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THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY: VAGARIES OF A FEDERAL FICTION

David B. Whitehill

The federal courts' injudicious attempts to allow legitimate redress against a state while swearing continued allegiance to the traditional postulate of state sovereign immunity in federal court has made a strange beast indeed of the deceptively simple eleventh amendment.¹ The eleventh amendment, as traditionally viewed, specifically limits federal jurisdiction over suits instituted by an individual against a state; it ostensibly serves to raise common law sovereign immunity to the status of a federally protected constitutional right.² Yet the doctrine of sovereign immunity, under attack as inequitable and as chief defender of the growth of the mega-state, has fallen into disfavor in recent years. The anomaly exists that even as the states curtail its application, federal problems, anchored in the eleventh amendment, persist.

Early landmark cases, decided in an era when sovereign immunity was virtually unquestioned,³ set the stage for confusion as to the full

1. U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

2. The amendment was passed as a reaction to the decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1773), in which the Supreme Court held that it had jurisdiction to hear a suit brought against a state by citizens of another state under article III, section 2 of the United States Constitution. See Cullison, *Interpretation of the Eleventh Amendment (A case of the White Knight's Green Whiskers)*, 5 HOUSTON L. REV. 1, 10-14 (1967).

3. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How

scope of the amendment's present application. The amendment itself, literally addressed only to suits by non-citizens of the state sued, was logically extended, in *Hans v. Louisiana*,⁴ to bar suits in federal court by a state's own citizen as well. A second case, *Osborn v. Bank of the United States*⁵ dealt with the most important eleventh amendment question of all—what is the “state,” within the purview of the amendment, against which a suit in federal court may not be brought. *Osborn* appeared to restrict the scope of the amendment's application to those cases only in which the states were specifically named as party defendant. But once again the amendment was extended when, in *The Governor of Georgia v. Juan Madrazo*,⁶ a suit for possession of a slave held by the state, Chief Justice Marshall reversed himself, saying:

[W]here the Chief Magistrate of a State is sued not by his name, but by his style of office, and the claim is made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as a defendant.⁷

Subsequent decisions give little evidence of any uniform attempt by the Supreme Court either to limit or expand the amendment's perimeters. In an 1883 decision⁸ the Supreme Court held that a state

could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted.

THE FEDERALIST No. 81, at 529-30 (Modern Library ed.) (A. Hamilton).

4. 134 U.S. 1 (1890). The Court said:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Id. at 15. Despite this language, one student writer suggests the basis for this decision to be common law sovereign immunity, the discussion of the amendment being merely dictum. See 17 VILL. L. REV. 713 (1972). Courts have consistently assumed, however, that the holding was based on the eleventh amendment. See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *Ex Parte Young*, 209 U.S. 123, 150 (1908); *Chandler v. Dix*, 194 U.S. 590, 591 (1904). But see *McCartney v. West Virginia*, 156 F.2d 739, 740 (4th Cir. 1946).

5. 22 U.S. (9 Wheat.) 738 (1824).

6. 26 U.S. (1 Pet.) 110 (1828).

7. *Id.* at 123.

8. *Clark v. Barnard*, 108 U.S. 436 (1883).

can waive its sovereign immunity by a voluntary appearance in federal court, but did a *volte-face* that same year in upholding a state's immunity when the plaintiff state was in court acting merely as an agent for the collection of a citizen's debts.⁹ In *Re Ayers*,¹⁰ 1887, emphasized that a suit against an officer was tantamount to suit against the state. In 1892, the Court refused to allow state immunity from suit instituted by the United States as plaintiff,¹¹ but, quixotically, refused to allow a foreign country the same privilege.¹²

Still, the awesome scope of the amendment was growing; a general rule evolved to the effect that the federal judicial power, absent waiver, does not extend to suits against a state by citizens of that or any other state, *even* in cases arising under the Constitution or laws of the United States that would certainly be within the federal jurisdiction were the suit instituted solely against a private individual.¹³ To counter the full scope of this general rule, federal courts, through judicial legerie de main, developed several concepts in order to hear a case against a state on the merits despite the prohibition of the eleventh amendment. One fiction, the subject of this comment, is to say that the suit is not really a suit against the state.¹⁴

