

INTERSTATE COMPACT AGENCY AS REGIONAL LEGISLATURE—A NEW BASIS FOR OFFICIAL IMMUNITY

With the consent of Congress,¹ states can contract to create an interstate compact agency.² A compact agency is, often by express terms of its authorizing compact, a distinct legal entity,³ although it exhibits both state⁴ and federal⁵ characteristics. Traditionally, judi-

1. Congressional consent to interstate compacts is a constitutional requirement: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ." U.S. CONST. art. I, § 10, cl. 3. See note 5 *infra* on the question of whether Congressional consent transforms an interstate compact into federal law.

2. In the absence of a constitutional definition, the nature and scope of compacts and compact agencies has been the subject of considerable judicial and scholarly speculation. The consensus is that a compact is a contract that, by virtue of the involvement of sovereign states as parties, is recognized as "an identifiable and separate document." R. LEACH & R. SUGG, *THE ADMINISTRATION OF INTERSTATE COMPACTS* 14 (1959). See F. ZIMMERMANN & M. WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, 42 (1951). Modern compact agencies include the Bi-State Development Agency (Missouri-Illinois), the Port of New York Authority (New York-New Jersey), the Delaware River Joint Toll Bridge Commission (New Jersey-Pennsylvania), the Interstate Sanitation Commission (New Jersey-New York-Connecticut), and the Tennessee-Missouri Bridge Commission.

3. See, e.g., Tahoe Regional Planning Compact, Pub. L. No. 91-148, art. III(a), 83 Stat. 360 (1969) ("There is created the Tahoe Regional Planning Agency as a separate legal entity.").

4. As a rule, the courts have found that interstate compact agencies are agencies of the participating states. *E.g.*, *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857, 859 (8th Cir. 1958) (compact agency is agency or instrument of the signatory states), *rev'd on other grounds*, 359 U.S. 275 (1959); *Howell v. Port of New York Auth.*, 34 F. Supp. 797, 801 (D.N.J. 1940) (bistate agency is joint or common instrument of the states); *Anderson Appeal*, 408 Pa. 179, 182, 182 A.2d 514, 515 (1962) (bistate agency is an agency carrying out an executive function of the state). See *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 399 (1979). See generally R. LEACH & R. SUGG, *THE ADMINISTRATION OF INTERSTATE COMPACTS* 22 (1959); Reimel, *Interstate Agencies, Their Tort Dilemmas and a Federal Solution*, 15 DUQ. U. L. REV. 407, 414-20 (1977).

5. Although compact agencies typically are treated as state agencies, the authority by which they operate is federal law. Courts have long recognized that by consenting

cial treatment of these agencies has been exclusively in terms of a state-federal dichotomy.⁶ In determining immunity from suit, courts generally have found that interstate agencies are the agencies of the participating states,⁷ hence the Eleventh Amendment immunizes them from damage suits.⁸ Until recently, no court squarely ad-

to an interstate agreement, Congress transforms the compact into "a law of the Union." *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851); *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 522 (9th Cir. 1974) (compact is federal statute for purposes of federal question jurisdiction), *cert. denied*, 420 U.S. 974 (1975). *Contra*, *People v. Central R.R.*, 79 U.S. (12 Wall.) 455, 456 (1870) (the Court's jurisdiction to review a state court's judgment construing a compact denied on ground that a compact was not a federal statute); *Yancoskie v. Delaware River Port Auth.*, 528 F.2d 722, 724-26 (3rd Cir. 1975) (mere Congressional approval of a compact does not raise it to the level of a federal statute for federal question jurisdiction purposes). *But see* *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 399 (1979) ("While congressional consent to the original compact was required, the states may confer additional powers and duties on [the compact agency] without further congressional action."). For purposes of *certiorari* jurisdiction, the Supreme Court has found that Congressional consent to an interstate compact constitutes a federal "title, right, privilege or immunity." *Delaware Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940). *See generally* J. WINTERS, *INTERSTATE METROPOLITAN AREAS* 19 (1962); Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965).

6. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1039 (1965).

7. *See* note 4 *supra*.

8. The Eleventh Amendment bars suits brought in federal court by a state or its citizens against another state:

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.

U.S. CONST. amend. XI.

The amendment does not specifically bar suits against a state by its own citizens. The Supreme Court has consistently held, however, "that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by" foreign citizens. *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 280 (1973); *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857, 862 (8th Cir. 1958), *rev'd on other grounds*, 359 U.S. 275 (1959).

