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Suing State Welfare Officials for Damages in Federal Court: The Eleventh Amendment and Qualified Immunity

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SUING STATE WELFARE OFFICIALS FOR DAMAGES IN FEDERAL COURT: THE ELEVENTH AMENDMENT AND QUALIFIED IMMUNITY

I. INTRODUCTION

The Social Security Act of 1935[1] created categorical public assistance programs for families with dependent children and for persons who were aged, blind, or disabled. The statute provided that state welfare officials would administer a complicated scheme of "cooperative federalism"[2] involving the federal and state regulations. Prior to 1965, state welfare officials were seldom involved in federal litigation.[3] In 1964, Congress created the Office of Economic Opportunity (OEO) legal services program.[4] Aggressive young OEO attorneys challenged state welfare statutes and regulations in federal court on behalf of welfare claimants.[5] State welfare officials were called upon to explain to federal judges why welfare benefits to 16,000 dependent children in Alabama were terminated because their mothers allegedly entertained a man-in-the-house.[6] A three-judge federal court inquired

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1. The provisions of the Social Security Act of 1935, as subsequently amended, created the categorical assistance programs commonly referred to as "welfare." Act of Aug. 14, 1935, ch. 531, 49 Stat. 620. The categorical assistance programs for the aged, blind, and disabled were consolidated into a single program effective January 1, 1974, called the Supplemental Security Income (SSI) program. Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1329. State welfare officials continue to administer the program for Aid to Families with Dependent Children [Hereinafter cited as AFDC].

2. King v. Smith, 392 U.S. 309 (1968).

3. *See* Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1; Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967). There were also few cases in state courts involving welfare. *See, e.g.*, People *ex rel.* Heyenreich v. Lyons, 30 N.E.2d 46 (Ill. 1940); Wilkie v. O'Connor, 25 N.Y.S.2d 617 (1941).

4. 42 U.S.C. § 2809(a)(3) (1970). The program provided free legal services to low income persons through neighborhood offices. For a discussion of the formative years of the legal services program, see E. JOHNSON, JR., JUSTICE AND REFORM (1974). For discussion of the role of legal services attorneys in welfare litigation, see Subrin & Sutton, *Welfare Class Actions in Federal Court: A Procedural Analysis*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 21 (1973); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967). The Legal Services Corporation now operates the program pursuant to the Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378.

5. The volume of welfare litigation has increased rapidly since 1965. The United States Supreme Court has issued several major opinions in cases dealing with welfare law. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Carleson v. Remillard, 406 U.S. 598 (1972); Jefferson v. Hackney, 406 U.S. 535 (1972); Townsend v. Swank, 404 U.S. 282 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

6. King v. Smith, 392 U.S. 309 (1968). An Alabama regulation denied AFDC benefits to dependent children whose mothers had sexual relations with men to whom

into the state law which denied welfare benefits to dependent children who attended college, while dependent children who attended vocational schools were granted benefits.[7] The United States Supreme Court invalidated a Connecticut statute which denied welfare benefits to persons who had not lived in the state a year prior to filing applications for assistance.[8] Welfare benefits, which had been viewed as gratituities,[9] were treated by the Supreme Court as statutory entitlements requiring due process protection prior to their termination.[10]

In these and other cases, federal courts invalidated state statutes and regulations.[11] In some cases, federal courts awarded retroactive welfare benefits as a form of equitable restitution.[12] But in *Edelman v.*

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they were not married. Such men were considered "substitute fathers," regardless of whether they owed a legal duty to support the woman's children, or did in fact support them. The federal statute defines a "dependent child" as a "needy child . . . who has been deprived of parental support or care . . . ." 42 U.S.C. § 606(a) (1970). Because of the Alabama regulation, children otherwise dependent were not considered deprived of "parental support." Between June 1964, when the regulation became effective, and January 1967, the number of children receiving AFDC in Alabama declined by 16,000. King v. Smith, *supra*, at 315. For a detailed discussion of this case, which invalidated the regulation, see Comment, *AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith*, 118 U. PA. L. REV. 1219 (1970). *See generally* Redlich, *Unconstitutional Conditions on Welfare Eligibility*, 1970 WIS. L. REV. 450.

7. Townsend v. Swank, 404 U.S. 282 (1971). In *Townsend*, the United States Supreme Court found an Illinois statute and regulation inconsistent with the Social Security Act and therefore invalid under the supremacy clause. *Accord*, Carleson v. Remillard, 406 U.S. 598 (1972).

8. Shapiro v. Thompson, 394 U.S. 618 (1969). The Supreme Court recently upheld a 1-year residency requirement for divorces. Sosna v. Iowa, 419 U.S. 393 (1974).

9. *See, e.g.*, Smith v. Board of Comm'rs, 259 F. Supp. 423 (D.D.C.), *aff'd*, 380 F.2d 632 (D.C. Cir. 1967); Wilkie v. O'Connor, 25 N.Y.S.2d 617 (1941).

10. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Van Alystyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

11. Although some of the more significant Supreme Court decisions in welfare cases were based on the due process clause, *e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970), and the equal protection clause, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), many Supreme Court decisions were based on the plaintiffs' argument that state statutes and regulations conflicted with federal regulations and the Social Security Act, and were therefore invalid under the supremacy clause. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); King v. Smith, 392 U.S. 309 (1968). *See generally* Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1.

12. Sterrett v. Mothers' & Children's Rights Organization, 409 U.S. 809 (1972), *aff'g*, Civil No. 70-F-46 (N.D. Ind. May 20, 1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Silvey v. Roberts, 363 F. Supp. 1006 (M.D. Fla. 1973); Story v. Roberts, 352 F. Supp. 473 (M.D. Fla. 1972); Zarate v. State Dep't of Health and Rehabilitative Services, 347 F. Supp. 1004 (S.D. Fla.), *aff'd*, 407 U.S. 918 (1972); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y.) *aff'd per curiam sub nom.*, Wyman v. Bowens, 397 U.S. 49 (1970). *See generally* Levy, *The Aftermath of Victory: The Availability of Retroactive Welfare Benefits Illegally Denied*, 3 CLEARINGHOUSE REV. 253, 285, 330 (1970).

