THE *ATASCADERO* RULE: NEW HURDLE FOR PLAINTIFFS SUING STATES IN FEDERAL COURT - A Practical Guide For Courts, Practitioners, Congress, and States

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I. INTRODUCTION

States, as defendants, cannot be sued in federal court on the basis of either federal question claims or state law absent explicit congressional abrogation of the states' Eleventh Amendment sovereign immunity rights in the text of the federal statute, or a specific indication in a state statute or constitution that the state consents to be sued.[1] The recent case of *Atascadero State Hospital v. Scanlon*[2] holds that congressional abrogation of Eleventh Amendment immunity must be "unmistakably clear in the language of the [federal] statute."[3] If not, every citizen suit authorized by federal law is potentially subject to dismissal. Additionally, the Court's requirement that a state waiver be "specifically indicate[d]" in state constitutional or statutory provisions[4] has eliminated the possibility of finding implied waivers from other state sources (e.g., waiver of tort or contract immunity), none of which specifically confer federal court jurisdiction.[5]

The impact of the *Atascadero* "express waiver-abrogation" re-

1. U.S. CONST. amend. XI provides: "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." (Emphasis added).

For a historical overview of the Eleventh Amendment and a discussion of the jurisdiction question, *see* Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) [hereinafter cited as Fletcher].

2. Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985), *reh'g den.* 106 S. Ct. 18 (1985).

3. 105 S. Ct. at 3147. *See* Welch v. State Dep't of Highways and Public Transp., 780 F.2d 1268 (5th Cir. 1986), where the *Atascadero* holding has been called a "bright line" rule. *See also, infra* note 33 (where J. Brennan in his dissent refers to the *Atascadero* requirement as an "extreme clear statement" rule).

4. 105 S. Ct. at 3147.

5. *See* State Chart *infra* Appendix.

quirement probably is not yet fully appreciated by the bar, the courts, Congress, or state legislatures. Therefore, this article focuses on the practical effects of *Atascadero* and suggests remedial measures for restoring citizen enforceability of federal law against the states. Absent such measures, which involve amendment of existing federal statutes or convincing states to waive their immunity, a number of lawsuits brought by private parties for damages and equitable relief will be subject to dismissal upon motions by either state defendants[6] or *sua sponte* by the courts.[7] The impact of the *Atascadero* holding is further displayed by two charts to be found in the Appendix. One contains a list of federal statutes enforceable by citizen plaintiffs against state defendants;[8] and the other contains existing state constitutional and statutory provisions relating to sovereign immunity.[9] Also analyzed are previous federal court decisions which found congressional abrogation or state waiver in circumstances that would conceivably no longer suffice under the requirements now imposed by *Atascadero.*

II. Scope Of The Eleventh Amendment

The scope of the Eleventh Amendment immunity doctrine must be reviewed in order to fully understand the ramifications of *Atascadero.* According to *Pennhurst State School and Hospital v. Halderman,*[10] the Eleventh Amendment affirms a "fundamental

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6. Presumably, state defendants would make a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See* Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 99 n.8 (1984); Demery v. Kupperman, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 810 (1985). *See also* Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982), where the court reviewed and upheld the state's Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim.

7. Chicago Burlington and Quincy Ry Co. v. Willard, 220 U.S. 413, 419-20 (1911). *See also* Demery v. Kupperman, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984); Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 846 (6th Cir. 1984); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1361 n.14 (9th Cir. 1977); Shipley v. First Fed. Sav. and Loan Ass'n of Delaware, 619 F. Supp. 421 (D.C. Del. 1985).

8. *See* Federal Chart *infra* Appendix. These statutes are applicable to the states and provide for citizen suits.

9. *See* State Chart *infra* Appendix.

10. *Pennhurst,* 465 U.S. 89. *Pennhurst* held that pendent state law claims may not be adjudicated against a state in federal court. For a more thorough analysis, *See generally* Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court,* 71 Va. L. Rev. 343 (1985); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case,* 98 Harv. L. Rev. 61 (1984); Comment, *Deepening The Anomaly of Sovereign Immu-*

principle of sovereign immunity"[11] by constitutionally limiting the grant of federal judicial authority contained in Art. III, Section 2 of the U.S. Constitution.[12] In particular, the Amendment limits the jurisdiction of federal courts to adjudicate controversies between a state and citizens of another state.[13] In *Hans v. Louisiana*,[14] the principle of Eleventh Amendment immunity was extended to bar suits in federal court by a citizen against his own state.

In citizen suits against a state, the jurisdictional bar of the Eleventh Amendment applies regardless of whether retroactive money damages or prospective injunctive relief is sought.[15] The Eleventh Amendment likewise bars a suit against state officials, irrespective of the nature of the relief, where the state itself is the real, substantial party in interest.[16] The Eleventh Amendment is a limitation on the subject matter jurisdiction of federal courts.[17] It may be raised as a defense by a state defendant at any stage of the

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nity: Pennhurst State School and Hospital v. Halderman, 59 ST. JOHN'S L. REV. 141 (1984); Comment, *Constitutional Law: State Sovereign Immunity Reaffirmed in Pennhurst State School and Hospital v. Halderman*, 24 WASHBURN L.J. 152 (1984); Note, *A Reaffirmation of State Sovereign Immunity: Pennhurst State School and Hospital v. Halderman*, 20 WILLAMETTE L.J. 823 (1984); and Note, *Reconciling Federalism and Individual Rights: The Burger Court's Treatment of the Eleventh and Fourteenth Amendments*, 68 VA. L. REV. 865 (1982).

11. 465 U.S. at 98.

12. U.S. CONST. art. III, § 2 provides:

> 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, or which shall be made, under their Authority:—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—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.

See also Chisholm v. Georgia, 2 U.S. (Dall) 419 (1793).

13. *See supra* note 1.

14. 134 U.S. 1 (1890).

15. *Pennhurst*, 465 U.S. at 100 (citing Missouri v. Fiske, 290 U.S. 18, 27 (1933), where it was stated the Eleventh Amendment "necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a state.")

16. *Pennhurst*, 465 U.S. at 101. In footnote 11, the Court cites to Dugan v. Rank, 372 U.S. 609 (1963), which held that a suit is against the sovereign if it would potentially affect the public treasury or restrain the government from acting or compel it to act.

17. *See supra* note 6. *But see* Fletcher, *supra* note 1, analyzing the possibility that the Eleventh Amendment is an affirmative grant of jurisdiction rather than a limitation.

federal proceeding.[18]

III. The Atascadero Rule

A. *The "Express Waiver-Abrogation" Requirement*

Atascadero presented the question as to whether states and their agencies are subject to suit in federal court by citizen litigants seeking retroactive monetary damages or whether such suits are barred by the Eleventh Amendment and its underlying doctrine of sovereign immunity.[19]

A suit was brought in federal district court[20] for a violation of Section 504 of the Rehabilitation Act of 1973.[21] The complaint alleged employment discrimination by California due to the plaintiff's physical handicap and sought compensatory, injunctive, and declaratory relief. The federal district court granted a motion to dismiss the complaint on grounds that the claim was barred by the Eleventh Amendment. The Ninth Circuit affirmed on the basis that the plaintiff had failed to allege that a primary objective of the federal funds received by the state was to provide employment.[22] On certiorari to the U.S. Supreme Court, the judgment of the appeals court was vacated and the case remanded because of a recent ruling by the Court that Section 504's bar on employment discrimination was not limited just to state programs receiving federal aid whose primary purpose was to provide employment.[23] On remand, the Court of Appeals reversed the district court, holding that because it had participated in and received funds pursuant to the Rehabilitation Act, the state impliedly had consented to be sued as a "recipient" under 29 U.S.C. Sec. 794.[24]

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18. *See supra* note 6.

19. 105 S. Ct. at 3144.

20. *See infra* note 22 for the Ninth Circuit's discussion of the district court decision.

21. 29 U.S.C. § 794 (1982).

22. Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982). The Court of Appeals did not decide the Eleventh Amendment question. Instead, it affirmed the District Court on the ground that Mr. Scanlon had failed to allege an essential element of a claim under Sec. 504, namely that a primary objective of the federal funds received was to provide employment.

23. Scanlon v. Atascadero State Hosp., 104 S. Ct. 1583 (1984). *See* Consol. Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

24. Scanlon v. Atascadero State Hosp., 735 F.2d 359, 362 (9th Cir. 1984). The Court of Appeals on remand addressed the Eleventh Amendment question and decided that a state could waive its immunity by implication.

On certiorari once again, the U.S. Supreme Court held that the Eleventh Amendment barred the plaintiff's suit against the state in federal court.[25] The Court found there was no language in the California Constitution to constitute a waiver of its Eleventh Amendment rights; nor did Congress, when promulgating the Rehabilitation Act, expressly abrogate those rights.[26] Further, the Court found that California did not consent to be sued in federal court by merely accepting federal funds under the Rehabilitation Act.[27] In supporting its decision, the Court said the doctrine of sovereign immunity plays a vital role in maintaining the proper balance of powers between state and federal governments.[28] A disruption in this delicate balance occurs whenever Congress enacts legislation which abrogates that immunity. The states' powers are necessarily limited as those of the federal government are expanded.[29]

Because a proper balance of power is essential to a federalist form of government, congressional abrogation must be carefully scrutinized. Consequently, the *Atascadero* Court required that Congress unequivocally express its intention to disrupt this balance with unmistakable statutory language specifically authorizing a citizen to sue a state in federal court.[30] The balance of powers between state and federal governments is too important for a disruption to be allowed by mere implication.[31] The Court concluded that Congress had not expressed a clear intention to abrogate the states' Eleventh Amendment immunity[32] when the strict "extreme

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25. 105 S. Ct. 3142. *Atascadero* was a 5-4 decision with Justices Brennan, Blackmun, Stevens, and Marshall dissenting. The Court of Appeals was reversed because a state could not waive its immunity by mere implication, *e.g.*, consent to be sued merely because it accepted federal funds.

26. *Id.* at 3147-3150.

27. *Id.*

28. *Id.* at 3147-3148.

29. *See generally*, Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977).

30. 105 S. Ct. at 3148.

31. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974), which previously indicated that "overwhelming implication from the text as [will] leave no room for any other reasonable construction" was sufficient to find a state's waiver. The *Atascadero* rule, if applied consistently, would seem to provide no room for "overwhelming implication" whether it be state waiver or congressional abrogation. *But see* Grotta v. Rhode Island, 781 F.2d 343 (1st Cir. 1986), *infra* note 165.

32. 105 S. Ct. at 3149.

clear statement"[33] requirement of *Atascadero* was applied to the "pertinent" language of the Rehabilitation Act.[34]

The directive of the *Atascadero* holding requiring "unmistakable language" is obvious, but its standards are far from clear. A federal court, when considering a state defense of Eleventh Amendment immunity to a citizen suit alleging state violation of a federal statute, need only look to the "pertinent" wording of the statute.[35] Reliance upon legislative history and related arguments of that nature will not be accepted.[36] Intent must be found on the face of the statute itself. However, the Court gave little indication as to what would constitute "unmistakable language."

Previously, congressional abrogation was rarely an issue.[37] In light of the *Atascadero* "express waiver-abrogation" requirement, however, all federal statutes permitting citizen suits must now be reexamined. Rather than proceeding directly to the merits, cases will be delayed until this crucial issue is resolved. Not only are

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33. *Id.* at 3154 n.7. In his dissent, Justice Brennan bitterly contests the reasoning of the majority. He argues: "[W]hen Congress enacted [the Rehabilitation Act], it could have no idea that it must obey the extreme clear statement rule adopted by the Court for the first time today. . . . [T]hat rule serves no purpose other than obstructing the will of Congress."

34. 105 S. Ct. at 3149. The court defines the "pertinent" part of Sec. 504 of the Rehabilitation Act to be, *inter alia*, "[A]ny program or activity receiving Federal financial assistance. . . ." Importantly, in its application of the *Atascadero* rule to other federal statutes, federal courts must make a determination as to what constitutes "pertinent" language of the statute. Is it the definitional section, the enforcement section, or is it the remedy section of the statute? Thus, courts are faced with not only "if" Congress "said" abrogation, but "where."

35. *Id.* at 3149.

36. One wonders whether the majority in *Atascadero*, by requiring a precise verification of congressional intent, is not simply requiring Congress to improve its draftsmanship skills. Justice Brennan, in his dissent, said the majority created a doctrine which imposed upon Congress the task of enacting "special rules of statutory draftsmanship." Brennan argues this "extreme clear statement rule". serves no purpose other than obstructing the will of Congress. . . . It places the federal judiciary in "the unseemingly position of exempting the States from compliance with laws that bind every other legal actor in our nation." Atascadero, at 3150. In the collateral event that Congress has inadvertently failed to "unequivocally" express that will, "no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain the intent of Congress." *Id.* at 3154.

37. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) held that congressional abrogation pursuant to Sec. 5 of the Fourteenth Amendment is constitutionally permissible. The Court, however, never specifically examined the language in Title VII to determine whether or not it sufficiently manifested congressional intent to abrogate. The issue addressed more recently in *Atascadero* was never raised in the *Fitzpatrick* Title VII case.

practitioners without guidelines, but each court must decide for itself whether the statutory text contains precise enough language to sustain congressional abrogation. The potential for inconsistent holdings is present; time consuming litigation undoubtedly will occur.

B. Exceptions

Over the years, the Supreme Court has developed several exceptions to Eleventh Amendment immunity, allowing certain kinds of specific relief against state officials and totally removing local units of govenment from the protection of the doctrine.

1. U.S. Attorney General Suits

The Eleventh Amendment does not bar suits brought by the federal government against states in federal court.[38] States can be sued by the United States, or by a sister state.[39] Consequently, federal statutes which authorize enforcement actions by the Attorney General are not subject to the *Atascadero* ruling.[40] This may be one means of achieving enforcement pending Congress' enactment of clarifying language in statutes of nationwide importance.

2. Enjoin Unlawful "Official-Capacity" Acts By State Officers

Ex Parte Young[41] held that a suit challenging the constitutionality of a state official's action is not a claim against the state itself. When a state official acts in violation of the federal constitution, his act is ultra vires and not in accordance with the state's grant of authority to him. Therefore, injunctive relief against a state official is permissible.[42] This was further refined in *Edelman v. Jordan*[43] where it was held that a state official who acts in violation of federal law may be enjoined from future violations, but may not be sued for retroactive damages. An award of damages was not

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38. *See Pennhurst*, 465 U.S. at 103 n.12. *See also supra* note 1.

39. *See* Demery v. Kupperman, 735 F.2d at 1145 n.3.

40. *See* Federal Chart, col. entitled "Proper Plaintiff" *infra* Appendix.

41. *Ex Parte* Young, 209 U.S. 123 (1908); *See* Comment, *Confronting the Fictions of the Eleventh Amendment—Pennhurst State School and Hospital v. Halderman*, 60 WASH. L. REV. 407, 418-422 (1985).

42. *Pennhurst*, 465 U.S. at 102-03.

43. Edelman v. Jordan, 415 U.S. 651 (1974). *See generally*, 5 DAVIS, ADMINISTRATIVE LAW TREATISE, 27.40 (2d ed. 1984).

allowed since it would affect the state's treasury.[44] Damage actions have a fiscal impact upon the state itself whereas injunctions do not.

Thus, Eleventh Amendment immunity does not bar the citizen plaintiff from seeking prospective injunctive relief against a person acting in his "official capacity" as an agent for the state.[45] In this regard, the potential for recovery of attorney fees makes a 42 U.S.C. Sec. 1983 injunctive action attractive.[46]

3. Damages For "Unofficial-Capacity" Acts By State Officers

A state officer acting in his "official capacity" cannot be sued for damages in federal court since Eleventh Amendment immunity barring an action against the state also is available to its agents.[47]

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44. *Pennhurst*, 465 U.S. at 102. When suit is brought against state officials on the basis of valid state law, federal courts are constitutionally powerless to award either retroactive or prospective relief. In some cases, injunctive relief alone, without damages, will be an inadequate remedy for the plaintiff. *Atascadero*, 105 S. Ct. at 3150.

