The Texas Tort Claims Act - Problems in Federal Court

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Prompted by dissatisfaction with the court-created concept that the state may not be sued without its consent, and a desire to "do justice" to victims of governmental tort, many states have either abrogated or modified the harsh common law doctrine of sovereign immunity. Founded upon the premise that "The King can do no wrong," this 16th-century English doctrine was exported intact to the colonies where it was applied to an extent never realized in England. Although its broad application in this country has been justified "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," somewhat less ephemeral and perhaps more practical reasons have been given for the concept's great vitality in the United States. The short-lived abrogation of sovereign immunity in Chisholm v. Georgia, based on interpretation of the judiciary article of the Constitution, led to the hurried

1. Ayala v. Philadelphia Bd. of Pub. Educ., 305 A.2d 877 (Pa. 1973), which abolished the doctrine in Pennsylvania, lists the positions of all the states with regard to sovereign immunity. The list is based on a compilation of cases from RESTATEMENT (SECOND) OF TORTS § 895A, at 12-20 (Tent. Draft, 1973). The compilation reveals that twenty-five jurisdictions have abrogated the doctrine, eighteen by judicial action and seven by legislation. Three states, Connecticut, South Carolina and Texas, have modified the doctrine, while another fifteen find a waiver of immunity where the governmental unit carries insurance. Apparently only seven jurisdictions have retained the doctrine in its common law form. 305 A.2d at 889. The typical view of the doctrine by today's courts is expressed in the following: "[S]overeign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this Court." Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 284, 316 P.2d 582, 585 (1957).

2. See, e.g., W. PROSSER, THE LAW OF TORTS § 131 (4th ed. 1971). See also F. POLLOCK AND F. MAITLAND, HISTORY OF ENGLISH LAW 181-83 (2d ed. 1911). The maxim that the King can do no wrong has been misunderstood. The English Kings did not enjoy absolute immunity. In fact, the maxim may have meant just the opposite, in the sense that the King was not allowed to do wrong. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 199 (1965).


7. 2 U.S. (2 Dall.) 419 (1793). In Chisholm, the Court allowed suit against the state by a South Carolina citizen.

8. "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 Controversies . . . between a State and Citizens of another State . . . ." U.S. CONST. art. III, § 2.
proposal and ratification of the eleventh amendment,\(^9\) thus giving a constitutional status to this "gaslight of another time."\(^{10}\)

As was the case in most states, the doctrine of sovereign immunity came early to Texas\(^{11}\) and existed with minor variation until only recently. When bringing suit against the state or one of its agencies or subdivisions, a Texas plaintiff was faced with two major obstacles. First, the general rule of sovereign immunity, that the state may not be sued without its consent, barred the maintenance of his action.\(^{12}\) Secondly, even if consent were present, the plaintiff could not recover in tort because the state was not liable for the negligent acts or omissions of its agents or employees under the principle of *respondeat superior*.\(^{13}\) Not all actions were barred by the

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\(^{9}\) "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 . . . ." U.S. Const. amend. XI. The amendment applies with equal force to suits against states by their own citizens. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974).

\(^{10}\) *Caporossi v. Atlantic City*, 220 F. Supp. 508, 518 (D.N.J. 1963), *aff'd*, 328 F.2d 62 (3d Cir.), *cert. denied*, 379 U.S. 825 (1964). With regard to the *Chisholm* decision and the subsequent ratification of the eleventh amendment, it has been said that two basic mistakes were made. First, the Court erred in interpreting art. III, § 2 as effecting abolition of states' sovereign immunity. The framers of the Constitution never expected the judiciary article to have such an effect. Second, those who sought to overturn *Chisholm* by resort to constitutional amendment erred in basing the amendment on the judiciary article. *Collison, Interpretation of the Eleventh Amendment, 5* Hous. L. Rev. 1, 7-15 (1967). The contention that the framers of art. III, § 2 intended the states to retain sovereign immunity is borne out by debate surrounding the article. *See, e.g.*, 3 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 527, 553, 555-56 (2d ed. 1901). *But see* C. JACOBS, *supra* note 6, at 40. Thus it seems logical to conclude that the amendment was proffered simply to restate the common law doctrine of sovereign immunity. *See, e.g.*, *Comment, State Sovereign Immunity: No More King's X?*, 52 *Texas L. Rev.* 100, 104 (1973).

The impact of the doctrine has not merely been with regard to suits against the sovereign. It has been suggested that the doctrine helps explain American government's negative attitude toward public-sector collective bargaining. K. HANSLOE, *The EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 11-20 (1967).

\(^{11}\) The case generally cited as establishing the doctrine in Texas is *Hosner v. DeYoung*, 1 Tex. 764 (1847), where the court declared that "no State can be sued in her own courts without her consent." *Id.* at 769. Immunity of the sovereign was apparently unquestioned, for the court cited no authority for the proposition. The first reported case recognizing the doctrine is *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812).

\(^{12}\) *See, e.g.*, *Hosner v. DeYoung*, 1 Tex. 764 (1847). *See also* Texas-Mexican Ry. v. Jarvis, 80 Tex. 456, 15 S.W. 1089 (1891); *Mosheim v. Rollins*, 79 S.W.2d 672 (Tex. Civ. App.—San Antonio 1935, writ dism'd).


In determining when an action was one against the state, the test generally accepted by the Texas courts followed closely the test enunciated in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945): "When 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 even though individual officials are nominal defendants." 323 U.S. at 464; *see A.F. of L. v. Mann*, 188 S.W.2d 276 (Tex. Civ. App.—Austin 1945, no writ). A somewhat broader test was also utilized by the Texas courts. In *San Antonio Ind. School Dist. v. Board of Educ.* 108 S.W.2d 445 (Tex. Civ. App.—San Antonio 1937, no writ), it was said that "a suit against an officer or department or agency of the state, the purpose or effect of which is to impose liabilities upon, or enforce liabilities against, the state, is in effect a suit against the state, and therefore cannot be maintained without the consent of the sovereign, expressed through
doctrine; however, these did not sound in tort.\textsuperscript{14} Governmental immunity from suit in Texas, like in other states, extended to political subdivisions, such as counties and municipalities.\textsuperscript{15} With regard to the latter, however, the courts created the nebulous governmental-proprietary distinction which allowed the imposition of tort liability against a city from accidents arising out of its performance of a proprietary function.\textsuperscript{16}

Although legislative attempts had been made as early as 1957 to eliminate, at least in part, the rigors of the sovereign immunity doctrine in Texas,\textsuperscript{17} they were largely unsuccessful until 1969. In that year the Texas Tort Claims Act was enacted,\textsuperscript{18} substantially modifying this “Loch Ness Monster of the tort system.”\textsuperscript{19}

It is not the purpose here, however, to detail the state court decisions interpreting and applying the Act. Rather, the purpose is to view two unique problems a claimant under the Act will face when attempting to maintain suit in federal court in Texas based on diversity of citizenship, namely, whether the scope of the immunity waiver under the Act permits maintenance of actions in federal court, and if so, whether such actions can be based on diversity jurisdiction.

