HB

103

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5190
FAX: (907)258-0760

April 1, 2005

The Honorable Lesil McGuire
Alaska State Legislature
State Capitol, Room 118
Juneau, Alaska 99801-1182

The Honorable Les Gara
Alaska State Legislature
State Capitol, Room 418
Juneau, Alaska 99801-1182

Re: HB 103, An Act requiring an actionable claim against the state to be tried without a jury.

Dear Representative McGuire and Representative Gara:

During the March 16, 2005, hearing in the House Judiciary Committee on HB 103, committee members and the chair requested that the Department provide information on the amount of dollars paid out on claims brought pursuant to AS 09.50.250.

The below information was assembled from two sources: the Division of Risk Management and from Judgment Bills passed during the last several sessions, as well as figures for FY 2005 to date. The Judgment Bill figures contain only those amounts paid to plaintiffs for claims brought pursuant to AS 09.50.250. The figures from Risk Management include personal injury (excluding workers compensation category and property loss) and include case costs, such as court reporters, experts, etc. but not assistant attorney general defense time.

FY 2000 = $ 5,792,511.00 (Risk Management)
FY 2001 = $11,921,452.00 (Risk Management)
FY 2002 = $ 9,166,624.00 (Risk Management)

The Judgment Bill totals for these 3 fiscal years are not included above; the majority of settlements or judgments were Risk Management matters, which were directly funded by that Division.

FY 2003 = $ 7,730,493.82 (Derived from the Judgment Bill for claims brought pursuant to AS 09.50.250)
$10,735,143.00 (Risk Management)
$18,465,636 82 Total AS 09.50.250 FY 2003

FY 2004 = $1,119,534.55 (Judgment Bill)
$4,514,535.00 (Risk Management)
$5,634,069.55 Total AS 09.50.250 FY 2004

FY 2005 = $1,604,975.46 (As of 3/18/05 included in this year's Judgment Bill)
$4,660,366.62 (Risk Management as of 3/30/05)
$6,265,342.08 Total AS 09.50.250 to date FY 2005

Please feel free to contact me if you have any further questions.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Gail T. Voigtlander
Gail T. Voigtlander
Assistant Attorney General

DWM:GTV:pr

cc: David W. Marquez
Deborah Behr
Kevin Jardell
Brad Thompson, Director, Division of Risk Management

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 4, 2005 **FURTHER REFERRALS: Finance**

Date of Committee Action: March 16, 2005

The JUDICIARY Committee considered: **HB 103**

HOUSE BILL NO. 103 **CLAIMS AGAINST THE STATE**

"An Act requiring an actionable claim against the state to be tried without a jury."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
CRT	1	✓		
LAW	2		✓	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gara		✓		
	Dahlstrom			X	
	Greenberg		✓		
	Kott		✓		
	ANDERSON			X	
Chair:	McGuire	✓			
Chair:					

HOUSE COMMITTEE REPORT

3.4.05

(7)

Date Referred to Committee: January 24, 2005 **FURTHER REFERRALS: Judiciary, Finance**

Date of Committee Action: 3/3/05

The STATE AFFAIRS Committee considered: **HB 103**

HOUSE BILL NO. 103 **CLAIMS AGAINST THE STATE**

"An Act requiring an actionable claim against the state to be tried without a jury."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CRT	1	X		
LAW	2		X	

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP (1)	NR (5)	AM
Beata Gardner	Gardner			X	
	Gatto			X	
Max Greenberg	Greenberg		✓		
	RAMKAS			X	
	ELKINS			X	
Chair: Paul K Seaton	Seaton			X	
Chair:					

Alaska State Legislature

Juneau
State Capitol Bldg., Rm. 434
Juneau, AK 99811-1182
Phone (907) 465-4976
Fax (907) 465-3883
Toll Free 866-465-4976

Fairbanks
119 N Cushman, Ste 213
Fairbanks, AK 99701
Phone (907) 452-6084
Fax (907) 452-6096

Representative Mike Kelly

House District 7

MEMORANDUM

To: Rep. Lesil McGuire, Chair – House Judiciary Committee
From: Rep. Mike Kelly, Member – House Finance Committee
Date: March 3, 2005
Re: Scheduling request

Attached you will find a complete committee packet as a request for hearing for HB 103 - *"An Act requiring an actionable claim against the state to be tried without a jury."*

I have included a sponsor statement, the most recent version of the bill, several legal memorandums from Legislative Legal, and other items of evidentiary support. In addition, I have been in contact with Doug Wooliver from the Alaska Court System and anticipate his presentation of the court system's fiscal note.

I would appreciate it, if you would consider scheduling this bill for the week of March 7th for consideration by the House Judiciary Committee prior to the Energy Break recess.

If you have any questions or comments, or require additional material please feel free to contact me at extension 4976. You may direct inquiries to my staff member, Heath Hilyard, who is carrying the bill.

Alaska State Legislature

Juneau
State Capitol Bldg., Rm. 434
Juneau, AK 99811-1182
Phone (907) 465-4976
Fax (907) 465-3883
Toll Free 866-465-4976

Fairbanks
119 N Cushman, Ste 213
Fairbanks, AK 99701
Phone (907) 452-6084
Fax (907) 452-6096

Representative Mike Kelly

House District 7

HB 103

"An Act requiring an actionable claim against the state to be tried without a jury."

HB 103 makes a small but important change to the manner in which claims against the state will be adjudicated. The doctrine of "sovereign immunity", originally taken from English common law, is a familiar one within our legal system. The doctrine precludes the institution of a suit against the sovereign [government] without its consent. This concept is intrinsic to our legal system.

We see this doctrine manifest itself in the 11th Amendment to the United States Constitution, and by extension this power is granted to the states through the 10th Amendment. More importantly, the Alaska State Constitution addresses the issue of sovereign immunity in Article 2, sec. 21 when it expressly grants the legislature sole authority to determine the manner in which suits against the state will be tried. Without that addition, the language in Article 1, sec.16 which specifically refers to "common law" would presuppose that sovereign immunity is absolute in Alaska.

Although HB 103 does change from the current standard of a trial by jury in a claim against the state, it returns to the standard that was in place from statehood until 1975. Our legal research revealed that Sen. John Butrovich (R-Fairbanks) sponsored SB 80, which changed to the current standard of a jury trial. Our research has further revealed that during the same period in 1975, the University of Alaska was in the midst of a lawsuit in which it had petitioned the court for a trial by jury and was denied. Although we have not been able to make the explicit connection, it seems that SB 80 was a legislative response to the controversy arising from that case.

Since that time, there have been a number of cases that have resulted in exorbitant jury awards against the state that may have been more reasonable had the court, rather than a jury tried them. Frequently, these awards are reversed on appeal, thus doubling the court time required for resolution. While responsible government requires the state make whole any person or entity that it harms in the course of its business, responsible government also dictates that we prevent such abuses and minimize exposure to the state. HB 103 accomplishes both ends with a simple and direct statutory change.

We further anticipate that the Alaska Court System will realize an additional benefit of less court time being consumed and thus a reduction in court operating expenses that will also allow our already overburdened courts the opportunity to address other cases with greater ease and expediency.

It is for these reasons that we appreciate your consideration and encourage you to support HB 103.

Member: House Finance Committee

Alaska State Legislature

Juneau
State Capitol Bldg., Rm. 434
Juneau, AK 99801-1182
Phone (907) 465-4976
Fax (907) 465-3883
Toll Free 866-465-4976

Fairbanks
119 N Cushman, Ste 213
Fairbanks, AK 99701
Phone (907) 452-6084
Fax (907) 452-6096

Representative Mike Kelly

House District 7

SAMPLE JURY AWARDS

(Prepared by the Attorney General's Office)

Garry Johnson v. DOC: prisoner at Ketchikan Correctional Center fell down a set of stairs when another inmate opened a door on the landing where plaintiff had been standing. As a result of the jury verdict, judgment was entered against the State in the amount of $2,356,293. The case was tried in Anchorage. The judgment was reversed on appeal, and the case was later settled. The case is reported at 2 P.3d 56 (Alaska 2000).

Kiokun v. State: claim of negligent failure to launch a search and rescue operation in a timely manner. Bethel jury verdict in the amount of $7.8 million (fault allocated 51% to the State, 49% to the Olruns). The judgment was reversed on appeal. The case is reported at 74 P.3d 209 (Alaska 2003).

Greg Bacon v. State (Alaska Marine Highway System): claim by injured ferry worker. Juneau jury awarded $350,000. of which approximately ½ of the verdict was for future pain and suffering. Plaintiff was back to work when the case went to trial.

Lance Miller v. State: claim by private pilot with seven months experience who lost control of his airplane attempting to land in windy winter conditions at a rural airport. Claim was that the accident was caused by the condition of the windsock. Bethel jury found no comparative negligence by Plaintiff, rendering verdict against the state in the amount of $1,300,000. (Post trial motions pending) 4BE-01-445 Civ.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 103
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Claims Against the State
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Representative Kelly
Requester:
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

House Bill 103 would require that claims against the state be tried by a court without a jury. Court records and information from the Department of Law show that over the past five years there have been an average of roughly four jury trials a year where the state was a defendant. Court records also show that the average jury trial costs the court $4,000 in jury fees, travel, meals and lodging. This fiscal note reflects the average yearly jury costs that would be saved by passage of this bill.

Prepared by: Douglas Wooliver, Administrative Attorney — Phone 463-4750
Division: Alaska Court System — Date/Time 3/2/05 3:56 PM
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director — Date 3/2/2005
Agency: Alaska Court System

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB103-LAW-Various-3-2
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act requiring an actionable claim against the state to be tried without a jury."
RDU CIVIL
Component Torts & Workers' Compensation, Labor & State Affairs
Sponsor Representative Kelly
Requester House State Affairs
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	(********)	(********)	(********)	(********)	(********)	(********)
Travel	(********)	(********)	(********)	(********)	(********)	(********)
Contractual	(********)	(********)	(********)	(********)	(********)	(********)
Supplies	(********)	(********)	(********)	(********)	(********)	(********)
Equipment	(********)	(********)	(********)	(********)	(********)	(********)
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(********)	(********)	(********)	(********)	(********)	(********)
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(********)	(********)	(********)	(********)	(********)	(********)
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	(********)	(********)	(********)	(********)	(********)	(********)

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill adds a new subsection under AS 09.50.250 requiring that actionable claims against the state falling under this statute be tried by a court without a jury.

Caveat: Although the state conducts approximately 5 to 10 jury trials per year, the number of actual jury trials only reveals part of the picture. Statistically, the greatest group of civil cases for damages (not just cases filed against the state) are worked extensively through motion and pretrial practice, and then settled after much of the motion and pretrial work has been completed (greater than 92% is the figure often quoted for cases settled, rather than tried). It is anticipated that HB 103 would effect not only the number of cases that are actually tried, but also result in savings in a much greater group of cases during the pretrial phase of litigation.

Prepared by: Kathryn Daughhetee, Director — Phone 465-3673
Division: Administrative Services Division — Date/Time 3/2/05 4:30 PM
Approved by: K. Daughhetee for Scott Nordstrand, Attorney General — Date 3/2/2005
Agency: Department of Law

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. _____

ANALYSIS CONTINUATION

Indeterminate savings to the state should result because of the following factors:

1. Cases may resolve without trial because there is more predictability of anticipated results with a court trial;

2. If the case is a court trial rather than a jury trial, the length of jury trials should be shortened by an average of two days because there would be no jury selection, no jury instructions, and some witnesses or evidence may not need to be produced at trial;

3. If the case is tried by the court rather than a jury there would be less pretrial preparation time and expense. For example, the parties will not need to draft instructions, draft jury voir dire or jury questionnaires, and they may not generate evidentiary motions.

4. In cases where summary judgment is currently precluded because there are genuine issues of material fact, the judge could do abbreviated, summary trials limited to the contested issues of fact that are relevant to the summary judgment motion.

5. It is also anticipated that some number of cases that are currently settled may be tried by a court because of the greater predictability in a court trial.

reviewable by the courts. In the end, the senate rules committee, which heard the evidence, did not find sufficient cause for the full senate and house to proceed with the matter.

Section 21. Suits Against The State

The legislature shall establish procedures for suits against the State.

The long-standing common law doctrine of sovereign immunity prevents the government from being sued. However, the federal government and most state governments have waived through statute their immunity from suit in certain types of cases. A few state constitutions still prohibit all suits against the state, but even here various exceptions and evasions have been devised so that justice may be served. This section of Alaska's constitution, which commands the legislature to establish procedures for suits against the state, has only a few counterparts elsewhere; typically, state constitutions that address sovereign immunity make the matter of its waiver permissive.

The Alaska legislature has complied with this constitutional directive in AS 09.50.250, which authorizes a person or corporation to bring a contract, quasi-contract, or tort claim against the state. This law is based on the federal tort claims act. Like its federal counterpart, the state statute contains certain exceptions to the waiver of immunity from suit, one of which is for the exercise of policy-making discretion by state officials. The supreme court has often rejected the use of this defense by the state, however, ruling that once a policy decision has been made to do something (e.g. maintain a road in winter), it must be done with reasonable care (see for example, *Carlson v. State*, 598 P.2d 969, 1979).

