Practical View Of The Eleventh Amendment: Lower Court Interpretations And The Supreme Courts Reaction

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A PRACTICAL VIEW OF THE ELEVENTH AMENDMENT—LOWER COURT INTERPRETATIONS AND THE SUPREME COURT’S REACTION

The eleventh amendment recently has emerged from the obscurity which surrounded its first 170 years of existence. Several aspects of contemporary political life have combined to cause heavier reliance on the amendment by state governments. The scope of government activity has widened to include areas previously under private control. In addition, due process and equal protection concepts have been expanded to include previously unrecognized claims against government defendants. Coupled with the broader interpretation of these constitutional protections is the heightened public interest in litigation against governmental organizations, evidenced by the increasing number of pro se cases against state officials or agencies.

1 U.S. Const. amend. 11. “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.” Id. The eleventh amendment was proposed by Congress on March 4, 1794, and declared to have been ratified by three-fourths of the state legislatures on January 8, 1798. See 6 Annals of Congress 809 (1798); 3 Annals of Congress 476-77 (1794).

2 Between 1964 and 1972, eleventh amendment cases increased threefold in both the district courts and the courts of appeals.

3 The recent proliferation of agency groups at the state level has shifted the emphasis of private suits from those against state officers and employees to suits against public authorities and municipal corporations. See S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, 268 F. Supp. 568, 574 (D.N.J. 1967). These agencies, although usually performing governmental functions, are not synonymous per se with the “state” described in the eleventh amendment. See, e.g., Southern Bridge Co. v. Department of Highways, 319 F. Supp. 948 (E.D. La. 1970); George A. Fuller Co. v. Coastal Plains, Inc., 290 F. Supp. 911, 914 (E.D. La. 1968); S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, supra at 573-75; notes 72-80 infra and accompanying text. But see Harris v. Pennsylvania Turnpike Comm’n, 410 F.2d 1332, 1333-34 n.1 (3d Cir. 1969). The distinction has forced increasing judicial awareness of the problems created by expansion of the amendment’s scope beyond suits against the state as the party of record. See also Clean Air Act of 1970, 42 U.S.C. § 1857h-2(a)(1) (ii) (1970) (suits against government instrumentalities permitted to extent allowed by eleventh amendment).


The rediscovery of the amendment, which is a limitation on federal court jurisdiction where the state is a defendant, has coincided with the resurrection of judicial arguments for increased abstention by federal courts in favor of state courts. The eleventh amendment may be the means by which courts justify increasing abstention and thus may be the vehicle by which the division of labor between federal and state courts is restructured. However, strict interpretation of the amendment would increase the number of suits which could be brought only in state courts, thereby leaving some classes of plaintiffs virtually remediless. Therefore, the practical effect of the amendment should be understood fully before it is applied, and its use should be limited by a full comprehension of its original purpose—the preservation of federalism.

**PURPOSE OF THE ELEVENTH AMENDMENT**

The eleventh amendment was added to the Constitution to protect both the sovereignty of the states and the sanctity of their treasuries. Although article III of the Constitution had granted the Supreme Court jurisdiction to hear cases “between a State and Citizens of another State,” substantial controversy existed whether this included suits in which the state was a defendant. When Chief Justice Jay, in *Chisholm v. Georgia*, stated that it did, the eleventh amendment was passed to counteract the effects of the decision.

The amendment is not, however, an unconditional recognition of the absolute sovereignty of the states and must be read in the context of

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(D. Del. 1972). This development of public interest law also has resulted in a greater number of suits against public officials.

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10 See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922). Sovereignty theories were far less important than fear of financial disaster if suits against states could be maintained successfully. *Id.* at 99. But see *The Federalist* No. 81, at 511 (Wright ed. 1961).

the whole Constitution. This interpretive framework for the eleventh amendment was recognized in 1903 when the Court stated:

It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress... Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded...”

The Court's candid statement indicates that the limitation is grounded not only in the original Constitution but also in later conceptions of state sovereignty resulting from events such as the Civil War. The adoption of the thirteenth through fifteenth amendments is evidence of this changed conception. Although later courts have been less explicit in defining the amendment's scope, they have continued to recognize that the dual sovereignties concept places limits on its literal wording.

**Development of the Eleventh Amendment**

The eleventh amendment appears on its face to bar absolutely the jurisdiction of the federal courts in suits by individuals against states. See also Parden v. Terminal Ry., 377 U.S. 184, 196 (1964) (waiver of immunity by entry into federal field “is in accord with the common sense of this Nation's federalism”); Erdmann v. Stevens, 458 F.2d 1205, 1212 (2d Cir. 1972) (Lumbard, J., concurring) (limitation of federal jurisdiction is an attempt to minimize the potential for conflict between the federal and state systems). The limitation is based at least in part upon the premise that state courts, to the same extent as federal courts, are obligated to enforce the United States Constitution. See Ex parte Young, 209 U.S. 123, 176 (1908) (Harlan, J., dissenting).

See Parden v. Terminal Ry., 377 U.S. 184, 196 (1964). Although the Supreme Court has not found the amendment a limitation on pre-existing clauses of the Constitution, it has been urged to do so in several dissents. See Ex parte Young, 209 U.S. 123, 182 (1908) (Harlan, J., dissenting); Virginia Coupon Cases, 114 U.S. 270, 331 (1885) (Bradley, J., dissenting). The Court reconsidered the issue this term. See Employees of the Dept of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 41 U.S.L.W. 4493 (U.S. Apr. 16, 1973).

The amendment, while speaking only of suits in law or equity, has been held equally applicable to suits in admirality. See Ex parte New York, 256 U.S. 503, 510-11 (1921);
However, interpretation by the courts has been inconsistent with the terms of the amendment, and in practice the amendment has never been held a complete bar.\textsuperscript{24} Its effect has been limited by the use of legal fictions\textsuperscript{22} and by the concept of waivability.\textsuperscript{23} Partially because the amendment was passed to overrule a Supreme Court decision,\textsuperscript{24} its effect at first was restricted severely by the Court. In \textit{Cobens v. Virginia}\textsuperscript{25} Chief Justice Marshall suggested that the amendment only encompassed suits by individuals requesting payment of state debts.\textsuperscript{26} Three years later in \textit{Osborn v. Bank of the United States},\textsuperscript{27} Marshall declared that the amendment was applicable only when the state was a party of record\textsuperscript{28} and consequently opened the great eleventh amendment loophole—naming a state officer as defendant rather than the state.\textsuperscript{29} This limiting interpretation of the amendment prevailed until the late nineteenth century, when the dire financial condition of the states rekindled judicial awareness of the original purposes of the amendment.

