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# Retroactive Relief in the Federal Courts Since *Edelman v. Jordan*: A Trip Through The Twilight Zone

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*In 1974, the Supreme Court held in* Edelman v. Jordan *that the eleventh amendment bars federal courts from awarding retroactive relief against state officials who have violated federal law. Thus* Edelman *limits federal courts to prospective injunctive relief while barring retroactive restoration of unlawfully withheld public benefits. This Article will review the eleventh amendment's history, the rationales behind the* Edelman *rule, and the problems arising with the rule's application. The Article will then discuss legal developments since the* Edelman *decision. The author concludes that the decision has unnecessarily extended the eleventh amendment bar, thereby restricting the equitable powers of federal courts and limiting deserving litigants from receiving the full relief to which they are entitled.*

## INTRODUCTION

*As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under* Ex parte Young *will not in many instances be that between day and night.*[1]

IN 1974, the United States Supreme Court ruled in *Edelman v. Jordan*[2] that the eleventh amendment[3] bars federal courts from awarding retroactive relief against state officials who have violated federal law.[4] The Court reasoned that retroactive restora-

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1. Edelman v. Jordan, 415 U.S. 651, 667 (1974).

2. 415 U.S. 651 (1974) (pointing to the rule in Ex parte Young, 209 U.S. 123 (1908)).

3. U.S. CONST. amend. XI states: "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."

4. 415 U.S. at 657–59. Five years later in Quern v. Jordan, 440 U.S. 332 (1979), a

tion of wrongfully withheld government benefits amounted to an award of money damages against the state since the benefits would come from the state treasury.[5] Thus, despite the normal, equitable considerations favoring court-ordered, retroactive correction of unlawful state procedures by restitution, *Edelman* limited the federal courts to providing only prospective relief mandating changes in state procedures.[6]

*Edelman* involved a claim for welfare benefits, but its effect has extended beyond welfare litigation to such areas as public school education,[7] handicapped services,[8] tuition charges,[9] scholarship assistance,[10] employment discrimination,[11] tuition assistance,[12] unemployment benefits,[13] medicaid reimbursement,[14] vocational rehabilitation,[15] condemnation,[16] zoning,[17] relocation assistance,[18] and railway freight charges.[19] As a result, not only may needy welfare recipients and other deserving litigants be deprived of benefits to which they are entitled, but state officials may stand to benefit from violating federal law.[20]

The thesis of this Article is that the Supreme Court unnecessarily interfered with the discretion of federal judges to provide restitution for official misconduct through a misapplication of the eleventh amendment.[21] This Article will review briefly the history of the eleventh amendment and its impact on equitable remedies

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sequel to *Edelman*, the Court reaffirmed its position respecting the 11th amendment. For a discussion of *Quern*, see *infra* notes 69–75 and accompanying text.

5. 415 U.S. at 664–68.

6. See the Appendix to this Article, *infra* 397–418, which includes a compilation of cases denying retroactive relief based upon the *Edelman* decision. Also included are cases in which *Edelman* was distinguished and benefits were awarded.

7. *See* Meiner v. Missouri, 673 F.2d 969 (8th Cir. 1982).

8. *See* M.R. v. Milwaukee Pub. Schools, 495 F. Supp. 864 (E.D. Wis. 1980).

9. *See* Riley v. Ambach, 508 F. Supp. 1222 (E.D.N.Y. 1980), *rev'd on other grounds*, 668 F.2d 635 (2d Cir. 1981).

10. *See* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976), *aff'd on other grounds*, 432 U.S. 1 (1977).

11. *See* Crutcher v. Kentucky, 495 F. Supp. 603 (E.D. Ky. 1980).

12. *See* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976).

13. *See* Drumright v. Padzieski, 436 F. Supp. 310 (E.D. Mich. 1977).

14. *See* Shashoua v. Quern, 612 F.2d 282 (7th Cir. 1979).

15. *See* Jones v. Illinois Dep't of Rehabilitation Servs., 504 F. Supp. 1244 (N.D. Ill. 1981).

16. *See* Nasralah v. Barcelo, 465 F. Supp. 1273 (D.P.R. 1979).

17. *See* Ligon v. Maryland, 448 F. Supp. 935 (D. Md. 1977).

18. *See* Tullock v. State Highway Comm'n, 507 F.2d 712 (8th Cir. 1974).

19. *See* Burlington N., Inc. v. North Dakota, 460 F. Supp. 140 (D.N.D. 1978).

20. *See* 415 U.S. at 692 (Marshall, J., dissenting).

21. *See infra* notes 92–103 and accompanying text.

in federal courts.[22] Next, the holdings of *Edelman* and *Quern v. Jordan*[23] will be dissected.[24] Finally, this Article will examine the lower federal courts' struggles with the *Edelman* rule,[25] developments in the law since *Edelman*,[26] and will discuss approaches which may be available to federal court litigants seeking retroactive relief.[27]

*Edelman* created a number of troublesome issues regarding the remedial powers of federal courts. This Article will explore the development of these issues and their implications in cases subsequent to the *Edelman* decision.

## I. THE ELEVENTH AMENDMENT AND EQUITABLE REMEDIES: A BRIEF HISTORY

The eleventh amendment, adopted in 1798, was a reaction to an early Supreme Court decision allowing a suit against the State of Georgia.[28] Congress feared that this decision would open the floodgates to a wave of litigation seeking to recover Revolutionary War debts. Despite the plain meaning of the amendment's language, the Supreme Court has long held that the amendment's prohibition of suits "commenced or prosecuted against one of the United States by citizens of *another* State"[29] also barred actions by citizens of the *same* state.[30]

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22. *See infra* notes 28–43 and accompanying text.

23. 440 U.S. 332 (1979).

24. *See infra* notes 44–103 and accompanying text.

25. *See infra* notes 104–209 and accompanying text.

26. The following student commentaries appeared shortly after the decision in *Edelman*: Note, Edelman v. Jordan: *A New Stage in Eleventh Amendment Evolution*, 50 NOTRE DAME LAW. 496 (1975); Comment, Edelman v. Jordan: *The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity*, 12 HOUS. L. REV. 891 (1975); Comment, *The Eleventh Amendment and Retroactive Welfare Benefits*, 36 U. PITT. L. REV. 78 (1974);

27. *See infra* notes 181–95 & 206–09 and accompanying text.

28. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). For discussions of the historical basis of the 11th amendment, see Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977); Cullison, *Interpretation of the Eleventh Amendment: (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1 (1967); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976). For an overview of the 11th amendment and a somewhat different view regarding the reasons for its enactment, see C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

29. U.S. CONST. amend. XI (emphasis added).

30. *See, e.g.*, *Ex parte* New York, 256 U.S. 490, 497 (1921); Duhne v. New Jersey, 251

*Ex parte Young*,[31] however, decided in 1908, narrowed the amendment by holding that a federal court suit, seeking to enjoin a state official from committing unconstitutional acts, was not a suit against the state.[32] Rather, the suit was one against a state official in his individual capacity who, by acting in an unlawful manner, was stripped of the authority and imprimatur of the state.[33] Furthermore, the state's necessary expenditure of money

U.S. 311, 313 (1920); Fitts v. McGhee, 172 U.S. 516, 524 (1899); Hans v. Louisiana, 134 U.S. 1, 10–17 (1890).

*Hans* is the primary authority for the notion that citizens of the defendant state are included in the prohibitions of the 11th amendment. *Edelman*, 415 U.S. at 662–63. *See also* Cullison, *supra* note 28, at 22–24 (discussion of *Hans*). In *Hans*, a bondholder brought suit to compel payment on coupons which the state of Louisiana had dishonored. He argued that the state's action impaired a contract in violation of Article I, section 10 of the United States Constitution. The Court recognized that the 11th amendment, by its own wording, did not apply to citizens of Louisiana, but stated that it would be "anomalous" if citizens of the same state could sue that state in federal court, while citizens of another or foreign state could not. 134 U.S. at 10–11. According to the Court, Congress could not have intended such a loophole. *Id.* at 15. It has been suggested that political and economic reasons pertaining to the Reconstruction period were responsible for the *Hans* decision. *See* Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C.L. REV. 747 (1981). While the decision in *Hans* may appear to rest on shaky grounds—it has been followed continually by the courts since that time. *Edelman*, 415 U.S. at 662–63.

31. 209 U.S. 123 (1908).

32. *Id.* at 159. In *Young*, railroad stockholders sought to enjoin the state of Minnesota from implementing maximum interstate railroad rates on the theory that the rates and the civil and criminal penalties imposed for failing to comply with rate schedules constituted a deprivation of due process. *Id.* at 129–30. Young, the state attorney general, ignored a federal court injunction and sought to enforce the rate structure in state court. *Id.* at 133–34. He was subsequently found in contempt and arrested by a United States marshall. *Id.* at 126. Young petitioned for a writ of habeas corpus with the United States Supreme Court. He argued that the 11th amendment was a barrier to the federal court's exercise of jurisdiction. *Id.* at 136–38.

33. *Id.* at 159–60. The Court stated:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

*Id.* Thus, the conduct of a state official constitutes state action governed by 14th amendment standards, but the very same conduct does not constitute state action to which the 11th amendment applies and injunction may issue. Despite the criticism directed toward its reasoning, the significance of *Young* is clear:

> With all its tortured reasoning, *Young* is one of the pillars of the American legal system, "indispensable to the establishment of constitutional government and the rule of law." If the eleventh amendment had succeeded in thwarting all federal court litigation against states and their officers, the importance of the inferior federal courts would have been seriously diminished. More to the point, if *Ex parte Young* had been decided otherwise, freedom itself would have suffered a terrible blow, for federal courts are the "primary and dominant instruments for vindicating rights given by the Constitution."

from the state treasury to comply with the injunction did not offend the eleventh amendment.[34] Thus, the equitable powers of the federal courts could be applied to reach a result which would otherwise be unconstitutional. One commentator noted:

> *Ex parte Young* crystalized the role of the federal courts. By legerdemain, it solved a constitutional riddle, how the eleventh and fourteenth amendments can coexist. The solution was Procrustean, dwarfing the eleventh. No more would the states attend the federal courts at their leisure. Now the states could be hauled there pseudonymously in the name of their hired hands, their own officialdom, high and low. *Ex parte Young* marks the conversion of the federal courts to guardians against state incursions, errant or marauding.[35]

The conceptual fiction of *Ex parte Young* has enabled the federal courts to entertain actions against state officials in various types of section 1983[36] civil rights actions, including public benefit cases.[37] *Ex parte Young*, however, did not indicate whether a federal court may award monetary benefits improperly denied by the state before the court's injunction.[38] This issue is critical since ret-

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Wechsler, *Federal Courts, State Criminal Law and The First Amendment*, 49 N.Y.U. L. REV. 740, 764 (1974) (quoting Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 509 (1928)).

34. 415 U.S. at 667–68. *Accord* Milliken v. Bradley, 433 U.S. 267, 289 (1977): "[F]ederal courts [may] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."

35. Wechsler, *supra* note 33, at 776–77.

36. 42 U.S.C. § 1983 (1976).

37. It is noteworthy that in the last eight years over 75,000 federal civil rights actions were filed in the federal courts. These included 1,592 cases in the welfare area. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1980) table 28, at 70. Moreover, the filing of such actions was facilitated in 1980 when Congress amended 28 U.S.C. § 1331 to eliminate the $10,000 amount in controversy requirement for federal question jurisdiction. Act of Dec. 1, 1980, Pub. L. No. 96–486, § 2(a), 94 Stat. 2369, 2369. The amended section states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* The $10,000 requirement was retained only for claims arising under the Consumer Product Safety Act. *Id.* § 2(b) (to be codified at 15 U.S.C. § 2072).

For a comprehensive discussion of 42 U.S.C. § 1983 (enacted as the Civil Rights Act of 1871) and its significance as "an enforcement mechanism of the fourteenth amendment to protect the citizenry from the unconstitutional actions of the States," see Thompson v. New York, 487 F. Supp. 212, 220 (N.D.N.Y. 1979). *See also* Baker, *supra* note 28, at 157–58; Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293, 331–34 (1980).

38. The Court in *Young*, 209 U.S. at 167, cited with approval Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738 (1824), a case involving an illegal state levy against a federally chartered bank. In *Osborn*, the court stated:

> The true inquiry is, whether an injunction can be issued to restrain a person, who is a State officer, from performing any official act enjoined by statute; and whether a Court of equity can decree restitution, if the act be performed. In pre-

roactive awards are essential for full equitable relief. They attempt to make whole those wronged by the illegal conduct of state officials.[39]

Before *Edelman v. Jordan*, federal courts frequently, though not uniformly, awarded retroactive benefits in welfare cases,[40] sometimes with summary affirmance by the Supreme Court.[41] In *Edelman*, the majority recognized the "precedential value" of the Court's recent affirmances, but stated that stare decisis was less constraining in areas of constitutional law than in other areas.[42] Since this was the first time the court had had an opportunity to "fully explore" the eleventh amendment issue with the benefit of briefing and argument, it was free to reach a different result.[43]

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serving this inquiry, it must be assumed . . . that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it.

*Id.* at 838. Both injunctive relief and restitution were found appropriate in *Osborn*, with no distinction made between the two. 22 U.S. (9 Wheat.) at 867–71.

39. The need for retroactive relief arises in various federal court claims against state officials. For examples of such claims, see *supra* notes 7–19 and accompanying text. *See also* Appendix *infra* pp. 397-418 (catalog of cases claiming retroactive relief). In public benefits litigation, the court's inability to provide full relief may affect the interests of a large class of persons. For instance, there were close to 20,000 persons affected in *Edelman*. *See infra* note 73 and accompanying text. Moreover, the court noted in Nelson v. Likens, 389 F. Supp. 1234 (D. Minn. 1974), *aff'd*, 510 F.2d 414 (8th Cir. 1975):

> This Court finds that in this particular situation the loss of money to these AFDC families is immediate and irreparable harm. While the loss of money is not considered irreparable, this Court must point out that in this case those affected are not the average citizens but rather those who are in the grip of poverty. The loss to them of a certain sum of money each month is much more of an injury than it is to the average individual.

*Id.* at 1237.

40. *See, e.g.*, Sterret v. Gaither, 409 U.S. 1070, *aff'g* 346 F. Supp. 1095 (N.D. Ind. 1972); State Dep't of Health & Rehabilitation Servs. v. Zarante, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (S.D. Fla. 1971); Wyman v. Bowens, 397 U.S. 49 (1970), *aff'g* 304 F. Supp. 717 (N.D.N.Y. 1969). In some instances, benefits were denied on 11th amendment grounds. *See, e.g.*, Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); Frye v. Lukehard, 364 F. Supp. 1379 (W.D. Va. 1973); Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970). In *Rothstein*, the Second Circuit's position was diametrically opposed to the Seventh Circuit's position in Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973). The Supreme Court granted certiorari in Edelman v. Jordan (Jordan v. Weaver below) to resolve this conflict between the circuits.

41. *See supra* note 40.

42. 415 U.S. at 671. Justice Rehnquist wrote the majority opinion.

43. *Id.* One can only speculate on why there was little litigation in this area before the late 1960's and why the Supreme Court did not write a decision specifically addressing the issue of retroactive relief before 1974. This may have been due to the increased use of the federal courts as forums to protect individuals and groups against state action during the 1960's and 1970's. The federal government did not become involved in providing lawyers for the poor until the passage of the Economic Opportunity Act of 1964. As a result of this legislation, there was an infusion of new lawyers who were prepared to represent low income persons in their conflicts with state officials. *See* M. GIRTH, POOR PEOPLE'S LAW-

## II. *EDELMAN V. JORDAN* AND *QUERN V. JORDAN*

### A. *The Opinions*

In *Edelman*, plaintiff recipients of Aid to the Aged, Blind, and Disabled (AABD) benefits claimed that certain procedures followed by the Illinois Department of Public Aid conflicted with federal regulations and violated the fourteenth amendment.[44] Specifically, plaintiffs alleged that there were lengthy delays in approving applications and paying assistance monies which caused considerable hardship to eligible recipients in Illinois.[45] Plaintiffs also claimed that defendants had acted illegally by authorizing grants to begin during the month in which approved, excluding payments for prior months during which recipients were eligible.[46] The District Court found that the Illinois procedures conflicted with federal regulations, enjoined their operation, and awarded back benefits wrongfully withheld by the state.[47]

Relying on prior Supreme Court summary affirmances, the Seventh Circuit affirmed, concluding that *Ex parte Young* was not limited to prospective relief, but encompassed the broad application of the court's remedial powers.[48] Accordingly, in order to provide full relief from the illegal conduct of defendant state officials, the court approved retroactive relief for benefits wrongfully

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YERS (1976). In 1970, the Deputy General Counsel of Health, Education, and Welfare wrote:

> Three years ago it could be said that the federal courts played virtually no role in shaping the rules which determine whether an individual is eligible for public assistance under federally financed programs. The intervening period has seen a dramatic change.

Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1, 1 (1970).

Barrett notes that "until January 1967 the federal courts had finally adjudicated but one action on welfare grants under 42 U.S.C. § 1983 . . . ." *Id.* Barrett attributes the increase in welfare litigation since 1967 to the lawyers sponsored by the Office of Economic Opportunity and the increased receptivity of the courts to "cases brought against government officials on issues involving the rights of individuals." *Id.* at 7–8.

For a comprehensive discussion of the development of public interest law in the late 1960's, see Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

44. 415 U.S. at 653–56. The AABD at that time was a federal categorical aid program administered by the states. Since January 1, 1974, this program has been administered by the federal government and has become known as Supplemental Security Income (SSI). *See* 42 U.S.C. §§ 1381–1385 (1976). The Aid to Families with Dependent Children (AFDC) Program remains the major federal categorical grant program administered by the states. *See* 42 U.S.C. §§ 601–660 (1976).

45. 415 U.S. at 655–56.

46. *Id.* at 655.

47. Jordan v. Swank, No. 71 Civ. 70 (N.D. Ill. Feb. 4, 1972).

48. Jordan v. Weaver, 472 F.2d 985, 991 (7th Cir. 1973).

withheld.[49] The Seventh Circuit based its holding on two critical factors. First, the plaintiffs were asking for "equitable restitution" rather than for compensatory damages—the latter remedy foreclosed by the eleventh amendment.[50] Second, the court believed that retroactive relief was essential to prevent the defendants from benefiting from their own illegal acts.[51]

The United States Supreme Court reversed the district court order of retroactive benefits.[52] The Court refused to extend *Ex parte Young* to encompass monetary awards not ancillary to the injunction against the state official.[53] The Court rejected the Seventh Circuit's distinction between payment of damages and an award of retroactive monetary relief.[54] As the Court observed, it was a "virtual certainty" that the award in either case would be paid from the state treasury.[55] Similarly, the Court rejected the Seventh Circuit's alternative argument that even if the eleventh amendment barred recovery of back benefits, the state had waived its constitutional immunity[56] by participating in the federally

49. *Id.* at 993–94.

50. *Id.* at 993.

51. *Id.* at 992, 994.

52. 415 U.S. at 664–66.

53. *Id.* at 664–69.

54. *Id.* at 668.

55. *Id.*

56. The *Edelman* Court adopted a two part test to determine if waiver of the 11th amendment occurred. First, Congress must evince a clear intent to abrogate the state's immunity when it enacts a particular program. 415 U.S. at 671–74. Second, the state by its participation must clearly intend to consent to such abrogation. The Court stated, "We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Id.* at 673 (citing Murry v. Wilson, 213 U.S. 151, 171 (1909)). *See* Florida Dep't of Health Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) (reaffirming the strict standard of "explicit intent"). *See also infra* note 103.

In applying the first prong of the test, the *Edelman* Court noted that the HEW regulations provided federal financial assistance for court-ordered payments of retroactive benefits. 415 U.S. at 675 n.17. *See also* 45 C.F.R. § 205.10(b)(2), (3) (1980) (present regulations). The Court, however, concluded that their promulgation was "not determinative of the constitutional issues here presented." 415 U.S. at 675 n.17.

The Court also distinguished the cases on which the Seventh Circuit relied to justify its finding that congressional authorization was missing, Pardon v. Terminal R., 377 U.S. 184 (1964) and Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959). The Court emphasized that the federal statute involved in *Pardon* (Federal Employers Liability Act) specifically authorized suits against the states or their instrumentalities, whereas no such authorization could be found in the Social Security Act. 415 U.S. at 671–77. *Petty* was also distinguishable since it involved an interstate compact permitting each party "to sue and be sued in its own name." *Id.* at 672. Finally, the Court observed that a third case relied on by the circuit court, Employees v. Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973), actually cut against a waiver since the Court in that case refused to find a waiver even though

funded AABD program.[57]

After rejecting the Seventh Circuit's arguments, the Court held that an award of back benefits for a violation occurring before the court's injunction took effect would be the equivalent of a damage award against the state, a remedy specifically prohibited by the eleventh amendment.[58] Nevertheless, where the payment of mon-

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the statutory language (Fair Labor Standards Act), expressly authorized suit against a general class while leaving to implication that the class included states.

A question not raised in *Edelman* is whether a state official could effect a waiver of the state's immunity through his or her conduct in limited circumstances. In Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), the affidavit of a state official filed in opposition to plaintiffs' motion for a preliminary injunction asserted that plaintiffs would not be prejudiced by denial of the injunction "since any sums ultimately found to be owing them could be disbursed at that time." *Id.* at 238. The Second Circuit found that this statement was not "authoritative" and could not be considered a "clear manifestation of consent by the state." *Id.* at 239. The opinion, however, did not articulate what would constitute "authoritative" and "clear" consent. A contrary result was reached by the Seventh Circuit in Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975), which held that a statement almost identical to the one in *Rothstein* in a memorandum opposing preliminary relief, constituted a waiver of state immunity. The wording of the statement in *Vargas* is slightly more emphatic. "If she [plaintiff] is successful on the merits, she will be awarded any benefits wrongfully withheld . . . ." *Id.* at 492. Because the difference is minimal, it is clear that the *Vargas* court chose to take a different approach than the *Rothstein* court, when it concluded that "[a] representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*." *Id.*

The representations made in *Rothstein* and *Vargas* occurred prior to the decision in the *Edelman* case. It is not surprising then, that since *Edelman* no cases have been found in which this kind of waiver has been claimed. State officials are not likely to represent that they will pay back benefits when they know that the Court will not otherwise direct them to do so.

A waiver has also been inferred where a state agreed to settle a claim for retroactive relief prior to the *Edelman* decision and later tried to invoke the 11th amendment after *Edelman* was handed down. Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974). *See also* Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir. 1977) (prior consent decree deemed a waiver of immunity); New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27 (2d Cir. 1979), *cert. denied*, 444 U.S. 836 (1979). (parties' consent judgment constituted 11th amendment waiver).

57. 415 U.S. at 671–74. The 11th amendment has been deemed to create a jurisdictional bar which can be raised at any stage of the proceedings, *id.* at 678, yet the immunity conferred by the amendment can be waived by the states or abrogated by congressional action with the consent of the states. *Id.* at 671–77. *See also* Parden v. Terminal Ry., 377 U.S. 184 (1964); Great N. Ins. Co. v. Reed, 322 U.S. 47, 51, 53–54 (1944).

58. 415 U.S. at 667–68. The *Edelman* Court placed considerable reliance on Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), which held that the 11th amendment barred a taxpayer from recovering amounts paid under protest for state taxes. 415 U.S. at 463–64. The Court's reliance was misplaced since *Ford* involved a claim for the return of state sales taxes, contained state law questions, and did not include a claim for injunctive relief. *Id.* at 460, 463. Indeed the Court in *Ford* did not even discuss *Young*.

*Edelman* also cited with approval Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946), in which a refund claimed for state taxes unconstitutionally assessed against a nonresident corporation was deemed barred by the 11th amendment. *Id.* at 576.

ies from state funds is a necessary and often "inevitable consequence" of compliance with a prospective court decree, neither *Ex parte Young* nor the eleventh amendment bars such a result.[59]

The dissenting opinions attacked the Court's premise that the eleventh amendment applied in these circumstances. Justice Douglas argued that *Ex parte Young* was dispositive since there was little difference in impact on the state treasury between prospective and retroactive relief.[60] Justice Douglas further maintained that the state's participation in the welfare program constituted an implied consent to be sued.[61] Moreover, Illinois had continued to participate despite its awareness of Supreme Court decisions affirming the award of retroactive welfare benefits.[62]

Justices Marshall and Blackmun also found that Illinois, by its voluntary participation in the AABD program, had waived its eleventh amendment immunity.[63] According to Justice Marshall, Illinois had impliedly agreed to comply with the statute and regulations and to subject itself to suit in federal court for any violations.[64] Congress, reasoned Justice Marshall, has provided a cause of action for violations of the Social Security Act in section 1983 and its remedy could not exclude awarding benefits illegally withheld in the past.[65] Congress intended a "full panoply of judicial remedies to be available" in actions under section 1983.[66]

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The words used by the Court expressing the rationale for its decision were ignored: "The reason underlying the rule, which is discussed at length in the *Reed* and *Ford* cases, is 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." *Id.* at 577. *Kennecott*, like *Ford*, made no reference to *Young*.

59. 415 U.S. 668–69.

60. *Id.* at 680–83 (Douglas, J., dissenting).

61. *Id.* at 685–87.

62. *Id.* at 687.

63. *Id.* at 688–90 (Marshall, J., dissenting).

64. *Id.* Justice Marshall pointed to the Social Security Act provision requiring "fair hearings," 42 U.S.C. § 1382(a)(4) (1976), and to the regulations providing that states must make retroactive payment to successful recipients, 45 C.F.R. § 205.10(a)(18) (1973), as evidence of a statutory and regulatory scheme which contemplated retroactive correction of past errors. 415 U.S. at 692–93. He also argued that HEW regulations which provide for federal financial assistance in meeting court directed retroactive payments indicate HEW's belief that such remedies were intended by Congress. *Id.* at 693.

65. *Id.* at 690–94.

66. *Id.* at 694.

Justice Marshall also noted that the Court did not resolve the issue of whether a judgment rendered pursuant to the 14th amendment would provide a constitutional basis to award retroactive benefits. He stated:

[T]here has been no determination in this case that state action is unconstitutional

Anything less would provide "truncated justice."[67]

After remand by the Supreme Court, the conflict between the parties continued to percolate in the lower federal courts.[68] In

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under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue.

*Id.* at 694 n.2.

The *Edelman* Court, in overruling prior decisions, did not distinguish between cases turning on statutory grounds and those decided under the 14th amendment. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). Since *Edelman*, no court has taken Marshall's bait by finding the 11th amendment limited in effect by the 14th. Although the question has been presented on several occasions, the courts have either avoided or rejected the notion of such limitation. *See, e.g.*, Jagnandan v. Giles, 538 F.2d 1166, 1182–84 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). *But see id.* at 1186–90 (Goldberg, J., concurring); Weisbord v. Michigan State Univ., 495 F. Supp. 1347, 1356 (W.D. Mich. 1980); Yuan Jen Cuk v. Lackner, 448 F. Supp. 4, 7 (N.D. Cal. 1977). The claim also was raised on appeal to the Supreme Court in Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976), *aff'd on other grounds*, 432 U.S. 1 (1977). The Court, however, denied cert. *sub nom.* Rabinovitch v. Nyquist, 433 U.S. 901 (1977).

In Millikin v. Bradley, 433 U.S. 267 (1977), the Court noted that it would not decide whether "the Fourteenth Amendment, *ex proprio vigore* works a *pro tanto* repeal of the Eleventh Amendment. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)." 433 U.S. at 291 n.23. Perhaps the Supreme Court will address this issue later.

There are strong arguments suggesting that the 14th amendment possesses independent vigor which does not require congressional action to effectuate its purposes. *See* Jagnandon v. Giles, 538 F.2d at 1186–90 (5th Cir. 1976) (Goldberg, J., concurring). Since Congress is unlikely to provide relief for every 14th amendment violation, in the absence of a self-executing force, "the fourteenth amendment's promise of full protection of individual rights might remain unfulfilled in many cases . . . ." *Id.* at 1188.

67. 415 U.S. at 696 (Marshall, J., dissenting) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)). Justice Brennan in a separate, dissenting opinion found that the absence of language in the 11th amendment barring suits against a state by its own citizens rendered the amendment inoperative in this case. He believed the issue should be determined by general principles of sovereign immunity which he resolved by looking to Art. I, § 8, cl. 1 of the Constitution respecting powers granted to Congress by the States. In Brennan's view, this section of the Constitution should be interpreted as a surrender of state sovereign immunity. 415 U.S. at 687–88 (Brennan, J., dissenting).

68. *Edelman's* impact was mitigated in Hutto v. Finney, 437 U.S. 678 (1978) and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In *Fitzpatrick* the Court ruled that Congress could, by enacting legislation pursuant to the enforcement provisions of § 5 of the 14th amendment, override the bar of the 11th amendment. In *Fitzpatrick*, a claim was made against Connecticut for alleged sex discrimination under Title VII of the Civil Rights Act of 1964. The 1972 amendments to the Act authorized suits by private individuals for money damages. Since the Act was an exercise of congressional power under § 5 of the 14th amendment, 11th amendment immunity would not apply and retroactive benefits were awarded. Under the *Fitzpatrick* formulation, consent of the state, either express or implied, is irrelevant. It should be noted that rejection by the courts of the theory that the 14th amendment acts as a limitation on the 11th amendment was based substantially on *Fitzpatrick*. The courts reasoned that since *Fitzpatrick* required congressional action under § 5 of the 14th

1979, the dispute came before the Supreme Court again in *Quern v. Jordan*.[69] The issue there was whether the eleventh amendment barred the district court from ordering the defendant state officials to notify the members of the plaintiff class that their benefits had been unlawfully denied and of their right to a state administrative appeal.[70] The district court ordered notice, but the Seventh Circuit reversed after finding the procedure and the notice impermissible under *Edelman*.[71] The Seventh Circuit held that the *form* of notice implied that state funds should be used to compensate plaintiffs. In an en banc rehearing, however, the court said that notice simply advising the class members of their right to state administrative procedures would not conflict with *Edelman*.[72] In affirming the Seventh Circuit's reversal, the Supreme Court agreed that such notice was merely informational and left it to the state to decide whether retroactive benefits should be paid.[73] As long as the state was not required to make any payments, the elev-

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amendment to override 11th amendment immunity, it is illogical to suppose that the desire to override can be inferred in the absence of such action. *See* Jagnandan v. Giles, 538 F.2d at 1184, 1185; Weisbord v. Michigan State Univ., 495 F. Supp. at 1355, 1356; Yuan Jen Cuk v. Lackner, 448 F. Supp. at 7. *See also* Field, *supra* note 28, at 548–49.

In Hutto v. Finney, 437 U.S. 678 (1978), the Court held that the Civil Rights Attorney's Fees Act of 1976, which provides for the award of attorney's fees in any action filed under specified civil rights statutes, authorizes the award of fees against a state by a federal court. In a 5 to 4 decision, the Court found that the Attorney's Fees Act was enacted pursuant to congressional power to enforce the 14th amendment.

Despite *Fitzpatrick*, *Hutto* and Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978) (cities and other localities are "persons" under 42 U.S.C. § 1983 (1976) and therefore can be sued directly for money damages), the Court in Quern v. Jordan, 440 U.S. 332 (1979), dashed any hopes that it was retreating from *Edelman*. *See infra* notes 69–75 and accompanying text.

69. 440 U.S. 332 (1979).

70. *Id.* at 334.

71. Jordan v. Trainor, 551 F.2d 152 (7th Cir. 1977), *rev'g* 405 F. Supp. 802 (N.D. Ill. 1975).

72. Jordan v. Trainor, 563 F.2d 873, 875 (7th Cir. 1977) (rehearing en banc).

73. 440 U.S. at 346–49.

This remedy is helpful only marginally since requiring each plaintiff who seeks retroactive relief to file separate administrative proceedings is inefficient, expensive, and will not ensure comprehensive relief.

