1965).

27 *See, e.g.*, Soviet Distillery in Austria Case, [1954] I.L.R. 101 (Administrative Court, Austria); Borga v. Russian Trade Delegation, [1955] I.L.R. 235 (Court of Cassation, Italy). *See generally* Lyons, *Conclusiveness of the Statement of the Executive, Continental and Latin American Practice*, 25 Brit. Y.B. Int'l L. 180 (1948).

28 *See, e.g.*, Judge Mack's remarks in The Pesaro, 277 F. 473, 485 (S.D.N.Y. 1921) (supplemental opinion).

29 *See* R. Falk, The Role of Domestic Courts in the International Legal Order 145-46 (1964); Lillich, *supra* note 26, at 26-27; Kuhn, *The Extension of Sovereign Immunity to Government Owned Commercial Corporations*, 39 Am. J. Int'l L. 772 (1945).

principles of municipal and international law, not international politics, can more objectively resolve questions of immunity; the judicial—not the executive—branch of government must interpret the law of the United States, including international law.[30] The independence of the judiciary in questions of sovereign immunity would clearly evidence this country's firm commitment to the principles of international law in the resolution of disputes. The present doctrine of deference to the executive is "antipathetic to the growth of world legal order."[31] The courts must apply rules of law in disputes involving foreign governments rather than executive fiat, which is often little more than a decision based upon changing political expediencies.[32] A judicial determination is much less likely to create embarrassment than an unpredictable edict by the Department of State.

What role should the Department of State have in sovereign immunity cases? Although its suggestion should not be conclusive,[33] the courts occasionally may require guidance from the Department of State. Accordingly, the narrow issue is what weight should the judiciary accord suggestions of immunity by the Department. The Restatement concludes that such suggestions should be

> . . . conclusive as to issues determined by executive action within the exclusive constitutional competence of the executive branch of government and as to other issues directly affecting the conduct of foreign relations. As to all other issues, such a suggestion will be given great weight.[34]

Regretfully, the application of this formula is often precluded when the Department of State does not justify its decision or reveal the issues considered. The Restatement position could be further frustrated by the Department if it constantly claims that its decisions are based upon foreign policy considerations. The courts should refuse to abdicate judicial responsibilities to the executive merely because the immunity issue may have some effect upon our foreign relations.

Because of this ease in circumventing the Restatement standard, the courts should accord at most only significant weight to

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30 The Paquete Habana, 175 U.S. 677 (1900); 1 L. Oppenheim, International Law 41-42 (8th ed. H. Lauterpacht 1955).

31 Falk, *supra* note 29, at 146.

32 *See generally* Chemical Natural Resources v. Republic of Venezuela, 215 A.2d 864, 881-94 (Pa.), *cert. denied*, 385 U.S. 822 (1966) (Musmanno, J., dissenting); P. Jessup, The Use of International Law 71-86 (1959).

33 Another argument against the Department's ex parte determination of sovereign immunity is that it constitutes a denial of due process. *See* Lillich, *supra* note 26, at 32-40; Note, *The Sovereign's Immunity and Private Property: A Due Process Problem*, 50 Geo. L.J. 284 (1961); 50 Calif. L. Rev. 559, 564-65 (1962).

34 Restatement § 72(1).

all suggestions of immunity by the Department of State. The suggestion of immunity should only be a factor of varying significance in the court's final resolution of the issue. For example, when the Department of State suggests immunity and demonstrates a probable impact on national security, undoubtedly the courts should grant the Department's request. However, when the Department suggests immunity and merely alludes to possible negative effects to our foreign relations if immunity were denied, the court should be primarily concerned with the applicable legal principles and give the suggestion minimal consideration. The practical effect of this proposal would undoubtedly be that the Department of State would refrain from entering any suggestion of immunity except in the most exceptional cases in which there was an excellent chance that its suggestion would be adopted by the courts. The Department would not want to jeopardize its prestige by suggesting immunity in those less important cases, thus risking a finding of no immunity.