After 1880, in a series of cases involving attempts by individuals to force states either to pay interest on state bonds\textsuperscript{30} or to accept bond

\begin{footnotesize}
\textsuperscript{24} The amendment overruled \textit{Chisholm v. Georgia}, 2 U.S. (2 Dall.) 419 (1793); see \textit{Holingsworth v. Virginia}, 3 U.S. (3 Dall.) 378, 381 (1798).

\textsuperscript{25} 19 U.S. (6 Wheat.) 264 (1821).

\textsuperscript{26} \textit{Id.} at 406-07.

\textsuperscript{27} 22 U.S. (9 Wheat.) 738 (1824).

\textsuperscript{28} \textit{Id.} at 837. Chief Justice Marshall admitted, however, that the officer named must have some personal responsibility for the act charged. \textit{Id.} at 838-39. This requirement was the basis for the first break-down in the party of record restriction when, in \textit{Hagood v. Southern}, the Court found that a suit against a state comptroller-general to force specific performance of a bond contract was a suit against the state even though it was not a party defendant, because the named party had no personal interest in the suit. 117 U.S. 52, 67 (1886).

\textsuperscript{29} The theory was that an act by a state officer under an unconstitutional law is not the act of the state at all and therefore suit to enjoin the officer's action could be maintained in federal court without running afoul of the eleventh amendment. 22 U.S. (9 Wheat.) at 836-37; see notes 102-107 infra and accompanying text.

\end{footnotesize}
couples in payment of state taxes, the Court gave the eleventh amend-

ment its broadest interpretation. In In re Ayres and Hans v. Louisiana, the Court barred any suit in federal court against either a state or its officials if the purpose of the suit was to enforce a state contract. How-

31 See, e.g., In re Ayres, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Virginia Coupon Cases, 114 U.S. 269 (1885). The Virginia Coupon Cases were of two types. In Poindexter v. Greenhow, persons whose property was taken for non-payment of taxes claimed tender of Virginia bond coupons in satisfaction of the taxes as a basis for their suit in detinue. Id. at 273-74. The Court held that it had jurisdiction to consider the validity of the refusal to accept the coupons as part of the suit against the officer for a personal trespass, and that the claim was not barred as a suit against the state. Id. at 288. However, in Carter v. Greenhow, the Court found that a suit for damages for refusal to accept the coupons tendered did not state a cause of action. 114 U.S. at 317, 320, 323. While the majority in these cases did not find the suits barred by the eleventh amendment, the four dissenting justices, foreshadowing the decisions in Hagood and Ayres, did. Id. at 338 (Bradley, J., Waite, C.J., Miller & Gray, J.J., dissenting). The dissent argued that a claim that an act of a state is unconstitutional can be maintained in district court only in response to an aggressive act by the state, and cannot be brought to force the state to act where it has declined to do so. Id. at 335-37.

32 123 U.S. 443 (1887).

33 134 U.S. 1 (1890).

34 Id. at 20-21; 123 U.S. at 505. Suits alleging unconstitutional impairment of contract obligations were also included in the eleventh amendment prohibition. See id. In Ayres, the Court found, as a collateral issue, that a non-citizen of Virginia could not bring suit in federal court against the state attorney general to enjoin actions amounting to a breach of contract. Id. at 502-03. The Court found that the suit was against the state and barred by the eleventh. Id. at 507. In Hans, this restriction was extended to cover suits by citizens of a state against their own state. 134 U.S. at 15. See also New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883). The Hans extension also applies to third party actions against a state. Lee v. Brooks, 315 F. Supp. 729 (D. Hawaii 1970).

There has been much discussion whether the decision in Hans amounted to an extension of the eleventh amendment or whether it was merely an interpretation of the original limitations on the jurisdiction of the federal courts found in article III of the Constitution or in common law sovereign immunity. See Parden v. Terminal Ry., 377 U.S. 184, 192 (1964) (eleventh); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944) (common law); Ex parte New York, 256 U.S. 490, 497-98 (1921) (eleventh); Duhne v. New Jersey, 251 U.S. 311, 313 (1920) (Constitution construed as a whole); Miller, Service of Process on State, Local, and Foreign Governments Under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers, 46 F.R.D. 101, 108-09 & n.12 (1969) (article III). See generally Comment, Private Suits Against States in the Federal Courts, 33 U. Cin. L. Rev. 331, 334-35 (1966). The article III theory finds support in the dissenting opinion in the Virginia Coupon Cases. See 114 U.S. at 337-38 (Bradley, J., Waite, C.J., Miller & Gray, J.J., dissenting). This is indicative of the basis of Hans because the dissent in the Virginia Coupon Cases and the majority opinion in Hans were both written by Justice Bradley, and the dissenting justices in the Virginia Coupon Cases joined the majority in Hans. Compare 134 U.S. at 9 with 114 U.S. at 330. The debate is historically interesting, but its only practical effect would arise from a decision that the eleventh amendment, as a specific limitation on article III, actually permits suits by citizens against their own states by not forbidding them. The Supreme Court considered the issue this term in Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, and appears to have determined that Hans rests on the eleventh amendment. 41 U.S.L.W. 4493, 4494 (U.S.
ever, this expansive interpretation of the eleventh was limited in 1908 by *Ex parte Young.* In a return to Chief Justice Marshall’s position in *Osborn,* the *Young* Court held that, because actions by a state officer to enforce a statute alleged to be unconstitutional were not acts of the state, the eleventh amendment did not bar a suit to enjoin such acts.

Although the Court in *Young* refused to overrule *Ayres,* it can be argued that the cases are factually indistinguishable. Both *Ayres* and *Young* involved an ultimate incident of state sovereignty—the power of a state to use its own courts to enforce its laws. These two cases reached the Supreme Court in habeas corpus petitions from state attorneys general jailed for refusal to obey federal court injunctions forbidding them to bring suits to enforce certain state laws. Allowing the injunction actions in federal courts strengthens the dual sovereignties interpretation of the amendment and suggests that the amendment is not in fact a bar

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85 209 U.S. 123 (1908).
87 209 U.S. at 159-60.
88 Id. at 152-53.
89 See id. at 189-90 (Harlan, J., dissenting). In *Ayres,* an injunction prevented the Virginia Attorney General from instituting suit to recover taxes paid with state bond coupons on the grounds that such action violated the contract clause of the Constitution. 123 U.S. at 486-87. In *Young* an injunction forbade the Minnesota Attorney General to institute suit to enforce a rate-making law because the law amounted to an unconstitutional taking of property. 209 U.S. at 131-32. The essential issue in each case was whether the lower federal court had jurisdiction to entertain the original suit. See 209 U.S. at 134; 123 U.S. at 485-87. The Court in *Young* distinguished *Ayres* on the ground that *Ayres* was brought to enforce a contract whereas the action in *Young* was designed to prevent enforcement of a law. 209 U.S. at 152-53, 167. Justice Harlan maintained that the same question was crucial in each—could a federal court bar a state from the use of its own court to enforce its own laws? Id. at 190, 203-04 (Harlan, J., dissenting). See also *Georgia R.R. & Banking Co. v. Redwine,* 342 U.S. 299, 304-05 (1952).

