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ABSTRACT

The history of the 11th amendment to the U.S. Constitution and its current application to schools and universities are examined in this paper. The amendment, which seeks to protect the states by redefining judicial boundaries within the federal concept of government, is unclear and paradoxical, especially to claimants seeking federal relief from a state cause of action. A historical overview is followed by a discussion of the amendment and educational issues, with a focus on the following: desegregation; school finance; special education; attorney's fees; schools and hospitals for the handicapped; copyright; and nonresident tuition. One conclusion is that the amendment may not have achieved its objectives to define federalism, maintain national supremacy, and afford protection for the states. Because the Supreme Court will probably maintain the 11th Amendment doctrine, modification can occur only by Congressional action. However, the uncertainty of judicial support may have a positive effect on local school governance by providing equitable and reasonable policies. (74 references) (LMI)

OUR BILL OF RIGHTS PLUS ONE: THE ELEVENTH AMENDMENT, ITS HISTORY AND CURRENT APPLICATION TO SCHOOLS AND UNIVERSITIES

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I. INTRODUCTION

Throughout the history of our nation, warring legal parties have settled disputes in both federal and state courts. Each of these court systems has used restraint to lessen jurisdictional interference with one another. Occasional difficulties arise because of overlapping geographic territory and the issues at law. Legal friction happens, at times, despite the clear language of the federal constitutional clauses[1] that outline the judicial powers of the U. S. Supreme Court and lesser federal tribunals. Following the passage of the Bill of Rights, the measures protecting our individual freedom, an eleventh amendment was ratified in 1795 to afford protection for the states. This protection was to be accomplished by redefining judicial boundaries within our federal concept of government. Although the Eleventh Amendment[2]--the subject of this study--appears to be literal and clear, many sense that it may not have achieved its objective. In fact, some say it may also be one of the least understood and most paradoxical elements of federal law, especially to claimants seeking federal relief from a state cause of action.

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1 "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain..." (U.S. Const. art. III, sec. 1), and "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made.....; to controversies to which the United States shall be a party; to controversies between two or more States, 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." (Id. art. III, sec. 2, cl. 1)

2 "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. (Id. amend. XI)

Since the Eleventh Amendment was proclaimed an addition to the Constitution in 1795, its application in federal courts for nearly two centuries has been sporadic and generally limited to issues of finance. It was drafted following the Revolutionary War to calm national anxieties over British and American Tory financial and property claims against economically-burdened state treasuries. Nearly one hundred years later the amendment surfaced with intensity during the period consumed by reconstructing the nation following the Civil War. A single Supreme Court decision in this era expanded the judicial concept of state immunity. This doctrine continues to be a source of protection for contemporary state officials facing charges in federal court. Critics of this interpretation urge lawmakers and jurists to overturn the ruling and return to the amendment's literal meaning. Many legal practicioners and scholars do not perceive the amendment as a means of maintaining the delicate balance between national supremacy and state sovereignty.

Until recently, the Eleventh Amendment represented a narrow area in the study of law. Schools preparing lawyers for service usually limit the topic to courses on federal jurisdiction. Graduate school law classes characteristically omit the Eleventh in the litany of amendments reaching into educational matters.[3] The amendment has evolved from a virtually undiscussed topic in education law to one of increasing concern. In less than a decade, eight United States Supreme Court decisions have turned on interpretations of the Eleventh Amendment, and there involved schools or universitites as either primary litigants or immediately affected such institutions. A computer search of Eleventh Amendment-related school and university cases produced fifty-five cases reviewed by the U. S. Circuit Courts of Appeal since 1960, with thirty-eight surfacing in the last ten years.

It appears as if the Eleventh Amendment is a subject that requires greater attention from the school law community. Addressing this need, this paper seeks to heighten interest in the amendment by reviewing the conditions that gave it birth and movement throughout the history of our nation. The study will highlight cases having an impact on contemporary scholastic and university operations.

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[3] Of the thirty school law course outlines collected for review at the 1989 NOLPE convention, none mentioned the Eleventh Amendment. Among ten educational law textbooks reviewed, only one contained a treatment of the amendment. The single text covering the subject was Valenti, William, Education Law (St. Paul: West), 1985. A new supplemental reader in school law, Vacca, Richard S., and H. C. Hudgins, Jr., The Legacy of the Burger Court and the Schools 1969-1986 (Topeka: NOLPE), 1991, limits the discussion of Eleventh Amendment immunity to a specific seventeen-year Supreme Court era.

II. HISTORICAL BACKGROUND

A. Evolving Concepts of Sovereignty

Early American concepts blending the perceived needs a central government and those of the collective colonies were colored by attitudes toward the British crown. Following the English Civil War of the 1640s and the Revolution of 1688, only the crown absolutists argued that legitimacy flowed directly from God rather than up from the People.[4] "The King can do no wrong" dictum was amended to limit the sovereign by not permitting the monarch to do wrong.[5] After the successful break from Britain's empire following the Revolutionary War, there was general agreement in this new country to ban titles and other trappings of royalty.[6] More problematic were the efforts in crafting an article of governance that would shield official acts yet give individuals the protection or relief they sought against civil wrongdoings. Sovereignty and federalism were issues at the heart of early east coast colonists. Debates among the colonials, just as those in Britain, focused on whether sovereignty resided with the government or the People.