The state's limited waiver of sovereign immunity does not extend to suits against the state in federal court. It does not mean that money judgments against the state are paid automatically. These may require a legislative appropriation (AS 09.50.270).

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 18, 2005

SUBJECT: Constitutional right to jury trial (Work Order no. 24-LS0403\A)

TO: Representative Mike Kelly
Attn: Heath Hilyard

FROM: Donald M. Bullock Jr.
Legislative Counsel

Enclosed is the draft of the bill you requested to require that an actionable case against the state be tried by a judge without a jury.

Although I initially expressed some concern about whether denying a plaintiff a jury trial may raise constitutional concern, I find that such a limitation is valid. Prior to 1975, AS 09.50.290 limited claims against the state to be tried before a judge without a jury. The application of that provision to claims against the state was upheld in *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121, 128-29 (Alaska 1975). The legislature repealed AS 09.50.290 in 1975.[1]

If I may be of further assistance, please advise.

DMB:jad
05-012.jad

Enclosure

[1] Ch. 147, SLA 1975.

such rental acceleration clauses.[8] While this court has not decided the question, we decline to do so here where the enforceability issue was not raised below.[9]

Affirmed.

UNIVERSITY OF ALASKA, Petitioner,

v.

NATIONAL AIRCRAFT LEASING, LTD., and Alaska International Air, Inc., for themselves and for Insurers at Lloyds of London and certain other insurance underwriters, Respondents.

No. 2365.

Supreme Court of Alaska at Fairbanks.

May 30, 1975.

Action was brought against University of Alaska for damage to aircraft in attempting to land on experimental floating ice strip maintained by the university. The Superior Court, Fourth Judicial District, Victor D. Carlson, J., denied university's request for jury trial and university petitioned for review. The Supreme Court, Dimond, J. pro tem, held that despite the degree of constitutional as well as statutory autonomy the university possesses and despite university's unique corporate character and its power to sue and be sued in its own name, university falls within ambit of language of statute governing suits against the state, and trial by jury is not allowed in actions against the university; and that distinction between proprietary and governmental functions will not be made in suits involving the state or its agencies.

Order affirmed.

Erwin, Boochever and Burke, JJ., did not participate.

1. Appeal and Error ⇐70(6)

Interlocutory order striking University of Alaska's demand for jury trial in action for damages against university would be reviewed to avoid possibility that postponing review until time for normal appeal could result in the necessity of a new trial. AS 09.50.250–09.50.300, 09.50.290; Rules of Civil Procedure, rule 38(b); Rules of Appellate Procedure, rule 23(e).

2. Jury ⇐18
States ⇐191(2)

Despite degree of constitutional as well as statutory autonomy possessed by the University of Alaska, university is an integral part of the state educational system mandated by the constitution and neither the corporate status of the university nor its power to sue and be sued in its own name militate against conclusion that university falls within ambit of statute governing suits against the state, including

8. Among the cases enforcing rental acceleration clauses are the following: Maddox v. Hobbie, 228 Ala. 80, 152 So. 222 (1934); Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc., 235 So.2d 344 (Fla.App.1970); Erickson v. O'Leary, 127 Kan. 12, 273 P. 414 (1929); Shepard Realty Co. v. United States Stores Co., 193 La. 211, 190 So. 383 (1939); Pierce v. Hoffstot, 211 Pa.Super 380, 236 A.2d 828 (1967).

On the other hand, courts in New York and California have refused to enforce acceleration clauses. *See, e. g.*, Ricker v. Rombough, 120 Cal.App.2d Supp. 912, 261 P.2d 328 (1953); 884 W. End Ave. Corp. v. Pearlman, 201 App.Div. 12, 193 N.Y.S. 670 (1922). For additional cases from other jurisdictions see Annot., 58 A.L.R. 300 (1929); Annot., 128 A.L.R. 750 (1940).

9. University of Alaska v. Simpson Bldg. Supply Co., 530 P.2d 1317, 1324 (Alaska 1975); Padgett v. Theus, 484 P.2d 697, 700 (Alaska 1971); Lumbermen's Mut. Cas. Co. v. Continental Cas. Co., 387 P.2d 104, 109 (Alaska 1963). We note that the trial court gave the lessee the right of use of the premises for the balance of the term, and as noted in this opinion at page 118, lessee had the right to use the premises during the entire term of the lease. Otherwise, we might have waived the rule in order to consider the rent acceleration clause as well as possible duty of the lessor to mitigate damages.

provisions that trial by jury is not allowed in actions against the state. Const. art. 7, § 1 et seq.; AS 09.50.250–09.50.300, 14.40.-040.

3. Jury ⇐18

Fact that University of Alaska is not a department of the executive branch allocated among the principal departments did not place university beyond purview of statute providing that actions against the state shall be tried by the court without a jury inasmuch as university enjoyed in some relative respects a status which was coequal rather than subordinate to that of the executive or legislative arms of government. Const. art. 3, § 22; AS 09.50.-250, 44.15.010.

4. States ⇐193

Distinction between proprietary and governmental functions will not be made in suits against the state or its agencies under statute authorizing such suits on contract, quasi-contract or tort claim. AS 09.50.-250–09.50.300.

Howard P. Staley, of Merdes, Schaible, Staley & DeLisio, Inc., Fairbanks, for petitioner.

William B. Rozell, of Faulkner, Banfield, Doogan, Gross & Holmes, Juneau, for respondents.

OPINION

Before RABINOWITZ, C. J., CONNOR, J., and DIMOND, Justice Pro Tem.

DIMOND, Justice Pro Tem.

Within certain limitations, one is authorized by statute to sue the State of Alaska on a contract, quasi-contract or tort claim.[1] One of these limitations is that the action must be tried by the court; under AS 09.-50.290 a trial by jury is not allowed in actions against the state.[2]

It is this statutory condition upon the state's waiver of sovereign immunity which gave rise to this petition for review. The petitioner, University of Alaska, has been sued for damages by the respondents, National Aircraft Leasing, Ltd., and Alaska International Air, Inc. The suit arose when an aircraft being operated by Alaska International Air, Inc., was damaged in attempting to land on an experimental floating ice air strip maintained by the University. The University demanded a trial by jury under Civil Rule 38(b).[3] Applying AS 09.50.290, however, the trial judge refused to grant a jury trial on the grounds that the University and the state are the same for purposes of AS 09.50.250–.300 which set forth the conditions under which suits against the state may be maintained. The court's reasoning was that the protections afforded the state by AS 09.-50.250–.300 apply to all entities that are similarly situated, e. g., possessing publicly owned assets and dependent upon the taxpayers for support. The petitioner asserts that the trial court erred in this ruling.

[1] This matter is before us, not on appeal from a final judgment, but on petition for review from an interlocutory order. In the exercise of our discretion we have granted review at this stage of the proceedings in order to avoid the possibility that postponing review of this question until the time for a normal appeal could result in the necessity of a new trial. The unnecessary delay and expense attendant upon such a possibility can be avoided by

1. AS 09.50.250–.300.

2. AS 09.50.290 provides:
Actions against the state under §§ 250–300 of this chapter shall be tried by the court without a jury.

3. Civil Rule 38(b) provides:
(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand shall be made in a separate written document signed by the party making the demand or by his attorney.

deciding the question now.[4] Moreover, the issue here presented is of sufficient importance to "justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court . . . ."[5]

All governmental authority in Alaska originates in the people of this state and is founded upon their will only.[6] The people formulated the basic government of our state by ratifying the Alaska Constitution which was drafted by delegates elected by the people to represent them at a constitutional convention. It is the Alaska Constitution, therefore, that forms the basis for the fundamental government of this state.

Article VII of the constitution frames the mandate whereby the health, education and welfare of the people are provided for. Section 1 of article VII directs the legislature to establish and maintain by general law a system of public schools open to all children of the state, and allows the legislature to provide for other public educational institutions. Section 2 of article VII, the import and construction of which is crucial to the resolution of this case, provides:

> The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

The question before us is whether the University of Alaska constitutes in function and character such an arm or instrumentality of the state as to bring it within the scope of those statutes which govern the conditional waiver of sovereign immunity in this state. If it is, then the ruling of the trial court on the applicability of AS 09.50.290 to this action must be affirmed.

By constitutional provision, the University as a corporate entity holds title to all property which is conveyed or set aside to it. The disposition and administration of such property, however, is made expressly subject to a degree of legislative control. The board of regents is empowered by the constitution to "govern" the university. Nevertheless it is obliged to formulate policy as well as appoint its chief executive "in accordance with law." The regents, moreover, hold office by virtue of the approval of both the governor and both houses of the legislature.[7]

Through legislative enactments, the University enjoys a considerable degree of statutory independence. Not only does the board of regents have the constitutional authority to appoint the president of the University, formulate policy, and act as the governing body for the institution, but the legislature has specifically empowered it to fix the president's compensation and the compensation of all teachers, professors, instructors and other officers; to confer such appropriate degrees as it may determine; to have care, control and management of all the real and personal property and all money of the University; and to

4. Appellate Rule 23(e) provides in part that an aggrieved party may petition this Court for review of nonappealable orders
> [w]here postponement of review until normal appeal may be taken from a final judgment . . . will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors.

5. Appellate Rule 24(a)(1). *See, e. g.*, Peter v. State, 531 P.2d 1263 (Alaska 1975).

6. Alaska Const. art. I, § 2 provides:
> All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

7. Alaska Const. art. VII, § 3 provides:
> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

receive, manage and invest money or property obtained from sources other than the state legislature or by way of federal appropriation.[8] In addition, the legislature has provided that title and control or possession of land and personal property, other than monies, which are devised, bequeathed or given to the University, shall be taken by the University in its corporate capacity acting through the regents or an authorized agent, and shall be entered in the perpetual inventory of the University.[9] The board of regents is also authorized to execute leases for mining, agriculture, or other purposes to the lands granted by Congress to the University for the benefit of an agricultural college and school of mines.[10] In addition, the board of regents may select the lands granted to Alaska by the Act of Congress approved January 21, 1929, and may sell or lease such lands.[11]

But the University is also subject to some executive and legislative control. As mentioned, the constitution provides that the regents of the University shall be appointed by the governor, subject to confirmation by the legislature.[12] Furthermore, as has been pointed out, the formulation of university policy as well as the administration and disposition of University property are made subject to legislative enactment. At the beginning of each regular session of the legislature the board of regents is required to make a written report to the legislature showing the condition of University property, all receipts and expenditures, and the educational and other work performed.[13] In addition, the board must make an annual report to the governor which shall include a statement of all trust funds the University possesses.[14]

All monetary gifts, bequests or endowments received for the University expansion program or other uses must be turned over to the Department of Revenue where they are placed in a separate fund.[15] This fund, denominated as a trust fund, shall also include all monies derived by the University from the sale or lease of lands granted by act of Congress. These funds shall be invested by the Department of Revenue in interest-bearing securities as approved by the governor.[16] The proceeds from the sale or lease of lands granted to Alaska for University purposes by acts of Congress shall be deposited in the state treasury by the board of regents.[17] The governor is the person authorized to make all certificates required by law or by regulations of the federal Departments of Agriculture or Interior to entitle the state to grants of money for the benefit of state colleges of agricultural and mechanical arts authorized under acts of Congress.[18]

Finally, there is the matter of financing the operations of the University from state funds. In 1974 the total funding of the University of Alaska was over 41 million dollars. Approximately 65 per cent of that amount, 26½ million dollars, was appropriated by the legislature from the state's general fund.[19]

[2] Despite the degree of constitutional as well as statutory autonomy the University clearly possesses, we are of the opinion that it must be considered to be an integral part of the state educational system mandated by the constitution. In its constitutional status it stands as the single governmental entity which was specifically created by the people to meet the statewide need for a public institution of higher education. In this light, the University must be regarded as uniquely an instrumentality of the state itself. Unlike other public educational institutions created to meet the

8. AS 14.40.170; AS 14.40.250.
9. AS 14.40.280.
10. AS 14.40.350.
11. AS 14.40.360.
12. Note 7 *supra*.
13. AS 14.40.190.
14. AS 14.40.370.
15. AS 14.40.280.
16. AS 14.40.400.
17. AS 14.40.360.
18. AS 14.40.450.
19. § 17, ch. 147, SLA 1974.

needs of local areas, it exists constitutionally to act for the benefit of the state and the public generally.

We reach this conclusion not only from article VII of the constitution, which we construe to be the expression of the will of the people of this state that there shall be an institution of higher learning within the scope of the constitutional mandate providing for public education, but also from the degree of control over the affairs of the University which is exercised by the executive and legislative branches of our government, and from the financial dependence the University has upon the state.

It is true that the constitution has established the University as a body corporate.[20] The fact that the University has had conferred upon it the status of a juristic person is not dispositive, however, of our ruling in this case. There are several reasons why this structural approach may have been taken.[21] It may have been created as a corporation so as to simplify its transactions with the federal government in accepting grants of lands, and to facilitate its dealings with other persons in leasing and selling the lands it acquires or in conducting general business activities. Also, this corporate status may have been chosen in order to shield the individual members of the board of regents from personal liability in actions which might lead to a judgment for money damages against the University.