40 209 U.S. at 190, 203-04 (Harlan, J., dissenting). This issue recently has been considered by the Court in the context of the federal anti-injunction statute. Mitchum v. Foster, 407 U.S. 225, (1972); Younger v. Harris, 401 U.S. 37 (1971); see 28 U.S.C. § 2283 (1970). The Court in *Younger* found that the anti-injunction statute limited the power of federal courts to interfere in state court proceedings because of the principles of equity, comity and federalism. 401 U.S. at 43-45; see Mitchum v. Foster, 407 U.S. 225, 243 (1972). However, the Court explicitly refrained from considering the effect of the statute in the *Younger* situation, where state court proceedings had not begun before the injunction issued. 401 U.S. at 41. Even if the *Younger* situation were to come within the present interpretation of the anti-injunction statute, the barring of this extreme form of federal interference with the states should not significantly affect the power of the federal courts in most suits against states.

41 209 U.S. at 126; 123 U.S. at 445.
42 See notes 14-19 supra and accompanying text.
to federal court jurisdiction where an unconstitutional act by the state or its officers is alleged. This less restrictive interpretation of the amendment in constitutional cases has continued and is especially apparent in the Court’s actions in school desegregation\textsuperscript{43} and reapportionment cases.\textsuperscript{44}

Until the middle of this century, the Supreme Court considered the eleventh amendment almost exclusively in the context of constitutional claims. The more recent decisions in the non-constitutional areas have been more internally consistent than those involving the Constitution. Suits based on federal statutory causes of action usually revolve around the issue of constructive waiver of immunity by the state’s entry into a federal sphere of regulation.\textsuperscript{45} However, a recent district court decision suggests that a constructive or explicit waiver is not in fact a prerequisite for federal jurisdiction over any federally based claim against a state.\textsuperscript{46}

During the 1972 term, for the first time since the birth of the constructive waiver doctrine in 1964,\textsuperscript{47} the Supreme Court reconsidered the issue.\textsuperscript{48} Suits against a state on a cause of action created solely by state law consistently have been barred from federal court unless the state has given clear consent to suit in that court.\textsuperscript{49} Claims against states by name on common law causes of action have been fairly rare,\textsuperscript{50} and the major issue in suits against a state agency usually is whether the suit is in fact against the state and, therefore, barred by the amendment.\textsuperscript{51}

\textsuperscript{43}See Griffin v. County School Bd., 377 U.S. 218, 228 (1964); Sweatt v. Painter, 339 U.S. 629 (1950).
\textsuperscript{45}See notes 130-144 infra and accompanying text.
\textsuperscript{47}See Parden v. Terminal Ry., 377 U.S. 184, 196-97 (1964) (state waived immunity to suit under Federal Employee Labor Act by operating railroad in interstate commerce).
\textsuperscript{49}Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 465-66 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54-55 (1944). Both these suits were actions to compel state tax refunds. 323 U.S. at 460; 322 U.S. at 48. The state laws allowed refund suits in state court, and the issue was whether the state thereby waived its immunity to suit in federal court. 323 U.S. at 464; 322 U.S. at 53. \textit{But see} Reagan v. Farmers’ Loan & Trust Co., 154 U.S. 362 (1894). In this similar case, the Court held that “a court of competent jurisdiction in Travis County” included the federal court, and that the state had therefore waived its immunity under the eleventh amendment. \textit{Id.} at 392; \textit{see} Mississippi River Fuel Corp. v. Cocreham, 382 F.2d 929, 932-36 (5th Cir. 1967) (consent in state statute).
\textsuperscript{51}Contract suits are often held barred as against the state. \textit{See} Hamilton Mfg. Co. v. Trustees of State Colleges, 356 F.2d 599 (10th Cir. 1966); DeLong Corp. v. Oregon State
LEGAL CHARACTER OF THE ELEVENTH AMENDMENT

Although courts have developed a series of working rules by which to decide eleventh amendment issues, judicial confusion still exists regarding the legal character of the eleventh. Courts have called the amendment both a jurisdictional question and a defense on the merits. This inconsistency is a result of judicial confusion between eleventh amendment principles and sovereign immunity. The distinction between these two concepts is frequently obscured by court decisions which speak of "sovereign immunity as embodied in the Eleventh Amendment." Although sovereign immunity was originally a basis for the eleventh, and the amendment is to some extent founded on the same principle of separation of powers, the two doctrines are distinct. While the purpose of sovereign immunity is to prevent courts and plaintiffs generally from interfering with the workings of government, the eleventh was de-


54 See Mathis, supra note 7, at 215-30.

55 In re Ayres, 123 U.S. 443, 505 (1887) (eleventh prevents states from having to account for actions before judiciary).

signed to prohibit the federal government, through its courts, from interfering in the internal functions of state government. 57

The wording of the amendment itself suggests that it raises a jurisdictional question. 58 Although some courts have interpreted it as merely a defense, 59 the policy reason behind the eleventh amendment—to preserve federalism—indicates that the jurisdictional interpretation is more legitimate. Under a jurisdictional interpretation, suits would be barred from federal courts before consideration on the merits, thereby preserving the separate integrity of the state judicial system. Dismissal of the suit for lack of jurisdiction would not be res judicata in a later suit in a state court on the same cause of action, but would merely function

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58 U.S. Const. amend. XI; note 1 supra; see Missouri v. Fiske, 290 U.S. 18, 25 (1933); In re Ayres, 123 U.S. 443 (1887); Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dep't., 415 F.2d 452 (5th Cir. 1969). Even if the amendment is jurisdictional in scope, the Supreme Court has found it to be waivable. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464-65 (1945); Missouri v. Fiske, 290 U.S. 18, 20 (1933); notes 136-137 infra and accompanying text. See also Whitner v. Davis, 410 F.2d 24, 29 (9th Cir. 1968); Missouri Pac. R.R. v. Travelers Ins. Co., 281 F. Supp. 100, 102 (E.D. La. 1968); Comment, supra note 34, at 333 n.10. This anomalous position is further supported by the holding that the issue can be raised at the Supreme Court level even though not argued in the lower court. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 64 (1944) (Frankfurter, J., dissenting); Mississippi River Fuel Corp. v. Cochrane, 382 F.2d 929, 932 (5th Cir. 1967), cert. denied, 390 U.S. 1014 (1968).

as a direct estoppel on the jurisdiction issue. If a state could use the eleventh amendment as a defense, a complete bar to suit in state and federal court might result.