45. Kentucky v. Graham, 105 S. Ct. 3099 (1985) (42 U.S.C. § 1983 action), restates these principles. "Thus, implementation of state policy or custom may be reached in federal court only because *official-capacity* actions for prospective relief are not treated as actions against the State." 105 S. Ct. at 3106 n.14 (emphasis added). In a subsequent footnote, the Court reiterated: "In injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants." (citations omitted) Monetary relief that is "ancillary" to injunctive relief also is not barred by the eleventh amendment." (citation omitted). *Id.* at 3107 n.18 (emphasis by the Court).

46. The Court has recognized that attorney fees can be recovered for wrongful "official-capacity" acts pursuant to the Civil Rights Act Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Kentucky v. Graham, ruled:

> Fees are unavailable only where a governmental entity cannot be held liable on the merits; today we simply apply the fee-shifting provisions of Sec. 1988 against a preexisting background of substantive liability rules.
>
> Only in an official-capacity action is a plaintiff who prevails entitled to look for relief, both on the merits and for fees, to the governmental entity.

105 S. Ct. at 3108. *See also* Brandon v. Holt, 105 S. Ct. 873, 878 (1985); Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 738-39 (1980); Hutto v. Finney, 437 U.S. 678, 694-95 (1978).

47. Kentucky v. Graham, 105 S. Ct. at 3107, where the Court held:

> [A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. (Citation omitted). This bar remains in effect when State officals are sued for damages in their official capacity. (Citations omitted). That is so because, as discussed above, "judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents. . . ." (Citation omitted).

The Court also said: "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 3106.

However, a 42 U.S.C. Sec. 1983 suit may be maintained against an officer for wrongful actions committed in his "personal-capacity" or "individual-capacity," but damages "can be executed only against the official's personal assets," not the state.[48] Further, statutory attorney fees for citizen plaintiffs are disallowed. *Kentucky v. Graham* turned "inside out" the deep pocket.[49] Despite substantially undercutting the incentive, such suits may be useful not only because of their simpler burden of proof,[50] but also for the practical coercive effect on state decisionmakers to alter their personal conduct as well as institutional practices.

4. Counties and Municipalities

The term "state" commonly is construed to include departments, agencies, and instrumentalities of the state. Conceivably this could include cities, counties, and other political subdivisions. However, the Supreme Court earlier ruled that Eleventh Amendment immunity does not apply to "counties and similar municipal corporations" being sued for civil rights violations pursuant to 42 U.S.C. Sec. 1983,[51] apparently because there is no fiscal impact on

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48. *Id.* at 3105. The officer may assert "personal immunity defenses, such as objectively reasonable reliance on existing law." *Id.* at 3106. *See also* Demery v. Kupperman, 735 F.2d at 1139-45.

49. The Court expressly held that civil rights attorney fees, 42 U.S.C. § 1988 (1982), could *not* be granted. It reasoned: "a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him." 105 S. Ct. at 3106. Reiterating that Congress sought to avoid making § 1988 a "relief fund for lawyers," the Court held: "Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity as ultimate insurer. Instead, fee liability runs with merits liability; . . . Section 1988 simply does not create fee liability where merits liability is non-existent." 105 S. Ct. at 3107. Only if injunctive relief were granted and "bad faith" of the official in his individual capacity were proven, could a common law award of attorney fees be obtained. Hutto v. Finey, 437 U.S. at 700.

50. Kentucky v. Graham noted:

> On the merits, to establish *personal* liability in a Sec. 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. (Citation omitted). More is required in an official-capacity action, however, for a governmental entity is liable under Sec. 1983 only when the entity itself is a "moving force" behind the deprivation (citations omitted); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. (Citation omitted).

105 S. Ct. at 3106 (emphasis by the Court).

51. *Pennhurst*, 465 U.S. at 123, n.34. *See* Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). *See generally*, Gibbons, *The Eleventh Amendment and State*

the state treasury.

Significantly, the Court has abolished the state-level distinction between "official" versus "unofficial" capacity acts, holding that "local government units can be sued directly for damages and injunctive or declaratory relief."[52] Eleventh Amendment immunity does not protect counties and municipalities. Consequently, there are no problems in a 42 U.S.C. Sec. 1983 action in recovering damages and court awarded 42 U.S.C. Sec. 1988 attorney fees against the local entity treasury. Another advantage for the citizen-plaintiff is that local units of government are "not entitled to the shield of qualified immunity which protects public servants acting in good faith."[53]

5. Administrative Relief

A number of federal statutes make administrative relief available to the citizen-plaintiff. The Eleventh Amendment arguably does not bar administrative actions against state defendants, only judicial actions in federal court.[54] Conceivably a private complaintant successful before an administrative agency could use the *Atascadero* doctrine as a shield to prevent review by a federal court which lacks jurisdiction to hear the appeal. On the other hand, the state could use the doctrine to prevent review if it prevailed at the administrative level. In either event, the decision by the federal agency would become final and unappealable. This could prove to be a pyrrhic victory for the citizen-plaintiff. Enforcement of any agency decision by the federal courts would be

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Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889 (1983).

52. Kentucky v. Graham, 105 S. Ct. at 3106 nn.12, 14 (1985); Brandon v. Holt, 105 S. Ct. 873, 878 (1985). As *Brandon* noted:

> In at least three recent cases arising under "Sec. 1983," we have plainly implied that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit.

Id. at 878.

53. Brandon v. Holt, 105 S. Ct. at 878.

54. *See* Age Discrimination Act, 42 U.S.C. § 6104(f), which requires exhaustion of administrative remedies before a civil action may be commenced in federal court. It seems that such administrative procedures would not be barred by the Eleventh Amendment. Either they are not "suits" as stated in the Eleventh Amendment, or the immunity doctrine applies only to federal "court" proceedings. *See supra* note 1. *See generally*, Scalia, *Sovereign Immunity and Non-Statutory Review of Federal Admininstrative Action: Some Conclusions from the Public Lands Cases*. 68 MICH. L. REV. 867, 886 (1970).

barred by *Atascadero.*

C. *Waivers of Eleventh Amendment Immunity*

Negating Eleventh Amendment immunity may be accomplished by Congress in federal statutes or by the states in either their constitutions or legislation. Whatever the means, *Atascadero* requires, on the face of the statute itself, express abrogating language or unmistakably clear congressional intent for states to be sued in federal court.

1. Federal Statutes

In deciding the Eleventh Amendment proscribed the suit, the *Atascadero* Court reaffirmed a prior doctrine which established Congress' authority to abrogate the Eleventh Amendment by legislation.[55] New ground in constitutional jurisprudence was carved out when the Court held "that Congress [may] . . . abrogate *the Eleventh Amendment in unmistakable language in the statute itself.*"[56] *Atascadero* rules that the Eleventh Amendment is "necessarily limited by the enforcement provisions of Section 5."[57] As a result, when acting pursuant to Section 5 of the Fourteenth Amendment,[58] Congress may abrogate the Eleventh Amendment

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55. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The *Fitzpatrick* court held that Congress had the power to authorize federal courts to grant monetary relief to citizens suing the state of Connecticut for violation of Title VII (Sec. 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982)). This authority was a means of enforcing the substantive guarantees of the fourteenth amendment. *Fitzpatrick* abrogation is grounded in principles first announced in *Ex Parte* Virginia, 100 U.S. 339 (1879). In *Ex Parte* Virginia, a state judge had been arrested and indicted under a federal criminal statute prohibiting the exclusion of any citizen, on the basis of race, from service as a juror in a state court. The defendant argued the statute was not a permissible enactment of congressional power granted to that body under either the Thirteenth or Fourteenth Amendments as it intruded upon the states' sovereignty. The Court disagreed, however, and observed that these amendments were a "limitation of the power of the States and enlargements of the Power of Congress. . . [In] exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power." 100 U.S. at 346. The *Fitzpatrick* court went on to conclude: "[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of sec. 5 of the Fourteenth Amendment." 427 U.S. at 456.

56. 105 S. Ct. at 3148 (emphasis added).

57. *Fitzpatrick*, 427 U.S. at 446; *Atascadero*, 105 S. Ct. at 3145.

58. U.S. CONST. amend. XIV, § 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

without the states' consent.[59] This is because the Fourteenth Amendment Section 5 abrogation doctrine is based upon the states' implied willingness to limit their own Eleventh Amendment powers by their later-in-time ratification of the Fourteenth Amendment.[60]

Statutory language may be insufficient to constitute abrogation. An examination of "pertinent" language in federal statutes authorizing citizen suits provides insight into what may constitute "unmistakable language" of congressional intent.

a. Insufficient Language. The textual language scrutinized and distinguished by the Court in *Atascadero* offers at least one guidepost as to the type of statutory language that is insufficient to constitute abrogation. The Rehabilitation Act provides remedies to any person aggrieved by an illegal action by "any recipient" of federal assistance.[61] Since the *Atascadero* requirement imposes on Congress the task of abrogating the state's immunity "specifically," the "any recipient" language of the statute was too broad to include "state" within its definition.[62] The Court found, in effect, that a state is not "any recipient." The state occupies a special position in the constitutional system, and given its special role, the state is unlike any other class of recipients of federal aid.[63]

Similar to the "any recipient" wording in the Rehabilitation Act is language contained in the Age Discrimination Act of 1975

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within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

59. 105 S. Ct. at 3145. *But see* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 548 (1978) (presenting support for the argument that Congress lacks power to impose suit upon the states because of the affirmative rights granted under the Eleventh Amendment).

60. *See* Peel v. Florida Dep't of Transp., *infra* notes 114-118 and accompanying text. However, the holding is suspect for two reasons. First, the statutory language does not "expressly abrogate" the state's Eleventh Amendment immunity, but like so many federal enactments merely indicates the general intent of Congress that states be subject to suit in the federal forum. Second, unlike Sec. 5 of the Fourteenth Amendment, the article 1 powers granted to Congress were ratified prior to the states' ratification of the Eleventh Amendment. Thus, the rationale that the states were willing participants in the limitation of their own power while at the same time, expanding those of Congress does not work. *See generally Fitzpatrick*, 427 U.S. at 445; *see also Ex parte* Virginia, 108 U.S. 339.

61. 29 U.S.C. § 794a (1982).

62. 105 S. Ct. at 3149.

63. *Id.* at 3147.

(ADA).[64] ADA defines its purpose as a legislative attempt to prohibit discrimination on the basis of age "in *any program* or *activity* receiving federal financial assistance."[65] Furthermore, Section 6104(e)(1) permits "any interested person" to bring suit for *injunctive* relief in any U.S. District Court.[66] Finally, Section 6105(b) indicates that a state may be sued.[67]

A citizen suit brought in federal court to enjoin a state from violating the ADA could be subject to an Eleventh Amendment attack. The court's first task would be to determine the "pertinent" language.[68] Section 6102 of the ADA provides "[W]hen any interested person brings an action in any United States District Court for the district in which the defendant is found or transacts business to enjoin a violation of this Act *by any program or activity* receiving Federal financial assistance, . . ."[69]

"[B]y any program or activity receiving federal financial assistance" is similar to the "any recipient" language of the Rehabilitation Act. Such a "general authorization for suit in federal court"[70] would not appear to be the kind of unequivocally clear language required by *Atascadero*. Further, the "any program" language would probably be too broad to include a state entity within its definition.

There are a number of federal statutes, particularly those designed to protect the environment, which expressly provide for citizen suits "to the extent allowable by the Eleventh Amendment."[71] Obviously, the intent of Congress is to expressly preserve

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64. 42 U.S.C. § 6101 (1982).

65. 42 U.S.C. § 6102 (1982) (emphasis added).

66. 42 U.S.C. § 6104(e)(1) (1982) (emphasis added).

67. 42 U.S.C. § 6105(b) (1982).

68. 105 S. Ct. at 3149. Before it can determine whether or not language within a statute satisfies the "unmistakable language" requirement, a court must first make a determination as to what constitutes the "pertinent" language under review. This then will be held either to express or not express congressional intent to abrogate.

69. 42 U.S.C. § 6105 (1978) (emphasis added).

70. 105 S. Ct. at 3149.

71. *See* Federal Chart, *infra* Appendix, for eight such environmental acts: Deepwater Ports Act of 1974, 33 U.S.C. § § 1501-1524 (1982 and Supp. 1983); Endangered Species Act of 1982, 16 U.S.C § 1531 (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1982); Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. § 1431 (1982 and Supp. 1984); Noise Control Act of 1972, 42 U.S.C. § 4901 (1982); Outer Continental Shelf Lands Acts, 10 U.S.C. § 7421 (1982 and Supp. 1984); Surface Mining Control and

a state's sovereign immunity. States have interposed the Eleventh Amendment and successfully barred plaintiff's claims.[72] In a suit against the state of New York for violation of the Federal Water Pollution Control Act, the court stated, "[t]he Eleventh Amendment provides a jurisdictional prohibition against *any* suit brought against a state . . . unless the state has waived its immunity."[73]

b. Questionable Language. Some statutory language may or may not be sufficient to constitute abrogation. For example, the Federal Employers' Liability Act (FELA)[74] provides that "*[e]very* common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carriers, in such commerce."[75] FELA further provides "[u]nder this chapter an action may be brought in a district court of the United States."[76]

In *Parden v. Terminal Railway of the Alabama State Docks Dept.*, the U.S. Supreme Court considered whether a state that owns and operates a railroad in interstate commerce may successfully plead its Eleventh Amendment sovereign immunity as a defense to a suit filed under FELA in federal courts by one of the railroad's employees who suffered personal injuries on the job.[77] The Court found the states' sovereign immunity to be subordinate to the states' grant to Congress of the power to regulate commerce.

> By empowering Congress to regulate commerce, then, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.[78]

Reclamation Act of 1977, 30 U.S.C. § 1201 (1982); Toxic Substances Control Act, 15 U.S.C. § 2601 (1982).

72. Love v. New York State Dep't of Envtl. Conservation, 529 F. Supp. 832 (S.D. N.Y 1981); *See also*, Almond Hill School v. U.S. Dep't of Agriculture, 768 F.2d 1030 (9th Cir. 1985).

73. 529 F. Supp. at 832.

74. 45 U.S.C. § 51 et. seq. (1982).

75. 45 U.S.C. § 51 (1982) (emphasis added).

76. 45 U.S.C. § 56 (1982). Section 56 also provides for concurrent jurisdiction in state court, an alternative remedy should the Eleventh Amendment bar suit in federal court. This remedy may not be available for other federal statutes which do not expressly provide for concurrent jurisdiction.

77. Parden v. Terminal Ry. of the Alabama State Docks Dep't, 377 U.S. 184 (1963).

78. *Id.* at 192.

The *Parden* Court reasoned that the State of Alabama had "necessarily consented" to the suit.[79]

> By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.[80]

This reasoning is inconsistent with *Atascadero*. Waiver of a state's Eleventh Amendment rights cannot be implied, either as an expression of states consenting to be sued or as an act of Congress which in effect is held to abrogate immunity.[81] In terms of abrogation, the *Parden* Court focused on the "every common carrier" language of FELA and concluded that it "meant what it said."[82] *Atascadero* requires more specific language, narrowly drafted to

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79. *Id.*

80. *Id.* The court would not extend this rationale to other federal legislation. The Fair Labor Standards Act (FLSA), 29 U.S.C. § 216 (1982), has been held insufficient to permit citizen suits against the states in federal courts. In Employees v. Missouri Pub. Health Dep't, 411 U.S. 279 (1973), state employees suing for overtime compensation due them under FLSA, advocated their right to sue the state in federal court based on the commerce clause implied consent rationale of *Parden*. With Justice Brennan dissenting on the grounds that *Parden* controlled, the majority affirmed the lower court ruling that the Eleventh Amendment barred the suit. The majority did not find

> [a] word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that state or another state to sue the state in the federal courts. . . . It is not easy to infer that Congress in legislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed under . . . the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

411 U.S. at 285. For subsequent developments, see San Antonio Metro Transit, 105 S. Ct. 1005, 1020 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), which held unconstitutional application of the FLSA to states and local units of government); Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2, 99 Stat. 787 (1985) (making the effective date of FLSA to states, etc., April 15, 1986, and enacting other substantive changes).