The identification process of an individual or agency as the "state" is, of course, a matter of federal law, although state decisions as to the character and attributes of the nominal defendant are often given great weight.¹⁵ Unfortunately, very few states have simplified the federal chore by unequivocally indicating by case law or statute just what exact relation its own various state agencies may have to the state. Consequently there is no uniformity; whether a particular state agency will be deemed suable in federal court will depend to a great degree upon which test the court chooses to adopt, and also, possibly, upon what ultimate result the court wishes to achieve.

9. *New Hampshire v. Louisiana*, 108 U.S. 76 (1883).

10. 123 U.S. 443 (1887).

11. *United States v. Texas*, 143 U.S. 621 (1892).

12. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

13. *See, e.g., Missouri v. Fiske*, 290 U.S. 18 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857 (8th Cir. 1958), *rev'd on other grounds*, 359 U.S. 275 (1958).

14. *See Cullison, Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUSTON L. REV. 1, 26 (1967), for another basic way to justify hearing a case against a state which is to say that the state has consented to the suit. This implied consent concept appears to have been recently limited in *Employees of the Dep't of Public Health and Welfare v. Dep't of Public Health and Welfare*, 411 U.S. 279 (1973). *See* 23 CATHOLIC L. REV. 171 (1973).

15. *See, e.g., Harris v. Tooele County School Dist.*, 471 F.2d 218 (10th Cir. 1971); *Harrison Const. Co. v. Ohio Turnpike Comm'n*, 272 F.2d 337 (6th Cir. 1959).

Various tests have been applied in the determination of whether the state is the real party in interest. The mere fact that the state has some interest in the outcome of proposed litigation is not sufficient to raise the constitutional bar. Nor does the fact that the state is the sole stockholder in a defendant corporation necessarily make the suit one against the state.¹⁶ The "state interest" test appears to serve only as the requisite starting point for further inquiry into the relation of an agency with the state.

What may be called the "distinct legal entity" test appears to be both an inquiry into the purpose for which the agency was created, the proprietary-governmental distinction, as well as an attempt legally to visualize the agency as an entity separate and distinct from the state. Thus the more independent and subordinate political groupings within the state, such as cities and counties, are generally viewed by the federal court as being far enough removed from the state itself to be subject to federal jurisdiction.¹⁷ Decisions as to state commissions and boards named as defendants are in hopeless disarray, with an apparent equal division as to whether they are truly a part of the state.¹⁸ The only common thread running through this segregation is that of characterization; an "alter-ego" or "arm" of the state is immune; an "instrumentality" or "sub-ordinate agency" is in limbo; an "independent agency" or "sub-agency" is doomed to litigation in federal court—irrespective of whether or not suit could have been instituted within the state court system originally.

A recent federal decision illustrates an attempt to escape from the subtle confines of this characterization by establishing more objective guidelines, with the possible net effect of an extension of the amend-

16. *Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1938); *United States ex rel. Skinner Corp. v. McCarl*, 275 U.S. 1 (1927). See *Cunningham v. Macon and B.R. Co.*, 109 U.S. 446 (1883) for classes of other cases in which immunity does not extend although the state does have some interest.

17. See, e.g., *Lincoln County v. Luning*, 133 U.S. 529 (1889); *City of Long Beach v. Metcalf*, 103 F.2d 483 (9th Cir. 1939).

18. For cases holding boards or departments to be distinct legal entities and thus not endowed with sovereign immunity, see, e.g., *Kirby Lumber Corp. v. Louisiana*, 293 F.2d 82 (5th Cir. 1961) (State Game and Fish Commission); *Gerr v. Ewrick*, 283 F.2d 293 (3rd Cir. 1960) (Pennsylvania Turnpike Commission); *Harrison Const. Co. v. Ohio Turnpike Comm'n*, 272 F.2d 337 (6th Cir. 1959).