Our constitutional framers enlarged the issue beyond the scope of power and authority to determine how federalism should operate within a fledgling nation. The delegates reflected on theoretically acceptable and practically workable concepts of limiting governmental powers. The Philadelphia delegates envisioned this separation of powers by dividing it vertically between governmental levels and horizontally within a single governmental tier. Each federal and state government entity would have incentives to win the sovereign favor of the People by monitoring and challenging the misdeeds of each other's agencies and officials.[7] Ceaseless arguments surrounding immunity and federation continued through the

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[4] Amar, Akhil Reed, "Of Sovereignty and Federalism," 96 Yale L.R. 1425-1520 (1987) at 1430-32. Professor Amar presented a comprehensive analysis of sovereignty, immunity, and federalism.

[5] Gibbons, John J., "The Eleventh Amendment and State Sovereign Immunity, A Reinterpretation," 83 Columbia L.R. 1998-2005 (1983) at 1895-97.

[6] "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State." (U.S. Const. art. 1 sec. 9, cl. 8)

[7] Amar at 1429-1439.

eighteenth and nineteenth centuries, culminating in the Civil War years. Unmistakably strengthened nationalism surfaced in the years following the War Between the States with the ratification of three Reconstruction Amendments,[8] passage of federal civil rights statutes,[9] and adoption of new congressional powers limiting the reach of state immunities.[10]

During the next seven decades of relative calm, cases challenging state action on non-Fourteenth Amendment topics were generally premised on state, not federal law. During this period the nation's high court systematically issued decisions interpreting the constitutional compact's concept of sovereignty. States were permitted to avoid suits in federal courts by citizens of another state[11] or foreign country[12] and yet be subject to suits by the central government[13] and sister states.[14] The federal government, however, remained immune from court action initiated by a state.[15]

In 1925, the U. S. Supreme Court plowed new ground through "incorporation," the extension of Fourteenth Amendment federal rights to cases formerly left to the states. The first application addressed a free speech issue, thus positioning the Bill of Rights to supersede state law.[16] Following this theme, the Court expanded the incorporation doctrine to cover state violations within the freedom of religion clause.[17] Soon thereafter, state action was curbed by the establishment clause.[18] It had become increasingly easier for the people to exercise sovereign rights by bringing federal suits against the states and their agents, a vision of the original separation of power theme. This evolved concept of sovereignty, with its limitations and challenges, continues to function within the nation's laws.

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8 U.S. Const. amens. XIII, XIV, and XV.

9 See Title 42 U.S. Code, sec. 1971 et seq., sec. 1981 et seq., for the five Civil Rights Acts signed into law between 1866 and 1875.

10 U.S. Const. amen. XIV, sec. 5.

11 Hans v. Louisiana, 134 U.S. 1 (1890).

12 Monaco v. Mississppi, 292 U.S. 313 (1934).

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

14 South Dakota v. North Carolina, 192 U.S. 286 (1904).

15 Kansas v. United States, 204 U.S. 331 (1907).

16 Gitlow v. New York, 268 U.S. 652 (1925). Cited in Brewster, Todd, "First & Foremost," LIFE (Bicentennial Issue on The Bill of Rights), Fall 1991, at 61. For further information, see Urofsky, Melvin I., A March of Liberty, A Constitutional History of the United States (New York: Alfred A. Knopf), 1988, at 642.

17 Cantwell v. Connecticut, 310 U.S. 296 (1940).

18 Everson v. Board of Education, 330 U.S. 1 (1947).

B. *Chisholm* Drafts an Amendment

In 1793, a full bench of five U. S. Supreme Court justices decided the most important case in their brief, three-year history. At issue was whether the new federal court possessed legal jurisdiction to hear the claim of a private citizen against a State.[19] In the case, South Carolinian Alexander Chisholm was seeking monetary settlement on behalf a decedent's estate for materials sold to the State of Georgia for use in the Revolutionary War. The court interpreted the constitutional clauses relating to obligation of contract[20] and federal judicial powers[21] to uphold the out-of-state citizen's claim against the state's treasury. Georgia authorities, unswervingly opposed to the forum, did not make an appearance in defence. Afterward, a defiant Georgia House of Representatives passed a resolution requiring that anyone attempting to make the state pay the debt be hanged without benefit of clergy.[22] Though the proposal died for lack of state senate support, *Chisholm* highlighted dedicated resistance to perceived federalist intrusions in areas of state sovereignty.