If this proposal is adopted, freeing courts to apply sound legal principles in cases in which sovereign immunity is pleaded, what legal principles or theories should guide the judiciary? Clearly, the courts should not follow the absolute theory of sovereign immunity; the reasons that may have prompted its application are no longer valid.[35] The extensive engagement by governments in world trade has significantly changed the character of international commerce from the era when the absolute theory might have been appropriate. A more realistic approach to problems of world trade and commerce is necessary. Courts should now apply the restrictive theory of sovereign immunity, favored by the Restatement,[36] and by many writers,[37] that would deny immunity to foreign governments for their obligations in private commercial transactions.[38]

One of the hallmarks of the law is predictability. Complete judicial deference over the past several decades to the Department of

[35] *See* Falk, *supra* note 29, at 140-46.

[36] Restatement § 69.

[37] *See* Dobrovir, *supra* note 17; García-Mora, *supra* note 5, at 359; Timberg, *supra* note 14. *See also* Comment, *Restrictive Sovereign Immunity, the State Department, and the Courts*, 62 Nw. U.L. Rev. 397 (1967).

[38] A major problem in implementing the restrictive theory is in characterizing acts as *jure imperii* or *jure gestionis*. *See generally* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 222-26 (1951); Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 Int'l & Comp. L.Q. 452, 455-56 (1958); Comment, *supra* note 17, at 1147. Even so, some courts have already devised standards to implement the doctrine properly. *See, e.g.*, Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In *Isbrandtsen* the court stated that if it were required to apply the distinctions set forth in *Victory Transport*, as to acts *jure imperii* and *jure gestionis*, it might well find the actions of the Indian government were purely private commercial transactions.

State in sovereign immunity cases has substituted political expediency and nebulous executive decision-making for any legal certainty in resolving disputes arising out of commercial transactions between American citizens and foreign governments. If courts adopt the restrictive theory of sovereign immunity and only accord Department of State suggestions significant weight, foreign governments will be forewarned that in commercial transactions with American citizens, they will no longer be entitled to the cloak of sovereign immunity when disputes arise from those transactions. Foreign governments could then have no complaint when brought before the courts of the United States. Most importantly, the United States would suffer no embarrassment, but would in fact make a significant contribution to the development of the rule of law among nations.

FREDERICK G. BOYNTON

LABOR LAW—UNION MEMBER WHO VOTES TO STRIKE, THEN RESIGNS, IS BOUND TO HONOR STRIKE TO CONCLUSION

Shortly before their collective bargaining agreement expired, members of a union local voted to strike if a new contract was not signed within six days.[1] Negotiations failed, the strike began, and the membership voted unanimously to levy a $2,000 fine on any member aiding or abetting the company during the strike. Two members subsequently sent letters of resignation to the local, but the local refused to accept the resignations and warned the employees that they would be fined if they returned to work. One member returned to work but stopped after receiving a second warning. Both employees then filed unfair labor practice charges with the National Labor Relations Board, alleging that threats of fines violated section 8(b)(1)(A) of the National Labor Relations Act (NLRA).[2] The trial examiner found no unfair practices, yet added he believed the fines unenforceable.[3] After publication of the trial examiner's decision, twenty-nine other employees resigned from the union and returned to work. The union found all thirty-

1 The vote was taken September 14, 1968, and called for a strike to begin on September 20, 1968 (the expiration date of the contract), if no agreement was reached by that date.

2 29 U.S.C. § 158(b)(1)(A) (1964).

3 Apparently, both the union and management felt that the trial examiner had decided the issue in their favor. Both sides proceeded to publicize the decision to the union membership and to the public in general. NLRB v. Granite State Joint Board, Textile Workers Local 1029, 446 F.2d 369, 371 (1st Cir. 1971).

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infliction of cruel and unusual punishments.[75]

A criminal code adopted by Congress for a territory as a temporary code until the territorial legislature can act must be considered as if it had been enacted by the territorial legislature, and therefore, the courts of the United States would not have jurisdiction of an offense committed in violation of the adopted code.[76] The continuing in force of the criminal law offended against, until the offender is convicted and the penalty of the law enforced, is a "rightful subject of legislation," and is not objectionable as being an ex post facto law.[77]

§ 165. Liability for acts of officers.

