Representing Formerly Incarcerated Women with Children
At least since the passage of the Social Security Act in 1935, the federal government has become a major source of programs and funding to assist low-income individuals and other persons with needs that they cannot meet without public intervention. Congress enacted cash assistance programs, medical care, food stamps, education, housing, and numerous other programs and in many instances implemented these programs through grants to the states, which were responsible for their administration in compliance with federal law.

In 1968 the U.S. Supreme Court issued its landmark decision in a suit brought under 42 U.S.C. § 1983, King v. Smith. The Court ordered state officials to operate federally funded programs in accordance with federal law. A state regulation under the Aid to Families with Dependent Children program, according to the Court, was invalid because it conflicted with the federal law. Since then there have been thousands of federal cases against states to enforce federal requirements in federally funded programs.

Congress also has enacted a series of laws prohibiting discrimination based on race, ethnicity, religion, gender, disability, and age. Either most of these laws have an express provision allowing suit against states or courts have interpreted these laws to allow such suits. Federal labor laws protecting employees have been applicable to states.

As a result, the ability to enforce federal rights against states has been a key element in the protection of low-income persons and populations that have traditionally been the target of discriminatory practices. A series of decisions by the U.S. Supreme Court’s five-member conservative majority, acting under the mantle of sovereign immunity, is now undermining that protection.

I. Primer on the Eleventh Amendment

The Eleventh Amendment to the U.S. Constitution bars suits in federal court against states by citizens of other countries and other states. In 1890 the Supreme Court held that the Eleventh Amendment also applied to suits by citizens of the defendant state. As a result:

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2 See also Maine v. Thiboutot, 448 U.S. 1 (1980).
5 Hans v. Louisiana, 134 U.S. 1 (1890).

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Private parties may not sue a state or state agency by name in federal court unless Congress has validly abrogated state Eleventh Amendment immunity or the state has consented to be sued. What is a state agency is dependent on a number of factors applicable on the basis of state law. What may appear to be local governmental entities (California's local school districts) courts may hold as state agencies. Under the process that *Ex parte Young* authorized, private parties may sue state officials in their official capacity to enforce federal laws and regulations, but only prospective relief is available, that is, injunctive or declaratory relief. No damages are recoverable if damages are unrecoverable against the state itself. State officials are suable for damages in their individual capacity for federal constitutional or statutory right violations that they commit in the course of official duties but are entitled to qualified immunity. Insofar as the official's conduct “did not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” qualified immunity bars recovery. States and state officials in their official capacity are not suable in federal courts on claims arising out of state law, regardless of the relief sought. Courts usually dismiss such claims even though the Eleventh Amendment does not bar other federal claims. Federal courts have supplemental jurisdiction to hear state law claims against state officials sued in their individual capacity if there are federal claims arising from the same subject matter which give the federal court jurisdiction.

### II. Abrogation of State Sovereign Immunity by Congress

Congress has a degree of power to abrogate state sovereign immunity and has done so on numerous occasions. If the abrogation is constitutionally valid, states are suable in their own name for violations of the statutes to which the abrogation applies, and plaintiffs may recover damages against the state if the underlying statute provides a damage remedy. However, since 1996, two circumstances have sharply limited abrogation-of-immunity cases against states and the recovery of damages against states for violations of federal law.

Before 1996, Congress was thought to have the power to abrogate immunity in the course of legislating under any of its broad powers under Article I of the U.S. Constitution, including the commerce clause, copyright powers, and bankruptcy. But in *Seminole Tribe of Florida v. Florida*, the Supreme Court declared that Congress' power to abrogate Eleventh Amendment immunity of states to suits in federal courts is limited to cases arising under the legislative enabling clause of

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8 The Fourth Circuit held in Lizi v. Alexander, 2001WL 694506 (4th Cir. June 20, 2001) (Clearinghouse No. 53,881), that individual capacity suits against state officials arising out of official acts might be limited to suits under 42 U.S.C. § 1983, see *Hafer v. Melo*, 502 U.S. 21 (1991), and not to liability arising under other federal statutes, even though the statute specifically makes the state official liable. The court says that such suits are in fact against the state, without specifying the reason. Presumably the court expects the state to indemnify the official for any liability. The Second Circuit held that the fact that the amount of damages sought far exceeded the ability to pay of the defendant sued in an individual capacity did not transform the suit into one against the state, even where the state voluntarily chose to reimburse the official. *Huang v. Johnson*, 251. F.3d 65 (2d Cir. 2001) (Clearinghouse No. 53,800).
the Fourteenth Amendment. The Court held that Congress had no power to abrogate immunity under the Indian commerce clause involved in Seminole and added that Congress lacked the power under any other Article I provision. Moreover, Congress must clearly express its intention to abrogate state immunity.