The lone, fearful dissent by Justice Iredell voiced concerns against the court's willingness to hear private suits against a state. He was alarmed at the potential for violating the sovereignty of a state and its rights by forcing a schedule of debt retirement. Iredell's prophesy in dissent[23] would reappear as support in fashioning an amendment to the Constitution and later affirming state immunities in federal court. The *Chisholm* decision stunned the Congress and sent intensely felt shock waves among states' rightists throughout the nation, all fearful that British creditors and American royalists deposed of properties could obtain fiscal relief from financially-troubled state treasuries. Federalist John Jay, the Supreme Court Chief Justice, had added to anxieties felt by state officials by calling for full restoration of properties confiscated in the Revolutionary War, a feature of the Paris (Peace) Treaty he authored while serving as

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[19] Chisholm v. Georgia, 2 U.S. 419 (1793). See Georgia v. Brailsford, 2 U.S. 415 (1793); 3 U.S. 1 (1794) for case commenced by the State of Georgia against a British subject with property in South Carolina. Some viewed this action as judicial contradiction to Georgia's position in *Chisholm*.

[20] U.S. Const. art 1, sec. 10, cl. 1.

[21] Id. art. III, sec. 2., cls. 1 and 2.

[22] Augusta (Ga.) Chronicle, Nov. 23, 1793. Cited in the recent and most comprehensive text on the topic, Orth, John V., The Judicial Power of the United States, the Eleventh Amendment in American History (New York: Oxford), 1987, at 17-18.

[23] Chisholm at 450.

Secretary of State. As a legislative countermeasure, an anonymous senator hurriedly drafted a proposed constitutional amendment. The measure received astonishing and rapid support. It passed both congressional houses in 1794, achieving ratification by the required twelfth state a year later. The Supreme Court upheld the legality of the new Eleventh Amendment in 1798.[24] In doing so, the court dismissed all suits still pending against states, including *Chisholm*.

C. Reconstruction and the Eleventh Amendment

The repudiation of state financial obligations, a continuing theme in Eleventh Amendment study, surfaced anew in the Southern States following the Civil War. Many in the region recalled successful opposition to earlier Federalists' plans to compensate Britain for the loss of war-related property and fiscal claims. Their successionist attempt and post-war resolve to preclude further erosion of state treasuries angered the northern political majority controlling Congress. Irate creditors with long memories, unpaid bills, and a tenacious willingness to sue clamored for justice. In some instances, federal supremacy and the sanctity of contractual obligations prevailed in satisfying financial lenders. Strategies for obtaining monetary compensation tested national lawmakers and the willingness of the Supreme Court to apply Eleventh Amendment remedies in forcing recalcitrant Southerners to honor their indebtedness.

Notwithstanding the Marshall Court's application of limits to the Eleventh Amendment by sweeping aside sovereign protection for errant state officials,[25] post-war claims against most states were largely unresolved. Left without full executive and congressional support, the Court waivered, often abdicating jurisdiction in state debt renouncement cases such as the antebellum railroad construction bond failures in North Carolina and Texas.[26] Louisiana emerged as one of the leading original Confederate States in repudiating financial burdens accumulated from the sale of conventional bonds during the war era.[27]

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[24] Hollingsworth v. Virginia, 3 U.S. 378 (1798).

[25] Osborn v. Bank of the United States, 22 U.S. 738 (1824).

[26] Swasey v. North Carolina Railroad, 90 L.Ed 405 (1875), and Forbes v. Memphis, El Paso, and Pacific Railroad, 9 F.Cas. 408 (C.C. W.D. Tex. 1872). Cited in Orth at 58-63.

[27] Louisiana v. Jumel, 107 U.S. 71 (1883), and New Hampshire v. Louisiana, 108 U.S. 76 (1883).

Virginia did not enjoy the widespread debt avoidance evidenced in other southern states because their bonds contained a novel coupon clause. To make the Old Dominion bonds more attractive to purchasers, a contract stipulation allowed the holder to redeem the coupon's value by satisfying their state property taxes. This incentive created a form of repayment. Virginia officials could not avoid settling with in-state claimants.[28] At the moment, the Eleventh Amendment did not deter intrastate litigants from attaining relief.

The "Old South," for the second time, was legally released from war-related endebtedness. The region, strengthened in its states' rights version of sovereignty and nationalism, was permitted to return to its agrarian cash crop economy, somewhat unaffected by poor credit ratings and inabilities to attract foreign venture capital for growth.[29] Meanwhile, the nation's high court was about lay aside the vexing and growing distinction in diversity jurisdiction between a state and its own citizens and the state's unwitting response to claimants from another state.

D. *Hans* Broadens a Constitutional Concept

Louisiana was particularly tenacious in protecting the state treasury from forced repayment of financial obligations. The state created a debt ordinance which prohibited suits in state court. Further, it had used the Eleventh Amendment to repel financial claims in federal court by a creditor from another state on the one hand and attained similar support in repelling a legal challenge from a "sister" sovereign on the other.[30] Then Justice Bradley, delivering the opinion of the Supreme Court, provided further judicial aid to the economically-burdened state by expanding the meaning of the Eleventh Amendment to bar suits from in-state citizens.[31] The authoritative statement reflected on the *Chisholm* decision and ratification of the Eleventh Amendment. *Hans*, basically an extension of Justice Iredell's reasoning,[32] enforced two objectives: (1) it removed the jurisdiction that most threatened the states, diverse citizen claims; and (2) preserved

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28 McGahey v. Virginia, 135 U.S. 662 (1890).