Jordan,[13] the United States Supreme Court rejected the proposition that retroactive welfare benefits could be ordered as a form of equitable restitution; the Court held that an award of retroactive benefits against state welfare officials is barred by the eleventh amendment.[14] The Court reasoned that an award of retroactive benefits is akin to an award of damages against the state.[15]

This note will discuss the eleventh amendment immunity of state welfare officials to suits for damages in federal courts and the impact of *Edelman v. Jordan* upon welfare litigation. The emerging doctrine of qualified immunity, developed by the Supreme Court in recent cases,[16] will be discussed as a possible means of holding state welfare officials personally liable for welfare benefits wrongfully withheld. This note will also consider whether the practical application of this doctrine will be of any real benefit to welfare claimants whose benefits have been wrongfully withheld.

II. The Eleventh Amendment Immunity of State Welfare Officials

A. The Ratification of the Eleventh Amendment and Its Early Interpretation

The eleventh amendment, ratified in 1798,[17] was enacted in response to the controversial decision of the United States Supreme Court in *Chisholm v. Georgia*,[18] which held that federal courts had

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13. 415 U.S. 651 (1974).

14. The U.S. Const. amend. XI, provides:

> 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.

15. 415 U.S. at 668.

16. O'Connor v. Donaldson, 420 U.S. 943 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). The qualified immunity doctrine will be examined in greater detail later in this Note.

17. For a discussion of the events surrounding the ratification of the eleventh amendment, see C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972); Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 Colum. L. Rev. 183 (1908); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207 (1968).

18. 2 U.S. (2 Dall.) 419 (1793). This action was an original bill in the United States Supreme Court brought by the executor of the estate of a South Carolina merchant who sold war supplies to the state of Georgia. Chisholm had presented his claim for payment to the Georgia Legislature in 1789. After his claim was rejected, he brought suit in the federal circuit court in 1791. After this suit was dismissed for lack of jurisdiction, Chisholm filed his action in the Supreme Court. The state refused to enter an appearance and sent a written protest to the Court, taking the position that it could not be compelled to answer against its will. The Court asserted its judicial authority over the states and entered a default judgment. This created an uproar which resulted in

jurisdiction over suits against a state brought by citizens of another state. This decision shocked the nation, largely because states feared that their wartime creditors could sue them in federal court.[19] Some scholars argue that the ratification of the eleventh amendment restored the original intent of the framers of the Constitution because sovereign immunity is implicit in article III; others take the position that the eleventh amendment reversed the original intent of the framers, expressed in article III, to abolish common law sovereign immunity.[20]

Although by its express terms the eleventh amendment does not bar federal suits against a state brought by its own citizens, the Supreme Court rejected the position that the judicial power of the United States extends to such suits.[21] In *Hans v. Louisiana*,[22] the plaintiff sued to recover the amount of coupons on bonds issued by the state. The Court did not clarify[23] why the eleventh amendment barred

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the ratification of the eleventh amendment 5 years later. Prior to the *Chisholm* decision, suits had been brought against Maryland in Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791) and against New York in Oswald v. New York, 2 U.S. (2 Dall.) 401 (1792), by persons who were not citizens of those states. Immediately after the decision, a number of suits were filed against states in federal courts by persons who were not citizens of the states. *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 224 n.66, 228 n.78, 228–29 n.81 (1968).

19. *See* Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183 (1908), Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

20. For a discussion of common law sovereign immunity in England and colonial America, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). The doctrine of sovereign immunity was firmly imbedded in English common law before the settlement of the American colonies. Although it was said "the King can do no wrong," in practice this did not mean that the King was completely above the law. *See* Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183, 189–95 (1908); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 207–10 (1968). Although the King's permission was necessary to sue in his courts, apparently this permission, in the form of various writs, was given as a matter of course. Since those who wrote the United States Constitution were students of the English legal system, scholars have puzzled over the question of whether article III is implicitly limited by the doctrine of sovereign immunity which existed at the time of its drafting, or whether article III in effect repeals common law statutory immunity. *See,* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 3–26 (1972).

21. The welfare cases with which this note is concerned involve citizens of a state suing their own state welfare officials.

22. 134 U.S. 1 (1890).

23. *See* Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966). Some commentators have criticized the *Hans* decision for its failure to explain how the Court reached this result given the express language of the amendment. *See, e.g.,* Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution*, 50 NOTRE DAME LAW. 496, 497–98 (1975). One commentator believes the *Hans* decision was based on common law sovereign immunity, rather than constitutional immunity as some courts have concluded. *See* Comment, 7 GA. L. REV. 366, 369 n.21 (1973). Nevertheless, the federal courts have consistently applied the *Hans* principle. *See, e.g.,* Edelman v. Jordan,

suits brought against an unconsenting state[24] by its citizens, but nevertheless held that federal courts do not have jurisdiction over such suits.[25] Had the Court held otherwise, citizens of a state would have a federal remedy against the state which citizens of other states and aliens would not have because of the express terms of the eleventh amendment.[26]

The eleventh amendment was originally interpreted by the Supreme Court to apply only to suits in which the state was a nominal party.[27] The Court rejected this position 4 years later,[28] holding that when a suit is brought against the chief state officer in his official capacity the state should be considered a party on the record.[29] Later cases extended this principle to "look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit."[30]

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415 U.S. 651, 663 (1974), and the cases cited therein. The basis for the *Hans* decision is crucial when the possibility of a waiver of immunity exists. If states are constitutionally immune from suit in federal court by their own citizens, waiver will have to meet a higher standard than if there is a waiver of common law immunity. *See* note 24 *infra*.

24. Eleventh amendment immunity is considered a jurisdictional bar. Edelman v. Jordan, 415 U.S. 651, 667–68 (1974). Generally, federal courts have held that parties may not consent to jurisdiction in the absence of constitutionally created judicial power. Minnesota v. Hitchcock, 185 U.S. 373 (1902). In the area of eleventh amendment immunity, however, the principle that a state may consent to suit and waive its immunity has long been recognized. Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 256 (1837); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). The principle that the state can waive its eleventh amendment immunity is based in part on the theory that sovereign immunity is implicit in article III. Since, historically, the King could consent to suit, the state may do likewise. *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 3–26 (1972). This raises the question of whether consent must be expressed or implied. In three cases in the 1940's, the Court held that consent must be clearly expressed. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944). In these cases, the Court held that suits to recover taxes allegedly wrongfully withheld were barred by the eleventh amendment. In later cases, the Supreme Court relaxed the standard and adopted the view that a state could waive its eleventh amendment immunity by implication. Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959). In 1973, the Court retreated from the *Parden* position in Employees v. Public Health Dep't, 411 U.S. 279 (1973). In Edelman v. Jordan, 415 U.S. 651 (1974), the Court returned to the standard first announced in *Ford Motor Co.*, that any waiver of immunity must be "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.

