

# When *Can* a State Be Sued?

William Van Alstyne

In her Popular Government article “When You Can’t Sue the State: State Sovereign Immunity” (Summer 2000), Anita R. Brown-Graham described a series of recent decisions in which a sharply divided U.S. Supreme Court barred individuals from suing states for money damages for certain violations of federal law, such as laws prohibiting discrimination against employees because of their age. In the response that follows, William Van Alstyne argues that this barrier to relief is neither unduly



imposing nor novel. The debate over the significance of these decisions is likely to continue. In February 2001, in another case decided by a five-to-four vote (Board of Trustees of University of Alabama v. Garrett), the Supreme Court again barred an individual’s suit for damages against a state entity, this time for a violation of the Americans with Disabilities Act.

—Editor

Professor Anita Brown-Graham’s welcome and comprehensive article (“When You Can’t Sue the State”) was first-rate. Even so, it may leave readers with a somewhat misleading impression of what has happened recently. If one rephrases the title merely to turn the question around (“When *Can* a State Be Sued?”), one will see that the U.S. Supreme Court’s recent Eleventh Amendment decisions overall may do less in securing state immunity from suits brought under various federal statutes, in federal courts, than one might first suppose.

## I

First, as Professor Brown-Graham acknowledged, with respect to all of the various state entities otherwise covered by the federal statutes touched on in her article, each remains subject to federal court suit by any federal enforcement agency authorized by Congress to pursue it, whether or not in federal court. That any such action may seek money damages (and not merely injunctive relief), moreover, does not affect the jurisdiction of the court.<sup>1</sup>

Second, as Professor Brown-Graham likewise acknowledged, even as to federal court enforcement actions brought by private parties (rather than by a federal agency such as the Equal Employment Opportunity Commission or the Department of Labor), private parties may still sue to halt any ongoing violations, merely substituting the state agency head (by name) as the defendant and shifting from seeking damages to demanding injunctive relief.<sup>2</sup>

Third, insofar as any of the federal statutes are grounded on the enforcement clause of the Thirteenth, Fourteenth, or Fifteenth Amendment, then even private actions against the state or state agency, seeking money damages (including punitive damages as well as attorney fees), may be brought in federal court, as provided by Congress.

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The author is Perkins Professor of Constitutional Law, Duke University School of Law. Contact him at WVA@law.duke.edu.

The Equal Pay Act of 1963 provides for money damages (actually, *double* liquidated damages plus attorney fees). As Professor Brown-Graham herself noticed, this act has been upheld in authorizing not merely effective injunctive relief but specified money damages as well. And so it is, equally, with any other act of Congress that can claim a *valid* basis in any of the enforcement clauses of these amendments.<sup>3</sup>

Fourth, insofar as some federal statutes are *not* based on any of the Civil War amendment enforcement clauses (and not all are), still, insofar as they *may* be tied to federal funds (as many assuredly are), the Supreme Court has held that Congress can make state or state agency acceptance of statutory provisions authorizing private actions for money damages to be brought against them in federal court *an express condition of funding eligibility*. Having thus accepted the bitter with the sweet (albeit under considerable real duress of otherwise being excluded from funding eligibility), the receiving state is bound by its waiver of immunity and liable to answer even to privately brought suits for money damages in federal court.<sup>4</sup>

Fifth, as acknowledged (but somewhat downplayed in the article), it *also* remains true that state officials may be sued *personally* in federal court, in privately brought actions seeking money damages from *them*, should they act in disregard of specific provisions in some federal acts. Why? Because neither state nor local officials acquire any personal immunity by force of the Eleventh Amendment.<sup>5</sup>

Sixth, of significance to many readers of *Popular Government*, most local government units (e.g., cities, counties, and school districts) generally receive *no* Eleventh Amendment immunity at all. So they have no shield to raise against private claims for money damages sought from them under the various applicable federal laws, whether or not in federal court.<sup>6</sup> None of the Supreme Court’s recent decisions have effected any change in this respect.

The net effect of all these considerations may

in fact be this: as with reports of Mark Twain's death, the *overall* effect of the Court's recent Eleventh Amendment decisions may have been considerably exaggerated. It is less than one might have supposed.

## II

Nor are the principal recent Eleventh Amendment decisions nearly as novel or precedent-shattering as they have been made to seem by their critics (e.g., those quoted in Professor Brown-Graham's article). The point merits some emphasis in its own right.

