So You Thought You Understood State Sovereignty and Sovereign Immunity? Will the Pendulum of Sovereign Immunity Swing for or against Public Pension Plans?

Robert D. Klausner & Adam P. Levinson, Klausner Kaufman Jensen Levinson

This summer the National Conference on Public Employee Retirement Systems (NCPERS) submitted an amicus brief to the United States Supreme Court supporting a petition for *certiorari* in the case of *Fowler v. Guerin, Director of the Washington State Department of Retirement Systems*.[1] While the complex facts and contested interest calculations[2] in *Fowler* are beyond the scope of this article, the underlying issue of sovereign immunity raises important questions for state retirement systems under the Eleventh Amendment.

In *Fowler*, a federal district court judge refused to certify and dismissed a class action challenging interest rate calculations by the Washington Teachers' Retirement System. The Ninth Circuit reversed, holding that the teachers' claim for daily interest was a *per se* taking which was not foreclosed by Eleventh Amendment sovereign immunity. The Ninth circuit also determined that the class was properly certified on the basis that the teachers were only seeking prospective injunctive relief. In a scathing dissent on the denial for rehearing *en banc*, Judge Bennett warned that the panel made "fundamental errors of enormous scope."[3]

According to Judge Bennett:

> First, the panel has wrongfully stripped the State of Washington of its Eleventh Amendment immunity from suit by permitting a damages claim to proceed against the State under the guise of an injunction requiring the State to return to Plaintiffs "their" property. The property was never Plaintiffs', and, in any case, is simply money—uncredited interest that will now be paid to Plaintiffs from the State's treasury. That decision, which contravenes clear Supreme Court and Ninth Circuit precedent and creates a circuit split, strips the Eleventh Amendment of much of its vitality. It takes little in the way of imagination to foresee future plaintiffs recasting their otherwise-barred claims for money damages against a state as injunctive relief claims for return of what is supposedly their property.
>
> Having bypassed Washington's immunity from suit, the panel then created a Fifth Amendment property right no court has ever recognized. . . . The panel's decision is wholly untethered to the text of the Fifth Amendment and unsupported by any case. Many states and the United States currently have retirement systems with interest bearing accounts that, just like Washington's, do not accrue interest daily.

---

1 On the date of submission of this article, the petition for writ of *certiorari* was pending before the United States Supreme Court in the case of *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018), *rehearing en banc denied*, 918 F.3d 644.

2 Interest is credited at "such rate as the director may determine" but since 1977 has been credited at an annual rate of 5.5% compounded quarterly, based on the value of an account balance at the end of the prior quarter. 899 F.3d at 1114.

3 *Fowler v. Guerin*, 918 F.3d 644, 645 (9th Cir. 2018)(J. Bennett dissenting)

> If the panel is correct, these states and the United States are all currently violating the Fifth Amendment and have been for decades.

This article is intended to provide an overview of the development of 11th Amendment jurisprudence, which has evolved over the past two hundred and twenty-five years. While caselaw interpreting the Eleventh Amendment can be compared to a pendulum, it remains to be seen whether the latest swing will erode Eleventh Amendment defenses which have long served as a shield for state retirement systems in federal court.

Federalism, Chisholm and the History of the Eleventh Amendment for the first 100 Years

The Eleventh Amendment, chronologically speaking, was the first amendment adopted after the Bill of Rights. The elusive Eleventh Amendment provides in full:

> 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.

As recognized by Justice Kennedy, the concept of federalism was invented by the founders in 1787 in Philadelphia, when they "split the atom of sovereignty" between the new federal government and the previously independent and autonomous states. The resulting federal system contains multiple layers of sovereignty, where the ultimate sovereign is the people. According to Justice Kennedy:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995)(Kennedy, J., concurring)

While the terms federalism and sovereign immunity are not explicitly mentioned in the constitution, they are universally understood to be derived "from the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999).