On remand in *Quern*, notice was mailed to the more than 18,000 members of the plaintiff class; 3,811 persons responded. There were 69 additional responses from relatives of class members who were no longer living. Letter from the Legal Assistance Foundation of Chicago, Counsel for plaintiffs in *Edelman* and *Quern* to Norman Lichtenstein (June 16, 1981). Since state funds appropriated for this purpose had lapsed, it was necessary for plaintiff to file an action in the state court of claims. That court ruled in favor of plaintiffs and sums due to those members of the class who had come forward were finally paid. Petz v. Illinois, 81 Ct. Cl. 1475 (1981); Richardson v. Illinois, 81 Ct. Cl. 2107 (1981).

enth amendment would not be violated.[74]

*Quern* resolved the notice issue but did not supply any new analysis or justification for the *Edelman* doctrine. *Quern* nevertheless reaffirmed *Edelman* and laid to rest questions raised by later cases as to *Edelman's* vitality.[75]

### B. *Analysis*

The *Edelman* rationale for applying the eleventh amendment as a bar to retroactive relief may be viewed as containing three elements: 1) retroactive relief looks to a past time when a defendant state official was not under a court-ordered obligation to comply with federal law. Injunctive relief, permissible under the eleventh amendment, can only be directed to the future and may not be used to correct unlawful conduct in the past;[76] 2) retroactive benefit awards disrupt the ability of the state to allocate its limited financial resources in ways prospective injunctive relief

74. 440 U.S. at 347–48.

75. *Id.* at 338–49. In a section superfluous to the decision, the Court said that a state was not a "person" within the meaning of § 1983. *Id.* at 338–45. In a concurring opinion, Justice Brennan was highly critical of this result because he believed the Court should not address or decide issues not presented by the parties. *Id.* at 350. Justice Brennan argued that cases decided subsequent to *Edelman* supported the basic premise that § 1983 abrogated state immunity under the 11th amendment. He contended that the Court's ruling in Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), that a municipality was a "person" for § 1983 purposes, left "at least an open question" as to whether a state was also a person under § 1983. If true, then § 1983 (originally enacted as the Civil Rights Act of 1871 to enforce the provisions of the 14th amendment) would embody a congressional intent to override the states' 11th amendment immunity. 440 U.S. at 350–54. *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976) (Congress had the power to abrogate the states' immunity by specific action).

In support of his argument, Justice Brennan cited at length to the Civil Rights Act's legislative history in an effort to show that Congress intended the term "person" in § 1983 to encompass states as well as local units of government. 440 U.S. at 354–66. Justice Rehnquist dismissed Justice Brennan's legislative history as "slender," *id.* at 341, while Justice Brennan accused the Court of choosing "to hear in the eloquent and pointed legislative history of § 1983 only 'silence.'" *Id.* at 365.

Although supported by dicta, it would appear that a clear majority of the Court (seven members, excluding Justice Marshall's concurrence with Justice Brennan) do not find § 1983 as a basis for overriding 11th amendment immunity. In lamenting the *Quern* ruling on this issue, one federal judge wrote:

> Reluctantly, this Court is bound by *Quern*'s limited reading of the legislative history of Section 1983 and its holding that a State is not a "person" within the meaning of the statute. The Court today must reject the persuasive and haunting voices of a previous era which would not let any form of body politic claim superiority over the Constitutional rights of the people.

Thompson v. New York, 487 F. Supp. 212, 226 (N.D.N.Y. 1979).

76. 415 U.S. at 668–69.

does not;[77] 3) retroactive benefits are equivalent to damages and are therefore not a constitutionally permissible component of the equitable relief available under the doctrine of *Ex parte Young*.[78]

Each proposition has serious conceptual or practical shortcomings. If, ideally, the law treats like cases alike, then a requirement that the eleventh amendment's bar turn on *timing* of the injunctive relief is irrational; a difference in timing should have no bearing on the facts or issues of two otherwise similar cases. Additionally, state expenditures in compliance with prospective injunctive relief are often more costly than retroactive benefit awards. Finally, equitable restitution and damages are in fact distinct remedies.

### 1. *Correction of Past Errors*

*Edelman* clearly permits federal courts to grant forward-looking injunctive relief even if compliance by state officials entails payment of substantial sums from the state treasury.[79] The critical factor in this formulation is the date the court's injunction is issued. Benefits wrongfully withheld before that date cannot be recovered, but they may not be withheld thereafter.[80] Future benefit payments which an injunction can compel do not differ from past benefits wrongfully withheld, for which no injunction will issue.[81] As one court observed, the power of the court to act turns on the speed with which judicial intervention can be obtained. The critical issue ought to be, however, "whether the court has [the] authority to control the distribution of these financial resources. If it has that control, prospective and retroactive equitable relief

77. *Id.* at 666 n.11.

78. *Id.* at 668 (pointing to the rule in Ex parte Young, 209 U.S. 123 (1908)).

79. *Id.* at 667–68.

80. *Id. See also* Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975); D'Iorio v. County of Del., 447 F. Supp. 229 (E.D. Pa.), *vacated on other grounds*, 592 F.2d 681 (3d Cir. 1978). Both of these cases are discussed in the Appendix *infra* pp. 401, 408).

In Lyons v. Weinberger, 376 F. Supp. 248 (S.D.N.Y. 1974), the court issued a temporary restraining order on March 20, 1974 providing that all state SSI benefits due and unpaid for March shall be paid. The court found that these payments would not be retroactive and thus barred under *Edelman* since they were due during the same month. *See also* Porter v. Schweiker, 527 F. Supp. 150 (D. Minn. 1981); Yuan Jen Cuk v. Lackner, 448 F. Supp. 4 (N.D. Cal. 1977) (no recovery of benefits until after final order providing injunctive relief); Taylor v. Hill, 377 F. Supp. 495, 496 (W.D.N.C. 1974), *vacated and rem'd*, 529, F.2d 517 (4th Cir. 1975).

81. In both cases, the monies sought are specifically determined on the basis of eligibility. The only distinguishing factor is the time when such benefits are due. Retroactive benefits are those payable prior to the issuance of a court injunction. *Edelman* 415 U.S. at 668.

should be possible."[82]

*Edelman* blithely ignored the fact that although the defendant state official was not under a *court-imposed* obligation in the past, the official was under a *federally imposed* obligation which was violated.[83] Thus, a forward-looking injunction merely orders the official to comply with the official's ongoing federal obligations. The forward-looking injunction adds nothing of legal significance to the duties expected of the state official. Thus, when a court treats cases arising before an injunction the same way as cases arising after an injunction, such court acts consistently with its equitable power as defined in *Ex parte Young*; such equitable power may be exercised to prevent state officials from acting illegally in violation of federal law.[84]

The defendant state official might also be viewed as committing a continuing violation of federal law which a federal court should be empowered to enjoin. Simply put, the bar of the eleventh amendment should not be made to turn on the timing of an injunction, but rather on the substance of the relief sought.

### 2. *Impact on the State Treasury*

Central to *Edelman's* holding is the notion that an award of retroactive benefits will cost great sums of money and thereby interfere with the state's fiscal process.[85] The Court emphasized that an award of back benefits "will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials . . . ."[86] Yet the Court acknowledged that injunctive relief

82. 447 F. Supp. at 239.

In Yearby v. Parham, 415 F. Supp. 1236, 1243 (N.D. Ga. 1976), the district court judge took the position that state AFDC funds which were directed to be paid into a court escrow account prior to the issuance of an injunction would escape classification as retroactive benefits and could be awarded to the plaintiffs consistent with *Edelman*.

83. The district court in *Edelman* found § 4004 of the Illinois Categorical Assistance Manual invalid insofar as it conflicted with 45 C.F.R. 206.10(a)(3) (1973)'s mandate that applications for assistance be processed within specific time limits. 415 U.S. at 656. It is difficult to imagine that the state defendants who delayed some applications for months did not realize that they were violating federal law. *Id.* at 655–56. Of course, in any case where injunctive relief is directed against a state official by a federal judge, there must be a finding that federal law (constitutional, statutory, or regulatory) has been violated.

84. 209 U.S. at 159–60; *see also Thornton*, *supra* note 37, at 311–12.

85. 415 U.S. at 666 n.11.

86. *Id.* at 668. Of course if recovery is sought against state officials in their *individual capacities* the 11th amendment would not operate as a bar to recovery. Wood v. Strickland, 420 U.S. 308 (1975). *See also* American Civil Liberties Union v. Finch, 638 F.2d 1336 (5th Cir. 1981) (claim against state governor, attorney general, secretary of state, and commissioner of safety in their individual capacities allowed). However, in such instances

which restrains future conduct may also have a substantial impact on a state's treasury and that such impact is a permissible consequence of the principle announced in *Ex parte Young*.[87] Thus, the majority recognized, as did Justice Douglas in his dissent, that "most welfare decisions by federal courts have a financial impact on the States."[88]

The majority, however, sought to distinguish between the impact of paying benefits prospectively and retroactively.[89] According to the Court, retroactive benefits "invariably mean there is less money available for payments for the continuing obligations of the public aid system."[90] The Court, however, ignored the fact that any benefits paid by the state will reduce the funds generally available for public assistance programs. Indeed, prospective benefits are likely to have a far greater effect on a state's ability to allocate its resources than will retroactive benefits.[91] The increased costs which the state will incur in the future are open-ended, whereas retroactive relief is confined to a specific time period and thus is limited in amount. This applies whether the court directs the payment of benefits unforeseen by the state or whether, as in *Edelman*, the benefits are to be paid at an accelerated rate. The finding by the *Edelman* majority of a more significant impact on a state treasury when retroactive relief is awarded is therefore unjustified.

### 3. *Retroactive Benefits are Damages and Do Not Constitute Allowable Equitable Relief*

In delineating the kind of relief which *Ex parte Young* permits, the *Edelman* Court held that a federal court is empowered to order expenditure of funds from a state treasury if "ancillary" to injunctive relief.[92] The test is whether relief is a "necessary conse-

good faith in carrying out official duties would be a defense and the ultimate recovery where significant amounts are involved would be limited.

87. 415 U.S. at 667–78.

88. *Id.* at 680–81 (Douglas, J., dissenting).

89. *Id.* at 666 n.11.

90. *Id.*

91. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 289–90 (1977); *Edelman*, 415 U.S. at 683–84 (Douglas, J., dissenting).

92. 415 U.S. at 668. The 11th amendment makes no distinction between actions in law or equity. It can therefore be argued that once the right to sue public officials for violation of federal law is established, it should not matter whether the remedy is legal or equitable. Injunctive relief against official misconduct, however, was the exception carved out by *Young* and approved by *Edelman*. It is the propriety of awarding retroactive relief in conjunction with that remedy which was at issue in *Edelman*.

quence of compliance in the future . . . ."[93] Anything else was regarded as damages forbidden by the eleventh amendment.[94] In so finding, the Court failed to analyze the remedy of equitable restitution. Its holding, that restitution is "indistinguishable" from damages,[95] was not supported by its reasoning. Indeed, the Court ignored its own words in *Porter v. Warner Co.*:[96]

> Restitution . . . may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.[97]

The majority also ignored the distinction between the restorative nature of retroactive relief and the compensatory nature of damages.[98] An illuminating analysis distinguishing retroactive relief from damages is found in *D'Iorio v. County of Delaware*,[99] which involved a section 1983 claim by a dismissed detective for restoration of his position.[100] In *D'Iorio*, Judge Lord viewed retroactive remedies as necessary adjuncts to the federal courts' equitable powers to enjoin official misconduct:

> Such remedies are intended to prevent, correct or terminate unconstitutional conduct by public officials. Thus, a court could issue an injunction preventing an official from wrongfully withholding monetary benefits. Equitable monetary relief is simply the retroactive application of such an order. This re-

93. *Id.* at 668.

94. *Id.* at 668–69.

95. *Id.* at 668. In support of its position, the Court suggested that the district court's view of awarding retroactive relief would require Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), to be overruled. *Id.* at 668–69. *Ford*, however, was concerned with state tax procedures and state law issues not present in *Edelman*. *See supra* note 58.

96. 328 U.S. 395 (1946).

97. *Id.* at 399. Justice Rehnquist, attempting to distinguish *Porter*, stated that "it did not purport to decide the availability of equitable relief consistent with the Eleventh Amendment." 415 U.S. at 672–73 n.15. *Porter*, however, allows the scope of injunctive relief to include restoration of lost entitlements. *See also* Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960), in which the Court affirmed "the historic power of equity to provide complete relief," including retroactive awards. *Id.* at 292.

98. 415 U.S. at 668, 669.

99. 447 F. Supp. 229 (E.D. Pa.), *vacated on other grounds*, 592 F.2d 681 (3d Cir. 1978). Judge Lord distinguished *Edelman*, asserting that all forms of equitable relief were available against counties and other localities (citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). Lord concluded that if back pay could be classified as a form of equitable relief instead of damages, it properly could be awarded by the court in this § 1983 action. His analysis of damages and equitable restitution contrasts with the lack of any significant discussion of the issue in *Edelman* and supports the position that these remedies are in fact distinguishable. 447 F. Supp. at 237–39.

100. *Id.*

> lief differs from a request for damages because it does not seek to measure the harm done plaintiff (such as consequential damages) but rather it is aimed at effecting the appropriate transfer of governmental benefits.[101]

A claim for damages stands in a very different posture:

> [D]amage relief is not concerned with halting the unconstitutional conduct of public officials but rather is intended to compensate the victim of such conduct for harm done. The funds from which such relief will come are not related to such conduct and no form of equitable relief can reach these financial resources. Consequently, it is reasonable to conclude that the sources of those funds . . . and not the offending official is the entity being held liable.[102]

Equitable restitution and damages are, in fact, distinct remedies designed to effectuate different results. The failure of the *Edelman* Court to recognize these differences underlies its application of the eleventh amendment as a limitation on the equitable powers of the federal courts.[103]

## III. THE TWILIGHT ZONE

The theoretical shortcomings of *Edelman v. Jordan* have produced much confusion. The artificiality of *Edelman's* distinction between prospective and retroactive relief, for example, has complicated determinations of whether relief sought is prospective or retroactive for eleventh amendment purposes. This section will review the *Edelman* legacy and the difficulties inherent in application of the *Edelman* rule.

### A. *Nature of the Remedy—When is Relief Retroactive?*

*Edelman* held that applicability of the eleventh amendment turns on timing of injunctive relief rather than on the substance of relief sought. Although this artificial distinction worked in *Edelman*, other situations may present problems. If, for example, a state were to violate federal law by improperly notifying recipients of a planned reduction in government benefits, it is unclear

101. *Id.* at 238–39.

102. *Id.* at 239.

103. The *Edelman* Court could have reached a different result without abandoning the long-held rule of a state's 11th amendment immunity from suits by its own citizens in federal courts. Retroactive relief fits neatly into the exception of *Young* since it reaches conduct which violated federal law and is thus beyond the authority of the state official in question. Thus, there should be no distinction between past correction of illegal acts and future restraint. To have so held would not have affected the 11th amendment protection afforded to the states against open-ended suits for damages.

whether a federal court order directing officials to continue benefits at prereduction levels would be retroactive or prospective.

A number of courts have wrestled with the question. At issue in *Kimble v. Solomon*[104] was Maryland's planned reduction in medicaid benefits without proper notice[105] which, the district court found, violated federal regulations on benefit reductions.[106] Manifesting considerable frustration with the harshness compelled by *Edelman*, the district court nonetheless refused to require restoration of benefits, while noting that prospective relief enjoining the improper notice was appropriate.[107]

The court of appeals, however, held that *Edelman* permitted an order of "prospective restoration" of benefits at prereduction levels to continue for at least ten days after Maryland had mailed "timely and adequate notice of the reduction."[108] This seemingly modest remedy, which provided no benefits for accrued medical expenses, evoked a short, acerbic dissent which asserted that the majority opinion would completely destroy the *Edelman* decision "by devising allegedly prospective procedures for the purpose of assuring the payment of retrospective benefits."[109]

In *Kimble*, the appellate court was divided as to whether the relief was retroactive or prospective. In effect, the Fourth Circuit majority directed nunc pro tunc restoration of eligible recipients to their position before the state's illegal reduction.[110] The majority rejected the distinction urged by defendants that a remedy for a "continuing wrong" would be prospective and thus permissible, but a remedy for the "continuing effects of a past wrong" would be retroactive and thus impermissible.[111] Accordingly, the court noted that "[a]s the *Edelman* and *Milliken* cases show, the proper focus of eleventh amendment scrutiny is on the nature of the relief sought, not the wrong committed."[112] In other words, the *Edelman* rule is satisfied so long as the relief provided only covers

104. No. Y-76-210 (D. Md. Aug. 18, 1977), *rev'd*, Kimble v. Solomon, 599 F.2d 599 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979).