For cases holding them to be immune from suit in federal court, see, e.g., *De Levay v. Richmond County School Bd.*, 284 F.2d 340 (4th Cir. 1960); *Simmons v. South Carolina State Highway Dep't*, 196 F. Supp. 516 (E.D.S.C. 1961); *Fleming v. Upper Dublin Public School Dist.*, 141 F. Supp. 813 (E.D. Pa. 1956); *Chicago Stadium Corp. v. Indiana*, 123 F. Supp. 783 (E.D. Ind. 1954) (Indiana State Fair Board); *Howell v. Port of New York Authority*, 34 F. Supp. 797 (E.D.N.J. 1940).

ment's application, at least within the Tenth Circuit. In *Harris v. Tooele County School District*¹⁹ a diversity action was brought by an individual against a Utah school district for injuries allegedly resulting from a negligently structured and supervised gate on a high school parking lot. In sustaining the lower court's dismissal on eleventh amendment grounds, the court cited their previous decision in *Brennan v. University of Kansas*²⁰ to the effect that state law was of primary importance in the process of characterization of the state agency. The court found that Utah school districts had been termed "mere agencies of the state" and "instrumentalities of the state" by Utah's highest courts.²¹ Although the discussion of what relation the school district had with the state was confused by the injection of the waiver argument,²² the eleventh amendment was held to apply despite the fact that school boards were authorized by state law to sue and be sued, and despite the fact that the state sovereign immunity act had termed school districts "political subdivisions" rather than including them in a list entitled "subdivisions of the State." Said the court:

Procedurally subdivisions of the government have been classified to aid in the administration of the Governmental Immunity Act, but the classification does not transform school districts into entities separate and distinct from the state. The Act has one purpose, to waive the defense of sovereign immunity; it does not restructure Utah's governmental subdivisions.²³

A second test employed by the court was a determination of the means by which the state agency was financed. Looking to Utah law once again, the court noted that although primary responsibility for fund-raising was borne by the school districts themselves, state funds were available under certain conditions should the school board levy an additional property tax. Because there existed a real possibility that state funds would make up at least a part of a money judgment against the district, the court felt constrained to dismiss under the eleventh amendment. Said the court: "When it is apparent a judgment against a political subdivision will ultimately reduce state funds, the action is in essence one for recovery of money from the state."²⁴

19. 471 F.2d 218 (10th Cir. 1973).

20. 451 F.2d 1287 (10th Cir. 1971).

21. 471 F.2d at 219, citing: *Campbell v. Board of Educ.*, 15 Utah 2d 161, 389 P.2d 464, 465 (1964); *Bingham v. Board of Educ.*, 118 Utah 582, 223 P.2d 432, 435 (1950).

22. See note 14 *supra*.

23. 471 F.2d at 220.

24. *Id.*

A second fiction, most often employed in the fundamental rights area, is used in deciding "the crucial question . . . whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign."²⁵ In the celebrated case, *Ex Parte Young*,²⁶ a Minnesota statute lowered railroad rates, and provided for severe penalties for any violation. Stockholders succeeded in getting a federal injunction to restrain the state attorney general from enforcing the rates in state courts. The attorney general refused to comply with the court's order and was held in contempt. He then sought a writ of habeas corpus, arguing that the action was prohibited by the eleventh amendment as an action against the state of Minnesota. Denying that the eleventh amendment was a bar, and finding that the statute violated both the equal protection and the due process clauses, the Court said:

[I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action.²⁷

The Court continued:

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that 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.²⁸

25. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949).

26. 209 U.S. 123 (1908). For an in depth study of the case, see 3 DAVIS, ADMINISTRATIVE LAW § 27.09 (1958).

27. 209 U.S. at 152.

28. *Id.* at 159-60.