29 Orth, p. 9.

30 See Jumel and New Hampshire decisions previously cited. The neighborning State of Mississippi would later use the Eleventh Amendment in successfully voiding a creditor's claim from a foreign country in Monoco v. Mississippi, 292 U.S. 313 (1934).

31 Hans (1890).

32 Id. at 848.

federal jurisdiction questions considered to be essential in enforcing constitutional laws.[33]

To lessen misunderstandings, the Court thought it proper to add that the obligations of a state rest upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the state consents to be sued or comes itself into court. In closing, the decision sought to stay state legislative powers to judge what the honor and safety of the state may require, even at the expense of temporarily failing to discharge its public debts. To do other, Justice Bradley said, "...would be attended with greater evils than such failure can cause."[34] States exercising discretionary powers could then initiate a waiver when such acts would not violate their constitution or statutory enactments.

Adding immediate judicial consistency to the Court's affirmation of state sovereign immunity, *Hans* was cited in a North Carolina decision[35] announced the same day. Disallowed was a plaintiff's claim requiring a state auditor to raise sufficient tax to pay interest on state bonds. The appeal was envisioned as a suit by a citizen against his state, an act now shielded by the Eleventh Amendment.

E. Continuing Questions of Abrogation

The Eleventh Amendment was originally crafted under unique political circumstances. The Federalists were guiding the nation through stressful times. Immediate concerns were directed at maintaining peace with Great Britain and conscripting revenue from the states to settle war debts. Long-range political compromises reflected on the nature and location of sovereign powers. At the time, Federalists did not perceive the Amendment to create a doctrine of state sovereignty. But then, *Hans* broadened the amendment's meaning to the dismay of "texturalists," the nationalists and creditors who weighed the specific wording contained in the constitutional addition. The "originalists," officials of debtor states, in contrast, applauded the new interpretation as merely sustaining the framer's original intent.[36]

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[33] Marshall, Lawrence C., "Fighting Words of the Eleventh Amendment," 102 Harvard L.R. 1342-1371 (1989) at 1362.
[34] Hans at 849.
[35] North Carolina v. Temple, 143 U.S. 22 (1890).
[36] Marshall, L., at 1345.

The Supreme Court, to many, created legal fiction in the decision since its reach altered the literal meaning of the Eleventh Amendment. As to be expected, tensions between borrowers and lenders continued to press the judiciaries. With few exceptions, the high court has maintained the state immunity concepts advanced in *Hans* nearly a century ago. Aside from a state waiving its Eleventh Amendment protection,[37] states further enjoyed immunity from the actions of errant officials,[38] activities within their local political subdivisions,[39] and admiralty issues within their jurisdiction.[40] Although injunctive relief could include attorney fees,[41] retroactive or prospective relief against a state could not include monetary damages.[42]

Abrogating state immunities guaranteed by the Eleventh Amendment and enhanced by the doctrine of *Hans* centers on the very nature of Congressional action. State protection from federal court action has been overriden by the imposition of rights bestowed by the Fourteenth Amendment's fifth section,[43] the spending clause,[44] or the unambiguous purpose of a federally-funded program.[45] The Supreme Court has supported Congressional power to abrogate the state's Eleventh Amendment shield,[46] but such federal statutes must be precise and unmistakably clear.[47]

U. S. Supreme Court interpretation of the Eleventh Amendment in this century is reflective of our increasingly complex and changing economic interests. The federalism envisioned in earlier, more simple agarian days protected the integrity of both levels of government. However, increased industrialization and urbanization have caused us to distance ourselves from the fading picture of dual sovereignty. Through interpretations of an expanding number of Constitutional clauses and acts by Congress, the Court has helped the nation move away from the separation of powers doctrine of dual federalism. Untrammelled state sovereignty is now, more than ever, in conflict with the supremacy of national policy.

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37 Clark v. Barnard, 108 U.S. 436 (1883).
38 Ex Parte Young, 209 U.S. 123 (1908).
39 Lincoln County v. Luning, 133 U.S. 529 (1890).
40 Ex Parte New York, 256 U.S. 490 (1924).
41 Hutto v. Finney, 437 U.S. 678 (1978).
42 Edelman v. Jordan, 415 U.S. 651 (1974).
43 Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
44 Atascadero v. Scanlon, 473 U.S. 234 (1985).
45 Pardens v. Terminal Railway, 337 U.S. 184 (1964).
46 Pennsylvania v. Union Gas, 109 S.Ct. 2273 (1989).
47 Atascadero (1985).