Whatever the framers' intentions, we have in the past recognized that corporate status alone is not determinative of the question of whether or not an entity performing public or governmental functions is an agent or instrumentality of the state. In Alaska State Housing Authority v. Dixon, 496 P.2d 649, 651 (Alaska 1972), we concluded that ASHA was a "state agency" within the intendment of the Administrative Procedure Act even though it was created as a "public corporate authority." In *Dixon* we also construed the holding in Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), to the effect that the Alaska Housing Authority was not the state for purposes of eminent domain proceedings, to mean only that that agency was not "identical" with the state.[22]

The same general conclusion was reached in DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alaska 1962). There we held that the act creating ASDC as an "instrumentality of the state within the Department of Commerce" was constitutional even though it also provided that the agency was a corporation with a "legal existence independent of and separate from the state." We concluded that this latter provision was nothing more than "a declaration of the legal relationship that most corporations have with respect to their creators."[23] Such corporate status did not have the effect of removing ASDC from the Department of Commerce.[24]

Although these decisions are not wholly dispositive of the question before us,[25] they are indicative of the fact that this Court has not been disposed to treat independent corporate status as sufficient to require the conclusion that a given entity is not in fact part of the State of Alaska. We recognize that the guideposts for such an inquiry are to be found more in political and functional realities than in organizational formali-

20. Alaska Const. art. VII, § 2.

21. Unfortunately the records from our constitutional convention offer no help in disclosing the thinking of the drafters on this matter.

22. 496 P.2d at 651 n. 4.

23. 376 P.2d at 724.

24. *See also* Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966), where the reasoning of *DeArmond* was followed in concluding that ASMA was not by virtue of its independent corporate nature an agency not within the Department of Commerce.

25. We are aware of the crucial fact that each of these cases dealt with a corporate entity which had been specifically declared in its organic act to be "within" a given executive department of the state. That is not the case here.

ties. This approach is in harmony with that of leading authorities in the area.[26]

Other courts have reached various conclusions as to the status and standing of their state universities with respect to the issue of sovereign immunity; there is a marked split of authority on the question.[27] There is, nevertheless, sound authority for the proposition that even where created as a corporate entity, a state university, because of its relation to the state, is mere agent or instrumentality of the state to carry out its public purpose.[28] Morevoer, there are two jurisdictions whose decisions on this question are particularly persuasive since they have considered the unique status of universities created as constitutional corporations.

In People, for Use of Regents of University of Michigan v. Brooks, 224 Mich. 45, 194 N.W. 602 (1923), the Supreme Court of Michigan observed that the regents of the University of Michigan had been created as a "constitutional corporation." The court concluded that for the purposes of a statute authorizing proceedings by "the state" to condemn private property for public use, this constitutional corporation, although a separate entity independent from the state as to the management and control of the University, was nevertheless "a department of the state government, created by the Constitution to perform state functions . . . ."[29]

In a later case, the Court of Appeals of Michigan, in Branum v. State, 5 Mich. App. 134, 145 N.W.2d 860 (1966), considered the status of the University of Michigan's board of regents with respect to that state's statutory waiver of governmental immunity. It was concluded that the statute was applicable to the board even though, as a constitutional corporation, it was not subject to legislative control as to many university affairs. In so doing, the court specifically held that

> [i]n spite of its independence, the Board of Regents remains a part of the government of the state . . . . The University of Michigan is an independent branch of the government of the state of Michigan, but it is not an island. Within the confines of [its exclusive constitutional powers] it is supreme. Without these confines, however, there is no reason to allow the Regents to use their independence to thwart the clearly established public policy of the people of Michigan [waiving governmental immunity to tort actions].[30]

A United States district court, considering the unique constitutional status of the board with respect to its immunity from suit under maritime law, concluded that the University of Michigan's board of regents was "a unique constitutional corporation . . . . similar to a department of the

26. *See, e. g.*, 1 K. Davis, Administrative Law § 1.01, at 1 (1958) (where the author recognizes that administrative agencies may be designated by many names, including that of "corporation"), *as quoted in* Dixon, 496 P. 2d at 651.

27. *See generally* Annot., 33 A.L.R.3d 703, § 4[d] (1970); Annot., 86 A.L.R.2d 489, § 7 (1962); Annot., 160 A.L.R. 7, § 4 (1946); 15 Am.Jur.2d Colleges and Universities §§ 7, 15, 35 (1964); 72 Am.Jur.2d States, Territories and Dependencies §§ 104–106 (1974); 14 C.J.S. Colleges and Universities §§ 2, 18 (1939).

28. *See, e. g.*, Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959) (recognizing that the state university and its hospital are "instrumentalities of the state" which may not be sued until the legislature enacts statutes determining "the manner in which such suits may be brought against the state."); University of Maryland v. Maas, 173 Md. 554, 197 A. 123 (1938); State v. Miser, 50 Ariz. 244, 72 P.2d 408, 412 (1937) (deciding that the fact that the University of Arizona is incorporated "does not make it any of the less an arm, branch or agency of the state for educational purposes").

29. 194 N.W. at 603.

30. 145 N.W.2d at 862.

state" which consequently enjoyed the immunity of the state from such suits.[31]

The character of the University of Minnesota's board of regents, also created as a "constitutional corporation," has been viewed by the supreme court of that state in this same general light. In State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951 (1926), it was decided that while the legislature could not subject the board to executive control in matters reserved by the state constitution to the board alone, the board was nevertheless

> an agency of government to accomplish a state purpose, just as a municipal corporation, however independent it may be under its charter, is an agency of [local] government for the accomplishment of local purposes.[32]

More recently, a United States district court observed in Reid v. University of Minnesota, 107 F.Supp. 439, 442 (N.D.Ohio 1952), that

> [t]he "Regents of the University of Minnesota" is a constitutional corporation created to carry out State purposes and the acts of the Regents are, therefore, the acts of the State of Minnesota.

We conclude from the foregoing that the corporate status of the University of Alaska under the Alaska Constitution does not militate against our conclusion that the University falls within the ambit of the language of AS 09.50.250–.300 which governs suits against the State of Alaska. Furthermore, this Court's actions in the recent case of University of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974), do not, as is urged by petitioner, require a contrary ruling.[33]

Petitioner also argues that the University is not subject to AS 09.50.250–.300 since the legislature has chosen to confer upon it the statutory power to "sue and be sued" in its own name.[34] This fact is not dispositive of the issue at hand. As a constitutional corporation, owing its existence not to the legislature but to a charter from the ultimate sovereign, the will of the people of this state, this basic corporate power would inhere in the University regardless of the legislature's declaration.[35]

In short, it is our conclusion that neither the University's unique corporate character nor its power to sue and be sued in its own name detracts in any degree from what we consider most significant and controlling in this case: that the University, in performing its constitutional functions, acts for the benefit of the state and of the public generally in the process of government; and that it was created to pursue the govern-

31. Huckins v. Board of Regents of University of Michigan, 263 F.Supp. 622, 624 (E.D. Mich.1967).

32. 220 N.W. at 953.

33. In *Chauvin*, where we ultimately concluded that under the fourteenth amendment to the Consitution of the United States a tenured employee of the University was entitled to a hearing before termination of his employment, this Court denied the University's motion for a stay of execution pending appeal under Rule 62(e) of the Alaska Rules of Civil Procedure. Rule 62(e) provides that no supersedeas bond is required when a stay of execution is granted pending an appeal by the state or its officers or agencies. In denying its motion, we did not specifically rule on the question of the University's status as an agency of the state for purposes of Rule 62. Moreover, we do not feel constrained in this case to decide whether the applicability of AS 09.50.290 to the University is dispositive of the University's standing with respect to Rule 62.

34. AS 14.40.040 provides:

> *General powers of the university.* There is created and established a corporation to be called the University of Alaska. It may in that name
>
> (1) sue and be sued;
>
> (2) receive and hold real and personal property;
>
> (3) contract and be contracted with;
>
> (4) adopt, use and alter a corporate seal;
>
> (5) do and have done all matters necessary for the purpose of any function set forth in this chapter.

35. Such a power, for example, is recognized to be a normal incident and attribute of corporate status per se. *See, e. g.*, H. Henn, Law of Corporations § 79, at 109 (1970).

mental task of providing education in accordance with an express mandate of the constitution, the fundamental and basic government of this state.

Article III, section 22 of the Alaska Constitution requires that all executive and administrative offices, departments, and agencies of the state government shall be allocated by law among and within not more than twenty principal departments. Petitioner contends that the University is not subject to AS 09.50.290 since it is not a department of the executive branch allocated among the 17 principal departments now identified under AS 44.15.010.[36]

[3] The answer to this contention is that the University could not be so allocated. In the light of our foregoing consideration of the unique character of the University as a constitutional corporation, we are persuaded that it is an instrumentality of the sovereign which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government.[37] We therefore conclude that it is not necessarily subject to such allocation under AS 44.15.010.

[4] Lastly, petitioner argues that in maintaining an experimental air strip on floe ice, the University was acting in a "proprietary," rather than "governmental" capacity, and that therefore, consistent with the common law principle in such cases, the privileges incident to sovereignty should not be recognized in this case.

We are aware of the historic force of this distinction and acknowledge that it would appear to be honored in many jurisdictions.[38] We note, however, that some states have recognized that the distinction between proprietary and governmental functions has little if any relevance in actions involving the question of the immunity or liability of the state, as opposed to its political subdivisions, in connection with the activities of public schools or institutions of higher learning.[39] We observe that the proprietary-governmental distinction was abandoned by this court with respect to municipal tort liability in the case of City of Fairbanks v. Schaible.[40] We take this opportunity to extend that ruling to suits involving the state or its agencies under AS 09.50.250–.300.

We reach the conclusion that the University of Alaska is an integral part of the state government and an instrumentality of the state in performing its educational function. This being so, AS 09.50.290, which provides that a suit against the state

36. AS 44.15.010 provides:
Offices and departments. There are in the state government the following principal offices and departments:
(1) Office of the Governor
(2) Department of Administration
(3) Department of Law
(4) Department of Revenue
(5) Department of Education
(6) Department of Health and Social Services
(7) Department of Labor
(8) Department of Commerce
(9) Department of Military Affairs
(10) Department of Natural Resources
(11) Department of Fish and Game
(12) Department of Public Safety
(13) Department of Public Works
(14) Department of Economic Development
(15) Department of Highways
(16) Department of Environmental Conservation
(17) Department of Community and Regional Affairs

37. *See* State ex rel. Sholes v. University of Minnesota, 54 N.W.2d 122, 125–26 (Minn. 1952).

38. *See* Annot., 33 A.L.R.3d 703, §§ 7 et seq. (1970).

39. *See* McCoy v. Board of Regents, 196 Kan. 506, 413 P.2d 73 (1966); Holzworth v. State, 298 N.W. 163 (1941).

40. 375 P.2d 201, 208 (Alaska 1962). It is significant that our decision in *Schaible* was predicated upon a statutory waiver of governmental immunity which, in all respects material to this case, is the functional equivalent of AS 09.50.250.

shall be tried by the court without a jury, is applicable in this case.

The order striking petitioner's demand for a jury trial is affirmed.

ERWIN, BOOCHEVER and BURKE, JJ., not participating.

EMPLOYERS COMMERCIAL UNION COMPANY, a Foreign Corporation and Aspeotis Construction Company, Appellants,

v.

Peter LIBOR and Alaska Workmen's Compensation Board, Appellees.

No. 2119.

Supreme Court of Alaska.

June 6, 1975.

Review was sought with regard to award made to claimant by Workmen's Compensation Board. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., affirmed Board's decision, and appeal was taken. The Supreme Court, Connor, J., held that substantial evidence, apart from statutory presumption that a claim for compensation is within Workmen's Compensation Act, supported Board's finding that claimant's herniated disc was caused by work-related injury and that Board, in making award to claimant, could additionally rely on statutory presumption.

Affirmed.

1. Workmen's Compensation ⇐1532

Substantial evidence, apart from statutory presumption that a claim for compensation is within Workmen's Compensation Act, supported Workmen's Compensation Board's finding that claimant's herniated disc was caused by work-related injury occurring when he was struck in small of back by accidentally dislodged rock as he was bent over in a ditch. AS 23.30.120(1).

2. Workmen's Compensation ⇐1357

Workmen's Compensation Board, in making award to claimant, could additionally rely on statutory presumption that a claim is within Workmen's Compensation Act where such presumption was not overcome by substantial evidence to contrary. AS 23.30.120(1).

Sanford M. Gibbs, of Hagans, Smith & Brown, Anchorage, for appellants.

Suzanne C. Pestinger and William K. Jermain of Birch, Jermain, Horton & Bittner, Anchorage, for appellee Libor.

OPINION

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

CONNOR, Justice.

This is an appeal from the judgment of the superior court reviewing a decision of the Alaska Workmen's Compensation Board.

About May 24, 1969, Peter Libor, while employed by the Aspeotis Construction Company, was struck in the small of his back by a rock which had been accidentally dislodged. At the time, appellee was in a bent over position standing in a ditch. The rock, which fell from above, was approximately eight inches across and weighed between four and five pounds. The injury was diagnosed as a fracture of the transverse process of the right side of vertebrae L2 and L3. Libor was absent from work for about two weeks. He then returned to work until February 25, 1971, at which time, because of increased pain in his low back, he went to see Dr. Tryon Wieland in Anchorage.