105. 599 F.2d at 602.

106. *Id.*

107. *Id.* at 602–03. In a letter to counsel for plaintiff the court stated: "I confess that I find the signing of this order as distasteful as anything I have done in my capacity as a judicial officer. However, I have reviewed the applicable law and this action is taken reluctantly in light of the language of [*Edelman v. Jordan*] . . . ."

108. *Id.* at 605.

109. *Id.* at 606 (Hoffman, J., dissenting).

110. *Id.* at 604–06.

111. *Id.* at 604 n.6.

112. *Id.*

expenses to be accrued in the future.[113]

Following the Fourth Circuit's decision, two other courts adopted the *Kimble* court's holding. The Third Circuit in *Eder v. Beal*[114] required Pennsylvania to reinstate a medicaid eyeglass program until the state gave proper notice of its intention to stop benefits.[115] In *Stenson v. Blum*,[116] the District Court for the Southern District of New York likewise required New York to provide prospective restoration of medicaid benefits until the state gave both appropriate notice and opportunity for hearing.[117] During this waiting time, payment of benefits was required, and plaintiffs had to be restored to their former status as medicaid eligibles.[118]

*Kimble*, *Eder* and *Stenson* did not direct payment of benefits for expenses accrued in the past, but rather called for restoration of improperly terminated benefit entitlements. These cases are entirely consistent with *Edelman*, since they do not order restoration of pre-injunction loss of benefits. They are, however, indicative of the problem inherent in the *Edelman* rule: the artificial distinction between reinstatement of a former entitlement and the restoration of benefits lost prior to court action. By permitting prospective relief while barring retroactive relief, *Edelman* requires federal courts to disregard compelling circumstances which militate in favor of equitable intervention.[119]

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113. *Id.* at 605-06.

114. 609 F.2d 695 (3d Cir. 1979).

115. *Id.* at 701.

116. 476 F. Supp. 1331 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 885 (1980).

117. The district court determined that automatic termination of medicaid benefits to persons found no longer eligible for SSI violated federal regulations. *Id.* at 1337–42. The state must determine the continuing eligibility of each person for medicaid, provide proper notice before any cutoff, and afford an opportunity for a hearing. *Id.* at 1341. During this time, benefits must continue for plaintiffs restored to their former status as medicaid eligibles.

118. *Id. See also* Turner v. Walsh, 435 F. Supp. 707 (W.D. Mo. 1977). The court directed that AFDC recipients be temporarily restored to a prior level of assistance for AFDC and medicaid payments pending proper steps taken by the state regarding notification of the reduction and the provision of an opportunity for a hearing.

119. A recent case which graphically illustrates this point is Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981). In *King*, Massachusetts had failed to issue checks owed to 145,000 recipients of AFDC benefits and Massachusetts General Relief. On July 1, 1981, the date checks were to be issued, plaintiffs appeared in court seeking a temporary restraining order directing payment. The district court denied relief. Two weeks later, however, the circuit court granted an injunction requiring issuance of checks due on July 16, 1981, but did not require issuance of checks which had been withheld for the first two weeks of the month. Citing *Edelman*, the court drew the line at "prospective"

B. *Ancillary Relief and the Costs of "Prospective Compliance"*

In *Quern v. Jordan*,[120] the defendants did not raise the issue of expenses for notifying the plaintiff class about possible state administrative remedies.[121] The Fifth Circuit recently confronted this issue in *Silva v. Vowell*,[122] where plaintiffs challenged a Texas welfare regulation declaring that Aid to Families with Dependent Children (AFDC) assistance would be unavailable if the father were "capable of light work."[123] The district court ordered Texas officials to issue a *Quern*-type notice advising plaintiff class members of their right to file an administrative claim for back benefits.[124] On appeal, defendants claimed that the eleventh amendment barred the district court's order because the cost of sending such notice was significant and would be paid from state funds.[125] The Fifth Circuit ruled that an advisory notice under *Quern* was "ancillary" to prospective injunctive relief, and that therefore, the costs involved were not the kind of retroactive charge barred under *Edelman*.[126] Under the court's interpretation, *Quern* held that "it is the character of an expense, whether 'ancillary' or not, rather than the amount, that is determinative as to whether there is an Eleventh Amendment issue."[127] The Fifth Circuit noted *Quern's* reliance on *Milliken v. Bradley*,[128] where compliance with the desegregation order cost the Detroit school system six million dollars.[129]

Both *Quern* and *Edelman* focused on the relief sought rather

relief. *Id.* at 842. Thus, relief covering the first part of the month could not be provided even though plaintiffs appeared in district court on a timely basis and the district court's failure to act was deemed erroneous. In *King*, Massachusetts did not contend that the claimants were not entitled to aid, but only that administrative considerations justified nonpayment. The artificiality of the *Edelman* rule was never more evident.

120. 440 U.S. 32. *See supra* notes 69-75 and accompanying text.

121. *Id.* at 347, 347 n.19.

122. 621 F.2d 640 (5th Cir. 1980), *cert. denied sub nom*, Johnston v. Silvia, 449 U.S. 1125 (1981).

123. *Id.* at 643.

124. *Id.* at 650–51.

125. *Id.*

126. *Id.* at 650–53. "The notice to this class is well within the prospective-compliance exception referred to in *Milliken*, and the bald assertion that it will cost too much is insufficient to invoke the proscriptions of the Eleventh Amendment." *Id.* at 653. *See also* Lewis v. Shulimson, 534 F.2d 794 (8th Cir. 1976); Mehler v. Blum, No. 80 Civ. 3531 (S.D.N.Y. Sept. 18, 1981).

127. 621 F.2d at 652–53.

128. 433 U.S. 267 (1977).

129. *Id.* at 293 (Powell, J., concurring).

than on the sums involved.[130] Impact on the state treasury becomes significant, according to those cases, only if such impact is retroactive in nature.[131] If an expense relates to "prospective compliance" with an injunction, it will not violate the eleventh amendment regardless of its financial impact on the state.[132] The problem is that what constitutes "ancillary" relief or "prospective compliance" has not yet been defined clearly.

The Supreme Court in *Quern* and the Fifth Circuit in *Silva* rejected an extension of *Edelman* that would have kept federal courts from ordering that plaintiffs be provided proper notification of their rights. The result of these two cases, while sensible, represents a further extension of a legal fiction; notification to a class of available state administrative remedies is not essential to a court's granting of a future injunction. *Quern's* characterization of the court's order of notice, however, avoids further limitation on relief a federal court may grant.

### C. *Recovery of Federal Benefits Unlawfully Taken by the State*

*Edelman* was based on the premise that an award of benefits unlawfully denied in the past is "indistinguishable . . . from an award of damages against the state" and has the same effect on the state treasury.[133] *Edelman*, however, involved welfare benefits.[134] Thus, it is questionable whether *Edelman* also bars recovery of purely federal benefits illegally taken by the state from the hands of recipients. Courts presented with this issue generally assume that *Edelman* applies.[135]

In *Fanty v. Pennsylvania Department of Public Welfare*[136] plaintiffs challenged Pennsylvania's requirement that state welfare recipients reimburse the state with their Social Security benefits.[137]

130. In *Edelman*, 415 U.S. at 668, Justice Rehnquist conceded that "[s]uch an ancilliary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* . . . ."

131. 415 U.S. at 668–69.

132. Since *Edelman*, courts have found that costs and even fines for contempt can be awarded "ancilliary" to injunctive relief. *See e.g.*, Class v. Norton, 505 F.2d 123 (2d Cir. 1974); Rodriguez v. Swank, 496 F.2d 1110 (7th Cir.), *cert. denied*, 419 U.S. 885 (1974); Thompson v. Walsh, 481 F. Supp. 1170 (W.D. Mo. 1979); Welsch v. Likens, 68 F.R.D. 589 (D. Minn. 1975).

133. 415 U.S. at 668.

134. *Edelman* was concerned solely with unpaid benefits, supported by both federal and state funding, due to recipients. *Id.* at 653–56.

135. *See infra* notes 136-49 and accompanying text.

136. 551 F.2d 2 (3d Cir. 1977), *cert. denied*, 440 U.S. 957 (1979).

137. *Id.* at 3.

After litigation began, Pennsylvania stopped this practice, but plaintiffs sought recovery of benefits unlawfully taken by the state. Both the district court and the court of appeals, citing *Edelman*, ruled that the eleventh amendment barred recovery.[138] Neither court distinguished between the claim to recover state welfare benefits wrongfully withheld, as in *Edelman*, and plaintiffs' claim for the return of federal benefits illegally collected by the state.[139] *Edelman*, however, is clearly distinguishable from *Fanty* in terms of the impact a pro-plaintiff court order would have on the state treasury; in *Fanty*, unlike *Edelman*, court-ordered disgorgement would simply restore the status quo.

*Moore v. Colautti*[140] reached the same result as *Fanty*. In *Moore*, public assistance recipients sought the return of illegally taken SSI benefits used to reimburse state welfare grants.[141] As in *Fanty*, the court applied *Edelman* without distinguishing between reimbursement and benefit withholding.

The Second Circuit, in *McAuliffe v. Carlson*,[142] similarly failed to distinguish a claim for the return of federal Social Security benefits unlawfully seized to defray the costs of a mental patient's care from a claim for improperly withheld state benefits.[143] The court reasoned that recovery of funds wrongfully taken, like recovery of benefits wrongfully withheld, would require payment from the state treasury,[144] and thus "the effect upon the fisc is the same."[145] Far from compelling such a conclusion, *Edelman* fails even to provide support. *Edelman* deemed the eleventh amendment to bar payment "from the *general revenues* of the State of Illinois . . . ."[146] Clearly, federal Social Security and SSI benefits are not part of a state's general revenues because the state does not raise these funds by state taxes. Thus, the critical impact triggering

138. *Id.* at 3–5. In *Fanty* a divided court also let stand the ruling of the District Court that notification to plaintiff class that the class may have had a state law claim for the return of benefits constituted a violation of *Edelman*. Accordingly, the Supreme Court took note of *Fanty* in *Quern* and made passing reference to the denial of retroactive relief, indicating neither approval nor disapproval. 440 U.S. at 334 n.2.

139. *Id.*

140. 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd*, 633 F.2d 210 (3d Cir. 1980).

141. *Id.* at 360–62.

142. 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

143. *Id.* at 1308.

144. *Id.*

145. *Id.* If the *Carlson* test is one of bare impact on state fisc in terms of cash outflow, then whether it survives *Quern's* approval of certain notices to plaintiff class members is open to question.

146. 415 U.S. at 665 (emphasis added). *See also* Travelers Indemnity v. School Bd. of Dade County, 666 F.2d 505, 509 (11th Cir. 1982).

eleventh amendment protection is lacking. Moreover, an award of federal benefits will not interfere with a state's budgeting process or its ability to allocate scarce state tax revenues for other public assistance recipients. Thus, unlawfully taken federal benefits, unlike other property, should be restorable without violating the rule in *Edelman*.

A result contrary to *Fanty*, *Moore*, and *McAuliffe* was reached in *Meade v. Hawaii Housing Authority*,[147] where low income tenants sought recovery of rent overcharges from a state-administered but federally subsidized housing authority.[148] Since the authority derived its revenues entirely from monthly rentals and federal subsidies, the court found that there was no impact on the state treasury and, therefore, that the eleventh amendment did not apply.[149] *Meade* was based on sound reasoning. The basis for eleventh amendment immunity is removed when a state is not required to expend funds collected in the exercise of its taxing power to satisfy the judgment.

### D. *Retroactive Relief Sought Against a County, Municipality or Other Local Unit of Government*

*Edelman* recognized that "a county does not occupy the same position as a State for purposes of the Eleventh Amendment."[150] Furthermore the Court noted that "while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."[151] Yet *Edelman* did not resolve whether a suit against county officials pursuing state policy could end in retroactive relief.[152] Local political units in many states administer public assistance programs subject to state agency supervision.[153] This hybrid system is neither clearly state nor clearly local because while local officials administer the programs, state

147. No. 74–46 (D. Hawaii Apr. 15, 1975).

148. [1974–1976] Pov. L. Rep. (CCH) ¶ 21,092.

149. *Id.* The issues raised in *Meade* also were presented, but not resolved, in Lopez v. Arraras, 606 F.2d 347, 349 (1st Cir. 1979).

150. 415 U.S. at 667 n.12.

151. *Id.*

152. *Id.*

153. Eighteen states, including New York, Ohio, and California, operate welfare programs through local units of government. In the other states, the programs are either operated entirely by a state agency or on a hybrid basis. *See* U.S. Dep't Health and Human Services, Characteristics of State Plans for Aid to Families with Dependent Children Under the Social Security Act, Title IV-A (September, 1979).

funds are often used in some measure, thus raising *Edelman* concerns for the state fisc.

In 1979, faced with such a hybrid system in *Holley v. Lavine*,[154] the Second Circuit held that the eleventh amendment did not bar retroactive relief against the *county* administering the welfare program even though twenty-five percent of the funds came from the state. The Second Circuit noted, however, that a fifty percent state contribution might require a different result.[155] In *Holley*, plaintiff challenged a state statute denying state welfare to citizen children of an illegal alien residing in New York.[156] The court of appeals affirmed the district court decision enjoining the act as violating federal law and awarded retroactive relief against the county, but denied relief against the state defendants.[157] Applying *Mt. Healthy City School District Board of Education v. Doyle*,[158] the *Holley* Court's test for eleventh amendment application was whether the County Department of Social Services was an arm of the state.[159] The county had an independent responsibility to provide public assistance to needy persons and independently had appointed the defendant county commissioner. Further, the County had its own taxing powers.[160] The state was not required to reimburse the county department for any adverse judgments.[161] The state's twenty-five percent share of welfare payments did not create an unconstitutional burden on the state treasury.[162] In this respect the court wrote:

> It is one thing to indulge in the semi-fiction that a state needs Eleventh Amendment protection for the full amount of a judgment against a state commissioner for past AFDC benefits, when half of the money will come back to the state from the federal government. The argument becomes strained when the judgment is against the County defendant and the State will eventually bear only 25 percent of the total.[163]

The court suggested that there is a point at which the impact on

154. 605 F.2d 638 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

155. *See id.* at 644.

156. *Id.* at 640–41.

157. *Id.* at 645–48.

158. 429 U.S. 274 (1977).

159. 605 F.2d at 643–45.

160. *Id.* at 644–45.

161. *Id.* Where a county is directed by a court to duplicate grants previously provided, state reimbursement is required. In this case, 11th amendment immunity would be present. *See* Fields v. Blum, 629 F.2d 825 (2d Cir. 1980).

162. 605 F.2d at 644.

163. *Id.*

the state treasury would be considered insufficient to trigger the eleventh amendment.

Besides their assertion of eleventh amendment issues, the defendants in *Holley* claimed good faith immunity, since they were enforcing supposedly valid state law.[164] The court found:

> [There is] no good faith defense to a claim for AFDC benefits that have been found to be due and owing. Moreover, there should be no good faith defense to a claim for AFDC benefits that were wrongfully withheld, since such an award puts defendants in no worse position than if they had initially complied with their obligation.[165]

The court was bootstrapping in *Holley*. At the time, however, it did not have the benefit of the Supreme Court's decision in *Owen v. City of Independence*,[166] holding that municipalities could not claim good faith immunity in suits alleging unconstitutional conduct by local officials.[167] Good faith will protect a local official from personal liability but will not protect the local treasury from his or her unlawful acts.[168] *Owen* significantly bolstered the *Holley* approach since local officials could not thereafter use good faith as a defense in actions brought against such officials for their execution of state laws. Shortly after its decision in *Owen*, the Supreme Court denied certiorari in *Holley*.[169]

The Seventh Circuit also has reviewed the applicability of eleventh amendment immunity to a county welfare department. In *Mackey v. Stanton*,[170] the court found that the eleventh amendment did not bar a claim by AFDC recipients for support payments retained by a county welfare department in contravention

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164. *Id.* at 645–46.

165. *Id.* at 645.

166. 445 U.S. 662 (1980).

167. *Id.* at 657.

168. *Id.* at 638 n.18, 653–55.