25. 134 U.S. at 18 (1890).

26. This was one of the reasons Mr. Justice Bradley gave to support the *Hans* decision. 134 U.S. at 10 (1890).

27. Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737 (1824); *accord,* Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872).

28. Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

29. *Id.* at 122.

30. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor

Federal courts have concluded that if a state is not named in a suit but state funds will be used to pay a judgment, the suit is against the state and barred by the eleventh amendment.[31]

But even if it is determined that a suit is against the state, the judicially created doctrine of *Ex parte Young*[32] allows suits by private citizens seeking injunctive relief against state officers.[33] Since a private individual could not sue the state in federal court without running afoul of the eleventh amendment, the Supreme Court created the fiction[34] that a state officer, when seeking to enforce an allegedly unconstitutional statute, is "stripped of his official or representative character"[35] and no longer entitled to the protection of the state for purposes of the eleventh amendment. Although the doctrine of *Ex*

Co. v. Department of Treasury, 323 U.S. 459 (1945); Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944). *In re* Ayers, 123 U.S. 443, 490 (1887).

31. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945), the Court stated:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

32. 209 U.S. 123 (1908). For discussion of this landmark case, see Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962); Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744 (1967). *See also* C. WRIGHT, FEDERAL COURTS § 48, at 183–86 (2d ed. 1970).

33. The holding of *Ex parte Young* was that the eleventh amendment did not bar an action in federal court which sought to enjoin the attorney general of Minnesota from enforcing a statute which allegedly violated the fourteenth amendment to the United States Constitution. An action had been brought by the shareholders of nine railroads to enjoin enforcement of a statute which reduced railroad rates to a level plaintiffs regarded as confiscatory.

34. The logical inconsistencies of this fiction have provoked comment. *See, e.g.*, Harkless v. Sweeny Independent School Dist., 388 F. Supp. 738 (S.D. Tex. 1975), in which the court referred to the doctrine of *Ex parte Young* as occupying a "peculiar niche in our jurisprudence." *Id.* at 746. The *Harkless* court stated:

> This Court will not pause here to elaborate on the logical inconsistencies inherent in the fiction of Ex parte Young. Its doctrine has fairly been termed "indispensible to the establishment of constitutional government and the rule of law." It is a firm part of our jurisprudence.

388 F. Supp. at 747 (footnotes omitted).

Professor Davis illustrated the logical applications of the *Ex parte Young* doctrine in his tongue-in-cheek article, *Suing the Government by Falsely Pretending To Sue an Officer*, 29 U. CHI. L. REV. 435 (1962). He pointed out:

> When you sue the government for an injunction or a declaratory judgment, you must falsely pretend (in absence of special statute) that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign. Even when the substance of sovereign immunity is gone, the form usually remains.

Id. at 435.

35. 209 U.S. at 160 (1908).

parte Young has never been extended to allow suits against state officials for damages, money judgments against the state in the form of equitable relief have been awarded by some federal courts[36] prior to the *Edelman* decision.

B. Retroactive Welfare Benefits as Damages: Edelman v. Jordan

In several cases in which federal courts granted retroactive welfare benefits, the eleventh amendment issue received scant attention,[37] or was rejected as a defense with little discussion.[38] Several courts denied retroactive welfare benefits on the grounds that such an award would be in effect a money judgment against the state and therefore barred by the eleventh amendment.[39] In *Rothstein v. Wyman*,[40] the United States Court of Appeals for the Second Circuit invalidated a New York regulation which provided varying amounts of welfare benefits for different geographical areas of the state.[41] The court issued an injunction against the Commissioner of the Department of Social Services to prevent enforcement of the regulation, but held that it lacked jurisdiction to enter an award of retroactive welfare benefits.[42] The *Rothstein* court pointed out:

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36. *See* note 12 *supra*.

37. Four three-judge court decisions requiring state welfare officials to pay retroactive welfare benefits from the state treasury were affirmed by the Supreme Court. Three of the affirmances were summary. Sterrett v. Mothers' & Children's Rights Organization, 409 U.S. 809 (1972), *aff'g* unreported order and judgment of N.D. Ind. 1972; State Dep't of Health & Rehabilitative Serv. v. Zarate, 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* Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969). In the fourth decision, Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court did not comment on the issue, although it was raised in the district court proceedings. Thompson v. Shapiro, 270 F. Supp. 331, 338 n.5 (D. Conn. 1967).

38. *See, e.g.*, Silvey v. Roberts, 363 F. Supp. 1006, 1013–14 (M.D. Fla. 1973); Story v. Roberts, 352 F. Supp. 473, 476–77 (M.D. Fla. 1972).

39. Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970).

40. 467 F.2d 226 (2d Cir. 1972). *See* Comment, 26 VAND. L. REV. 633 (1973).

41. The district in which New York City was located provided maximum payments of $208 for a family of four, while the surrounding seven-county area provided maximum payments of $183. 467 F.2d at 229.

42. The *Rothstein* court could have followed traditional equity principles and held that equitable relief was inappropriate in that particular fact situation without reaching the constitutional issue. Although the court stated that "we do not consider it an appropriate exercise of federal equity jurisdiction for the District Court to compel New York to devote its funds to retroactive payments." 467 F.2d at 241. It went on to reach the constitutional issue:

> [E]ven if the action taken by the District Court [awarding retroactive benefits] be deemed to be in keeping with the framework of federal-state relationships in the case of grants-in-aid for welfare programs, the Eleventh Amendment stands in the way.