The general rule that acts of public officers must, in order to be binding, be within the limits of the power conferred[78] applies with full force in the case of officers of the United States, including officers of territories. In other words, if a territorial or United States officer does an act in violation of specific instructions, the United States or its territory is not bound thereby.[79] Similarly, the well-established rule that a state is not liable for the negligence or misfeasance of its officers or agents, except when such liability is voluntarily assumed by its legislature,[80] is no doubt applicable to the torts of territorial officers, including those appointed by the United States Government, as well as those elected under the laws of the territory.[81]

E. Actions By or Against Territories

§ 166. Generally.

The principles governing actions by or against territories are, for the most part, similar to the principles which govern actions by or against states,[82] the only difference being that federal sovereignty instead of state sovereignty is involved. This is true because the same provisions of immunity extend to the Federal Government as extend to the state governments.[83] Undoubtedly, a territory, like a state[84] or the United States,[85] may institute a suit in any of its courts, whether it is required by its pecuniary interests or the general public welfare, and may adopt any legal remedy or measures available to a private suitor. The general principle that the claims of the sovereign are not subject to the defenses of laches and the statute of limitations is applicable to a territory, unless expressly waived.[86]

§ 167. Actions against territories.

The incorporated territories have always been held to possess an immunity

until amended or appealed by act of Congress does not put congressional legislation regulating criminal procedure in the territory beyond the amendatory power of the territorial legislature. United States v Wigger, 235 US 276, 59 L Ed 226, 35 S Ct 42.

75. Wilkerson v Utah, 99 US 130, 25 L Ed 345.

76. United States v Pridgeon, 153 US 48, 38 L Ed 631, 14 S Ct 746; Ex parte Larkin, 1 Okla 53, 25 P 745.

77. Ex parte Larkin, 1 Okla 53, 25 P 745.

78. See 63 Am Jur 2d, Public Officers and Employees §§ 261 et seq.

79. See United States (1st ed §§ 92 et seq.).

80. See 57 Am Jur 2d, Municipal, School, and State Tort Liability §§ 26, 97 et seq.

81. Harris v Municipality of St. Thomas & St. John (DC Virgin Islands) 111 F Supp 63, aff'd (CA3) 212 F2d 323.

Territory as federal agency under Federal Tort Claims Act, see 35 Am Jur 2d, Federal Tort Claims Act § 59.

82. See supra, §§ 90 et seq.

83. See United States (1st ed §§ 127 et seq.).

84. See supra, § 90.

85. See United States (1st ed § 115).

86. Re Estate of Hooper (CA3 Virgin Islands) 350 F2d 569, cert den 385 US 903, 17 L Ed 2d 133, 87 S Ct 206.

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from suit without their consent, and although a territory is not an integral part of the United States, the same rule should apply.[87] And the same immunity has been held to apply to unincorporated territories.[88] But any right of a territory to invoke immunity from suit without its consent to defeat jurisdiction of an action is lost where it appears by its proper officer and makes full answer to the original complaint, a day for trial is fixed by stipulation, amended and supplemental complaints are filed and appropriately answered, and the court's jurisdiction is first challenged by a motion to dismiss several months after the action was begun.[89] So also, where a territory is not a defendant in the first instance but voluntarily petitions to be made a party, asserting rights to the property in controversy, and against the opposition of the plaintiff it is made a party defendant, its right to claim immunity thereafter is waived.[90]

The contention has been made that where the Organic Act provides that the territory shall have "governmental power as hereinafter conferred, and with power to sue and be sued as such," immunity from suit does not exist. This contention has not been sustained.[91]

§ 168. —To recover moneys illegally collected.

Where there has been an illegal collection by an agent of a territorial government and the funds have been turned into the treasury, a suit to recover the payment is barred by governmental immunity; but if the funds remain in the hands of the agent, it is sometimes held that recovery is permissible.[92]

87. Porto Rico v Rosaly y Castillo, 227 US 270, 57 L Ed 507, 33 S Ct 352 (stating the rule).

88. Richardson v Fajardo Sugar Co. 241 US 44, 60 L Ed 879, 36 S Ct 476; Porto Rico v Emmanuel, 235 US 251, 59 L Ed 215, 35 S Ct 33; Porto Rico v Ramos, 232 US 627, 58 L Ed 763, 34 S Ct 461; Porto Rico v Rosaly y Castillo, 227 US 270, 57 L Ed 507, 33 S Ct 352.