A state may, of course, choose to waive any immunity from suit that it might enjoy. Evidence of a state's consent to be sued, however, must be unequivocal, either in the form of express statutory language, or by clear implication. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) ("by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction"); *McAuliffe v. Carlson*, 520 F.2d 1305, 1308 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (waiver not implied unless state clearly declares intent to submit its fiscal problems to courts other than its own); *Flesch v. Eastern Pa. Psychiatric Inst.*, 434 F. Supp. 963, 977 (E.D. Pa. 1977) (waiver not inferred in the absence of specific

dressed the question of immunity for officers of compact agencies.⁹ In *Jacobson v. Tahoe Regional Planning Agency*,¹⁰ the Ninth Circuit broke from the traditional judicial view of compact agencies by finding agency officials immune from suit based on their identification as "regional legislators."¹¹

In *Jacobson*, residents and landowners of the Tahoe Basin area brought actions for injunctive, declaratory, and monetary relief against the compact agency¹² and agency officers authorized to regulate regional land use.¹³ Plaintiffs sued under the Fifth and Fourteenth Amendments, alleging that an agency ordinance restricting land use in the area constituted an inverse condemnation or a "taking" of their property.¹⁴ Defendant Tahoe Regional Planning Agency (TRPA) and its officers moved for dismissal, arguing the complaints failed to state a cause of action against them.¹⁵

statutory language consenting to suit in federal court). Further, a state's waiver of immunity to suit in its own courts will not serve to waive its immunity to suit in federal courts. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

9. *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 944 (9th Cir. 1977). *But see* note 23 *infra*.

10. 566 F.2d 1353 (9th Cir. 1977).

11. *Id.* at 1365.

12. The Tahoe Regional Planning Agency (TRPA) is an authority created by a 1968 compact between California and Nevada to regulate the development of land and natural resources in the Lake Tahoe Basin area. The compact provides that the agency's governing body be appointed from the respective states by certain counties, agencies and executives of the states. The agency is financed primarily by assessments on the area counties, and the compact specifically provides that no obligation contracted by the TRPA will bind either the states or any political subdivisions of the states. Congress approved the compact in 1969. *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517 (9th Cir. 1974); CAL. GOV'T CODE § 66800 (West Supp. 1974); NEV. REV. STAT. § 277.190 (1973).

13. Other defendants were the states of California and Nevada, several counties in the Lake Tahoe Basin area, and the United States.

14. The Land Use Ordinance enacted by the TRPA in 1972 attempted to "maintain an equilibrium between the Region's natural endowment and its manmade environment." The practical effect of the ordinance was an almost complete prohibition on the uses to which the plaintiffs had put their land. The Land Use Ordinance reclassified residential areas for "general forest" and "recreation," and reclassified a lumber company's land in the area for "general forest," "recreation," and "conservation." Plaintiff *Jacobson* was a partner in a limited partnership that owned land in the area at the time of the Land Use Ordinance's enactment. *Western Int'l Hotels v. TRPA*, 387 F. Supp. 429 (D. Nev. 1975).

15. *Id.* at 438.

The federal district court dismissed the complaints¹⁶ and dismissed all defendant parties except the TRPA.¹⁷ On appeal, the Ninth Circuit reversed the dismissal of the complaints. The court agreed that the TRPA was a proper party and remanded the question whether the agency officers were immune from the suit.¹⁸ On rehearing, the court found that the TRPA was an agency of the participating states¹⁹ and therefore was immune from suit under the Eleventh

16 The district court held that the acts of the agency were entitled to the same presumption of constitutionality afforded state legislative acts and it dismissed the actions on finding that plaintiffs did not meet their burden of overcoming the presumption. *Id.* at 434-38.

17. The court dismissed all counties named as defendants, finding that the TRPA was not an agent of the counties, that the counties were not liable for any monetary damages assessed to the TRPA, and that plaintiffs could obtain complete relief without joining the counties. The states were dismissed on the alternate theories that the TRPA was a subdivision of the states and that the ordinance was a joint TRPA-state undertaking. The court did not decide whether the TRPA was a state agency for it held that if the ordinance were found to be a condemnation, it would constitute an action beyond the authority of the agency, and thus it could not be an action of the state. The United States was dismissed upon the finding that the TRPA was not a federal agency, and that the United States' involvement with the compact was insufficient to hold it responsible for the TRPA's acts. The court dismissed the members of TRPA's governing board, holding that governmental officers are immune from liability for acts undertaken in the exercise of their discretionary functions. *Id.* at 438-39.

18. The court of appeal's resolution of the immunity issues in the first hearing was virtually identical to that of the second opinion. Since the court withdrew the prior opinion, treatment of those issues is preserved for discussion of the court's final rendering.