Dr. Wieland prescribed exercise and physical therapy. When that procedure afforded little relief, Libor consulted Dr. George A. Lyon, who diagnosed Libor's

11th Amendment to the United States Constitution

"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."

STATE IMMUNITY

Purpose and Early Interpretation

Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions inconsistent. At the same time, it is a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states." 1 Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability of the States and their officers to federal constitutional standards, it has occasioned considerable dispute within and without the Court. 2

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793 3 provoked such angry reaction in Georgia and such anxieties in other States that at the first meeting of Congress following the decision the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with, what was for that day, "vehement speed." 4 Chisholm had been brought under that part of the jurisdictional provision of Article III that authorized cognizance of "controversies . . . between a State and Citizens of another State." At the time of the ratification debates, opponents of the proposed Constitution had objected to the subjection of a State to suits in federal courts and had been met with conflicting responses--- on the one hand, an admission that the accusation was true and that it was entirely proper so to provide, and, on the other hand, that the accusation was false and the clause applied only when a State was the party plaintiff. 5 So matters stood when Congress, in enacting the Judiciary Act of 1789, without recorded controversy gave the Supreme Court original jurisdiction of suits between States and citizens of other States. 6 Chisholm v. Georgia was brought under this jurisdictional provision to recover under a contract for supplies executed with the State during the Revolution. Four of the five Justices agreed that a State could be sued under this Article III jurisdictional provision and that under section 13 the Supreme Court properly had original jurisdiction. 7

The Amendment proposed by Congress and ratified by the States was directed specifically toward overturning the result in Chisholm and preventing suits against States by citizens of other States or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, altogether bar suits against States in the federal courts. 8 That is, it barred suits against States based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter. 9 The early decisions seemed to reflect this understanding of the Amendment, although the point was not necessary to the decisions and thus the language is dictum. 10 In Cohens v. Virginia, 11 Chief Justice Marshall ruled for the

Court that the prosecution of a writ of error to review a judgment of a state court alleged to he in violation of the Constitution or laws of the United States did not commence or prosecute a suit against the State but was simply a continuation of one commenced by the State, and thus could be brought under Sec. 25 of the Judiciary Act of 1789. 12 But in the course of the opinion, the Chief Justice attributed adoption of the Eleventh Amendment not to objections to subjecting States to suits per se but to well-founded concerns about creditors being able to maintain suits in federal courts for payment, 13 and stated his view that the Eleventh Amendment did not bar suits against the States under federal question jurisdiction 14 and did not in any case reach suits against a State by its own citizens. 15

In Osborn v. Bank of the United States, 16 the Court, again through Chief Justice Marshall, held that the Bank of the United States 17 could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the State itself. This ruling embodied two principles, one of which has survived and one of which the Marshall Court itself soon abandoned. The latter holding was that a suit is not one against a State unless the State is a named party of record. 18 The former holding, the primary rationale through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and thus can derive no protection from an unconstitutional statute of a State. 19

Expansion of the Immunity of the States .--Until the period following the Civil War, Chief Justice Marshall's understanding of the Amendment generally prevailed. But in the aftermath of that conflict, Congress for the first time effectively gave the federal courts general federal question jurisdiction, 20 and a large number of States in the South defaulted upon their revenue bonds in violation of the Contracts Clause of the Constitution. 21 As bondholders sought relief in federal courts, the Supreme Court gradually worked itself into the position of holding that the Eleventh Amendment, or more properly speaking the principles "of which the Amendment is but an exemplification," 22 is a bar not only of suits against a State by citizens of other States, but also of suits brought by citizens of that State itself. 23 Expansion as a formal holding occurred in Hans v. Louisiana, 24 a suit against the State by a resident of that State brought in federal court under federal question jurisdiction, alleging a violation of the Contracts Clause in the State's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only the entertaining of a suit against a State by citizens of another State, or citizens or subjects of a foreign state, the Court nonetheless thought the literal language was an insufficient basis for decision. Rather, wrote Justice Bradley for the Court, the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the Chisholm decision and reflected the determination that that decision was wrong and that federal jurisdiction did not extend to making defendants of unwilling States. 25 The amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. The views of the opponents of subjecting States to suit "were most sensible and just" and those views "apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." 26 "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . .

The suability of a State without its consent was a thing unknown to the law." 27 Thus, while the literal terms of the Amendment did not so provide, "the manner in which [Chisholm] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing," 28 led the Court unanimously to hold that States could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

Then, in Ex parte New York (No. 1), 29 the Court held that, absent consent to suit, a State was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification. . . . It is true the Amendment speaks only of suits in law or equity; but this is because . . . the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in Chisholm v. Georgia . . . from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case." 30 Just as Hans v. Louisiana had demonstrated the "impropriety of construing the Amendment" so as to permit federal question suits against a State, so "it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its citizens or not." 31

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. "Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suit, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" 32

Footnotes

[Footnote 1] C. Wright, The Law of Federal Courts Sec. 48 at 286 (4th ed. 1983).

[Footnote 2] An extraordinary amount of writing on the Amendment and its interpretation has appeared in recent years. See, e.g., Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1978); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978); Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139 (1977); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682 (1976); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983); Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983); Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423; Nowak, The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975).

[Footnote 3] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[Footnote 4] The phrase is Justice Frankfurter's, from Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House; ratification occurred on February 7, 1795, when the twelfth State acted, there then being fifteen States in the Union.

[Footnote 5] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. Farrand, The Records of the Federal Convention of 1787 423-25 (rev. ed. 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making States subject to suit, 3 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 526-27 (1836), but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied States could be made party defendants, id. at 533, 555-56, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that States could be and ought to be subject to suit. Id. at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that States would be subject to suit. 2 id. at 491. See Hamilton, in The Federalist No. 81 (Modern Library ed. 1937), also denying state suability. See Fletcher, supra n.2, at 1045-53 (discussing sources and citing other discussions).

[Footnote 6] Ch. 20, Sec. 13, 1 Stat. 80 (1789). See also Fletcher, supra n.2, at 1053-54. For a thorough consideration of passage of the Act itself, see J. Goebel, History of The Supreme Court of the United States: Vol. 1, Antecedents and Beginnings to 1801 457-508 (1971).

[Footnote 7] Id. at 723-34; Fletcher, supra n.2, at 1054-58.

[Footnote 8] Id. at 1058-63; Goebel, supra n.6, at 736.

[Footnote 9] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[Footnote 10] One square holding, however, was that of Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (C.C.D.Pa. 1809) (No. 14,647), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that States were subject to suits in admiralty. This understanding, see Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 J. Story, Commentaries of the Constitution of the United States 560-61 (1833), did not receive a holding of the Court during this period, see Georgia v. Madrazo, supra; United States v. Peters, 9 U.S. (5 Cr.) 115 (1809); Ex parte Madrazo, 32 U.S. (7 Pet.) 627 (1833), and was held to be in error in Ex parte New York (No. 1), 256 U.S. 490 (1921).

[Footnote 11] 19 U.S. (6 Wheat.) 264 (1821).

[Footnote 12] 1 Stat. 73, 85, supra, pp.701-05, 723-25.

[Footnote 13] "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." 6 Wheat. at 406-07.

[Footnote 14] "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." Id. at 382-83.

[Footnote 15] "If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." Id. at 412.

[Footnote 16] 22 U.S. (9 Wheat.) 738 (1824).

[Footnote 17] The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it

were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

[Footnote 18] 9 Wheat. at 850-58. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, see id. at 857-58. But compare id. at 849. The holding was repudiated in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a State "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." In re Ayers, 123 U.S. 443, 487 (1887).

[Footnote 19] 9 Wheat. at 858-59, 868. For the flowering of the principle, see Ex parte Young, 209 U.S. 123 (1908).

[Footnote 20] Act of March 3, 1875, ch. 137, Sec. 1, 18 Stat. 470. See discussion supra, pp. 713-14.

[Footnote 21] See, e.g., Orth, The Eleventh Amendment and the North Carolina State Debt, 59 N.C. L. Rev. 747 (1981); Orth, The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction, 2 Tul. Law. 2 (1980); Orth, The Virginia State Debt and the Judicial Power of the United States, in Ambivalent Legacy: A Legal History of the South 106 (D. Bodenhamer & J. Ely eds.) (1983).

[Footnote 22] Ex parte New York (No. 1), 256 U.S. 490, 497 (1921).

[Footnote 23] E.g., In re Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); The Virginia Coupon Cases, 114 U.S. 269 (1885); Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446 (1883); Louisiana v. Jumel, 107 U.S. 711 (1882). In Antoni v. Greenhow, 107 U.S. 769, 783 (1883), three concurring Justices propounded the broader reading of the Amendment which soon prevailed.

[Footnote 24] 134 U.S. 1 (1890).

[Footnote 25] Id. at 11.

[Footnote 26] Id. at 14-15.

[Footnote 27] Id. at 15-16.

[Footnote 28] Id. at 18-19. The Court acknowledged that Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382 - 83, 406-07, 410-12 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." 134 U.S. at 20 . For the continuing vitality of Hans, see infra, text at nn.55-56.

[Footnote 29] 256 U.S. 490 (1921).

[Footnote 30] Id. at 497-98.

[Footnote 31] Id. at 498. See also Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982). And see Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

[Footnote 32] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 -23 (1934) (quoting The Federalist No. 81). Similarly, the Court has recently held, relying on Monaco, the Amendment bars suits by Indian tribes against non-consenting states. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

The Nature of the States' Immunity

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of Hans v. Louisiana, Ex parte New York, and Principality of Monaco, is that Chisholm was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding" that Article III's grants of federal court jurisdiction did not extend to suits against the States. That view finds present day expression. 33 It explains the decision in Edelman v. Jordan, 34 in which the Court held that a State could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." 35 But that the bar is not wholly jurisdictional seems established as well. 36

Moreover, if under Article III there is no jurisdiction of suits against States, the settled principle that States may consent to suit 37 becomes conceptually difficult, inasmuch as it is not possible to confer jurisdiction where it is lacking through the consent of the parties. 38 And there is jurisdiction under Article III of some suits against States, such as those brought by the United States or by other States. 39 And, furthermore, Congress is able in at least some instances to legislate away state immunity, 40 although it may not enlarge Article III jurisdiction. 41 The Court has recently declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived." 42

Another explanation of the Eleventh Amendment is that it recognizes the doctrine of sovereign immunity, which was clearly established at the time: a state was not subject to suit without its consent. 43 The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with fed eral governmental immunity. 44 Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver. 45 The limited effect of the doctrine in this context in federal court arises from the fact that traditional sovereign

immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the States surrendered their sovereignty to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but which is more than their coequal. 46

Thus, outside the area of federal court jurisdiction, there is the case of Nevada v. Hall, 47 which perfectly illustrates the difficulty. The case arose when a California resident sued a Nevada state agency in a California court because one of the agency's employees negligently injured him in an automobile accident in California. While recognizing that the rule during the framing of the Constitution was that a State could not be sued without its consent in the courts of another sovereign, the Court discerned no evidence in the federal constitutional structure, in the specific language, or in the intention of the Framers that would impose a general, federal constitutional constraint upon the action of a State in authorizing suit in its own courts against another State. The Court did imply that in some cases a "substantial threat to our constitutional system of cooperative federalism" might arise and occasion a different result, but this was not such a case. 48

Within the area of federal court jurisdiction, the issue becomes the extent to which the States upon entering the Union gave up their immunity to suit in federal court. Chisholm held, and the Eleventh Amendment reversed the holding, that the States had given up their immunity to suit in diversity cases based on common law or state law causes of action; Hans v. Louisiana and subsequent cases held that the Amendment in effect codified an understanding of broader immunity to suits based on federal causes of action. 49 Other cases have held that the States did give up their immunity to suits by the United States or by other States and that subjection to suit continues. 50

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal Government. 52 In this respect, the federal courts may not act without congressional guidance in subjecting States to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially-created doctrines requiring it to be explicit when it legislates against state immunity. 53

In the 1980s four Justices, led by Justice Brennan, argued that Hans was incorrectly decided, that the Amendment was intended only to deny jurisdiction against the States in diversity cases, and that Hans and its progeny should be overruled. 55 But the remaining five Justices adhered to Hans and in fact stiffened it with a rule of construction quite severe in its effect. 56 The Hans interpretation has been solidified with the Court's ruling in Seminole Tribe of Florida v. Florida, Supp.1 that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment. That too, however, was a 5-4 decision, with the four dissenting Justices believing that Hans was wrongly decided. Supp.2

Footnotes

[Footnote 33] E.g., Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291 -92 (1973) (Justice Marshall concurring); Nevada v. Hall, 440 U.S. 410, 420 -21 (1979); Patsy v. Florida Board of Regents, 457 U.S. 496, 520

(1982) (Justice Powell dissenting); Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1127-28 (1996).

[Footnote 34] 415 U.S. 651 (1974).

[Footnote 35] Id. at 678. The Court relied on Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the State's immunity. Edelman has been followed in Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion. But see infra, n.36.

[Footnote 36] See Patsy v. Florida Board of Regents, 457 U.S. 496, 515-16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. See id. at 520 (Justice Powell dissenting).

[Footnote 37] Clark v. Barnard, 108 U.S. 436 (1883).