I. THE TEXAS TORT CLAIMS ACT

Section 4 of the Act provides that to the extent liability is created under 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 . . . .”\textsuperscript{20} Section 3 limits the extent

\textsuperscript{1} See also Griffin v. Hawn, 161 Tex. 422, 341 S.W.2d 151 (1960). Tort claims were no exception. State v. Isbell, 127 Tex. 399, 94 S.W.2d 423 (1936).
\textsuperscript{2} The exceptions to the immunity doctrine in Texas are set out in Comment, The Governmental Immunity Doctrine in Texas—An Analysis and Some Proposed Changes, 27 SW. L.J. 341, 342 (1969); Comment, Governmental Immunity from Suit and Liability in Texas, 27 TEXAS L. REV. 337 (1949).
\textsuperscript{3} Waco v. Landingham, 138 Tex. 156, 157 S.W.2d 631 (1941): Harris County v. Gerhart, 115 Tex. 449, 283 S.W. 139 (1926); see Greenhill & Murto, note 13 supra.
\textsuperscript{4} See, e.g., Tyler v. Ingram, 139 Tex. 600, 164 S.W.2d 516 (1942); Meska v. City of Dallas, 429 S.W.2d 223 (Tex. Civ. App.—Dallas 1968, writ ref'd). The question of when a municipality is performing a governmental function as opposed to a proprietary one is perplexing and is the subject of much discussion in its own right. For this reason, no attempt will be made to deal with the question here. But for the results of some attempts by Texas courts to distinguish between the two, see Greenhill, \textit{Should Governmental Immunity for Torts be Re-examined, and, If So, by Whom?}, 31 TEXAS B.J. 1036, 1053-66 (1968). See also Doddridge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations, 23 MICH. L. REV. 325 (1925). One writer has defined proprietary function as “a term meaning those functions for which appellate courts think municipalities ought to be liable.” Smith, \textit{Insurance and the Texas Tort Claims Act}, 49 TEXAS L. REV. 445, 447 n.5 (1971). It should be noted that the distinction still plays an important role in suits against Texas municipalities. See notes 26-28 infra and accompanying text.
\textsuperscript{5} The history of attempts to enact tort claims legislation in Texas, as well as the history surrounding the present Act, are detailed in Kronzer, \textit{The New Texas Tort Claims Act—Some Offhand Reflections}, 4 TEXAS TRIAL L. F. 11 (November-December 1969) (pt. 1), and 4 TEXAS TRIAL L. F. 21 (January-February 1970) (pt. 2). See also Greenhill & Murto, note 13 supra.
\textsuperscript{7} TEX. REV. CIV. STAT. ANN. art. 6252-19, § 4 (1970).
of waiver by making governmental units liable for property damage, personal injury or death caused by the negligence of any officer or employee of the state where he would be liable under general principles of tort law, provided such officer or agent is acting within the scope of his employment and the accident arises "from the operation or use of a motor-driven vehicle" or "motor-driven equipment." Further, units of government are liable for premise defects to the extent a private person would be liable therefor, although the duty owed by the unit is limited to that owed by a private individual to a licensee.

Additionally, the Act restricts the amount of money damages available and prohibits awards of punitive damages. Among the other exceptions and limitations provided for is that the Act does not apply to the proprietary functions of cities, which means that these units will not enjoy limited liability when performing such functions.

II. PROBLEMS IN FEDERAL COURT

Although the Act makes governmental units liable for their negligence in certain cases, and thereby accords legal protection to victims of governmental torts similar to that accorded victims of private torts, the plaintiff in a diversity suit will nevertheless find that he must deal with the revered position of the states when in federal court.

A. Scope of Waiver and the Flores Approach

As a general proposition a state may, though effecting a waiver of its immunity from suit, restrict that waiver to state courts. In determining whether the State of Texas or its units of government may be sued in federal court under the Tort Claims Act, two of the Act's sections have commanded

22. Id. § 3 (Supp. 1975).
23. Id. § 18(b) (1970). This limitation of duty does not apply if payment has been made for the use of the defective premises or if the duty owed by the unit of government in the first instance is one to warn of special defects on highways or streets, or the absence, condition or malfunction of certain warning devices. Id. Damage to property is not compensable under that portion of section 3 which deals with premise defects. Id. § 3 (Supp. 1975).
24. Id.
25. Id.
28. See note 16 supra.
29. See, e.g., Kennecott Copper Corp. v. Utah Tax Comm'n, 327 U.S. 573 (1946), citing Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), and Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944). Whether such a proposition is valid, or whether it conflicts with some seemingly well-settled notions about federal subject-matter jurisdiction and the relationship between state and federal laws in general, will be discussed below. See notes 51-95 infra and accompanying text.
most of the courts' attention. Section 7 in part provides that '[t]he laws and the statutes of the State of Texas and the Rules of Civil Procedure... insofar as applicable' and to the extent that such rules are not inconsistent with the provisions of this Act, shall apply to and govern all actions brought under the provisions of this Act.30 Section 5 calls for venue of suits to lie in the county in which the cause of action or part thereof arose.31

The first case involving the question of whether Texas had consented to suit in federal court, Weaver v. Hirsty,32 arose nearly three years after the effective date of the Act.33 The plaintiffs, residents of Michigan, were injured in an automobile collision with defendant, a Texas resident. The defendant impleaded the Texas Highway Commission seeking indemnity or contribution on the grounds that THC's negligent surfacing of the highway contributed to the plaintiff's injury. The Commission moved to dismiss, contending that the impleader action could not be maintained in federal court because THC had not consented to suit there. In granting the motion the court relied on sections 5 and 7 of the Act and summarily concluded "that the legislature of Texas did not intend by passage of the Tort Claims Act to consent to be sued in federal court."34

Shortly thereafter a federal district court pointed to some fundamental oversights in the Weaver opinion. The court in Flores v. Norton & Ramsey Lines, Inc.35 flatly declared that it "respectfully... disagrees with the reasoning in the Weaver case and declines to follow it."36 Like Weaver, Flores involved impleader, this time of the Texas Department of Public Safety. The plaintiff's vehicle had been struck from the rear by the defendant's truck after the plaintiff had been directed to stop by a DPS officer who failed to make proper provision for removing the plaintiff's vehicle from the highway. Rejecting the contention that sections 5 and 7 of the Act indicated a legislative intent to restrict suits to state tribunals, the court said:

Section 5 of the Act commanding that suit be instituted in the county in which the cause of action arose merely relates to venue. It is inconceivable that the Texas Legislature intended to limit suits in federal court under the Act by that language. Finally, the application of the Texas Rules of Civil Procedure to the Act in Section 7 does so 'insofar as applicable.' In federal court the Texas Rules... are clearly not applicable and the language used could be construed as a recognition of that fact... .37

Additionally, the court reasoned that if the state legislature had intended to restrict the scope of waiver "it could have easily stated so in Section 4 or in Section 14, where numerous exceptions to liability are set out."38

37. Id. (emphasis in original; footnote omitted).
Slightly more than a month later a third U.S. district court encountered the same problem in *Lester v. County of Terry*, and, deciding what it thought was a question of first impression, reached the same result as *Flores*. In *Lester*, however, only the section establishing venue in the county where the cause of action arose was urged to bar suit in federal court. In response to this contention the court concluded that to accept such an argument "would . . . create the anomaly that a county could be sued in federal court only where the cause of action happened to arise in a county in which . . . a federal district court . . . sit[s]." Such a result was termed "unacceptable and certainly contrary to legislative intent." *Lester* also questioned the proposition that a state could defeat federal court jurisdiction consistently with the supremacy clause by limiting the scope of waiver to state courts where the federal court requisites of diversity and amount are present. The case thus became the first of those dealing with scope of waiver under the Act to impliedly suggest that a new look should be taken at the holdings which have established that a state may limit the applicability of its consent to courts of its own creation.

