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# Private Suits Against State Officials: The Return of the Eleventh Amendment

Robert Emerson Eatman Jr.

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# NOTES

## PRIVATE SUITS AGAINST STATE OFFICIALS: THE RETURN OF THE ELEVENTH AMENDMENT

Alleging that the state had violated HEW regulations governing distribution of welfare benefits under the Aid to the Aged, Blind and Disabled (AABD) program,<sup>1</sup> plaintiff brought suit in federal district court against the director of the Illinois Department of Public Aid. Injunctive relief and a retroactive award of benefits were sought, and the award of both by the district court was affirmed by the Seventh Circuit Court of Appeals.<sup>2</sup> To resolve the conflict between circuits over the validity of a retroactive payment award,<sup>3</sup> the United States Supreme Court granted certiorari and *held* that the eleventh amendment prohibits retroactive relief against a state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974).

When the eleventh amendment<sup>4</sup> was adopted in 1789, its purpose was to overrule the controversial decision of *Chisholm v. Georgia*,<sup>5</sup> which had upheld federal jurisdiction over a suit by a South Carolina citizen against the state of Georgia. Thus restored was the state's sovereign immunity from suit by citizens of another state which *Chisholm* had declared abrogated by the grant of jurisdiction to federal courts in article III, section 2 of the Constitution.<sup>6</sup> *Hans v. Louisiana*,<sup>7</sup> decided some years after the amendment's passage, held that the amendment not only restored the immunity lost in *Chisholm* but also denied jurisdiction to the federal courts over suits against a state even when brought by one of its own citizens. Despite criticism of the *Hans* construction of the amendment,<sup>8</sup> its continuing vitality

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1. 42 U.S.C. § 1381 (1935). The regulation violated was 45 C.F.R. § 206.10 (1973), setting maximum time standards for processing applications.

2. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).

3. The holding of *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972) was in conflict with the Seventh Circuit's holding in the instant case.

4. U.S. CONST. amend. XI: "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."

5. 2 U.S. (2 Dall.) 419 (1793).

6. *Id.* at 463-66. U.S. CONST. art. III, § 2: "The judicial Power shall extend to all Cases . . . between a State and Citizens of another State. . . ."

7. 134 U.S. 1 (1890).

8. See *Employees of Dep't of Publ. Health & Welfare v. Missouri*, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting) (state hospital employees held to be barred by eleventh amendment from recovering overtime payments under Fair Labor Standards

insures that no federal court will entertain a direct suit against an unconsenting state.

Nevertheless, the practice of instituting private suits against state officials in their official capacities has often resulted in circumvention of the eleventh amendment bar. While Chief Justice Marshall was willing, in *Osborn v. Bank of the United States*,<sup>9</sup> to limit the amendment's effect to suits against states only when they were parties, subsequent decisions refused to find jurisdiction over certain actions when state officials were dummy defendants.<sup>10</sup> The type of relief sought also influenced the Court in deciding whether to bar certain actions: federal courts could enjoin prospective illegal actions by state officials,<sup>11</sup> but they were not the appropriate forum to reach money or property already in the state's possession.<sup>12</sup>

The passage of the fourteenth amendment creating new federal rights limiting state actions complicated the question of when the eleventh amendment should be applied. In allowing a preliminary injunction against the Attorney General of Minnesota to stand, *Ex parte Young*<sup>13</sup> showed a limited preference for the fourteenth amendment over the eleventh and definitively established the federal judicial power to enjoin state officials from enforcing unconstitutional statutes. The Court found the official's proposed conduct to be sufficient state action to invoke the due process clause of the fourteenth amendment, but held that the suit to enjoin that action was not within the eleventh amendment restriction on federal jurisdiction. Thus, although *Ex parte Young* did not directly hold that the fourteenth amendment limited the eleventh amendment, by allowing injunctive relief against state officials, the decision has enabled federal courts to act as a check upon the states in many instances.<sup>14</sup> Left

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Act). The constitutional protection extends only to states and state instrumentalities. It does not apply to actions against officials for which they would be personally liable. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Nor does it apply to actions against political subdivisions such as counties or municipalities. *Griffin v. School Board*, 377 U.S. 218 (1964); *Lincoln County v. Luning*, 133 U.S. 529 (1890).

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

10. See, e.g., *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446 (1883); *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828).

11. See, e.g., *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891) (suit to restrain state officials from acts alleged violative of vested contract rights held not forbidden by eleventh amendment).

12. See, e.g., *Belknap v. Schild*, 161 U.S. 10, 18 (1896): "[N]o injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced. . . ."

13. 209 U.S. 123 (1908).