Justice Scalia, speaking for the high court in two recent decisions, reflected on the controversial nature of the Eleventh Amendment. In a Commerce Clause abrogation case, Scalia questioned the values perpetuating the *Hans* doctrine of state immunities[48] and then, in an Alaska Native claim against the State, defended elements of state sovereignty by reaffirming the Louisiana decision and redefining the purposes of the amendment.[49] The Court has drawn praise and scorn by competing interests looking for judicial clarity and consistency in changing times. To some, reversing the inconsistent and fictive doctrines of the current judiciary would be a waste of time and energy.[50] Others would relocate state protections in the Tenth Amendment,[51] reaffirm judicial arenas by returning to the original intent of Article III,[52] or decry any need for additional constitutional theories on the topic.[53]

III. THE AMENDMENT AND EDUCATIONAL ISSUES

A. Desegregation

The Eleventh Amendment entered into deliberations of the U. S. Supreme Court in a recent scholastic desegregation case.[54] Officials in Kansas City, Missouri, had been ordered by the federal district court to levy a tax in excess of $200 million to support ambitious school district program improvements in connection with court-ordered racial desegregation. A federal district court and school board plan sought to make a magnet of the district as a whole.[55] Achieving this objective would make the school system's buildings and programs so attractive that they would draw back

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[48] Pennsylvania v. Union Gas, 109 S.Ct. 2273 (1989) at 2299. Cited in Brown, George D., "Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity," 68 North Caroline L.R. 867-891 (June 1990) at 867, fn. 1. For further coverage of *Union Gas* issues, see Blakeslee, Merritt R., "The Eleventh Amendment and States' Sovereign Immunity from HANS v. LOUISIANA and its Progeny After PENNSYLVANIA v. UNION GAS COMPANY," 24 Georgia L.R. 133-136 (Fall 1989).

[49] Blatchford v. Noatak, 501 U.S. _; 59 U.S.L.W. 4803-4808 (1991) at 4804.

[50] Jackson, Vickie, "The Supreme Court, the Eleventh Amendment, and State Soveeign Immunity," 98 Yale L.J. 1-80 (1988) at 52-53.

[51] Massey, Calvin R., "State Sovereignty and the Tenth and Eleventh Amendments," 56 Univ. Chicago L.R. 61-152 (1989) at 151-52.

[52] Schreve, Gene R., "Letting Go of the Eleventh Amendment," 64 Indiana L.J. 601-615 (1989) at 615.

[53] Marshall, L., at 1371.

[54] Missouri v. Jenkins, 109 L.Ed. 2d 31 (1990).

[55] Id. at 59-60.

white suburbanite families that had left the city. The lower court exercized what it called broad equitable powers and ordered the school tax raised, regardless of any state-law limits, to complete the project.[56] The petitioner State of Missouri argued that regulating levels of taxation was a legislative and executive function, not a subject open to judicial scrutiny. The state also reasoned that a federal court order requiring state taxation upset the delicate balance in federal and state comity, a violation of Constitutional Tenth and Eleventh Amendment principles.

On appeal, the Supreme Court unanimously affirmed the correctness of an Eighth Circuit Court requirement to mandate the school district levy at a level sufficient to fund the basic desegregation plan. However, a narrow 5-4 majority ruled that the lower federal court erred in supporting the imposition of a property tax exceeding a rate prohibited by a state revenue statute. They held that circuit court-mandated school district modifications were valid despite the Tenth Amendment's reservation of non-delegated power to the states. Federal courts were empowered by the Fourteenth Amendment to disestablish local government institutions that run afoul of the amendment's equal protection clause. In sum, the Supreme Court found that the federal judiciary had the authority to require the state to exercise its power to tax and that the court had powers to suspend tax limitation statutes if it violated the Fourteenth Amendment.[57]

B. School Finance

The Eleventh Amendment surfaced in a challenge brought against the State of Mississippi for the manner in which it distributed public school funds.[58] Specifically questioned was the level of funding provided for programs on "Sixteenth Section" school lands located in the twenty-three northern counties of the state. This territory had been ceded to the United States by the Chickasaw Indian Nation in the early nineteenth century. Congress reserved other lands in lieu of the Sixteenth Section school properties. These "lieu lands" were eventually placed under state control and then sold by the Mississippi legislature to fund railroads, soon destroyed in the Civil War. Thereafter, no funds were available for the twenty-three counties. Although the state lawmakers made special appropriations over the years to the school districts in the affected area, a significant disparity developed between financial expenditures per pupil in

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[56] Id. at 31.

[57] Id. at 58.

[58] Papasan v. Allain, 92 L.Ed. 2d 209 (1986).

the northern twenty-three counties and monies spent on students in the other counties of the state. As an example, the 1984 legislative appropriations varied from sixty-three cents per child in the Chickasaw Cession schools to $75.34 for pupils in other state schools.

On *certiorari*, the Supreme Court reviewed three questions. First, did the Eleventh Amendment bar a claim requiring state officials to provide appropriate trust income? Second, did the amendment void a claim that unequal distribution of school land funds violate equal protection under the Fourteenth Amendment? And third, was the manner in which Mississippi distributed the financial benefits from public school lands rationally related to legitimate state interest?

