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THE OHIO DOCTRINE OF SOVEREIGN IMMUNITY *vis-a-vis* the United States Constitution, fourteenth amendment, will hereinafter be considered. Before delving into the constitutional realities, however, the substance of this narrow discussion should be placed in perspective with the multifarious civil actions arising out of the Kent State tragedy, May 4, 1970.

In all, twenty-two civil lawsuits have been commenced against a motley group of parties-defendants with aggregate prayers totalling in excess of $99,300,000. Summarily, these actions have been posited in both federal and state forums, and predicated upon the following theories:

1. Federal civil rights actions (Title 42 U.S.C., § 1983; Title 28 U.S.C., §§ 1331, 1343) designating various agents of the State of Ohio as parties-defendants.

2. Federal wrongful death and personal injury actions (Title 28 U.S.C. § 1332) designating various agents of the State of Ohio as parties-defendants.

3. Ohio state court wrongful death and personal injury actions designating various agents of Ohio as parties-defendants.

4. Ohio state court wrongful death and personal injury actions designating the State of Ohio as the sole party-defendant.

The lawsuits falling within the first, second and third categories defined above are not, at this time, finally resolved and, therefore, the writer has deemed it inappropriate to comment thereon. On December 11, 1972, however, the United States Supreme Court determined that the appeal from *Krause v. Ohio*,[1] lacked a substantial federal question, making proper the following comments relative to the constitutional issues involved in the fourth group of actions above defined.

On July 19, 1972, the Ohio Supreme Court held in *Krause* that the State of Ohio could not be sued in tort pursuant to the court's interpretation of the Ohio Constitution, article I, section 16, as amended September 3, 1912. Furthermore, the Ohio Supreme Court concluded that article I, section 16, was not violative of the United States Constitution, fourteenth amendment.

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[1] 31 Ohio St.2d 132 (1972).

Thereafter, Mr. Krause appealed this decision to the United States Supreme Court[2] arguing in his jurisdictional statement that the Ohio Supreme Court's conclusions violated his fourteenth amendment rights to both due process of law and equal protection under the laws. Responding thereto, the State of Ohio submitted a motion to dismiss the appeal arguing, among other things, that the appeal was devoid of merit and precluded by earlier decisions of the United States Supreme Court. Although the writer's schedule does not permit an all-inclusive review of the various and far-reaching constitutional aspects and ramifications of the Ohio doctrine of sovereign immunity, the following is the pertinent portion of the State of Ohio's motion to dismiss the appeal.

1. Due Process

Inherent to the due process of law concept in our country's jurisprudence is the well-settled and fundamental rule that a state cannot be sued without its consent. This reality is documented at the genesis of our Constitution in the debates of the Virginia Convention, convened to ratify the *new* document. For example, John Marshall, debating Section 2, Article III, stated:

> "It is not rational to suppose that the sovereign power should be dragged before a court . . . But, say they, there will be partiality in it if a state cannot be a defendant — if an individual cannot proceed to obtain a judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff." J. ELLIOT, ELLIOT DEBATES 555 (1876)

Indeed, the Eleventh Amendment, constitutionalizing this basic precept relative to the federal courts, came in the wake of shock and surprise caused by this Court's decision in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793). Describing the sequence of events following *Chisholm,* the Court wrote in *Hans v. State of Louisiana,* 134 U.S. 1, 10-11 (1890):

> "*Chisholm v. Georgia* [holding that a state was liable to suit by a citizen under the Constitution as originally drawn] . . . created such a shock of surprise throughout the country that, at the first meeting of Congress

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[2] Krause v. Ohio, 28 Ohio App.2d 1, 274 N.E.2d 321 (1971); *rev'd.,* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *appeal dismissed,* 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed,* ..... U.S. ....., Jan. 22, 1973.

> thereafter, the 11th Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states."

This Court has, on numerous occasions, affirmed this inherent proposition. Speaking for the Court in *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857), Chief Justice Taney stated at page 529:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts . . . without its consent or permission." *See* "Note," commencing at 61 U.S. (20 How.) 527

This basic principle has remained viable throughout our country's jurisprudence, *See, e.g., Langford v. United States*, 101 U.S. 341 (1880); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907); *In the Matter of the State of New York*, 256 U.S. 490 (1920); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Monaco v. Mississippi*, 292 U.S. 313 (1934); *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949); *Dugan v. Rank*, 372 U.S. 609 (1963); *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184 (1964). Although these exemplary cases involved the immunity of the United States and the immunity of the states to federal suit, the underlying precept is consistent; to-wit, a sovereign entity cannot be sued without the sovereign's consent.