[Footnote 38] E.g., People's Band v. Calhoun, 102 U.S. 256, 260-61 (1880). See Justice Powell's explanation in Patsy v. Florida Board of Regents, 457, U.S. 496, 528 n.13 (1982) (dissenting) (no jurisdiction under Article III of suits against unconsenting States).

[Footnote 39] See, e.g., the Court's express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[Footnote 40] E.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[Footnote 41] The principal citation is, of course, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[Footnote 42] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 99 (1984).

[Footnote 43] As Justice Holmes explained, the doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1170-71 (1996) (Justice Souter dissenting). On the sovereign immunity of the United States, see supra, pp.746-48. For the history and jurisprudence, see Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

[Footnote 44] See, e.g., United States v. Lee, 106 U.S. 196, 210-14 (1882); Belknap v. Schild, 161 U.S. 10, 18 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642-43, 645 (1911).

[Footnote 45] A sovereign may consent to suit. E.g., United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940).

[Footnote 46] See Fletcher, supra n.2.

[Footnote 47] 440 U.S. 410 (1979).

[Footnote 48] Id. at 424 n.24. The Court looked to the full faith and credit clause as a possible constitutional limitation. The dissent would have found implicit constitutional assurance of state immunity as an essential component of federalism. Id. at 427 (Justice Blackmun), 432 (Justice Rehnquist).

[Footnote 49] For a while only Justice Brennan advocated this view, Parden v. Terminal Ry., 377 U.S. 184 (1964); Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 298 (1973) (dissenting), but in time he was joined by three others. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens), and other cases cited in n.55, infra.

[Footnote 50] E.g., United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[Footnote 51] Deleted in 1996 Supplement.

[Footnote 52] E.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Quern v. Jordan, 440 U.S. 332, 337 (1979).

[Footnote 53] See Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves on the degree of explicitness required. See also Quern v. Jordan, 440 U.S. 332, 343 -45 (1979). Later cases stiffened the rule of construction. See n.56 infra and, text at nn.79-84. The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching States, while in Maryland v. Wirtz, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law.

[Footnote 54] Deleted in 1996 Supplement.

[Footnote 55] E.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (dissenting); Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (dissenting): Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (concurring). Joining Justice Brennan were Justices Marshall, Blackmun, and Stevens. See also Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

[Footnote 56] E.g., Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97 -103 (1984) (opinion of the Court by Justice Powell); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237 -

40, 243-44 n. 3 (1985) (opinion of the Court by Justice Powell); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472-74, 478-95 (1987) (plurality opinion of Justice Powell); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Justice Scalia concurring in part and dissenting in part); Dellmuth v. Muth, 491 U.S. 223, 227-32 (1989) (opinion of the Court by Justice Kennedy); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (plurality opinion of Justice White); id. at 2824 (concurring opinions of Justices O'Connor and Scalia); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice O'Connor).

[Footnote 1 (1996 Supplement)] 116 S. Ct. 1114 (1996).

[Footnote 2 (1996 Supplement)] Chief Justice Rehnquist wrote the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens dissented, as did Justice Souter, whose opinion was joined by Justices Ginsburg and Breyer.

WAIVERS OF STATE SOVEREIGN IMMUNITY AND THE IDEOLOGY OF THE ELEVENTH AMENDMENT

JONATHAN R. SIEGEL†

ABSTRACT

States normally enjoy immunity from suit by private parties, but they may waive this immunity. The Supreme Court's steady contraction of other exceptions to the rule of state sovereign immunity has renewed interest in the previously little-discussed possibilities of waiver. This Article explores the boundaries of waiver doctrine.

This Article shows that, prior to 1945, the Supreme Court—even as it enforced a broad, substantive rule of state sovereign immunity—applied a sensible doctrine of waiver that balanced the interests of states with those of private parties and the federal judicial system. The Court's traditional doctrine treated state sovereign immunity like the defense of personal jurisdiction. Failure to assert immunity in a timely fashion waived the immunity defense. This rule prevented unfair gamesmanship.

Beginning in 1945, the traditional rules concerning waiver of state sovereign immunity got swept away by the overall ideological tide of state sovereign immunity doctrine. The immunity became so important that it overrode all other considerations, including the need to run the federal judicial system in a sensible way. The new rules of waiver permitted states to abuse their immunity and waste federal judicial re-

---

Copyright © 2003 by Jonathan R. Siegel.

† Professor of Law, George Washington University Law School. The production of this Article was supported by a grant from the George Washington University Law School, which the author acknowledges with gratitude. The author would also like to thank Brad Clark, Chip Lupu, and Jonathan Molot for their helpful comments. The author represents the plaintiff in one of the cases discussed herein, *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001), *vacated*, 122 S. Ct. 1958 (2002), which, at press time, has returned to the Fourth Circuit following a remand from the Supreme Court.

sources by litigating the merits of a case while holding an immunity defense in reserve.

The Supreme Court's most recent decisions suggest that the Court has returned to its traditional rules concerning waiver. The Court should make clear that it has fully reinstated the traditional, sensible, non-ideologized rules of waiver. Such rules respect the states' prerogative of refusing to be sued in a federal forum, while at the same time requiring states to assert their prerogative in an orderly way that respects the needs of the federal judicial system.

TABLE OF CONTENTS

INTRODUCTION

Fifteen years ago—perhaps even ten—hardly anyone would have cared about waivers of state sovereign immunity from suits based on federal law.[1] Traditionally, waivers played only a small and subordinate role in the long saga of state sovereign immunity theory. The sovereign immunity that the federal Constitution guarantees to the states is a personal privilege that the states may waive at pleasure,[2] but cases exploring such waivers have been rare. Far more attention has been paid to other mechanisms by which private parties may sue states.

The last decade has witnessed an abrupt change in this situation. Suddenly, waivers of state sovereign immunity are an important issue. Cases concerning waivers are cropping up all over the federal courts.[3]

---

1. As this Article explains, courts and scholars have at times used the term "waiver" of state sovereign immunity to describe three different things: action by Congress that eliminates state sovereign immunity; a state's voluntary, knowing relinquishment (usually in advance of suit and usually on a generic basis) of its own sovereign immunity; and other actions by state officers (usually those taken in the course of litigation itself) that have the effect of relinquishing state sovereign immunity. *See infra* Part I.C. Courts, scholars, and litigants have cared very much about the first category, the ability of Congress to eliminate state sovereign immunity by statute. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity when acting pursuant to its Article I powers); Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995) (exploring mechanisms Congress could use to achieve the equivalent of abrogation of state sovereign immunity). That category, however, really describes a different situation that should be called by a different name. *See infra* Part I.C.

2. Clark v. Barnard, 108 U.S. 436, 447 (1883).

3. At the Supreme Court level, see Lapides v. Bd. of Regents of the Univ. Sys., 535 U.S. 613 (2002); Raygor v. Regents of Univ., 534 U.S. 533 (2002); Wis. Dep't of Corr. v. Schacht, 524 U.S. 381 (1998).

The lower courts have struggled with, and gone into conflict regarding, the rules of waiver doctrine. *Compare, e.g.*, Arecibo Cmty. Health Care, Inc. v. Puerto Rico, 270 F.3d 17, 26–29 (1st Cir. 2001) (holding that waiver occurs when a state files a proof of claim in a bankruptcy proceeding); *In re* SDDS, Inc., 225 F.3d 970, 973 (8th Cir. 2000) (holding that waiver occurs when a state makes a general appearance and litigates on the merits), Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754, 756–58 (9th Cir. 1999) (holding that the state waives immunity by failing to raise it until the first day of trial), *amended by* 201 F.3d 1186 (9th Cir. 2000), Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (holding that waiver occurs when a state removes a case from state court to federal court and litigates on the merits), *and In re* Burke, 146 F.3d 1313, 1319–20 (11th Cir. 1998) (holding that waiver occurs when a state files a proof of claim in a bankruptcy proceeding) *with* Montgomery v. Maryland, 266 F.3d 334, 338–39 (4th Cir. 2001) (holding that a state defendant is permitted to raise the immunity defense on appeal despite the fact the immunity defense was expressly withdrawn while the case was pending in district court), *vacated*, 122 S. Ct. 1958 (2002), Lapides v. Bd. of Regents of the Univ. Sys., 251 F.3d 1372, 1378 (11th Cir. 2001) (holding that removal does not give rise to waiver),

The reason for this change is simple. Since its landmark decision in *Seminole Tribe of Florida v. Florida*,[4] the Supreme Court has steadily constricted the set of circumstances in which private parties may sue states. As this set diminishes, each remaining element in the set takes on increased importance. Lawyers, courts, and scholars paid little attention to waivers of state sovereign immunity as long as there were other mechanisms available for bringing suits against states; now that waivers are almost the only game in town, everyone wants to play. Because cases in which a state defendant waives its immunity make up one of the very few remaining categories in which private suit against states is permitted, it is essential that the boundaries of this category be fully understood.[5]

Additionally, waivers of state sovereign immunity are of interest because they provide a window into the ideology of state sovereign immunity doctrine. They display, in microcosm, larger ideological trends that run through the Supreme Court's handling of federalism issues. In early cases, the Supreme Court handled the issue of waivers of state sovereign immunity in a reasonable way that appropriately balanced state, federal, and private interests. Later, the issue became ideologized. The larger trend of respecting states' rights, particularly state sovereign immunity, became so strong that it overrode all other considerations. Even the rules regarding waiver had to be recast so

---

rev'd, 535 U.S. 613 (2002), Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 227 (3d Cir. 2000) (holding that there is no waiver even though the case was tried in district court and the state did not raise immunity until the case was on appeal), *and* Kovacevich v. Kent State Univ., 224 F.3d 806, 816 (6th Cir. 2000) (same). *See also* LensCrafters, Inc. v. Sundquist, 184 F. Supp. 2d 753, 759 n.3 (M.D. Tenn. 2002) ("[C]ircuits are split as to whether voluntary appearance and defense on the merits constitutes waiver of Eleventh Amendment immunity.").

4. 517 U.S. 44 (1996).

5. Although there has been little interest in waivers of state sovereign immunity until recently, I do not mean to suggest that the subject has been entirely neglected. For some analyses of waivers of state sovereign immunity, see Christiana Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273 (2002); Gil Seinfeld, *Waiver-In-Litigation: Eleventh Amendment Immunity and the Voluntariness Question*, 63 OHIO ST. L.J. 871 (2002).

Scholars have paid a good deal of attention to the question of whether Congress can induce waivers of state sovereign immunity through the use of the federal spending power or other federal powers. *E.g.*, Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439 (2002). This Article is primarily concerned with waivers of state sovereign immunity that result from actions taken by states in the context of litigation, but these other kinds of waivers are discussed *infra* Part II.C and Part III.C.5.

that they would conform to the Court's overall ideology of state sovereign immunity doctrine.[6]

A careful review of the history of waiver doctrine reveals that, in the mid-twentieth century, the Supreme Court erroneously conflated two separate traditions. Prior to 1945, the Court had one line of cases concerning states' voluntary and knowing *consent* to suit, and another line of cases concerning actions by state officers that had the effect of *waiving* a state's immunity from suit without consent. Although the two concepts appear similar (and the term "waiver" is sometimes applied to both), the cases distinguished them and subjected them to quite different rules.[7] These pre-1945 decisions reflected an appropriate balance between the importance of states' rights and the need for sensible rules governing the operation of the federal judicial system.

Beginning in 1945 and continuing, with some backsliding, for decades, the Court conflated the two lines of cases.[8] This conflation led to paradoxes and contradictions that reflected the elevation of state sovereign immunity from an important but waivable defense into an almost sacred principle. Other values, including obvious, common-sense rules about how to run the federal judicial system, were sacrificed. Such elevation and sacrifice are possible only in the context of an ideologized doctrine of state sovereign immunity.

Interestingly, however, notwithstanding the great and continuing strength of the Supreme Court's overall push on federalism issues, the most recent trend regarding waivers of state sovereign immunity represents a return to the prior, more reasonable rules. In two recent cases—*Wisconsin Department of Corrections v. Schacht*[9] and *Lapides v. Board of Regents of the University System of Georgia*[10]—the Court has retreated from the post-1945 waiver cases and explicitly overruled the most troublesome case from the ideologized period.[11] It appears that the Court has once again made room for reasonable, common-sense rules of waiver within the larger doctrine of state sovereign immunity.

The lower courts' reception of the Supreme Court's most recent cases has not, however, been uniform. Some lower courts have cor-

---

6. *See infra* Part II.
7. *See infra* Part II.A.
8. *See infra* Part II.B.
9. 524 U.S. 381 (1998).
10. 535 U.S. 613 (2002)
11. *See infra* Part II.E.

rectly understood *Schacht* and *Lapides* to reinstate the reasonable, pre-1945 rules governing state consent to suit and waiver of immunity from suit without consent. Others, however, still embrace the ideology of the post-1945 cases and have given *Schacht* and *Lapides* very narrow readings.[12]

This Article attempts to de-ideologize the doctrine of waiver of state sovereign immunity, to explain the Supreme Court's decisions in this context, and to resurrect the useful distinction between cases about state *consent* to suit and cases about state *waiver* of immunity from suit. The Article seeks to show that there is room, even within the Supreme Court's broad doctrine of state sovereign immunity, for a sensible doctrine of waiver. Such a sensible, non-ideologized doctrine would not be as favorable to states as the rules created by the Court's post-1945 waiver cases,[13] but neither would it deny the importance of respect for state interests that is at the heart of the Court's sovereign immunity doctrine.[14]

Part I of this Article briefly reviews the rule of state sovereign immunity and its chief exceptions, emphasizing the reasons why the exception permitting waiver of state sovereign immunity has taken on increased importance. Part II traces the development of the rules governing state consent to suit and other waivers of state sovereign immunity and notes how these reasonably sensible rules became ideologized in the mid-twentieth century. Part III suggests how to mend the doctrine of waiver of state sovereign immunity.