From the above language, it appears that J. Douglas' opinion in *Employees* is a forerunner of *Atascadero*. The "constitutional constraints on the 'judicial power' of the United States" in *Employees* was of prime concern in holding that congressional abrogation did not occur. This focuses on the central concern of *Atascadero*, namely the preservation of the balance of powers between state and federal governments.

81. *Atascadero*, 105 S. Ct. at 3142.

82. *Parden*, 377 U.S. at 192.

"unmistakably" denote state inclusion within the definition of the term "every."

Today, courts could find that although Congress may have designed FELA to bring state owned carriers within its coverage, the text of the Act itself is not an "unmistakably clear" expression of that intent. The language "every common carrier" appears quite similar to the "any recipient" language of the Rehabilitation Act held insufficient in *Atascadero*. The FELA arguably fails to provide for clear abrogation of the state's Eleventh Amendment rights.

An examination of Title VII of the Civil Rights Act of 1964 and its amendments (the Equal Employment Opportunity Act of 1972), reveals the magnitude of the problem *Atascadero* has created.[83] In 1975, Mr. Justice Rehnquist introduced his opinion in *Fitzpatrick v. Bitzer* as follows:

> In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under Section 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin."[84]

Justice Rehnquist supported this contention by citing to: 42 U.S.C. Section 2000e-2(a), defining unlawful employment practices by employers; 42 U.S.C. Section 2000e(a), defining "person" as a "government;" and 42 U.S.C. Section 2000e(b), defining "employer" as a "person."[85] The Court inferred that Congress, by merely enacting these definitional phrases, was expressing its intent to abrogate the Eleventh Amendment right not to be sued by a citizen in federal court.[86] The Court then held Congress had the constitutional authority to exercise that intent through its Section 5 powers as a legitimate "means of enforcing the substantive guarantees of the Fourteenth Amendment."[87]

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83. 42 U.S.C. § 2000e et. seq. (1982).

84. *Fitzpatrick*, 427 U.S. at 447-48.

85. *Id.* at 448, nn.1 and 2.

86. The definitional language of a statute helps to determine whether the statute is applicable to the states. *Atascadero* focused on the enforcement language of the Rehabilitation Act in determining that Congress did not intend to abrogate the Eleventh Amendment.

87. 427 U.S. at 448.

In light of *Atascadero,* two observations immediately arise from the earlier *Fitzpatrick* opinion. First, subsequent to *Fitzpatrick,* it has generally been assumed that Title VII was enforceable by citizens against the states in federal court,[88] and that Title VII abrogates the states' Eleventh Amendment defense. The reason is the arcane belief that simply because a federal statute is enacted pursuant to Section 5, abrogation of the Eleventh Amendment is automatically inferred.[89] *Atascadero* requires more than a judicial conclusion that an act as a whole was passed pursuant to Section 5. Rather, the court must find somewhere within the act itself, that Congress has specifically utilized its Section 5 powers to unmistakably deprive the states of their constitutional rights.[90]

Second, the issue of whether the actual language of Title VII is sufficiently clear to express congressional intent "unmistakably" to abrogate Eleventh Amendment immunity has never been raised.[91] The *Atascadero* "extreme clear statement" rule was not and never has been applied to Title VII.

Because of this, citizens who bring future suits against a state in federal court for violation of the Act should be aware of the Eleventh Amendment defense. A decision to uphold *Fitzpatrick,* without first applying the *Atascadero* test to Title VII, would be inconsistent with *Atascadero.* The critical inquiry is whether Congress, "unmistakably", intended to disrupt the delicate balance between the state and the federal governments abrogating the states' sovereign immunity when it enacted Title VII.

The pertinent language of Title VII to be scrutinized is found within its enforcement section. "[T]he Attorney General in a case

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88. *See,* Am. Fed'n of State, County, and Mun. Employees, AFL-CIO v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) (where no mention of the Eleventh Amendment was made); Clay v. Texas Woman's Univ., 728 F.2d 714 (5th Cir. 1984); Daisernia v. State of New York, 582 F. Supp. 792 (N.D.N.Y. 1984); Harley v. Carman, 585 F. Supp. 1353 (N.D. Ohio 1984); State Teachers Retirement Bd. v. Flour Corp., 592 F. Supp. 592 (S.D.N.Y. 1984); Peel v. Florida Dep't of Transp., 443 F. Supp. 451 (N.D. Fla. 1977).

89. *But see* Hutto v. Finney, 437 U.S. 678, which holds that a federal statute, promulgated to enforce the Fourteenth Amendment, abrogates the state immunity. This would be "implied" abrogation prohibited under *Atascadero.*

90. Query whether Congress has the power to legislate away a constitutional amendment.

91. 427 U.S. at 445. The Court merely pointed to the language; it never debated or held that the wording was sufficient.

involving a *government* . . . shall so notify the person aggrieved and within ninety days after the giving of such notice *a civil action may be brought against the respondent* named in the charge . . ."[92] Further, 42 U.S.C. Section 2000e-5(f)(3), reads: "Each United States District Court . . . shall have jurisdiction of actions brought under this subchapter."[93]

Congress undoubtedly intended for a citizen to be able to bring a suit against a state in federal court for violation of Title VII. *Atascadero* requires that "Congress unequivocally expresses this intention in the *statutory language.*"[94] Thus, if Title VII is found to satisfy *Atascadero,* the focus would be on the general "intention" of the Act rather than on specific "abrogating type" language.

Atascadero raises several new questions not yet answered. Is it proper to assume that "governments" are "states"? Is "respondents" too general, too similar, to the "any recipient" language of the Rehabilitation Act?[95]

The Age Discrimination in Employment Act (ADEA)[96] provides another example of questionable statutory language. The Act, as amended in 1974, includes within the definition of "employer,"[97] "a state or local subdivision of a state. . . ." As such, the ADEA prohibits any "employer" from "failing or refusing to hire on the basis of age."[98] The state, therefore, would violate the statute if it used age as a criteria for employment.[99]

States have sought to avoid the sanctions of the amendment by contending that the ADEA infringes their Eleventh Amendment rights.[100] Courts which addressed the issue applied a two-

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92. 42 U.S.C. § 2000e-5(f)(1)(1982) (emphasis added).

93. 42 U.S.C. § 2000e-5(f)(3)(1982).

94. 105 S. Ct. 3148 (emphasis added).

95. 42 U.S.C. § 2000e-5(f)(1)(1982). *See also* 29 U.S.C. § 794 (1982).

96. 29 U.S.C. § 621 et. seq. (1982).

97. 29 U.S.C. § 630(b) (1982).

98. 29 U.S.C. § 623(a) (1982).

99. 29 U.S.C. § 623 (f)(1) (1982) gives the states the defense of establishing that the age requirement is a bona fide occupational qualification reasonably necessary to the normal operation of the business.

100. *See,* Daisernia v. State of New York, 582 F. Supp. 792 (N.D.N.Y. 1984); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983); E.E.O.C. v. KDM School Bus. Co., 612 F. Supp. 369 (S.D. N.Y. 1985); Barrett v. Suffolk Transp. Servs. Inc., 600 F. Supp. 81

part analysis to determine first, whether Congress passed the amendment pursuant to Section 5 of the Fourteenth Amendment[101] and second, whether Congress intended the ADEA to abrogate the Eleventh Amendment. Apparently Section 5 was the means of applying the ADEA to the states.[102]

In *Ramirez v. Puerto Rico Fire Service*,[103] the plaintiff applied for a firefighter position in the Puerto Rico Fire Service. After receiving passing scores on the required tests, Ramirez was informed that he was being denied employment because of age. Ramirez subsequently brought suit against the Fire Service in federal court alleging that he had been discriminated against because of his age in violation of the ADEA.

The court of appeals reversed the district court[104] and allowed injunctive relief along with back pay and damages. The court found no Eleventh Amendment problem with prospective injunctive relief since this was authorized by the *Edelman* decision.[105] However, in addressing the retroactive damage issue, the court examined the legislative history to determine if the ADEA was passed pursuant to section 5 of the Fourteenth Amendment. The

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(E.D. N.Y. 1984).

101. In EEOC v. Wyoming, 460 U.S. 226 (1983), the Court noted that federal courts have upheld the extension of the ADEA to the states as either an exercise of Congress' power under the Commerce Clause or Sec. 5 of the Fourteenth Amendment. *See* 103 S. Ct. at 1059 n.6. The Court left the question as to whether the ADEA was a Sec. 5 enactment.

102. *See Ex parte* Virginia, 100 U.S. 339 (1879), where the Court addressed the conflict between the Fourteenth and Eleventh Amendments by stating:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth . . . [s]uch enforcement is no invasion of the State sovereignty. No law can be, which the people of the State have, by the Constitution of the United States, empowered Congress to enact . . . a State cannot disregard the limitations which the Federal Constitution has applied to her power.

100 U.S. at 346.

103. Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983).

104. *See id.* at 696, where the district court stated:

> (i) the Eleventh Amendment to the United States Constitution granted defendants immunity from suit because each of the agencies sued was an integral part of the executive branch of the government of the Commonwealth of Puerto Rico, and the individual defendant (the director of the Office of Personnel) was likewise immune since he had been named only in his official capacity; and (ii) the Commonwealth had neither waived its immunity nor consented to claims for relief arising under ADEA.

105. *See supra* note 30 and accompanying text.

history, albeit sparse,[106] indicated to the court that Congress intended the ADEA to be enforceable via the Fourteenth Amendment. The court concluded:

> Congress' purpose in extending the ADEA coverage was to shield public employees from the invidious effects of age-based discrimination. . . . This proscription of vagarious sovereign conduct is of a genre which, by any logical standard, falls well within the category of "appropriate legislation" under Section 5 of the Fourteenth Amendment. . .[107]

The fact that Congress failed to mention the Fourteenth Amendment was of little concern to the court since "there is no requirement that the statute incorporate buzz words such as 'Fourteenth Amendment' or 'section 5' or 'equal protection' . . ." in order to determine congressional intent.[108] Therefore, the first part of the test was satisfied.

The court then looked at whether there was sufficient congressional intent to abrogate the immunity conferred by the Eleventh Amendment. By analogizing to Title VII, the court concluded that Congress had evinced the requisite intent.[109] Under Title VII, the *Fitzpatrick* Court noted that Congress had authorized suits by including "state" under the definition of employer.[110] Since this was also the case with the ADEA amendments, *Ramirez* held that ". . . the present case [is] . . . indistinguishable from *Fitzpatrick*; and here, too, we must hold that the ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate the congressional will that Eleventh Amendment immunity be abrogated."[111] Having satisfied the two-part test, the court vacated the judgment of the district court and remanded the case for further proceedings.

Ramirez was decided prior to *Atascadero* and hence not subject to its stringent "express abrogation" test. It is clear that legislative history cannot be used to imply abrogation. Rather, the language of the statute itself must clearly indicate Congress' intent

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106. *See* 715 F.2d at 699.

107. *Id.*

108. *Id.* at 698 (citing to Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980)).

109. 715 F.2d at 700. *See also* U.S.E.E.O.C. v. County of Calument, 686 F.2d 1249, 1253 (7th Cir. 1982).

110. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976).

111. 715 F.2d at 701.

that the state's immunity is abrogated. Whether the ADEA sufficiently abrogates state immunity is unresolved.

c. Sufficient Language. Some statutory language appears sufficient under *Atascadero* to abrogate state immunity. For example, the enforcement provision of the Veterans' Reemployment Rights Act (VRR)[112] permits a person entitled to the benefits available under the Act to sue an employer, who is a ". . . State or political subdivision thereof, . . . [in] the district court of the United States for any district . . ."[113] This language should be sufficient to express congressional intention to abrogate the state's Eleventh Amendment rights because it specifically allows for citizen suits against a state.

In *Peel v. Florida Dept. of Transportation,* a district court was presented with the question as to whether the states were shielded by the Eleventh Amendment in a VRR suit by a state employee who was denied reemployment after completing National Guard training.[114] The court held the statutory language of the VRR Act evidenced congressional authorization to permit a citizen to sue a state.[115] However, this statutory language was passed pursuant to the War Powers Clause in Article I of the Constitution rather than section 5 of the Fourteenth Amendment.[116] Nevertheless, the court inferred that "nothing in previous decisions indicates that section 5 is the exclusive avenue to abrogate state sovereignty from suit" and went on to conclude that "[b]ecause of their paramount importance to our country's national defense, the War Powers have been the source of Congress' authority to abrogate the States' Eleventh Amendment immunity from suit, without the necessity of an enforcement clause."[117] Much can be learned from this case. First, the War Power clause has been held to constitute a separate basis for abrogation.[118] Second, *Atascadero* mandates an unmistakable expression of "intent" in order to find abrogation.[119] Congressional "intent" arguably can be found in the text of a stat-

112. 38 U.S.C. § § 2021-2026 (1982).
113. 38 U.S.C. § 2022 (1982).
114. 443 F. Supp. 451 (N.D. Fla. 1977).
115. *Id.* at 462.
116. *Id.* at 458.
117. *Id.* at 462.
118. *Id. See also, supra* note 60.
119. 105 S. Ct. at 3142.

ute from words other than technical language stating "States' Eleventh Amendment immunity is hereby abrogated." The language of the VRR Act expressly indicates congressional intent to permit a state to be sued by a citizen in federal court for a violation of that Act. Even under the strict requirements of *Atascadero*, a court would be hard pressed not to find such congressional intent.

This being so, the language of the VRR Act can provide some insight into what may constitute sufficient statutory language in order to permit congressional abrogation of the Eleventh Amendment. The statutory language need not necessarily include words specifically referring to the Eleventh Amendment or section 5 of the Fourteenth Amendment; arguably even the term "abrogation" should not be a technical requirement. However, the statute should specifically use words indicating "citizens suits" . . . "suing the State" . . ., and "in District Court."

2. State Waivers

a. Constitutional Waivers. A state waiver of Eleventh Amendment immunity may be found in its constitution. However, in *Atascadero*, the Court cited the language of *Edelman v. Jordan*[120] that a state will have waived its immunity only "where stated by the most express language or by such overwhelming implications from the text as "[will] leave no room for any other reasonable construction."[121] The Court held that Art. III, section 5 of the California constitution, which provides that "suits may be brought against the State in such manner and in such courts as shall be directed by law," did not constitute a waiver of Eleventh Amendment immunity because the provision did not "specifically" indicate a willingness on the part of the state to be sued in federal court. Although general waiver of sovereign immunity may subject a state to suit in state court, it will not subject the state to suit in federal court. California's constitutional provision simply authorized the legislature to waive sovereign immunity, rather than constituting the waiver itself.[122]

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120. Edelman v. Jordan, 415 U.S. 651 (1974).

121. *Atascadero*, 105 S. Ct. at 3146.

122. *Id.* at 3147. The respondent did not make reference to CAL. GOV'T CODE § 945 (West 1980) which provides that a "public entity may sue and be sued." According to CAL. GOV'T CODE § 811.2 (West 1980), "public entity" includes the state.