19. The court reached its primary conclusion on this issue without citing case authority, of which there is an abundance. *See* note 3 *supra*. The court reasoned: "With Congress' constitutionally required approval, the TRPA exercises a species of state authority. In effect, the bi-state Authority serves as an agency of the participating states, exercising a specially aggregated slice of state power." *Jacobson v. TRPA*, 566 F.2d 1353, 1359 (9th Cir. 1977). *Cf.* *Jacobson v. TRPA*, 558 F.2d 928, 935 (9th Cir. 1977) (the court declined to decide whether the TRPA was an arm of the state). The court's cautious analysis of this issue perhaps suggests its ultimate characterization of the agency as a "regional legislature." The court only indirectly offered case authority for the conclusion that the TRPA is an agency of the state. *Jacobson v. TRPA*, 566 F.2d 1353, 1360 (9th Cir. 1977).

On *certiorari*, the Supreme Court did not squarely approach the question. While strongly suggesting that the TRPA was not an agency of the participating states, the Court redirected the inquiry to the question of whether the states intended to share their immunity with the bistate agency. In the view of the Court, the significant question was not whether the TRPA was a state agency, but whether the states intended to bestow their immunity upon it. *Lake Country Estates, Inc. v. Tahoe Planning Agcy.*, 440 U.S. 391, 401 (1979).

Amendment.²⁰ Again, the court remanded the issue of immunity for the agency officers, but provided specific guidelines to determine the legal issue. In this context the court found that the compact agency was, in effect, a "regional legislature,"²¹ whose officers were "regional legislators." The court concluded that, as "regional legislators," the

20. In reaching the conclusion of agency immunity, the court relied almost entirely upon *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). See text accompanying notes 30-36 *infra*.

21. The court's first opinion credited David Engdahl with the general concept of interstate legislation. *Jacobson v. TRPA*, 558 F.2d 928, 935 (9th Cir. 1977).

We are accustomed to thinking in terms of only two principle species of legislation: federal and state. . . . [S]eemingly all of the discussion of compacts by other writers and the courts, has proceeded on the assumption that compacts fit, or must be fit, into one or the other of these two species, the only ones which the federal jurisdictional statutes . . . recognize. But it may be more fruitful to recognize compacts as a third and distinct species: interstate legislation. The dissimilarities between compacts and ordinary state legislation are certainly no less significant than the similarities; and at the same time the similarities of compacts to congressional legislation are not imposing.

Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1039 (1965).

The recognition of compact agencies as regional governments, however, dates back to the classic Frankfurter-Landis critique of compact agencies in 1925. Frankfurter and Landis found that the difficult problems facing the nation in the twentieth century were regional in character, and that only regional solutions were adequate to meet the modern challenges. State and federal remedies, they contended, were neither adequate nor desirable to deal with regional problems. Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

The regions are less than the nation and are greater than any one State. The mechanism of legislation must therefore be greater than that at the disposal of a single State. National action is the ready alternative. But national action is either unavailable or excessive. For a number of interstate situations, Federal control is wholly outside the present ambit of Federal power, wholly unlikely to be conferred upon the Federal government by constitutional amendment and, in the practical tasks of government, wholly unsuited to Federal action even if constitutional power were obtained. With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies. These produce regional problems calling for regional solutions. Control by the nation would be ill-conceived and intrusive. . . . As to these regional problems Congress could not legislate effectively. Regional interests, regional wisdom and regional pride must be looked to for solutions.

Id. at 707-08 (footnotes omitted). "The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths 'States-Rights' and 'National Supremacy' Our regions are realities. Political thinking must respond to these realities." *Id.* at 729. See also Reimel, *Interstate Agencies, Their Tort Dilemmas and a Federal Solution*, 15 DUQ. L. REV. 407, 425-26 (1977).

officers of the TRPA should be granted the same immunity allowed their state and federal counterparts.²²

Although the question of immunity for compact agency officials was one of first instance,²³ the federal courts' previous applications for Eleventh Amendment immunity suggest a different approach than that taken by the Ninth Circuit in *Jacobson*.²⁴ Generally, the

22. The Ninth Circuit noted that official immunity was previously applied only to state and federal officials. *Jacobson v. TRPA*, 566 F.2d at 1365 (9th Cir. 1977). Although the court found a different basis of immunity for agency officers, it clearly stated that the tests for determining whether individual officials would receive immunity for their actions were the same for agency officers as for state and federal officers. Specifically, the court pointed to *Scheuer v. Rhodes*, 416 U.S. 232 (1974), as the test of immunity for officials acting in an executive capacity (qualified immunity varying with the degree of discretion required), and to *Tenney v. Bandhove*, 341 U.S. 367 (1951), as the test for officials acting in a legislative capacity (absolute immunity).