> It is not pretended that these payments are to come from the personal resources of appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. It is equally a part of the lore of the Eleventh Amendment that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh Amendment; and a court will, absent the state's consent, be deemed without jurisdiction to enter such a judgment.[43]

The *Rothstein* court rejected the contention that the doctrine of *Ex parte Young* had completely stripped the state welfare official of his immunity; it distinguished that principle in the following language:

> The doctrine of *Ex parte Young* had made it possible for suits to be brought in federal courts against state welfare officials without impingement on the Eleventh Amendment, but the available remedies against them do not exceed the scope of *Ex parte Young* and, in particular, they do not comprehend judgments involving the payment of money which are intended to be—and which can only be—liquidated by the expenditure of state funds.[44]

The *Rothstein* court also rejected the contention that the state had waived its eleventh amendment immunity by participating in the federal-state welfare program.[45] Relinquishment of a constitutional right must be clear and unequivocal; the mere fact of participation in the welfare program could not be considered a clear and unequivocal waiver of the eleventh amendment immunity by the state.[46]

Id. After balancing the interest of the plaintiffs in receiving retroactive welfare benefits with the defendant's interests in protecting the state treasury, the court concluded that an award of retroactive benefits would have a disruptive effect on the state treasury and the administration of the welfare program. Further, the court stated:

> [W]e cannot be sure that the persons from whom funds were withheld in 1969 have a present compelling need for them, or that it is provident, given existing deprivations which might be relieved, to order the expenditures of scarce funds as compensation for past suffering which, however deplorable, cannot be undone.

Id. at 234. One commentator has criticized the court for its assumption that once deprived, a person no longer suffers the consequences of the deprivation:

> The court completely missed the point as to what *real* effects the withholding of funds (due retroactively or otherwise) will have on an indigent person. For instance, it can mean the loss of health, dignity, or sense of worthiness as well as inadequate food, housing, and clothing.

Comment, 7 GA. L. REV. 386–87 n.108 (1973).

43. 467 F.2d at 236.

44. *Id.* at 238.

45. *Id.*

46. *Id.*

The United States Court of Appeals for the Seventh Circuit, faced with the issue of whether the eleventh amendment barred an award of retroactive welfare benefits, reached the opposite conclusion in *Jordan v. Weaver*.[47] The court held invalid an Illinois regulation which allowed the Illinois Department of Public Aid to delay processing welfare applications beyond the time allowed by federal regulation.[48] The *Jordan* court upheld the district court's award of retroactive benefits,[49] and criticized[50] the *Rothstein* court for limiting the doctrine of *Ex parte Young*. It argued "the teaching of *Ex parte Young* is not that a prospective injunction only may issue, but that, where appropriate to deal with defiance of federal law, a federal court's equitable intervention may take an effective form."[51]

The *Jordan* court also criticized the *Rothstein* court's emphasis upon the fact that the judgment would affect the state treasury. That a judgment must be met from the state's funds, "is not the touchstone of the Eleventh Amendment's applicability,"[52] because, the court pointed out, public funds must also be spent to comply with the terms of an injunction allowed by the doctrine of *Ex parte Young*.[53] The *Jordan* court also refused to characterize retroactive welfare benefits as damages, insisting that such an award was an integral part of equitable restitution by which the "defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives."[54]

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47. Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973). *See* Comment, 7 GA. L. REV. 366 (1973); Comment, 21 KAN. L. REV. 429 (1973).

48. Plaintiff Jordan, a mentally retarded 61-year-old man, had an application pending for disability benefits for almost four months. The federal regulations required a decision within 60 days. 45 C.F.R. § 206.10(a)(3) (1973). *See* Edelman v. Jordan, 415 U.S. 651, 654 n.3 (1974). Defendant Weaver was the Director of the Illinois Department of Public Aid.

49. 472 F.2d at 993. The court declined to review the appropriateness of the award of retroactive relief because "defendants did not pointedly bring out below countervailing considerations that might make the district court's relief an improper exercise of equitable discretion." *Id.* at 993 n.14.

50. The court stated: "We recognize the Second Circuit came to a contrary conclusion in Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), but are unpersuaded by its reasoning." *Id.* at 990 (footnote omitted).

51. *Id.* at 991.

52. *Id.*

53. *Id. See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Griffin v. County School Bd. 377 U.S. 218 (1964).

54. 472 F.2d at 994, *quoting* Professor Moore. The court stated that restitution differs from damages and penalties; it cited Porter v. Warner Holding Co., 328 U.S. 395 (1946), as its authority. 472 F.2d at 993. The court also stated that plaintiffs were not seeking consequential damages. "Rather, incident to the injunctive relief prayed for, they asked that exactly measured benefits retained by defendants which would have been paid out but for a violation of the federal law be paid over to them." 472 F.2d at 993.

The court was fearful of the "spectre of a state, perhaps calculatingly, defying federal law"[55] unless retroactive benefits were granted; it warned:

> Otherwise a state could engage in practices which would deny eligible recipients the full measure of that assistance which Congress has intended for them "at the minimal risk of a subsequent finding of unconstitutionality [or illegality] (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of [their] existence."[56]

Unlike the *Rothstein* court, the *Jordan* court found that the state had waived whatever immunity it may have had by participating in the state-federal welfare program.[57] The *Jordan* and *Rothstein* decisions also conflicted over the question of whether the doctrine of *Ex parte Young* establishes federal jurisdiction over suits seeking retroactive welfare benefits. To resolve the conflict, the United States Supreme Court granted certiorari[58] in the *Jordan* case *sub nom., Edelman v. Jordan.*[59]

By a 5-to-4 vote,[60] the Supreme Court reversed that portion of the judgment of the *Jordan* court which awarded retroactive benefits.[61] The Court concluded that the eleventh amendment bars an award of retroactive benefits since "it is in practical effect indistinguishable in many aspects from an award of damages against the state."[62] Because the "funds will obviously not be paid out of the pocket of petitioner Edelman,"[63] the Court observed that the funds:

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55. 472 F.2d at 995.

56. *Id., quoting* Alexander v. Weaver, 345 F. Supp. 666, 673 (N.D. Ill. 1973).

57. The court stated:

> We cannot conceive that Illinois could legitimately expect to be able to participate in the federal program, receive federal funds in consideration for its agreement to channel them, together with state funds, to beneficaries in compliance with federal law, and then be able to violate that law and invariably retain the savings accruing through that illegality.

Id.

58. 412 U.S. 937 (1973).

59. 415 U.S. 651 (1974). For discussion of the significance of this case, *see* Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution,* 50 NOTRE DAME LAW. 496 (1975); Comment, 29 U. MIAMI L. REV. 144 (1974).