Even courts which view the amendment as jurisdictional have understandable difficulties in classifying that jurisdiction as either subject matter or personal, because the amendment, as interpreted, bears characteristics of both. Like personal jurisdiction, it consistently has been held waivable. On the other hand, the eleventh amendment issue may be raised at any step of the judicial process, and is not waived by a general appearance and answer on the merits, both unique characteristics of subject matter jurisdiction. Therefore, the amendment cannot be classified as relating only to either subject matter or personal jurisdiction and should be recognized as having attributes of both.

**APPLICATION OF THE ELEVENTH PARTIES PLAINTIFF**

Perhaps the only area in which the courts are consistent in their approach to the eleventh amendment is party-plaintiff problems. Although the amendment nominally precludes federal court jurisdiction only in cases against a state brought by citizens of another state or aliens, its bar has been extended to include plaintiffs other than those mentioned in the amendment itself. For example, its protective shield has been interpreted to cover suits against a state by citizens of the same state. Although section two of article III of the Constitution confers jurisdiction on federal courts in suits between states, an action brought by one state against another violates the eleventh amendment if the plaintiff state actually is bringing the claim for an individual citizen. Finally, the

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60 See F. James, Civil Procedure § 12.6 (1965); note 115 infra and accompanying text.
62 See id. at 466-67; see notes 123-124 infra.
63 See C. Wright, Law of Federal Courts § 7 (2d ed. 1970); see also F. James, supra note 60, § 12.6 (personal jurisdiction waived by appearance or answer on merits).
65 U.S. Const. amend XI.
67 See North Dakota v. Minnesota, 263 U.S. 365, 374-76 (1923) (dicta); cf. Hawaii v. Standard Oil Co., 405 U.S. 251, 258 n.12 (1972) (although doctrine of *parens patriae* viable, held not to authorize damage action under Clayton Act). Early in the judicial interpretation of the eleventh amendment, the Supreme Court examined the exercise of control over litigation initiated by one state against another to determine whether
The crucial factor in determining whether to apply the eleventh amendment is the remedy requested. Language to the contrary by the courts is merely a smokescreen for the real judicial concern—the power of the federal courts over state governments. However, most courts first consider the superficial eleventh amendment issue, the characterization of the party defendant, since the amendment appears to bar federal court jurisdiction in certain cases solely because the state is the defendant. The suit was actually one for the benefit of an individual. See New Hampshire v. Louisiana, 108 U.S. 76 (1883). In deciding that New Hampshire was merely representing an individual interest by suing as assignee of Louisiana bonds held by a New Hampshire citizen, the Court cited four factors: the bondholder paid all legal expenses, retained authority to conclude a compromise, received any state recovery, and utilized private counsel in addition to the state attorney general. Id. at 89. The eleventh amendment does not bar suits where the United States sues a state on behalf of individuals if the United States is also enforcing its own law. See Hodgson v. Board of Educ., 344 F. Supp. 79, 86 (D.N.J. 1972) (action by Secretary of Labor to enforce Fair Labor Standards Act).

The amendment has been extended to bar federal court entry when a foreign country is plaintiff. There is also agreement, however, that the amendment does not encompass some legal situations to which it might extend under a broad interpretation. For example, the amendment does not cover suits in which the United States or another state is the actual plaintiff. Cases in which the state is plaintiff in the court of original jurisdiction but becomes the defendant-in-error on appeal are similarly beyond the scope of the amendment.

PARTIES DEFENDANT

The crucial factor in determining whether to apply the eleventh amendment is the remedy requested. Language to the contrary by the courts is merely a smokescreen for the real judicial concern—the power of the federal courts over state governments. However, most courts first consider the superficial eleventh amendment issue, the characterization of the party defendant, since the amendment appears to bar federal court jurisdiction in certain cases solely because the state is the defendant. The suit was actually one for the benefit of an individual. See New Hampshire v. Louisiana, 108 U.S. 76 (1883). In deciding that New Hampshire was merely representing an individual interest by suing as assignee of Louisiana bonds held by a New Hampshire citizen, the Court cited four factors: the bondholder paid all legal expenses, retained authority to conclude a compromise, received any state recovery, and utilized private counsel in addition to the state attorney general. Id. at 89. The eleventh amendment does not bar suits where the United States sues a state on behalf of individuals if the United States is also enforcing its own law. See Hodgson v. Board of Educ., 344 F. Supp. 79, 86 (D.N.J. 1972) (action by Secretary of Labor to enforce Fair Labor Standards Act).

68 See Monaco v. Mississippi, 292 U.S. 313, 330 (1934). The Court based this decision on the practical consideration that the foreign country enjoyed immunity similar to that of a state and could not itself be sued absent consent. Id. at 330.

69 See United States v. California, 297 U.S. 175 (1936); United States v. Texas, 143 U.S. 621, 692-43 (1892); United States v. Pennsylvania, 349 F. Supp. 1370, 1385-86 (E.D. Pa. 1972). The eleventh may not apply if the United States is the real party in interest, even if it is not a named plaintiff. See Marquardt Corp. v. Weber County, 360 F.2d 168, 171 (10th Cir. 1966). In Marquardt, two companies alleged that the Utah state tax was discriminatory. Since they held a contract requiring the United States to reimburse them for taxes paid, the court held the eleventh not applicable. Id. at 171. Impleader of a state in a tort action by the United States is also allowable. See Lee v. Brooks, 315 F. Supp. 729, 732 (D. Hawaii 1970). See also United States v. California, 328 F.2d 729, 735-36 (9th Cir. 1964), cert. denied, 379 U.S. 817 (1965).


72 A suit by an individual naming the state as defendant almost certainly will be barred by the eleventh amendment unless a waiver is found. See, e.g., Neal v. Georgia, 469 F.2d 446, 449 (5th Cir. 1972); O'Neill v. Pennsylvania, 459 F.2d 1 (3d Cir. 1972); Knight v. New York, 443 F.2d 415, 417-18 (2d Cir. 1971); Janda v. Illinois, 348 F. Supp.
Despite the eleventh amendment, a suit against an agency or political subdivision or a state may be within federal jurisdiction if the defendant is somehow independent of the state or is not an “alter ego” of the state.8

In determining whether the agency or subdivision is an alter ego, the courts look at one or a combination of characteristics of the agency which indicate its relationship to the state. Some courts, using a distinction derived from theories of municipal sovereign immunity, hold that if the entity performs governmental rather than proprietary functions, it is an alter ego.76 However, this theory is difficult to apply consistently since municipalities and counties, both of which perform governmental functions, have traditionally been held not to share the state’s eleventh amendment immunity.