169. 446 U.S. 913 (1980). For later application of *Holley*, see Willis v. Lascaris, 499 F. Supp. 749, 760 (N.D.N.Y. 1980) (class of food stamp recipients entitled to retroactive benefits from county defendant who violated due process requirements in attempting to reduce the assistance level). Following *Holley*, the court noted that "[t]o do otherwise in this action would permit the County . . . to violate federal rights with financial impunity." *Id.* at 760.

*Holley* was also applied recently in three cases involving challenges to New York's system of computing medicaid eligibility. *See* Markel v. Blum, 509 F. Supp. 942, 951 (N.D.N.Y. 1981); Jamroz v. Blum, 509 F. Supp. 953, 962 (N.D.N.Y. 1981); Calkins v. Blum, 511 F. Supp. 1073, 1098–1102 (N.D.N.Y. 1981), *aff'd*, 675 F.2d 44 (2d Cir. 1982). In *Markel*, *Jamroz*, and *Calkins*, state and county defendants were enjoined and the county defendants were compelled to pay retroactive benefits.

170. 586 F.2d 1126 (7th Cir. 1978), *cert. denied*, 444 U.S. 882 (1979).

of federal law.[171] The county department had its own taxing and bonding powers and maintained a separate welfare fund supported by a special tax levy.[172] The court's result was sound, even though the department was subject to state supervision and received substantial financial support from the state.[173] As long as the state was not required to reimburse the department for this specific outlay, the eleventh amendment would not apply.[174]

In contrast, the same court in *Carey v. Quern*[175] found that a claim for a clothing allowance against the Cook County Department of Public Aid was constitutionally barred.[176] The critical fact in *Carey* was that the Cook County Director of Public Aid, as a state agent, collected monies placed in a special state-controlled trust fund.[177] Hence, the financial independence factor of *Mackey* was missing here.

*Holley*, *Mackey*, and *Carey* each focused on a number of factors relevant to the political entity's operation.[178] The two most critical factors were whether the local body exercised its own revenue raising powers and whether it was primarily responsible for providing public assistance to eligible persons within its jurisdiction. Moreover, the court in each of those cases had to determine

171. *Id.* at 1130–31.

172. *Id.*

173. *Id.*

174. *Id.*

175. 588 F.2d 230 (7th Cir. 1978).

176. *Id.* at 23–34.

177. *Id. But see* Bowen v. Hackett, 387 F. Supp. 1212 (D.R.I. 1975). A state unemployment and disability fund collected from a limited group of persons was not part of the state treasury and therefore not protected by 11th amendment immunity even though administered by a state official.

178. For other cases taking this approach, see Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975) (public junior college is not an arm of the state); Hutchinson v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975), *vacated*, 429 U.S. 1033, *cert. denied*, 429 U.S. 1037 (1977); Cline v. School Dist. No. 32, 476 F. Supp. 868 (D. Neb. 1979) (school district not an arm of the state); Doe v. Sullivan, 472 F. Supp. 975 (W.D. Tex. 1979) (sheriff is an officer of the state and county is an arm of the state); Knight v. Carlson, 478 F. Supp. 55 (E.D. Cal. 1979) (county not an arm of the state); Savage v. Pennsylvania, 475 F. Supp. 524 (E.D. Pa. 1979), *aff'd*, 620 F.2d 289 (3rd Cir. 1980) (liquor control board is an arm of the state); Farr v. Chesney, 441 F. Supp. 127 (M.D. Pa. 1978) (mental health board is an arm of the state); WATCH v. Harris, 535 F. Supp. 9 (D.C. Conn. 1981) (urban renewal agency not an arm of the state); Laje v. R.E. Thomason Gen. Hosp., 665 F.2d 724 (5th Cir. 1982) (hospital district not an arm of the state).

This approach was also adopted in Degregorio v. O'Bannon, 86 F.R.D. 109 (E.D. Pa. 1980). There the court found that the Philadelphia County Board of Assistance was deemed by the state courts to be a state agency, had its members appointed by the governor and its administrative expenses paid directly by the state, was not financially independent, and therefore was an arm of the state for 11th amendment purposes. *Id.* at 118.

whether the state was obligated to reimburse the locality for legal judgments. The rule which may be derived from those cases, therefore, is that for retroactive recovery to be allowed, the principal burden for judgment costs must fall on the locality and not the state. In states where welfare is administered by independent local units, the *Holley/Mackey* approach (along with that of *Owen*)[179] provides a means for retroactive recovery of benefits wrongfully withheld by local officials, provided that the state's financial contribution to the locality meets *Holley* or *Mackey* standards.

Joinder of state officials as defendants is not fatal to a plaintiff's case, since the state policy can be challenged as unlawful, and the retroactive relief can be sought against only the local defendants.[180] Where the state, however, administers welfare programs itself, the eleventh amendment bars retroactive benefit recovery.

### E. *Waiver and the Court's Latest Word*

In 1981, the Supreme Court issued its latest pronouncement on retroactive relief and the eleventh amendment in *Florida Department of Health & Rehabilitation Service v. Florida Nursing Home Association*.[181] In *Florida Nursing Home*, a group of nursing homes sought reimbursement for medicaid fees illegally withheld by the state.[182] The district court held that the eleventh amendment barred such retroactive relief.[183] Relying on two distinct rationales, the Fifth Circuit reversed, holding that the state had waived immunity.[184] First, the statute creating the Florida Department of Health and Rehabilitation Services provided that the agency could "sue and be sued."[185] Second, Florida had agreed in writing to be bound by federal regulations and guidelines applicable to participation in the Title XIX medicaid program.[186] The Fifth Circuit concluded: "[t]o bar federal jurisdiction in this case could operate to immunize state officers and the agency from their

179. *See infra* text accompanying notes 166–69.

180. *See, e.g.*, Calkins v. Blum, 511 F. Supp. at 1098–1102; Jamroz v. Blum, 509 F. Supp. at 962; Markel v. Blum, 509 F. Supp. at 951.

181. 450 U.S. 147 (1981).

182. *Id.* at 148.

183. *Id.* at 148–49.

184. *Id.* at 149. *See* Florida Nursing Home Ass'n v. Page, 616 F.2d 1355 (5th Cir.), *cert. denied*, 449 U.S. 872 (1980).

185. 450 U.S. at 149.

186. *Id.*

contractual duty to adhere to federal statutory requirements."[187] Within the year, however, the Supreme Court reversed, holding that the state's explicit agreement to comply with federal requirements "can hardly be deemed an express waiver of Eleventh Amendment immunity,"[188] because the agreement was a "customary condition" for state participation in federal programs.[189] The Court relied on *Smith v. Reeves*,[190] a pre-*Young* decision which found that the state in enacting a waiver of this type, "has not consented to be sued except in one of its own Courts. This is not expressly declared in the statute, but such we think is its meaning."[191] Thus, in accordance with this pronouncement, the Court read Florida's waiver statute very restrictively.[192]

Since *Edelman*, most courts have approached the issue with great caution,[193] finding waiver only occasionally.[194] Thus, the negative impact of *Florida Nursing Home* will not be severe. Had the court affirmed, however, the state's general consent to be sued ex contractu along with its contractual participation in a federal program would have provided a new basis to bypass the eleventh amendment and award retroactive relief.[195]

In the post-*Edelman* cases of *Quern* and *Florida Nursing Home*, the Supreme Court reaffirmed its intention to restrict retroactive relief in the federal courts. Regarding abrogation by Con-

187. 616 F.2d at 1363.

188. 450 U.S. at 150.

189. *Id.*

190. 178 U.S. 436 (1900).

191. *Id.* at 441.

192. Despite the Court's change in composition since *Edelman* (Justice Stevens replaced Justice Douglas), four Justices remain who believe that *Edelman* was decided incorrectly— Justices Brennan, Marshall, Blackmun, and Stevens. 450 U.S. 151–55. Since the decision in *Florida Nursing Home*, Justice O'Connor has replaced Justice Stewart who stood with the majority in *Edelman*, *Quern*, and *Florida Nursing Home*.

193. *See, e.g.*, Jagnandan v. Giles, 538 F.2d 1166, 1177 (5th Cir. 1976) *cert. denied*, 432 U.S. 910 (1977); Long v. Richardson, 525 F.2d 74, 79 (6th Cir. 1975); Jones v. Illinois Dep't of Rehabilitation Servs., 504 F. Supp. 1244, 1257 (N.D. Ill. 1981); Weisbord v. Michigan State Univ., 495 F. Supp. 1347, 1356–57 (W.D. Mich. 1980); Gilchrist v. Califano, 473 F. Supp. 1102, 1107–08 (S.D.N.Y. 1979); Savory v. Kawasaki Motor Corp., 472 F. Supp. 1216, 1217–18 (E.D. Pa. 1979).

194. *See* Soni v. Board of Trustees of the Univ. of Tenn., 513 F.2d 347, 352–53 (6th Cir. 1975) (provision in university charter stating that it may be sued "in any court of law or equity in this State or elsewhere"); Tullock v. State Highway Comm'n, 507 F.2d 712, 715 (8th Cir. 1974) (waiver based on agreement to administer federal Uniform Relocation Assistance Act); Marrapese v. Rhode Island, 500 F. Supp. 1207, 1222–24 (D.R.I. 1980) (general waiver in state statute).

195. The Fifth Circuit in *Florida Nursing Home* adopted this approach. 616 F.2d at 1363.

gress pursuant to the fourteenth amendment, only in *Fitzpatrick v. Bitzer*[196] and *Hutto v. Finney*[197] has the Court approved a basis for averting *Edelman*.[198]

### F. *Reflections on a Paradox*

One court recently observed that "[a]ny step through the looking glass of the Eleventh Amendment leads to a wonderland of judicially created and perpetuated fiction and paradox."[199] This view, evidently, is accurate. The eleventh amendment has been interpreted to mean something other than what it says.[200] It has been held not to bar a suit for injunctive relief against a state official, breaching the constitution or federal law, on the grounds that this is not a suit against the state.[201] Although deemed jurisdictional, its protection may be waived and can be abrogated by Congress.[202] *Edelman* approved prospective injunctive relief no matter how expensive but disapproved restoration of the same benefits illegally withheld as inconsistent with the eleventh amendment.[203]

*Edelman*, however, has not prevented courts from directing that plaintiffs be restored to a former *status of entitlement*, al-

196. 427 U.S. 445 (1976). Recent examples of the application of the *Fitzpatrick* rule are two cases holding that the Education For All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-61 (1976), and the Rehabilitation Act of 1973 (1976), 29 U.S.C. §§ 701-794, were enacted by Congress pursuant to § 5 of the 14th amendment and, therefore, abrogate a state's 11th amendment immunity. Department of Educ. v. Katherine D., 531 F. Supp. 517 (D. Haw. 1982); Parks v. Pakovic, 536 F. Supp. 296 (N.D. Ill. 1982).

197. 437 U.S. 678, *reh'g denied*, 439 U.S. 1122 (1978).

198. The Supreme Court has not ruled on whether congressional abrogation may be accomplished through the enactment of legislation under sections of the Constitution other than the 14th amendment. Some courts have found that congressional enactments under its Constitutional war powers, article I, § 8, cls. 11–13, override 11th amendment immunities. *See, e.g.*, Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979); Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979).

For critical discussion of these decisions and the issues of waiver and abrogation, see generally, M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 141–68 (1980).

199. Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980).

200. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890), (the 11th amendment applies to suits against a state by a citizen of that state). *See also* Cullison, *supra* note 28, at 22–24.

201. *Ex parte* Young, 209 U.S. 123 (1908). The Supreme Court has recently emphasized that the 11th amendment will apply to bar injunctive relief where there is no claim that a state official acted contrary to federal law. Cory v. White, 103 S. Ct. 2325 (1982) (federal interpleader action).

202. Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, 415 U.S. 651, 672–73 (1974); Parden v. Terminal Ry., 377 U.S. 184 (1964).

203. Edelman v. Jordan, 415 U.S. 651.

though accumulated benefits cannot be paid.[204] Particularly unfortunate, however, are the denials of retroactive relief when a state has wrongfully appropriated federal benefits.[205] Such cases represent an unwarranted extension of *Edelman*, by allowing states to retain monies not raised from state revenues and not belonging in the state treasury. The Supreme Court has not yet reviewed this issue.

*Edelman* may be avoided in states where public benefit programs or other state programs are administered by local units of government.[206] Otherwise, resort to state administrative or state court proceedings is necessary to obtain retroactive relief. For example, some measure of relief may be obtained by requesting a *Quern* notice advising plaintiffs and class members as to the availability of state administrative remedies.[207] Federal court plaintiffs may also pursue retroactive relief in state courts by using the federal court judgment as a basis for such relief.[208] Of course, plaintiffs may sue a state official in his or her individual capacity to obtain retroactive relief.

These approaches are limited and less than satisfactory. *Quern* notices may not be understood by low income class members and many, fearful of official notices, may be unlikely to respond. Those who do respond must have their claims for restitution reviewed by the very authority which originally denied them. Suing on a federal judgment in state court may enable state defendants to inject state law questions, including sovereign immunity issues, which must be resolved before relief is granted.

204. *See* Kimble v. Solomon, 599 F.2d 599 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979); Eder v. Beal, 609 F.2d 695 (3d Cir. 1979); Stenson v. Blum, 476 F. Supp. 1331 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 885 (1980).

205. *See* Fanty v. Pennsylvania Dep't of Pub. Welfare, 551 F.2d 2 (3d Cir. 1977), *cert. denied*, 440 U.S. 957 (1979); Moore v. Colautti, 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd*, 633 F.2d 210 (3d Cir. 1980).

206. *See* Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); Mackey v. Stanton, 586 F.2d 1126 (7th Cir. 1978), *cert. denied*, 444 U.S. 882 (1979).

207. *See, e.g.*, Folsom v. Blum, 87 F.R.D. 443, 447 (S.D.N.Y. 1980).

208. *See, e.g.*, Toomey v. Blum, 54 N.Y.2d 669, 426 N.E.2d 181, 442 N.Y.S.2d 774 (1981); Bardo v. Pennsylvania, 40 Pa. Commw. 585, 397 A.2d 1305 (1979).

For a discussion of sovereign immunity problems involved in state court actions, see Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981). The federal courts, moreover, remain the preferred forum for vindicating federal civil rights violations by state officials. *See id.* at 193; *supra* note 30; Appendix *infra* pp. 397-418. Indeed, the Supreme Court has stated that § 1983 was enacted "to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." Mitchum v. Foster, 407 U.S. 225, 242 (1971).

For suits against state officials in their individual capacities, a finding of bad faith is necessary and recovery is doubtful where substantial sums are involved. At bottom, the commencement of separate proceedings to obtain full relief for the same matter represents an inefficient use of the time of litigants, administrators, and courts.

The power to correct past illegal conduct is concomitant to enjoining future illegal conduct. In separating remedies for future and past action, *Edelman* has created a procedural schizophrenia, thereby frustrating the federal court's ability to do "complete rather than truncated justice."[209]

## CONCLUSION

*Edelman* unduly restricts the equitable powers of federal courts and limits deserving litigants from recovering illegally withheld public benefits. The Court's conclusions unnecessarily extend the bar of the eleventh amendment. The Court failed to analyze the nature of retroactive relief and neglected to discern its proper relation to the granting of an injunction halting official misconduct. Retroactive awards are not damages, but rather are restitutory awards, providing plaintiffs with those sums to which they were statutorily entitled.

The *Edelman* majority's determination to add yet another twist to the tortuous history of the Eleventh Amendment may have been motivated by a concern for principles of federalism. Such concern, however, seems misdirected in this instance. The federal courts' power to enjoin state officials who violate federal law was clearly established in *Ex parte Young* and was confirmed in *Edelman*. The grant to a federal court of the ability to order state officials to correct retroactaively their past illegal conduct does not

209. *Edelman*, 415 U.S. at 696 (Marshall, J., dissenting).

The difficulties encountered by federal courts in this regard were highlighted in the recent Eighth Circuit decision, Nevels, III v. Hanlon, 656 F.2d 372 (8th Cir. 1981). In *Nevels*, a former Nebraska state employee claimed his dismissal violated the due process clause. He lost the state court action for reinstatement and back pay and then filed suit in federal court. The district court found that his due process rights had been violated and directed that plaintiff be reinstated or a new hearing held. The court awarded back pay which represented restitution and denied damages directed against the defendant, commissioner of labor *in his official capacity. Id.* at 377.