By failing to deal more fully with these various considerations, however, *Lester* was simply another *Weaver* with a different result. *Flores*, on the other hand, though not questioning the proposition that a state *may* restrict the scope of its waiver, provided the most thorough interpretation to date of whether or not the Texas Legislature did in fact intend to restrict the scope of consent to suit with regard to forum. In a footnote, the *Flores* court correctly pointed out that to read the venue section of the Act as an indication that the legislature intended to restrict suits to state courts would not be in keeping with authority which holds that similar venue provisions of other acts generally have not been interpreted to preclude suit in federal court. Undoubtedly, the backbone of *Flores* is its reasonable interpretation of sections 5 and 7 and its recognition that there is indeed an ambiguity with respect to the scope of waiver. Accordingly, grasping the section 13 provison which mandates that the Act shall receive a liberal construction, the court found that any ambiguity should be construed in favor of the claimant. Moreover, two policy arguments had some bearing on the question of whether waiver is complete under the Act. First, the *Flores* result would eliminate multiplicity of actions where there is more than one defendant who cannot rely on sovereign immunity. Had the case against the Department of Public Safety been dismissed it would have had the undesirable effect of...

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40. 353 F. Supp. at 172.
41. *Id.*
42. *Id.* at 171-72.
45. *Id.* at 153.
forcing any continued action against the DPS into a state court, while the action against the other defendants could have proceeded in the federal tribunal. Secondly, the Flores decision preserves the diverse plaintiff's choice of forum in a situation where his choice should receive protection. More than one plaintiff's attorney would voice apprehension at the difficulties a citizen from a different part of this country might face by bringing suit against the State of Texas or one of its agencies in the courts of the state. Of course, local prejudice is by no means unique to Texas. Whether such prejudice would indeed result is by no means certain; however, such a fear was instrumental in the creation of the concept of diversity jurisdiction. In addition, whether a fairer trial could be had in a federal district court within the state is not beyond debate.

Perhaps a more fundamental question, one not considered heretofore, should be raised and considered in determining whether consent under the Act is complete. Whereas the preceding paragraphs have discussed the effect upon the plaintiff, the present question requires an opposite approach, namely: what prejudice would result to units of government in allowing the maintenance of tort actions against them in federal court? Put another way, what valid state purpose is served by restricting the scope of waiver when tort claims are involved? The tort cases are distinguishable from suits brought against a state by a foreign corporation for the recovery of taxes. In the latter situation a state has a valid interest in restricting controversies to state court: efficient administration of specialized state tax schemes. However, the adjudication of tort claims would not require the special knowledge of a state court. It could hardly be argued that a state court possesses any greater competence with respect to applying and interpreting tort law than does a federal court.

If the state has any interest in restricting waiver in the tort area, perhaps it derives from the notion that potential verdicts would be larger in federal court. However, section 3 of the Texas Tort Claims Act limits liability of governmental units to compensatory damages to the extent of "$100,000 per person and $300,000 for any single occurrence for bodily injury or death and . . . $10,000 for any single occurrence for injury to or destruction of property." Presumably, the reasons that units of government argue that

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46. Id.

47. The most generally accepted rationale was given by Chief Justice Marshall in Bank of the United States v. Devaux, 2 U.S. (5 Cranch) 61, 87 (1809): However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation . . . it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between citizens of different states. See generally Phillips & Christenson, The Historical and Legal Background of the Diversity Jurisdiction, 46 A.B.A.J. 959 (1960).

48. While the question is raised in the context of the Texas Act, it is not for that reason less applicable to any similar act of another state.

49. See cases cited infra notes 53-59.

they may be sued only in state court are a desire to forestall speedy prosecution of actions or a hope to find a not-so-immune forum.

**Questioning the Validity of the Premise.** Since it is fairly well settled that a state may limit the extent of its waiver to state courts, one might question the propriety of challenging the proposition. It is asserted, however, that the challenge should be made and the continued vitality of the maxim attacked. Presently, the proposition that a state may limit the scope of waiver with regard to the forum in which it may be sued has risen to a level that a presumption arises that the state did not intend to consent to suit in federal court unless there is a clear indication to the contrary. Historically, the view that a state may restrict its consent to suit dates from the turn of the century. But three cases decided in the mid-1940's firmly established the proposition, the opinion in each case being delivered by Mr. Justice Reed and each being a suit for the recovery of taxes. In the first, *Great Northern Life Insurance Co. v. Read,* the Court found that a suit to recover taxes paid under protest by the plaintiff could not be maintained in federal court, even though the general jurisdictional provision of the Oklahoma Act allowing suit was framed in broad terms containing no indication that the forum of suit was to be restricted. Nevertheless, the Court said that "when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than . . . own . . . must be found." The Court also recognized that the special procedures called for in the act would undoubtedly result in a different type of judgment being given in federal court than in state court.

In *Ford Motor Co. v. Department of Treasury,* the second of the three decisions, the state statute provided that suit for the recovery of wrongfully assessed taxes should be brought "in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides . . . shall have original jurisdiction . . . ." Again the Court found no clear indication that the state had consented to suit in federal court. By the time *Kenneecott Copper Corp. v. State Tax Commission,* the last of the

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52. The proposition probably had its firm origin in Smith v. Reeves, 178 U.S. 436 (1900), where the Court held that a California statute which provided for suit in a specifically named court in Sacramento County showed an intent on the part of the legislature to restrict suit to courts of the state. Four years later the same result was reached in Chandler v. Dix, 194 U.S. 590 (1904), where the Court found that a Michigan statute allowing tax suits against the state, which contained complex state procedural provisions, was evidence of an intention on the part of the state to limit suits to the courts of its creation.
54. Id. at 54 (emphasis added; footnote omitted).
55. 322 U.S. at 55.
56. 323 U.S. 459 (1945).
57. Quoted id. at 465.
58. 323 U.S. at 465 (footnote omitted). The Court relied on *Read* for the proposition that "it is not consonant with our dual system for the federal courts to be astute to read . . . consent to embrace federal as well as state courts." 323 U.S. at 465, citing *Great N. Life Ins. Co. v. Read,* 322 U.S. 47, 54 (1944).
trilogy, reached the Court, there was ample precedent to rely upon in Read and Ford Motor Co. The Kennecott Court gave the reason for the rule as "the right of a State to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances."61