Although the *Atascadero* majority did not go so far as to say that a state may only be deemed to have waived its sovereign immunity where the relevant constitutional or statutory provision contains specific language that "the state waives its immunity to suit in federal court," a reasonable inference might be that such "magic words" or their equivalent are indeed necessary. In an important footnote to his dissent in *Atascadero,* Justice Brennan says:

> The "stringent" . . . test that the [c]ourt applies to purported [s]tate waivers of sovereign immunity is a mirror image of the test it applies to congressional abrogation of state sovereign immunity. Just as the [c]ourt today decides that Congress, if it desires effectively to abrogate a state's sovereign immunity, must do so expressly in the statutory language, so the [c]ourt similarly decides that a [s]tate's waiver, to be effective, must be "specifically applicable to federal court jurisdiction."[123]

Justice Brennan went on to add that the majority should have determined the scope of the California constitutional waiver provision by construing it in accordance with relevant legislative history and case law precedent. Instead the majority not only rejected reliance on legislative history, but deliberately chose to impose the same special rule of statutory draftsmanship on the state legislature before immunity to suit in federal court could be waived.[124]

If specific language in a state constitution or state statute is necessary to effectively waive Eleventh Amendment immunity, then arguably the Court has dispensed with part of the holding in *Edelman* that a waiver may result because of "overwhelming implications from the text."[125] *Atascadero* clearly signifies that an implied waiver is no longer sufficient. To be effective, waiver of Eleventh Amendment immunity must be express and unequivocal in the text. Nothing short of this will suffice.

b. Legislative Waivers. A state also may waive its Eleventh Amendment immunity by legislative decree. In *Pennhurst,* which like *Atascadero* involved an action against a state agency for an

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123. 105 S. Ct. at 3153 n.5.

124. *Id.* According to Justice Brennan, "the Court eschews any effort to construe California's constitutional waiver requirement in accordance with California law." He adds that the majority's holding effectively prevents the states from making a federal forum available for the "fair adjudication" of actions arising under federal law. 105 S. Ct. at 3153 n.5.

125. *Edelman,* 415 U.S. at 673.

alleged violation of the Rehabilitation Act, the Court rejected the contention that a Pennsylvania statute had waived that state's immunity to suit in federal court. The suit against Pennsylvania would be allowed only if authorized by the legislature. In this case, there were no provisions expressly waiving the state's Eleventh Amendment immunity. The Court went on to add that Pennsylvania now has a statute expressly preserving its immunity to suit in federal court.[126]

c. State Provisions. A review of the 50 states indicates that none of their constitutional or statutory provisions meet the "stringent" test requirement (assuming that the *Atascadero* majority meant "specific indication of waiver" to be "express language" within a state constitution or statute). There simply are no existing state constitutional or statutory provisions which contain language declaring that the state waives immunity and consents to suit in federal court.

A few states expressly have preserved their immunity from suit in federal court. These states include Florida, Maine, Mississippi, Nevada, Oklahoma, and Pennsylvania. Florida's statute, for example, says that no provision shall be construed to constitute a waiver of the Eleventh Amendment "unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court."[127] Maine's statute is similar in that waiver of the Eleventh Amendment is only allowed where "explicitly stated by law."[128] The other states have statutes which flatly provide that the state does not waive its Eleventh Amendment immunity. These statutes do not provide for any exception allowing another statute to permit suit against the state in federal court.[129]

A second group of provisions are not as specific in preserving

126. *Pennhurst*, 465 U.S. at 103. In addition to the federal claim, the plaintiff in *Pennhurst* also brought a pendent state law claim based on the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, § § 4101-4704 (Purdon 1969 and Supp. 1985).

127. FLA. STAT. ANN. § 768.28(15) (West. Supp. 1986).

128. ME. REV. STAT. ANN. tit. 14, § 8118 (1964).

129. MISS. CODE ANN. § 11-46-5(4) (Supp. 1985); NEV. REV. STAT. § 41.031(3) (1979); OKLA. STAT. ANN. tit. 51, § 152.1(b) (West Supp. 1985); PA. STAT. ANN. tit. 42, § 8521(b) (Purdon 1982).

Eleventh Amendment immunity, yet nevertheless indicate that the state may not be made a defendant in federal court. Idaho and Utah have statutes which provide that any immunity they have under "federal law" remains in effect, notwithstanding any other particular waiver of sovereign immunity which the state legislature may have enacted.[130] Georgia's constitution provides that no waiver of sovereign immunity is to be construed as a waiver of any immunity provided to the state under the federal Constitution.[131]

Although the constitutions of Alabama and West Virginia do not mention "federal courts," they provide that the state may never be made a defendant in any court of law or equity. West Virginia's constitution makes an exception for attachment and garnishment proceedings.[132] Arkansas' constitution provides that the state shall not be made defendant in "any of her courts."[133]

Other states have statutes providing for the immunity of the state to suit in particular instances. For example, New Mexico may not be named a defendant in suits involving a claim of title or interest in real property.[134] In Tennessee, no court may entertain a suit against the state which could affect the state or its treasury. Arizona has a statute providing absolute immunity to the state in certain delineated instances.[135]

In some cases, it is a matter of inferring the state cannot be sued in federal court because of the jurisdictional restrictions contained in a statute allowing actions against the state. For example, in Wyoming no action is to be brought against the state "except in the courts of the state of Wyoming."[136] In Vermont, the county courts have exclusive jurisdiction of actions against the state.[137] In Ohio, actions against the state are to be brought in the court of claims, whereas in Nebraska and Iowa the district courts have jurisdiction over such actions.[138] Washington provides that a right of

130. IDAHO CODE § 6-903(f) (Supp. 1984); UTAH CODE ANN. § 63-30-4(2) (Supp. 1985).
131. GA. CONST. art. I. § 2 ¶ 9(a).
132. ALA. CONST. art. I. § 14; W. VA. CONST. art. 6, § 35.
133. ARK. CONST. art. 5, § 20.
134. N.M. STAT. ANN. § 42-11-1 (Supp. 1985).
135. TENN. CODE ANN. § 20-13-102(a) (1980); ARIZ. REV. STAT ANN. § 12-820.01 (Supp. 1984).
136. WYO. STAT. § 1-35-101 (1978).
137. VT. STAT. ANN. tit. 12, § 5601 (1973).
138. IOWA CODE ANN. § 25A.4 (Supp. 1985); NEB. REV. STAT. § 24-319 (1979); OHIO REV.

action against the state shall be enforced in superior court.[139] Alaska also provides that claims against the state may be brought in state superior court, whereas in Hawaii the state circuit courts and district courts have original jurisdiction of tort claims against the state.[140] Inferentially no other courts, state or federal, have jurisdiction.

There are a number of states which do have statutes waiving sovereign immunity. However, none make mention of the Eleventh Amendment or federal courts. For example, a California statute provides that "a public entity may sue and be sued."[141] The state of Rhode Island by statute is liable for tort actions in the same manner as a private individual or a corporation.[142] In Texas, sovereign immunity is expressly waived or abolished by the legislature and permission is given to sue the state.[143]

Finally, there are some states which do not have any sovereign immunity provisions. These states include New York, Michigan, Indiana, North Carolina, and Oregon. The absence of such provisions does not constitute a waiver of Eleventh Amendment immunity since there is accompanying case law which reveals that claims against these states previously have been held to be barred by the Eleventh Amendment.[144]

d. Cases. Prior case law illustrates the difficulty *Atascadero* presents regarding effective waiver. *In re Holoholo*[145] allowed a suit against the University of Hawaii, Research Corporation of the Uni-

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CODE ANN. § 2743.02(A) (1981).

139. WASH. REV. CODE § 4.92.010 (Supp. 1985).

140. ALASKA STAT. § 09.50.250 (1962); HAWAII REV. STAT. § 662-3 (Supp. 1984).

141. CAL. GOV'T CODE § 945 (West 1980).

142. R.I. GEN. LAWS § 9-31-1 (Supp. 1984).

143. TEX. CIV. CODE ANN. § 6252-19(4) (Vernon 1970). The Fifth Circuit has held the Texas statute insufficient to waive Eleventh Amendment immunity, barring a state-employed "seaman" from suing the state of Texas for damages under the Jones Act. Welch v. State Dep't of Highways and Public Transportation, 780 F.2d 1268 (5th Cir. 1986). The court ruled that there is no unequivocal language in the Jones Act abrogating immunity and the worker's compensation scheme cannot be read to implicitly constitute a waiver by the state.

144. Trotman v. Palisades Interstate Park Commission, 557 F.2d 35 (2d Cir. 1977); Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973); Stanley v. Indiana Civil Rights Commission, 557 F. Supp. 330 (N.D. Ind. 1983); Weisbord v. Michigan State University, 495 F. Supp. 1347 (W.D. Mich. 1980); Southeast Legal Defense Group v. Adams, 436 F. Supp. 891 (D. Ore. 1977).

145. *In re* Holoholo, 512 F. Supp. 889 (D. Hawaii 1981).

versity of Hawaii, and the Regents of the University of California as "state entities." The decision was based on an analysis of Hawaii Revised Statutes Sec. 662-2 and Sec. 662-3.[146] Section 662-2 waives Hawaii's immunity for the torts of its employees, but says nothing about the Eleventh Amendment or federal courts. The district court found the waiver in Sec. 662-2 to be for suits in federal as well as state courts. Section 662-3 had been amended to give state circuit courts and district courts "original jurisdiction" over actions against the state as compared to the "exclusive jurisdiction" which they previously had enjoyed. Thus, section 662-2 did not constitute a waiver only of actions in state courts.[147] The district court also noted that the phrase "except as otherwise provided by statute or rule" had been inserted into section 662-3. This provided yet another justification for federal court jurisdiction, since the action was based in part on the Death on High Seas Act[148] which vests exclusive jurisdiction in federal district courts.[149]

As to the claim against the University of California, the district court examined the Eleventh Amendment issue *sua sponte* and concluded that the University had not consented to suit in federal court either on the basis of Art. III, section 5 of the state constitution or sec. 945 of the California Government Code.[150] These provisions did not contain sufficient express language for a waiver of Eleventh Amendment immunity nor could a waiver be implied from the existing language.[151] However, federal jurisdiction over the University of California was upheld on other grounds including the fact that it had entered an area of exclusive federal regulation.[152]

Under *Atascadero,* the Hawaii statutory provisions would be held to lack as much specificity as the California provisions in

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146. *See* State Chart *infra* Appendix for text of these statutes.

147. 512 F. Supp. at 896.

148. *Death on High Seas Act*, 46 U.S.C. § § 761-767 (1982).

149. 512 F. Supp. at 897.

150. *See* State Chart *infra* Appendix for text of California constitutional and statutory provisions.

151. 512 F. Supp. at 898. *But see* Grotta v. Rhode Island, 781 F.2d 343 (1st Cir. 1986); Marrapese v. Rhode Island, 500 F. Supp. 1207 (D. R.I. 1980) (holding waiver by implication was sufficient), *rev'd on other grounds*, 749 F.2d 934 (1st Cir. 1984), *cert. den.*, 106 S. Ct. 252 (1985).

152. 512 F. Supp. at 904.

terms of waiving Eleventh Amendment immunity. The statutes of both states are indistinguishable since neither contains language granting federal court jurisdiction.

There are an equal number of earlier cases which are in harmony with *Atascadero.* For example, there are several decisions which hold that a state's waiver of immunity to suits in its own courts cannot be constituted to be a waiver of immunity to suit in federal court. In *Verner v. State of Colorado,*[153] an attorney who had been suspended from the practice of law brought an action against the state for damages and injunctive relief pursuant to 42 U.S.C. Sec. 1983 for violations of various constitutional rights. The plaintiff-attorney claimed that the state had waived its Eleventh Amendment immunity via partial waiver of common law sovereign immunity against being sued in state court.[154] The court held that the state's waiver of immunity against suit in its own courts did not constitute a waiver of Eleventh Amendment immunity to suit in federal court.[155]

The *Atascadero* decision also made it clear that a state's receipt of federal funds or participation in a federal program will not constitute a waiver of Eleventh Amendment immunity.[156] Case law indicates that federal courts followed that principle before *Atascadero.*[157] *Crutcher v. Kentucky*[158] held that Kentucky's participa-

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153. Verner v. Colorado, 533 F. Supp. 1109 (D. Colo. 1982), *aff'd,* 716 F.2d 1352 (10th Cir. 1983), *cert. den.,* 466 U.S. 960 (1984).

154. COLO REV. STAT. § 24-10-104 and § 24-10-106.

155. 533 F. Supp. at 1113-14. For other decisions holding that a state's general waiver of its sovereign immunity cannot also be construed to constitute a waiver of Eleventh Amendment immunity, *See* Riggle v. California, 577 F.2d 579 (9th Cir. 1978); Jacobs v. College of William and Mary, 495 F. Supp. 183, (E.D. Va. 1980) *aff'd,* 661 F.2d 922 (4th Cir. 1981), *cert. den.,* 454 U.S. 1033 (1981); Safeco Ins. Co. of America v. Guyton, 443 F. Supp. 10 (C.D. Cal. 1978); Confederated Tribes of Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978); Pharmacists Soc. of Milwaukee County, Inc. v. Department of Health and Social Services, 79 F.R.D. 405 (E.D. Wis. 1978). For cases holding to the contrary, *see* Meeker v. Addison, 586 F. Supp. 216 (S.D. Fla. 1983); Irwin v. Calhoun, 522 F. Supp. 576 (D. Mass. 1981); Weidenfeller v. Kudulis, 392 F. Supp. 967 (E.D. Wis. 1975).

156. *Atascadero,* 105 S. Ct. at 3150.

157. Cases holding that state participation in federal programs will not constitute a waiver of Eleventh Amendment immunity include: Jones v. Illinois Dept. of Rehabilitation Services, 504 F. Supp. 1244 (N.D. Ill. 1981) *aff'd,* 689 F.2d 724 (7th Cir. 1982); Friendship Villa-Clinton, Inc. v Buck, 512 F. Supp. 720 (D. Md. 1981); Municipal Authority of Bloomsburg v. Pa., Dept. of Environmental Resources, 496 F. Supp. 686 (M.D. Pa. 1980); Gilchrist v. Califano, 473 F. Supp. 1102 (S.D.N.Y. 1979); Pharmacists Soc. of Milwaukee County, Inc. v. Department of Health and Social Services, 79 F.R.D. 405 (E.D. Wis. 1978); Red Star

tion in a federal program supported by federal funds, without more, did not amount to a waiver of Eleventh Amendment immunity. The plaintiff brought a Sec. 1983 claim against the state of Kentucky and its governor in his official capacity. The claim against the governor also was dismissed, at least to the extent that retroactive monetary damages were sought, because it would have been paid out of the state treasury. However, the court did not dismiss that part of the claim against the governor seeking prospective injunctive relief.[159]

IV. UNCERTAIN JUDICIAL APPLICATION

David D. v. Dartmouth School Committee[160] illustrates the difficulties, or perhaps reluctance, of courts to apply *Atascadero.* This case involved an appeal from a federal district court order that the plaintiff, a 17-year old boy with Downs Syndrome, be placed in a residential private school. In making its decision, the district court used standards which had been established by the State of Massachusetts. On appeal, Massachusetts argued that because of the Eleventh Amendment, the district court could not en-

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Towing and Transp. Co. v. Connecticut 431 F. Supp. 1003 (D. Conn. 1976) *aff'd,* 556 F.2d 559 (2nd Cir. 1977). For cases holding to the contrary, *see* Briggs v. Sagers, 424 F.2d 130 (10th Cir. 1970), *cert. denied,* 400 U.S. 829; Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968); Federal Deposit Ins. Corp. v. Cades, 357 F. Supp. 1111 (E.D. Pa. 1973); Ward v. Ackroyd, 344 F. Supp. 1202 (D. Md. 1972).

158. Crutcher v. Kentucky, 495 F. Supp. 601 (E.D. Ky. 1980).

159. *Id.* at 602. *Crutcher* should be compared to *In re* Holoholo *supra* note 145 where the court in that case found that the state defendants (University of Hawaii, Research Corporation of the University of Hawaii, and the Regents of the University of California) had impliedly consented to be sued in federal court under the Jones Act, 46 U.S.C. § 688 (1982), and the Death on the High Seas Act, *see supra* note 148, by entering into a federally regulated admiralty and maritime area. The state defendants constructively had waived their Eleventh Amendment immunity because they knew they were operating in a sphere of exclusive federal regulation, 512 F. Supp. at 902. The court in *Holoholo* also held that by the terms of a master contract between the University of California and the University of Hawaii, and the Research Corporation of the University of Hawaii, the state defendants had impliedly consented to be sued in federal court. In making its analysis of constructive waiver and implied consent, the court cited the language of *Edelman* as to "overwhelming implications from the text" constituting a waiver of eleventh amendment immunity. 512 F. Supp. at 899.