On the first question, the high court reasoned that trust claims against the state, regardless of legal characterization, were prohibited by the Eleventh Amendment. The court majority found no substantive difference between the liability of a past breach of trust and the continuing obligation to meet trust responsibilities asserted by petitioners.[59] Agreeing with the Fifth Circuit Court while addressing the second question, the Supreme Court affirmed that the Eleventh Amendment did not override an equal protection claim stemming from the unequal distribution of funds derived from state lands, an issue covered by the Fourteen Amendment. The court determined that the unequal distribution of these funds was precisely the type of continuing violation for which prospective injunctive relief might be fashioned, rather than see the action as a wrong for which remedy might involve bestowing an award for accrued monetary liability. The high court remanded the last question to the Fifth Circuit Court of Appeal for action by refashioning the inquiry. The Supreme Court asked, "Given that the state has title to assets granted to it by the Federal Government for the use of the state's schools, does the equal protection clause permit it to distribute the benefit of these assets unequally among the school district as it now does?"[60] Thus, the high court sidestepped the question of whether or not unequal distribution of funds was rationally related to a legitimate state purpose, the legal test which would normally apply. They directed the lower tribunal to reconsider the issue in terms of the Fourteenth Amendment equal protection clause.[61]

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[59] Id. at 219.

[60] Id. at 234.

[61] Id. at 235-35, n. 18.

C. Special Education

In 1989the federal judiciary was tested to determine if Congress had abrogated the Eleventh Amendment[62] when it passed the Education of the Handicapped Act (EHA).[63] After alleging that the school district had developed an inappropriate individualized education program (IEP) for the child, the plaintiff-parents unilaterally moved their child to a private program while the appeal process was underway. They sought tuition payments and attorneys' fees to compensate for their monetary burden related to the matter.

The district court concluded that the school district's original IEP was appropriate but that the Muth parents were entitled to reimbursement for tuition because of procedural flaws in the hearing process. The lower court also found that the EHA had abrogated state immunity protection afforded by the Eleventh Amendment, subjecting the school district and the Commonwealth of Pennsylvania to be jointly and separately liable for tuition reimbursement and attorney's fees. On appeal, the Third Circuit Court affirmed the district, holding that the text of the EHA and its legislative history left no doubt that Congress intended to abrogate state immunity.[64]

The United States Supreme Court, unable to agree on the textual provisions on which the Court of Appeals relied, reversed the lower court decision. Once again, the high court acknowledged that Congress has the right to abrogate Eleventh Amendment immunity when it is acting to exercise enforcement authority under Section 5 of the Fourteenth Amendment. Under this power, the court reasoned, Congress may void state protection from suit in federal court only when it has made its intentions unmistakably clear in the language of the statute.[65] The Supreme Court held that the statutory language of the EHA did not evince clear intention to abrogate the state's consitutionally secured immunity from suit in federal court. The Eleventh Amendment barred the respondent's attempt to collect private school tuition payments and attorney's fees from the Commonwealth.[66] It is important to note that a subunit or arm of the state,

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[62] Dellmuth v. Muth, 105 L.Ed. 2d 181 (1989).

[63] 20 U.S. Code Section 1200, et seq. This legislation was amended as P.L. 101-476 (January 1991).

[64] Muth v. Central Bucks School District, 839 F.2d 113 (3rd Cir. 1988).

[65] Atascadero at 242.

[66] Dellmuth at 191.

a school district in this case, was not shielded by the reach of state immunity and might be subject to costs related to EHA violations.

D. Attorney's Fees

Subsequent to 1989, prevailing plaintiffs sought recovery of attorney fees under the Civil Rights Attorney's Fee Awards Act of 1976.[67] Substantial litigation fees were created in the lengthy Missouri racial desegregation trial court and appellant activities mentioned above. In this case, the plaintiffs had been represented by co-counsels, attorney Arthur Benson and staff members from the National Association for Colored People's Legal Defense Fund (LDF). The attorneys had employed paralegal personnel in the litigation. The district court awarded Benson and his associates approximately $1.7 million; nearly $2.3 million were to be paid to the LDF. The total award of $4.0 million included costs of the attorneys' time while the litigation was pending. The Eighth Circuit Court of Appeal affirmed the lower court decision.[68]

On *certiorari*, the Supreme Court addressed two questions: (1) did the Eleventh Amendment prohibit enhancement of fee awards under Section 1988 to compensate for delay in payment? and (2) could separate compensation be awarded under the 1988 section for paralegal assistance provided by law clerks and recent law school graduates? The high court reaffirmed a prior ruling[69] that the payment of attorney's fees represents "prospective injunctive relief" rather that "retroactive monetary relief." As such, attorney's fees are not like ordinary retroactive relief, like damages or similar elements of restitution, but a reimbursement for a portion of the expenses incurred in seeking prospective relief.[70] The court ruled, therefore, that fee enhancement to compensate for delay in payment and compensation of paralegal personnel and law clerks at current market rates did not violate the Eleventh Amendment.[71]

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[67] See 42 U.S. Code Section 1988 for procedures related to attorney fee award. The case was Missouri v. Jenkins by Agyei, 109 S.Ct. 2463 (1989).