23. The *Jacobson* court stated that "the question of immunity for officers acting under the authority of an interstate compact has not been squarely addressed." *Jacobson v. TRPA*, 566 F.2d at 1365. In *Byram River v. Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), however, the question came before a federal district court. In *Byram River*, plaintiffs sued for injunctive relief against the Interstate Sanitation Commission, a tristate compact agency. The commission and a commission officer, named as a defendant, moved for dismissal on the theory they were immune under the Eleventh Amendment. The *Byram River* court declined to decide the constitutional question of the amendment's applicability to compact agencies, but found that the commission was "sufficiently independent of New York State as not to enjoy sovereign immunity." *Id.* at 628. See note 36 *infra*. Addressing itself to the commission officer's motion to dismiss, the court held that insofar as the commission could not claim the protection of the Eleventh Amendment, it was "certainly axiomatic" that an officer of the commission could not do so. The court further noted that, even if the commission could claim immunity from suit generally, an action against an officer for prospective injunctive relief would stand.

Byram River is distinguishable from *Jacobson* in several respects. First, the *Jacobson* court decided the constitutional question which, by the time the *Byram River* decision was rendered, had not been resolved. That is, *Jacobson* held that the Eleventh Amendment was applicable to compact agencies. Second, *Byram River* found that the particular agency involved was, on the facts, not entitled to immunity. It is possible that the holding in *Jacobson* would preclude such a conclusion today. Finally, *Byram River* dealt with an action for injunctive relief, which is a prospective remedy, rather than monetary damages, and thus avoided the more difficult question. It has been clear since *Ex Parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment does not bar suits for prospective equitable relief. The real test of whether the Eleventh Amendment would apply to compact agency officials could only have been decided in an action for monetary relief, as in *Jacobson*.

24. The concept of a "regional legislature" as a real, distinct and separate entity had, prior to *Jacobson*, appeared only in secondary authorities. See note 21 *supra*. The majority of these writers shared the view that compact agencies were operating as independent governmental entities. They called for judicial recognition of the independent and unique nature of the agencies. As late as 1959, however, an empirical

courts have found that the Eleventh Amendment applies in damage suits where a state, as a defendant, is the real party in interest.²⁵ A state usually is found to be the real party in interest when the action ultimately seeks satisfaction from the state treasury.²⁶ Under this approach, state agencies and officers are cloaked in Eleventh Amendment immunity because of their financial dependence on state funds.

A frequently cited source of the test for Eleventh Amendment applicability is *Ford Motor Co. v. Department of Treasury*,²⁷ where petitioner corporation sued the Department of the Treasury of the State of Indiana for recovery of alleged illegal taxes. The Supreme Court dismissed the action, finding that it was essentially an action against the state and therefore barred by the state's Eleventh Amendment immunity. The Court reasoned that in cases where the Eleventh Amendment potentially applied, the nature and effect of the judgment determined whether the action was characterized as one against the state. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit."²⁸ Thus,

analysis of compact agencies found they were far from independent. Leach and Sugg found that, in practical operations, compact agencies constituted an affirmation of the traditional state-federal view of government. The states, they found, regarded the agencies as their own select tools to exercise state powers effectively. Yet the states were at least equally concerned with protecting their powers from both the compact agencies and the federal government. The writers found that the states' integrity prevailed: "Had the compact agencies gone against this sentiment in any fashion, they would hardly have survived, much less grown in popularity." R. LEACH & R. SUGG, *THE ADMINISTRATION OF INTERSTATE COMPACTS*, 214-16 (reprint ed. 1969).

25. See text accompanying notes 27-29 *infra*.

26. The financial-dependence test for determining whether a state is the real party in interest in a suit for damages is essentially the *Ford Motor* analysis discussed below. See text accompanying notes 27-29 *infra*. While the effect that a judgment will have on a state treasury is most determinative, the courts frequently look to other factors in deciding whether a state is the real party in interest. Among these factors the courts have suggested that ability to sue and be sued, lack of express authority to sue, performance by the entity of an essential governmental function, power to take property in the name of the state, power to take property in its own name, corporate status, lack of corporate status, financial interest in the state, and lack of financial interest in the state, are significant. *Whitten v. State Univ. Constr. Fund*, 493 F.2d 177 (1st Cir. 1974); *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975). For an exhaustive list of the factors considered by the courts in determining whether an agency is an alter ego of a state, see Note, *The Eleventh Amendment as Applied to State Agencies: A Survey of the Cases and a Proposed Model for Analysis*, 22 VILL. L. REV. 153, 160-63 (1976).

27. 323 U.S. 459 (1945).