In the same time period, beginning with City of Boerne v. Flowers, the Court narrowed the legislative authority of Congress under the Fourteenth Amendment and thus also limited the authority of Congress to abrogate state immunity. It then held that Congress lacked Fourteenth Amendment authority to enact the Age Discrimination in Employment Act. The next year it held that Congress exceeded its legislative powers under the Fourteenth Amendment in providing for damages against state governments for violation of the employment provisions of Title I of the Americans with Disabilities Act.

The immediate effect of these decisions is that if there is no Fourteenth Amendment legislative authority or other valid basis for abrogation or waiver of immunity, a suit may not be brought in federal court against a state or state agency named as defendant, and retroactive monetary relief against state officials sued in their official capacity is barred.

Although enforcement of federal rights against states has been limited, there remain a number of ways in which private litigation can succeed in enforcing federal rights against state governments.

III. Waiver of Immunity Under Congressional Spending Power

College Savings Bank v. Florida Postsecondary Education Expense Board reaffirmed that Congress, in exercising its spending powers, might condition its grant of funds to the states upon their taking certain actions that Congress could not require them to take and that acceptance of the funds might entail an agreement to the actions. Consent to suit in the federal court is one such condition that Congress may impose. But the mere receipt of federal funds cannot establish that a state has consented to suit in federal court. There must be a clear warning to the states of the consequences of accepting the money.

A number of cases have found a waiver even though the statutory language supporting a waiver is not phrased expressly in terms of waiver or abrogation of immunity. In Illinois Bell Telephone Co. v. WorldCom Technologies Inc., the state agency voluntarily undertook to act as part of a federal regulatory scheme.

References:

11 Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (Clearinghouse No. 51112). As discussed below, abrogation is also recognized under the spending clause power of Congress. Strictly speaking, abrogation of immunity under the spending clause power is more nearly correctly denoted as waiver or constructive waiver of immunity. If Congress makes clear that if a state accepts federal funds it is subject to suit in federal or state courts, the state “waives” its immunity by accepting the funds.


13 Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (Clearinghouse No. 52744); in a case decided after Garrett, a district court held that the Americans with Disabilities Act's Title II, which bars discrimination by state and local governmental agencies, was a valid enactment under the Fourteenth Amendment; Project Life v. Glendening, 139 F. Supp. 2d 703 (D. Md. 2001).


15 Seminole, 517 U.S. at 58–59.


17 Illinois Bell Telephone Co. v. WorldCom Technologies Inc., 179 F.3d 566 (7th Cir. 1999), cert. granted sub nom. Mathias v. WorldCom Technologies Inc, 121 S. Ct. 1224 (2001); see also Innes v. Kan. State Univ., 184 F.3d 1275 (10th Cir. 1999), holding that participation of a state university in a federal student loan program which required the university to participate in bankruptcy proceedings constituted a waiver of immunity for those proceedings.
The applicable statute provided for federal court review of the decisions of the state agency, but did not expressly provide that the state agency could be made a party to the proceeding. The Seventh Circuit held that the agency had consented to being a party by acting as a regulator, but the Fourth Circuit disagreed. The Supreme Court will hear both cases in its October 2001 Term.

Congress has expressly abrogated state immunity for claims arising under four important federal laws enacted under the spending clause. 42 U.S.C. § 2000d-7 abrogates state immunity for suits under Title VI of the Civil Rights Act of 1962 (discrimination based on race, religion, and ethnicity), the Age Discrimination Act, Title IX of the Education Amendments of 1972 (gender discrimination in education), and Section 504 of the Rehabilitation Act of 1974 (discrimination based on disability). Other federal statutes contain abrogation provisions, so each statute should be examined to determine whether it contains language which can be construed to impose a consent to suit against the state as a condition of accepting federal money.

Laws that are enacted under the spending clause and that expressly waive state immunity have a wide applicability to state governments. Although the four laws that section 2000d-7 cover by abrogation apply only to programs that are recipients of federal funds, these laws should cover almost all state agencies receiving federal funds. Under proposed regulations (which state that they merely reflect existing law), "program" is given a fairly broad definition, so the antidiscrimination provisions of section 2000d-7 would cover all activities of a state agency receiving any federal funds. The preamble to the proposed regulations offers by way of example that if a state health agency receives any federal funding, all of its operations are subject to the antidiscrimination requirements. The Bush administration could change these proposed regulations.

