Understanding the 11th Amendment and Sovereign Immunity

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Eleventh Amendment and Sovereign Immunity doctrine are kind of messy. Here’s the short version:

The idea of “sovereign immunity” is that a government may not be sued without its consent. The text of the Eleventh Amendment only strips federal courts of jurisdiction over suits against states by “foreigners” (i.e., suits from citizens of other states, or other countries). As a citizen of Iowa, if I brought suit against Illinois, I wouldn’t be entitled to bring it in federal court.¹

But the Supreme Court has nonetheless created a much broader sovereign immunity doctrine with no obvious textual foundation.

How did we get here?

The Eleventh Amendment was originally enacted in response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which allowed a South Carolian to sue Georgia for revolutionary war debts. As Article III of the constitution says that the judicial power extends “to controversies… between a state and citizens of another state,” it seemed the original text of the Constitution authorized these suits. Almost instantly (in constitutional time), the Eleventh Amendment was ratified.

Since then, there has been great dispute about the broader implications of the Eleventh Amendment. It has been read as expressing a rule of sovereign immunity from suit much broader than its plain terms would otherwise suggest.

According to this theory, the Eleventh Amendment merely captures a preexisting legal principle of sovereign immunity, according to which the Constitution, and in particular Article III, never divested the states of the immunity that they had in the first place.

One way to interpret the Eleventh Amendment on that theory is that Chisholm was a mistake, and that all the Eleventh Amendment did was clarify existing law. Like almost any view, this

¹Some, including on the liberal wing of the current Court, have argued that this merely bars diversity jurisdiction, not federal question jurisdiction as well. But the current doctrine, to the extent it’s clear, is that the Eleventh Amendment bars both federal question and subject matter jurisdiction. There are also issues about the extent to which the federal government has sovereign immunity, but this handout will only discuss the states.
has some support in the writings of the founders; in particular, Hamilton wrote in Federalist 81 a spirited defense of the idea that states remain immune from suit.

It also has a little bit of textual support. The leading words are “The Judicial power of the United States shall not be construed” (emphasis mine). The “shall not be construed” language might be read to suggest that the ratifiers were not changing existing law, but rather reversing an unfortunate misconstrual of existing law—and this is consistent with the idea that the Constitution before the enactment of the Amendment did not strip states of a sovereign immunity that they originally had.

While that kind of theory is highly controversial, it makes the best sense of the Supreme Court cases that have extended sovereign immunity:

- *Hans v. Louisiana*, 134 U.S. 1 (1890), holding that states also have sovereign immunity against suits by their own citizens in federal court.

**What’s The Actual Doctrine?**

There’s a lot of sovereign immunity doctrine, to which we’re not going to devote time in this course. However, for purposes of things like the bar exam, here are some rules:

1. States are immune to suits for damages without their own consent (however, they often do consent, e.g., by statute), by any person, in state or federal court.
2. They’re also immune to claims brought in federal administrative agencies.
3. They’re also immune to suits in equity (i.e., injunctive relief).
4. Congress cannot (with some exceptions relating to Congress’s power to enforce the Fourteenth Amendment, which we’ll discuss later in the course) authorize suits against states without their consent.
5. They are not immune from suits brought by other states (with the exception for when they’re just bringing private claims on behalf of their own citizens) or the federal government.
6. They are also not immune from some kinds of in rem suits, which are basically certain kinds of suits involving property, and which include some admiralty and bankruptcy claims.
7. The Eleventh Amendment does not strip the Supreme Court of jurisdiction to hear appeals from courts that do have jurisdiction over the original claims (i.e., if a state consents to be sued in state, but not federal court, about some matter, the Supreme Court may hear an appeal).
8. Sovereign immunity does not apply to suits against cities, counties, or other such political subdivisions of a state (except in some circumstances where relief would tap into the state treasury).
Practical Sovereign Immunity Lawyering

The doctrine of sovereign immunity is not as harsh as it seems for two reasons. First, as noted above, states often consent to suit (because, democracy). Most states have something like a tort claims act consenting to a broad array of suits, often with procedural requirements like prior notice to the state to give them an opportunity to settle.²

Second, and more importantly, the Court has interpreted the doctrine of sovereign immunity in a very formalist sense: only when the state is actually named, or its treasury is directly at risk, does sovereign immunity apply. This means that a plaintiff can often sue a state official for injunctive relief which effectively works against the state.

The key case there is *Ex parte Young*, 209 U.S. 123 (1908), which allowed injunctive relief in federal court against state attorney general to prohibit enforcement of an allegedly unconstitutional statute. There’s some weird theoretical shuck and jive underlying the opinion; I’m happy to talk further about it if you want.

But leaving the theory aside just this once, the practical implications of *Young* are as follows:

1. You can sue a state official for prospective injunctive relief, such as enjoining ongoing policies or practices of the state. These suits are permitted even when complying with the injunction would cost the state money.

2. You cannot sue a state official in their official capacity for damages that will be paid directly by the treasury.³

3. You can, however, sue a state official for damages that they are personally obligated to pay, even if the state has agreed to indemnify them.⁴

Jargon note: suing a state official for damages that they’re personally obliged to pay are called “individual capacity” suits. Suits against a state official for action that they must take on behalf of the state (like for the injunction) are called “official capacity” suits. Item (2) above is equivalent to saying that official capacity suits for damages are not permitted. When we label a suit an “individual capacity” or an “official capacity” suit, we don’t refer to the capacity in which the official was acting, but the capacity in which the individual was sued.⁵

Wrap-up

There are lots of other rules relating to sovereign immunity. I’ve given you enough to do things like get through the bar exam. But these are actually only the very basics. There are lots

²See e.g. Iowa Tort Claims Act, Iowa Code sec. 669 https://www.legis.iowa.gov/law/iowaCode/sections?codeChapter=669&year=2016 (consenting to personal injury and property damage tort suits in state court under various conditions)


⁴However, before doing so, you should make yourself aware of common-law immunities these officials sometimes have, as well as immunities that may be conferred by the statute giving you a cause of action.

more rules and exceptions to the above.

If you actually have ambitions to practice in this area, you must spend some focused time learning the rest. There are entire practice manuals devoted to suing the government.\textsuperscript{6}

\textsuperscript{6}There is a pretty good section of a legal aid practice manual on the subject here: http://www.federalpracticemanual.org/node/47