60. The majority consisted of Justices Rehnquist, Burger, Stewart, White, and Powell. Justices Douglas, Brennan, Marshall, and Blackmun dissented.

61. 415 U.S. 651, 659.

62. *Id.* at 668.

63. *Id.* at 664.

> [m]ust inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself, *Ford Motor Co. v. Department of Treasury, supra,* than it does the prospective injunctive relief awarded in *Ex parte Young.*[64]

In reaching this conclusion, the Court recognized that a literal reading of the eleventh amendment does not bar suits for damages against a state brought by citizens of the same state.[65] But it relied on the *Hans* doctrine[66] to extend eleventh amendment immunity to Edelman in his official capacity as Director of the Illinois Department of Public Aid. After this determination, the Court found that the State of Illinois though not a named party to the suit, was a real party in interest.

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.[67]

The Court also rejected the court of appeals' position that the doctrine of *Ex parte Young* allowed an award of retroactive benefits as a form of equitable relief. The Court limited the holding of *Ex parte Young* to prospective equitable relief. It stated:

> We do not read *Ex parte Young* or subsequent holdings of this court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex parte Young* hewed to no such line.[68]

The Court acknowledged that prospective equitable relief often has a significant effect on the state treasury,[69] but held that "[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* . . . ."[70]

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64. *Id.* at 665.
65. *Id.* at 662–63.
66. *See* notes 22–26 and accompanying text *supra.*
67. 415 U.S. at 663, *quoting* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).
68. 415 U.S. at 666.
69. *Id.* at 667–68.
70. *Id.* at 668.

The *Edelman* decision was criticized by one commentator as resting on "ambigiuous, doubtful precedent and tenuous reasoning."[71] Nevertheless, it had immediate repercussions. In *Owens v. Roberts*,[72] a three judge panel in the Middle District of Florida was forced to withdraw the portion of its order which granted retroactive welfare benefits. Welfare claimants Owens and Worth had been denied benefits pursuant to an unconstitutional statute.[73] After *Edelman*, the *Owens* court ruled that only prospective declaratory and injunctive relief was available. And since the federal government took over the operation of the programs under which Owens and Worth were eligible,[74] that relief was of no direct benefit to them. Another retroactive welfare benefit case pending before the same court of appeals which had decided *Edelman, sub nom., Jordan v. Weaver,* was reversed after the *Edelman* decision. In *Wilson v. Weaver,* the court which had heard oral argument before *Edelman,* reversed the district court's award of retroactive benefits.[75] When faced with the identical situation, the United States Court of Appeals for the Sixth Circuit remanded *Milburn v. Huecker*[76] for consideration in light of *Edelman*. In *Thompson v. Madison County Board of Education*,[77] an appeal was pending at the time of the *Edelman* decision. The United States Court of Appeals for the Fifth Circuit remanded the case to the district court for findings on the eleventh amendment issue, since neither of the parties had an opportunity to brief or argue it. Finally, in an action for back wages brought by Connecticut state troopers, the United States Court of

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71. Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution,* 50 NOTRE DAME LAW. 496, 506 (1975).

72. 377 F. Supp. 45 (M.D. Fla. 1974).

73. Fla. Laws 1969, ch. 69-268 (§ 409.185(1)(b), and the Division of Family Service regulations promulgated thereunder created an rebuttable presumption that any person transferring property worth more than $600 for less than its assessed value had made the transfer with intent to defraud the welfare authorities. The named plaintiffs and members of their class were absolutely foreclosed from receiving benefits to which they were otherwise entitled for 2 years from the date of the transfer. Plaintiff Owens, an 85-year-old woman, had sold her home for $1,050 (although its assessed value was $2,885) to pay her husband's burial expenses. Plaintiff Worth, a 54-year-old woman with only one kidney who suffered from arthritis, an ulcer, an infected liver, and gallbladder disease, sold used beauty parlor equipment assessed at $660 for $200 after her doctor had advised her to discontinue operating her beauty parlor. A three-judge court found the statute and regulation inconsistent with the Social Security Act and therefore invalid under the supremacy clause. 377 F. Supp. at 54. The court also found that the regulation violated the equal protection and due process clauses of the fourteenth amendment. *Id.* at 51-54.

74. *See* note 1 *supra.*

75. Wilson v. Weaver, 499 F.2d 155 (7th Cir. 1974).

76. Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974).

77. 496 F.2d 682 (5th Cir. 1974).

Appeals for the Second Circuit concluded that since the troopers' argument "was destroyed by the recent Supreme Court decision in Edelman v. Jordan . . . . [T]here is no need to investigate further the merits of the case presented."[78]

Beyond this immediate impact,[79] it is difficult to determine whether Justice Marshall's dire prediction, made in his dissent in *Edelman,* will come true. Justice Marshall Stated:

> Absent any remedy which may act with retroactive effect, state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate that assistance be paid with reasonable promptness to all eligible individuals.[80]

Regardless of the logical inconsistencies[81] of *Edelman,* it is certain that attorneys for welfare claimants will be forced to face the decision in the future. One commentator has suggested several alternatives for avoiding the results of *Edelman,* although none appears feasible.[82] It is not likely that the Court will overrule its decision, or that the eleventh amendment will be repealed, or that the Court will limit the holding to the facts of the case, given the broadly worded opinion. As one commentator stated:

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78. Wilkerson v. Meskill, 501 F.2d 297, 298 (2d Cir. 1974).

79. *See also* Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); Johnson v. Harder, 383 F. Supp. 174 (D. Conn. 1974); Burrell v. Norton, 381 F. Supp. 339 (D. Conn. 1974); Clifton v. Grisham, 381 F. Supp. 324 (N.D. Miss. 1974); Taylor v. Hill, 377 F. Supp. 495 (W.D.N.C. 1974); Hjelle v. Brooks, 377 F. Supp. 430 (D. Alas. 1974); Borror v. White, 377 F. Supp. 181 (W.D. Va. 1974). The effect of *Edelman* can also be seen in cases dealing with awards of attorneys' fees. *See, e.g.,* Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974); Gonzalez v. Gonzalez, 385 F. Supp. 1226 (D.P.R. 1974); Harrisburg Coalition Against Ruining the Environment v. Volpe, 381 F. Supp. 893 (M.D. Pa. 1974). Some courts have also held that an award of back pay may be barred by the eleventh amendment as interpreted in *Edelman. See, e.g.,* Fitzpatrick v. Bitzer, No. 74–2581 (2d Cir. 1975); Murgia v. Board of Retirement, 386 F. Supp. 179 (D. Mass. 1974). *See* McGee, *Employment Discrimination and the Eleventh Amendment: The Impact of Edelman v. Jordan on Title VII Practice,* 9 CLEARINGHOUSE REV. 235 (Aug. 1975). A novel concept which appears to avoid the eleventh amendment issue is an award of "front pay" in which successful plaintiffs are paid a larger salary in the future to which they might not otherwise be entitled, as a form of restitution. United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973).