I. THE RULE OF STATE SOVEREIGN IMMUNITY AND ITS EXCEPTIONS

The story of the Supreme Court's development and expansion of state sovereign immunity doctrine is a familiar one that need be recounted only briefly here. Without attempting much normative analysis, this Part describes the development of the rule of state sovereign immunity and its most important exceptions. The focus is on understanding why the rules of consent and waiver have taken on increased importance.

---

12. *See infra* notes 296–97 and accompanying text.

13. *See, e.g.*, *infra* Part III.C.1 (arguing that a state's failure seasonably to raise the issue of its immunity from suit should constitute a waiver of that immunity).

14. *See, e.g.*, *infra* Part III.C.3 (arguing that a state's removal of a suit from state court to federal court should constitute a waiver only of the state's immunity from a federal forum, not a waiver of the state's immunity from liability).

A. *The Rule of State Sovereign Immunity*

The issue of state sovereign immunity from suit in federal court is older than the Constitution itself: it arose during debates over the Constitution's ratification, when opponents of ratification drew attention to the provision, in Article III, for federal jurisdiction over suits "between a State and Citizens of another State."[15] This provision, Anti-Federalists observed, appeared to apply just as much to suits in which a state is a defendant as to suits in which a state is a plaintiff. In particular, it appeared to permit suits against states upon their debts, which could be conveyed to someone who was not a citizen of the debtor state.[16] The financial condition of many states at the time was such that suits on their debts could have caused them considerable embarrassment.[17]

Proponents of ratification assured opponents that the Constitution was not intended to countenance suits against states for the payment of debt.[18] Shortly after the Constitution's adoption, however, an out-of-state creditor of Georgia began just such a suit in the United States Supreme Court, in the Court's original jurisdiction.[19] The Court, relying on the plain text of Article III (among other considerations), held that such an action would indeed lie.[20] A shocked[21] Congress quickly adopted, and the states ratified, the Eleventh Amendment, which 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

---

15. U.S. CONST. art. III, § 2, cl. 1; 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (photo. reprint 1941) (Jonathan Eliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of George Mason); *id.* at 543 (statement of Patrick Henry).

16. ELLIOT'S DEBATES, *supra* note 15, at 542–43 (statement of Patrick Henry); THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1928).

18. *See, e.g.*, THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . [T]here is no color to pretend that the State governments would . . . be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.").

19. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 419 (1793).

20. *Id.* at 452 (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 469 (Cushing, J.); *id.* at 479 (Jay, C.J.).

21. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (stating that the decision in *Chisolm* created "a shock of surprise throughout the country"); 1 WARREN, *supra* note 17, at 96 ("The decision fell upon the country with a profound shock.").

> one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[22]

The Eleventh Amendment's enigmatic text created problems and paradoxes that remain difficult to explain today. On the one hand, the amendment clearly seems textually limited to suits against a state by citizens *of another state* (or by foreign citizens or subjects), and so it would appear to have no application to a suit against a state by one of its own citizens. On the other hand, when a suit is brought against a state by a citizen of another state, the amendment's text contains nothing that would appear to limit its application based on the *nature* of the suit (provided it be a "suit in law or equity"). Thus, the amendment would, in particular, appear to apply equally to suits based on state and federal law.

A literal reading of the amendment might, therefore, lead to the conclusion that the amendment bars *all* suits in law or equity brought in federal court against a state by a citizen of another state, but permits suits in federal court against a state by its own citizens—provided, of course, that they are otherwise within the federal jurisdiction.[23] Curiously, this "literal" interpretation of the Eleventh Amendment has almost no adherents.[24] It would lead to the paradoxical result that a private citizen could sue her own state on a federal cause of action, but a citizen of another state could not sue the state on an identical claim. This result is paradoxical because under the Constitution the presence of an interstate element in a case typically enhances, rather than detracts from, the basis for the exercise of fed-

---

22. U.S. CONST. amend XI. Congress adopted the amendment in March, 1794, just a little over a year after the *Chisolm* decision. It took the states, however, almost four years to ratify the amendment. 1 JULIUS GOEBEL, JR., THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 726–37 (1971).

23. I annually ask my students in Federal Courts what they understand to be the literal meaning of the text of the Eleventh Amendment. The reading given above is the most popular answer, but it is not universal. Some students say that the text literally indicates the "diversity" reading explained in the following paragraphs; others offer still other "literal" readings. *See infra* note 24.

24. For a rare exception, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346 (1989). Another scholar also recommends applying the amendment literally, although in his view the literal reading permits congressional abrogation of state sovereign immunity. Steven Breker-Cooper, *The Eleventh Amendment: A Textual Solution*, 38 WAYNE L. REV. 1481, 1482 (1992).

eral jurisdiction.[25] The "literal" reading of the Eleventh Amendment therefore makes little sense.

As a result, most interpretations of the Eleventh Amendment depart from this literal reading. The two principal readings may be termed the "official" reading and the "diversity" reading. The "diversity" reading, advocated by numerous scholars and some judges, argues that the Eleventh Amendment simply repealed the portion of Article III of the Constitution that conferred federal judicial power over cases between a state and citizens of another state.[26] It did not bar a case fitting that description from being heard in federal court if the case was otherwise within the federal jurisdiction.[27] Thus, under this theory, the Eleventh Amendment bars cases such as *Chisolm* itself, in which a private plaintiff sues a state on a state law cause of action and the case is in federal court *only* because of the diversity of the parties.[28] The Eleventh Amendment does not, under the diversity reading, bar a private party from suing a state in federal court on a federal cause of action, whether or not the plaintiff is a citizen of the defendant state, because such a claim can proceed under the "federal question" jurisdiction.[29]

The diversity theory respects the limiting language of the Eleventh Amendment, which limits application of the amendment to suits against states by citizens of other states. Its textual weakness is that it must confront the broad language defining the types of cases that the amendment apparently bars: "any suit in law or equity" that falls within the party configurations listed in the amendment. This weakness is not necessarily insuperable—diversity theorists have explained

---

25. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1 (conferring federal judicial power over cases "between Citizens of different States").

26. To be precise, it repealed *part* of that provision: it repealed the grant of judicial power over cases between a state and citizens of another state where the state is the defendant. It did not affect the provision's application to cases where the state is the plaintiff. For judicial explanations of the diversity theory, see Seminole Tribe v. Florida, 517 U.S. 44, 101–16 (1996) (Souter, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258–302 (1985) (Brennan, J., dissenting). For scholarly explanations, see, for example, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

27. *Atascadero*, 473 U.S. at 301 (Brennan, J., dissenting) ("If federal jurisdiction is based on the existence of a federal question or some other clause of Article III . . . the Eleventh Amendment has no relevance.").

28. *Id.* at 289 (Brennan, J., dissenting).

29. *Id.* at 301 (Brennan, J., dissenting).

that the amendment's text is directed specifically at the state-citizen diversity clause of Article III[30]—but it is a textual difficulty.

---

30. *See, e.g., id.* at 289 (Brennan, J., dissenting) (explaining that the "rather legalistic terms" of the Eleventh Amendment exist because the amendment was intended to remedy *Chisolm*'s interpretation of the state-citizen and state-alien diversity clauses in Article III as themselves abrogating state sovereign immunity). Justice Brennan's otherwise comprehensive opinion omits one potentially powerful explanation for how the Eleventh Amendment's text could have taken its curious form if it was intended to embody the diversity theory. In 1805, Senator Breckenridge proposed to amend the Constitution to provide that:

> The judicial power of the United States shall not be construed to extend to controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects.

14 ANNALS OF CONG. 53 (1805). Evidently this proposal was intended to repeal all forms of diversity jurisdiction, but surely no one could think that the statement that "[t]he judicial power of the United States shall not be construed to extend to controversies . . . between citizens of different States" was intended to eliminate federal judicial power over suits between citizens of different states that were based on federal questions. That would make no sense at all; it would limit the federal question jurisdiction to cases that arose under federal law *and* were between citizens of the *same* state. (Actually, it would also allow a federal question case between aliens, but not between an alien and a citizen—another nonsensical result.)

The language of the Breckenridge proposal closely parallels that of the Eleventh Amendment. If Senator Breckenridge could have imagined, as he evidently did, that his language would have the effect of repealing diversity jurisdiction but not of affirmatively barring cases that fell within the party configurations listed in the amendment if the cases were otherwise within the federal jurisdiction, then perhaps it is not so strange after all to give a similar reading to the text of the Eleventh Amendment: it repeals the state-citizen and state-alien diversity jurisdiction but does not bar cases falling within those party configurations if they are otherwise within the federal jurisdiction.

Countering this argument, Professor Lawrence Marshall finds a "crucial" distinction between the Breckenridge proposal and the actual text of the Eleventh Amendment: the Eleventh Amendment refers to "any suit in law or equity," whereas the Breckenridge proposal uses the term "controversies." Lawrence Marshall, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 127, 129 (1990). This latter term, Marshall argues, has a much narrower significance than the broad language used in the Eleventh Amendment; it evokes only the last six categories of Article III judicial power, not the first three, which Article III refers to as "cases" rather than as "controversies." *Id.* at 129–30.

I would respectfully suggest that Marshall reads far too much into this slight linguistic difference. Marshall claims that "[a]lthough Breckenridge modeled his proposal on the Eleventh Amendment, he deliberately departed from its broad formulation," but his accompanying footnote provides no support for the key word "deliberately." *Id.* at 130 n.11. It is easy to imagine a far greater degree of precision in drafting constitutional amendments than likely exists. Think back to the balanced budget amendment that Congress considered in 1995. H.R.J. Res. 1, 104th Cong. (1995). Did anyone really understand the precise meaning of the text of the amendment—including all the different versions of that text that were proposed? *E.g., id.*; H.R.J. Res. 7, 104th Cong. (1995); H.R.J. Res. 15, 104th Cong. (1995); H.R.J. Res. 20, 104th Cong. (1995); H.R.J. Res. 21, 104th Cong. (1995) (each a different version of a balanced budget amendment). Yet the amendment came within one vote of passing the Congress. Michael Wines, *Senate Rejects Amendment on Balancing the Budget; Close Vote Is Blow to G.O.P.*, N.Y. TIMES, Mar. 3, 1995, at A1.

II. THE IDEOLOGIZATION OF WAIVER DOCTRINE

The Supreme Court's approach to the issue of waiver may be divided into distinct periods, with the 1945 case of *Ford Motor Co. v. Department of Treasury of Indiana*[93] marking an important dividing line. Two notable principles characterized the pre-1945 cases. First, the pre-1945 cases recognized two distinct traditions governing two different kinds of waivers. In some cases, a state voluntarily, knowingly, and intentionally agreed to be sued.[94] In other cases, state officials took actions that had the effect of relinquishing the state's sovereign immunity whether they knew it or not and whether they intended it or not.[95] Very different rules governed these different kinds of cases.

Unfortunately, these two kinds of cases do not have distinct, standard names. Both may be said to involve "waiver" of state sovereign immunity.[96] Inasmuch, however, as the cases were governed by quite different rules, it will prove useful to have different terms for them. Drawing on the language of the pre-1945 cases, this Article will say that when a state voluntarily and knowingly agrees to be sued, it has *consented to suit*, and that when a state's actions otherwise eliminate its immunity, the state has *waived its immunity from suit without consent*.[97] The choice of these terms is somewhat arbitrary (and, where context permits, the term "waiver" will still refer to both kinds of cases), but the key point is that, whatever terms are used, there were two different concepts that the cases treated very differently.[98]

The second notable point about the pre-1945 cases is that they struck a balance between states' rights and the reasonable and legitimate interests of private plaintiffs and the federal judicial system. State sovereignty was not the only value the Court considered as it made its decisions. The Court also considered the effect of immunity on plaintiffs and on the judicial system itself.

---

93. 323 U.S. 459 (1945).

94. *See infra* Part II.A.1.

95. *See infra* Part II.A.2.

96. *See, e.g.*, Lapides v. Bd. of Regents of the Univ. Sys., 535 U.S. 613, 624 (2002) ("[T]he State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity . . . ."); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision . . . .").

97. *See* Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 284 (1906) ("Although a state may not be sued without its consent, such immunity is a privilege which may be waived . . . .").

98. *See infra* Part II.A.

Starting in 1945 and continuing until quite recently, the Court's rulings reflected a sharp hardening and ideologization of state sovereign immunity principles. The Court conflated the lines of cases concerning consent and waiver. State sovereign immunity was transformed from an important but rather easily waivable defense into an almost sacred principle that could be avoided only by the clearest and most unequivocal consent to suit or waiver of immunity.[99]

Then, starting in 1998, the Court created a countertrend. The Court's most recent cases overruled *Ford Motor Co.* and vitiated the rules of the post-1945 period. The trend is to return to the traditional rules regarding waivers of state sovereign immunity.[100]

This Part first explores these little-known cases descriptively, in order to understand what the Court has done and to exhume the useful, but lost, distinction between consent cases and waiver cases. The next Part examines this area normatively and explains the way in which a non-ideological doctrine would approach the question of waivers of state sovereign immunity.

