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Comment

State Sovereign Immunity: No More King's X?

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Throughout American history the Supreme Court has zealously protected the sovereign immunity of both state and federal governments.[1] Yet state sovereign immunity as articulated by the eleventh amendment and the case law has seriously impeded federal regulatory programs that increasingly rely on suits by private individuals for enforcement. The federal courts have reached inconsistent results in private suits, often upholding the sovereign immunity defense to the detriment of the federal regulatory scheme.[2] Recently, in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*,[3] the Supreme Court articulated a rationale that could sweep away state sovereign immunity in this context. Although the immunity barred the employees' suit, all nine Justices agreed that Congress in the proper exercise of its delegated power could effectively abrogate it. This departure from past law seems thoroughly appropriate in light of the federal government's vastly expanded regulatory role.

I. Background: The Doctrine and the Amendment

A. Nineteenth Century Interpretation

The United States imported the sovereign immunity doctrine along with other parts of the common law, but did not adopt the various remedial devices that had greatly ameliorated its practical impact in England.[4] Ironically, this doctrine, founded on the prerogatives of royalty, has provided much broader immunity in the United States. Both

1. The glaring exception to this general rule was Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which the eleventh amendment quickly reversed.

2. *See, e.g.*, Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972) (both cases denying retroactive welfare payments on authority of the eleventh amendment). *Contra*, Jordan v. Weaver, 472 F.2d 985 (7th Cir.), *cert. granted*, 93 S. Ct. 2766 (1973).

3. 411 U.S. 279 (1973).

4. *See* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

courts and commentators have condemned this anomaly.[5] Despite its unpopularity, sovereign immunity has endured primarily because of the eleventh amendment.[6] While phrased as a restriction on the federal judicial power, the courts have interpreted the amendment as the enshrinement of state sovereign immunity.[7] The two concepts, however, are not necessarily congruent. Furthermore, it is likely that state power vis-a-vis the federal government rather than immunity per se was the real concern of the amendment's supporters.[8] Consequently, the amendment seems doubly inarticulate, and, not surprisingly, the law interpreting it has been particularly muddled.

The amendment in terms applies only to suits "commenced or prosecuted against one of the United States" by "Citizens of another State" or by "Citizens . . . of a Foreign State." Resolution of the initial question of applicability appeared to be a process of simple application of these straightforward phrases to concrete cases. This simple process, however, soon produced a morass.[9] The Supreme Court in its first interpretation looked solely to the pleadings, barring the suit only if a

5. It once moved Justice Frankfurter to remark: "[w]hether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State." Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting). The vast majority of opinion accords with Justice Frankfurter's view. *See, e.g.*, C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUSTON L. REV. 1 (1967); McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C.L. REV. 485 (1973).

6. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The amendment was passed to overrule Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which allowed a South Carolina citizen to sue the State of Georgia in federal court over a sovereign immunity defense. The Court held that article III had explicitly extended the federal judicial power to all controversies between a state and citizens of another state. Shortly thereafter the amendment passed amid great public indignation at the apparent extension of the federal judicial power. *See* C. JACOBS, *supra* note 5, at 41-74.

7. *See* Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944); Hans v. Louisiana, 134 U.S. 1 (1890); *In re* Ayers, 123 U.S. 443 (1887).

8. *See* C. JACOBS, *supra* note 5, at 41-74; Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968).

9. Justice Johnson did not anticipate the problems that application of the amendment would eventually present. Johnson stated:

> That a state is not now suable by an individual, is a question on which the Court below could not have paused a moment.
>
> The 11th amendment of the Constitution, put that question at rest for ever.

Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 128 (1828) (Johnson, J., dissenting).

state was a necessary party of record.[10] This test decided only the narrowest issue of jurisdiction—whether the amendment required dismissal. A court could still refuse to grant the relief sought if the named party was not the real party in interest.[11] In 1828 the Court in *Governor of Georgia v. Madrazo*[12] modified the rule to bar suit against a state officer only in his official capacity. At first glance it appeared that the initial pleadings still resolved the applicability question. But the courts also looked to the nature of the claim, and thus the Court began developing a method of analysis to harmonize state sovereign immunity and federal supremacy.

This approach developed a number of artificial rules, some apparently formulated to advance state sovereign immunity, others favoring federal power.[13] The Court found that the amendment prohibited a suit to compel a state officer to perform a "discretionary" duty, since the state was deemed to be the real party in interest. Yet mandamus was appropriate if the duty was "ministerial,"[14] creating a distinction that was often elusive.[15] Federal courts were powerless to enjoin state officers from suing to collect state debts under an allegedly unconstitutional statute;[16] yet *Ex parte Young*[17] permitted an injunction to stop state enforcement of allegedly unconstitutional railroad rates over eleventh amendment objections. The theoretical justification for this departure was transparently inadequate;[18] it held the en-

10. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809).

11. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 858 (1824).

12. 26 U.S. (1 Pet.) 110 (1828).

13. For a more complete discussion of the law of the amendment, see Cullison, *supra* note 5. *See also* Comment, *A Practical View of the Eleventh Amendment—Lower Court Interpretations and the Supreme Court's Reaction*, 61 GEO. L.J. 1473 (1973).

14. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

15. *Compare* Louisiana v. Jumel, 107 U.S. 711, 726-27 (1882) (suit to require state officers to act in accordance with 1874 statute and constitutional amendment rather than 1880 state constitution barred by eleventh amendment), *with* Rolston v. Missouri Fund Comm'rs, 120 U.S. 390, 411 (1887) (suit to prevent state officials from selling railroad property in violation of valid state statute not barred by eleventh amendment), *and* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876) (permanent injunction proper to prevent state officer from using bonds to liquidate pretended debt). *Rolston* distinguished *Jumel* as a case in which ". . . the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what the statute requires of him." 120 U.S. at 411. The real basis of distinction seems to be whether or not the officer's action is in fact constitutional.