The Eighth Circuit reversed the award for retroactive relief based upon *Edelman*. Thus, plaintiff Nevels was denied any recovery of back pay and other employment benefits lost due to his unlawful dismissal. The district court's common sense approach for providing full relief to the federal court plaintiff was frustrated by the Edelman rule.

represent an extension of this power, but is totally consistent with the federal courts' role as principal protectors of federal rights.

The *Edelman* rule does not contribute to efficient administration of justice. *Edelman* requires federal courts to distinguish artificially between the same kinds of public benefits, and to base such distinction entirely on the timing of a judicial order. The power of the federal courts to provide equitable relief should not be restricted in this fashion. Furthermore, *Edelman* unwisely limits the scope of injunctive relief available under the *Young* doctrine. Although the effect of these decisions may be avoided in certain instances, they continue to limit the federal courts' ability to remedy unlawful acts of state officials.

As one commentator has noted, "the legal system . . . suffers damage when a court finds a violation of an individual's rights, but is precluded by ancient concepts from granting a remedy. This is precisely what happens when a federal court denies relief pursuant to *Edelman v. Jordan*."[210] According to Justice Stevens, "[t]he arguments in favor of overruling *Edelman* are appealing . . . ."[211] In light of the considerable impact which *Edelman* has had, the Court should review these arguments and permit the federal courts to provide full equitable relief when federal rights are violated.

210. Schwartz, *Poverty Law, Supreme Court Developments*, 185 N.Y.L.J. 115 (1981).

211. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. at 151.

# APPENDIX*

## I. WELFARE BENEFITS

### A. *Retroactive Relief Denied*

*Stanton v. Carter*[1]

Challenge to a state regulation requiring an applicant seeking assistance due to separation or desertion of a spouse to prove that the spouse has been absent for at least six months, absent exceptional circumstances of need. Remanded in light of *Edelman v. Jordan*.

*Doe v. Flowers*[2]

Action challenging validity of state regulation requiring unmarried mothers of applicants and recipients of AFDC benefits to cooperate with welfare authorities by identifying putative fathers of the children and initiating support or paternity proceedings against them.

*Adams v. Harden*[3]

Challenge to state regulation limiting sixteen-year-olds' eligibility for AFDC benefits to those attending school or those physically unable to attend school.

*Barron v. Bellairs*[4]

Challenge to the state's use of the "averaging method" to compute the income of AFDC recipients who were the intended beneficiaries of court-ordered child support payments, but who were receiving sporadic payments.

*Wilson v. Weaver*[5]

Challenge to state regulation denying AFDC benefits claimed on behalf of an unborn child. Retroactive benefits denied on eleventh amendment grounds.

*Milburn v. Huecker*[6]

Action involving AFDC benefits withheld because applicant had not filed a paternity action against the putative father. Subsequent to the initiation of the paterntiy action, benefits were approved.

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* This appendix is a compendium of cases through October 15, 1981 (with an addendum of additional cases decided through March 30, 1982) presenting federal courts with claims for retroactive relief which were either denied on the basis of *Edelman* or granted by distinguishing *Edelman*. Where relief was granted, the court's rationale for distinguishing *Edelman* is set forth, except under the heading *Notice to Class Cases*. The numerous Title VII employment discrimination cases have not been included. In these cases, retroactive relief was awarded based on congressional abrogation of the 11th amendment pursuant to § 5 of the 14th amendment.

1. 416 U.S. 918 (1974), *vacating and remanding* Carter v. Stanton, 350 F. Supp. 1337 (S.D. Ind. 1972).

2. 364 F. Supp. 953 (N.D. W. Va. 1973), *aff'd*, 416 U.S. 922 (1974).

3. 493 F.2d 21 (5th Cir. 1974).

4. 496 F.2d 1187 (5th Cir. 1974).

5. 499 F.2d 155 (7th Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975).

6. 500 F.2d 1279 (6th Cir. 1974).

*Rochester v. White*[7]

Action against state officials for reducing AFDC benefits; plaintiffs alleged that officials failed to give proper notice of reduction of benefits.

*Owens v. Roberts*[8]

Allegation of unconstitutionality of statute relating to transfer of assets as an exclusion from welfare eligibility.

*Smith v. Vowell*[9]

Action for relief based on state's failure to provide medically necessary transportation for medicaid recipients, as required by federal law and regulations.

*Burrell v. Norton*[10]

Challenge to state regulation limiting emergency assistance to welfare recipients in situations where loss was due to fire or flood.

*Johnson v. Harder*[11]

Attack on state regulation providing that Old Age, Survivors, and Disability Insurance benefits received by a representative parent may be included as income (to the extent that benefits exceed budgeted needs of children) for purposes of determining parent's AFDC eligibility.

*Bethea v. Mason*[12]

Challenge to state rule denying AFDC-E (a program providing benefits to the children of unemployed fathers) benefits to children whose fathers were not eligible for unemployment compensation due to voluntary resignation from their jobs.

*Cornelius v. Minter*[13]

Action brought by an AFDC recipient and disability assistance recipient against state officials charging failure to provide essential welfare services with reasonable promptness.

*Gooch v. Edelman*[14]

Challenge to statute imposing a charge upon all claims, demands, or causes of action for injuries to applicants for or recipients of financial aid from the state.

*Dunbar v. Weinberger*[15]

Challenge to state regulation forbidding AFDC recipients participating in work incentive programs to disregard income derived from those programs for AFDC purposes.

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7. 503 F.2d 263 (3d Cir. 1974).

8. 377 F. Supp. 45 (M.D. Fla. 1974).

9. 379 F. Supp. 139 (W.D. Tex.), *aff'd*, 504 F.2d 759 (5th Cir. 1974).

10. 381 F. Supp. 339 (D. Conn. 1974).

11. 383 F. Supp. 174 (D. Conn. 1974), *aff'd*, 512 F.2d 1118 (2d Cir. 1975), *cert. denied*, 423 U.S. 876 (1976).

12. 384 F. Supp. 1274 (D. Md. 1974), *aff'd sub nom.* Bethea v. Batterton, 529 F.2d 514 (4th Cir. 1975), *rev'd on other grounds sub nom.* Batterton v. Francis, 432 U.S. 416 (1977).

13. 395 F. Supp. 616 (D. Mass. 1974).

14. 398 F. Supp. 723 (N.D. Ill. 1974).

15. 412 F. Supp. 454 (D. Mass. 1974).

*Grow v. Smith*[16]
Challenge to state regulation denying or terminating AFDC benefits for failure to provide information about absent parents or failure to assist in support for filiation proceedings.

*Begins v. Philbrook*[17]
Action assailing state regulation which denied welfare benefits to families owning two operable motor vehicles, regardless of their value.

*Townsend v. Edelman*[18]
Claim against state welfare policy denying AFDC benefits to otherwise eligible eighteen-to twenty-one-year olds attending a college or university rather than a technical or vocational school.

*Linkenhoder v. Weinberger*[19]
Attack on state policy of including earnings from public service employment in computing AFDC benefits.

*Garcia v. Silverman*[20]
Objection to state administrative policy under which applicants for relief were presumed unwilling to work if they had lost two jobs without just cause within twelve months.

*McLaughlin v. Wohlgemuth*[21]
Challenge to state AFDC regulation which conclusively presumed that income of a legally responsible relative was available to dependents living in the same assistance unit.

*Roe v. Ray*[22]
Claim against state regulation which denied AFDC benefits to parent solely because she had not reached the age of majority.

*Roldan v. Minter*[23]
Attack on state policy requiring documentary verification of age and relationship of children for eligibility for AFDC benefits.

*McGraw v. Berger*[24]
Action against state welfare regulation authorizing the recoupment of AFDC overpayments from earned income "disregard" where overpayment not occasioned by the recipient's willful act or omissions.

*White v. Beal*[25]
Challenge to state regulation limiting distribution of eyeglasses under the medical assistance program to those persons having eye diseases.

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16. 511 F.2d 1146 (9th Cir. 1975).
17. 513 F.2d 19 (2d Cir. 1975).
18. 518 F.2d 116 (7th Cir. 1975).
19. 529 F.2d 51 (4th Cir. 1975).
20. 393 F. Supp. 590 (E.D. Wis. 1975).
21. 398 F. Supp. 269 (E.D. Pa. 1975), *vacated*, 535 F.2d 251 (3d Cir. 1976).
22. 407 F. Supp. 351 (N.D. Iowa 1976), *aff'd*, 551 F.2d 241 (8th Cir. 1977).
23. 409 F. Supp. 663 (D. Mass.), *appeal dismissed*, 429 U.S. 967 (1976).
24. 410 F. Supp. 1042 (S.D.N.Y.), *aff'd*, 537 F.2d 719 (2d Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977).
25. 413 F. Supp. 1141 (E.D. Pa. 1976), *aff'd*, 555 F.2d 1146 (3d Cir. 1977).

*Yearby v. Parham*[26]
Challenge to state administrative maximums for AFDC grants.

*Gurley v. Wohlgemuth*[27]
Action against state AFDC regulation used to determine the number of assistance units when two or more eligible AFDC families reside together.

*Robinson v. Rhodes*[28]
Claim that state welfare officials improperly denied poor-relief payments.

*Houston Welfare Rights Organization, Inc. v. Vowell*[29]
Attack on welfare department's policy of prorating recipients' shelter and utility expenses when noneligible individuals lived with recipients.

*Davis v. Smith*[30]
Challenge to state policy providing for a deduction of a recipient's advance allowance from subsequent AFDC grants when the allowance was made to prevent a threatened utility shutoff caused by prior nonpayment of bills.

*Rush v. Smith*[31]
Action against income maintenance procedure authorizing termination of AFDC benefits to recipients failing to report for interviews investigating fraudulent receipt of public assistance.

*Yuan Jen Cuk v. Lackners*[32]
Challenge to statute which conditioned health and medical aid on recipient's status as United States citizen, as five-year United States resident, or as an applicant for United States citizenship.

*Carey v. Quern*[33]
Claim against policy distinguishing between employed and unemployed general assistance recipients for purpose of determining both the entitlements to clothing allowance and the procedure for administering such allowance.

*Swift v. Toia*[34]
Attack on state's policy of prorating public assistance grants when an individual with no legal obligation to support an AFDC family resides with an AFDC family.

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26. 415 F. Supp. 1236 (N.D. Ga. 1976).

27. 421 F. Supp. 1337 (E.D. Pa. 1976).

28. 424 F. Supp. 1183 (N.D. Ohio 1976).

29. 555 F.2d 219 (5th Cir. 1977).

30. 431 F. Supp. 1206 (S.D.N.Y. 1977), *aff'd*, 607 F.2d 535 (2d Cir. 1978).

31. 437 F. Supp. 576 (S.D.N.Y. 1977), *vacated on other grounds*, 573 F.2d 110 (2d Cir. 1978).

32. 448 F. Supp. 4 (N.D. Cal. 1977).

33. 588 F.2d 230 (7th Cir. 1978).

34. 450 F. Supp. 983 (S.D.N.Y. 1978), *aff'd sub nom.* Swift v. Blum, 598 F.2d 312 (2d Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

*Rickards v. Solomon*[35]
Challenge to Department of Health and Mental Hygiene's practice of attributing spouse's income to the recipient to determine level of medicaid benefits.

*Doe v. Montana*[36]
Action against state and county management of AFDC program; plaintiff alleged deprivation of constitutional rights.

*Kimble v. Solomon*[37]
Challenge to across-the-board reduction in medicaid benefits without compliance with federal notice regulations. Retroactive benefits denied, though benefits prospectively restored.

*Metcalf v. Trainor*[38]
Attack on state policy regarding shelter allowance paid to AFDC and SSI recipients. Plaintiff was barred from receiving retroactive relief for alleged wrongful deprivation of payments from State Supplement Shelter Program.

*Gilchrist v. Califano*[39]
Challenge to classifications by state in providing SSI benefits. Mere participation by state in SSI program held not to be express waiver of state's eleventh amendment immunity to retroactive relief. Retroactive SSI benefits denied.

*Thiboutot v. State*[40]
Suit against reduction in AFDC benefits which reduction state based on change in method of computation of available income.

*Folsom v. Blum*[41]
Challenge to state commissioner's practice of considering SSI and Social Security income actually contributed toward shelter of AFDC recipients. Plaintiff successfully brought action for declaratory and injunctive relief, but court denied retroactive benefits under eleventh amendment. The court, however, ordered defendant to inform plaintiff class of available administrative remedies for recoupment of benefits wrongfully withheld.

*Coalition For Basic Human Needs v. King*[42]
Equitable action demanding that state mail delinquent AFDC checks. Owing to budgetary difficulties, Massachusetts was unable to mail AFDC checks due in first half of month. Timely application for injunctive relief in federal district court was erroneously denied. Court of appeals reversed, but granted prospective relief only; since half of the month had passed, the court applied its injunctive relief only to checks to be mailed in second half of month. Initial checks

35. 457 F. Supp. 95 (D. Md. 1978).
36. 457 F. Supp. 389 (D. Mont. 1978).
37. 599 F.2d 599 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979).
38. 472 F. Supp. 576 (N.D. Ill. 1979).
39. 473 F. Supp. 1102 (S.D.N.Y. 1979).
40. 405 A.2d 230 (Me. 1979), *aff'd*, 448 U.S. 1 (1980).
41. 87 F.R.D. 443 (S.D.N.Y. 1980).
42. 654 F.2d 838 (1st Cir. 1981).

erroneously withheld, for which district court failed to grant injunctive relief, were classified as retroactive benefits.

## B. *Retroactive Relief Granted*

*Vargas v. Trainor*[43]

Challenge to procedure whereby state agency reduced or terminated public assistance to Aid to Aged, Blind, and Disabled (AABD) recipients.

*Rationale for granting relief*: Waiver found. State welfare official openly represented that state had no eleventh amendment immunity for retroactive payments.

*Lyons v. Weinberger*[44]

Complaint against reduction of AABD benefits where advance notice and opportunity to be heard was not afforded.

*Rationale for granting relief*: T.R.O. construed as directing defendant to pay money presently due.

*Rhodes v. Weinberger*[45]

Attack on constitutionality of Social Security Act (SSA) provision under which illegitimate children were denied survivors benefits because of unacknowledged or undetermined father.

*Rationale for granting relief*: T.R.O. construed as directing defendant to pay money presently due.

*Mackey v. Stanton*[46]

Challenge to welfare department practice of retaining court-ordered child support payments as reimbursement for amounts already paid to welfare recipient as AFDC.

*Rationale for granting relief*: In light of state statute declaring county welfare departments independent from state, eleventh amendment did not apply.

*Holley v. Lavine*[47]

Challenge to statute rendering illegal aliens ineligible for AFDC benefits.

*Rationale for granting relief*: County was not an arm of the state for eleventh amendment immunity purpose.

*Harrington v. Blum*[48]

Challenge to procedures governing eligibility for and issuance of expedited food stamp benefits.

*Rationale for granting relief*: Since state would be reimbursed by the federal government for retroactive benefits, eleventh amendment was not a bar.

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43. 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975).
44. 376 F. Supp. 248 (S.D.N.Y. 1974).
45. 388 F. Supp. 437 (E.D. Pa. 1975).
46. 586 F.2d 1126 (7th Cir. 1978), *cert. denied*, 444 U.S. 882 (1979).
47. 605 F.2d 638 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).
48. 483 F. Supp. 1015 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2d Cir. 1980).

*Henkin v. South Dakota Department of Social Services*[49]

Suit by mentally retarded plaintiff seeking private right of action against state officials under the Developmentally Disabled Assistance and Bill of Rights Act for funding of tuition in a private facility which provided treatment not available in state facilities.

*Rationale for granting relief*: Relief which places burden on state treasury is permissible if incidental to prospective injunctive relief.

*Morrow v. Bassman*[50]

Suit under section 1983 of the Civil Rights Act averring that plaintiff had unlawfully been denied AFDC benefits and food stamps.

*Rationale for granting relief*: County welfare department is not an arm of the state, so eleventh amendment does not apply.

*Markel v. Blum*[51]

Class action challenging state and county officials' policy classifying New York State Higher Education Services Corporation (HESC) loans as income for purposes of determining medicaid eligibility; plaintiff sought declaratory, monetary, and injunctive relief.