A. The Traditional Rules of Consent and Waiver

Prior to 1945, the Supreme Court's Eleventh Amendment jurisprudence combined severity with mildness. On the one hand, during this period, the Court created and continually expanded the rule that state sovereign immunity bars suits against states without regard to the text of the Eleventh Amendment.[101] It also looked askance at claims that a state had consented to suit in federal court.[102] On the other hand, the Court tempered the rigors of immunity by recognizing waivers of a state's immunity from suit without consent.[103] In general, the Court treated the defense of state sovereign immunity rather

---

99. *See infra* Part II.B.

100. *See infra* Part II.E.

101. *See* Monaco v. Mississippi, 292 U.S. 313, 329–30 (1934) (holding that immunity applies to suits against a state by a foreign state, although a foreign state is not a "citizen or subject of" a foreign state); *Ex parte* New York, 256 U.S. 490, 497 (1921) (holding that immunity applies to suits in admiralty against a state, even though the Eleventh Amendment refers only to suits in law or equity); Smith v. Reeves, 178 U.S. 436, 449 (1900) (holding that immunity applies to suits against states by federally chartered corporations, even though such corporations are neither citizens of any other state nor citizens or subjects of a foreign state); Hans v. Louisiana, 134 U.S. 1, 20 (1890) (holding that immunity bars a suit against a state by one of its own citizens, even though the Eleventh Amendment covers suits only by citizens of other states or by citizens or subjects of a foreign state).

102. *See infra* Part II.A.1.

103. *See infra* Part II.A.2.

like the defense of personal jurisdiction. The defense certainly existed and could lead to dismissal of a case, but the defendant had to assert the defense, and had to do so in a timely fashion. If the defense was not seasonably asserted, it was waived and could not be reasserted thereafter.

1. *Consent Cases.* In cases in which a state had allegedly consented to suit against itself, the Supreme Court employed very strict, pro-state rules. Consent to suit, the Court held, was "altogether voluntary" on the part of a state, and a state was free to set conditions on any consent that it chose to give.[104] In particular, a state could consent to be sued in its own courts, but not in federal courts.[105] Indeed, not only could a state give such a limited consent, but the Supreme Court held as early as 1900 that it was appropriate to read state consent statutes narrowly and interpret them to permit suit against the state only in its own courts, even when that restriction was not clearly specified.[106] This rule has persisted.[107]

Moreover, and perhaps most strikingly, the Court held that, because a state's consent to suit was wholly voluntary, a state remained free to withdraw its consent, even after a suit against it had commenced in accordance with that consent. In *Beers v. Arkansas*,[108] the plaintiff sued Arkansas in its own courts, as state law permitted, for failure to pay on state bonds.[109] Subsequently, the state legislature enacted a new statute providing that, in any such suit, the court should order that the original bonds be filed with the court, and, if they were not so filed, the case should be dismissed.[110] The plaintiff, upon being

104. Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858).

105. *Reeves*, 178 U.S. at 441.

106. *Id.*

107. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

108. *Beers*, 61 U.S. (20 How.) at 527.

109. *Id.* at 528.

110. *Id.* Arkansas's requirement was just one of many schemes used by states to avoid paying bond debts throughout the nineteenth century. For example, Virginia, after defaulting on its bond obligations, managed to obtain new credit in 1871 by issuing bonds with a statutory promise that the bond coupons, if past maturity, could be used to pay any tax owed to the state. Then, in 1882, the state passed a new statute directing its tax collectors to refuse to accept the coupons in payment of taxes. Poindexter v. Greenhow (*Virginia Coupon Cases*), 114 U.S. 269, 273–74 (1885). Other states, including Mississippi and Florida, simply repudiated their debts. MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 144 (1970). The frustration of state bondholders following Pennsylvania's repudiation of its debts in 1843 was expressed in this acerbic letter to the *Morning Chronicle*:

ordered to file his bonds in accordance with the law, failed to do so, and his case was dismissed.[111] The plaintiff took the case to the Supreme Court on the claim that Arkansas's modification of its prior consent to be sued impaired the obligation of its contracts in violation of the Contracts Clause of the federal Constitution.[112]

The Supreme Court might have treated the case narrowly; it could have held that Arkansas had not withdrawn its consent to be sued but had merely regulated the procedures to be followed in a suit based on that consent. Instead, the Court announced a broad rule. It held that, inasmuch as a state's consent to suit is voluntary, the state "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."[113] The state's consent to be sued was not, the Court held, a contract subject to the Contracts Clause.[114]

The consent cases thus reflect a strongly pro-state rule. A state could consent to suit, or not, as it pleased; it could attach such conditions to its consent as it thought appropriate; and it could withdraw its consent even after a suit against it had commenced.

2. *Waiver Cases*. Simultaneously with these consent cases, however, the Supreme Court decided cases evincing a quite different tradition regarding *waiver* of a state's immunity from suit without consent. Unlike consent, such waiver did not have to occur expressly. It could arise by implication, and it could occur without regard to the intent of the state or its officials. Moreover, a state's waiver of sovereign immunity was irrevocable.[115]

> [I never meet a Pennsylvanian at a London dinner] without feeling a disposition to seize and divide him—to allot his beaver to one sufferer and his coat to another—to appropriate his pocket-handkerchief to the orphan, and to comfort the widow with his silver watch, Broadway rings, and the London Guide, which he always carries in his pockets. How such a man can set himself down at an English table without feeling that he owes two or three pounds to every man in company, I am at a loss to conceive.

HESKETH PEARSON, THE SMITH OF SMITHS: BEING THE LIFE, WIT AND HUMOUR OF SYDNEY SMITH 268 (1977).

111. *Beers*, 61 U.S. (20 How.) at 529.

112. *Id.*

113. *Id.*

114. *Id.* at 529–30.

115. *See infra* notes 132–33 and accompanying text.

The waiver cases began, as noted earlier, with *Clark v. Barnard*,[116] in which Rhode Island's claim to money in the possession of a federal district court was held to constitute a waiver of any objection to the court's power to determine that claim.[117] *Clark* was a somewhat unusual case in that the state appeared not solely in the character of a defendant, but also as a party that had made an affirmative claim to a fund that was in a federal court's possession.[118] The Court might therefore have chosen to write a narrow opinion in *Clark*, establishing nothing more than the principle that when a state affirmatively invokes the jurisdiction of a federal court, it necessarily consents to the court's determination of the claim that the state has brought to it. Such a rule has, indeed, persisted in the bankruptcy area, where a state's filing of a proof of claim acts as a waiver of any objection to the federal courts' ability to rule on that claim, even if the ruling goes against the state.[119]

Notably, however, the *Clark* opinion contained broad language regarding waiver that would support a more general rule. The Court said:

> The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .[120]

Notwithstanding the particular circumstances presented by *Clark*, this language—directed specifically at cases in which a state's interest was as a defendant—suggested that the Court believed that a state waives its immunity not only by affirmatively *invoking* the jurisdiction of a federal court, but also by merely *appearing* in federal court in a case in which it has been summoned as an ordinary defendant.

Subsequent cases confirmed the rule implied by *Clark*'s broad language. *Gunter v. Atlantic Coast Line Railroad Co.*[121] concerned a

---

116. 108 U.S. 436 (1883).
117. *Id.* at 447–48.
118. *Id.* at 447.
119. Gardner v. New Jersey, 329 U.S. 565, 573–75 (1947).
120. *Clark*, 108 U.S. at 447.
121. 200 U.S. 273 (1906).

tax exemption granted to a railroad by South Carolina.[122] After the railroad and its successors had enjoyed the exemption for thirteen years, the state passed a new tax law, pursuant to which the treasurers of two counties within the state started taxing the railroad's property.[123] The railroad sued the treasurers and claimed that the new law impaired the obligations of a contract between the state and the railroad company.[124] The treasurers were represented in this litigation by the state attorney general.[125] No issue of immunity was, apparently, raised in this litigation, which proceeded to the United States Supreme Court and was resolved in favor of the railroad.[126]

Another twenty-five years passed, after which the state attempted once again to tax the railroad.[127] In subsequent litigation, the Supreme Court decided that the state was effectively a party to, and was therefore bound by the judgment in, the first case.[128] Although noting that private parties may not sue a state without its consent, the Court observed that:

> Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.[129]

The *Gunter* case made several noteworthy points. First, the Court distinguished a state's *consent* to be sued from the subtly different concept of the state's *waiver* of its immunity from suit without consent. The Court had jealously guarded the states' right to limit the former,[130] but here it said that the latter may occur when a state simply "voluntarily becomes a party to a cause and submits its rights for judicial determination."[131] Moreover, the Court held such a waiver to be irrevocable: the state could not later invoke its immunity to "escape

---

122. *Id.* at 277.
123. *Id.*
124. *Id.* at 278.
125. *Id.*
126. Humphrey v. Pegues, 83 U.S. (16 Wall.) 244, 249 (1872).
127. *Gunter*, 200 U.S. at 279.
128. *Id.* at 289
129. *Id.* at 284 (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)).
130. *See supra* Part II.A.1.
131. *Gunter*, 200 U.S. at 284.

the result of its own voluntary act."[132] The Court determined that the state attorney general, by virtue of his authority to litigate on behalf of the state, could effectively bind the state and waive the state's immunity by failing to assert it in the initial litigation.[133] Finally, and most important, *Gunter* extended the rule of *Clark* to the situation in which the state was an ordinary defendant and not the party invoking federal jurisdiction; even in such a case, the state's voluntary appearance would constitute a waiver of its immunity. Thus, although *Gunter* was another slightly peculiar case (because immunity was waived in the first, separate suit), it applied a broad rule that states waive their immunity by simply failing to assert it.

Further developments confirmed the broad rule of waiver. *Porto Rico v. Ramos*[134] was a somewhat tangled case concerning title to real property. The plaintiff, Ramos, claiming to be the owner of certain real property, sued Eduardo Wood, who was holding the property as an estate administrator.[135] Because Wood was an alien, Ramos sued in federal district court.[136] Wood asserted that the property had escheated to Puerto Rico.[137]

Puerto Rico then appeared by its attorney general and sought time to determine whether it should be made a party defendant in the case.[138] The case was continued, after which Puerto Rico again appeared and claimed an interest in the action.[139] The district court ordered Puerto Rico to be made a party defendant, and Ramos amended his complaint accordingly.[140] Puerto Rico then, however, demurred to the complaint on the ground of sovereign immunity.[141] The demurrer was overruled, and Ramos won at trial.[142]

The Supreme Court affirmed.[143] Puerto Rico, it noted, was not the defendant in the beginning; it had voluntarily petitioned to be

---

132. *Id.*
133. *Id.* at 288.
134. 232 U.S. 627 (1914).
135. *Id.* at 628.
136. *Id.*
137. *Id.* at 628–29.
138. *Id.* at 629.
139. *Id.*
140. *Id.*
141. *Id.* at 630.
142. *Id.* at 630–31.
143. *Id.* at 633.

made a defendant.[144] The attorney general had taken time to consider this action, and had decided to intervene so as to be better able to look after Puerto Rico's interests in the litigation.[145] Having done so, Puerto Rico had consented to be a party to the case.[146] Moreover, its consent was irrevocable. The Court explained, "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."[147]

Like *Clark*, *Ramos* shows the willingness of the Supreme Court to hold sovereign defendants to the consequences of their own litigation decisions. Puerto Rico challenged the court's jurisdiction immediately upon being made a defendant; nonetheless, the Court held that it could not first ask to be made a defendant and then challenge the court's power over it. The case also evinces judicial concern for the interests of the private plaintiff. By observing that the sovereign cannot "come in and go out of court at its will, the other party having no right of resistance to either step," the Court suggests that, notwithstanding the sovereign character of the defendant, some regard must be given to the interests of the other party.

Although *Ramos* is yet another slightly unusual case in that the sovereign defendant itself sought to be made a party to the suit, the case represents an extension beyond *Clark*, because in *Ramos*, the sovereign intervened as a defendant, not as a claimant to a fund in the possession of the court. Moreover, *Ramos* continued the pattern of *Clark* and *Gunter* in that its language and reasoning were broad. The Court stated a strong pro-plaintiff rule that, without reference to the particular circumstances of the case, constricted the ability of sovereign defendants to assert sovereign immunity.

Moreover, once again, further developments showed the Court giving full effect to the broad language employed in the previous cases. The starkest example of this period's jurisprudence came in *Richardson v. Fajardo Sugar Co.*,[148] decided in 1916. In *Richardson*, the plaintiff, a corporation, sought a refund of an allegedly unlawful

144. *Id.* at 631.
145. *Id.*
146. *Id.* at 632.
147. *Id.*
148. 241 U.S. 44 (1916).

tax, which it had paid under protest to the treasurer of Puerto Rico.[149] The plaintiff sued the treasurer in federal court.[150] The treasurer answered the plaintiff's complaint, and some other steps were also taken: the parties fixed a day for trial by stipulation, and the plaintiff filed an amended and supplemental complaint, which the defendant answered.[151] Then, eight months after the action was first instituted, the defendant moved for dismissal on the ground of sovereign immunity.[152]

The Supreme Court briskly denied the defendant's assertion of immunity as untimely. Citing *Ramos* and *Gunter*, the Court simply said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction."[153] The Court did not appear to believe that the case required any lengthy discussion.