Whereas the majority in all three cases took the view that consent to suit in federal court must be clear, Mr. Justice Frankfurter, in a well-reasoned dissent in Read took a different approach. While accepting the proposition that a state may restrict the scope of its waiver, the state, he noted, had not said it was doing so;62 moreover, no "restriction [is] indicated by practical considerations in the administration of state affairs."63 In his view, it would make no difference in which court the state was sued:

Here the suit in a federal court would not supplant a specially adaptable state scheme of administration nor bring into play the expert knowledge of a state court regarding local conditions. The subject matter and the course of the litigation in the federal court would be precisely the same as in the state court.64

In mechanistically applying this proposition to the tort area65 the Court has been guilty of ignoring several distinctions of importance. First, without exception, the cases which established the proposition that a state may restrict waiver to its own courts dealt with taxes in one form or another.66 Secondly, and to varying extents, the opinions in Read, Ford Motor Co., and Kennecott seemed concerned chiefly with interfering in what Mr. Justice Frankfurter called "a specially adaptable state scheme of administration" requiring the expertise of a state tribunal.67 But perhaps most of all, the opinions failed to discuss prior significant decisions of the Court which had not assumed the proposition, or at least had not given it such broad application.

Foremost among these delimiting opinions is Chicago & North Western Railway v. Whitten,68 a wrongful death action in which the Court held that where a general legal right is conferred, it may be enforced by any federal court within the state, provided the court has jurisdiction over the parties.69 This was said despite a provision in the particular act allowing suit only in a court established under the laws of the state. In responding to this language

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60. "Upon the question of the consent of Utah to suit . . . in the federal courts . . . little needs to be added to our discussion in the Read and Ford Motor Co. Cases." Id. at 577.
61. Id.
63. Id.
64. Id. (emphasis added). "Legislation giving consent to sue is not to be treated in the spirit in which seventeenth century criminal pleading was construed." Id.
66. See text accompanying notes 53-59 supra.
68. 80 U.S. (13 Wall.) 270 (1872).
69. Id. at 286.
the Court said: "[W]henever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court . . . is not subject to state limitation."70

One must conclude that the proposition that a state may restrict the scope of its waiver with regard to forum is not as broad as might be suggested. Rather, it is contended that when the federal courts say that a state may qualify the forum in which suit against it will be maintained, despite the mandates of federal jurisdictional statutes, they are merely seeking "to refrain from interference with state policies."71 In other words, it is simply a matter of deference on the part of the courts to some unique local system of legal administration which the state tribunals are better equipped to handle. As is apparent, tort law does not fit this category. But by applying the proposition to all types of actions, the lower courts and perhaps the Supreme Court itself have confused the problem of the scope of consent with regard to forum, on the one hand, with that of consent to be sued initially, on the other. Only as to the latter should sovereign immunity be an issue. It is here that the state makes the choice of retaining or foregoing such immunity, of determining the extent of waiver as regards liability as opposed to the scope of waiver as regards forum. The problem of forum of suit, therefore, is an entirely different question, one not touching on immunity at all; for if there is immunity from suit in the first instance there need be no inquiry as to sufficiency of forum. The effect of retaining sovereign immunity would bar suit in either arena; the effect of waiver would bar suit in neither.72 As to the extent of liability, or the limited extent of that liability as provided in the Texas Tort Claims Act, a federal court would be bound to follow those provisions in the same manner as would a state court.73

Some Questions on Supremacy. Accepting for the moment the proposition that a state may select the forum in which it shall be sued, an additional consideration arises. The foregoing sentence speaks in terms of action on the

70. Id. Another such case, though not a tort action, is Reagan v. Farmers Loan & Trust Co., 154 U.S. 362 (1894), a suit to enjoin enforcement of certain rates by the Texas Railroad Commission, where the statute involved provided for suit to be brought in a state court in Travis County, Texas. There the Court declared that "[g]iven a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts." Id. at 391. Accord, Smyth v. Ames, 169 U.S. 466 (1898); Interstate Constr. Co. v. Regents of the University of Idaho, 199 F. 509 (D.C. Idaho 1912). See also Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1869).

The Whitton case was distinguished in Smith v. Reeves, 178 U.S. 436 (1900), and the general proposition it stated was held applicable to actions between private individuals. Id. at 444. Also distinguished in Reeves were the Reagan and Smyth cases, which were said not to have been suits against states, in that the relief sought was actually against state officers who were about to take action hostile to the plaintiffs' rights. 178 U.S. at 444-45.

71. See Comment, supra note 51, at 358.

72. This could be termed the theory of "complete" waiver. It finds analogy in other areas of the law of privileges and immunities, most notably in the privilege against self-incrimination situation, where the accused in a criminal proceeding, once choosing to take the stand and tell his version of the story, may not invoke the privilege on cross-examination. See, e.g., Brown v. United States, 356 U.S. 148, 155-56 (1958); C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 148 (2d ed. 1972).

part of the state to limit the scope of its consent to courts of its own creation when it has waived immunity. This is so because it is in such terms that the courts have spoken when considering the amenability of a unit of government to suit in federal court. Yet it is difficult to understand how a state may validly restrict the power of a federal court to entertain suit against it once immunity has been waived, particularly when it is recognized that federal diversity jurisdiction is self-executing or self-attaching in the sense that a party to a suit may not manipulate it at his will. Besides indicating that what federal courts must mean when saying that a state may restrict the scope of waiver with regard to forum is that they are deferring to state tribunals, the proposition also indicates that if it is to be taken at face value, questions may arise under the supremacy clause of the Constitution. This becomes evident upon reviewing a few fundamental principles. Diversity jurisdiction is conferred by the Constitution and is implemented through federal statute. Like any other portion of the Constitution, or the laws enacted in pursuance thereof, the provisions regarding diversity are obviously deemed to be "the supreme Law of the Land." Without the special doctrine of sovereign immunity, the state and its various units of government would stand on the same footing as an individual. Such is the view in Texas as espoused by its courts; such was the view of the legislature that enacted the Texas Tort Claims Act.