Likewise, an overwhelming majority of the states in this country continue to recognize the viability of this basic precept. It is important to emphasize that the states have not retained the fundamental rule solely due to the traditional concepts of sovereignty but rather, as a consequence of the venerable rationale upon which it is founded. The tenet has been inherent in all notions of due process since the inception of our country.

Ignoring this heritage, appellant would assert that the Supreme Court of Ohio's non-self-executing interpretation of Section 16, Article I of the Ohio Constitution violates his rights to due process of law guaranteed by the United States Constitution, Fourteenth Amendment. This appeal is not novel and this Court has previously ruled on the identical issue.

Shortly after the people of Ohio amended Section 16, Article I of the Ohio Constitution, the Ohio Supreme Court ruled, in an analogous case sounding in tort, that the *new*

amendment was not self-executing. Specifically, the Supreme Court of Ohio held in *Raudabaugh v. The State of Ohio; Palmer v. The State of Ohio,* 96 Ohio St. 513 (1917) syllabus paragraphs one and two:

> "1. A state is not subject to suit in its own courts without its express consent.
>
> "2. The provisions of the Ohio Constitution, article I, section 16, as amended September 3, 1912, that, 'Suits may be brought against the state, in such courts and in such manner, as may be provided by law' is not self-executing; and statutory authority is required as a prerequisite to the bringing of suits against the state."

The decision was thereafter appealed to this Court on the issue of whether it violated plaintiffs' rights to due process of laws guaranteed by the Federal Constitution. Determining that plaintiffs' rights to due process were not violated, the United States Supreme Court held in *Palmer v. The State of Ohio,* 248 U.S. 32, 33 (1918):

> "The right of individuals to sue a state, in either a federal or a state court, cannot be derived from the Constitution, or laws of the United States. It can come only from the consent of the state. *Beers v. Arkansas.* 20 How. 527; *Railroad Co. v. Tennessee,* 101 U.S. 337; *Hans v. Louisiana,* 134 U.S. 1. *Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, no federal right being involved. Elmendorf v. Taylor,* 10 Wheat. 152, 159; *Old Colony Trust Co. v. Omaha,* 230 U.S. 100, 116; *Memphis Street. Ry. Co. v. Moore,* 243 U.S. 299, 301" (Emphasis added)

From the foregoing, it is clear that any proper due process question which appellant might have raised is devoid of merit and foreclosed by earlier decisions of this Court.

2. Equal Protection

Section 16, Article I of the Ohio Constitution, is not, on its face, discriminatory. No person may sue the State of Ohio without legislative consent. Appellant has not established an inceptive classification, much less a *suspect* classification, nor argued that any duty exists upon the Ohio legislature to provide an Ohio court jurisdiction over his

cause of action. Therefore, any discussion of equal protection is foreign to the appeal herein.

Furthermore, should this Court determine that Section 16 of Article I does create a classification, that classification is reasonable and does not offend appellant's constitutional rights. *Graham v. Richardson,* 403 U.S. 365 (1971); *Dandridge v. Williams,* 397 U.S. 491 (1970); *McGowan v. Maryland,* 366 U.S. 420 (1961); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911). While one of the most compelling and critical aspects for not granting a court jurisdiction over the state is the necessity of protecting the state from an astronomical invasion of its treasury, the policy also enables the state government to function unhampered by the threat of time and energy consuming legal actions which would appreciably inhibit the rigorous and effective administration of traditional state activities. Additionally, it affords that degree of protection demanded by the numerous administrative and high-risk activities undertaken by the state government; activities unknown to private enterprise *(e.g.* maintaining a highway system, penal institutions, mental hospitals, providing police and fire protection, *etcetera).* Clearly, these circumstances establish more than a reasonable basis for leaving to legislative determination the instances when the state shall be subject to suit. Accordingly, a view of this Court's ruling that, "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *(McGowan v. Maryland, supra)* Section 16, Article I of the Ohio Constitution, does not violate appellant's right to the equal protection of the laws.

