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Sovereign Immunity--Eleventh Amendment (Matherson v. Long Island State Park Commission

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courts continually strike out at subtle attempts to maintain a segregated society, even when it is camouflaged as a legitimate use of a city's police power. The trend is not to accept seemingly legitimate claims of city governments as valid on their face. The court on its own initiative searches into the depths of the problem to discover the true aim or effect of the zoning ordinance. When, as in *Kennedy*, the court discovers such a severe deficiency of equal protection, it will strike down the ordinance as unconstitutional.

SOVEREIGN IMMUNITY — ELEVENTH AMENDMENT[110]

The Second Circuit in *Matherson v. Long Island State Park Commission*[111] applied the landmark rule of *Ex parte Young*[112] that actions of a state officer may constitute a state action within the meaning of the fourteenth amendment and at the same time be of an individual character with respect to the eleventh amendment.[113] Thus, while the

110 In England the doctrine of sovereign immunity was based on the theory that the "King can do no wrong." But such an explanation has been specifically rejected in the United States. Langford v. United States, 101 U.S. 341, 343 (1879). Mr. Justice Holmes thought the doctrine to be based on "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polybank, 205 U.S. 349, 353, (1907). But this reasoning has now been discredited. For a jurisprudential criticism, see Borchard, *Governmental Responsibility in Tort, V*, 36 YALE L.J. 757 (1927). In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which led to the adoption of the eleventh amendment, a citizen of one state was permitted to maintain a suit against another state. The tenor of the opinion was that the idea of a sovereign has no place in a republican form of government. The states, however, concerned about being forced to pay huge war debts, were more interested in practice than theory, and, as a result, the eleventh amendment was shortly ratified. *See* Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 483-85 (1953).

111 442 F.2d 566 (2d Cir. 1971).

112 209 U.S. 123 (1908). United States v. Lee, 106 U.S. 196 (1882), established that federal officers were not protected by sovereign immunity where there is an unconstitutional deprivation of property. But on similar facts in Malone v. Bowdoin, 369 U.S. 643 (1962), the Court held that the doctrine was available. The Court there relied on Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), which is considered a modern-day extension of sovereign immunity. The rationale was that the Government should not be excessively interfered with in its ordinary duties. K. DAVIS, DAVIS ON ADMINISTRATIVE LAW 807-09 (1951); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 222-31 (1965). *See generally* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484 *et seq.* (1962). *Larson* may be relevant to *Young* to the extent that it affects the concept of what constitutes an unconstitutional taking.

113 In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), the Court held that when an officer is acting under a law that is unconstitutional, he is not acting as an agent of the state and therefore the doctrine of sovereign immunity is not applicable. Prior to *Young*, however, a distinction had been made between an officer acting under a specified statute and an officer exercising discretionary powers under the general laws of the state. See Fitts v. McGhee, 172 U.S. 516 (1894); *In re* Ayers, 123 U.S. 443 (1887). *Cf.* Smyth v. Ames, 169 U.S. 466 (1898); Scott v. Donald, 165 U.S. 58 (1897); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Allen v. Baltimore & O.R.R., 114 U.S. 311 (1884); Poindexter v. Greenhow, 114 U.S. 270 (1884).

eleventh amendment is in full effect, it will not prevent suits based on the deprivation of a right in derogation of the Federal Constitution.[114]

In *Matherson*, the appellees, the Long Island State Park Commission and the Jones Beach State Parkway Authority, attempted to limit the number of cars entering the appellant's night club parking lot. Police closed the exit on the Jones Beach Parkway leading to the appellant's club; Commission personnel at the toll booths on the Parkway told potential customers that the appellant's inn was closed; and Parkway police blocked off the parking lot after it was half full. The complaint, alleging a deprivation of property without due process under the fourteenth amendment, was dismissed on the grounds that the suit was barred by sovereign immunity and a failure to state a claim for which relief may be granted.[115]

As to the Authority, the court concluded that it was not an alter ego of the State, relying on *Zeidner v. Wulforst*.[116] That case dealt with the New York State Thruway Authority whose statutory authorization is conveniently parallel.[117] The Commission, however, presents a different picture primarily because of its police responsibilities and authorization.[118] Thus, as to the Commission, the court applied the *Young* rule.[119]

With respect to the second ground for dismissal, the court held that the appellants "stated a non-frivolous claim arising under the Con-

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However, the distinction was made in order to prevent suits against officers, who had no other relation to the statute than the mere fact that they were state officers, in order to test the constitutionality of the statute. The cases did not stand for the proposition that an officer who threatened to violate constitutional rights was immune if he was exercising a duty which was general and discretionary as opposed to a specific duty under a specific statute. *Contra*, Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 236 (1968). Thus *Young* is not in conflict with these cases while at the same time it narrows the scope of the eleventh amendment.