14. The Court emphasized that "the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the author-

unchanged by the decision, however, were the earlier decisions that the eleventh amendment precludes tampering with property already possessed by the state. Thus, for example, if not barred by the Tax Injunction Act,<sup>15</sup> a corporation may sue in federal court to enjoin the revenue commissioner of a state from collecting illegal taxes.<sup>16</sup> Nevertheless, recovery from a state treasury is not permitted, for once taxes are in the state's coffers, a federal court will not entertain a suit for their recovery.<sup>17</sup>

Successful invocation of the eleventh amendment has been rare in recent years. The applicability of the amendment has been ignored or avoided by a finding of the state's consent to suit.<sup>18</sup> This led commentators to predict that the eleventh amendment would soon join the ninth and tenth amendments in constitutional limbo,<sup>19</sup> and the Supreme Court's affirmance without comment of a number of cases subject to eleventh amendment objections gave credence to these predictions.<sup>20</sup>

In the instant case, the Seventh Circuit characterized the demand for past benefits as one for restitution rather than damages, and therefore not within the eleventh amendment prohibition.<sup>21</sup> The

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ity of and one which does not affect the State in its sovereign or governmental capacity." *Id.* at 159. Obviously, the doctrine does affect states in their governmental capacities. It is patently fictitious, and the fiction has led to a quagmire of legal inconsistency. However, many of the major innovations of the Warren Court would have been impossible without the *Young* rule. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Griffin v. School Board*, 377 U.S. 218 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). The *Ex parte Young* rule has been called "indispensable to the establishment of constitutional government and the rule of law." C. WRIGHT, *FEDERAL COURTS* 186 (1970).

15. 28 U.S.C. § 1341 (1948).

16. See *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

17. *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) (eleventh amendment barred suit for refund of allegedly illegally collected taxes). *Ford* was heavily relied on in the instant case.

18. See Comment, 33 *UNIV. CHI. L. REV.* 331 (1966). No state won an eleventh amendment argument at the Supreme Court level between *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946) and *Employees of Dep't of Pub. Health & Welfare v. Missouri*, 411 U.S. 279 (1973).

19. See Comment, 33 *UNIV. CHI. L. REV.* 331 (1966). The prediction was based on the implied waiver implications in the decision of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). See also Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 *HOUSTON L. REV.* 1 (1967), suggesting an interpretation which would eliminate the *Hans* rule in federal question cases.

20. *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809 (1972); *Dep't of Health & Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972); *Wyman v. Bowens*, 397 U.S. 49 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969). None of these cases discussed the eleventh amendment issue. All but *Shapiro* were summary affirmances.

21. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). For a comparison of the case

United States Supreme Court, however, refused to accept such a distinction,<sup>22</sup> pointing out that restitution, like damages, would be paid from the state treasury to compensate for a past official breach of duty, and concluded that both would therefore be outside the *Ex parte Young* exception for suits seeking prospective relief against a state. While prospective relief might affect a state treasury, the Court considered it to be a "permissible ancillary effect" resulting from a change in the manner a state official conducts his duties and not from a direct order by a federal court to pay out funds from the state treasury.<sup>23</sup>

The distinction between a direct effect and a "permissible ancillary effect" on the state treasury seems artificial. However, the doctrine of *Ex parte Young* is itself artificial and its limitations can only be explained in terms of federal-state relationships. A judgment for damages against a state is equivalent to a direct order to a state legislature to appropriate funds for a specific purpose. For a federal court to order such a remedy would do violence to our traditional notions of comity. While an order directed to a state functionary is relatively easy to enforce through the contempt power, a court would justifiably wish to avoid, in all but the most extreme cases, the serious questions of federal-state comity which would be raised if it punished a state legislative body for contempt.<sup>24</sup> Limiting suits in federal courts to those seeking prospective relief is an accommodation between

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with the conflicting Second Circuit decision of *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), see Note, 21 KAN. L. REV. 429 (1974).

22. 415 U.S. at 668. The eleventh amendment itself makes no distinction between suits at law and suits in equity. Furthermore, the remedy refused in the tax repayment cases of the 1940's could easily be characterized as restitution. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). The Seventh Circuit in the instant case may have been unwilling to leave the protection of individual rights to state courts since in some instances state courts have been known to be reluctant to enforce federal rights. For an extreme example, see *NAACP v. Alabama*, 360 U.S. 240 (1959), in which the Alabama supreme court was overturned by the Supreme Court for reissuing a contempt citation which the Supreme Court had previously voided.

23. While prospective injunctions can often have a greater effect on the state treasury than retrospective relief, in the former situation the state at least theoretically has the option of discontinuing the program entirely. Whether such an option contributes meaningfully to harmonious federal-state relationships may be debatable, but its availability should be considered.

24. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 219 (1965): "When a court presents its own legislative and executive authorities with a judgment to be paid, these authorities may see fit not to pay it if there are good enough reasons. But the judgment of a federal court against a state treasury gives warrant to and imposes perhaps a duty on the President of the United States to enforce the court's decree; it has the makings of a constitutional crisis."

the eleventh amendment, which emphasizes the state's independence, and the fourteenth amendment, which emphasizes federal protection against state abuse of individual rights. The decision in the instant case maintains this accommodation.

Of course, the eleventh amendment does not prohibit federal court jurisdiction when the state has consented to suit. The alternative holding of the Seventh Circuit in the instant case was that Illinois had waived its immunity from suit by accepting federal matching funds to administer the AABD program.<sup>25</sup> Following the approach of *Parden v. Terminal Railway*,<sup>26</sup> the court reasoned that Illinois had left the sphere that was exclusively its own and had thereby constructively consented to suit in federal court. The Supreme Court distinguished *Parden*<sup>27</sup> and continued:

Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . . [W]e will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as leave no room for any other reasonable construction.'<sup>28</sup>

This approach, which strongly resembles the dissent in *Parden*, demands that if Congress wishes to make waiver of eleventh amendment immunity a requirement for participation in a federal-state program, it must impose the requirement in sufficiently clear language to leave the state with no reasonable doubt that it has waived its immunity. Eleventh amendment immunity is viewed by the Court as being no different from other constitutional rights, the waiver of which will not be implied.<sup>29</sup>

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25. *Jordan v. Weaver*, 472 F.2d 985, 994 (7th Cir. 1973).

26. 377 U.S. 184 (1964).

27. The distinction was on the basis of a sue-and-be-sued clause in the specific congressional enactment involved in *Parden*. Public aid recipients, on the other hand, must sue under the general provisions of 42 U.S.C. § 1983 (1871). See *Rosado v. Wyman*, 397 U.S. 397 (1970). If the dissenters' reasoning in the instant case had been adopted, the result would have been to write a constructive consent to private suit into every state utilization of federal matching funds. See 415 U.S. at 688 (Marshall, J., dissenting). Given the massive use of federal funds in virtually all areas of state government, the eleventh amendment would then have only historical interest.

28. 415 U.S. at 673 (citation omitted). See also *Parden v. Terminal Ry.*, 377 U.S. 184, 199 (1964) (White, J., dissenting): "A decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with unmistakable clarity."

29. Strict requirements for waiver of individual constitutional rights have existed for some time. See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969); *Miranda v. Arizona*, 384 U.S. 436 (1966).

The majority in *Edelman* determined that abrogation of the eleventh amendment by the federal courts is not an acceptable method of coping with state violation of a Congressional directive. Congress, if it so desires, has the power to tie waiver of the amendment's bar to acceptance of federal funds.<sup>30</sup> There may be shortcomings with the majority's approach, as Justice Marshall noted in dissent:

Without a retroactive-payment remedy, we are indeed faced with 'the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them.'<sup>31</sup>

Nevertheless, the decision to leave this aspect of the delicate balancing process between private rights and federal-state comity to Congress is wise. By placing the onus upon Congress to determine when a state must submit to suit in federal court, flexibility is afforded to evaluate, in light of potential strains on the federal system, the importance of the private interest at stake and the extent it will be infringed. If the *Edelman* dissenters' fears prove to be well founded, Congress is at liberty to remedy the problem by including appropriate provisions in its welfare legislation.

*Robert Emerson Eatman, Jr.*

#### GROWTH RESTRICTION V. THE RIGHT TO TRAVEL: THE PETALUMA PLAN

Petaluma, a suburban California community experiencing rapid growth, implemented a five year land-use program which restricted

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30. See, e.g., *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). The commission was formed under a compact authorized by Congress. The authorization provided that the commission would have authority to sue and be sued. The Court held that formation of the commission waived the states' constitutional immunity. The Court may reach a different result in an appropriate case if an individual constitutional right, rather than a statutory right, is involved. *Edelman* was a 5-4 decision. Perhaps the Court may distinguish the case if the argument that individual constitutional rights should stand on equal footing with those of a state prevails. See *Louisiana State Bd. of Education v. Baker*, 339 F.2d 911, 914 (5th Cir. 1964): "The time may even have come when it would be well to admit the realities, face up to the fact that in these actions against a state agency or public official the party at interest is the State, and hold that the Eleventh Amendment does not contemplate a suit based on state action contrary to the United States Constitution."

31. 415 U.S. at 692 (Marshall & Blackmun, JJ., dissenting) (citation omitted). The two Justices placed a high value on the deterrent effect of the retroactive remedy. Their views on the necessity of keeping a tight rein on state action are analogous to those expressed in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The majority, on the other hand, seems willing to assume good faith administration on the part of the state, and consequently believes the deterrent not worth the cost. Cf. *Younger v. Harris*, 401 U.S. 37 (1971).