Appellant urges, however, that the right to judicial redress is fundamental as the concept is employed by this Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969). Therefore, he concludes appellee's burden is increased and the State of Ohio must demonstrate a compelling state interest, as opposed to the traditional reasonable basis.

Initially, it must be noted that the right to judicial redress has never been held fundamental *vis-a-vis* the *Shapiro* doctrine, thus demanding the demonstration of a compelling state interest. Additionally, as appellee has demonstrated, the state's interests involved herein are not limited to fiscal integrity as in *Shapiro* but permeate the vital functions of state government.

Assuming, *arguendo,* the right to judicial redress is of a fundamental character, even the most fundamental of rights

is not absolute but is circumscribed with exception. For instance, this Court has recently held that malicious libel enjoys no First Amendment protection [*Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)], and that obscenity is not within the area of protected speech or press [*Ginsberg v. New York*, 390 U.S. 629 (1968), *reh. denied* 391 U.S. 971 (1968)]. Further, as Mr. Justice Harlan points out in his dissent to *Shapiro v. Thompson*, 394 U.S. at 661, such fundamental rights as the right to pursue a particular occupation [*Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Katch v. Board of River Pilot Comm'rs*, 330 U.S. 552 (1947)], the right to receive wages for one's labors [*Bunting v. Oregon*, 243 U.S. 426 (1917)], and the right to inherit property [*Miller v. Wilson*, 236 U.S. 373 (1915)] are adjudged under the traditional equal protection standard.

Very recently, this Court, considering the identical fundamental right that was involved in *Shapiro* (interstate travel), held the state need only show a rational basis to constitutionally justify a commercial airline passenger tax [*Airport Authority v. Delta Airlines*, ... U.S. ....., 31 L. Ed. 2d 620 (1972)]. And in another recent decision, this Court indicated that even the basic democratic right to vote was not an absolute [*Dunn v. Blumstein*, ... U.S. ....., 31 L. Ed. 2d 274 (1972)].

As with these fundamental rights, the right to judicial redress is tempered by a most important exception, crucial to this appeal. Specifically, the right to judicial redress against a state can only be effectuated if the state consents to suit. As previously demonstrated (III. ARGUMENT, Part C, 1, *See* pp. 10-13, *supra)*, a venerable exception our country's notion of due process is that a state may not be sued without its consent.

This limitation on the right to judicial redress was specifically affirmed in *Palmer v. The State of Ohio*, 248 U.S. at 33, where this Court held:

> "The right of individuals to sue a state, in either a federal or state court, cannot be derived from the Constitution, or laws of the United States. It can come only from the consent of the state." (omitting citations)

Consequently, if access to the courts is a fundamental right, that right has been circumscribed by this limitation since the origin of our nation's Constitution.

> Further, there is no substantive distinction to be drawn between the Ohio situation in question and the immunity of the federal government to suit. Would appellant argue that the immunity of the United States as applied by this Court violates the Fifth Amendment to the United States Constitution? Or, indeed, would appellant argue that the Eleventh Amendment to the United States Constitution is in some manner offensive to the Constitution to which it is amended? These questions are posited to demonstrate the quagmire upon which appellant's contentions rest.
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> Earlier this year, this Court considered, on the merits, an appeal raising the identical equal protection issue presently at bar. The case of *Carolyne v. Youngstown,* 404 U.S. 1007 (1972), presented the question:
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> > "Does Article I, Section 16 of the Ohio Constitution, by failing to provide for suits sounding in tort against the state or its agents violate the Equal Protection Clause?" 40 U.S.L.W. 3271 (1971).
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> The appeal was dismissed.
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> It is respectfully submitted that the only questions which could conceivably be raised by appellant are devoid of merit and precluded by earlier decisions of this Court. Axiomatically, the appeal must be dismissed. *Zucht v. King,* 260 U.S. 174 (1922); *Sugarman v. United States,* 249 U.S. 182 (1919); *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902).

In light of the United States Supreme Court's ruling on the merits, the doctrine of sovereign immunity is today viable and remains within the discretion of the sovereign — the people of the several States. Although sophisticated fourteenth amendment attacks can and have been waged against this reality, the orderly administration of law in our country demands that the integrity of the majority be honored.