Atascadero has rejected both constructive waiver and implied consent as basis for state waivers of immunity.

160. David D. v. Dartmouth School Committee, 54 U.S.L.W. 2225 (1st Cir. 1985). Plaintiff claimed violation of the Education of the Handicapped Act, 20 U.S.C. § 1401 et. seq. (1982).

force pertinent state substantive law against it. According to Massachusetts, only a waiver of Eleventh Amendment immunity would permit a federal court to enforce state substantive law.[161]

The First Circuit noted that the Education of the Handicapped Act (EHA) guarantees a "free public education" defined as "special education and related services which . . . meet the standards of the state educational agency."[162] According to the court, this language explicitly incorporates state substantive law and allows a complaint brought pursuant to the Act to be reviewed in either state or federal court on the issue of whether a child's educational plan is in accordance with the state's educational standards.[163]

The court then dealt with the question of whether Congress had abrogated the state's immunity with respect to the EHA. In doing so, the court cited *Atascadero*'s language as to the Eleventh Amendment being "necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment" or, in other words, by the power of Congress to pass appropriate legislation in order to enforce the Fourteenth Amendment. The majority opinion held that in passing the EHA, Congress had acted pursuant to section 5 and had used "unmistakable language" within the text of the Act itself to abrogate the state's Eleventh Amendment immunity. According to the court, this "unmistakable language" is contained in the preamble to the EHA which states that the national interest is served by programs to meet the needs of handicapped children "in order to assure equal protection of the law."[164]

In a short dissent, one of the judges argues that the case was "indistinguishable" from *Atascadero*. As in *Atascadero*, there was no evidence that Congress had unmistakably indicated textually in language of the federal statute its intent to make the states amenable to suits in federal court.[165]

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161. 54 U.S.L.W. at 2225.

162. 20 U.S.C. § 1401 (18)(B)(1982).

163. 54 U.S.L.W. at 2225.

164. *Id.* at 2226.

165. Another example of the First Circuit's struggle with the *Atascadero* rule is Grotta v. Rhode Island, 781 F.2d 343 (1st Cir. 1986). In *Grotta*, a prior Rhode Island Supreme Court decision held that a state statute manifested a legislative intent to waive the state's Eleventh Amendment immunity. *Grotta* held that this judicial admission of waiver was suf-

The *David D.* case is representative of some of the confusion which may arise as federal courts now attempt to ascertain what "unmistakable language" actually means. In the absence of more concrete guidelines, the "unmistakable language" requirement is subject to as many varied interpretations as there are federal courts.[166] This uncertainty is best resolved by affirmative action on the part of Congress to clarify existing legislation with amendatory language expressly abrogating state immunity.

V. Remedial Legislation By Congress

Atascadero represents much more than a decision concerning language in federal and state statutes. Its broader implications touch upon the fundamental concept of "federalism" and the delicate balance of power between the federal government and the states. *Atascadero* signifies a strong shift in favor of the rights of states regarding their relationship to the federal government.

This "shift" may be but temporary if Congress takes the appropriate action required by *Atascadero.* Indeed, the Supreme Court has almost invited Congress to take the steps necessary to make states amenable to citizen suits in federal courts.

Congress' first option is to make abrogation "crystal-clear" in the text of existing federal legislation. *Atascadero* requires "unmistakable language," and this task the Court has left to Congress. Perhaps the safest route is for Congress to insert new sections[167] in federal acts explicitly declaring that these statutes have been enacted in accordance with the Sec. 5 power of Congress to enforce the Fourteenth Amendment and therefore are binding on the states notwithstanding the Eleventh Amendment. In order to leave

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ficient to satisfy *Atascadero.* The court also ruled that once it has waived its Eleventh Amendment immunity, the state is a "person" for 42 U.S.C § 1983 purposes. This presumably would indicate that attorney fees under 42 U.S.C. § 1988 (1982) also may be obtainable. The *Grotta* ruling is questionable in view of the express textual waiver favored by *Atascadero.* Is a judicial pronouncement of state Eleventh Amendment "waiver" just as sufficient as second branch legislated waiver?

166. The U.S. Supreme Court may be hesitant to provide guidelines as to what will meet the "unmistakable language" requirement since doing so could be viewed as a usurpation of Congress' legislative function or as an advisory opinion. *But see* Welch v. State Department of Highways and Public Transp., 780 F.2d 1268 (5th Cir. 1986), *supra* note 143 and accompanying text.

167. *See* Federal Chart, *infra* Appendix, col. entitled "Enforcement Language.".

no doubt about its intent, Congress should use such words as "Eleventh Amendment," "abrogation," and "section 5 of the Fourteenth Amendment." Congress also should include words "citizen suits," "state," and "District Court of the United States."

A second option is for Congress to amend existing legislation to provide for concurrent state court jurisdiction under every federal statute not currently authorizing such suits.[168] An alternate forum for adjudication would exist if federal jurisdiction were foreclosed for failure to sufficiently abrogate immunity via *Atascadero.* The number of suits in state courts undoubtedly would increase, resulting in states bearing the costs of enforcing federal legislation. Faced with an increased financial burden, perhaps states would then be motivated to make themselves amenable to suits in federal courts.

A third option for Congress is to withhold federal funds from the states until they agree to waive their Eleventh Amendment immunity. In other words, Congress might force state legislatures to adopt new statutory or constitutional provisions, or amend existing provisions, to "specifically indicate" the willingness of the states to be sued in federal court. Politically, this option is least likely to occur.

If such steps are not taken, significant numbers of federal regulatory statutes guaranteeing private citizens rights ranging from equal employment opportunities, to rehabilitation for the handicapped, will be totally unenforceable. As a principal "person" owing federal statutory duties to citizens, state governments will be completely immune from accountability under the laws of the Nation. Congress surely will not allow its legislated objectives to be so easily circumvented.

VI. Practitioner's Dilemma

In the meantime, citizens seeking to enforce their rights against state defendants in federal courts now have the unenviable task of proving either congressional abrogation or state waiver of Eleventh Amendment immunity.[169] As has been demonstrated,

168. *Id.* col. entitled "Adjudicative Forum."
169. *Atascadero,* 105 S. Ct. at 3142.

that will be extremely difficult.

The citizen plaintiff has the alternative of bringing his cause of action in state court for damages, but only if the federal act allows for concurrent jurisdiction[170] and the statute of limitations has not run.[171] There also is support for the proposition that states can be sued in state court even if the federal act does not allow for concurrent jurisdiction.[172]

If a federal statute limits jurisdiction exclusively to federal courts, the citizen plaintiff may seek to bring an action pursuant to state law which parallels the federal legislation.[173] This means the plaintiff must resort to enforcing his rights against a state defendant in a state court, conceivably a less hospitable forum than a federal court since the defendant is the state itself.

Perhaps a common form of relief, until Congress abrogates immunity under federal statutes allowing money damages against the state, will be for citizen plaintiffs to file a civil rights action under 42 U.S.C. Sec. 1983 for injunctive relief[174] to prevent state officers, acting in their "official-capacity," from violating plaintiff's federal statutory rights.[175] Damage actions against state officers for their "unofficial-capacity" acts is less attractive, but still an alternative.[176]

Roll-over or conversion of actions also is possible. Presuming the statute of limitations has not run,[177] amending pleadings to request injunctive relief in a 42 U.S.C. Sec. 1983 damage action, or converting a federal statutory damage action into a civil rights injunctive lawsuit, appears to be the most practical step left short of

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170. *See* Fair Labor Standards Act, 29 U.S.C. § 216(b) (1982), providing that actions may be brought in any federal or state court of competent jurisdiction.

171. *See* Federal Chart, col. entitled "Statute of Limitations," *infra* Appendix.

172. *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 546 (1977).

173. *See e.g.*, 29 U.S.C. § 667(b)-(c) (1980) of the Occupational Safety and Health Act (OSHA), and the Washington Industrial Safety and Health Act (WISHA), WASH. REV. CODE 49.17.010 (1985).

174. 42 U.S.C. § 1983 (1982) states that persons who violate a citizen's civil rights are "liable to the party injured in an action at law, *suit in equity*, or other proper proceedings for redress." (Emphasis added).

175. *See supra* note 45 and accompanying text.

176. *See supra* notes 45-47 and accompanying text.

177. *See* Federal Chart, *infra* Appendix, col. entitled "Statute of Limitations."

experiencing an *Atascadero* dismissal of the client's suit.

The action for prospective injunctive relief against the offending state official arguably could be in either federal or in state court since 42 U.S.C. Sec. 1983 confers concurrent jurisdiction.[178] Admittedly, the state *itself* cannot be enjoined. A question remains whether prospective injunctive relief against state *officials* personally may be based not only on alleged violations of the U.S. Constitution (a well recognized exception to immunity), but also on violations of federal statutory rights?[179]

As a last resort, the citizen-plaintiff could request that the U.S. Attorney General intervene, if the federal statute allows governmental enforcement,[180] and assume responsibility for the litigation.[181] Such requests undoubtedly will be granted infrequently due to fiscal limitations, among other variables, including political considerations.

VII. Conclusion

The *Atascadero* requirement of "explicit" state waiver or congressional abrogation of Eleventh Amendment immunity virtually annuls most previous federal statutory language purporting to abrogate immunity, and places in doubt the reliability of prior Supreme Court rulings on the subject. Hundreds of cases in the litigative pipeline, where citizen plaintiffs are seeking enforcement of federal statutory rights alleged to have been violated by state governments, are subject to summary dismissal.

The intent of Congress to make states subject to federal law effectively is thwarted by the Atascadero Rule. No longer will immunity be considered abrogated or waived by implication. Legislative history cannot be substituted for express textual abrogation

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178. Maine v. Thiboutot, 448 U.S. 1 (1980). An *injunctive* action under 42 U.S.C. § 1983 (1982) in the state forum may avoid the troublesome "federal court" Eleventh Amendment immunity problem presented by *Atascadero*. However, it is unlikely that a damage action for violation of the substantive provisions of a federal statute could be maintained in the concurrent state forum inasmuch as 42 U.S.C. § 1983 (1982) is procedural only. Federal law in that alternate forum must be applied; i.e. *Atascadero* immunity from damage recoveries.

179. *See supra* notes 41-43 and accompanying text.

180. *See* Federal Chart, *infra* Appendix, col. entitled "Proper Plaintiff."

181. *See supra* notes 38-40 and accompanying text.

language. Further, little can be expected from the states themselves in waiving their Eleventh Amendment immunity in either constitutional provisions or by way of legislation. The ball is in Congress' court. Enforcement provisions of statutes which impose federal obligations on states to observe citizen rights must be redrafted to include unmistakably clear language satisfying *Atascadero*. Congress directly must abrogate immunity and allow states to be sued in federal court.

Until Congress acts, the options to avoid complete loss of federal relief are few for counsel representing citizen plaintiffs. Their cases will be dismissed with prejudice if the statute of limitations on the federal cause of action has run. If not, dismissals should be without prejudice. Plaintiffs can amend pleadings or file new actions alleging damages for unofficial capacity acts by state officials and request prospective injunctive relief against state officers. Or, if concurrent jurisdiction exists, plaintiffs should avoid the federal forum altogether and bring a separate suit in state court on the same cause of action which can include requests for damages against the state itself. Furthermore, citizens contemplating lawsuits against states in federal court, to enforce federal statutory rights, must make the same choices as existing litigants.

Time is of the essence. Both the federal practitioner and Congress should act promptly and wisely to avoid complete unenforcibility of federal law claimed by citizens to have been violated by state government.

VIII. Federal and State Charts

The two charts found in the Appendix display a variety of useful information. The Federal Chart focuses on significant federal statutes allowing citizen suits, including "pertinent language" extracts and references to statutes of limitation. The State Chart deals exclusively with language purporting to waive state sovereign immunity, either in constitutions or legislative enactments.

The first chart lists 28 federal acts which currently authorize citizen suits against state defendants in federal courts.[182] For each one, the chart makes reference to a particular statutory section

182. This list is selective and does not include all statutes authorizing citizens suits.

which indicates the application to the states. In some cases, an act is applicable to the states by virtue of the fact that "person" is defined to include "state" within the meaning of the statute. In others, an act is applicable because it authorizes federal funding be made available to the states.

The chart includes a section for statutes of limitation which exist for some of the federal acts. This section is included as a reminder that if a claim is dismissed from federal court because of the Eleventh Amendment, plaintiff may be able to file the action in state court, provided the statute authorizes concurrent jurisdiction and plaintiff's claim is not barred by the statute of limitations, or refile in federal court requesting prospective injunctive relief against offending state officials.

Also contained within the chart are those provisions of the various acts which specifically authorize citizen suits and U.S. Attorney General actions. Included under the heading of "Proper Plaintiff - U.S." are those statutory sections authorizing the U.S. Attorney General to intervene in a citizen suit.[183] The availability of attorney general action is noted in the chart for the purpose of showing that federal acts do remain enforceable, even if citizen suits are subject to dismissal,[184] provided the Attorney General can be convinced to sue.

The proper court in which to bring the action is found under the heading of "Adjudicative Forum." A majority of the acts specify federal district court as the proper forum, however, some of them allow concurrent jurisdiction in state court.[185]

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183. Several federal statutes provide only for Attorney General actions for enforcement purposes. *See* for example, Job Training Partnership Act, 29 U.S.C. § 1501 et. seq. (1982); Maternal and Child Health Services Block Grant Act, 42 U.S.C. § 701 et. seq. (1982), and the Urban Mass Transp. Act, 49 U.S.C. § 1601 et. seq. (1982).

184. Potential or actual Attorney General intervention would not prevent a citizen suit against a state defendant from being dismissed in federal court. Indeed, even if the federal government were a co-plaintiff, the citizen suit would be subject to dismissal. *See Pennhurst*, 465 U.S. at 103 n.12, where the majority says that the presence of the United States in any case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that injunctive relief could be awarded to the U.S. on a federal constitutional claim would not in turn allow a federal court to order the State defendant to pay damages to other plaintiffs.

185. *See Atascadero*, 105 S. Ct. at 3154, where Justice Brennan in his dissent describes the function of federal courts as one of providing "a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land."

The chart also sets out the various remedies available under the statutes. Damages and equitable relief have been separated into different categories due to the important distinction between these two remedies with regard to suits against state officials.[186]

Importantly, the relevant existing enforcement language for these federal acts is included. Excerpted is the specific language which authorizes citizen suits against state defendants in federal court. This information will allow the reader to judge whether the statute is sufficient under *Atascadero* requiring "unmistakable language" in order for there to be effective congressional abrogation of a state's Eleventh Amendment immunity.

The second chart lists sovereign immunity provisions currently in existence for the 50 states. Of particular importance are the various waiver provisions contained in the state constitutions and state statutes.[187] For each state, a case in which the particular state was a defendant in a suit brought in federal court is shown and whether the suit was dismissed or allowed.

NOTE

The Federal Charts contain thirteen columns which have been divided into two pages. They are to be read from left to right, beginning on the even-numbered page, with a continuation of the chart on the odd-numbered page (follow the arrow). The State Charts, however, are single page presentations.

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186. Damages are not recoverable from a state official if they are to be paid out of the state's treasury. Injunctive relief against a state official is allowed because it does not impact upon the state treasury. However, even injunctive relief may be disallowed against the state official where the state is the real, substantial party in interest. *See supra* note 44 and accompanying text.

187. These provisions were discovered by an examination of the 50 state statutory indices under the headings of "sovereign immunity," "actions against the state," and "claims against the state." Only the most relevant provisions for each state are listed in the chart.