28. *Id.* at 464. See *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573

the Court predicated application of Eleventh Amendment immunity upon the financial dependence of a department on the state, rather than on the apparent administrative affiliation *per se*.²⁹

In *Petty v. Tennessee-Missouri Bridge Comm'n*,³⁰ the Eighth Circuit applied the *Ford Motor* analysis to an action against a compact agency. In *Petty*, petitioner brought a damage action against the bi-

(1946); *Great Northern Ins. Co. v. Read*, 322 U.S. 47 (1944); *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973).

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court observed the continuing authority of the *Ford Motor* financial-dependence test: "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State treasury is barred by the Eleventh Amendment." *Id.* at 663. The *Edelman* Court noted, however, that not every action that affects state revenues will be barred. The Eleventh Amendment does not bar actions for prospective equitable relief. *Ex Parte Young*, 209 U.S. 123 (1908). In *Edelman*, the Court recognized that many actions for prospective equitable relief will have a significant effect on state treasuries, but stated that the amendment does not bar such actions. 415 U.S. at 663. Thus, an action for prospective equitable relief against a state officer may be allowed under the Eleventh Amendment, even when its effect is to diminish the state treasury. *But see* note 39 *infra*. The *Ford Motor* test of Eleventh Amendment applicability, then, may only operate outside the realm of the *Ex Parte Young* exception.

29. By positing financial relation as the crucial factor for determining whether the state's immunity will apply to a defendant, the *Ford Motor* analysis appears to anticipate inclusion of a broad range of defendants. Because administrative affiliation with the state is not determinative, a titular officer of the state may or may not be granted immunity, depending upon whether the requisite financial relation is present. Similarly, an official of a corporation or agency, not normally identified with a state, may be covered by the state's immunity if a judgment against him would be satisfied by state funds.

In *Lake Country Estates, Inc. v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979), the Supreme Court interposed an important caveat to the *Ford Motor* analysis: "[T]he protection afforded by that Amendment is only available to 'one of the United States.'" *Id.* at 400. Rejecting the *Ford Motor* financial-dependence test for determining whether the Eleventh Amendment applied, the Court ruled that the constitutional immunity did not apply to a compact agency unless it appeared that the states intended to share their immunity with the agency. Reversing the Ninth Circuit's *Jacobson* finding that the amendment immunized the TRPA, the Court held that, on the facts, the amendment did not apply to the compact agency. The Court looked to the intent of the participating states, the terms of the compact, and the actual operation of the agency, and concluded that there appeared to be "no justification for reading additional meaning into the limited language of the Amendment." *Id.* at 401. Although the Court did not overrule *Ford Motor*, the practical effect of the *Lake Country Estates* holding may be that the courts will not find constitutional immunity for compact agencies unless contracting states stipulate such an intent in the wording of their compact.

30. 254 F.2d 857 (8th Cir. 1958), *cert. granted*, 359 U.S. 275 (1959).

state commission for the death of an agency employee.³¹ After considering the agency's finding, the court found that a judgment against the commission would adversely affect the participating states, and concluded that the commission was the agency or instrument of the states.³² The court expressly rejected the suggestion that the compact agency, as a bistate creation, was a separate and distinct entity apart from the states.³³ In the Eighth Circuit's view, the bistate commission was a common instrument of the states, and congressional consent to the compact sanctioned that view.³⁴ On *certiorari*, the Supreme Court,³⁵ assuming that the commission was the agency of the participating states, addressed itself only to the question of whether the Commission had waived "any immunity it might have." The Court held that since the bistate agency had consented to suit in its authorizing compact, the suit was not barred by any immunity it might have had.³⁶

31. Plaintiff sued under the Jones Act, 46 U.S.C. § 688 (1920) alleging respondent's negligence in connection with the death of petitioner's husband.

32. Aside from the *Ford Motor* approach, the court considered the function of the interstate agency. The court found that the states had entered into the compact to fulfill their respective state obligations in building highways and bridges, and therefore the agency was an instrument of the states. *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857, 859 (8th Cir. 1958). See *Kansas City Bridge Co. v. Alabama Bridge Corp.*, 59 F.2d 48 (5th Cir. 1932). But cf. *Lake Country Estates, Inc. v. Tahoe Planning Agcy.*, 440 U.S. 391, 399 (1979) (Court found that "[i]n discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them," but did not find that the agency was a state agency, rather, that the Eleventh Amendment did not apply).

33. *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857, 860 (8th Cir. 1958).

34. *Id.*

35. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

36. The precedential value of *Petty* on the agency immunity issue is not altogether certain. The specific question dealt with by the Court was whether a sue-and-be-sued clause in the compact acted as a waiver of any immunity the agency might have. Six justices concluded that the clause did act as a waiver, but of that majority only three justices reached the question of constitutional immunity. The others, having found a waiver, thought it unnecessary to reach the constitutional question. The three justices in dissent apparently agreed the Eleventh Amendment applied to the agency, differing only on the question of the waiver's existence. The Court seemed to rely upon the findings of the lower court, rather than to develop its own analysis. The Court assumed *arguendo* that the compact agency had immunity. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 (1959).