However, problems arise because the party of record is not conclusive, and a suit nominally against a party other than the state may be deemed a suit against the state. See In Re Ayers, 123 U.S. 443, 487 (1887), overruling in part Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 264 (1824); S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, 268 F. Supp. 568, 573-74 (D.N.J. 1967); notes 28-29 supra and accompanying text. But cf. Thompson v. Fugate, 347 F. Supp. 120, 123 (E.D. Va. 1972) (“presumption” that eleventh does not apply when named party is highway director).

Although no cases have reached the issue, the amendment probably does not protect the District of Columbia. Cf. United States v. Carter, 41 U.S.L.W. 4127 (U.S. Jan. 10, 1973) (District of Columbia not a state for purposes of section 1983).


75 See Lewis v. Vermont, 289 F. Supp. 246, 248 (D. Vt. 1968); DeLong Corp. v. Oregon State Highway Comm’n, 233 F. Supp. 7, 15-16 (D. Ore. 1964), aff’d, 343 F.2d 911 (9th Cir.), cert. denied, 382 U.S. 877 (1966). But see Raymond Int’l, Inc. v. M/T Dalzelleagle, 336 F. Supp. 679, 682 (S.D.N.Y. 1971) (governmental function not controlling); S.J. Groves & Sons v. New Jersey Turnpike Authority, 268 F. Supp. 568, 575 (D.N.J. 1967) (governmental function inconclusive). The DeLong court considered the following factors in finding that the Highway Commission performed an “essential governmental function” and therefore was an alter ego of the state: contracts by the Commission were executed in the name of the state; condemnation proceedings were in the name of the state; the Commission’s funds came from state taxes and were deposited with the state treasurer; and Commission bonds were issued in the name of the state as general obligations. 233 F. Supp. at 11-12, 15-16.


Instead of focusing on the purpose of the agency, other courts look to the agency’s structure to determine if it has a corporate existence separate from that of the state.\(^7\) If the only indication of corporate independence is a “sue and be sued” clause,\(^9\) or a separate fiscal existence,\(^8\) the eleventh will bar the suit. However, a separate fiscal existence combined with a “sue and be sued” clause frequently will result in a finding of corporate independence.\(^2\)


The scope of diversity jurisdiction can neither be expanded nor limited by the states. Although the eleventh has been held waivable, the state cannot similarly waive its non-citizen status to create valid diversity jurisdiction since diversity jurisdiction does not involve a privilege belonging to the state. S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, supra at 571; see Harris v. Pennsylvania Turnpike Comm’n, supra at 1334 n.1; Missouri Pac. R.R. Co. v. Travelers Ins. Co., 281 F. Supp. 100, 102 (E.D. La. 1968). On the other hand, the state cannot limit the reach of diversity jurisdiction by conferring alter ego status upon an agency. See Baton Rouge Contracting Co. v. West Hatchie Drainage Dist., 279 F. Supp. 430, 432 (N.D. Miss. 1968); S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, supra at 573.
The "alter ego" limitation upon the applicability of the eleventh is a clear example of the disjunction between words and meaning. While the courts discuss the relative independence of the agency as a theoretical matter, their practical consideration in finding independence is that a judgment against a financially separate corporation will not involve a federal court in a battle with a state legislature over the proper use of state revenues. When the court is unable to find such independence, however, the remedy requested becomes the central issue on which the decision to apply the amendment is based. If the plaintiff requests damages, or any other remedy requiring expenditure of state funds, the federal courts have generally found that the eleventh precludes jurisdiction. Conversely, most requests for injunctions which do not require direct expenditure are not barred by the amendment; their success is dependent on the merits of the claim. Judges are even more willing to discount the effect of the eleventh when the plaintiff requests a declaratory judgment, reasoning that "the possibility of some type of affirmative state action in the future to correct the illegality will not bring the suit into conflict with the Eleventh Amendment." 

Several tests have been developed by the courts to aid them in the categorization of the cases. Since the eleventh amendment was designed to protect state treasuries, courts deciding whether to apply the amendment will inquire if, as a direct result of an adverse judgment, the state will be forced to pay the plaintiff. There are nominally three different tests employed to make this determination, but the distinctions between them are minimal. The most expansive test simply inquires whether the suit requests damages. The other two tests turn upon

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[82] See note 8 supra and accompanying text.

[83] Parker v. Mandel, 344 F. Supp. 1068, 1072 (D. Md. 1972); see Like v. Carter, 448 F.2d 798, 805 (8th Cir. 1971), cert. denied, 405 U.S. 1045 (1972); Gaiter v. Sterrett, 346 F. Supp. 1095, 1099 (N.D. Ind.), aff'd, 409 U.S. 1070 (1972); Housing Authority v. Richardson, 346 F. Supp. 1027, 1033 (D.N.J. 1972). However, an injunction or declaratory judgment may prove useless if the court refuses to issue a contempt citation or grant damages when the order is disobeyed. See Rodriguez v. Weaver, Civil No. 69 C 2615 (N.D. Ill. 1972) (although "widespread and substantial noncompliance" with October 29, 1970 order, motion for contempt citation denied); cf. Landman v. Royster, 12 Crim. L. Rptr. 2393 (E.D. Va. Jan. 29, 1973) (although conduct of defendants violates "both the letter and the spirit of the court's order" of Oct. 30, 1971, imprisonment not appropriate and contempt fine of $25,000 suspended on condition that immediate steps be taken to comply with order).


[85] See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Ex parte New York, 256 U.S. 490, 500-01 (1921); Knight v. New York, 443 F.2d 415, 419, 421
whether a judgment for the plaintiff will require the taking of monies from the state treasury without the state's consent and whether the relief requested would require the appropriation of funds by the state legislature. If any of these questions are answered affirmatively, most courts find that the eleventh bars the action.

The most extreme effect resulting from the use of the tests is to deprive a plaintiff of a forum for his claim. Lack of a remedy for an infringement of rights by a state is most apparent in patent and copyright cases where federal courts have exclusive jurisdiction. In common law contract or tort claims, the effect is less extreme but still can be damaging to the plaintiff.

Recently, there have been numerous actions requesting retroactive welfare benefits from the states. Some courts, applying the tests literally and finding a damage claim, have barred relief upon invocation of the eleventh by the state-defendant. Other courts, concerned with the


See, e.g., Whirl v. Crow, 309 F.2d 777, 781 (8th Cir. 1962) (copyright action against state barred by eleventh); Hercules, Inc. v. Minnesota State Highway Dep't, 327 F. Supp. 795, 797, 800-01 (D. Minn. 1972) (patent infringement action against state barred as to damages, but not as to injunctive relief).