[68] Missouri v. Jenkins, 838 F.2d 260 (8th Cir. 1988).

[69] Hutto (1978).

[70] Jenkins by Agyei at 2467.

[71] Id. at 2472.

E. Schools and Hospitals for the Handicapped

A class action suit in Pennsylvania sought to close a state school and hospital for the mentally retarded because operating conditions were perceived to violate federal and state statutes. Services performed by the institute were to be redistributed to community-based centers for the mentally handicapped. The financial burden of pupil redistribution would have been substantial for the public school districts with students enrolled in the school. A federal district decision granting an injunction proposed by the plaintiff, was affirmed by the Third Circuit Court of Appeal.

The United States Supreme Court was then called upon to determine if the Eleventh Amendment prohibited the federal district court from awarding injunctive relief against state officials on the basis of state law.[72] Also at issue were questions of whether state officials could be forced to comply with state law in spite of deficient funds, whether Eleventh Amendment proscribe claims against the state in federal court under pendant jurisdiction, and whether county officials could be forced to provide relief even though state officials were shielded from federal court directives.

After reviewing Eleventh Amendment precedents, especially those relating to the exception for state officials who were acting beyond their authority,[73] the court ruled that the subject amendment prohibited the federal judiciary from requiring state officials to conform to state--as opposed to federal--law. As stated in the majority opinion, "... it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."[74] The amendment bars the federal courts from hearing claims brought by citizens against the state, even if they are brought under pendant jurisdiction.[75]

Finally, the high court considered whether a judgment could be maintained against county officials, even if the Eleventh Amendment protected state officials with immunity from federal judiciaries. The court dispensed with this line of reasoning quickly by acknowledging that any

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72 Pennhurst v. Helderman, 456 U.S. 89 (1984).
73 Ex Parte Young (1908).
74 Pennhurst at 106.
75 Id. at 120-21.

relief afforded by county officials would be partial and incomplete at best. In short, since the counties could not afford to provide a remedy without state financial assistance, the court could not sustain an order establishing a right.[76] In this case, the following Latin phrase seems appropriate, *ubi non jus, ibi remedium nullum* (where there is no right, there is no remedy).

F. Copyright

The U. S. Supreme Court denied *certiorari* in two recent copyright infringement cases in which a state agency was the reputed offender of the Copyright Act of 1976. Each case involved state universities. In California, the Ninth Circuit Court reviewed the questions of whether the Eleventh Amendment protected The University of California, Los Angeles, from federal court action for making numerous reproductions of computer programs protected by copyright.[77] The court examined three conditions under which a state may waive its immunity, namely when (1) the state expressly consents to court action, (2) a state statute or constitution provides for a waiver, or (3) the Congress clearly conditions participation on the state's waiver of immunity.[78]

Noting that a state at its discretion may expressly provide consent for suit in federal judiciaries, the circuit court ruled in this instance that the state's voluntary participation in the protection of copyrights--by recognising an obligation to pay royalties within the statute--indicated only implied consent. Further, the court confirmed that the California law waiving tort immunities did not affect its protection from involuntary federal court action. Finally, and in harmony with the *Atascadero* standard, the Ninth Circuit Court found no evidence that the statutory language of the Copyright Act reflected on unmistakable Congressional intentions to abrogate a state's Eleventh Amedment immunity. Holding the state university harmless by the circuit court was confirmed by the denial of *certiorari* by the Supreme Court.[79]

With a similar judicial resolve, the Fourth Circuit Court determined that Radford University was immune from suit in a federal venue.[80] Applying the congressional abrogation standards of *Atascadero*, the

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76 Id. at 124.
77 B. V. Engineering v. U. C. L. A., 858 F.2d 1394 (9th Cir. 1988).
78 Collins v. Alaska, 823 F.2d 329 (1987) at 331-32.
79 B. V. Engineering, cert. den., 109 S.Ct. 1557 (1989).
80 Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988).

appellate court affirmed the lower court ruling that the provisions of the Copyright Act did not include unequivocal language to set aside the immunities afforded states by the Eleventh Amendment. However, the court held that a school official could be held accountable as an individual and remanded that aspect of the case to the lower tribunal. Again, the Supreme Court apparently shared this judicial stance and denied *certiorari*[81] as it did in the B. V. Engineering litigation cited above.

The *B. V. Engineering* and *Anderson* decisions briefly opened a legal loophole in the copyright laws for state institutions.[82] Congress, sensing a clear directive to override the judicial protection afforded educators, reacted swiftly to petitions from publishers, producers, and other copyright owners by amending the Copyright Act of 1976.[83] The federal lawmakers appear to have abrogated Eleventh Amendment public university protection by redefining the statutory term "anyone" to include state employees in the same manner and to the same extent as any person acting in a nongovernmental entity.