In *Byram River v. Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), the district court recognized that the Supreme Court's *Petty* opinion did not settle whether compact agencies have Eleventh Amendment protection. As noted above, the Supreme Court

In *Edelman v. Jordan*,³⁷ the Supreme Court adopted the *Ford Motor* analysis to determine whether the Eleventh Amendment barred a suit against state officers.³⁸ Public-aid recipients seeking declaratory and injunctive relief sued former directors of the Illinois Department of Public Aid. Plaintiffs alleged that defendants administered certain public aid programs in violation of the Fourteenth Amendment. The Court of Appeals upheld an award of retroactive benefit payment to plaintiffs. The Supreme Court reversed, finding that the award would ultimately be satisfied from state funds and accordingly was barred by the Eleventh Amendment. The Court conceded that there was an exception to the bar where only prospective equitable relief is sought, but found that the award in question did not fit within the exception.³⁹ Although the circuit court characterized the award as "equitable restitution," the Supreme Court found controlling the fact

was able to avoid the constitutional question in *Petty*, for it was apparent that the compact agency in that case had consented to suit. The court in *Byram River* approached the problem of whether the amendment immunized a compact agency from suit as an open question. See note 23 *supra*. See also note 29 *supra*.

37 415 U.S. 651 (1974).

38. The cases in which the courts have established official immunity from the state's Eleventh Amendment immunity are distinguishable from those where official immunity is based on the common law doctrine of immunity. See Note, *The Eleventh Amendment as Applied to State Agencies: A Survey of the Cases and a Proposed Model for Analysis*, 22 VILL. L. REV. 153 (1976). Characterization of an officer as other than a state officer affects constitutional immunity, but not immunity derived from the common law doctrine. Based upon practical policy considerations, the common law doctrine of immunity traditionally has been applied to both state and federal officers. See *Barr v. Matteo*, 360 U.S. 564 (1959); *Tenney v. Brandhove*, 341 U.S. 367 (1951). Essentially, the doctrine is founded upon the belief that governmental officers should be free to exercise their duties without fear of damage suits resulting from acts undertaken in their official capacities. The privilege is granted to officials so such suits will not inhibit the administration of governmental policies and programs. *Barr v. Matteo*, 360 U.S. 564, 571 (1959). Unlike the constitutional immunities, it would appear that the common law doctrine of immunity is not necessarily limited to state or federal offices. See U.S. CONST. art. I, § 6, cl. 1 (speech or debate clause); U.S. CONST. amend. XI (state immunity provision). See also note 53 *infra*.

39 See *Ex Parte Young*, 209 U.S. 123 (1908). The Court in *Edelman* noted that, even when the award will have a substantial effect on a state treasury, an action for prospective equitable relief normally will stand under the amendment. 415 U.S. 651, 664-68 (1974). "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." *Id.* at 667-68. The Court distinguished the award in *Edelman* on the grounds that it was equivalent to an award of monetary damages. Although it can scarcely be doubted that the award in *Edelman* was "the necessary result" of compliance with a prospective decree, it appears that the Court found the directness of the claim on state funds to warrant the application of the state's immunity.

that the award would be paid from state funds. The Court held that the Eleventh Amendment barred the action against the state officers because the state was the real party in interest.⁴⁰

Jacobson marks a significant shift in judicial characterization of compact agencies and offers an unexpected approach to the issue of immunity for compact agency officers. First, *Jacobson* abandons the *Ford Motor* analysis which controlled previous judicial applications of Eleventh Amendment immunity.⁴¹ The opinion did not refer to the ultimate source of funds that a judgment might claim. Rather, relying completely upon the Supreme Court's *Petty* opinion,⁴² the Ninth Circuit in *Jacobson* accepted, as a rule, the proposition that the Eleventh Amendment applies to compact agencies.⁴³

At least one federal district court has recognized that the *Petty* opinion never reached the constitutional question.⁴⁴ Regardless of precedent, however, it is apparent that *Jacobson* applied the Eleventh Amendment to the TRPA without considering whether a judgment against the agency would deplete state funds, and in so doing short-cut the traditional test for Eleventh Amendment immunity.

Although the *Jacobson* court treated the TRPA as an arm of the state for agency immunity purposes,⁴⁵ it established immunity for agency officers on the theory that the TRPA was a "regional legislature."⁴⁶ The dual characterization represents a rejection of the traditional state-federal view of government and a recognition of compact

40. For other applications of the Eleventh Amendment to state officers, see *Great N. Ins. Co. v. Read*, 322 U.S. 47 (1944); *Smith v. Reeves*, 178 U.S. 436 (1900); *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972); *Westberry v. Fisher*, 309 F. Supp. 12 (D. Maine 1970).