Sovereign immunity may bar the plaintiff from a hearing in state court. See notes 54-56 supra and accompanying text. However, that issue is beyond the scope of this Note. See generally Davis, Sovereign Immunity Must Go, 22 Am. L. Rev. 383 (1970); Note, Krause v. State: Is Ohio Sovereign Immunity Unconstitutional?, 33 U. Prr. L. Rev. 611 (1972); Comment, State Immunity from Suit Without Consent—Scope & Implications, 71 Wis. L. Rev. 879 (1971).


justice of allowing states which have disobeyed federal statutes or the Constitution to avoid permanently the payment of welfare benefits and obedience to federal law, have developed various ways of circumventing the eleventh. At least one court has avoided the eleventh by stating that it was not granting damages but rather was giving restitution of monies unconstitutionally withheld. 92 Another avoidance technique is to view a grant of past due benefits to one plaintiff as a redistribution of funds previously allocated for expenditure to the class of which the plaintiff is a member. 93 Still other courts have ignored the eleventh amendment problem altogether. 94 Although a split now exists between the Second and Eighth Circuits as to whether the eleventh bars payment of retroactive benefits 95 there is no inherent reason why these techniques cannot be used in other types of situations where strict application of the damage-injunction distinction would be inequitable.

If a court is unwilling to employ these techniques, and the suit is against an individual, still another means of avoiding the effect of the eleventh may be available. The Civil Rights Act of 1871 96 authorizes damage actions against persons acting under color of state law to deny constitutional rights, privileges and immunities. 97 Since the Act can be


One major problem with section 1983 suits is that states and cities have been held not to be "persons" for section 1983 purposes. See Monroe v. Pape, 365 U.S. 167, 191 (1961)
invoked successfully only when the court finds that the judgment will operate solely against the specific individual who has violated the statute, its effectiveness is limited. Furthermore, damages are frequently disallowed if the official is found to have acted in good faith within the scope of his official duty.


Courts are split on whether state agencies are persons within the meaning of section 1983. Compare Lee v. Board of Regents, 441 F.2d 1257, 1260 (7th Cir. 1971) and Louisiana State Bd. of Educ. v. Baker, 339 F.2d 911, 911 (5th Cir. 1964) (agency a person within section 1983) with Whitner v. Davis, 410 F.2d 24, 29 (9th Cir. 1969) (agency not a person within the meaning of section 1983). See generally Levy, supra note 92.


Damage actions brought under federal statutes which have fewer constitutional overtones than section 1983 are generally considered barred by the eleventh unless there has been state or congressional waiver of the protection. Claims based on state statute or common law require an even more explicit demonstration of waiver which is found only infrequently.

While successful damage actions against state officials in federal courts by-pass the eleventh only infrequently, injunction requests are far more likely to succeed, particularly when brought under the Constitution. This success stems in large part from judicial differentiation between suits against officers and suits against the state. The development of this distinction began in 1824 when Chief Justice Marshall determined that so long as the defendant official was directly responsible for the allegedly unconstitutional act, a suit seeking to enjoin his act was not barred by Davidson, 340 F. Supp. 351 (D. Md.), aff'd, 409 U.S. 904 (1972) (distinction not recognized). See also Board of Trustees v. Davis, 396 F.2d 730, 732 (8th Cir.), cert. denied, 393 U.S. 962 (1968). Where the distinction is not recognized and the court applies the treasury rationale of the eleventh strictly, damage actions against officials have been barred even for acts allegedly in contravention of section 1983. See Francis v. Davidson, supra at 370.

Actions brought under section 1983 should not be confused with pure "constitutional torts"—damage actions based solely on violation of the Constitution and not yet limited by the defense of good faith and the doctrine of absolute immunity. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). The Court explicitly stated that there is an underlying power to grant such a remedy for violation of "legal rights" even without any explicit statutory authority. Id. at 396-97; see District of Columbia v. Carter, 409 U.S. 418, 432-33 (1972) (dictum). See also 33 Ohio St. L.J. 205 (1972); 46 Tul. L. Rev. 816 (1972). Although their future is uncertain, constitutional torts may become a viable alternative to some section 1983 damage actions against state officials.

See notes 115-144 infra and accompanying text.


Requests for equitable remedies which are brought under state statutes or common law are almost as unsuccessful as damage actions on similar causes of action. See Missouri v. Fiske, 290 U.S. 18, 27-28 (1933) (eleventh bars injunction against state intervenor in probate proceedings); Tardan v. Chevron Oil Co., 463 F.2d 651, 653 (5th Cir. 1972) (eleventh bars suit to quiet title against state mineral board).
the eleventh amendment.\textsuperscript{103} After an 80 year hiatus, the Supreme Court reaffirmed this position in \textit{Ex parte Young},\textsuperscript{104} where the Court held:

\begin{quote}
[T]he officer in proceeding under such [unconstitutional] enactment comes into conflict with the superior authority of [the] Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.\textsuperscript{105}
\end{quote}

This distinction between acts of an official and acts of the state is obviously a fiction which enables federal courts to enjoin acts of the state which can, of course, act only through its officers.\textsuperscript{106} Successful

\textsuperscript{103} Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 836-37 (1824); see notes 27-29 \textit{supra} and accompanying text.

\textsuperscript{104} 209 U.S. 123 (1908).


Claims of unconstitutional impairment of contracts are less common today than they were when \textit{Ayers} was decided. In one of the few cases which have arisen, the Fifth Circuit held that the eleventh was not a bar to a suit to enjoin the impairment of a land sale contract. McGuire v. Sadler, 337 F.2d 902, 905-06 (5th Cir. 1964); cf. Pilling, \textit{supra} note 15, at 475-77.


suits against officials can be maintained both where the official individually has acted unconstitutionally and where he has enforced an unconstitutional state law.\textsuperscript{107} If the act or statute enforced is unconstitutional, the official’s belief that his action was within his authority is immaterial.\textsuperscript{108} Since \textit{Young} itself involved a constitutional claim, courts are most willing to use the fiction to provide jurisdiction to enjoin unconstitutional acts of state officers.\textsuperscript{109}

Allegations of actions contrary to federal statutes also have been the basis for use of the \textit{Young} fiction. In particular, injunction actions brought under section 1983 of the Civil Rights Act of 1871\textsuperscript{110} are more consistently successful than damage claims brought under the same statute. The same court which will enjoin section 1983 violations will frequently refuse to grant damages to remedy past violations.\textsuperscript{111} Courts


\textsuperscript{108} 209 U.S. at 155-56, 167. On the other hand, a mere tortious act, even outside the scope of authority, should not break down the eleventh amendment barrier, although it might bar a sovereign immunity defense. See Board of Trustees of Ark. A. & M. College v. Daniels, 376 F.2d 730, 732-33 (8th Cir.), \textit{cert. denied}, 393 U.S. 962 (1968). \textit{But see} Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703 (1949) (tortious action may be within the general scope of authority in which case sovereign immunity is a valid defense).