80. 415 U.S. at 692 (1974).

81. As one commentator who has criticized the Court's decision stated:

> "[T]he failure of the Court should not be ascribed to its present members. The entire history of the eleventh amendment has been and remains ambiguous and uncertain; the Edelman opinion is merely a product of that history."

Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution,* 50 NOTRE DAME LAW. 496, 506 (1975).

82. *Id.* at 504–506.

> The inevitable conclusion is that *Edelman,* in contrast to the eleventh amendment itself, means exactly what it says, that the states cannot be compelled by federal courts to compensate those who federal rights they violate.[83]

III. The Qualified Immunity Doctrine and Section 1983: The Personal Liability of State Welfare Officials for Wrongfully Withheld Benefits

A. The Qualified Immunity Doctrine: Scheuer v. Rhodes

Since it has been established that retroactive welfare benefits will be treated as damages for purposes of the eleventh amendment, it is clear that welfare claimants cannot recover wrongfully withheld benefits from the state treasury. But because the eleventh amendment relates only to a state welfare official's liability in his or her official capacity, it is appropriate to consider separately the official's personal liability.[84] Under section 1983 of Title 42, United States Code, an individual has a cause of action against every person[85] who, acting under color of state law[86] subjects the individual to the deprivation of "rights, privileges, or immunities secured by the Constitution and laws."[87] Although this statute is not jurisdictional, welfare claimants have used subsections 1343(3) and (4) of Title 28, United States Code, as a jurisdictional basis for actions against state welfare officials.[88] Section 1983 is

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83. *Id.* at 507.

84. *See generally* Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State,* 50 N.C.L. Rev. 548 (1972); Note, *The Doctrine of Official Immunity Under the Civil Rights Acts,* 68 Harv. L. Rev. 1229 (1955).

85. The effect of § 1983 has been limited by judicial decisions which narrowly define the term "person." *E.g.,* City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961). *See* Note, *Federal Jurisdiction—Municipal Immunity Under the Civil Rights Act—Closing the Loopholes,* 52 N.C.L. Rev. 1289 (1974).

86. This phrase has been liberally construed. *See, e.g.,* Monroe v. Pape, 365 U.S. 167 (1971); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

87. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper procedure for redress.

The protected rights are principally due process rights, equal protection rights, rights created by federal statutes, and rights owing their existence to federal functions. *See generally* C. Antieau, Federal Civil Rights Acts (1971).

88. 28 U.S.C. §§ 1343(3)–(4) (1970) provide:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> ....

broadly phrased to impose liability for damages on "every person" who deprives an individual of rights secured by the Constitution and federal laws. Federal courts, however, have held that actions under section 1983 are limited by common law immunity.[89] It is only by overcoming the hurdle of common law immunity that the welfare claimant can recover damages against an individual state welfare official.[90]

Historically, members of the legislature[91] and judicial officers[92] have been absolutely immune from suit. The doctrine of official immunity for executive officials was not a part of this common law tradition, except for the immunity of the Chief Executive.[93] The concept of immunity for state executive officials did not arise in this country until the nineteenth century;[94] it was justified on the grounds that it would be unfair for an official to be liable for performing a mandatory duty.[95] Because high state officials regularly engaged in policy decisions, it was thought that subjecting them to liability would be a deterrent to effective performance of their discretionary functions.[96]

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(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

89. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). Chief Justice Warren, writing for the majority in *Pierson*, stated: "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. at 554.

90. *See generally* Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548 (1972); Comment, 53 N.C.L. REV. 439 (1974).

91. *See* Tenney v. Brandhove, 341 U.S. 367 (1951). According to Justice Frankfurter, "The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Id.* at 372.

92. *See* Pierson v. Ray, 386 U.S. 547 (1967). As Chief Justice Warren pointed out:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 . . . (1872).

386 U.S. at 553–54. Officers such as prosecutors and grand jurors are also protected by common law immunity when engaged in judicial or quasi-judicial functions. *See, e.g.*, Cawley v. Warren, 216 F.2d 74 (7th Cir. 1954); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

93. *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1886).

94. *See* Spalding v. Vilas, 161 U.S. 483 (1896); *accord*, Barr v. Matteo, 360 U.S. 564 (1959).

95. *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1295 n.54 (1953).

96. *See generally* Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548 (1972).

Although the distinction between discretionary and ministerial or mandatory functions appears simple, in practice federal courts have not been able to agree on which function is being performed in various fact situations.[97] Additionally, it has been thought improper to require state officials to defend themselves in protracted and expensive litigation, for as Judge Learned Hand pointed out:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.[98]

On the other hand, the public also has an interest in obtaining redress for the wrongful acts of state officials.[99] Thus, although judges and legislators have absolute common law immunity, it has been extended in only qualified form to state executive officials.[100] One reason for the failure to extend broad immunity to state officials is the public's interest in holding state officials liable for their wrongful acts. In cases arising under section 1983, the threshold question is whether a state official, acting under color of state law, has deprived an individual of rights secured by the Constitution or federal law. Federal courts have recognized the conflict between extending common law immunity to state officials and the desirability of liberally construing the civil rights acts.[101] As one commentator concluded: "Although unlimited

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97. Professor Jaffe summarized the distinction between ministerial and discretionary functions as follows:

> It has for some time been traditional to say that an officer is not liable if he is exercising "discretionary" power. As the principle is applied, if the officer acts in an area where customarily he has discretion—that is, has a power and duty to make a choice among valid alternatives—he is not held liable in damages even though in the case at hand he made a choice that was beyond his power, or indeed had no valid choice open to him at all. . . . However, if the officer has no discretion—if rather his duties are "ministerial"—he is held liable for failure to perform them.