*Rationale for granting relief*: Although the eleventh amendment bars direct restitution by state commissioner in official capacity, the county defendant did not enjoy such immunity and was required to reimburse amounts which plaintiffs were unlawfully forced to pay for medical treatment.

*Calkins v. Blum*[52]

Class action challenging methods of determining eligibility for medicaid, brought by plaintiffs who were denied status as medically needy for purposes of medicaid program; plaintiffs were then denied medical assistance.

*Rationale for granting relief*: Restitution and monetary relief are not barred by eleventh amendment in this instance since counties do not fall within the "arm of the state" category; counties are payors of the first instance of medicaid benefits.

*Jamroz v. Blum*[53]

Class action challenging state and county social service commissioners' routine finding that nonexempt New York State HESC loans were income under the AFDC program.

*Rationale for granting relief*: Eleventh amendment is no bar to relief based on the rationale of *Markel v. Blum*.[54]

*Willis v. Lascaris*[55]

Challenge to county department of social services' reduction of food stamp benefits based on new method of computing household income; county had begun to include heat allowance in the

49. 498 F. Supp. 659 (D.S.D. 1980), *vacated*, 676 F.2d 703 (8th Cir. 1982).
50. 515 F. Supp. 587 (S.D. Ohio 1981).
51. 509 F. Supp. 942 (N.D.N.Y. 1981).
52. 511 F. Supp. 1073 (N.D.N.Y. 1981), *aff'd*, 675 F.2d 44 (2d Cir. 1982).
53. 509 F. Supp. 953 (N.D.N.Y. 1981).
54. *See supra* note 51.
55. 499 F. Supp. 749 (N.D.N.Y. 1980).

computation.

*Rationale for granting relief*: Court cited *Holley v. Lavine*,[56] and classified county department of social services as a local agency independent of the state, thus having no eleventh amendment immunity.

*Taylor v. Hill*[57]

Equitable claim brought by pregnant women seeking preliminary injunction to halt state practice prohibiting unborn children from receiving AFDC benefits.

*Rationale for granting relief*: In light of *Edelman v. Jordan*'s ban on retroactive relief, plaintiffs made adequate showing of the irreparable harm which would result from continuance of state regulation without injunctive relief.

*Eder v. Beal*[58]

Claim for injunctive relief to prevent state withdrawal from the eyeglass program under Title XIX of Social Security Act until requisite prewithdrawal notice requirements were met.

*Rationale for granting relief*: Eleventh amendment presented no bar, even though there would be costs incidental to the injunction and the temporary effect of such injunction would be to give plaintiff past benefits denied.

*Mehler v. Blum*[59]

Class action for reimbursement of wrongfully withheld "medical assistance benefits" from county, demanding that *Quern* notices[60] be sent to class members.

*Rationale for granting relief*: Eleventh amendment does not bar award of damages against county, despite county's entitlement to reimbursement from the state. Plaintiff class members are entitled to individual *Quern* notices except where both plaintiff and defendant agree the cost outweighs any benefit to be derived. In such a case alternate means of notice (e.g., posting or publication) may be used.

## II. BACK PAY/RESTORATION OF STATUS

### A. *Back Pay/Restoration of Status Denied*

*Wilkerson v. Meskill*[61]

Claim for overtime pay allegedly improperly withheld from state troopers.

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56. *See supra* note 47.

57. 377 F. Supp. 495 (W.D.N.C. 1974), *vacated on other grounds*, 529 F.2d 517 (4th Cir. 1975).

58. 609 F.2d 695 (3d Cir. 1979).

59. No. 80 Civ. 3531 (S.D.N.Y. Sept. 18, 1981).

60. *See infra* note 104.

61. 501 F.2d 297 (2d Cir. 1974).

*Borror v. White*[62]

Claim for recovery of back bonuses and payment for services rendered as a prison barber brought by a prisoner in a state facility.

*Roseman v. Hassler*[63]

Action brought by nontenured professor seeking reinstatement and damages. State educational institution deemed an arm of the state for eleventh amendment purposes.

*Delafose v. Manson*[64]

Action brought by prisoners seeking "hospital pay." Monies sought deemed "back pay" and denied under *Edelman v. Jordan* as retroactive relief.

*Murgia v. Commonwealth of Massachusetts Board of Retirement*[65]

Action brought by state policeman seeking reinstatement and back pay following statutorily imposed retirement. District court permitted reimbursement, but denied back pay; United States Supreme Court reversed on issue of reinstatement.

*Harkess v. Sweeny Independent School District*[66]

Action for back pay brought by school teachers whose contracts were not renewed when staff was reduced.

*Georgia Association of Educators v. Harris*[67]

Action for payment of state university faculty salary increases legislatively repealed after contract agreement.

*Skehan v. Board of Trustees of Bloomsburg State College*[68]

Action for back pay alleging improper dismissal of nontenured faculty member.

*Farr v. Chesney*[69]

Action brought by clinical psychologist seeking back pay for wrongful dismissal.

*Atchison v. Nelson*[70]

Action brought by state employee seeking job reinstatement, damages, and back pay.

*Jacobs v. College of William & Mary*[71]

Action alleging sex discrimination in employment; plaintiff sought back pay. Court held that eleventh amendment barred suit for back pay to be distributed from public funds unless state consented to such suit; fourteenth amendment only abrogates eleventh amendment im-

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62. 377 F. Supp. 181 (W.D. Va. 1974).

63. 382 F. Supp. 1328 (W.D. Pa. 1974), *aff'd sub nom*, Roseman v. Indiana Univ. of Pa., 520 F.2d 1364 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976).

64. 385 F. Supp. 1115 (D. Conn. 1974).

65. 386 F. Supp. 179 (D. Mass. 1974), *rev'd*, 427 U.S. 307 (1976).

66. 388 F. Supp. 738 (S.D. Tex. 1975), *modified on other grounds*, 554 F.2d 1353 (5th Cir.), *cert. denied*, 434 U.S. 966 (1977).

67. 403 F. Supp. 961 (N.D. Ga. 1975).

68. 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979).

69. 441 F. Supp. 127 (M.D. Pa. 1977).

70. 460 F. Supp. 1102 (D. Wyo. 1978).

71. 495 F. Supp. 183 (E.D. Va. 1980), *cert. denied*, 102 S.Ct. 572 (1981).

munity if Congress explicitly holds eleventh amendment applicable whenever state is real party in interest. Each state- created entity is to be considered on its own merits; if it lacks sufficient power to be independent, it receives eleventh amendment immunity as a state "alter ego."

*Weisbord v. Michigan State University*[72]

Allegation of racial and sexual employment discrimination. Court followed rationale of *Jacobs v. College of William & Mary*,[73] adding that congressional power to abrogate eleventh amendment immunity under section five of fourteenth amendment must be "express." Court held Congress had not abrogated eleventh amendment immunity of states in section 1983 suits, but had done so in title VII suits.

*Brook v. Thornburgh*[74]

Allegation of political affiliation discrimination. Former state employees sought back pay and reinstatement. Court held claim for back pay against state or its officers in their official capacities was barred by eleventh amendment; neither reinstatement and award of back pay against state officers in their *individual* capacities nor prospective injunctive relief was barred by eleventh amendment. Such relief not barred even if it would cause state to make incidental expenditures or would cause state officials to take official action.

*Savage v. Pennsylvania*[75]

Section 1983 action for preliminary and permanent injunction and back pay, charging violation of first amendment, brought by dismissed liquor control board examiner. Preliminary injunctive relief granted, but claim for back pay barred by eleventh amendment.

*In re Friendship Medical Center, Ltd.*[76]

Action brought in bankruptcy court by creditor for funds owed to him for work rendered. Court held since funds were in possession of state department of public aid, relief was barred because it amounted to monetary relief from state treasury.

*Nevels v. Hanlon*[77]

Action for back pay by state employee allegedly discharged without due process. District court ordered commissioner of labor to restore lost wages as restitution. Circuit court reversed based on *Edelman*.

### B. *Back Pay/Restoration of Status Granted*

*Gordenstein v. University of Delaware*[78]

Action brought by former member of university faculty seeking reinstatement and damages.

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72. 495 F. Supp. 1347 (W.D. Mich. 1980).
73. 495 F. Supp. 183.
74. 497 F. Supp. 560 (E.D. Pa. 1980).
75. 475 F. Supp. 524 (E.D. Pa. 1979), *aff'd*, 620 F.2d 289 (3d Cir. 1980).
76. 3 Bankr. 304 (N.D. Ill. 1980).
77. 656 F.2d 372 (8th Cir. 1981).
78. 381 F. Supp. 718 (D. Del. 1974).

*Rationale for granting relief*: Eleventh amendment shield does not apply; state treasury was insulated from an award in plaintiff's favor since the university has fiscal autonomy.

*Soni v. Board of Trustees of University of Tennessee*[79]

Action for recovery of back pay brought by former professor when his contract was not renewed.

*Rationale for granting relief*: Consent to be sued is inferred from Tennessee Constitution.

*Schiff v. Williams*[80]

Allegation of infringement of first amendment rights brought by dismissed student editors of school newspaper who were seeking back pay.

*Rationale for granting relief*: Source of back pay award was a fund of student activity fees.

*Burt v. Board of Trustees Edgefield County School District*[81]

Action brought by discharged teacher seeking back pay.

*Rationale for granting relief*: School board deemed not an arm of state for eleventh amendment purposes.

*Hander v. San Jacinto Junior College*[82]

Action brought by discharged public junior college teacher seeking back pay.

*Rationale for granting relief*: Junior colleges are primarily local institutions, created by local authority and supported by local revenue.

*Wright v. Houston Independent School District*[83]

Action for damages brought against school district for failing to rehire plaintiffs.

*Rationale for granting relief*: Eleventh amendment does not apply; school district failed to adhere to a judicially mandated standard of action.

*Davis v. Griffin-Spalding County, Georgia, Board of Education*[84]

Action for back pay brought by former teacher challenging her forced retirement at age sixty-five.

*Rationale for granting relief*: School board had no right to terminate plaintiff's employment; the act was a nullity, and school board was obligated to pay salary.

*Campbell v. Gadsden County District School Board*[85]

Action for back pay brought by former principal because of demotion following unification of previously segregated school system.

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79. 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

80. 519 F.2d 257 (5th Cir. 1975).

81. 521 F.2d 1201 (4th Cir. 1975).

82. 519 F.2d 273 (5th Cir. 1975).

83. 393 F. Supp. 1149 (S.D. Tex. 1975), *vacated on other grounds*, 569 F.2d 1383 (5th Cir. 1978).

84. 445 F. Supp. 1048 (N.D. Ga. 1975).

85. 534 F.2d 650 (5th Cir. 1976).

*Rationale for granting relief*: Florida school boards are not alter egos of the state.

*Savage v. Kibbee*[86]

Action alleging discriminatory employment practices brought by former university employee.

*Rationale for granting relief*: Judgment paid by city university would only have an ancillary effect on state treasury.

*Goss v. San Jacinto Junior College*[87]

Action for damages brought by untenured public junior college instructor for nonrenewal of contract.

*Rationale for granting relief*: Junior college is an independent political subdivision.

*D'Iorio v. County of Delaware*[88]

Action for back pay and reinstatement brought by county detective for allegedly wrongful dismissal.

*Rationale for granting relief*: Back pay included in reinstatement is essentially equitable in nature.

*Miller v. Board of Education*[89]

Action for back pay brought by school employee allegedly discharged for political beliefs.

*Rationale for granting relief*: County or county agency is not entitled to eleventh amendment immunity.

*Berry v. Arthur*[90]

Action brought by professor alleging deprivation of standard wage and rank promotions due to his exercise of free speech.

*Rationale for granting relief*: Upgrade in rank and salary deemed permissible prospective relief, although it may involve future expenditures by state; eleventh amendment immunity not triggered in suit against defendants in their individual capacities.

*Eckerd v. Indian River School District*[91]

Action brought by discharged tenured teacher seeking damages representing last salary.

*Rationale for granting relief*: School board not deemed an arm of the state for eleventh amendment purposes.

*Pell v. Florida Department of Transportation*[92]

Action for reinstatement and recovery of back pay brought by state employee discharged due to absence while attending national guard training.

*Rationale for granting relief*: Court held that suit for back wages was

86. 426 F. Supp. 760 (S.D.N.Y. 1976).

87. 588 F.2d 96 (5th Cir. 1979).

88. 477 F. Supp. 229 (E.D. Pa.), *vacated on other grounds*, 592 F.2d 681 (3d Cir. 1978).

89. 450 F. Supp. 106 (S.D.W. Va. 1978).

90. 474 F. Supp. 427 (D.S.D. 1979).

91. 475 F. Supp. 1350 (D. Del. 1979).

92. 600 F.2d 1070 (5th Cir. 1979).

proper since it is expressly allowed by the Veterans' Reemployment Rights Act which abrogates states' eleventh amendment immunity.

*Downing v. Williams*[93]

Action for reinstatement and recovery of back pay brought by discharged state employee alleging violations of first amendment and procedural due process rights.

*Rationale for granting relief*: Before a court finds an agency or individual in his or her official capacity has eleventh amendment immunity, it must examine his or her relationship to the state.

*Hillis v. Stephen F. Austin State University*[94]

Action for reinstatement and recovery of back pay brought by former professor claiming first amendment violation.

*Rationale for granting relief*: Action for back pay was not barred by eleventh amendment because university was not an arm of the state; university had own bonding authority with which it raised more than fifty percent of its own budget and had power to make own employment decisions.

*Morrow v. Sudler*[95]

Action for recovery of back pay brought by former curator of state historical society.

*Rationale for granting relief*: State historical society received both state and private funding. Since the privately donated funds were held by the state for the sole use of the society, the eleventh amendment did not bar an award of back pay which came solely from private donations.

## III. UNEMPLOYMENT BENEFITS

### A. *Retroactive Relief Denied*

*Drumright v. Padzieski*[96]

Action for recovery of unemployment benefits which were terminated without a hearing.

### B. *Retroactive Relief Granted*

*Jordan v. Fusari*[97]

Action brought by female plaintiffs seeking unemployment benefits denied during months surrounding childbirth pursuant to state policy.

*Rationale for granting relief*: Settlement for back benefits deemed a

93. 624 F.2d 612 (5th Cir. 1980), *vacated on other grounds*, 645 F.2d 1226 (5th Cir. 1981).

94. 486 F. Supp. 663 (E.D. Tex. 1980), *rev'd on other grounds*, 665 F.2d 547 (5th Cir. 1982).

95. 502 F. Supp. 1200 (D. Col. 1980).

96. 436 F. Supp. 310 (E.D. Mich. 1977).

97. 496 F.2d 646 (2d Cir. 1974).

waiver of eleventh amendment immunity. Claim for attorneys fees not barred by eleventh amendment in this context.

*Bowen v. Hackett*[98]

Challenge to state laws providing children's dependency benefits to unemployed males while requiring females to prove dependency to satisfaction of the department of employment security.

*Rationale for granting relief*: Funds for this program were sufficiently independent from the sovereign; eleventh amendment protection was not triggered.

*Jennings v. Illinois Office of Education*[99]

Action under Veterans' Reemployment Rights Act for recovery of back pay brought by state employee. Employee had left his position to serve in the United States armed forces. Upon returning, he applied for reappointment, was turned down, and later filed suit for recovery of pay lost during period prior to the state's offer of reemployment.

*Rationale for granting relief*: Eleventh amendment does not bar relief sought by plaintiff. Congress passed Veteran's Reemployment Rights Act pursuant to its war powers in article I of the Constitution and thus acted to abrogate state's eleventh amendment immunity.

## IV. NOTICE TO CLASS CASES

### A. *Relief Denied*

*Fanty v. Pennsylvania Department of Public Welfare*[100]

Notice to plaintiff class members informing them that they were not legally obligated to reimburse the state from their federal disability benefits, and that, as a matter of state law, they may have had a cause of action against the Department of Public Welfare.[101]

*Yuan Jen Cuk v. Lackner*[102]

Notice to permanent resident aliens of their right to health and medical aid under California's medically indigent law (an unconstitutional provision conditioning eligibility for benefits on United States citizenship, status as applicant for citizenship, or five-year legal presence in United States). Notice denied would have apprised class members of the state's wrongful denial of the retroactive benefits to which such class members were entitled.