Nevertheless, despite its undisputed importance, the evolving doctrine of state sovereign immunity initially arose in an unusual and unexpected manner. Not long after the constitution was ratified, the Supreme Court initially held that sovereign immunity did not bar a private suit for damages asserted against a state by a citizen of another state.[4] The controversial decision in

[4] *Chisholm v. Georgia*, 2 U.S. 419 (1793)

Chisholm v. Georgia provoked an immediate backlash precipitating the adoption of the Eleventh Amendment, which was ratified in only two years.[5]

As state retirement systems understand, where sovereign immunity applies it provides a powerful defensive shield empowering both states and state agencies to bar otherwise meritorious claims in federal court. This result is justified in part on the basis that state sovereign immunity is the corollary of federalism. Were the states subject to suit without limit, state autonomy would be substantially undermined and state treasuries might quickly bleed out.[6]

The Continuing Evolution of the Eleventh Amendment

After the Eleventh Amendment was ratified in 1795, the simple text served its purpose of preventing a citizen of one state from suing another state in federal court. However, nearly a century later, in *Hans v. Louisiana*[7] the Supreme Court clarified that that the Eleventh Amendment should *not* be limited to its precise terms. According to *Hans*, the Eleventh Amendment prevented a citizen from suing their own state in federal court. The *Hans* court explained that due to the repudiation of *Chisholm*, the Eleventh Amendment restored the Founders' original understanding of the Constitution that a state cannot be sued without its consent, regardless of the citizenship of the plaintiff. In other words, ever since *Hans*, the Supreme Court has interpreted the Eleventh Amendment atextually, following "the plan of the convention,"[8] rather than the precise text of the Eleventh Amendment.

Nevertheless, following *Hans*, the Supreme Court has crafted a number of important exceptions to state sovereign immunity. First, states may waive their sovereign immunity by consenting to suit.[9] Secondly, the Eleventh Amendment does not bar suits against local government, including municipalities and other political subdivisions.[10] By contrast, sovereign immunity does apply if the suit would result in a money judgment to be paid directly out of the

---

5 As pointed out by NCPERS in its amicus brief, the first proposal to create the 11th Amendment was introduced in the House on the next day following the *Chisholm* decision. Interestingly, support for the 11th Amendment united both federalists and their democratic-republican opponents.

6 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 2.10.2, at 194–95, § 2.10.4.1, at 208 (4th ed. 2011).

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

8 Alexander Hamilton, FEDERALIST NO. 81

9 Such waiver must be unequivocal and is applied narrowly. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673, (1974); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 675–76 (1999)(indicating that state consent is "construed narrowly and exists only where the State 'makes a "clear declaration" that it intends to submit itself' to a court's jurisdiction."). To constitute a waiver of Eleventh Amendment immunity in federal court, the state statute "must specify the State's intention to subject itself to suit in *federal court*." *See e.g., Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990)(emphasis in original).

10 *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

state treasury.[11] Moreover, in another exception to the exception, state sovereign immunity does not bar suits against state officers for prospective injunctive relief.

In *Ex parte Young*, 209 U.S. 123 (1908) the best known example of this doctrinal caveat, the Supreme Court established that the Eleventh Amendment permits suits against state officers to enjoin violations of federal law, even where the remedy would enjoin official state policy. Any other conclusion, would fundamentally weaken core constitutional rights, otherwise protected by the Bill of Rights.

Under the *Ex parte Young* doctrine, for most of the latter half of the twentieth century, the Supreme Court held that Congress could forcibly override state sovereign immunity. For example, in *Fitzpatrick v. Bitzer,*[12] the Court held that Congress could enforce the "substantive guarantees of the Fourteenth Amendment" by piercing the "shield of sovereign immunity afforded the State by the Eleventh Amendment."

The *Fitzpatrick* Court reasoned that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Thus, "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[13]

Slightly over a decade later, in *Pennsylvania v. Union Gas Co*.,[14] the Court expanded Congressional power to defeat state sovereign immunity to its limit. As interpreted by Justice Brennan, federal environmental laws and Superfund Amendments evinced an intent to hold states liable in federal court for money damages, which could be enforced by Congress using its powers under the Commerce Clause.