Jaffe, *Suits Against Governments and Officers: Damages Actions*, 77 HARV. L. REV. 209, 218 (1963).

98. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

99. As Chief Justice Burger pointed out in Scheuer v. Rhodes, 416 U.S. 232, 241 (1974), "the public interest requires decisions and action to enforce laws for the protection of the public." This quotation can be interpreted either to mean that the public interest requires officials to obey the law, or that state officials should not be hampered in their enforcement of the law by fear of personal liability for performing discretionary acts.

100. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Spalding v. Vilas, 161 U.S. 483 (1896).

101. *See, e.g.*, Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Robichaud v. Ronan,

liability may be unwise, absolute immunity would be equally undesirable, for it would virtually deprive the Acts of all meaning insofar as they provide an action at law against state officials."[102] Similarly, the United States Court of Appeals for the Second Circuit stated:

> [T]he purpose of § 1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under § 1983.[103]

The United States Supreme Court unanimously reaffirmed the validity of the qualified immunity doctrine in *Scheuer v. Rhodes,*[104] and provided guidelines for its application in a suit for damages against state officials. In *Scheuer,* suits were brought on behalf of students killed at Kent State University in May 1970, when Ohio National Guardsmen fired into a crowd.[105] The defendants, sued in their individual and official capacities, were the Governor of Ohio, officials of the Ohio National Guard, unnamed guardsmen, and the president of the university. The complaint alleged that defendants willfully caused an unnecessary guard deployment and ordered illegal actions which resulted in the students' deaths.[106] The United States District Court for the Northern District of Ohio dismissed the suit, holding that because the action was one for damages against the state, it was barred by the eleventh amendment.[107] The United States Court of Appeals for the Sixth Circuit affirmed.[108] The court of appeals held, in addition, that an unqualified immunity protected the defendants.[109] On appeal, the

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351 F.2d 533 (9th Cir. 1965); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959).

102. Note, *The Proper Scope of the Civil Rights Acts,* 66 HARV. L. REV. 1285, 1298 (1953).

103. Jobson v. Henne, 355 F.2d 129, 133–34 (2d Cir. 1966); *accord,* McLaughlin v. Tilendis, 398 F.2d 287, 290–91 (7th Cir. 1968).

104. 416 U.S. 232 (1974).

105. *See generally* J. MICHENER, KENT STATE: WHAT HAPPENED AND WHY (1971). *See also* NEWSWEEK, May 18, 1971, at 28–30.

106. Defendants were sued under 42 U.S.C. § 1983 (1970) for allegedly depriving plaintiffs of rights secured by the Constitution.

107. Three suits were filed in the Northern District of Ohio on behalf of students killed at Kent State University. *See* Scheuer v. Rhodes, Civil No. 70–859; Krause v. Rhodes, Civil No. 70–544; Miller v. Rhodes, Civil No. 70–816, *all noted in* Verkuil, *supra* note 84, at 552 n.17, 554 n.25.

108. Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972).

109. *Id.* at 442.

United States Supreme Court reversed and remanded the case to allow plaintiffs to offer evidence in support of their claims against the defendants as individuals.[110]

The *Scheuer* court rejected the holding of the court of appeals that the action was barred by the eleventh amendment. Because plaintiffs alleged facts that indicated they were seeking to impose personal liability upon the defendants, the Court concluded that the suit was not against the state; therefore, the eleventh amendment did not apply.[111] Relying on the doctrine of *Ex parte Young*, Chief Justice Burger, writing for the Court, concluded that when a state officer acting under a state law violates the federal constitution, the officer

> 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 his responsibility to the supreme authority of the United States.[112]

The Supreme Court reaffirmed its *Edelman* view that the doctrine of *Ex parte Young* does not allow a plaintiff to seek damages from the public treasury.[113] The Court pointed out, however, that damages against private individuals may be a "permissible remedy in some circumstances notwithstanding the fact that [those individuals] hold public office."[114]

Having overcome the hurdle of the eleventh amendment by seeking to hold state officials personally liable, the plaintiffs in *Scheuer* faced the barrier of common law official immunity. The court of appeals held that the defendants, as state officials, were absolutely immune from suits for damages;[115] the Supreme Court, after reviewing the history of common law immunity, rejected this view.[116] The Court balanced the interest of the public in obtaining redress for state officials' wrongful acts against the interest of the public in vigorous and effective exercise of discretion by state officials. The Court concluded that state officials were not absolutely immune from suits for damages.[117]

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110. Scheuer v. Rhodes, 416 U.S. 232 (1974).

111. *Id.* at 238.

112. *Id.* at 237, *quoting from Ex parte* Young, 209 U.S. 123, 159–60 (1908).

113. 416 U.S. at 238.

114. *Id.* As authority, the Court cited: Moor v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961); Myers v. Anderson, 238 U.S. 368 (1915).

115. Krause v. Rhodes, 471 F.2d 430, 442 (6th Cir. 1972), *rev'd*, 416 U.S. 232 (1974).

116. Scheuer v. Rhodes, 416 U.S. 232, 238–49 (1974).

117. *Id.* at 247.

In addition, the Court developed standards to be used to determine whether a public official[118] may be held personally liable for wrongful acts:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[119]

In developing the qualified immunity test, the Court apparently rejected the traditional discretionary-ministerial functions distinction.[120] Rather than examine the nature of the duties performed by the state official to see if they were ministerial or discretionary, the Court seemed to adopt the subjective "good faith" and objective "reasonableness" standards of *Pierson v. Ray*.[121] These standards are to be applied even to discretionary acts of state executive officials, although the scope of discretion will be considered in determining liability.[122]

B. The Qualified Immunity Doctrine Applied to State Welfare Officials

In applying the *Scheuer* qualified immunity test to welfare cases, welfare claimants will have difficulty in proving that a state welfare official's wrongful acts resulted from bad faith and were unreasonable under the circumstances. First, state welfare officials are not likely to be involved in day-to-day contact with clients. Therefore, it would be difficult to show that the official exhibited personal malice towards welfare claimants. Second, since state and federal welfare law changes rapidly, it is not likely that welfare claimants could prove that a state welfare official knowingly violated their rights.[123] State welfare officials,

118. The doctrine of qualified immunity applies not only to state officials, but to federal officials. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973); Barr v. Matteo, 360 U.S. 564 (1959); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); United States *ex rel.* Lewis v. Johnson, 383 F. Supp. 600 (E.D. Pa. 1974).

119. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

120. *See generally* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

121. 386 U.S. 547 (1967).

122. *See* Note, *The Federal Rules of Evidence and Florida Evidence Law Compared*, 3 FLA. ST. U.L. REV. 384, 388 n.24 (1975).

123. Even in an area which appears to be settled, once a particular statute or regu-

like the police officers in *Pierson v. Ray,* [124] are "not charged with predicting the future course of constitutional law."[125] But in circumstances such as those confronting the Court in *Edelman,*[126] it might be possible to show that Edelman's failure to require his employees to process welfare applications within the time prescribed by federal regulations was evidence of bad faith. It is difficult to see how Edelman could argue that he reasonably believed such a delay was proper in the face of explicit federal guidelines to the contrary. Since Edelman himself was not directly involved in processing welfare applications, he might have argued that any delays were the result of inadequate staffing due to a shortage of funds, and not a result of bad faith. On the other hand, in a situation such as that confronting the court in *Owens v. Roberts,*[127] application of the *Scheuer* doctrine is more difficult. In *Owens,* a Florida statute and regulation were held invalid as inconsistent with the Social Security Act,[128] and violative of due process and equal protection.[129] The statute and regulation[130] created an irrebuttable presumption[131] that the transfer of property worth more than $600 for less than its assessed value within 2 years prior to or during the receipt of assistance, was made with intent to defraud the welfare authorities. Had plaintiffs sought to impose personal liability against the defendant state welfare official, the official could have argued that he reasonably believed that the statute and regulation were valid, since almost every other state had such provisions.[132]

One element which affects the performance of both mandatory and discretionary acts by state welfare officials is the political climate in the nation and the particular state. It is common knowledge that there are abuses and inefficiencies in the welfare system; state government

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lation has been declared unconstitutional, a state may try to regulate the same conduct by enacting another statute or regulation. *Compare* King v. Smith, 392 U.S. 309 (1968), *with* Van Lare v. Hurley, 421 U.S. 338 (1975), *and* Lewis v. Martin, 397 U.S. 552 (1970).

124. 386 U.S. 547 (1967).

125. *Id.* at 557.

126. 415 U.S. 651 (1974).

127. 377 F. Supp. 45 (M.D. Fla. 1974).

128. *Id.* at 55.

129. *Id.* at 51–54.

130. *See* note 75 *supra.*

131. The fate of the statutory presumption argument presented in *Owens* is uncertain after the Supreme Court's decision in Weinburger v. Salfi, 422 U.S. 749 (1975).

132. Prior to the federal administrative takeover of OAA and APTD, 39 states had statutes similar to Florida's which restricted eligibility if claimants had transferred property under certain circumstances prior to or during receipt of assistance. *See, e.g.,* ALA. CODE tit. 49, § 17(14) (1958); ARIZ. REV. STAT. ANN. § 46–252 (1956); GA. CODE ANN. § 99–603 (1968); ILL. ANN. STAT. ch. 23, § 3–1.3 (1968); IND. ANN. STAT. § 52–1251 (a)–1 (1933).

officials and citizens are often hostile to welfare programs.[133] The welfare system, especially in times of inflation, is often a target for budget cuts and other restrictions. A state welfare official who wants to change a constitutionally defective policy may be faced with an inadequate staff and lack of resources to implement changes; a state welfare official who supports constitutionally defective policies can obstruct changes in policy by pointing to fiscal problems.

In an obvious violation of settled welfare law, it is possible that a state welfare official could be held personally liable for wrongfully withheld welfare benefits. The Supreme Court has indicated its willingness to apply the *Scheuer* qualified immunity doctrine,[134] and it is likely that federal courts will flesh out the doctrine in the future.[135] The Supreme Court may, however, be sidestepping the major issue. For even though it is theoretically possible to hold state welfare officials personally liable, the officials will probably be judgment proof, unless the state provides insurance.[136]

An attempt to avoid the effect of the eleventh amendment by using the *Scheuer* theory may prove little more than a provocative but ultimately futile intellectual exercise for attorneys. For their welfare clients, it could mean the loss of food, clothing, shelter, and medical care which they would have received but for the operation of an unconstitutional state statute or regulation. That is the price that must be paid for the continued legislative and judicial obeisance to the eleventh amendment to the United States Constitution.

MARIE JANIEWSKI

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133. *See, e.g., Crackdown on Welfare Begins to Take Hold,* U.S. NEWS AND WORLD REP., Feb. 19, 1973, at 37–40; *How Welfare Keeps Women from Working,* BUS. WEEK, Apr. 7, 1973, at 51; New York Times, July 1, 1975, at 15, col. 1.

134. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975) (section 1983 suit for damages against staff of Florida state mental hospital for failure to provide treatment or release patient); Wood v. Strickland, 420 U.S. 308 (1975) (section 1983 suit seeking damages against school district officials for failing to provide a hearing prior to expulsion of students from high school).

135. A number of lower federal courts have considered the *Scheuer* doctrine of qualified immunity. *See, e.g.,* Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974); Oppenheimer Mendez v. Acevedo, 388 F. Supp. 326 (D.P.R. 1974), *aff'd,* 512 F.2d 1373 (1st Cir. 1975); Weathers v. West Yuma County School Dist., 387 F. Supp. 552 (D. Colo. 1974); James v. Wallace, 386 F. Supp. 815 (M.D. Ala. 1974); Black Bros. Combined v. City of Richmond, 386 F. Supp. 147 (E.D. Va. 1974); Gordenstein v. University of Del., 381 F. Supp. 718 (D. Del. 1974); Gettleman v. Werner, 377 F. Supp. 445 (W.D. Pa. 1974).

136. Some states provide personal liability insurance for state officials. *See* Note, *The Doctrine of Official Immunity Under the Civil Rights Acts,* 68 HARV. L. REV. 1229, 1232 (1955); Comment, 53 N.C.L. REV. 439, 446 (1974). Although funds for the insurance policies come from the state treasury, judgments for damages would be payable through the insurance company, and not directly from the state treasury.