Mr. Justice Harlan, dissenting, realized that a fiction was afoot:

[T]he Federal court . . . said in effect to the state of Minnesota: "It is true . . . that under the Constitution (the Eleventh Amendment) the judicial power of the United States does not extend to any suit brought against a State by a citizen of another State . . . yet the Federal court adjudges that you, the State . . . shall not appear in your own courts, by your law officer, with the view of enforcing, or even for determining the validity of the state enactments which the Federal court has, upon a preliminary hearing, declared to be a violation of the Constitution of the United States."²⁹

This "stripped of official capacity" fiction is very selectively applied outside of the area of unconstitutional action evidenced in *Ex Parte Young*.³⁰ Two Supreme Court cases arising out of Oklahoma, *Johnson v. Lankford*,³¹ and *Lankford v. Platte Iron Works*,³² decided within three years of each other, indicate the subtleties of the fiction. *Johnson v. Lankford* was an action instituted against an Oklahoma Banking Commissioner and his surety for damages. A bank had issued plaintiff a certificate of deposit, and had subsequently become bankrupt. Plaintiff alleged that the defendant Commissioner had failed to adequately supervise the business of the insolvent both before and after its failure, and had caused the plaintiff's loss. The federal trial court held the eleventh amendment to be an effective bar. The Supreme Court reversed, saying:

There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. The charges are all against Lankford. The result sought is against him because of his willing or negligent disregard of the laws of the State and it is because of this his surety is charged with liability, it having guaranteed his fidelity.³³

Emphasizing the element of individual conduct, the Court further said:

We think . . . the action is not one against the State. To answer . . . otherwise would be to assert, we think, that whatever an officer does, even in circumvention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment. Surely

29. *Id.* at 175.

30. For a classification of other cases in which this concept has been applied, see Reference, *Federal Judicial Power, A Study of Limitation—II: The Eleventh Amendment*, 2 RACE REL. L. REP. 757 (1957).

31. 245 U.S. 541 (1918).

32. 235 U.S. 461 (1915).

33. 245 U.S. at 545.

an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both.³⁴

In *Lankford v. Platte Iron Works*,³⁵ however, the same defendant escaped the fiction's application. The Bank Commissioner had been required by statute to levy an assessment against all state banks in order to establish a depositors' guaranty fund. Further, he was granted authority to issue guaranteed certificates of indebtedness to reimburse those losing deposits when a bank became insolvent. The federal trial court gave judgment for plaintiff when the Commissioner failed to pay the plaintiff for his loss. The Supreme Court reversed, finding that title to the fund was in the state of Oklahoma and that, consequently, any suit to compel officers to administer the fund was a suit against the state and so barred by the eleventh amendment.

Thus, it would appear that active or negligent wrongdoing by an official may be sufficient to invoke the fiction, whereas the same official will evade the fiction and not be compelled to act when it appears he has the slightest bit of discretion. This is not an isolated example; other decisions exhibit the same tortured reasoning that makes consistent application of the eleventh amendment proscription difficult.³⁶ On the present state of the judicial record, no one can accurately foretell under what circumstances these fictions will be allowed when the suit is nominally against an officer or agency of the state.

The concepts used to define the "state" and the fictions used cavalierly to negate the eleventh amendment are unreal distinctions readily visible to those who employ them.³⁷ It is obvious that a state can act only through its officers and agencies, the various arms and organs of any bureaucracy. These agencies, in turn, are made up of individuals charged with various duties and provided with various powers through which the state exerts its power. A "state" is itself a mere

34. *Id.*

35. 235 U.S. 461 (1915).

36. For other sources dealing with complexities in this area, see Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

37. "The judges can often grant relief against the sovereign but they usually cannot acknowledge that they do so. They must hide the truth. Judge X hides the truth from Judge Y, who hides the truth from Judge Z, who hides the truth from Judge X. The litigants hide the truth from the Judges, and the Judges hide the truth from the litigants." Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 436 (1962).

concept, with real people in the wings who make decisions and act in the name of the people. Enjoining a public official or making him liable to a suit in damages is certainly the equivalent to a suit against the state.

Whatever the merits of sovereign immunity, arcane reasoning and artful pleading should not, in theory, be the instruments of its demise. The use of selective fictions, inconsistently applied, is offensive to legal scholars and confusing to practitioners. At the very least, if this is to be the game, thoughtful decisions, possibly even a new amendment, are needed to make the rules of the game clearer to all.