114 There has been some criticism of the reasoning in *Young*. It has been suggested that it would have been more logical to rule that the eleventh amendment is overruled where the two came into conflict. *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 243 (1968). But in any case it is apparent that the *Young* doctrine is essential to prevent the denial of constitutional rights by states via the eleventh amendment. *Id.* at 245.

115 442 F.2d at 568.

116 197 F. Supp. 23 (E.D.N.Y. 1961).

117 *Compare* N.Y. PUB. AUTH. LAW §§ 150-65 *with* N.Y. PUB. AUTH. LAW §§ 350-75 (McKinney 1970). In Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961), the action was dismissed on the grounds that the state had granted limited immunity by section 361-b, which gave jurisdiction to the court of claims for suits against the Thruway Authority. Section 163-a, applicable to Jones Beach State Parkway Authority, is identical in language. However, in *Zeidner*, jurisdiction was based on diversity of citizenship which demands that the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), be applied. But in *Matherson*, jurisdiction was based on a federal claim.

118 N.Y. CONSERV. LAW § 774 (McKinney 1967).

119 442 F.2d at 568.

stitution. . . ."[120] Relying on *Bell v. Hood*,[121] which held that the allegation of damages suffered as a result of actions of federal officers in violation of the fourth and fifth amendments stated a sufficient claim for the district court to exercise jurisdiction, the court stated that the lower court might have jurisdiction under 28 U.S.C. § 1331(a). However, the action was dismissed with leave to amend "for failure to allege a statutorily required amount in controversy exceeding $10,000."[122]

THE WAR POWER

Litigation challenging the legality of the Vietnam War has arisen in a variety of contexts. Citizens claiming their ultimate liberty is at stake,[123] taxpayers contending their money is being spent for an unconstitutional purpose,[124] young men refusing to be inducted into an army which they claim is fighting an unconstitutional war,[125] and soldiers who have received orders to report for transfer to Vietnam[126]

120 *Id.*

121 327 U.S. 678 (1946).

122 422 F.2d at 568.

123 *See* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). Plaintiff, a college professor, alleged that maintenance of the present military conflict in Vietnam absent a congressional declaration of war jeopardized his ultimate liberty, contributed to serious inflation, diminished funds available for social welfare, and led to the death and wounding of innumerable Americans, including his relatives. The court held that the plaintiff had failed to demonstrate such a personal stake in the matter as to warrant the conclusion that he had standing to sue.

124 *See* Kalish v. United States, 411 F.2d 606 (9th Cir.), *cert. denied*, 396 U.S. 835 (1969); In *Kalish*, Plaintiff claimed that a taxing statute was motivated by the need to raise funds for use in the Vietnam War effort. The court said that the taxpayer did not have standing since he failed to show that Congress in enacting the Tax Adjustment Act of 1966 had breached a specific limitation upon its taxing and spending power; In Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969), a class action taxpayer suit brought by conscientious objectors to the war, the court held that the Constitution does not prohibit Congress from levying taxes upon all persons, regardless of religion, for support of the general government.

125 *See* United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967). The defendant was convicted of willful failure to report for induction into the armed services. The court stated:

> Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service Act and our nation's efforts in Vietnam, as a matter of law the congressional power "to raise and support armies" and "to provide and maintain a navy" is a matter quite distinct from the use which the Executive makes of those who have been found qualified . . . . Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress.

Id. at 324.

See also Ashton v. United States, 404 F.2d 95 (8th Cir. 1968), *cert. denied*, 394 U.S. 960 (1969); United States v. Pratt, 412 F.2d 426 (6th Cir. 1969); United States v. Prince, 398 F.2d 686 (2d Cir.), *cert. denied*, 393 U.S. 946 (1968); United States v. Bolton, 192 F.2d 805 (2d Cir. 1951).

126 *See* Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970); Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967). *But see* Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).