It seems anomalous, then, for a federal court to say that even though a state has consented to be sued, thus placing itself in the position of an individual, it may nevertheless deprive a federal court of jurisdiction to hear suits to which it has consented, even if that jurisdiction is conferred by the Constitution and laws of the United States. It has been held that other portions of tort claims statutes must fall if not consonant with due process or equal protection. Certainly provisions for federal diversity jurisdiction are

74. See cases cited at notes 53-59 supra.
75. See, e.g., Page v. Wright, 116 F.2d 449, 453 (7th Cir. 1940), cert. denied, 312 U.S. 710 (1941).
76. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.
77. Art. III, § 2, quoted at note 8 supra.
81. See notes 145, 146 infra and accompanying text.
82. See notes 145, 146 infra and accompanying text.
83. "It is elementary that what Congress constitutionally has given, the state may not constitutionally take away." Local 232, UAW-AFL v. Wisconsin Employment Relations Bd., 336 U.S. 245, 254 (1949).
84. See, e.g., Turner v. Staggs, 510 P.2d 879 (Nev. 1973), where the Nevada Supreme Court invalidated a notice-of-claim statute on due process and equal protection
no less efficacious in their sphere than the fourteenth amendment is in its own. Perhaps the anomaly derives from an erroneous interpretation of the eleventh amendment, which is framed in terms of a limitation on the power of the federal judiciary. History will reveal, however, that the amendment was proposed and ratified simply to force recognition by the federal courts of the common law doctrine of sovereign immunity. The framers and proponents of the amendment were surely not concerned with such niceties as restricting the forum of suit; rather, what was abhorrent to them was the principle that the state could be sued at all without its consent. Indeed, in actions which had long been recognized as maintainable against the sovereign, the courts realized that the forum of suit could not be restricted. It would be a difficult interpretation at best to say that the amendment bars a federal court from hearing a suit to which the state has consented. The preceding contentions are easily illustrated and clarified once it is recognized that the eleventh amendment restates the classic doctrine of sovereign immunity and is not a jurisdictional barrier.

grounds for the reason that the statute arbitrarily barred victims of governmental tort but left unimpaired the rights of victims of private tort. Accord, Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972), where the notice provision of the Michigan Tort Claims Act was held unconstitutional as a violation of due process and equal protection. See also Salavea v. City and County of Honolulu, 517 P.2d 51 (Hawaii 1973).

85. See note 10 supra.
86. See notes 9, 10 supra; Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga. L. Rev. 207 (1968). As previously noted, the doctrine of sovereign immunity had been disregarded by the Court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); see notes 7-10 supra.
87. See, e.g., Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 252-53 (1905), a condemnation proceeding brought by the Traction Company under Kentucky statutes relating to the condemnation of lands. When the state court refused to allow the defendant to remove the proceeding to federal court, the defendant applied to a federal circuit court for relief. The circuit court sustained its exercise of jurisdiction over the controversy and the Supreme Court agreed, saying that a state has no ability to withdraw a suit from the cognizance of a federal court where there is a controversy between citizens of different states. "In the exercise of that power a circuit court of the United States, sitting within the limits of a state and having jurisdiction of the parties, is, for every practical purpose, a court of that state." Id. at 255 (emphasis added).
88. See note 10 supra. The Supreme Court has never forthrightly declared that the amendment presents a traditional jurisdictional bar, since the concept of waiver would be inconsistent therewith. See C. Wright, The Law of the Federal Courts § 7, at 15-16 (2d ed. 1970). The Court has said, however, that the amendment is quasi-jurisdictional, in that it may be raised for the first time on appeal. Edelman v. Jordan, 415 U.S. 651, 677-78 (1974). At least one court has gone to the extreme by declaring that state sovereign immunity is "a limitation . . . on the constitutional grant of jurisdiction to the federal courts." Jordan v. Gilligan, 500 F.2d 701, 706 (6th Cir. 1974), cert. denied, 95 S. Ct. 1996, 44 L. Ed. 2d 481 (1975).
89. Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 253 (1905). See also Moss v. Calumet Paving Co., 201 F. Supp. 426, 430 (S.D. Ind. 1962), and cases there cited. The principle is recognized in Texas: "A State . . . cannot deprive a federal instrumentality of one of its constitutional or statutory rights, and a federal court cannot be defeated under the name of state practice." Langdeau v. Republic Nat'l Bank, 161 Tex. 349, 356, 341 S.W.2d 161, 166 (1960).
Allowing a state that has otherwise consented to suit in effect to deny the right of a federal court to entertain such a suit, when no provision in the Constitution allows it to do so, bears a striking resemblance to the doctrine of "dual federalism." This doctrine was perceived in the mandate of the tenth amendment and it "meant that states' rights somehow limited even the expressly delegated national powers for some, but not for all, purposes." Even today, however, with the repudiation of the doctrine nearly forty years in the past, its counterpart finds expression in cases arising under modern tort claims statutes.

**Texas Has Consented to Suit in Both State and Federal Court.** With the foregoing factors in mind it seems apparent that Texas has consented to suit in federal as well as in state courts. First, accepting the proposition that a state may restrict waiver with regard to forum, it is evident that the Texas Tort Claims Act did not do so. This much is clear when various sections of the Act are analyzed in accordance with *Flores.* Secondly, the several considerations that weighed heavily with the Supreme Court in finding a lack of intent to submit to federal court in the tax cases necessarily are not present in cases arising under the Act. It is hard to see how a federal court, in the tort field particularly, would be forced to render a judgment different from that which a state court would render. Nor in the tort area would the court run the risk of interfering in the field of state financial administration or with any unique state scheme which accompanies it. Additionally, no specialized procedural requirements are found in the Act, and it cannot be said that the course of the litigation would be any different in federal court. Third, it would appear that section 3 of the Act, which places the state and its governmental units on the same plane as individuals, would necessarily preclude the state from contending that it has not consented to suit in federal court. As was pointed out in *Flores,* other sections of the Act specifically set out numerous exceptions, though restriction as to forum of suit is not one of them. Finally, it is at least questionable whether once a state has set out guidelines as to *how* it may be sued it may say *where* it can be sued consistently with federal supremacy as established by the Constitution.

**B. The Diversity Statute: A New Basis for Sovereign Immunity?**

The diversity statute provides that "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $10,000 . . . and is between—(1) citizens of different States . . . ." The questions of whether a state has consented to suit, and only then

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90. See W. Mendelson, *The Constitution and the Supreme Court* 94 (2d ed. 1965). This doctrine thrived during a period beginning with the 1890's and ending with the latter part of the 1930's. *Id.*
91. *Id.* (emphasis in original).
92. See note 29 supra.
95. See note 26 supra and accompanying text.
whether it has consented to be sued in federal court, pose considerable difficulty to the diverse plaintiff. However, an even greater barrier to the maintenance of his action under the Texas Tort Claims Act is the federal diversity statute, which, through judicial interpretation, has in effect acted as a quasi-sovereign immunity statute at the federal level.

The principle proposition in this area is that a state is not a "citizen" for purposes of diversity jurisdiction, and as a corollary, neither is an agency of the state which is merely its "arm or alter ego." The courts, however, have not always been clear on the reasons for finding that a state or one of its units lacks citizen status, and, unfortunately, they have many times confused what are two distinct issues: (1) whether the unit of government being sued stands in such a relation to the state in general that it may enjoy the benefit of the latter's sovereign immunity; and (2) whether the unit has such a distinct character relative to the state in general that it may be viewed as a citizen for diversity purposes.

The principle that a state is not a citizen for diversity purposes derives from the case of Postal Telegraph Cable Co. v. Alabama, a suit brought by the state in a state court. When the defendant made an effort to remove the action to federal court, the Supreme Court denied it the right to do so because "a suit between a State and a citizen . . . of another State is not between citizens of different States. . . ." However, the case generally relied on as stating the principle is State Highway Commission v. Utah Construction Co., involving breach of contract, where the commission was held not to be a citizen for diversity purposes. In so holding, the Court stated that the commission, when entering the contract in question, "was but the arm or alter ego of the State with no funds or ability to respond in damages." The state, not the commission, was held to be the real party in interest, and diversity vel non must be determined with reference to that party.