The Commonwealth of Puerto Rico enjoys sovereign immunity from suit in common with other governments. Alcoa S. S. Co. v Perez (CA1 Puerto Rico) 424 F2d 433.

89. Richardson v Fajardo Sugar Co. 241 US 44, 60 L Ed 879, 36 S Ct 476.

90. Porto Rico v Ramos, 232 US 627, 58 L Ed 763, 34 S Ct 461.

91. Porto Rico v Rosaly y Castillo, 227 US 270, 57 L Ed 507, 33 S Ct 352.

92. Alcoa S. S. Co. v Perez (CA1 Puerto Rico) 424 F2d 433.

damages, there are strong public policy reasons against permitting a court exercise its compulsive power to restrain the government from acting or to npel it to act.[89]

§ 102. Effect of Federal Constitution.

The state's immunity from suit is subject to limitations arising from the federal nature of the United States and the provisions of the Federal Constitution.[90] Even without its consent, a state may be sued in a federal forum by the United States and a federal instrumentality.[91] And nothing in the Eleventh Amendment or in any other provision of the Constitution prevents a state's being sued by the United States, with or without specific authorization from Congress.[92] But Congress cannot directly subject the states to suit in matters falling outside the power granted to Congress by the Constitution.[93]

§ 103. —Eleventh Amendment.

The Eleventh Amendment provides that 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.[94] This Amendment denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent.[95] And the mere fact that the case is one arising under the Constitution or laws of the United States does not deprive the state of its immunity.[96] Suits against state agencies based upon maritime torts are no exception to the principle.[97] Even though the Eleventh Amendment is not in terms applicable to a suit against a state by its own citizens, a federal court cannot entertain such a suit without the state's consent.[98] As in

89. Larson v Domestic & Foreign Commerce Corp. 337 US 682, 93 L Ed 1628, 69 S Ct 1457, reh den 338 US 840, 94 L Ed 514, 70 S Ct 31.

90. Kaufman Const. Co. v Holcomb, 357 Pa 514, 55 A2d 534, 174 ALR 189.

91. Department of Employment v United States, 385 US 355, 17 L Ed 2d 414, 87 S Ct 464.

92. United States v Mississippi, 380 US 128, 13 L Ed 2d 717, 85 S Ct 808.

93. Parden v Terminal R. of Alabama State Docks Dept. 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207, reh den 377 US 1010, 12 L Ed 2d 1057, 84 S Ct 1903.

The Federal Constitution does not authorize an action against a state by a corporation created by Congress. Smith v Reeves, 178 US 436, 44 L Ed 1140, 20 S Ct 919.

94. See Am Jur 2d Desk Book, Document 1.

95. Ford Motor Co. v Department of Treasury, 323 US 459, 89 L Ed 389, 65 S Ct 347.

The Eleventh Amendment is an absolute bar to suits against a state, without her consent, by citizens of another state or by citizens or subjects of a foreign state. Keifer & Keifer v Reconstruction Finance Corp. 306 US 381, 83 L Ed 784, 59 S Ct 516; Monaco v Mississippi, 292 US 313, 78 L Ed 1282, 54 S Ct 745.

96. An action in federal court against a state on state debt obligations without its consent, and in which an attempt is made to invoke federal question jurisdiction by alleging an impairment of the obligation of contract, is precisely the evil against which both the Eleventh Amendment and the sovereign immunity doctrine are directed. Parden v Terminal R. of Alabama State Docks Dept. 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207. See generally 32 Am Jur 2d, Federal Practice and Procedure § 25.

97. Petty v Tennessee-Missouri Bridge Com. 359 US 275, 3 L Ed 2d 804, 79 S Ct 785.

98. Parden v Terminal R. of Alabama State Docks Dept. 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207, reh den 377 US 1010, 12 L Ed 2d 1057, 84 S Ct 1903; Georgia R. & Banking Co. v Redwine, 342 US 299, 96 L Ed 335, 72 S Ct 321.

The judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state, without its consent. Duhne v New Jersey, 251 US 311, 64 L Ed 280, 40 S Ct 154.

