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In *her* Popular Government article “When You Can’t Sue the State: State Sovereign Immunity” (Summer 2000), Anita R. Brown-Graham described a series of recent decisions in which a sharply divided U.S. Supreme Court barred individuals from suing states for money damages for certain violations of federal law, such as laws prohibiting discrimination against employees because of their age. In the response that follows, William Van Alstyne argues that this barrier to relief is neither unduly imposing nor novel. The debate over the significance of these decisions is likely to continue. In February 2001, in another case decided by a five-to-four vote (Board of Trustees of University of Alabama v. Garrett), the Supreme Court again barred an individual’s suit for damages against a state entity, this time for a violation of the Americans with Disabilities Act.

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

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

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

Third, insofar as any of the federal statutes are grounded on the enforcement clause of the Thirteenth, Fourteenth, or Fifteenth Amendment, then even private actions against the state or state agency, seeking money damages (including punitive damages as well as attorney fees), may be brought in federal court, as provided by Congress.3

The Equal Pay Act of 1963 provides for money damages (actually, double liquidated damages plus attorney fees). As Professor Brown-Graham herself noticed, this act has been upheld in authorizing not merely effective injunctive relief but specified money damages as well. And so it is, equally, with any other act of Congress that can claim a valid basis in any of the enforcement clauses of these amendments.4

Fourth, insofar as some federal statutes are not based on any of the Civil War amendment enforcement clauses (and not all are), still, insofar as they may be tied to federal funds (as many assuredly are), the Supreme Court has held that Congress can make state or state agency acceptance of statutory provisions authorizing private actions for money damages to be brought against them in federal court an express condition of funding eligibility. Having thus accepted the bitter with the sweet (albeit under considerable real duress of otherwise being excluded from funding eligibility), the receiving state is bound by its waiver of immunity and liable to answer even to privately brought suits for money damages in federal court.5

Fifth, as acknowledged (but somewhat downplayed in the article), it also remains true that state officials may be sued personally in federal court, in privately brought actions seeking money damages from them, should they act in disregard of specific provisions in some federal acts. Why? Because neither state nor local officials acquire any personal immunity by force of the Eleventh Amendment.6

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

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

II

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

More than a century ago, the Supreme Court
noted that when the Constitution itself was
under discussion, in the founding period, “[a]ny . .
power as that of authorizing the federal judi-
ciary to entertain [money damages] suits by indi-
viduals against the States [without their consent],
had been expressly disclaimed . . . by the great
defenders of the Constitution.”7 And so the law
had been expressly disclaimed . . . by the great
individuals against the States [without their consent],
Council to provide redress through civil actions, including appro-
priate federal court actions for money dam-
ages (and not merely for injunctive relief), as
Congress might decide to do, is surely exactly
as one would logically suppose.

4. To be sure, as Professor Brown-Graham
correctly indicated, the Court requires that
Congress be forthright if it means to qualify a
state’s (or state agency’s) eligibility for some
category of federal aid by its willingness to
answer to private parties in damages in federal
court for failing to adhere to the terms of the
statute. But this is merely a requirement of
“plain statement” by Congress, nothing more.

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

6. More than a century ago, the Supreme
Court held that cities (“municipal corpora-
tions”) and counties (and frequently, school

Notes

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

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

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

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

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


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

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