IX. Appendix

Federal Charts

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff Private	Proper Plaintiff U.S.
1	Age Discrimination Act	42 U.S.C. 6101-6107	Prohibits discrimination on the basis of age in programs receiving Federal financial assistance.	42 U.S.C. 6102 ". . . no person . . . shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."		42 U.S.C. 6104 (e)(1)	
2	Age Discrimination In Employment Act	29 U.S.C. 621-634	Promote employment of older persons based on ability rather than age. Prohibits arbitrary age discrimination in employment.	29 U.S.C. 623(a) "It shall be unlawful for an employer . . ." 29 U.S.C. 630(b) "employer" includes "State or political subdivision of a State. . ."	29 U.S.C. 626(e) 29 U.S.C. 255 (for actions accruing after May 14, 1947: 1) 2yrs. 2) 3yrs. for willful violations)	29 U.S.C. 216(b) 29 U.S.C. 626(c)(1)	29 U.S.C. 216(b)(c) 29 U.S.C. 626(c)(1)
3	Bankruptcy Reform Act of 1978 (Chapter I- General Provisions)	11 U.S.C. 101-109	Provides the procedures for bankruptcy.	11 U.S.C. 101(24) Defines "governmental unit" to include a "state."	11 U.S.C. 108	11 U.S.C. 106	11 U.S.C. 106
4	Civil Rights Act of 1964 (Subchapter II - Public Accommodations)	42 U.S.C. 2000a et. seq.	Insures equal access to public accommodations.	42 U.S.C. 2000a Prohibits discrimination or segregation in places of public accommodation.		42 U.S.C. 2000a-3(a)	42 U.S.C. 2000a-3(a) 2000a-5
5	Civil Rights Act of 1964 (Subchapter III Public Facilities)	42 U.S.C. 2000b et. seq	Insure equal utilization of public facilities owned, operated or managed by the States.	42 U.S.C. 2000b Authorizes actions against the states for discrimination in the use of public facilities.		42 U.S.C. 2000b-2	42 U.S.C. 2000b

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	Enforcement Language
1	42 U.S.C 6104(e)(1)			42 U.S.C. 6104(e)(1)	42 U.S.C. 6104 (e)(1) (costs & attorney fees)	"When any interested person brings an action in any United States district court . . . to enjoin a violation of this Act by any program or activity receiving Federal financial assistance. . . ." 42 U.S.C. 6104(e)(1).
2	29 U.S.C. 217	29 U.S.C. 216(b)(c) 29 U.S.C. 626(c)(1)	29 U.S.C. 216(b)(c) 29 U.S.C. 626(b) 626(c)(1)	29 U.S.C. 216(b) 217 29 U.S.C. 626(b) 626(c)(1)	29 U.S.C. 216(b) (costs & attorney fees)	"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief. . . ." 29 U.S.C. 626(c)(1) "An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. 216(b)
3	11 U.S.C. 105 (bankruptcy court)				11 U.S.C. 106 (claim against bankruptcy estate)	"A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose." 11 U.S.C. 106
4	42 U.S.C. 2000a-6(a)			42 U.S.C. 2000a-3(a) 2000a-5	42 U.S.C. 2000a-3(b) (costs & attorney fees)	". . . a civil action for preventive relief . . . may be instituted by the person aggrieved." 42 U.S.C. 2000a-3(a) "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter. . . ." 42 U.S.C. 2000a-6
5	42 U.S.C. 2000b	42 U.S.C. 2000b-2			42 U.S.C. 2000b (such relief as may be appropriate) 2000b-2 2000b-1 (costs & attorney fees)	"Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this subchapter." 42 U.S.C. 2000b-2

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff → Private	U.S.
6	Civil Rights Act of 1964 (Subchapter IV-Public Education)	42 U.S.C. 2000c et. seq.	Desegregation of public schools owned, operated or managed by the states.	42 U.S.C. 2000c-2 Authorizes technical assistance to aid in the desegregation of public schools.		42 U.S.C. 2000c-8	42 U.S.C. 2000c-6
7	Clean Air Act (Subchapter III-General Provisions)	42 U.S.C. 7401 et. seq.	Protect and enhance the quality of the nation's air resources.	42 U.S.C. 7405 Authorizes grants to states for development of air pollution control programs.		42 U.S.C. 7604(a)	42 U.S.C. 7603(a) 7604(c)
8	Deepwater Port Act of 1974	33 U.S.C. 1501-1524	Protect marine and coastal environment in the development of deepwater ports.	33 U.S.C 1502(15) Defines "person" to include a "governmental entity."		33 U.SC. 1515(a)	33 U.S.C. 1514(b)(c) 1515(c)
9	Education of the Handicapped Act	20 U.S.C. 1401 et. seq.	Ensures that all handicapped children have a free, appropriate public education.	20 U.S.C. 1411 Financial allocations to the states. 20 U.S.C. 1415 Requires state educational agencies to establish and maintain procedural safeguards.	Appropriate state limitations period. *See* e.g. *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D.C. Neb. 1980)	20 U.S.C. 1415(e)(2)	
10	Endangered Species Act	16 U.S.C. 1531 et. seq.	Provides a means to conserve endangered species.	16 U.S.C. 1532(13) "Person" includes officer, employee, agent, department, or instrumentality of any state.		16 U.S.C. 1540(g)	16 U.S.C. 1540(e)(6) 1540(g)(3)(B)

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	Enforcement Language
6	42 U.S.C. 2000c-6	42 U.S.C. 2000c-8			42 U.S.C. 2000c-6 (such relief as may be appropriate) 2000c-7 2000c-8	"Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education." 42 U.S.C. 2000c-8
7	42 U.S.C. 7604(a) 7603(a)		42 U.S.C. 7604(a)	42 U.S.C. 7603(a) 7604(a)	42 U.S.C. 7604(d) (costs)	". . . any person may commence a civil action . . . against any person (including . . . any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of . . . this chapter. . . ." "The district courts shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties. . . ." 42 U.S.C. 7604(a)
8	33 U.S.C. 1514(b)(c) 1515(a)			33 U.S.C. 1514(c) 1515(a)	42 U.S.C. 1514(b)(3) (civil penalties) 1515(d) (costs, attorney fees, witness fees)	". . . any person may commence a civil action for equitable relief . . . against any person (including . . . any other governmental instrumentality to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any provision of this chapter or any condition of a license issued pursuant to this chapter. . . ." 33 U.S.C. 1515(a) ". . . the district court shall have jurisdiction. . . ." 33 U.S.C. 1515(a)
9		20 U.S.C. 1415(e)(2) & (4)			20 U.S.C. 1415(e)(2) ("Such relief as the court determines is appropriate.")	". . . any party aggrieved . . . shall have the right to bring a civil action . . . which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." 20 U.S.C. 1415(e)(2).
10	16 U.S.C. 1540(c) 1540(g)(1)			16 U.S.C. 1540(e)(6) 1540(g)(l)(A)		". . . any person may commence a civil suit . . . to enjoin any person, including . . . any other governmental instrumentality or agency (to the extent permitted by the Eleventh Amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. . . ." 16 U.S.C. 1540(g)(l)(A)

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff Private	Proper Plaintiff U.S.
11	Equal Credit Opportunity Act	15 U.S.C. 1691-1691f	Prohibits discrimination against any applicant with respect to credit transactions.	15 U.S.C. 1691a(f) Defines "person" to include "government." 15 U.S.C. 1691a(e) Term "creditor" means "person."	15 U.S.C. 1691e(f) (2 years from occurrence of the violation).	15 U.S.C. 1691e	15 U.S.C. 1691e(h)
12	Equal Educational Opportunities Act of 1974	20 U.S.C. 1701-1758	Promotes equal educational opportunity without regard to race, color, sex or national origin.	20 U.S.C. 1703 "No state shall deny equal educational opportunity to an individual . . ."		20 U.S.C. 1706	20 U.S.C. 1706 1709 1710
13	Equal Employment Opportunity Act of 1972 (Title VII - Civil Rights Act of 1964)	42 U.S.C. 2000e et. seq.	Promotes non-discriminatory employment practices; outlaws discriminatory employment practices.	42 U.S.C. 2000e(a) Term "person" includes "governments," "governmental agencies," "political subdivisions."	42 U.S.C. 2000e-5(e) (Charge must be filed within 180 days after unlawful employment practice).	42 U.S.C. 2000e-5 (f)(1)	42 U.S.C. 2000e-5 (f)(1) 2000e-6(a)
14	Fair Labor Standards Act of 1938	29 U.S.C. 201 et. seq.	Promotes and maintains the minimum standard of living necessary for health, efficiency, and general well-being of workers.	29 U.S.C. 203(d) Defines "employer" to include a "public agency" 29 U.S.C. 203(x) Defines "public agency" to include the government or agency of a state.	29 U.S.C. 255 (for actions accruing after May 14, 1947: 1) 2 yrs. 2) 3 yrs. for willful violations).	29 U.S.C. 216(b)	29 U.S.C. (b) and (c) 29 U.S.C. 217

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	ENFORCEMENT LANGUAGE
11	15 U.S.C. 1691e(h)	15 U.S.C. 1691e(c) 1691e(f)	15 U.S.C. 1691e(a)	15 U.S.C. 1691e(c)	15 U.S.C. 1691e(d) (costs and attorney fees).	"Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction." 15 U.S.C. 1691e(f).
12	20 U.S.C. 1706 1708				20 U.S.C. 1706 (such relief as may be appropriate). 1712 1713 (including busing).	"An individual denied an equal educational opportunity as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate." 20 U.S.C. 1706
13	42 U.S.C. 2000e-5(f)(1) and (3) 2000e-6(a)		42 U.S.C. 2000e-5(g)	42 U.S.C. 2000e-5(a) 2000e-5(f) (2) 2000e-5(g)	42 U.S.C. 2000e-5(k) (costs and attorney fees) 2000e-6(a) (AG may seek such relief as he deems necessary).	"The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission [Equal Employment Opportunity Commission] or the Attorney General in a case involving a government, governmental agency, or political subdivision." Provided that certain conditions are met, ". . . a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ." 42 U.S.C. 2000e-5(f)(1) "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." 2000e-5(f)(3)
14	29 U.S.C. 217	29 U.S.C. 216(b)&(c)	29 U.S.C. 216(b)&(c)	29 U.S.C. 216(b) 29 U.S.C. 217	29 U.S.C. 216(b) (costs and attorney fees).	"An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. 216(b)

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff → Private	U.S.
15	Federal Water Pollution Control Act	33 U.S.C. 1251 et. seq.	Restore and maintain the chemical, physical and biological integrity of the nation's waters.	33 U.S.C. 1251(b) Policy of Act is to provide Federal technical services and financial aid to the states.		33 U.S.C. 1365(a)	33 U.S.C. 1319(b) 1365(c)(2)
16	Marine Protection Research and Sancturaries Act of 1972	33 U.S.C. 1401 et. seq.	Regulates dumping of materials into ocean waters.	33 U.S.C. 1402(e) Defines "person" to include state government.		33 U.S.C. 1415(g)(1)	33 U.S.C. 1415 (a)(d) 1415 (g)(3)(B)
17	Money and Finance (Revenue Sharing)	31 U.S.C. 6701 et. seq.	Revenue sharing with the states.	31 U.S.C. 6702 Authorizes that each State government shall be paid an amount equal to any allocation made for each entitlement period.		31 U.S.C. 6721(a)	31 U.S.C. 6720 6721(d)
18	Noise Control Act of 1972	42 U.S.C. 4901-4918	Promotes an environment for all Americans free from noise that jeopardizes their health and welfare.	42 U.S.C. 4902(2) Term "person" includes any officer, employee, department, agency, or instrumentality of a state.		42 U.S.C. 4911(a)	42 U.S.C. 4910(c)

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	Enforcement Language
15	33 U.S.C. 1319(b) 1365(a)		33 U.S.C. 1365(a) 1319(d)	33 U.S.C. 1319(b) 1365(a)	33 U.S.C. 1319(b) ("Appropriate relief"). 1365(d) (costs).	". . . any citizen may commence a civil action . . . against any person (including . . . any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of . . . this chapter. . . ." 33 U.S.C. 1365(a)(1) "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties. . . ." 33 U.S.C. 1365(a)
16	33 U.S.C. 1415(a) and (d) 1415(g)(1)			33 U.S.C. 1415(d) 1415(g)(1)	33 U.S.C. 1415(a) (AG may commence action for "such relief as may be appropriate"). 1415(g)(4) (costs).	". . . any person may commence a civil suit . . . to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of . . . this subchapter. The district courts shall have jurisdiction. . . ." 33 U.S.C. 1415(g)(1)
17	31 U.S.C. 6720	31 U.S.C. 6721(a)		31 U.S.C. 6720(3) 6721(c)(1)	31 U.S.C. 6721(c)(2) (attorney fees).	"When a State government . . . engages in a practice prohibited by this chapter a person adversely affected by the practice may bring a civil action in an appropriate district court of the United States or a State court of general jurisdiction." 31 U.S.C. 6721(a)
18	42 U.S.C. 4910(c) 4911(a)		42 U.S.C. 4911(a)	42 U.S.C. 4910(c) 4911(a)	42 U.S.C. 4911(d) (costs including attorney fees).	". . . any person (other than the United States) may commence a civil action . . . against any person (including . . . any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of *any noise control requirement*. . . ." 42 U.S.C. 4911(a) "The district courts shall have jurisdiction, without regard to the amount in controversy, to restrain such person from violating such noise control requirement. . . ." 42 U.S.C. 4911(a)

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff → Private	U.S.
19	Outer Continental Shelf Lands Act	43 U.S.C. 1331 et. seq.	Protection of submerged lands.	43 U.S.C. 1331(d) Term "person" includes a state.	Appropriate State limitations period *Bonner v. Chevron USA Inc.* 512 F. Supp. 1313 (D.C. Miss. 1981).	43 U.S.C. 1349(a)(1) 1352(f)	43 U.S.C. 1349(a)(4) 1350(a)
20	Public Works Employment Act of 1976	42 U.S.C. 6701 et. seq.	Federal assistance to state and local governments in order to stimulate economic recovery.	42 U.S.C. 6722(a) Authorizes payments to be made to the states.		42 U.S.C. 6727(b) 31 U.S.C. 6721(a)	42 U.S.C. 6727(b) 31 U.S.C. 6720 6721(d)

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	Enforcement Language
19	43 U.S.C. 1349(b) 1350(a) 1352(f)		43 U.S.C. 1349(a)(1) 1352(f)	43 U.S.C. 1349(a)(1) 1350(a)	43 U.S.C. 1349(a)(5) (costs)	". . . any person having a valid legal interest which is or may be adversely affected may commence a civil action . . . to compel compliance with this subchapter against any person including . . . any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation . . . of this subchapter. . . ." 43 U.S.C. 1349(a)(1) ". . . the district courts of the United States shall have jurisdiction. . . ." 43 U.S.C 1349(b)(1) ". . . any person . . . may commence a civil action for damages in the appropriate district court of the United States against the Federal Government or such state, as the case may be." 43 U.S.C. 1352(f)(1) "In any action commenced against . . . a State . . . such State . . . may not raise as a defense . . . any claim of sovereign immunity. . . ." 43 U.S.C. 1352(f)(2)
20	31 U.S.C. 6720	31 U.S.C. 6721(a)		31 U.S.C. 6720 6721(c)(1)	31 U.S.C. 6721(c)(2) (attorney fees)	"Any person aggrieved by a violation of subsection (a) of this section shall have the same rights and remedies as a person aggrieved by a violation of section 6716(a)-(c) of Title 31 including the rights provided under section 6721(d) of Title 31." 42 U.S.C. 6727(b) "When a state government . . . engages in a practice prohibited by this chapter [discrimination], a person adversely affected by the practice may bring a civil action in an appropriate district court of the United States or a State court of general jurisdiction." 31 U.S.C. 6721(a)

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff → Private	U.S.
21	Rehabilitation Act of 1973	29 U.S.C. 701 et. seq.	Develops and implements programs of vocational rehabilitation. Prohibits discrimination on basis of qualified handicap in programs receiving federal financial assistance.	29 U.S.C. 707 Allots percentage of federal funds to the states.		29 U.S.C. 794a 42 U.S.C. 2000e-5 (f)(1)	29 U.S.C. 794a 42 U.S.C. 2000e-5 (f)(1)
22	Resource Conservation and Recovery Act of 1976 and Solid Waste Disposal Act	42 U.S.C. 6901 et. seq.	Promotes the protection of health and the environment and to conserve valuable material and energy resources. Provide technical and financial assistance to states in order to promote solid waste management.	42 U.S.C. 6903(15) Term "person" includes a state.		42 U.S.C. 6972(a)(1)	42 U.S.C. 6928(a) 6972(d)