The success in relying on \textit{Young} is dependent, in part, on whether the allegation of the unconstitutional act is considered before any inquiry into the effect of the proposed remedy on the state treasury. If \textit{Young} is considered first, the suit will survive a motion to dismiss for lack of jurisdiction. Cf. 209 U.S. at 159-60; Waller v. Professional Ins. Corp., 299 F.2d 193, 195 (5th Cir. 1962) (action of official outside scope of authority prerequisite to jurisdiction); Pitts v. Department of Revenue, 333 F. Supp. 662, 669 (E.D. Wis. 1971) (eleventh no bar to "patently unconstitutional action by official"); National Audubon Soc'y, Inc. v. Johnson, 317 F. Supp. 1336, 1334 (S.D. Tex. 1970) (suit against official action within discretionary authority barred by sovereign immunity). If the court first considers the monetary effect of an adverse judgment, however, it may bar a suit nominally against an individual as a suit against the state. See, e.g., Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Rothstein v. Wyman, 467 F.2d 226, 236 (2d Cir. 1972), \textit{cert. denied}, 41 U.S.L.W. 3527 (U.S. Apr. 2, 1973); Francis v. Davidson, 340 F. Supp. 351, 370 (D. Md. 1972), \textit{aff'd}, 409 U.S. 904 (1972).


also have employed the fiction to facilitate enjoining acts of state officials in conflict with the Social Security Act\textsuperscript{112} and the Federal Aid Highway Act of 1968.\textsuperscript{113}

Although redress against the state appears to be circumscribed severely by the eleventh amendment, the federal courts do possess the power to remedy injuries to citizens. This is particularly true where the Young fiction can be invoked, as in federal causes of action, or where a court interprets requests for monies as restitution of funds improperly withheld rather than as damages. These techniques are useful, but the confusion engendered by their application could be mitigated by a return to Chief Justice Marshall’s conception of the purpose of the amendment: to preserve the state’s interest in adjustment of its debts or other claims without stripping the federal judiciary of power to enforce the Constitution.\textsuperscript{114}

**Waiver**

The Supreme Court has maintained for the last 80 years that the bar of the eleventh amendment is not absolute; the power of the state to forego its privilege has not been questioned.\textsuperscript{115} Therefore, once the amendment is found applicable, courts focus on the possibility that the state has waived its eleventh amendment protection.


A finding that section 1983 overcomes the eleventh amendment is in fact a decision that when an official is found to have violated section 1983, Young is applicable. See Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1352-53 (E.D.N.C. 1970); Miller v. Parsons, 313 F. Supp. 1150, 1151-52 (M.D. Pa. 1970); Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 974-75 (W.D. Wis. 1970), aff’d, 446 F.2d 806 (7th Cir. 1971), rev’d on other grounds, 408 U.S. 564 (1972).

These statements should not be interpreted to mean that a suit nominally against a state and alleging a civil rights violation will avoid the eleventh. See, e.g., Miller v. Hulsey, 347 F. Supp. 192, 197 (E.D. Ark. 1972) (eleventh extends to alter ego state agency but not to individual commissioners when section 1983 violation alleged); Muller v. Wachtel, 345 F. Supp. 160, 161 (S.D.N.Y. 1972) (eleventh extends to name state defendant even where section 1983 violation alleged); Bennett v. Gravelle, 323 F. Supp. 203, 211 (D. Mbl.), aff’d, 451 F.2d 1011 (4th Cir. 1971), petition for cert. dismissed, 407 U.S. 917 (1972) (where state would have to pay money, section 1983 does not override eleventh). See also note 96 supra.


314 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821). See also L. JAFFE, supra note 105, at 222.

WAIVER BY APPEARANCE

The Supreme Court first explicitly recognized eleventh amendment waiver, as distinguished from sovereign immunity waiver, in Clark v. Bernard.116 The Court found that when Rhode Island became a positive actor in the suit by intervening as a plaintiff,117 jurisdiction was conferred upon the federal courts to enter judgment against the state “to the full extent required for ... complete determination” of the suit.118 The Court modified this statement in Missouri v. Fiske,119 by holding that a state could become a plaintiff-intervenor for limited purposes without waiving the eleventh, even in claims for injunctive relief.120 The three federal courts since Fiske which have considered the waiver effect of a state appearance to contest the merits have disagreed, two finding a total waiver,121 and the third finding a waiver only on claims in the nature of recoupment or set-off.122

On the other hand, immunity is not waived by a mere procedural appearance in federal court by a representative of a defendant state,123 nor by an answer on the merits.124 The state can raise this issue at any point in the proceedings, even in the Supreme Court.125

WAIVER BY STATE CONSTITUTION, STATUTE OR DECISION

A state can, by constitution, statute, or decision waive eleventh amendment protection either in general or in a limited class of cases.126 This waiver must be a clear and unambiguous indication of the state’s intention to submit to suit in federal court.127 Several courts requiring an ex-

116 108 U.S. 436 (1883).
117 Id. at 447-48.
118 Id. at 448.
119 290 U.S. 18 (1933).
120 Id. at 25.
124 Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-69 (1945); Aerojet-General Corp. v. Askew, 453 F.2d 819, 828 (5th Cir. 1971), cert. denied, 409 U.S. 892 (1972); MacDonald v. Board of Regents, 371 F.2d 818, 819 (6th Cir. 1967) (per curiam).
explicit consent by the state import the requirement from habeas corpus cases that waiver must be an "intentional relinquishment or abandonment of a known right or privilege." 128 The use of this habeas corpus standard in the context of the eleventh amendment waiver by the state is somewhat disingenuous, since habeas decisions involve the waiver of crucial legal rights of individuals in quasi-criminal proceedings. Where personal freedom is not at stake, the use of such a strict test exalts form over substance. 129 Furthermore, since a state can waive only through agents, it can never have personal knowledge of the rights which it relinquishes. One result of this strict interpretation of eleventh amendment waiver is the finding that statutory consent by the state to suit, without clear specification that the consent extends to suit in federal court, does not constitute consent to suit in the federal courts. 130

CONSTRUCTIVE WAIVER

The doctrine of constructive waiver by entry into a sphere of federal regulation evolved from Parden v. Terminal Ry. Co. 129 where the Supreme Court found that by operation of a railroad engaged in interstate commerce, Alabama had consented to suit in federal court under the Federal Employer's Liability Act. 130 The Court declared that "when a

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129 See Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) (consent not dependent on ritualistic formula).