Cases upholding waivers under the spending clause apply to Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, and the Individuals with Disabilities Education Act.

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20 Id. at 64195.
21 On Section 504 of the Rehabilitation Act, at least five circuit courts of appeal held that the mandated waiver of Eleventh Amendment immunity by accepting federal funds in 42 U.S.C. § 2000d-7 was constitutional; see Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000), and cases cited therein. However, in Pugliese v. Ariz. Dep’t of Health & Human Servs., 2001 WL 694524 (D. Ariz. June 15, 2001), a district court in the Ninth Circuit held that the waiver of immunity in § 2000d-7 by states accepting federal funds violated the Eleventh Amendment, notwithstanding a Ninth Circuit decision authorizing the waiver. See Clark v. California, 123 F. 3d 1267 (9th Cir. 1997), cert. denied sub nom. Wilson v. Armstrong, 524 U.S. 937 (1998). The court in Pugliese held that the Clark decision must be reconsidered because it preceded the U.S. Supreme Court’s decision in College Savings, under which a state waived immunity only if it made a clear declaration that it consented to be sued. The acceptance of funds under the Rehabilitation Act is not such a clear declaration. Quoting Justice Scalia in College Savings, the court states that there is a fundamental difference between a state’s expressing unequivocally its intention to waive immunity and Congress’ expression of its intention that if a state accepts funding it waives immunity. Bd. of Trustees, 121 S. Ct. at 955. On Title IX of the Education Amendments of 1972, see Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), cert. denied, 120 S. Ct. 1220 (2000) (Clearinghouse No. 52,564). On Title VI of the Civil Rights Act of 1964, see Sandoval v. Hagan, 197 F. 3d 484 (11th Cir. 1999), reh’g denied, 211 F.3d 133 (11th Cir. 2000), rev’d on other grounds sub nom. Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (Clearinghouse No. 51,706). On the Individuals with Disabilities Education Act, see Bradley v. Ark. Dep’t of Educ., 189 F. 3d 745 (8th Cir. 1999), rev’d on other grounds sub nom. Jim C. v. United States, 235 F. 3d 1079 (8th Cir. 2000), cert. denied, 150 L. Ed. 2d 750 (2001) (Clearinghouse No. 52,595).
If the state waives sovereign immunity under statutes enacted as part of the spending power, a private plaintiff may sue the state as a named defendant and recover damages to the extent that the underlying statute allows them, as well as obtain injunctive and other relief.

The power of Congress to abrogate immunity under the spending clause has one further limitation. If the financial or other inducement offered by Congress is so coercive as to pass the point at which pressure turns into compulsion, the abrogation of immunity exceeds congressional power.22 In Jim C. v. United States the potential loss of federal funds came to $250 million, 12 percent of the state’s annual education budget.23 The court described replacing these funds as “politically painful, but we cannot say that it compels Arkansas’s choice.” This decision is very significant because, with the exception of the Medicaid program, few, if any, federal grant programs are likely to exceed the amount of aid to education.

IV. Waiver of Immunity by Litigation

In certain circumstances, if a state defendant appeared and litigated without raising a sovereign immunity defense, some federal circuits held the state to have waived the defense. Where the state agency litigated the case, including discovery, and did not raise the issue of sovereign immunity until the day of trial, the Ninth Circuit held that the state agency waived any claim to immunity.24 Other courts would allow a state to raise a sovereign immunity claim at almost any stage of the case.25 In a case which the Supreme Court decided on other grounds, the Court stated in a footnote that “the Eleventh Amendment is jurisdictional in the sense that it is a limitation of the federal court’s judicial power, and therefore can be raised at any state of the proceedings. . . .”26 Commenting on this statement, the Fifth Circuit observed that a state might waive immunity other than by an express renunciation and noted that [c]ourts have found waiver in two general varieties of cases: where the state asserted claims of its own or evidenced an intent to defend the suit against it on the merits. The common thread among these cases is that the state cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense.27

Courts are divided as to whether removal of a case containing federal claims by a state defendant from state to federal court waives Eleventh Amendment immunity.28 The Supreme Court allowed the state to remove and then assert the sovereign immunity defense.29 Justice Kennedy’s concurring opinion suggests that removal constitutes a waiver of immunity.30