→	Adjudicative Forum		Remedies			
		(Fed. & State Ct.)				
No.	Fed. Dist. Ct.	Concurrent	Damages	Equity	Other	Enforcement Language
21	29 U.S.C. 794a 42 U.S.C. 2000e-5 (f)(1) and (3)		29 U.S.C. 794a 42 U.S.C. 2000e-5(g)	29 U.S.C. 794a 42 U.S.C. 2000e-5 (f)(2) 2000e-5(g)	29 U.S.C. 794a (b) 42 U.S.C. 2000e-5(k) (costs and attorney fees).	"The remedies, procedures, and rights set forth in . . . the Civil Rights Act of 1964, including . . . (42 U.S.C. Sec. 2000e-5(f) through (k)), shall be available with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take a final action on such complaint." 29 U.S.C. 794a(a)(1) *See* 42 U.S.C. 2000e-5(f)(1) Equal Employment Opportunity Act of 1972 *supra*. "The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. Sec. 2000d et. seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or federal provider of assistance under section 794 of this title." 29 U.S.C. 794a(a)(2) "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any activity or program receiving Federal financial assistance." 42 U.S.C. 2000d - Judicially established private cause of action. *See generally* 525 F. Supp. 678 (D.C. N.Y. 1981)
22	42 U.S.C. 6928(a) 6972(a)		42 U.S.C. 6972(a)(1)	42 U.S.C. 6928(a) 6972(a)(1)	42 U.S.C. 6928(a) ("such relief as may be appropriate.") 6972(e) (costs)	". . . any person may commence a civil action . . . against any person (including . . . any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of . . . this chapter. 42 U.S.C. 6972(a)(1) "Any action . . . shall be brought in the district court for the district in which the alleged violation occurred. . . ." 42 U.S.C. 6972(a)

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff → Private	U.S.
23	Securities Act of 1933	15 U.S.C. 77a et. seq.	Protection of investors.	15 U.S.C. 77b(2) Defines "persons" to include a "government."	15 U.S.C. 77m	15 U.S.C. 77k 77l	15 U.S.C. 77t
24	Securities Exchange Act of 1934	15 U.S.C. 78a et. seq.	Regulation and control of over-the-counter market securities in order to protect the security holder.	15 U.S.C. 78c(9) Defines "person" to include "government" and "agency" and "instrumentality" thereof.	15 U.S.C. 78i(e) 78r(c) (within 1 yr. after discovery of violation or within 3 yrs. after the violation occurred).	15 U.S.C. 78i(e) 78r(a)	15 U.S.C. 78u
25	Surface Mining Control and Reclamation Act of 1977	30 U.S.C. 1201 et. seq.	Establishes a nationwide program to protect society and the environment from the adverse effects of surface coal mining and reclamation operations.	30 U.S.C. 1253 Authorizes the states to make programs regulating surface coal mining and reclamation operations.		30 U.S.C. 1270(a)(1)	30 U.S.C. 1268(d) 1270(c)(2) 1271(c)

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	Enforcement Language
23	15 U.S.C. 77t	15 U.S.C. 77k 77l 77v	15 U.S.C. 77k 77l	15 U.S.C. 77k 77l	15 U.S.C. 77k(e) (costs and attorney fees).	"In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue . . . every person. . . ." 15 U.S.C. 77k(a) "Any person . . . shall be liable to the person purchasing such security from him, who may sue either in law or equity in any court of competent jurisdiction . . ." 15 U.S.C. 77l
24	15 U.S.C. 78u 78aa			15 U.S.C. 78i(e) 78r(a) and 78u(d)(e) 78u(d) and (e)	15 U.S.C. 78i(e) 78r(a) (costs and attorney fees).	"Any person who willfully participates in any act or transaction in violation . . . of this section, shall be liable . . . and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction." 15 U.S.C. 78i(e) "A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction." 15 U.S.C. 78r(a)
25	30 U.S.C. 1270(a) 1271(c) 1268(d)		30 U.S.C. 1270(a)	30 U.S.C. 1270(a) 1271(c)	30 U.S.C. 1268(d) (civil penalties) 1270(d) (costs) 1271(c) (appropriate order).	". . . any person having an interest which is or may be adversely affected may commence a civil action . . . against any other governmental instrumentality to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter. . . ." 30 U.S.C. 1270(a)(1) "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of parties." 30 U.S.C. 1270(a)

No.	Popular Name	Title U.S.C	Legislative Objective	Application to States	Statute of Limitations	Proper Plaintiff → Private	U.S.
26	Toxic Substances Control Act	15 U.S.C. 2601-2629	Regulates chemical substances which present unreasonable risk of injury.	15 U.S.C. 2619(a)(1) Allows suits against governmental instrumentalities to the extent permitted by the eleventh amendment.		15 U.S.C. 2619(a)(1), 2616	15 U.S.C. 2616 2622(d) 2620 2619(b)(1)(B), 2619(c)
27	Vietnam Era Veterans Readjustment Assistance Act of 1974	38 U.S.C. 2021 et. seq.	Protects the benefits and establishes the rights to reimbursement of inducted persons.	38 U.S.C. 2022 Refers to a "state" as an employer.		38 U.S.C. 2022	38 U.S.C. 2022

→	Adjudicative Forum		Remedies			
No.	Fed. Dist. Ct.	(Fed. & State Ct.) Concurrent	Damages	Equity	Other	Enforcement Language
26	15 U.S.C. 2616(a)(1) 2619(a) 2622(d)		15 U.S.C. 2619(a)(1) 2622(d)	15 U.S.C. 2616(a) 2622(d)	15 U.S.C. 2619(c)(2) (costs and attorney fees) 2622 ("all appropriate relief.")	". . . any person may commence a civil action . . . against any person (including . . . any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of this chapter. . . ." 15 U.S.C. 2619(a)(1)
27	38 U.S.C. 2022		38 U.S.C. 2022	38 U.S.C. 2022		". . . the district court of the United States for any district . . . in which such State . . . exercises authority or carriers [sic] out its functions, shall have the power, . . . to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. 2022

State Charts

I. STATES WITH SPECIFIC NON-WAIVER PROVISIONS

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
FLORIDA	FLA CONST. Art X, Sec. 13 Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.	FLA. STAT. ANN. Sec. 768.28(15) (West Supp. 1985) *Tort Claims —* No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.	*Tuveson v. Florida Governor's Council on Indian Affairs, Inc.* 734 F.2d 730 (11th Circ. 1984) *Held*: State's waiver of its sovereign immunity does not waive its constitutional eleventh amendment immunity to suits in federal court.
MAINE		ME. REV. STAT. ANN. Tit. 14, Sec. 8118 (1964) *Tort Claims —* Nothing in this chapter or any other provision of state law shall be construed to waive the rights and protections of the State under the eleventh amendment of the United States Constitution, except where such waiver is explicitly stated by law and actions against the State for damages shall only be brought in the courts of the State in accordance with this chapter.	*Westberry v. Fisher* 309 F. Supp. 12 (D.C. Me. 1970) *Held*: Suit against state could not be maintained in federal district court for want of jurisdiction in that under eleventh amendment state is immune from federal court suits for damages brought by state's own citizens.
MISSISSIPPI		MISS. CODE ANN. Sec. 11-46-5(4) (Supp. 1985) *Tort Claims —* Nothing contained in this chapter shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.	*Karpovs v. State of Mississippi* 663 F.2d 640 (5th Circ. 1981) *Held*: (1) Congress did not abrogate Mississippi's sovereign immunity through enactment of the Bridge Act of 1906 and the Rivers and Harbors Appropriations Act; (2) state did not waive sovereign immunity by purchase of fidelity bonds.
NEVADA		NEV. REV. STAT. Sec 41.031(3) (1985) *Actions in General —* The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.	*Ginter v. State Bar of Nevada* 625 F.2d 829 (9th Circ. 1980) *Held*: Nevada State Bar Association, as arm of state, is not subject to suit under eleventh amendment.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
OKLAHOMA		OKLA. STAT. Tit. 51, Sec. 152.1(B) (Supp. 1985) *Tort Claims —* The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.	*Summers v. Civis* 420 F.Supp. 993 (D.C. Okla. 1976). *Held*: Immunity provided by eleventh amendment extended not to high school teachers but only to school board as agency and instrumentality of the state and which was not waived by statute.
PENNSYLVANIA	PA. CONST. Art. I, Sec. 11 Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.	PA. STAT. ANN. Tit. 42, Sec. 8521(b) (Purdon 1982) *Actions in General —* Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal court guaranteed by the Eleventh Amendment to the Constitution of the United States.	*Pennhurst State School and Hospital v. Halderman* — U.S. — (1984) *Held*: See text

II. STATES WITH GENERAL NON-WAIVER PROVISIONS

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
ALABAMA	ALA. CONST. Art. 1, Sec. 14 That the State of Alabama shall never be made a defendant in any court of law or equity.		*Williams v. Bennett* 689 F.2d 1370 (11th Circ. 1982) *Held*: Board of Corrections and its officials could invoke the eleventh amendment so as to render them immune from suit in their official capacity.
ARIZONA	ARIZ. CONST. Art. 4, Prt. 2, Sec. 18 The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.	ARIZ. REV. STAT. ANN. Sec. 12-820.01 (Supp. 1985) *Actions in General —* A. A public entity shall not be liable for acts and omissions of its employees constituting: 1. The exercise of a judicial or legislative function; or 2. The exercise of an administrative function involving the determination of fundamental governmental policy.	*Markowitz v. U.S.* 650 F.2d 205 (9th Circ. 1981) *Held*: Arizona had not waived its eleventh amendment immunity from tort suit in federal court.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
ARKANSAS	ARK. CONST. Art. 5, Sec. 20 The State of Arkansas shall never be made defendant in any of her courts.		*Hutto v. Finney* 437 U.S. 678 (1978) *Held*: Congress, when it passed the Civil Rights Attorney's Fees Award Act of 1976, intended to exercise the power to set aside the states' immunity from retroactive relief in order to enforce the fourteenth amendment and to authorize fee awards payable by the states when state officials are sued in their official capacities.
GEORGIA	GA. CONST. Art. I, Sec. 2, Paragraph 9(a) No waiver of sovereign immunity shall be construed as a waiver of any immunity provided to the state or its departments and agencies by the United States Constitution.	GA CODE ANN. Sec. 50-21-1(a)(b) (Supp. 1985) *Actions Ex Contractu* — The defense of sovereign immunity is waived as to any action ex contractu for the breach of any written contract existing on April 12, 1982, or thereafter entered into by the state, departments and agencies of the state, and state authorities. Venue with respect to any such action shall be proper in the Superior Court of Fulton County, Georgia. . . .	*Intracoastal Transportation Inc. v. Decatur County, Georgia* 482 F.2d 361 (5th Circ. 1973) *Held*: Even if Georgia subjected itself to overlordship of the United States when it entered federally regulated activity, Georgia did not thereby subject itself to suits by private parties.
IDAHO		IDAHO CODE Sec. 6-903(f) (Supp. 1984) *Tort Claims* — Nothing in this act shall enlarge or otherwise adversely affect the liability of an employee or a governmental entity. Any immunity or other bar to a civil lawsuit under Idaho or federal law shall remain in effect.	*Hickman v. Idaho State School and Hospital* 339 F.Supp. 463 (D.C. Idaho 1972) *Held*: Establishment of Idaho Personnel Commission was clear expression by Idaho Legislature that it has not waived its eleventh amendment right to immunity from suit in federal courts based on Fair Labor Standards Act.
KANSAS		KAN. STAT. ANN. Sec. 75-418 (1977) *Actions in General* — Nothing contained in this act shall in any manner constitute or be deemed to waive any immunities from service or suit now existing in or to the state of Kansas, or any board, commission, department or agency thereof.	*Brennan v. University of Kansas* 451 F.2d 1287 (10th Circ. 1971). *Held*: University of Kansas and the university press function as arms or alter egos of the state and are immune from suit in federal court without a clear consent by the state.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
KENTUCKY	KY. CONST. Sec. 231 The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.		*Crutcher v. Commonwealth of Kentucky* 495 F.Supp. 601 (D.C. Ky. 1980) *Held*: (1) Participation of state in program supported in part by federal funds did not constitute waiver of eleventh amendment where state had not explicitly consented to suit; (2) eleventh amendment barred any retroactive money award against governor in his official capacity, however, prospective injunctive relief was not forbidden.
NEW JERSEY		N.J. REV. STAT. Sec. 59:2-1 (1982) *Tort Claims —* Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.	*Ritchie v. Cahall* 386 F.Supp. 1207 (N.J. 1974) *Held*: New Jersey Tort Claims Act does not impair immunity granted by eleventh amendment and eleventh amendment barred third-party action, in absence of state's waiver of sovereign immunity.
NEW MEXICO		N.M. STAT. ANN. Sec. 42-11-1 (Supp. 1985) *Actions Relating to Property —* The state of New Mexico and its political subdivisions or any of their branches, agencies, departments, boards, commissions, instrumentalities or institutions are granted immunity from and may not be named a defendant in any suit, action, case or legal proceeding involving a claim of title to or interest in real property except as specifically authorized by law.	*Gallagher v. Evans* 536 F.2d 899 (10th Circ. 1976) *Held*: Claim to recover filing fees paid for political offices not barred by eleventh amendment where fees did not go to the state.
NORTH DAKOTA		N.D. CENT. CODE Sec. 32-12.1-03. (4) (Supp. 1980) *Liability of Political Subdivisions —* The sovereign immunity of the state is not waived in any manner by this chapter, and this chapter shall not be construed to abrogate the immunity of the state.	*Burlington Northern Inc. v. State of North Dakota* 460 F.Supp. 140 (D.C. N.D. 1978) *Held*: North Dakota's waiver of sovereign immunity with respect to actions brought in state court against State Mill and Elevator Association did not amount to consent to be sued in federal court.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
TENNESSEE		TENN. CODE ANN. Sec. 20-13-102(a) (1980) *Actions in General* — No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.	*Hill v. U.S.* 453 F.2d 839 (6th Circ. 1972) *Held*: U.S. could not recover contribution from state where only remedy victim would have had against state would have been claim before State Board of Claims.
UTAH		UTAH CODE ANN. Sec. 63-30-3 (Supp. 1985) *Actions in General* Except as may be otherwise provided in this act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities. UTAH CODE ANN. Sec. 63-30-4(2) (Supp. 1985) *Actions in General* — Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law. UTAH CODE ANN. Sec. 63-30-16 (Supp. 1985) *Actions in General* — The district courts shall have exclusive original jurisdiction over any action brought under this *chapter*, and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this *chapter*.	*Harris v. Tooele County School District* 471 F.2d 218 (10th Circ. 1973) *Held*: Neither school district nor state had waived its immunity from suit.
WEST VIRGINIA	W. VA. CONST. Art. 6, Sec. 35 The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.		*U.S. v. West Virginia* 537 F.Supp. 388 (D.C. W. Va. 1982) *Held*: West Virginia's state constitutional immunity from suit did not preclude district court's exercise of jurisdiction over suit brought by U.S.

