



SOVEREIGN IMMUNITY

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November 2, 2018

NORTH CAROLINA DEPARTMENT OF JUSTICE

"the king could do no wrong"



State Sovereign Immunity vis-a-vis the federal government

(the anchor: the Eleventh Amendment)

"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."

Although a literal reading of the 11th Amendment suggests that it only restricts Article III diversity jurisdiction, the Supreme Court affirmed the long-standing presupposition that, because states are sovereign within our federal system, they are immune from being sued without consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 45 (1996) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).



Exceptions to State Sovereign Immunity (loosening the moorings)

1. Congress can abrogate state sovereign immunity, in certain circumstances.
2. States can waive sovereign immunity or consent to being sued.
3. States can be sued by other states and by the United States.
4. *Ex parte Young* (suits against state officers, seeking prospective injunctive relief).

From Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1157, 1178-85 (2003)



Abrogation of state sovereign immunity (loss of immunity by the outside force of Congress)

The Supreme Court held that Congress can abrogate states' sovereign immunity from suit if:

1. Congress "unequivocally expresses its intent" to do so; and
2. Congress acts "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68 (1985).



"unequivocally expresses its intent"

- Congress's intent to abrogate state sovereign immunity "must be obvious from 'a clear legislative statement.'" *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).
- The Supreme Court sets the bar high, in order to "temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure." *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989).
- Accordingly, it must be "unmistakably clear" that Congress intends to abrogate state sovereign immunity. *Seminole Tribe*, 517 U.S. at 56.
- If Congress makes a general grant of authority to bring suit in federal court, that is not enough. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 236 (1985). The Court explains: Congress's mere creation of a cause of action in federal court does not prove that Congress intends to abrogate all defenses to that claim. *Id.*



"pursuant to a valid exercise of power"

- Congress does not abrogate a state's 11th Amendment immunity when Congress attempts to unilaterally replace the immunity with some new grant of some other authority. *Seminole Tribe*, 517 U.S. at 58.
- For example, Congress cannot establish that a state has consented to suit in federal court based on the state having merely received federal funds, unless Congress manifests a "clear intention to condition participation in programs under [an act] on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 235.
- Similarly, Congress does not somehow abrogate a state's 11th Amendment immunity when it prescribes prospective injunctive relief, rather than retroactive monetary relief. *Seminole Tribe*, 517 U.S. at 58.
- According to the Supreme Court in *Seminole Tribe*: Whether Congress has the power to unilaterally abrogate the states' immunity from suit is narrowly focused on one question: Was the act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? *Id.* at 59.



What constitutional provisions give Congress the power to abrogate?

Not the Commerce Clause.

- In *Seminole Tribe*, the Supreme Court overturned its prior, plurality decision in *Union Gas*, in which the Court had held that Congress had the power to abrogate under the Interstate Commerce Clause. 517 U.S. at 66 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 17 (1989)).
- "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73.

State sovereign immunity from private suit in state courts is also "beyond the congressional power to abrogate by Article I legislation." *Alden v. Maine*, 527 U.S. 706, 754 (1999) (emphasis added).



Section 5 of the 14th Amendment

Section 5 of the 14th Amendment explicitly grants Congress the authority to enforce the 14th Amendment.

- Through the 14th Amendment, federal power "intrudes upon the province" of the 11th Amendment. Congress's power to enforce the 14th Amendment allows Congress to abrogate state sovereignty. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976).
- To invoke § 5, Congress must "identify conduct transgressing the 14th Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct. Congress must properly invoke its power under § 5 of the 14th Amendment." *Florida Prepaid*, 527 U.S. 627, 627-28 (1999).



Exception to state sovereign immunity: *Ex parte Young*

Eleventh Amendment immunity does not apply in lawsuits seeking injunctive relief against state officers, as long as the officers are sued in their official capacities. *Ex Parte Young*, 209 U.S. 123 (1908).

- This applies to both constitutional and statutory violations. *Verizon Md. Inc. v. Pub. Svc. Comm'n of Md.*, 535 U.S. 635, 636 (2002).