From the Wyoming case, then, has come the proposition that where it is determined by the court that the unit of government sued is the arm or alter ego of the state, or that the unit is not a separate one, distinct in some manner from the state, the real party in interest will be said to be the state itself. Of course, determining when a certain agency fits the above

97. See notes 99-105 infra and accompanying text.
98. See DeLong Corp. v. State Highway Comm'n, 233 F. Supp. 7, 14 (D. Ore. 1964). While a determination of the first question may be made by resorting to expressions of state authorities, or becomes irrelevant when the state has abrogated its immunity, the second question is essentially one to be determined by a federal court and does not become meaningless upon a state's giving its consent to suit. See, e.g., Louisiana Highway Comm'n v. Farnsworth, 74 F.2d 910 (5th Cir.), cert. denied, 294 U.S. 729 (1935); White v. Umatilla County, 247 F. Supp. 918 (D. Ore. 1965).
99. 155 U.S. 482 (1894).
100. Id. at 487.
101. 278 U.S. 194 (1929).
102. While the case is cited as authority for that proposition, it is at best doubtful whether it can be said that its holding was that broad. The highway department was not named as the contracting party in the original contract, the "State of Wyoming" was. 278 U.S. at 197-98.
103. 278 U.S. at 199 (emphasis added).
104. 278 U.S. at 199-200 (emphasis added).
description is not always easy. However, it has been said that a state is the real party in interest when a judgment rendered against one of its units must be paid from state funds, or where the relief injures the state itself.\textsuperscript{106} Whether such a view proceeds from an overzealous fervor on the part of the courts to protect states, or results from some unidentifiable "logical" progression of judicial thought, its effect has been to equate requisites regarding diversity jurisdiction with concepts of sovereign immunity. So, one sees in such cases the reasoning that since the state would ultimately bear the burden, the suit is against the state and is therefore not maintainable.\textsuperscript{107}

It is difficult to perceive how this test differs from that employed in determining whether an agency of the state is cloaked with sovereign immunity, namely that when the action will result in 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 even though individual officials are nominal defendants."\textsuperscript{108} To enhance the confusion, it has been held that a governmental unit, because it performs a traditionally governmental function, such as the operation of the highway system, is not a citizen for diversity purposes.\textsuperscript{109} Of course, the governmental-proprietary distinction is uniquely applicable to the question of whether an agency is cloaked with sovereign immunity.\textsuperscript{110}

It has been recognized that considerable confusion exists "in the authorities in failing to distinguish between jurisdiction under the diversity statute and a claim of immunity,"\textsuperscript{111} and perhaps because of such recognition there has been somewhat of a departure from what was essentially one approach to both issues. But while the approach is different, the terminology will be the same, so that "arm or alter ego," "separate and distinct entity," and "real party in interest" are phrases which will still be employed.

\textit{Becoming a Citizen.} Despite the blanket statements that neither a state nor a unit thereof which is considered its arm or alter ego is a citizen for purposes of diversity jurisdiction, it is possible, at least with regard to governmental units, that the unit involved may have its disabilities removed and thus become a "citizen," provided the unit possesses certain characteristics. In other words, a state legislature may give such powers and duties to a unit of government that the unit is taken from being a nonentity on the one hand, to a citizen for diversity purposes on the other. Those factors which are taken


\textsuperscript{107} See, e.g., Pacific Fruit & Produce Co. v. Oregon Liquor Control Comm'n, 41 F. Supp. 175 (D. Ore. 1941).

\textsuperscript{108} Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). See also Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337, 340 (6th Cir. 1959), and note 13 supra and accompanying text.

\textsuperscript{109} See, e.g., Fowler v. California Toll-Bridge Authority, 128 F.2d 549 (9th Cir. 1942); Cargile v. New York Trust Co., 67 F.2d 585 (8th Cir. 1933), cert. denied, 292 U.S. 625 (1934); notes 116-19 infra and accompanying text.

\textsuperscript{110} See note 16 supra and accompanying text.

into account by the courts in making the determination whether a certain unit of government is a citizen or merely an arm of the state include, but are by no means limited to: (1) whether the unit may sue or be sued; (2) whether its overall character is quasi or publicly corporate; (3) whether the unit has control over funds and their expenditure; (4) whether it may contract; (5) whether it may sell, hold or otherwise deal in property; (6) the state's view of the unit. These characteristics, with the exception of the last mentioned, may be subsumed by the term "powers and duties" or perhaps by the more limited phrase "managerial autonomy."118

The Texas Approach. Despite this new approach to the problem of diversity, many courts have still not broken with the past. Apparently this is the case in Texas with claims arising under the Tort Claims Act. At present, there is only one reported case in Texas on the question of whether a certain governmental unit, when sued under the Tort Claims Act, is a citizen for purposes of diversity jurisdiction. This does not mean, however, that the question is rarely encountered or that it does not present severe difficulties for the practitioner, because invariably the question is presented in a motion to dismiss and the order sustaining the contention, being without opinion in most cases, will seldom be reported.

Johnson v. Texas Department of Corrections118 is the exception. In Johnson, the decedent's widow, an Oklahoma resident, sued the department for negligence in the crash of a TDC airplane which claimed the life of her husband. One of the grounds urged by the department to bar the maintenance of the action was that the state was immune from suit without its consent. However, the court said that before determining whether the state could invoke the doctrine of sovereign immunity, the court would have to determine whether there was jurisdiction on the part of the court to hear the suit:

A careful scrutiny of the legislative provisions establishing and maintaining the TDC, Vernon's Ann. Civ. St. arts. 6166a-6203g, reveals that the TDC performs a basic governmental function of the State. Thus, the TDC is merely the alter ego of the State of Texas. The State of Texas is the real party in interest and as such cannot be a citizen'. . . .'117

In using the governmental function test to determine the status of the TDC for diversity purposes the Johnson court was incorrect. Had a Texas county been the defendant in the suit, and had "careful scrutiny" been given to state court determinations as to the status of a county relative to the state, the