III. STATES WITH JURISDICTIONAL RESTRICTIONS

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
ALASKA	ALK CONST. Art. II, Sec. 21 The legislature shall establish procedures for suits against the State.	ALASKA STAT., Sec. 09.50.250 (1962) *Actions in General —* A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court.	*State of Alaska v. O/S Lynn Kendall* 310 F. Supp. 433 (D.C. Alk. 1970) *Held*: Fact that Alaska brought a suit against one of its own citizens in federal court did not establish that state had waived its sovereign immunity with respect to defendant's counterclaims, even though there may have been such a waiver with regard to suit in state court.
CONNECTICUT		CONN. GEN. STAT. ANN. Sec. 4-160(a)(b) (Supp. 1985) *Actions in General —* The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. . . . Action shall be brought against the state as party defendant in the judicial district in which the claimant resides or, if the claimant is not a resident of this state, in the judicial district of Hartford-New Britain or in the judicial district in which the claim arose. . . .	*Red Star Towing and Transportation Co. v. State of Connecticut* 431 F. Supp. 1003 (D.C. Conn. 1976) *Held*: Act of state in constructing and maintaining bridge pursuant to authority granted it by federal act did not constitute implied waiver of sovereign immunity under eleventh amendment.
HAWAII		HAWAII REV. STAT. Sec. 662-2 (1976) *Tort Claims —* The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. HAWAII REV. STAT. Sec. 662-3 (Supp. 1984) *Tort Claims —* The circuit courts of the State and, except as otherwise provided by statute or rule, the state district courts shall have original jurisdiction of all tort actions on claims against the State, for money damages accruing on and after July 1, 1957 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the State while acting within the scope of his office or employment.	*In re Holoholo* 512 F. Supp. 889 (D.C. Hawaii 1981) *Held*: State of Hawaii expressly consented to suit in federal court, thereby waiving its eleventh amendment immunity.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
IOWA		IOWA CODE ANN. Sec. 25A.4 (Supp. 1985) *Tort Claims —* The district court of the state of Iowa for the district in which the plaintiff is resident or in which the act or omission complained of occurred, or where the act or omission occurred outside of Iowa and the plaintiff is a nonresident, the Polk county district court has exclusive jurisdiction to hear, determine, and render judgment on any suit or claim as defined in this chapter. The state shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the state shall not be liable for interest prior to judgment or for punitive damages.	*Chicago and Northwestern Transportation Company v. Hurst Excavating Inc.* 498 F. Supp. 1 (D.C. Iowa 1978) *Held*: eleventh amendment did not limit (federal) district court's power to exercise pendent or ancillary jurisdiction over contractual claim against state for indemnity and contribution.
MARYLAND		MD. STATE GOV'T CODE ANN. Sec. 12-104(a) (Supp. 1985) *Tort Claims —* Subject to the exclusions and limitations in this subtitle, the immunity of the State and of its units is waived as to a tort action, in a court of the State, to the extent of insurance coverage under Article 95, Sec. 27(d) of the Code.	*Friendship Villa-Clinton Inc. v. Buck* 512 F. Supp. 720 (D.C. Md. 1981) *Held*: Mere fact that state participated in federally-funded aid program such as medicaid did not constitute waiver of eleventh amendment immunity, nor could waiver be inferred from fact that Maryland provided state judicial remedies.
MASSACHUSETTS		MASS. GEN. LAWS ANN. Ch. 258 Sec. 12 (West 1980) *Actions in General —* Claims against the commonwealth, except as otherwise expressly provided in this chapter or by any general or special provision of law, may be enforced in the superior court.	*Massachusetts Hospital Association Inc. v. Harris* 500 F. Supp. 1270 (D.C. Mass. 1980) *Held*: Massachusetts statutes providing for judicial review in state courts did not abrogate eleventh amendment immunity of the Commonwealth in suit brought in federal court.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
OHIO	OHIO CONST. Art. I, Sec. 16 Suits may be brought against the state, in such courts and in such manner, as may be provided by law.	OHIO REV. CODE ANN., Sec. 2743.02(A) (Page 1981) *Actions in General —* The state hereby waives, in exchange for the complainant's waiver of his cause of action against state officers or employees, its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter.	*State of Ohio v. Madeline Marie Nursing Homes* 694 F.2d 449 (6th Cir. 1982) *Held*: Participation in federal medicaid program did not constitute waiver nor did statute by which state waived its immunity and consented to be sued in its court of claims.
VERMONT		VT. STAT. ANN. Tit. 12, Sec. 5601 (1973) *Tort Claims —* The state of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the state while acting within the scope of his office or employment. . . . The county courts of the state shall have exclusive jurisdiction of any actions brought hereunder.	*Turner v. Baxley* 354 F. Supp. 963 (D.C. Vt. 1972) *Held*: Absent an effective waiver of sovereign immunity by the state of Vermont, no jurisdiction resided in federal district court to entertain an action against the state seeking injunctive relief against the Vermont Attorney General.
VIRGINIA		VA. CODE, Sec. 8.01-195.3 (1950) *Tort Claims —* Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982, on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his employment under circumstance where the Commonwealth, if a private person, would be liable to the claimant for such damage, loss, injury or death. . . . VA. CODE, Sec. 8.0-1-195.4 (1950) *Tort Claims —* Original jurisdiction to hear, determine and render judgment on any claim against the Commonwealth cognizable under this article shall be limited to the circuit courts of the Commonwealth.	*Croatan Books Inc. v. Commonwealth of Virginia* 574 F. Supp. 880 (D.C. Va. 1983) *Held*: Commonwealth of Virginia was immune from liability by virtue of eleventh amendment and was not amenable to suit for declaratory judgment.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
WASHINGTON		WASH. REV. CODE ANN. Sec. 4.92.010 (Supp. 1985) *Tort Claims —* Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court. WASH. REV. CODE ANN., Sec. 4.92.090 (Supp. 1985) *Tort Claims —* The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.	*Confederated Tribes of Colville v. State of Wash.* 446 F. Supp. 1339 (D.C. Wash. 1978) *Held*: State of Washington's statutory waiver of immunity to suit does not extend to federal court actions.
WYOMING	WYO. CONST. Art. I, Sec. 8 Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.	WYO STAT. Sec. 1-35-101 (1977) *Actions in General —* Any action permitted by law which is brought against the Wyoming farm loan board, board of land commissioners, state board of charities and reform, public service commission of Wyoming, state board of equalization of Wyoming or the trustees of the University of Wyoming is an action against the state of Wyoming and no action shall be brought against any of such boards, commissions or trustees except in courts of the state of Wyoming, and no action shall be maintained against any of such boards, commissions or trustees in any other jurisdiction.	*Atchison v. Nelson* 460 F. Supp. 1102 (D.C. Wyo. 1978) *Held*: Since defendant state agencies did not waive their eleventh amendment immunity nor consent to suit, claims against state agencies for monetary damages were improper.

IV. STATES WITH NO SPECIFIC PROVISIONS RELATING TO WAIVER

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
INDIANA			*Stanley v. Indiana Civil Rights Commission* 557 F. Supp. 330 (D.C. Ind. 1983) *Held*: Plaintiff's Sec. 1983 claim against Commission was barred by eleventh amendment; also, eleventh amendment barred claim for monetary relief against individual members of Commission under Sec. 1983.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
MICHIGAN			*Weisbord v. Michigan State University* 495 F. Supp. 1347 (D.C. Mich. 1980) *Held*: Plaintiff's attempt to secure money damages or other retrospective relief from university, its board of trustees and president, was precluded by eleventh amendment except insofar as such relief was pursuant to Title VII.
NEW YORK			*Trotman v. Palisades Interstate Park Comm.* 557 F.2d 35 (2nd Circ. 1977) *Held*: Sue-and-be-sued clause in compact creating commission could not be construed as a waiver of eleventh amendment immunity simply because Congress had approved the compact.
NORTH CAROLINA			*Dawkins v. Craig* 483 F.2d 1191 (4th Circ. 1973) *Held*: Mere participation of state in AFDC program did not waive its eleventh amendment immunity.
OREGON			*Southeast Legal Defense Group v. Adams* 436 F. Supp. 891 (D.C. Ore. 1977) *Held*: Congress may, in exercise of its enforcement power under section of fourteenth amendment, authorize an award of attorney's fees against the state without violating the eleventh amendment.

V. STATES WITH GENERAL WAIVER PROVISIONS

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
CALIFORNIA	CALIF. CONST., Art III, Sec. 5 Suits may be brought against the state in such manner and in such courts as shall be directed by law.	CAL. GOV'T CODE Sec. 945 (West 1980) *Actions in General* — A public entity may sue and be sued.	*Yuan Jen Cuk v. Lackner* 448 F. Supp. 4 (D.C. Cal. 1977) *Held*: State statutes and constitutional provisions did not waive state's immunity from suit in federal courts.
COLORADO		COLO. REV. STAT. Sec. 24-10-104(1) (1973) *Tort Claims* — . . . If a public entity provides insurance coverage provided by an insurance company authorized to do business in this state to insure itself against liability for any injury or to insure any of its employees against his liability for any injury resulting from an act or omission by such employee acting within the scope of his employment, then such public entity shall be deemed to have waived the defense of sovereign immunity in any action for damages for any such injury insured against . . . . COLO. REV. STAT., Sec. 24-10-106(1)(1973) *Tort Claims* — A public entity shall be immune from liability in all claims for injury which are actionable in tort except as provided otherwise in this section.	*Verner v. State of Colorado* 533 F. Supp. 1109 (D.C. Colo. 1982) *Held*: Suspended attorney's section 1983 claims against state and its named agencies for damages were barred by the eleventh amendment.
DELAWARE		DEL. CODE ANN. Tit. 18, Sec. 6511 (1974) *Actions in General* — The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.	*Pagano v. Hadley* 535 F. Supp. 92 (D.C. Del. 1982) *Held*: eleventh amendment barred civil rights actions against state and its agents in their official capacities.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
ILLINOIS	ILL. CONST. Art. 13, Sec. 4 Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.	ILL. ANN. STAT. Ch. 48, Sec., 1625 (Smith-Hurd Supp. 1985) Public Labor Relations Act. *Actions in General* — For purposes of this Act, the State of Illinois waives sovereign immunity. ILL. ANN. STAT. Ch. 48, Sec. 1719 (Smith-Hurd Supp. 1985) Educational Labor Relations Act *Actions in General* — For purposes of this Act, the State of Illinois waives sovereign immunity.	*Williamson Towing Co. Inc. v. State of Illinois* 396 F. Supp. 431 (D.C. Ill. 1975) *Held*: Examination of Illinois constitution and Illinois Court of Claims Act failed to reveal any language indicating that Illinois had waived its eleventh amendment protection.
LOUISIANA	LA. CONST. Art. XII, Sec. 10(A)(B) Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.		*Building Engineering Services Co., Inc. v. State of Louisiana* 459 F. Supp. 180 (D.C. La. 1978) *Held*: Louisiana, including its political subdivisions, did not consent to be sued in federal court and in fact limited its waiver of sovereign immunity to suits in state court.
MINNESOTA		MINN. STAT. ANN. Sec. 3.736 (Supp. 1986) *Tort Claims* — The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of any employee of the state while acting within the scope of his office or employment . . . under circumstance where the state, if a private person, would be liable to the claimant.	*Walstad v. University of Minnesota Hospitals* 442 F.2d 634 (8th Circ. 1971) *Held*: University of Minnesota hospitals were immune from suit for failure to accord patient reasonable care and attention.
MISSOURI		MO. ANN. STAT. Sec. 537.600 (Vernon Supp. 1985) *Tort Claims* — Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances: (1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course of their employment; (2) Injuries caused by the condition of a public entity's property	*Complaint of Valley Towing Service* 581 F. Supp. 1287 (D.C. Mo. 1984) *Held*: Missouri Highway and Transportation Commission was immune from suit under eleventh amendment since statutes waiving state's common law sovereign immunity did not serve to waive its immunity to suit in federal court.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
MONTANA	MONT. CONST. Art. II, Sec. 18 The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.	MONT. CODE ANN. Sec. 2-9-102 (1983) *Tort Claims —* Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature under Article II, section 18, of The Constitution of the State of Montana.	*Kenney v. Board of Trustees of Valley County School District* 563 F. Supp. 95 (D.C. Mont. 1983) *Held*: Local school district is a "political subdivision" and not "alter ego" of the state, and thus does not partake of immunity provided the state by the eleventh amendment.
NEBRASKA		NEB. REV. STAT. Sec. 24-319 (1979) *Actions in General —* The several district courts of the judicial districts of the state shall have jurisdiction to hear and determine (1) all claims against the state filed therein . . . . NEB. REV. STAT Sec. 24-324 (1979) *Actions in General —* The state may be sued in the district court of the county wherein the Capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state.	*Board of Regents of the University of Nebraska v. Dawes* 370 F. Supp. 1190 (D.C. Neb. 1974) *Held*: State board of regents did not, by seeking declaratory judgment, consent to be sued by counterclaim under Fair Labor Standards Act.
NEW HAMPSHIRE		N.H. REV. STAT. ANN. Sec. 507-B:5 (1983) *Tort Claims —* No governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute.	*State of New Hampshire v. Mottolo* 605 F. Supp. 898 (D.C. N.H. 1985) *Held*: State, by filing suit as plaintiff, waived its sovereign and eleventh amendment immunity with respect to defendant's purely defensive counterclaim.
RHODE ISLAND		R. I. GEN. LAWS, Sec. 9-31-1 (Supp. 1984) *Tort Claims —* The state of Rhode Island and any political subdivision thereof, including all cities and towns, shall subject to the period of limitations set forth in Sec. 9-1-25, hereby be liable in all actions of tort in the same manner as a private individual or corporation, provided however, that any recovery in any such action shall not exceed the monetary limitations thereof set forth in the chapter	*Marrapese v. State of Rhode Island* 500 F. Supp. 1207 (D.C. R.I. 1980) *Held*: R. I. statute providing for liability of state and political subdivisions in all actions of tort represents waiver of state's eleventh amendment immunity for tort suits in federal court as well as in state court.

STATE	STATE CONSTITUTION	STATUTORY PROVISION	RELEVANT CASE
SOUTH CAROLINA		S.C. CODE ANN. Sec. 6-16-190 (Law Co-op Supp. 1985) *Actions in General —* The General Assembly waives and withdraws from the joint agencies authorized by this chapter their immunity from suit of every kind and description whether the suit is in tort, contract or otherwise when the suits arise out of or are in any way connected with the development, ownership, operation, maintenance or otherwise of a project or the doing, or failure to do, of anything authorized by this chapter.	*U.S. v. State of South Carolina* 445 F. Supp. 1094 (D.C. S.C. 1977) *Held*: Action against state and agencies could not be maintained because of eleventh amendment; prospective injunctive relief against state agency officers was not precluded by Eleventh Amendment.
SOUTH DAKOTA	S.C. CONST. Art. III, Sec. 27 The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.	S.D. CODIFIED LAWS ANN. Sec. 21-32-16 (Supp. 1985) *Actions in General —* To the extent such liability insurance is purchased pursuant to Sec. 21-32-15 and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.	*Schumaker v. Sommer* 386 F. Supp. 618 (D.C. S.D. 1974) *Held*: Where plaintiffs sought to impose personal liability on officials of state highway department and were not seeking money damages from the state and relief sought would not be paid from state treasury, suit was not barred by eleventh amendment.
TEXAS		TEX. CIV. CODE ANN. Sec. 6252-19(4) (Vernon 1970) *Tort Claims —* To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the Legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.	*Keiffer v. Southern Pacific Transportation Co.* 486 F. Supp. 798 (D.C. Tex. 1980) *Held*: Federal district court had ancillary jurisdiction over third party claim under Texas Tort Claims Act where Texas had consented to suit in federal court against the school district.
WISCONSIN	WIS. CONST. Art. 4, Sec. 27 The legislature shall direct by law in what manner and in what courts suits may be brought against the state.	WIS. STAT. ANN. Sec. 775.10 (West 1981) *Actions in General —* The state may be made a party defendant in any action for a declaration of interests under Sec. 841.01 or between other parties, when necessary to the proper determination of their rights. The compaint shall set forth with particularity the nature of the interest or lien of the state. But no judgment for the recovery of money or personal property or costs shall be rendered in any such property or costs shall be rendered in any such action against the state.	*Abraham v. Beatrice Foods Company* 418 F. Supp. 1384 (D.C. Wis. 1976) *Held*: Although for eleventh amendment purposes suit against state agency was a suit against the state, state had waived sovereign immunity.