132 Id. at 192; see Federal Employer's Liability Act, 45 U.S.C. § 55 (1970). The Court had hinted that it might find waiver merely by entry into the federal sphere in Petty v. Tennessee-Missouri Bridge Comm'n, where two states had entered into an interstate compact to build a bridge. 359 U.S. 275, 281-82 (1959). However, in Petty, there was a
State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.” 138 It is possible that in applying this broad-reaching proposition, the Parden court in effect held that the state must know it is entering the federal sphere in order to waive immunity.134

In its recent decision of Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare,136 the Supreme Court reconsidered the scope of the Parden doctrine. In Employees the Supreme Court was asked to determine if the state of Missouri had waived its eleventh amendment protection when it continued to operate state institutions and homes for delinquents after the 1966 amendments to the Fair Labor Standards Act, which subjected these facilities to FLSA regulation for the first time.138 Speaking for the Court, Justice specific proviso in the compact retaining federal jurisdiction in causes of action arising out of the interstate commerce activities of the states. Id. at 277.

The Parden Court held that “[t]o read a 'sovereign immunity exception' into the Act would result . . . in a right without a remedy . . . ” 377 U.S. at 190. This argument makes sense as applied to common law sovereign immunity, which would bar recovery in both federal and state courts. However, the conclusion the Court draws from its statement is that there is jurisdiction over the suit in federal district court, an unnecessary result since the Federal Employer's Liability Act vests concurrent jurisdiction in state courts. Id. at 190 n.8; see 45 U.S.C. § 56 (1970). The conclusion indicates a finding of eleventh amendment as well as sovereign immunity waiver, and demonstrates the confusion between the two concepts.

133 377 U.S. at 196.
134 See id. at 192.

One of the reasons for confusion in the Fair Labor Standards Act cases is that the operation of state hospitals traditionally has not been regarded as an activity involving interstate commerce. Therefore, a state making the decision to operate such a hospital may not have realized that it was entering into the federal sphere of influence and
Douglas found that Missouri had not waived its constitutional immunity to suit in federal court, noting that:

"It could . . . be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without changing the [FLSA] under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away." 327

Since the Court refused to overrule Parden,138 the scope of constructive waiver is still uncertain. The only reasonable interpretation of the Employees decision is that waiver is more difficult to show where Congress has not clearly conditioned the state's subjecting itself to regulation on relinquishment of eleventh amendment immunity.139 Therefore, acceptance of federal funds may continue to provide excellent grounds for finding state waiver of the eleventh amendment. It can be inferred from acceptance of federal monies that a state has knowingly and willingly subjected itself to federal regulation by the Congress and the Executive. Regulation by the federal judiciary, the main interpreter of these

thereby waiving its eleventh amendment immunity. This situation was more likely before Maryland v. Wirtz, 392 U.S. 183 (1968).

Even when states have entered into activities which have been more generally subject to congressional regulation, courts have been uncertain of the waiver effect. For example, courts have disagreed on the question of whether states building bridges or tunnels involving navigable waterways have thereby waived their immunity to suit in federal court. Compare Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen, 404 F.2d 1001, 1003 (4th Cir. 1968) (waiver) and Adams v. Harris County, 316 F. Supp. 938, 947 (S.D. Tex. 1970) (dictum), rev'd on other grounds, 452 F.2d 994 (5th Cir. 1971), cert. denied, 406 U.S. 968 (1972) (waiver) with Red Star Towing & Transp. Co. v. Department of Transp., 423 F.2d 104, 106 (3d Cir. 1970) (no waiver) and DeLong Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 18-19 (D. Ore. 1964), aff'd, 343 F.2d 911 (9th Cir. 1965) cert. denied, 382 U.S. 877 (1965) (no waiver). See also Daye v. Pennsylvania, 344 F. Supp. 1337, 1349 (E.D. Pa. 1972) (applying for and accepting federal funds for interstate highway; no waiver); 50 B.U. L. Rev. 590 (1970). Two courts seem to have confused jurisdiction with a statement of a valid cause of action by finding no waiver because the regulation to which the state had subjected itself did not provide a remedy. See Red Star Towing & Transp. Co. v. Department of Transp., 423 F.2d 104, 105-06 (3d Cir. 1970) (bridge over navigable waters); Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dep't, 415 F.2d 452, 455-56 (5th Cir. 1969) (international shipping).

137 41 U.S.L.W. at 4495.

138 Id.

139 The Court also noted that Parden could be distinguished as involving proprietary, rather than governmental activities, such as mental hospitals. Id. This is consistent with the Second Circuit's interpretation of Parden. See Rothstein v. Wyman, 467 F.2d 226, 238 (2d Cir. 1972), cert. denied, 41 U.S.L.W. 3527 (U.S. Apr. 2, 1973); Knight v. New York, 443 F.2d 415, 418 (2d Cir. 1971).
federal statutes and regulations, should be regarded as a necessary concomitant.

Lower courts have interpreted acceptance of federal funds as sufficient to subject the state to suit in federal court where an individual brings an action to force state compliance with the federal statutes and regulations under which the state receives federal monies. This finding may be based in part on a belief that the individuals bringing such actions are acting as “private Attorney-Generals [sic],” and represent not only their own interests but those of the United States as well. Since suits by the United States are not subject to the eleventh amendment bar, these private injunction actions should not be subject either.

As in other areas, however, courts have found that a distinction should be made between claims for damages and suits for injunctive relief, with the eleventh providing greater protection in damage actions. A plaintiff claiming damages in a suit against the state may not be as successful in urging that the state has waived its eleventh amendment immunity by accepting federal funds. In deciding waiver, especially waiver founded on entry into the federal sphere, courts finally must face the essential eleventh amendment problem—the power of the federal government, whether court or Congress, to regulate the activities of the states.

CONCLUSION

The single most overwhelming fact about eleventh amendment cases is their complete confusion. The fictions which surround the amendment, both the Young fiction and the doctrine of constructive waiver, obscure the effect of the decisions in which they are employed. The result is that no clear distinction has been made between uses which are consistent with the purpose of the amendment and those which are not.

When a plaintiff raises a common law claim with no constitutional implications, the restrictions placed on federal court jurisdiction by the


141 Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943).

142 See notes 66-68 supra and accompanying text.


amendment must be respected. The plaintiff may still have a remedy, because the suit may yet be cognizable in state court. Furthermore, these claims will raise questions of state law in which the state courts, not the federal courts, have the greatest competence. Similarly, where the claim is based on a right created by a state statute, the state should have the option of restricting the plaintiff to state court.

On the other hand, since the purpose of the amendment is to protect both sovereignties within the federal system and not to provide total state immunity from suit, the eleventh should not be applied when there is friction between the policies of the two levels of government. Conflicts may arise when state action or policy contradicts either the Constitution or federal statutes. Even actions which appear to result only in common law claims may in fact raise constitutional issues, such as appropriation of property without due process or impairment of a contractual obligation. In such situations the eleventh does not bar jurisdiction and the federal courts can grant all necessary remedies against the state by name.

Today the courts utilize the eleventh in such a broad range of cases that not only its legitimacy but also its meaning is lost. The eleventh amendment must be narrowly construed and should be relegated, once again, to its original purpose of barring common law claims against states from federal court.