The right of individuals to sue a state in either a federal or a state court cannot be derived from the Constitution or laws of the United States, but can come only from the consent of the state. Palmer v Ohio, 248 US 32, 63 L Ed 108, 39 S Ct 16.

A bill in equity to compel the specific per-

other instances of the state's immunity from suit,[99] its immunity under the Eleventh Amendment may be waived.[1] The question as to when an action in federal court against a state agency or officer is barred by the Eleventh Amendment is a part of the more general question as to when such an action is considered a suit against the state, which is reserved for later discussion.[2]

§ 104. Immunity as extending to state agencies and officers.

The state's immunity from suit extends to the boards, commissions, and agencies through which it must act,[3] at least where they are carrying on the state's governmental functions[4] and have no independent proprietary powers or functions.[5] And it has been held that, even where consent to sue a particular state agency has been granted by statute, such suits may not be maintained unless money has been appropriated for the payment of such damages as may be awarded, or unless the agency itself is authorized to raise money for that purpose.[6] A suit against the legislature or its duly constituted committees is a suit against the state.[7] The secretary of state is an agent of the state and suits against him are subject to the defense of sovereign immunity.[8] A suit against an administrative state department is one against the state, not maintainable without legislative consent.[9] The immunity of a state agency is not affected by the lack of any other remedy.[10]

formance of a contract between individuals and a state cannot, against the objection of the state, be maintained in a court of the United States. Murray v Wilson Distilling Co. 213 US 151, 53 L Ed 742, 29 S Ct 458.

99. §§ 118 et seq., infra.

1. Ford Motor Co. v Department of Treasury, 323 US 459, 89 L Ed 389, 65 S Ct 347; Great Northern Life Ins. Co. v Read, 322 US 47, 88 L Ed 1121, 64 S Ct 873.

2. §§ 108 et seq., infra.

3. Cobb v Louisiana Board of Institutions, 229 La 1, 85 So 2d 10; Heiser v Severy, 117 Mont 105, 158 P2d 501, 160 ALR 319; Schloss v State Highway & Public Works Com. 230 NC 489, 53 SE2d 517.

Annotation: 62 ALR2d 1222, 1224, § 2 (highway authority).

An action against the state board of finance and revenue is an action against the state. Land Holding Corp. v Board of Finance & Revenue, 388 Pa 61, 130 A2d 700.

Except for purposes of federal taxation, the undisputed rule appears to be that a state liquor control agency, being an agency of the state, is immune from suit in the same manner as the state. Schippa v West Virginia Liquor Control Com. 132 W Va 51, 53 SE2d 609, 9 ALR2d 1284. Annotation: 9 ALR2d 1292, 1293.

The state retirement system is the kind of state instrumentality that is clothed with the sovereign immunity of the state. Glassman v Glassman, 309 NY 436, 131 NE2d 721.

As to tort actions against state agencies, see 57 Am Jur 2d, MUNICIPAL, SCHOOL, AND STATE TORT LIABILITY § 25.

As to mandamus against a state officer as an action against the state, see 52 Am Jur 2d, MANDAMUS § 129.

As to a suit to enjoin a state agency as one against the state, see 42 Am Jur 2d, INJUNCTIONS § 177.

As to government or public officers as defendants in a declaratory judgment action, see 22 Am Jur 2d, DECLARATORY JUDGMENTS § 85.

As to a taxpayers' action to enjoin the expenditure of state funds, see TAXPAYERS' ACTIONS (1st ed § 6).

4. Glassman v Glassman, 309 NY 436, 131 NE2d 721; Smith v Hefner, 235 NC 1, 68 SE2d 783.

Sovereign immunity covers state officials acting in their official capacities. Helela v State, 49 Hawaii 365, 418 P2d 482.

5. Kenosha v State, 35 Wis 2d 317, 151 NW2d 36.

6. University of Maryland v Maas, 173 Md 554, 197 A 123 (breach of contract).

7. NAACP v Committee on Offenses, etc. 201 Va 890, 114 SE2d 721.

8. Kenosha v State, 35 Wis 2d 317, 151 NW2d 36.

9. Schwing v Miles, 367 Ill 436, 11 NE2d 944, 113 ALR 1504 (department of public works and buildings); Angelle v State, 212 La 1069, 34 So 2d 321, 2 ALR2d 666.