"In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."
Id.



"Queen Anne's Revenge" (a recent illustration)

Allen v. Cooper, 895 F.3d 337 (2018):

- North Carolina did not waive its 11th Amendment immunity by entering into a settlement agreement;
- Congress's enactment of the Copyright Remedy Clarification Act did not abrogate North Carolina's 11th Amendment immunity;
- The *Ex parte Young* exception to sovereign immunity did not apply.



Consent/Waiver of State Sovereign Immunity (loss of immunity by the state's own action)

CONSENT:

- A state consents to suit when it "voluntarily, knowingly, and intentionally agrees to be sued." Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1157, 1187 (2003).
- A state can revoke previously given consent to be sued in state court. Its withdrawal of consent does not violate the Contracts Clause. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).
- There is no constructive consent by merely participating in a federally regulated activity. *Florida Prepaid*, 527 U.S. at 680.



Consent/Waiver of State Sovereign Immunity

(loss of immunity by the state's own action)

WAIVER:

- "A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 304 n. 1.
- In deciding whether a state has waived its constitutional protection under the 11th Amendment, courts will find waiver only "by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).
- A state can also waive its sovereign immunity when state officials take actions that have "the effect of relinquishing the state's sovereign immunity," whether the state knows it or not and whether it intends it or not. Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1157, 1187 (2003).



What actions can effect waiver?

(navigating the course)

- Failure to assert sovereign immunity.
- Waiver by invoking the federal court's jurisdiction, such as filing a proof of claim in a bankruptcy proceeding.
- Waiver by removal.
- Waiver by engaging in a federally regulated activity.



WARNING:

(stormy seas in the area of consent and waiver)

Sometimes courts conflate consent and waiver.

- Because consent is revocable & waiver is irrevocable (among other differences), the distinction is critical.
- A state's right to give or withhold consent has always been "jealously guarded" by the courts, so courts have required "unequivocal" and "unmistakable" consent to be sued.
- On the other hand, under the traditional concept of waiver, sovereign immunity was an easily waivable defense. If the state did not assert sovereign immunity, it could be lost. This view fell out of favor in the mid 20th-century, when courts demanded "unequivocal" waiver. That trend seems to be changing, however, as the Supreme Court has signaled a return to the traditional view.¹

¹Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1157, 1178-85 (2003)



Sovereign v. Governmental Immunity

Sovereign immunity precludes most kinds of lawsuits against the states, except insofar as the states consents to be sued.

Governmental immunity is generally understood to be that limited portion of the state's sovereign immunity which extends to **local** governments.

- *Meinck v. City of Gastonia*, __ N.C. __, __ S.E.2d __ (2018)



Sovereign Immunity or Governmental Immunity does not apply...

- Contract claims – by entering into a valid contract, a governmental body waives immunity and consents to be sued for damages for breach of its contractual obligations.
- When the state provides express consent.
- When the state has purchased excess insurance to cover the type of claim brought.
- State Constitutional violations – plaintiffs can generally seek relief for violations of rights guaranteed by the North Carolina Constitution.
 - but not if an adequate alternative remedy is available. *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782 (1992).
 - an alternative remedy is not adequate if barred by sovereign or governmental immunity.
- Federal Constitutional Claims – 42 U.S.C. § 1983, in certain circumstances.
 - local governments not considered part of the state: not immune from § 1983
 - individual government officers/employees not immune
 - legislative/judicial immunity may provide shield from § 1983
 - public officials may have qualified immunity/good faith defenses (only subject to money damages if knew or should have known acts violated clearly established rights)
- Tort Claims brought against the state.



Public Official Immunity

A civil claim cannot stand against a public official taken within scope of their duties unless malicious or corrupt.

Official v. Employee:

- Public officials occupy offices created by statute, take an oath of office, and exercise discretion in carrying out of duties (*e.g.*, council board members, police officer)
- Public employees perform ministerial functions involving little or no discretion The immunity does not extend to public employees. They can be found liable for injuries caused by negligence in the performance of their duties.