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112. See, e.g., Moor v. County of Alameda, 411 U.S. 693 (1973), which incorporates most of these criteria. See also Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337 (6th Cir. 1959); Louisiana Highway Comm'n v. Farnsworth, 74 F.2d 910 (5th Cir.), cert. denied, 294 U.S. 729 (1935); Weyerhaeuser Co. v. State Roads Comm'n, 187 F. Supp. 766 (D. Md. 1960).
113. See cases cited at note 112 supra.
116. Id.
117. Id. at 1110 (emphasis added).
court would have found that a county, like the TDC, performs basic governmental functions. Under state law a county is said to be incapable of performing anything but governmental functions. Yet it is beyond question that counties, whether or not viewed by the state to be separate legal entities, are "citizens" for diversity purposes. The type of reasoning found in Johnson has apparently persisted, for units of government have met with much success in contending they are not citizens. Nevertheless, it is significant to note that neither in Flores v. Norton & Ramsey Lines, Inc., nor in Weaver v. Hirsty was the diversity hurdle asserted by the defendants. Nor did the courts raise the question sua sponte, although diversity, being subject-matter jurisdiction, must be affirmatively evidenced and is not subject to waiver. One further error which results when looking solely to state court decisions to determine the status of a unit for diversity purposes is that the state opinions and statutes viewed will deal exclusively with the unit in an attempt to determine whether it is to be deemed the "state" for purposes of cloaking it with sovereign immunity. A state court usually would not have occasion to decide whether the unit stands in such a position relative to the state that it may be a citizen for purposes of diversity jurisdiction. But the two are entirely different questions, and different factors must determine their answers. Significant in this area is Couch v. Banks, which, although dismissed for lack of diversity jurisdiction, was dismissed on the authority of Moor v. County of Alameda. The Moor Case: A New Approach? Moor was a damage action against a California county wherein the petitioner alleged that the county was a citizen for diversity purposes. The respondent county acknowledged that generally counties had been considered citizens for such purposes, but moved to dismiss based on the ground that unlike counties of most states, it was not an independent political subdivision, but was, under California law, nothing more than an arm or agency of the state itself. After reviewing the numerous duties and powers possessed by the county, the Court concluded that such powers "strike us as persuasive indicia of the independent status occupied by California counties relative to the State of California." Further, the Court found a California Supreme Court opinion helpful in determining that the county was, rather than was not, a citizen for diversity purposes.

118. See, e.g., Harris County v. Gerhart, 115 Tex. 449, 283 S.W. 139 (1926).
119. See, e.g., Chicot County v. Sherwood, 148 U.S. 529, 533-34 (1893); Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868). In one recent case against a city, the diversity "defense" was apparently not even raised. See Starr v. United States, 393 F. Supp. 1359 (N.D. Tex. 1975).
124. It might have occasion to view the question, however, if the defendant seeks to remove the action to federal court. See State v. O'Connor, 96 Tex. 484, 74 S.W. 899 (1903), aff'd, 202 U.S. 501 (1906).
125. No. 3-74-574 (N.D. Tex., Nov. 27, 1974).
127. Id. at 720.
128. Id. at 720-21.
opinion had determined that a county of that state "is sufficiently corporate in character to justify the issuance of a writ of mandate to it." 293

After Moor, the determination of whether a governmental unit is merely an arm of the state and hence not a "citizen" is to be made by reference to the powers and duties possessed by the unit. And while a state decision or law might aid in a determination that the unit is a citizen, state authority which maintains that it is not more than an arm of the state will seemingly carry little weight. Hopefully, the test that will eventually be derived from Moor to determine if a unit is a citizen is whether the unit of government has a sufficiently recognizable and independent status relative to the state in general so that the unit may properly be so classified. In other words, the unit must be recognizable in the sense that one would view it as being a body different from what is commonly referred to as the state, and independent in the sense that it is a body which substantially manages its own affairs.

III. AN ILLUSTRATION

To put the various problems in focus, an illustration should prove helpful. Suppose A, a resident of Michigan, is traveling in Texas along a highway under construction. Ahead of him is a motorcyclist, who, when attempting to round a curve constructed to detour traffic, hits a patch of ice in the roadway, loses control, and tumbles to the pavement. To avoid hitting the cyclist, A applies his brakes and turns the wheel, at which time he too makes contact with the ice patch, which causes him to lose control of the tractor-trailer rig he is operating. The ensuing accident results in severe personal injury to A and his truck is completely destroyed. Later it is found that the ice standing in the roadway was caused by a trench dug alongside the road for the purpose of allowing the water to drain onto and across the roadway. Potential defendants are the Texas Highway Department, the construction contractor, and the adjacent landowner. A files suit against all three in federal district court. By virtue of the Texas Tort Claims Act the highway department is amenable to suit. 130

Prior to the day that answer is due, A's attorney receives a copy of the department's motion to dismiss, based on the grounds that the state has not waived immunity from suit in federal court and that the Texas Highway Department is not a "citizen" for diversity purposes because it is merely the

129. People ex rel. Younger v. County of Eldorado, 5 Cal. 3d 480, 491 n.12, 487 P.2d 1193, 1199 n.12, 96 Cal. Rptr. 553, 559 n.12 (1971). However, it seems apparent that the fact that the unit in question is not a corporation is not controlling. Hunkin-Conkey Constr. Co v. Pennsylvania Turnpike Comm'n, 34 F. Supp. 26 (M.D. Pa. 1940). The decision in the Moor case that Alameda County was a "citizen" for diversity purposes was reached by the Court before incidentally noting how counties of the state have been characterized by the state courts. It should be noted that this holding in Moor runs the risk of being overshadowed by another issue raised in the case, namely whether the county was a suable "person" under the Civil Rights Act of 1877, 42 U.S.C. § 1983 (1970). In concluding that it was not, the Court relied on its earlier decision in Monroe v. Pape, 365 U.S. 167 (1961). The issue in Moor on whether the county was a "citizen" for diversity purposes arose under a separate claim in the case based on state law.

130. The fact situation is taken from Couch v. Banks, No. 3-74-574 (N.D. Tex., Nov. 27, 1974).
arm or alter ego of the state. While countering the first contention may pose problems, it should not prove as difficult as overcoming the second. In the first place, the weight of authority\(^{131}\) holds that the Texas Tort Claims Act effects a complete waiver as regards forum. More importantly, however, the rationale of Flores\(^{132}\) combined with that of Lester\(^{138}\) is sound, or at least is far more convincing than the sole case to the contrary.\(^{134}\)

The diversity problem will provide the major barrier to the maintenance of A's action, because it is here that his attorney must show that the highway department is a citizen.\(^{185}\) To show this he must convince the court that the department occupies an independent status, or possesses a sufficiently recognizable character, relative to the state in general, by way of setting forth its various powers and duties. As an initial measure, A's attorney may contend that the department has "indirectly" become a citizen in that it has been given the power to join in suit "at any time for all purposes, including the right of appeal at any stage . . . ."\(^{138}\) It may be sued for certain of its torts\(^{137}\) and may be made to respond in damages when it injures property while constructing a highway.\(^{138}\) It has the authority to enter into contracts,\(^{139}\) and may be subject to suit thereon.\(^{140}\) Additionally, the department has broad control over funds by virtue of various statutory provisions,\(^{141}\) and the courts of Texas have held that the department has supervision over the expenditure of highway funds with the state treasury merely holding them at the department's will.\(^{142}\) Perhaps very significantly, the department and the department alone must answer for any liability it incurs as the result of its tortious activity,\(^{143}\) and to cover such potential liability it is authorized to carry insurance.\(^{144}\)


\(^{133}\) Lester v. County of Terry, 353 F. Supp. 170 (N.D. Tex. 1973), aff'd, 491 F.2d 975 (5th Cir. 1974).

\(^{134}\) See note 112 supra and accompanying text.

\(^{135}\) See note 112 supra and accompanying text.