More than a century ago, the Supreme Court noted that when the Constitution itself was under discussion, in the founding period, "[a]ny . . . power as that of authorizing the federal judiciary to entertain [money damages] suits by individuals against the States [without their consent], had been expressly disclaimed . . . by the great defenders of the Constitution."<sup>7</sup> And so the law generally stood for most of our constitutional history, right up until 1989.

Indeed, not until 1989, in *Pennsylvania v. Union Gas*,<sup>8</sup> did the Court presume to declare that, other than pursuant to acts of Congress derived from the Civil War amendments, private parties could generally sue states without their consent, in federal courts, for money damages, whenever Congress might think it suitable to treat states no differently than private parties in this respect. Readers of *Popular Government* may not now remember, but it was actually just *this* decision, *Union Gas*, that was "revisionist." A thin majority of justices in *Union Gas* presumed to overturn virtually two centuries of established Article III and Eleventh Amendment constitutional immunity previously acknowledged by the Court. In turn, it was merely just *this* decision, and not some more ancient precedent, that was repudiated by a bare majority of the Court itself, in 1996, in *Seminole Tribe v. Florida*.<sup>9</sup>

Essentially, then, except for this short interval (1989–96), the general position of the Supreme Court respecting the scope of Article III and Eleventh Amendment immunity of the states was pretty much as the Court has once again said it is, neither more nor less. And as we have seen in the course of this brief review, that immunity (such as it is) is effectively quite a bit less, as a practical matter, than it has been made to appear.

## III

In fact, it may be more strongly arguable that in recent decades, Congress has presumed to burden state and local governments with more restrictions (and more affirmative duties) than historically Congress imagined it had any authority to do. And far from intervening against Congress's ever-expanding claims of power over the states in any general way, for the most part the Supreme Court has merely acquiesced.<sup>10</sup> In turn, as against this *general* trend, the overall effects of the Court's recent Tenth and Eleventh Amendment "immunity" decisions are rather puny countermeasures, such as they are. They are, in brief, far less like impassable roadblocks placed in Congress's pathway (as it presumes to sweep its way through and over the states by imposing ever more restrictions, costs, and liabilities upon them) than like mere "traffic bumps" along the federal juggernaut road.<sup>11</sup>

*In February 2001 the U.S. Supreme Court ruled that individuals could not sue states for money damages for violations of the Americans with Disabilities Act. Earlier the Court ruled similarly regarding the Age Discrimination in Employment Act.*



## Notes

1. In brief, even as the Supreme Court has said all along, the Eleventh Amendment provides no immunity from suits against the states in federal courts when they are brought by, or on behalf of, the national government as such.

2. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

3. As the Court itself has noted, these amendments (the Thirteenth, Fourteenth, and Fifteenth) were added to the Constitution in the aftermath of the Civil War. They were added, moreover, as new, express restrictions on the states as such. And each explicitly pro-

vided an express power in Congress—that is, a power to "enforce" these new restrictions on the states "by appropriate legislation." Each of these clauses (Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment) is later in time than the Eleventh Amendment. That they were meant to, and did, empower Congress to provide redress through civil actions, including appropriate *federal* court actions for money damages (and not merely for injunctive relief), as Congress might decide to do, is surely exactly as one would logically suppose.

4. To be sure, as Professor Brown-Graham correctly indicated, the Court requires that

Congress be forthright if it means to qualify a state's (or state agency's) eligibility for some category of federal aid by its willingness to answer to private parties in damages in federal court for failing to adhere to the terms of the statute. But this is merely a requirement of "plain statement" by Congress, nothing more.

5. Since the action neither is brought against the state as such nor seeks damages from the state [rather, from the personal savings and assets of the named individual defendant(s)], nothing in the Eleventh Amendment bars the action from proceeding in federal court.

6. More than a century ago, the Supreme Court held that cities ("municipal corporations") and counties (and frequently, school

districts) cannot invoke or “borrow” a state’s Eleventh Amendment immunity to shield their assets from federal court civil actions brought against them by private parties. *See, e.g., Mount Healthy City School District Bd. v. Doyle*, 429 U.S. 274 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890).

7. *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). *See also Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000), O’Connor, J., concurring (“[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States”).

8. *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989).

9. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

10. Here’s but one example. The Fair Labor Standards Act, referred to in Professor Brown-Graham’s article, was adopted in 1936 (during the New Deal), pursuant to the power vested in Congress to “regulate commerce . . . among the states.” The act applied in a far-reaching manner, to be sure. It did so by decreeing the minimum wage to be paid not only by businesses engaged in *interstate* commerce (enterprises competing in national and foreign commerce) but also by more local (intrastate) commercial enterprises. Even so, Congress also carefully abstained from imposing any such demands on ordinary state and local government units as such. Congress readily recognized that these government units were *not* commercial entities, *nor were they conducting themselves as though they were*. In Congress’s own understanding, that is, a state, or county, or city that merely devotes some fraction of state and local taxes to defray the expense of providing local parks or other local service (e.g., ordinary police and fire protection) was *not* “engaged in commerce” as such, according to any plausible or common understanding of that term. Nearly forty years later, however, in 1974, Congress brushed away its previous sense of self-restraint. Accordingly it abandoned its own previous understanding and presumed to treat the states as in no respect different from a mere for-profit, privately owned business enterprise, claiming a power to regulate them quite as much as it had already regulated ordinary business enterprises. This was a breathtaking step. At first, the Supreme Court balked [*National League of Cities v. Usery*, 426 U.S. 833 (1976)], only to reverse itself within a decade [*Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 28 (1985)], thus sanctioning a scope of congressional power over the states that even the New Deal Congress had never supposed it possessed.

11. As some readers of POPULAR GOVERNMENT may know, moreover, even these mere traffic bumps, such as they are, are now at risk. If there is replacement on the Court of a single vote, depending (of course) on whose it might be, they may be razed.

at the  
Institute



## From Rigorous Researcher to Fine Art Photographer

### Stevens H. Clarke

A gradual transformation, five years in the making, culminated in January 2001 when Stevens H. Clarke, professor, retired as a member of the Institute faculty and opened his first solo show as Steve Clarke, fine art photographer. The man known for his rigorous research into sensitive social issues like sentencing and recidivism now would be specializing in images of dancers and other performers.

While perhaps surprising on the surface, this redirection is not unusual or even unexpected to those at the Institute who know Clarke well. They speak of his “unique” or “rare” combination of talents. “What I find most intriguing about Steve,” remarks book designer Daniel Soileau, “is the fact that his impressive work as a criminologist did not bar him from becoming an equally impressive artist/photographer.” Michael R. Smith, director of the Institute, says Clarke has “brought a passion to his work that’s consistent with the passion he brings to photography. He has great respect and compassion for the people he works with. When he talks with probation officers and jail officials, he’s fully engaged with them. And he’s recognized nationally as one of the leading evaluators of criminal justice programs. It comes from that same passion that drives all of what he does. He cares about it in the same way he cares about his photography.”

Clarke himself says he has “always either been doing something in the arts or [been] unhappy because I haven’t been.” For a number of years, Clarke worked in community theater, until the theater’s demands on his time became too great. His passion for performance is shared by his wife, Sheila Kerrigan, a writer, a teacher, and a theater director, who once toured as a mime. Photographing dancers, he finds, is somewhat like being part of a performance again.

A self-described “not very good” ballroom dancer, Clarke finds the action of dancers fascinating. “To them, what they do is routine,” he says, “but to me it’s like magic.” He took up photography five years ago and began photographing dancers when a friend needed photographs of a performance. Although he has worked with a number of Triangle-area dancers, most of the subjects in his one-month solo show at Duke’s Institute of the Arts Gallery are members of the dance department at UNC Greensboro, where he has an unpaid adjunct appointment.

Clarke also is intrigued by the problems of lighting, whether natural or artificial. He uses a Bronica 6x6 medium-format camera, does his own printing in a basement darkroom at home, and works with black-and-white silver gelatin prints more than color, preferring the abstract quality that can be achieved when light merges into dark. He has taken a few photography classes, but most of what he knows has come from trial and error and from studying the work of other photographers.

“I’m continually learning about it,” he says. “Photography is complicated and difficult, frequently frustrating and humiliating, but also wonderfully exciting. It’s an adventure, and I cannot tell you what a joy it is to me. I feel very, very lucky at my advanced age to be doing something that’s this much fun.”

Clarke came to the Institute in 1971, a few years after graduating from Columbia University’s law school, to pursue his interest in criminal justice reform and crime prevention. He had majored in math as an undergraduate, however, and has always been interested in statistical, rather than legal, interpretations of public policies. “They [public policies] may sound good, but do they really give us the benefits we think they do, or are we just kidding ourselves?” he asks. Professor James C. Drennan, noting that Clarke was both a legal resource and a researcher, comments, “He has a strong commitment to helping people make decisions based on reliable, credible, factually supportable data. The