G. Non-Resident Tuition

A trio of foreign students attending the state-operated University of Maryland sued the institution's president for in-state student status. A university policy had denied preferential in-state student classification and its accompanying tuition and fee benefits to the students whose parents possessed nonimmigrant alien visas. The pupils had "G-4" visas themselves. Pursuant to the will of Congress, such visas were issued under federal law to officers or employees, and their immediate family members, while living in this country and performing duties for certain international organizations. The foreign student-plaintiffs claimed that denial of in-state status by the university policy violated various federal laws and supremacy, due process and equal protection clauses of the U. S. Constitution. Eleventh Amendment protection was sought by university officials.[84]

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81 Anderson Photography, cert. den., 109 S.Ct. 1171 (1989)

82 Dratler, Jay, "To Copy or Not to Copy: The Educator's Dilemma," 19 J. of Law & Education 1-49 (1990).

83 P.L. 101-553 (November 15, 1990), The Copyright Remedy Clarification Act cited as 17 U.S. Code Section 101.

84 Toll v. Moreno, 458 U.S. 1 (1982).

The federal district court ruled that the suspect policy violated the equal protection clause and, alternatively, offended the supremacy clause by encroaching upon Congressional perogatives with respect to the regulation of immigration. This judicial rationale was upheld by the U. S. Court of Appeals for the Fourth Circuit.

The U. S. Supreme Court, on *certiorari*, brushed aside the acertion of Eleventh Amendment immunity and required the university to reimburse the students for tuition charges exceeding those paid by resident, in-state students. The high tribunal opined that the actions of the university violated the Constituition's supremacy clause and that under the circumstances it had no occasion to consider whether the policy subsequently violated due process and equal protection clauses.[85]

IV. EPILOGUE

As the first addition to the Federal Constitution following the adoption of the Bill of Rights, the Eleventh Amendment received astonishing and rapid endorsement by Congress and state legislatures. Originally rooted in a disputed renunciation of state debt following the Revolutionary War, the amendment has continually aided state governments in repelling claims by plaintiffs seeking federal authority to attain financial relief from suspect state action. Although the Eleventh Amendment appears literal and clear, many sense that it may not have achieved its objectives of defining federalism, maintaining national supremacy, and affording protection for the states. Many see the amendment as a fictional pawn, either defended by federal courts or abrogated by Congressional statutes.

It seems as though the Supreme Court's present membership may keep the one-hundred-year-old Eleventh Amendment doctrine in place. Justice Scalia, delivering the majority opinion for the Court in a recent decision, reaffirmed the doctrine of state immunity in federal judiciaries. He stated, "Despite the narrowness of its terms, since Hans v. Louisiana (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the State entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the

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[85] Id. at 9.

convention."[86] Addressing the issue of statutory abrogation, Scalia went on to say, "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statu '"[87]

With *Hans* in place, the issues of a state's sovereignty and its immunity in federal courts will be subject to modification only by Congressional action. If this perception is true, claimants should look to alternatives other than suing in federal court, unless a state willingly participates in the hearing or there is a clear Constitutional abrogation to explore.[88]

Within the last decade, an increasing number of Eleventh Amendment court contests have implicated public school and university programs. In the area of racial desegregation, school districts can be required to tax themselves to further the causes promoted by the Fourteenth Amendment. Attorney's fees can be assessed against school boards as one of the costs of litigation. Federal and state laws may require state and local school district special education officials to provide appropriate education for all handicapped students. By applying Eleventh Amendment immunities to the state government, local school authorities could be forced to bear the financial burden of litigation without state assistance. Although state universities were shielded from federal copyright statutes by a Supreme Court decision, Congress hastily redefined a 1976 law to include state institutions of higher education, thus effectively removing Eleventh Amendment protection. This protection was also denied a state university that found itself incurring some financial loss because of its failure to grant in-state tuition and academic fees to nonresident alien students, a class protected by federal immigration laws and the supremacy clause.

Not all of the Eleventh Amendment implications for school districts are negative. In general, the amendment continues to protect state treasuries. Had the plaintiff parents been successful in forcing the closure of Pennhurst, local school boards would have faced an additional monetary burden in providing community-based services for exceptional students

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[86] Blatchford at 4804.

[87] Id. at 4806, citing Dellmuth at 227-28.

[88] Boren, Donald R., "Suing a State in Federal Court Under a Private Cause of Action: An Eleventh Amendment Primer," 37 Cleveland St. L.R. 417-448 (1989) at 448.

warranting institutionalization. The elusive element of Eleventh Amendment immunity might prompt educational administrators to propose constitutionally-acceptable options in managing budgets and designing academic programs free of socioeconomic and racial distinctions. The uncertainties of judicial support may have a positive effect in local public school governance by causing policymakers to reflect on equity, fairness and reason in providing educational services for all students, especially when the state government may be excused from legal challenges in federal court.

Nota Bene

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