\(^{140}\) TEX. REV. CIV. STAT. ANN. art. 6674t (1969).

\(^{141}\) TEX. REV. CIV. STAT. ANN. arts. 6673e-2, 6674d-1, and 6674e (1969).


\(^{144}\) Id. See also TEX. REV. CIV. STAT. ANN. art. 6674e-1 (Supp. 1975). The department may carry insurance. See Interoffice Communication, attached as exhibit "H" to SENATE INTERIM COMM., 62D LEGISLATURE OF TEXAS, REPORT ON THE TEXAS TORT CLAIMS ACT A-44 (1971); see Smith, Insurance and the Texas Tort Claims Act, 49 TEXAS L. REV. 445 (1971).

Although the illustration in the text consistently refers to the Texas Highway Department, the agency's name has recently been changed to the State Department of Highways and Public Transportation, upon its merger with the Texas Mass Transportation Commission. Ch. 678, § 3, [1975] Tex. Laws Reg. Sess. 2063, amending, Tex.
There is yet another approach that A's attorney might take to show that the department is a citizen for diversity jurisdiction purposes, one which may be termed the "direct" approach to a citizen status. This is based upon the simple proposition that the department has been imbued with such a status for the purpose of suit. This conclusion derives from a reading of certain sections of the Tort Claims Act. Section 3 provides, in pertinent part: "Each unit of government in the state shall be liable for money damages . . . where such unit of government, if a private person, would be liable . . . ." 145 Section 19 of the Act is also significant in this respect by providing that "Any governmental unit carrying Workmen's Compensation Insurance . . . shall be entitled to all of the privileges and immunities granted by the . . . Act . . . to private persons and corporations." 146 Of course, the courts of the state have recognized that once the state or its governmental units are involved in litigation they are regarded as private individuals. 147

One might argue that to allow the legislature to give units of government a citizen status for diversity purposes runs counter to the notion that federal subject-matter jurisdiction cannot be conferred by consent of the parties. However, it is contended that such an analysis presents itself too easily. Accepting, ad arguendo, that parties may not manipulate diversity jurisdiction requirements, 148 it would nevertheless seem consistent to say that if the legislature may give the department sufficient powers so that at some recognizable point it becomes a citizen for diversity purposes (the "indirect" approach to becoming a citizen), it may just as well say that the department is to be deemed a citizen for purposes of suit (the "direct" approach to becoming a citizen). Further, it is doubtful whether the courts have considered situations such as this when stating that one cannot confer diversity jurisdiction by consent. In reality, the problem is not too different from the situation where two citizens, both residents of the same state, are about to engage in a legal battle, and the prospective plaintiff makes a bona fide move to another state and files the action based on diversity. 149 The analogy is closer still to the corporate situation where before corporate existence the nonentity necessarily could not be a citizen for diversity purposes, but once incorporated is deemed to be a citizen. 150 The problem is simply one of removal of a disability. While one may not confer diversity jurisdiction upon

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147. See note 80 supra and accompanying text.
148. The notion that the parties may not manipulate jurisdictional requirements has been challenged as not absolute. F. James, Civil Procedure § 11.6, at 537 (1965).
150. See, e.g., Barrow S.S. Co. v. Kane, 170 U.S. 100, 106 (1898); Louisville, C. & C. R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558-59 (1844).
himself when not possessing a citizen status, none would argue that he may not remove those disabilities which keep him from obtaining that status. Nor should it make a difference that the geographical boundaries of the unit involved in the action, such as those of the Texas Highway Department, are co-extensive with those of the state itself, no such distinction being perceived in the cases.

It should be noted that this latter argument regarding the approach to take when showing citizen status is applicable to any governmental unit suable under the Tort Claims Act, while the former approach, at least in regard to those statutory provisions it relies on, deals only with the Texas Highway Department. If these arguments are employed, and the court takes the time to review the authorities, with particular reference to the Moor case, A should be successful in withstanding the department's motion to dismiss.

IV. CONCLUSION

The doctrine of sovereign immunity is an unnecessarily harsh and arbitrary one which undoubtedly "runs counter to democratic notions of the moral responsibility of the State." Recognizing this, many states have acted to relieve the doctrine of its vitality. The Texas Legislature did so by enacting the Texas Tort Claims Act in 1969. Yet even though this waiver of immunity has put most victims of governmental tort in a better position than they were prior to the passage of the Act, a plaintiff, when seeking to vindicate his rights in a federal tribunal on the jurisdictional basis of diversity of citizenship, may still find his way barred. By strictly construing the Act as not to permit suit in the federal arena because of failure of the state to waive immunity in federal tribunals, a court surely acts in an out-dated manner, while at the same time ignoring the express intention of a legislature that called for the Act to be liberally construed. Fortunately, the problem of scope of waiver as regards forum may no longer be a great obstacle, due to the well-reasoned opinion of the Flores case. But even with the question

151. See note 148 supra and accompanying text.
152. Thus, one must consult the proper statute dealing with the particular unit involved in order to determine its powers, duties and degree of autonomy.
154. As has been pointed out, supra note 130 and accompanying text, the case from which the fact situation was taken was dismissed for lack of diversity jurisdiction on the authority of Moor. Letter from Judge Wm. M. Taylor, Nov. 14, 1974, to counsel of record in Couch v. Banks, No. 3-74-574 (N.D. Tex., Nov. 27, 1974). It is contended that the case was wrongly decided. The suit was not pursued in the federal arena, but was refiled in state court. No. 34,352, Dist. Ct. of Hunt County, 196th Judicial Dist. of Texas, Jan. 16, 1975. One favorable consequence of the ruling, however, was that it recognized the Moor criteria as being applicable in the determination of the diversity question, rather than the antiquated test that had been employed in the previous Texas case of Johnson v. Texas Dep't of Corrections, 373 F. Supp. 1108 (S.D. Tex. 1974), discussed at notes 116-19 supra and accompanying text.
155. Greenhill & Murto, supra note 13, at 472.
of forum no longer a major hurdle, another factor may yet impede the diverse plaintiff, namely the proposition that a state and its units which are said to be its arms or *alter egos* are not "citizens" for purposes of diversity jurisdiction. Application of nebulous tests in a zeal for formalism to determine the issue does not outweigh the negative consequences which flow from a conclusion that a governmental unit is not a "citizen": deprivation of a plaintiff's choice of forum and the protection his choice should be accorded, and the multiplicity of actions that will inevitably result. The *Moor* case may signal a new era for determination of the status of governmental units, but this is by no means certain. The better view, however, is that a unit of government is a citizen either when it has been outrightly deemed to be so by the legislature, or when, in cases where it is not, it may be said to possess a sufficiently recognizable and independent character relative to the state in general, coupled with some degree of fiscal or managerial autonomy. When counties and municipalities are perceived as citizens for diversity purposes, no valid reason suggests itself why an agency such as the Texas Highway Department may not also be so perceived. Outmoded doctrines of construction, and especially those which can be spoken of only in the abstract, should not be employed to effect what is merely a substitute on the federal level for the doctrine of sovereign immunity.