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10. Glassman v Glassman, 309 NY 436, 131 NE2d 721.

An action by one state agency or officer against another to determine their rights and obligations inter se is not barred by sovereign immunity.[11]

§ 105. Immunity from suit of corporation created as state agency or wholly or partly owned by state.

The question whether a corporation created as an agency of, or whose stock is owned in whole or in part by, a state, is subject to or immune from suit, and the extent of such subjection or immunity, is one of legislative intention.[12] The mere fact that such a corporation is an agency of the state does not in and of itself render it immune from suit.[13] And the mere fact that a state owns all of the stock of such a corporation is not alone sufficient to identify the corporation with its stockholder so as to render it immune.[14] It has been held that as a matter of policy, such corporations should be subject to suit, especially when embarking upon commercial ventures.[15]

§ 106. —Purpose or function of corporation as test.

The purpose for which a governmental corporation is created or the function which it is designed to fulfil is generally regarded as of importance in determining whether such a corporation is subject to suit. For example, where a state creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily held subject to suit, the same as any private corporation organized for the same purpose.[16] Illustrative are corporations organized for purposes not strictly governmental, such as those organized for the operation of water and power plants, swimming pools, and parks and other recreational facilities, which come under the classification of proprietary, as distinguished from governmental, enterprises.[17] Where, however, the corporation is performing what are essentially public or governmental pur-

11. East Orange v Palmer, 47 NJ 307, 220 A2d 679.

The fact that nominally one arm of the state is suing another does not make the action subject to dismissal on the ground of an absence of adversary parties where each is acting in behalf of persons claiming to be the rightful owners of certain specified property, and there is therefore a real controversy. Friedrichs v Goldy, 153 Colo 554, 387 P2d 274.

12. Keifer v Reconstruction Finance Corp. 306 US 381, 83 L Ed 784, 59 S Ct 516; Federal Land Bank v Priddy, 295 US 229, 79 L Ed 1408, 55 S Ct 705, reh den 295 US 769, 79 L Ed 1709, 55 S Ct 832; Home Owners' Loan Corp. v Hardie & Caudle, 171 Tenn 43, 100 SW2d 238, 108 ALR 702.

Annotation: 42 ALR 1464, 1486, s. 50 ALR 1408; 83 L Ed 794, 795.

13. Keifer v Reconstruction Finance Corp. 306 US 381, 83 L Ed 784, 59 S Ct 516; United States ex rel. Skinner & E. Corp. v McCarl, 275 US 1, 72 L Ed 131, 48 S Ct 12; Linger v Pennsylvania Turnpike Com. (DC Pa) 158 F Supp 900; Gross v Kentucky Bd. of Managers, 105 Ky 840, 49 SW 458.

Annotation: 42 ALR 1464, 1486, s. 50 ALR 1408; 83 L Ed 794.

14. Sloan Shipyards Corp. v United States Shipping Bd. Emergency Fleet Corp. 258 US 549, 66 L Ed 762, 42 S Ct 386; Louisville, C. & C. R. Co. v Letson, 2 How (US) 497, 11 L Ed 353; Bank of Kentucky v Wister, 2 Pet (US) 318, 7 L Ed 437.

But see Ballaine v Alaska Northern R. Co. (CA9 Alaska) 259 F 183, 8 ALR 990.

Annotation: 83 L Ed 799.

15. Sloan Shipyards Corp. v United States Shipping Bd. Emergency Fleet Corp. 258 US 549, 66 L Ed 762, 42 S Ct 386.

Annotation: 83 L Ed 798.

16. Bank of United States v Planters' Bank, 9 Wheat (US) 904, 6 L Ed 244; Gross v Kentucky Bd. of Managers, 105 Ky 840, 49 SW 458.

Annotation: 83 L Ed 794, 801.

Suits or actions may be maintained against a corporation created by the state which acts in a proprietary capacity and through which the state exercises no governmental power. Schippa v West Virginia Liquor Control Com. 132 W Va 51, 53 SE2d 609, 9 ALR2d 1284.

17. Schippa v West Virginia Liquor Control Com. 132 W Va 51, 53 SE2d 609, 9 ALR2d 1284.