41. 323 U.S. 459 (1945). See text accompanying notes 27-29 *supra*.

42. 359 U.S. 275 (1959). See note 36 and accompanying text *supra*.

43. *Jacobson v. TRPA*, 566 F.2d 1353, 1359-60 (9th Cir. 1977).

44. *Byram River v. Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975). See note 36 *supra*.

45. If one accepts the *Jacobson* interpretation of *Petty* (that the Eleventh Amendment applies to compact agencies), the characterization of a compact agency as a state agency appears superfluous. If the amendment applies to compact agencies it is unnecessary to identify the agency with a state. If, however, the *Byram River* interpretation of *Petty* is accepted, it appears essential that the compact agency be identified with a state. By its terms, the amendment bars only suits "commenced or prosecuted against one of the United States." U.S. CONST. amend. XI. See note 8 *supra*. Under the *Ford Motor* test, an agency would be sufficiently identifiable with a state to qualify for Eleventh Amendment immunity if an action brought against the agency would ultimately be satisfied by state funds. See note 29 *supra*.

46. In its earlier *Jacobson* opinion, the Ninth Circuit Court of Appeals recognized

agencies as a distinct species. The court established immunity for the TRPA officers, not on the basis of their affiliations with state or federal government, but upon their identification as "regional legislators."⁴⁷ The novel characterization clearly and intentionally breaks from the state-federal view of government traditionally characterizing judicial treatment of compact agencies.⁴⁸

Treating agency officers as the third-type "regional legislators,"

the difficulty of employing the "regional legislature" concept to resolve the question of agency immunity.

Perhaps an argument could be made that, because the TRPA is not a federal agency, it is not "the government" and therefore the Fifth Amendment is inapplicable, just as the Fourteenth Amendment is inapplicable if the TRPA is not a state agency. This reasoning, however, could lead to the untenable conclusion that the TRPA is immune from suit because of its somewhat unique status: part state and part federal but not entirely either.

558 F.2d at 936. Despite these reservations, the court fully embraced the concept for purposes of resolving the question of officers' immunity. *See also* Lake Country Estates, Inc. v. Tahoe Planning Agcy., 440 U.S. 391, 404 (1979).

47. *Jacobson v. TRPA*, 566 F.2d 1353, 1365 (9th Cir. 1977).

48. A comparison of the court's first and second *Jacobson* opinions suggests a clear intent to introduce the concept of a third-type "regional legislature" to judicial thinking in full recognition of the problems inherent in the concept. The court's treatment of the official immunity question was virtually identical in both opinions: in each, the court suggested that immunity should be granted the agency officers *qua* "regional legislators." On the issue of agency immunity, however, the opinions diverged.

In the first opinion, the court avoided deciding whether the agency could claim constitutional immunity, but introduced and discussed the concept of interstate legislation by way of dicta. There, the court ventured that the recognition of an interstate legislative body would present problems for a system traditionally based in a dichotomous conceptualization of government. *See* note 46 *supra*. The court found, however, that such difficulties would not be so great as to be unresolvable by the "judicial inventiveness" inherent in the federal courts. *Jacobson v. TRPA*, 558 F.2d 928, 937 (9th Cir. 1977). On rehearing, the Ninth Circuit held that the compact agency was in effect an agency of the state, hence immune from suit under the Eleventh Amendment, but maintained its previous prescriptions for treatment of the "regional legislators." Thus stood the court's dual characterization of the compact agency, unreconciled and unexplained.

In *Lake Country Estates, Inc. v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979), the Supreme Court attempted to resolve the paradox. Consistent with the Ninth Circuit's *Jacobson* holding, the Court found that officers of the compact agency were immune from suit as "regional legislators." *See* note 53 *infra*. On the question whether the Eleventh Amendment immunized the agency, however, the Court took a different approach. Whereas the Ninth Circuit's conclusion that the amendment applied to the compact agency was predicated on the finding that the agency was an arm of the state, the Supreme Court avoided the state agency characterization. The Court concluded that the compact agency was not immune because the states did not bestow their immunity upon the agency, and did not attempt to determine whether the agency was

rather than as state or federal officers, the Ninth Circuit denies the officers a constitutional basis for immunity. That constitutional basis for state officers is the Eleventh Amendment,⁴⁹ and for federal legislative officers it is the speech or debate clause.⁵⁰ The availability of the constitutional immunity from suit is dependent, by terms of the provisions, upon the finding of a minimal association with the specified office or sovereign. To the extent that those provisions are based in a dichotomous state-federal view of government, a "regional legislature" and "regional legislators" are excluded from the constitutional grant of immunity.⁵¹ The *Jacobson* opinion fails to mention the constitutional immunity in regard to compact agency officers.