22 College Sav., 527 U.S. at 686-87.
25 Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000).
27 Neinast v. Texas, 217 F.3d 275, 279, reh’g denied, 228 F.3d. 411 (5th Cir. 2000), cert. denied, 121 S. Ct. 1188 (2001) (Clearinghouse No. 53,245).
30 Id. at 393.
If the state removes and asserts Eleventh Amendment immunity, the plaintiff should move to remand the case to the state court, a result reached in Lapides v. Board of Regents of the University of Georgia.31

V. Prospective Relief

Even absent a valid congressional abrogation of state immunity, since Ex parte Young, prospective relief in federal courts has been available to enforce federal rights by suing a state official, usually the official in charge of the agency responsible for the violation.32 Even if the Fourteenth Amendment does not authorize a federal statute, the statute’s substantive provisions may be valid under other congressional authority, such as the commerce clause, and under Maryland v. Wirtz; they may be also enforceable prospectively against the states under Young.33

The Supreme Court reaffirmed Ex parte Young in Seminole and in its subsequent state immunity decisions. Indeed, the availability of the Young remedy is the majority’s answer to the argument that states will be free to disregard federal law. In Seminole the majority states that “[t]his argument wholly disregards other methods of ensuring the States’ compliance with federal law; ... an individual can bring suit against a state officer in order to ensure that the officer’s conduct is in compliance with federal law, see, e.g., Ex parte Young ...”34

In the case barring recovery of damages against states under Title I of the Americans with Disabilities Act, the Court expressly approves use of Young to enforce Title I by injunctive relief against states engaging in employment discrimination:

Our holding here that Congress did not validly abrogate the State’s sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the [Americans with Disabilities Act] still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young ... 35

The Young procedure has two basic formats for bringing suits for prospective relief: (1) directly under a federal statute which creates a private cause of action and (2) under 42 U.S.C. § 1983, which creates a federal cause of action for violation of “rights” that the federal laws and the U.S. Constitution secured.36

In Seminole the Court raised a possible barrier to enforcement of federal rights under Young.37 The Court held that where Congress had created a comprehensive scheme with a limited remedy for the enforcement of a particular federal right, the courts might refuse to “supplement” that scheme with judicial enforcement under Ex parte Young. In Seminole the Court found that a system of mandated conferences and mediation, culminating in a suit against the state with very limited authorized remedies, was a suffi-

31 Lapides v. Bd. of Regents of the Univ. of Ga., 2001 WL 561352 (11th Cir. May 24, 2001) (Clearinghouse No. 53,836); see also Henry v. Metro. Sewer Dist., 922 F.2d 332 (6th Cir. 1990); Watkins v. Cal. Dep’t of Corrections, 100 F. Supp. 2d 1227 (C.D. Cal. 2000) (remanding claims that the Eleventh Amendment bars as well as supplemental state law claims); but see Pahk v. Hawaii, 109 F. Supp. 2d 1262 (D. Haw. 2000) (dismissing federal claims under the Eleventh Amendment and remanding state claims to state court).

32 Ex parte Young, 209 U.S. at 123.


34 Seminole, 517 U.S. at 71 n.14.

35 Bd. of Trustees, 121 S. Ct. at 968; see also text accompanying supra note 13.

36 On the first format see Bd. of Trustees, 121 S. Ct. at 955. On the second format see Rosado v. Wyman, 397 U.S. 397 (1970); see also Capistrano, supra note 9.

37 Seminole, 517 U.S. at 73–76.
cient alternative scheme to indicate that Congress did not intend suits under the Ex parte Young theory. The remedy under the statute before the Court in Seminole limited a remedy in a suit against a state to the transfer of decision-making power from the state to the federal government. It did not permit any injunctive relief or damages, as does Section 1983.

A number of cases hold that particular statutory remedies do not preclude resort to Young to enforce federal rights by prospective relief. The Effect of Statutory Remedies on Enforcement of Federal Statutes Against States Through Ex Parte Young, a memorandum on the effect of alternative statutory remedies on Young suits, is on the Web at the National Senior Citizens Law Center's Federal Rights Project, www.nsclc.org.