*Rickards v. Solomon*[103]

Notice to potential victims of state policy which attributed spouses' income to medicaid recipients for purposes of determining benefits.

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98. 387 F. Supp. 1212 (D.R.I. 1975).

99. 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979).

100. 551 F.2d (3d Cir. 1977), *cert. denied*, 440 U.S. 957 (1979).

101. This case was reversed by Quern v. Jordan, 440 U.S. 332 (1979).

102. 448 F. Supp. 4 (N.D. Cal. 1977).

103. 457 F. Supp. 95 (N. Md. 1978).

### B. *Relief Granted*

*Quern v. Jordan*[104]

Notice to plaintiff class members apprising them of available state administrative procedures for determining eligibility for past benefits.

*Lewis v. Shulimson*[105]

Notice to plaintiff class members who were denied medical assistance in violation of district court order.

*Silva v. Vowell*[106]

Explanatory notices to plaintiff class members who were denied AFDC benefits because of "capable of light work" eligibility standard. Court rejected defendant's argument that administrative mailing costs were barred by eleventh amendment. Notice informed plaintiffs that regulations were changed and that, therefore, plaintiffs had right to reapply for benefits.

*Turner v. Walsh*[107]

Notice to plaintiffs whose AFDC and/or medicaid benefits were being discontinued, terminated, suspended, or reduced. Injunction was issued prohibiting such reductions/terminations until plaintiffs received notice.

*Townsend v. Quern*[108]

Notice of administrative procedures granted to individuals denied AFDC benefits who had children eighteen to twenty-one years of age attending college. Decision was based on the possibility of collecting previously entitled benefits.

## V. MISCELLANEOUS CASES

### A. *Retroactive Relief Denied*

*Beck v. California*[109]

Action for damages for state's denial of coastal permit.[110]

*Fowler v. Department of Education*[111]

Sex discrimination action for recovery of back pay. Court held eleventh amendment immunity applies to state officials acting in their official capacities.

*Stubbs v. Kline*[112]

Action for damages alleging denial of free education for handicapped child.

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104. 440 U.S. 332 (1979).
105. 534 F.2d 794 (8th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).
106. 621 F.2d 640 (5th Cir. 1980), *cert. denied sub nom*, 449 U.S. 1125 (1981).
107. 435 F. Supp. 707 (W.D. Mo. 1977), *aff'd per curiam*, 574 F.2d 456 (3d Cir. 1978).
108. 473 F. Supp. 193 (N.D. Ill. 1979).
109. 479 F. Supp. 392 (C.D. Cal. 1979).
110. *See infra* notes 123–26 and accompanying text on lost property rights.
111. 472 F. Supp. 121 (E.D. Va. 1978).
112. 463 F. Supp. 110 (W.D. Pa. 1978)

*Crossroads Academy, Inc. v. Carballo*[113]

Action for damages and injunctive relief for alleged conspiracy to deny plaintiff the right to participate as a provider under Title XIX of the Social Security Act.

*Crutcher v. Kentucky*[114]

Action for race discrimination brought by state employee under section 1983 against the state and the governor in his official capacity. Court dismissed claim for retroactive relief against state and governor; state's participation in a program supported partially by federal funds, could not by itself be construed as a waiver of eleventh amendment immunity. Eleventh amendment barred retroactive award against governor in his official capacity. Claim for prospective injunctive relief against the governor was allowed to stand.

*Miener v. Missouri*[115]

Action for monetary, injunctive, and declaratory relief under Education of the Handicapped Act and the Civil Rights Act for defendant's "past shifting" of its responsibility in providing education to the handicapped. Court denied relief, although plaintiff phrased her complaint in equitable terms. She sought "compensatory education" for past infractions, rather than future compliance; court viewed this as retroactive relief barred by the eleventh amendment.

*Pennsylvania Department of Environmental Resources v. Williamsport Sanitary Authority*[116]

Counterclaim alleging payment of EPA funds to state was contrary to Federal Water Pollution Control Act. Plaintiff was seeking recovery of sums improperly paid to state. Although court agreed with counterclaim's allegation, it denied retrospective relief under eleventh amendment since such relief would have impacted on the state fisc. Court found that state funds were protected by eleventh amendment; state funds need not be derived from state tax revenues, but only need be funds state can use as it desires. Court cited part test of *Bloomsburg v. Pennsylvania*.[117] Declaratory relief was granted.

### B. *Retroactive Relief Granted*

*Class v. Norton*[118]

Action brought by AFDC recipients seeking back benefits which were denied due to state commissioner's failure to make eligibility determination within federally mandated thirty-day period.

*Rationale for granting relief*: State welfare commissioner failed to appeal a 1972 order in a timely fashion. This required payment of retroactive benefits and doctrine of res judicata barred review.

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113. 432 F. Supp. 620 (W.D. Wis. 1977).

114. 495 F. Supp. 601 (E.D. Ky. 1980).

115. 498 F. Supp. 949 (E.D. Mo. 1980) *aff'd*, 673 F.2d 969 (8th Cir. 1982).

116. 497 F. Supp. 1173 (M.D. Pa. 1980).

117. *See infra* note 120 and accompanying text.

118. 505 F.2d 123 (2d Cir. 1974).

*Tullock v. State Highway Commission*[119]

Action for relocation assistance brought after state took over residential property to construct a highway.

*Rationale for granting relief*: State consented to suit and waived its immunity by accepting responsibility for administering relocation benefits under federal statutes and by legislating a statutory waiver of immunity for non-tort suits.

*Bloomsburg v. Pennsylvania Department of Environmental Resources*[120]

Action brought by municipal authorities alleging money claims against Pennsylvania based on section 206(a) of the Federal Water Pollution Control Act.

*Rationale for granting relief*: Plaintiffs were "citizens" for eleventh amendment purposes. Eleventh amendment did not bar declaratory or injunctive relief. Moreover, court refused to dismiss plaintiff's claim for monetary relief. Court stated three-part test for award of monetary relief; if funds are paid to state by federal government with intent that they be paid to plaintiff, if state keeps such funds in a "segregated account," and if state does not treat such funds as available for uses other than those for which they are granted, then monetary relief may be granted.

*Corpus v. Estell*[121]

Action to enforce inmates' right to legal assistance from one another. State appealed district court decision awarding attorney's fees under Civil Rights Attorney's Fees Awards Act.

*Rationale for granting relief*: Civil Rights Attorney's Fees Awards Act was passed by Congress pursuant to its power under section 5 of the fourteenth amendment; eleventh amendment was no bar.

*Blake v. Kline*[122]

Claim for death benefits against Pennsylvania public schools' retirement board brought in district court under diversity jurisdiction. Case was dismissed as barred under the eleventh amendment; plaintiff appealed.

*Rationale for granting relief*: Court of appeals agreed that claim barred by the eleventh amendment could not be brought in federal court under diversity jurisdiction, but vacated and remanded. Court held that prior to dismissal on eleventh amendment grounds a district court must determine whether defendant agency and individual are alter egos of the state, i.e., whether the damage award will come from state treasury.

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119. 507 F.2d 712 (8th Cir. 1974).

120. 496 F. Supp. 686 (M.D. Pa. 1980).

121. 605 F.2d 175 (5th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980).

122. 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (see Urbano v. Board of Managers of N.J. State Prison, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970), a pre-*Edelman* case for criteria used by this court).

## VI. Loss of Property Rights

### A. *Retroactive Relief Denied*

*Ligon v. Maryland*[123]

Action for monetary and injunctive relief for devaluation of real property caused when the property was rezoned from light industrial to rural residential.

*Burlington Northern, Inc. v. North Dakota*[124]

Action brought by common carrier seeking to recover rail freight undercharges. North Dakota Mill and Elevator Association held to be arm of state and suit was barred by eleventh amendment.

*McAuliffe v. Carlson*[125]

Action for recovery of funds taken by state to cover expenses incurred in providing plaintiff with mental health services. Court held that equitable restitution in this context was equivalent to retroactive damages against the state's treasury.

*Nasralah v. Barcelo*[126]

Inverse condemnation suit brought by property owner seeking to compel commonwealth's acquisition of his property because zoning change had allegedly prevented his making a profit from the land. Plaintiff also sought punitive damages. Inverse condemnation and damages held to be barred by eleventh amendment since commonwealth funds would be used to effectuate such remedies. Commonwealth, not the named official, was held to be the real party in interest.

### B. *Retroactive Relief Granted*

*Vecchione v. Wholgemuth*[127]

Action brought by mental patients seeking to annul statute permitting state to summarily seize and control property in satisfaction of care and maintenance costs.

*Rationale for granting relief*: Pennsylvania deemed to have waived eleventh amendment immunity since prior consent decree directly bound the state.

*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*[128]

Action for monetary and equitable relief from bi-state agency brought by property owners alleging official action, which reduced property values, constituted a taking in violation of the fourteenth amendment.

*Rationale for granting relief*: Such bi-state association was not immune from suit under eleventh amendment in federal court.

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123. 448 F. Supp. 935 (D. Md. 1977).
124. 460 F. Supp. 140 (D.N.D. 1978).
125. 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).
126. 465 F. Supp. 1273 (D.P.R. 1979).
127. 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977).
128. 440 U.S. 391 (1979).

## VII. REIMBURSEMENT/AID SOUGHT

### A. *Retroactive Relief Denied*

*Pharmacists Society v. Department of Health & Social Services*[129]
Action for monetary relief arising from state-imposed rate freeze on reimbursement of pharmacists participating in medicaid program.

*Shashoua v. Quern*[130]
Action brought by doctor seeking reimbursement for medicaid billings. Court denied relief because plaintiff had named state official as defendant for acts performed in his official capacity.

*Moore v. Colautti*[131]
Challenge to state welfare department's policy of obtaining reimbursement from individuals who received state-administered public assistance pending award of federal SSI benefits. Reimbursement of illegally obtained federal benefits by state was barred by eleventh amendment.

*Long v. Richardson*[132]
Action brought by former law students at state university for reimbursement of out-of-state tuition fees.

*Jagnandon v. Giles*[133]
Action for restitution of excess tuition payments made to state university by resident aliens under a statute requiring resident aliens to pay nonresident tuition rates.

*Mauclet v. Nyquist*[134]
Challenge by resident aliens to statute requiring applicant for state financial assistance to be or intend to be United States citizen; one plaintiff sought damages for past monies withheld.

*Stemple v. Board of Education*[135]
Action brought by parents of handicapped child seeking reimbursement of tuition for special schooling of their child.

*McAuliffe v. Carlson*[136]
Action for reimbursement of social security funds taken to pay hospitalization costs at mental health facility; restitution of federal benefits unlawfully seized by state barred by eleventh amendment.

*Alabama Nursing Home Association v. Califano*[137]
Action brought by nursing home association which contested validity of payment rates used by state to reimburse nursing homes under

129. 79 F.R.D. 405 (E.D. Wis. 1978).
130. 612 F.2d 282 (7th Cir. 1979)..
131. 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd*, 663 F.2d 210 (3d Cir. 1980).
132. 525 F.2d 74 (6th Cir. 1975).
133. 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977).
134. 406 F. Supp. 1233 (W.D.N.Y. 1976), *aff'd*, 432 U.S. 1 (1977).
135. 464 F. Supp. 258 (D. Md. 1979), *aff'd*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).
136. 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).
137. 433 F. Supp. 1325 (M.D. Ala. 1977), *aff'd*, 617 F.2d 385 (5th Cir. 1980).

medicaid program. Plaintiffs sought only prospective, injunctive relief, but court noted that restitutory, i.e., damage, relief was barred by the eleventh amendment.

*Fanty v. Pennsylvania Department of Public Welfare*[138]

Request for injunction brought by recipients of lump sum Social Security benefits. Plaintiffs sought to enjoin state welfare department practice of collecting federal benefits to reimburse the department for amounts granted under state welfare laws. District court denied restitution of federal benefits wrongfully withheld; circuit court concurred on this issue.

*Riley v. Ambach*[139]

Action brought by parents seeking reimbursement for tuition costs incurred when they placed their handicapped children in residential schools in reliance on invalid regulation promulgated by state commissioner of education. Relief was barred by eleventh amendment.

*Jones v. Illinois Department of Rehabilitation Services*[140]

Crossclaim brought by college against state for reimbursement for cost of deaf student's interpreter. Student was suing college, state department of rehabilitation services, its director, and college president. Crossclaim was barred by the eleventh amendment.

*Stenson v. Blum*[141]

Challenge to state's termination of medicaid benefits without notice or opportunity to be heard. Court restored benefits prospectively but denied plaintiffs' claim for retroactive relief for out-of-pocket medical expenses incurred while medicaid benefits were denied.

*Massachusetts Hospital Association, Inc. v. Harris*[142]

Challenge by hospital association to state's method of medicaid reimbursement, petitioning court to enjoin secretary of HEW from making medicaid payments to state if state did not reimburse plaintiffs for all past underpayments. Court held that this use of injunctive relief would be the effective equivalent of ordering reimbursement, i.e., retroactive relief, which is barred by the eleventh amendment. The proper issue was whether relief sought was prospective or retrospective, not whether it was framed in equitable as opposed to monetary terms.

*Friendship Villa Clinton, Inc. v. Buck*[143]

Action brought by nursing home challenging method by which reimbursable expenses were calculated. Nursing home was seeking retrospective equitable relief and prospective relief. Retrospective relief, even when framed in equitable terms, held barred in this context by eleventh amendment. State's participation in medicaid program

138. 551 F.2d 2 (3d Cir.), *cert. denied*, 440 U.S. 957 (1977).

139. 508 F. Supp. 1222 (E.D.N.Y. 1980).

140. 504 F. Supp. 1244 (N.D. Ill. 1981).

141. 476 F. Supp. 1331 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 885 (1980).

142. 500 F. Supp. 1270 (D. Mass. 1980).

143. 512 F. Supp. 720 (D. Md. 1981).

and/or state's provision of a judicial remedy did not constitute state waiver of eleventh amendment immunity in this case.

## VIII. ADDENDUM

### ADDITIONAL CASES

### A. *Retroactive Relief Denied*

*Sumrall v. Schweiker*[144]

Claim for refund of excessive rentals from state housing project.

*United Carolina Bank v. Stephen F. Austin State University*[145]

Action for back pay brought by professor who was illegally denied tenure.

*Cooney v. Miller*[146]

Action for reimbursement from medicaid program brought by physician.

*Pape v. Lermen*[147]

Claim for unemployment benefits.

*Mohegan Tribe v. Connecticut*[148]

Action brought by Indian tribe seeking rents and profits as part of claim for possession of tribal land held by the state.

### B. *Retroactive Relief Granted*

*Porter v. Schweiker*[149]

Challenge to policy regarding recoupment of AFDC overpayments.

*Rationale for granting relief*: Injunction construed as directing defendant to pay money presently due.

*Parks v. Pakovic*[150]

Claim for tuition due for handicapped child at residential facility.

*Rationale for granting relief*: Education For All Handicapped Children Act of 1975[151] under which relief was sought was enacted by Congress pursuant to the fourteenth amendment and abrogates state immunity.

*Department of Education of Hawaii v. Katherine D.*[152]

Claim for tuition assistance for handicapped child.

*Rationale for granting relief*: (a) State waived immunity by voluntarily commencing federal action to appeal administrative decision awarding tuition; (b) Education For All Handicapped Children Act

144. No. 81-475-5 (D. Mass. Dec. 31, 1981).
145. 685 F.2d 553 (5th Cir. 1982).
146. No. 78 C 3250 (N.D. Ill. Feb. 24, 1982).
147. 28 EMPL. PRAC. DEC. (CCH) ¶ 32,621 (W.D. Wisc. 1982).
148. 528 F. Supp. 1359 (D. Conn. 1982).
149. 527 F. Supp. 150 (D. Minn. 1981).
150. 536 F. Supp. 296 (N.D. Ill. 1982).
151. 20 U.S.C. §§ 1401-61 (1976).
152. 531 F. Supp. 517 (D. Hawaii 1982).

of 1975[153] under which relief was sought by parents abrogates state's eleventh amendment immunity.

*International Union v. Indiana Employment Security Board*[154]

Claim for retroactive unemployment benefits.

*Rationale for granting relief*: Payment would not come from state funds, but from federal funds and private employer contributions.

153. 20 U.S.C. §§ 1401-61.

154. [1981 Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 21,654 (S.D. Ill. 1981).