This interpretation, however, was short lived. In the 1990s the Rehnquist Court led what some have described as a federalism revolution, emphasizing federalism and states' rights. During this period, the Court repudiated earlier holdings and supported more robust state sovereign immunity protections. Thus, beginning with *Seminole Tribe of Florida v. Florida*,[15] the pendulum of federalism and sovereign immunity swung back in favor of the states. In *Seminole Tribe* the Supreme Court overruled *Union Gas* and held that Article I and the Commerce Clause cannot be used to circumvent state sovereign immunity. In so holding, *Seminole Tribe* extended *Hans*. The court had come full circle.

---

11 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984).

12 *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

13 *Fitzpatrick*, 427 U.S. at 456.

14 491 U.S. 1 (1989).

15 517 U.S. 44 (1996).

In *Alden v. Maine* sovereign immunity protections continued to expand.[16] Completely untethered to the text of the Eleventh Amendment, *Alden* held that state sovereign immunity extends not only to suit against a state in federal court, but also to state court, even when enforcing a federal law. According to the *Alden* court, state sovereign immunity was not limited to either the Eleventh Amendment or Article III. Rather, state sovereign immunity was derived from "from the structure and history of the Constitution" and exists today "by constitutional design." *Alden*, 527 U.S. at 734.

As described by Justice Kennedy's 5–4 majority opinion in *Alden*, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."[17] In other words, sovereign immunity is now *forum independent*. Indeed, the very phrase "Eleventh Amendment immunity," according to *Alden*, was merely "convenient shorthand but something of a misnomer," because state sovereign immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment."[18] Or, as more recently explained by Justice Thomas, "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."[19]

Is the 11th Amendment Pendulum in the Process of Swinging against State Retirement Plans?

In its recent amicus brief, NCPERS argued that the Eleventh Amendment immunity issue presented in the *Fowler* case merited review in the Supreme Court. The Ninth Circuit's decision strikes at the heart of core state interests protected by principles of federalism and the Eleventh Amendment. The Ninth Circuit decision in *Fowler* creates a conflict with other federal Circuits and threatens the autonomy of state pension plans. The *Fowler* case also risks unleashing a wave of new litigation against state retirement systems, contrary to longstanding precedent.

"[I]t 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." *Pennhurst State School & Hosp. v. Halderman*.[20] According to Justice Powell, "[s]uch a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id*. Notwithstanding Justice Powell's admonition in *Pennhurst*, the Ninth Circuit's decision below strikes at the heart of Eleventh Amendment and longstanding principles of federalism that date back over 200 years.

Importantly, Congress has unambiguously and repeatedly decided not to micromanage the operation of governmental pension plans. When the Employee Retirement Income Security Act of 1974 (ERISA) was adopted, Congress excluded coverage of state and

16 527 U.S. 706 (1999).

17 *Alden*, 527 U.S. at 713.

18 *Id*.

19 *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 753 (2002).

20 465 U.S. 89, 106 (1984).

local retirement systems based on strong federalism concerns.[21] One is left to wonder, where Congress has specifically exempted governmental plans from ERISA, why the Ninth Circuit has seen fit to intercede in an area that this Court has decided is shielded by Eleventh Amendment immunities.

By way of example, the Court has held that the ADEA, ADA and FLSA do not abrogate a state's Eleventh Amendment immunity. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of Univ of Ala. v. Garrett*, 531 U.S. 356, 360 (2001)(holding that Title I of the ADA does not abrogate states' 11th Amendment immunity); *Alden v. Maine,* 527 U.S. 706 (1999)(holding that FLSA does not abrogate 11th Amendment immunity). By contrast, the Eleventh Amendment is not implicated where suit is brought by the federal government, or the EEOC, as was the case in *Kentucky Retirement Systems v. E.E.O.C.*, 554 U.S. 135 (2008).

It remains to be seen whether the Ninth Circuit's decision will grow legs as it threatens to upend not only long established Eleventh Amendment precedent, but also clear Congressional intent not to regulate governmental pension plans established and maintained by the states.

It is anticipated that the United States Supreme Court will decide in October of 2019 whether or not to grant cert in the *Fowler* case. Even if the Supreme Court declines to hear the case, one thing is almost certain: Eleventh Amendment issues will continue to litigated as other federal circuits work through the questions presented in the *Fowler* case.

---

[21] 29 U.S.C. §§1002(32), 1003(b).