For traditional sources of immunity,⁵² the concept of a "regional legislature" may have other serious implications. By process of elimination, if there is no constitutionally based immunity from suit for officials designated "regional legislators," any immunity granted such officers apparently must arise from the common law doctrine of sovereign immunity.⁵³ Under common law, immunity from suit was rec-

a state agency. As such, it avoided the paradox of regional legislators in a state agency.

49. See note 8 *supra*.

50. The constitutional basis of immunity for federal legislators is found in the speech or debate clause:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. I, § 6, cl. 1. The historical precedents of the clause suggest that the persons to whom the privilege is granted should be narrowly limited to those mentioned in terms by the provision. See generally *Tenney v. Brandhove*, 341 U.S. 367 (1951).

51. Clearly, the Constitution makes no express provisions for the role of a "regional legislature" in the American system. On the contrary, the Tenth Amendment strongly suggests that a third, distinct species of legislative body is precluded: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Nor can the compact clause be claimed as support for an independent regional legislature. That clause is a certain affirmation of federal power in the form of a limitation on state power: "No State shall, without the Consent of Congress . . . , enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3. Constitutional immunity from suit has accordingly been applied only to state and federal officials.

52. Where immunity from suit is not available under the Eleventh Amendment, the common law doctrine of sovereign immunity may apply. See note 38 *supra*.

53. *Id.* There would appear to be no initial difficulty in applying the common law

ognized as an aspect of sovereignty.⁵⁴ The difficulty with basing immunity for "regional legislators" on the common law doctrine, therefore, is that it necessarily implies the sovereignty of the subject. To ascribe common law immunity to an administrative body, as *Jacobson* suggests, is to endow that body with a large measure of sovereignty.⁵⁵ The introduction of a class of regional sovereigns would pose serious difficulties for the existing federal system.

The significance of *Jacobson* extends beyond its holding that compact agency officials are entitled to the same immunity granted state and federal legislators. Importantly, the court granted the immunity to TRPA officials *qua* "regional legislators." *Jacobson* thus signifies that the common law doctrine of official immunity is applicable to other than state and federal officials. With that limitation removed, immunity may now be available to a broad range of intra-state offi-

doctrine to agency officers. for the doctrine is based in general policy considerations. If the rationale for the doctrine of immunity is that it prohibits suits from impairing the effective administration of governmental policies and programs, then it is at least *prima facie* applicable to compact agency officers.

In *Lake Country Estates, Inc. v. Tahoe Planning Agency*, 440 U.S. 391 (1979), petitioners argued that common law official immunity should be limited to the state and federal levels and should be denied to compact agency officials. The Supreme Court held that compact agency officers were entitled to the same measure of immunity afforded state and federal legislators. *Id.* at 405. Relying on *Tenney v. Brandhove*, 341 U.S. 367 (1951), the *Lake Country Estates* opinion observed that the granting of common law official immunity was qualified by the need for the immunity to protect the public good. The Court found the need equally compelling whether the official be a federal, state, or regional legislator. The opinion concluded that "to the extent the evidence discloses that these individuals [compact agency officials] were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406 (1979). Justice Marshall and Justice Blackmun, dissenting in part in separate opinions, objected to the majority's functional analysis in that it appeared to provide immunity for members of all levels of political structures. *Id.* at 406-09.

54. The oft-stated formulation of the doctrine of immunity is "the King can do no wrong." It is an attribute firmly established through history that a sovereign cannot be sued without its consent. See generally *Barr v. Matteo*, 360 U.S. 564 (1959); *Tenney v. Brandhove*, 341 U.S. 367 (1951); Reimel, *Interstate Agencies, Their Tort Dilemmas and a Federal Solution*, 15 DUQ. L. REV. 407, 422-23 (1977).

55. See Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965). Engdahl presents a more cautious opinion. In his view, recognition of compact agencies as independent interstate legislatures would permit, although not require, the inference that interstate agencies created by compact are subdivisions of neither the state nor the federal government, but are political entities *sui generis*, exercising a limited sovereignty distinct from that of the states which have delegated power to them, and from the United States.

Id. at 1040.

cials as well. *Jacobson* also imparts a significant break from the dichotomous state-federal view that traditionally has controlled judicial treatment of compact agencies. For the first time, a federal court has recognized the unique and independent nature of compact agencies as such. Regardless of whether the opinion recognized or in effect created the "regional legislature," its impact upon the federal and democratic system may be substantial.

James K. Horstman