Richardson unequivocally evinces a strongly pro-plaintiff rule of waiver. The case is simple and straightforward. It shows that, unlike the rules regarding *consent* to suit, the traditional rule regarding *waivers* of sovereign immunity strongly favored plaintiffs.

The defendant in *Richardson* appeared in the ordinary character of a defendant; he was not the one invoking the federal court's jurisdiction. The defendant never expressly waived immunity or consented to suit. The waiver of immunity arose only implicitly, from the defendant's failure to assert immunity at the proper time. Moreover, the defendant did not wait very long before attempting to assert immunity. The assertion was made while the case was still in trial court and was, indeed, only a few months old and still in its pretrial stages. Notwithstanding all of these points, the Supreme Court held that the defendant had waited too long and that his implicit waiver of immunity from suit was binding.[154]

---

149. *Id.* at 46–47.

150. *Id.* at 44, 47.

151. *Id.* at 47.

152. *Id.*

153. *Id.* (citations omitted).

154. One detail remains: in *Richardson*, and in *Ramos* as well, the defendant was Puerto Rico, which is a United States territory, not a state. Several indications, however, show that the cases provide the rule that would have applied to state defendants in the same period. Most importantly, the Court's opinions in the two cases make no reference to the territorial status of Puerto Rico. The opinions appear to treat the cases as involving general rules of sovereign immunity that would apply equally to the case of a state defendant. Moreover, a year before *Ramos*, the Court had expressly stated that Puerto Rico "is of such nature as to come within the

Considered together, the Supreme Court's early cases on waiver of state sovereign immunity reflected a very different, and much more pro-plaintiff, rule than its cases regarding state consent to suit. Even where a state never consented to suit, it could be held to have waived its immunity from suit without consent. Such waivers could arise implicitly from a state's conduct, including its mere failure to assert its immunity at the proper time. A state could be bound by the actions of its litigation counsel. Finally, a state's waiver of its immunity, once made in litigation, was irrevocable. These principles persisted until 1945.[155]

B. Waiver Doctrine Constricted

The year 1945 witnessed a marked shift in the Supreme Court's approach to waiver issues, which occurred in the case of *Ford Motor Co. v. Department of Treasury of Indiana*.[156] *Ford Motor Co.* was in form quite similar to the *Richardson* case just discussed: it was an action brought in federal court to recover an allegedly illegal tax collected by state officials.[157] The defendants were the state's Department of the Treasury and three officials who together constituted the department's board.[158] The defendants, represented by the state's attorney general, defended the case on its merits throughout proceedings in the trial and appellate courts. They made no mention of the issue of sovereign immunity in either court.[159] When the case reached

---

general rule exempting a government sovereign in its attributes from being sued without its consent." Porto Rico v. Rosaly, 227 U.S. 270, 273 (1913). This statement suggests that the rules for suits against Puerto Rico would be the same as those for cases against state sovereigns. The Court cited this case in *Richardson*, 241 U.S. at 47, so it had not forgotten about it. Similarly, Puerto Rico is today treated as a state for Eleventh Amendment purposes. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141–42 n.1 (1993) (assuming this point *arguendo*); Ramirez v. P.R. Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983) (holding that the Eleventh Amendment applies to Puerto Rico in all aspects). Finally, in *Richardson*, the Court relied upon *Gunter*, a case involving a state defendant. 241 U.S. at 47; *see supra* notes 148–53 and accompanying text. The fair inference from all these indications is that the holdings of *Richardson* and *Ramos* would apply to state defendants.

155. *See* Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754, 760 (9th Cir. 1999) ("Before 1945, it was generally acknowledged that a state waives its Eleventh Amendment immunity by litigating a case on the merits without timely objecting to the federal court's assertion of jurisdiction."), *amended by* 201 F.3d 1186 (9th Cir. 2000); The Sao Vicente v. Transportes Maritimos do Estado, 281 F. 111, 115 (2d Cir. 1922) ("The underlying principle of Clark v. Barnard has been consistently followed."), *cert. dismissed*, 260 U.S. 151 (1922).

156. 323 U.S. 459 (1945).

157. *Id.* at 460–61.

158. *Id.* at 460.

159. *Id.* at 466–67.

the Supreme Court, however, the defendants, for the first time, asserted that sovereign immunity barred the plaintiff's suit.[160] Possibly the defendant's tardiness resulted from another shift in the Supreme Court's sovereign immunity doctrines: it was only a year earlier, in the case of *Great Northern Life Insurance Co. v. Read*,[161] that the Supreme Court had ruled that an action against state officials seeking a refund of wrongfully collected taxes constituted a suit against the state itself subject to the defense of sovereign immunity, rather than an action against officials subject to the rule of *Ex parte Young*.[162] Therefore, it might not have occurred to the defendants to assert immunity from suit until after the appellate proceedings were already concluded.[163] In any event, the defendants did not raise their immunity until the case reached the last possible court.

The Supreme Court made several important rulings in favor of the defendants. First, it reiterated its holding from *Read*, that the suit, although naming individual defendants, was effectively a suit against the state of Indiana and subject to the rules of state sovereign immunity.[164] Second, the Court, relying on its earlier decision in *Reeves*, held that the state had not consented to be sued in federal court, even though a state statute authorized a refund action against the state treasury department "in any court of competent jurisdiction."[165] The Court held that the statute evinced the state's consent only to suits in the state's own courts.[166]

Finally, the Supreme Court determined that the defendants' assertion of immunity "was in time."[167] The defendants added a new wrinkle to the issue of waivers of state sovereign immunity: the issue of state law authority. Defense counsel conceded that their failure to assert immunity from suit in the lower courts constituted a waiver of immunity, but only if they were authorized by state law to make such

160. *Id.* at 467.

161. 322 U.S. 47 (1944).

162. *Id.* at 53.

163. The *Read* decision did not come until one month after Indiana had already prevailed in the court of appeals on the merits of Ford's suit against it. *Id.* at 47; Ford Motor Co. v. Dep't of Treasury, 141 F.2d 24, 24, 26 (7th Cir. 1944).

164. *Ford Motor Co.*, 323 U.S. at 462–63.

165. *Id.* at 465–66 (quoting BURNS, IND. STAT. ANN. § 64-2602 (1943 Replacement)).

166. *Id.*

167. *Id.* at 467.

a waiver.[168] They claimed that under the relevant state law they were not competent to waive the state's sovereign immunity.[169]

The Supreme Court agreed. The Constitution of Indiana, the Court observed, provided that the state legislature might generally waive immunity for a class of cases, but expressly forbade it to waive immunity in a particular case or to pay damages to a particular claimant.[170] From this provision, the Court inferred that the legislature would not, except by clear language, confer discretion on state executive or administrative officials to waive immunity in a particular case.[171] Although the state attorney general was generally authorized to represent the state in litigation, the state supreme court had construed his powers strictly and had held that he did not have the broad authority of an attorney general at common law.[172] Accordingly, the Court held that the defendants could not have effected a waiver of the state's sovereign immunity.[173]

The Court's holding represented a considerable departure from the waiver cases discussed in Part II.A.2. In none of the previous cases had the Court demanded that, before a court could find that a state had waived its sovereign immunity from suit, the court first inquire into the authority of the state's attorneys to waive immunity as a matter of state law. To the contrary, in *Gunter*, the Court had held that the state attorney general's appearance had waived the state's sovereign immunity based simply on his general authority under state law to represent the state in litigation.[174] In *Ford Motor Co.*, the Court said that in *Gunter*, the state's submission to the court was authorized by state statute, not by the unauthorized consent of an official.[175] This argument, however, hardly seems like a persuasive distinction, inasmuch as the attorney general's authority in both cases was simply the authority to represent the state in litigation. In one case this was held to be sufficient to bind the state to a waiver of immunity; in the other,

168. *Id.*
169. *Id.*
170. *Id.* at 468.
171. *Id.*
172. *Id.* at 468–69.
173. *Id.* at 469–70.
174. Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 288 (1906).
175. *Ford Motor Co.*, 323 U.S. at 469–70.

it was not.[176] The Court also dismissed *Richardson* with the cryptic observation that in that case "without consideration of any limitations on his powers, we held that the attorney general of Puerto Rico could waive its sovereign immunity."[177] The Court's statement acknowledges that it had previously recognized a waiver of sovereign immunity based on the mere failure of counsel to assert the immunity seasonably.

Ford Motor Co. thus tightened waiver doctrine considerably. A state's counsel's inadvertent—or even, apparently, advertent—failure to raise immunity could not waive state sovereign immunity unless state law authorized the counsel to waive. Most state attorneys general have, of course, the power to represent the state in litigation, but few if any have express statutory authority to waive the state's sovereign immunity from suit.[178]

---

176. The Court also suggested that *Gunter* had turned on res judicata principles. *Id.* This suggestion at least had the merit of pointing to a real distinction between *Gunter* and *Ford Motor Co.*, although it was not consistent with the broad waiver language used in *Gunter*.

177. *Id.* at 469 n.14.

178. *See, e.g., id.* at 468:

> [None] of the general or specific powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.

See also Montgomery v. Maryland, 266 F.3d 334, 399 (4th Cir. 2001) ("'[T]he Attorney General of Maryland lacks the authority to waive Eleventh Amendment immunity on behalf of the state and its officials.'" (quoting *Booth v. Maryland*, 112 F.3d 139, 145 n.2 (4th Cir. 1997))), *vacated*, 122 S. Ct. 1958 (2002); Lapides v. Bd. of Regents of the Univ. Sys., 251 F.3d 1372, 1375 (11th Cir. 2001) (concluding that "the Attorney General of the State of Georgia lacks the statutory authority to waive the State's Eleventh Amendment immunity"), *rev'd on other grounds*, 535 U.S. 613, 624 (2002); Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 432 (8th Cir. 1997) ("The Tribe has failed to demonstrate that waiver of the State's Eleventh Amendment immunity is within the authority of Nebraska's attorney general."); Estate of Porter v. Illinois, 36 F.3d 684, 691 (7th Cir. 1994) ("As Illinois law now stands, the Attorney General is *not* authorized to waive Illinois' Eleventh Amendment immunity."); Dagnall v. Gegenheimer, 645 F.2d 2, 3 (5th Cir. 1981) ("Louisiana law does not clearly give attorneys for the State authority to waive its eleventh amendment immunity."); Taylor v. Perini, 503 F.2d 899, 905 (6th Cir. 1974) (Weick, J., concurring) ("The Attorney General of Ohio had no power or authority to waive sovereign immunity of either the State or its officers and agent . . . ."), *vacated*, 421 U.S. 982, 982–83 (1975); Mallon v. City of Long Beach, 1' Cal. Rptr. 15, 22 (Cal. Ct. App. 1961) ("At bar there was no evidence that any authority had been conferred on the attorney general to waive the state's right of immunity."); Dep't of Pub. Safety v. Great Southwest Warehouses, Inc., 352 S.W.2d 493, 495 (Tex. Civ. App. 1961) (noting that the Texas Attorney General is "without legal power or authority to waive the right of the State to immunity"). *But see* ALASKA STAT. § 44.23.020(c) (Michie 2002) (giving Alaska's Attorney General power, expiring January 1, 1999, to waive the state's Eleventh Amendment immunity in a very limited class of cases).

Moreover, the Court expanded the holding of *Ford Motor Co.* even further with its later decision in *Edelman v. Jordan*.[179] The case is known principally for its holding that the "officer suit fiction" of *Ex parte Young* is limited to cases in which the plaintiff seeks prospective, injunctive relief and cannot be applied to cases seeking retroactive monetary damages.[180] The case also, however, almost casually, effected a significant extension of *Ford Motor Co.*

Edelman was a class action challenge to the administration of the Aid to the Aged, Blind, or Disabled (AABD) program by Illinois.[181] Like many welfare programs, AABD was a combined federal-state program that was administered largely by state officials and partially funded by the federal government.[182] Plaintiffs sued the state officials administering the program in Illinois and asserted that the state's implementation of the program violated federal law in various respects.[183] The district court agreed with the plaintiffs. It ordered the defendants to administer the program properly in the future and to pay benefits it had wrongfully denied in the past.[184]

On appeal, the defendants, for the first time, asserted sovereign immunity from suit.[185] The Supreme Court held that the defendants could raise immunity on appeal for the first time.[186] Quoting *Ford Motor Co.*, the Court simply observed that "it has been well settled since the decision in *Ford Motor Co. v. Department of Treasury*, . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[187]

As the above discussion suggests, the Court's statement is not a fully accurate rendering of *Ford Motor Co.* It is true that, in *Ford Motor Co.*, the Court made the following broad statement: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this

179. 415 U.S. 651 (1974).
180. *Id.* at 664–71.
181. *Id.* at 653.
182. *Id.*
183. *Id.*
184. *Id.* at 656.
185. *Id.* at 657–58, 677.
186. *Id.* at 677–78.
187. *Id.*