



Written by [Joe Wolverton, II, J.D.](#) on November 10, 2011

Obama Jobs Bill Abolishes 11th Amendment

The [American Jobs Act](#) contains several key provisions that apparently push the boundary between state and federal power back, expanding Washington's sphere of authority.

Section 376 of the President's bill, for example, seems to abolish the protection of immunity provided to states by the 11th Amendment to the United States Constitution.

The section at issue reads:

SEC. 376. FEDERAL AND STATE IMMUNITY.

(a) Abrogation of State Immunity- A State shall not be immune under the 11th Amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act.

Later in the same section, the 11th Amendment is again dismissed.

(A) WAIVER- A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th Amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity under this Act for a remedy authorized under Section 375(c) of this Act.

A fair reading of this portion of the American Jobs Act reveals that if any state chooses to avail itself of the federal funds provided by the bill, it must at the same time accept the surrender of its constitutionally protected sovereign immunity.

Of course, constitutionalists and other opponents of President Obama's jobs bill worry that if the 11th Amendment is so easily abrogated, then other amendments may be next in line to suffer the government guillotine.

For now, however, a brief analysis of the history 11th Amendment's ratification and application is worthwhile.

After it was approved by the delegates to the Constitutional Convention in Philadelphia, the Constitution was sent to the several states for their ratification of the new charter. As the ratification debates progressed, various opponents of the Constitution raised the issue of the document's grant of power to the federal judiciary to preside over "cases ... between a state and citizens of another state." This group argued that lawsuits brought against a state could be financially disastrous for that state and, by extensions, its citizens.

John Marshall, a friend of the product of the Convention of 1787 and a well-respected jurist, assuaged these fears by explaining that a suit brought by an individual against a uncooperative state would not conform to the accepted legal definition of "case" or "controversy." The dispute was settled, therefore, as the Constitution afforded authority to the federal courts over cases and controversies, thus not over





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the types of suits in question. Accordingly, the opposition relented and the Constitution was ratified.

It must be remembered that the Constitution as originally drafted and ratified, did not include the 11th Amendment. That addition was made as a result of furor fomented by the number of lawsuits of the type many found worrisome that were being permitted by the newly empowered Supreme Court.

Recognizing the discrepancy between promise and practice, Congress recommended the 11th Amendment to the states and the states ratified it. This amendment was understood not to alter the balance of power between the states and the federal government, rather it is quite simply an attempt to clarify and solidify the original intent of the framers of the Constitution.

The 11th Amendment reads:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

As with so many of the protections provided by the Constitution and the Bill of Rights, the 11th Amendment is under attack not only from the executive branch, but from the judicial branch, as well.

In an [article](#) on this issue published by the Tenth Amendment Center, Professor Rob Natelson expertly describes the judicial gerrymandering of the border between state and federal authority.

During the 20th century, the Court did punch a few holes in the Eleventh Amendment. Perhaps the most important is that Congress may authorize individual suits against states under the power the Fourteenth Amendment gives Congress to protect individuals from state oppression. I'm all for protecting people from state oppression, but the Court has never explained how it can be "appropriate legislation" for Congress to violate another specific constitutional guarantee. Could, for example, Congress override the First Amendment in the process of enforcing the Fourteenth?

The Obama bill never mentions the Fourteenth Amendment. But presumably its supporters will justify suspending the Eleventh Amendment as part of enforcing the Fourteenth. If so, that argument flies in the face of some very recent Supreme Court rulings.

In *University of Alabama v. Garrett* (2001) and *Nevada Dep't of Human Resources v. Hibbs* (2003), the Court made it clear that Congress may override the Eleventh Amendment only when dealing with certain kinds of discrimination (race, gender, and a few others), of which unemployed status is not one. Moreover, Congress must show a pattern of state discrimination of that kind. The Obama bill meets neither of these criteria.

The foregoing demonstrates that the American Jobs Act presents substantial, novel re-interpretations of fundamental provisions of the Constitution. The plain language of one section of the bill explicitly eradicates the principle of the sovereign immunity of states. Many observers worry that the apparent abolition of the 11th Amendment may presage future surreptitious substitutions of constitutional protections with the unconstitutional will of the President, the Congress, or the courts.

While it is indisputable that the economy of this country is suffering and that an especially difficult aspect of this dire situation is the unemployment rate, the answer to the problem cannot be the abandonment of the timeless (and timely) principles of freedom upon which our Republic is built. In fact, a measure such as the American Jobs Act and the purported help it affords those struggling to make ends meet would be unnecessary were the people of the United States to demand that the federal government (including every branch and agency thereof) return to within the boundaries of its power as



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set forth in the Constitution and the Bill of Rights.



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