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Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution

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NOTES

EDELMAN V. JORDAN: A NEW STAGE IN ELEVENTH AMENDMENT EVOLUTION

I. Introduction

Edelman v. Jordan,[1] decided by the United States Supreme Court in March of 1974, culminated a series of decisions concerning the administration of federally funded welfare programs by various states.[2] In its holding, the Court reversed an apparent trend of affirming lower court decisions ordering retroactive payment of welfare benefits wrongfully withheld by states.[3] In so doing, the Court also provided new insight into the broader issue of state immunity from suits in federal court, as based on the eleventh amendment[4] and its subsequent judicial extension in *Hans v. Louisiana*.[5] Since this broader issue involves elements of constitutional history and interpretation, conflicting and ambiguous precedent, modern concepts of federalism, and the moral responsibilities of government, *Edelman* deserves searching and critical examination.

II. *Edelman:* The Lower Courts

Edelman v. Jordan began as a class action suit for declaratory and injunctive relief against Illinois and Cook County[6] officials, alleging that they were administering the joint federal-state program of Aid to the Aged, Blind and Disabled[7] in a manner contrary to federal regulations[8] and thereby were violating the equal protection clause of the fourteenth amendment.[9] The District Court for the Northern District of Illinois held that the Illinois regulations[10] followed by the defendants contradicted the controlling federal regulations[11] and were, consequently, invalid. As a result, the lower court enjoined the defendants from

1 415 U.S. 651 (1974).

2 Swank v. Rodriguez, 403 U.S. 901 (1971), *aff'g* 318 F. Supp. 289 (N.D.Ill. 1970); Graham v. Richardson, 403 U.S. 365 (1971) (Arizona, Pennsylvania); Wyman v. Boddie, 402 U.S. 991 (1971), *aff'g* 434 F.2d 1207 (2d Cir. 1970) (New York); Wyman v. Rosado, 402 U.S. 991 (1971), *aff'g* 437 F.2d 619 (2d Cir. 1970) (New York); Wyman v. James, 400 U.S. 309 (1971) (New York); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland); Rosado v. Wyman, 397 U.S. 397 (1970) (New York); Goldberg v. Kelly, 397 U.S. 254 (1970) (New York); Wyman v. Bowens, 397 U.S. 49 (1970), *aff'g* 304 F.Supp. 717 (S.D.N.Y. 1969); Shapiro v. Thompson, 394 U.S. 618 (1969) (Connecticut, Pennsylvania, District of Columbia); King v. Smith, 392 U.S. 309 (1968) (Alabama).

3 Sterrett v. Mothers and Children's Rights Organization, 409 U.S. 809 (1972); State Dep't of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972); Wyman v. Bowens, 397 U.S. 49 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

4 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.

5 134 U.S. 1 (1890).

6 Cook County is the Illinois county wherein Chicago is located.

7 Act of July 25, 1962, Pub. L. No. 87-543, § 141(a), 76 Stat. 197.

8 45 C.F.R. § 206.10 (1973).

9 Jordan v. Weaver, 472 F.2d 985, 987-88 (7th Cir. 1973).

10 Ill. Dep't of Public Aid, Categorical Assistance Manual §§ 4004.1, 8255.

11 45 C.F.R. § 206.10 (1973).

further violations of federal standards and, additionally, ordered payment of wrongfully withheld benefits to the plaintiffs.[12]

On appeal, the Court of Appeals for the Seventh Circuit affirmed the district court, rejecting the contention by the defendants-appellants that the eleventh amendment[13] barred the award of retroactive benefits.[14] The court of appeals rebutted this argument by citing four decisions, each affirmed in the Supreme Court, wherein the same eleventh amendment defense to retroactive welfare payments had been rejected.[15] It added that "even if an independent analysis were open to us, we would hold the defendants' contentions to be without merit."[16] Certiorari was granted[17] to resolve the conflict which had arisen between the Seventh Circuit, because of its decision in *Edelman,* and the Second Circuit[18] on the issue of retroactive payment of welfare benefits by a state agency.[19]

III. *Edelman:* The Supreme Court

By a five-to-four vote, the Supreme Court reversed the judgment of the Seventh Circuit affirming the order of retroactive benefits and remanded the case.[20] The majority opinion, written by Justice Rehnquist, discussed four issues which bore on the question of retroactive benefits: (1) whether state immunity extends beyond the eleventh amendment to suits by a citizen against his own state; (2) whether state immunity applies to suits wherein the state is not a named defendant; (3) whether retroactive benefits are permitted by *Ex parte Young*'s exception to state immunity; (4) whether Illinois waived its immunity by participating in the Aid to the Aged, Blind and Disabled program.