16. *In re* Ayers, 123 U.S. 443 (1887).

17. 209 U.S. 123 (1908).

18. "The decision in Ex parte Young rests on purest fiction. It is illogical. It is only doubtfully in accord with the prior decisions." C. WRIGHT, THE LAW OF FEDERAL COURTS § 48, at 186 (2d ed. 1970).

forcement to be state action prohibited by the fourteenth amendment, but only the official's individual action for eleventh amendment purposes.[19] The artificial rules tended to narrow the amendment's jurisdictional prohibition. Yet in one respect the amendment's coverage was broader than its wording. *Hans v. Louisiana*[20] had established that suits by citizens against their own states were barred even though outside the terms of the amendment.[21] Although its rationale was ambiguous, later cases have consistently assumed that *Hans* rested on a constitutional rather than a common law foundation.[22]

The procedural rules formulated to apply the amendment were more precise than the rules on coverage. It was clear that even if the amendment barred federal district court jurisdiction, the Supreme Court had appellate jurisdiction to review state decisions for errors of federal law.[23] Although this proposition comports with the Court's role as final interpreter of federal law, its theoretical basis is somewhat precarious since the eleventh amendment speaks in terms of federal judicial power, which also should restrict the Court's appellate jurisdiction.[24] Similarly, a state can waive its eleventh amendment protection and defend a suit in federal court; a general appearance suffices to confer jurisdiction.[25] The state legislature may also give consent, but it must clearly consent to suit in federal court.[26] The waiver option

19. Several times before *Young*, the Court attempted to deal with the problem of federal injunctions against state officers. Fitts v. McGhee, 172 U.S. 516 (1899), intimated that a federal injunction against state enforcement suits might lie only against state officers who had a special duty of enforcement. State attorneys general, with only general duties of enforcement, might still be immune. *Young* rejected this possible restriction. 209 U.S. 157-61. In Prout v. Starr, 188 U.S. 537 (1903), the Court seemed on the verge of holding that the fourteenth amendment had modified the eleventh pro tanto. This latter line of reasoning would have avoided the illogic of *Young*.

20. 134 U.S. 1 (1890).

21. This rule has properly been termed "[p]robably the most anomalous rule the Court has pronounced under the Eleventh Amendment." Cullison, *supra* note 5, at 22.

22. Duhne v. New Jersey, 251 U.S. 311 (1920); Fitts v. McGhee, 172 U.S. 516 (1899); North Carolina v. Temple, 134 U.S. 22 (1890).

23. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

24. In fact, the state argued in *Cohens* that the Court had no jurisdiction since the writ was prosecuted by an individual against the state. Marshall answered that a writ of error is not a suit within the meaning of the amendment, no claim being asserted against the state. Rather, appellate review operates on the record, not on the parties. Perhaps sensing that this distinction might not be persuasive, Marshall added that, even if he were wrong, the eleventh amendment was inapplicable since Cohens was a citizen of Virginia. 19 U.S. at 410-12.

25. Clark v. Barnard, 108 U.S. 436, 447-48 (1883). *See also* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952) (Douglas, J., concurring).

26. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

is proper with regard to sovereign immunity, merely a privilege of the government, but seems contrary to the general rule that a party may not confer on a federal court subject matter jurisdiction not vested by the Constitution and Congress.[27] That the prohibition is waivable indicates that courts have interpreted the amendment merely as a restatement of the doctrine of sovereign immunity.

B. The Development of the Implied Waiver Theory

After *Ex parte Young*[28] in 1908, the federal courts were well equipped to prevent undue state encroachment into a properly federal preserve. But the increasing number of federal regulatory programs presented a different legal problem. Litigants sought to force the states to take affirmative action, as federal laws often directed, but the ministerial duty concept provided the only precedent for coercion. This concept was clearly too narrow a base for implementing complex federal programs, and instead of building on this theory, the Supreme Court articulated the new doctrine of implied waiver of sovereign immunity. Under the theory Congress could require a state to waive its sovereign immunity in order to participate in a federal program. The Court might imply a waiver from the state's participation. Two cases, *United States v. California*[29] and *California v. Taylor*,[30] laid the groundwork for the new theory. These cases applied federal statutes to state-owned railroads though the statutory language did not specifically cover them.[31] Although neither case raised the immunity question,[32] they both unequivocally decided that congressional regulation under the commerce clause overrides state power, whether exercised in a "governmental" or "proprietary" fashion.[33]

27. Knee v. Chemical Leaman Tank Lines, Inc., 293 F. Supp. 1094 (E.D. Pa. 1968). "The parties cannot waive lack of jurisdiction, whether by express consent, or by conduct, nor yet even by estoppel." C. WRIGHT, *supra* note 18, § 7, at 15-16.

28. 209 U.S. 123 (1908).

29. 297 U.S. 175 (1936).

30. 353 U.S. 553 (1957).

31. *United States v. California* held that the Federal Safety Appliance Act, 45 U.S.C. §§ 2, 6 (1970), applied to state-owned railroads, while *Taylor* reached the same result with regard to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970).

32. State sovereign immunity could not bar the federal government's suit in *United States v. California*. United States v. Texas, 143 U.S. 621 (1892).

33. The Court asserted:

> Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. . . . The sovereign power of the states is necessarily diminished to the extent of the grants of power to the government in the Constitution.

United States v. California, 297 U.S. 175, 183-84 (1936).