VI. Assault on Ex Parte Young

Encouraged by the recent sovereign immunity cases, some states have begun a wholesale attack on the ability of private parties to enforce federal laws under Young. The first fruits of this attack was a lengthy complex decision in Westside Mothers v. Haveman. The case appeared to be a routine suit under 42 U.S.C. § 1983 to enforce the provisions of the federal Medicaid law, which requires certain screening and services for eligible children. The suit, against state officials responsible for administering the Michigan Medicaid program, sought only prospective injunctive relief. Literally hundreds, if not thousands, of reported decisions in such suits require states to abide by the federal Medicaid statute and regulations in its Medicaid program. Medicaid is enacted under the spending clause; although states are free not to participate, all states do so. The Supreme Court explicitly stated that, "[a]lthough participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirement of Title XIX [the Medicaid title of the Social Security Act]."

The court in Westside Mothers ruled that, under the new emphasis on sovereign immunity in Supreme Court decisions, the existing precedents enforcing the Medicaid statute were no longer good law. At the heart of the decision is an argument (1) that Young applies only to violations by state officials of the U.S. Constitution or federal laws and (2) that, because the Medicaid program is enacted under the spending clause, the federal requirements are not binding federal laws since the states are free not to participate in the Medicaid program. Rather, the nature of the program is a contract between the federal and state government. Ex parte Young, the court concludes, does not authorize suits for breach of contract against state officers. It reaches this conclusion while acknowledging that the Supreme Court "held that federal-state cooperative programs enacted under the Spending power fall within the ambit of the Supremacy Clause." Describing those cases to be assertions "without analysis," the decision relies on "a more searching analysis" found in recent Supreme Court immunity cases. An appeal of the decision is pending in the Sixth Circuit.


40 Harris v. McRae, 448 U.S. 297, 301 (1980).

41 Westside Mothers, 133 F. Supp. 2d at 561; the court also made a number of additional rulings, excluding relief under Young under 42 U.S.C. § 1983.

42 Two district courts have rejected the decision in Westside Mothers. In Boudreau v. Ryan, No. 00-5392-011.MEV (N.D. Ill. May 1, 2001) (Clearinghouse No. 53,950), the decision refutes the case on virtually every point; in Antican v. Buell, No. 4:00-CV-173(H) (E.D. N.C. Apr. 17, 2001), the court dismisses the essence of the Westside Mothers decision in footnote 5, saying that it is without merit.
VII. Interlocutory Appeals

One major factor to consider in naming federal litigation defendants who may assert a claim to sovereign immunity is that in federal court a state or state official claiming immunity has a right to an interlocutory appeal if the district court rejects the immunity defense.43 The general rule is that the filing of the appeal ousts the district court of jurisdiction as to those defendants that are appealing on immunity grounds, at least as to claims that the immunity defense covers. If this occurs, proceedings against the appealing defendants come to a halt, and the district court has discretion to stay or limit proceedings against other defendants.44

Many circuits recognize one exception to staying proceedings against the appealing state defendant. If the district court certifies in writing that immunity appeal is frivolous, proceedings in the district court may continue. The Supreme Court approved this procedure.45 The interlocutory appeal nonetheless proceeds to decision in the court of appeals.

VIII. Suits in State Courts

In Alden v. Maine the Court held that, under the structure of the U.S. Constitution and historic principles of sovereign immunity, Congress could not authorize suits against states in state courts on federal claims without the consent of the state to be sued, except when Congress acted pursuant to its Fourteenth Amendment powers.46 Since the decision rests on Eleventh Amendment jurisprudence, mandated waiver of immunity in state courts under the spending clause power would seem also to apply, but the issue is not free of doubt.

Another route to state court enforcement of federal claims against a state may be that indicated by the Seventh Circuit in Erickson v. Board of Governors of State Colleges and Universities, which stated that if a state opened its courts to suits against the state on state law claims comparable to federal claims against the state, it may not exclude claims based on the federal law.47 Almost all states have laws against discrimination, and many allow the enforcement of such laws in suits against the state or state agencies.

However, other courts require an express consent to suits in state courts to enforce federal law. In Alden v. Maine, decided before the Seventh Circuit decision in Erickson, the Court stated that "[t]o the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit."48

Advocates in several states are seeking state legislation waiving sovereign immunity in suits to enforce federal laws. Minnesota is the first state to enact such a law, applicable only to federal employment laws.49

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44 Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992); see, e.g., Root v. Liberty Emergency Physicians Inc., 68 F. Supp. 2d 1086 (W.D. Mo. 1999) (staying all proceedings against all parties pending the immunity appeal of one party).
48 Alden, 527 U.S. at 758.
49 2001 Minn. Laws ch. 159.