A. *The* Hans *Extension of State Immunity Beyond the Eleventh Amendment*

Read literally, the eleventh amendment does not bar suits such as *Edelman,* brought in a federal forum by a citizen against his own state.[21] Nevertheless, a long line of Supreme Court cases has held that such suits are barred unless the defendant state consents, although the rationale for this rule is often unclear. Some cases have held that the eleventh amendment itself prohibits suits in federal court against a state by one of its citizens.[22] However, the cases cited in *Edelman* on this point acknowledged that such suits are not literally barred by the

12 Jordan v. Weaver, 472 F.2d at 988.
13 *See* note 4 *supra* for text.
14 472 F.2d at 989-95.
15 *See* cases cited at note 3 *supra.*
16 472 F.2d at 990.
17 *Sub nom.* Edelman v. Jordan, 412 U.S. 937-38 (1973).
18 Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972).
19 Edelman v. Jordan, 415 U.S. at 658.
20 *Id.* at 658-59.
21 *See* note 4 *supra.*
22 Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945); Missouri v. Fiske, 290 U.S. 18 (1933).

eleventh amendment.[23] Resting on these decisions, the *Edelman* Court rejected the view that a federal suit by a citizen against his own state is within the eleventh amendment prohibition. The Court argued that such suits are barred by the intent of the authors of the Constitution that the states retain their immunity from suit. A lengthy footnote supporting this view is included in the *Edelman* opinion.[24] However, this view, when judged in the light of constitutional history, appears to be incorrect.

When the Supreme Court first considered the question in 1793, it decided in *Chisholm v. Georgia*[25] that the federal courts had jurisdiction over a suit against the state of Georgia by a citizen of a different state.[26] Ratification of the eleventh amendment five years later overturned *Chisholm,* the wording of the amendment evidencing this narrow purpose.[27] The most recent study of this question agrees with the *Chisholm* decision that the states were not immune from federal suits before the eleventh amendment.[28] After considering the Constitution's history, including the material subsequently examined in the *Edelman* footnote,[29] this study found that there was no consensus at the time the Constitution was ratified that the states would retain their immunity from suits in federal court by citizens of other states or of foreign countries. On the contrary, the consensus seems to have been that the states might be sued in federal court without their consent.[30]

Significantly, *Hans v. Louisiana,* which extended the eleventh amendment prohibition to suits by citizens against their own state, relied on the doubtful conclusion that the framers of the Constitution intended the states to retain their immunity.[31] *Edelman* cited *Hans* and three other cases which either adopted the same rationale[32] or simply cited *Hans* and its progeny.[33] Thus, the conclusion reached in *Edelman,* that states are immune from suits in federal court by their own citizens, rests on impugnable precedent. The difficulty with this initial issue foreshadows the legal and conceptual complexity surrounding the other eleventh amendment questions considered in *Edelman.*

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23 Employees v. Dep't of Public Health and Welfare, 411 U.S. 279, 280 (1973); Parden v. Terminal Ry., 377 U.S. 184, 186 (1964); Duhne v. New Jersey, 251 U.S. 311, 313 (1920); Hans v. Louisiana, 134 U.S. at 10. The fifth case cited in *Edelman* on this point, *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 48 (1944), involved a suit by a foreign corporation against a state and therefore falls within the language of the eleventh amendment.

24 415 U.S. at 660-62 n.9.

25 2 U.S. (2 Dall.) 419 (1793).

26 *Id.*

27 The eleventh amendment begins: "The Judicial power of the United States shall not be construed to extend . . . ." The complete text of the amendment is set out at note 4 *supra.* The amendment is worded to prohibit an otherwise permissible interpretation of the Constitution, rather than to add new substantive provisions as most other amendments do.

28 C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972) [hereinafter cited as C. JACOBS].

29 *Id.* at 34-37.

30 *Id.* at 40.

31 As stated in *Hans:*

> Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. 134 U.S. at 12.

32 Duhne v. New Jersey, 251 U.S. at 313.

33 Employees v. Dep't of Public Health and Welfare, 411 U.S. at 280; Parden v. Terminal Ry., 377 U.S. at 186.

B. *State Immunity When the State Is Not a Named Defendant*

Having concluded that sovereign immunity extends beyond the eleventh amendment, the Court then inquired whether sovereign immunity also extended beyond the face of the pleadings. Since the complaint in *Edelman* did not name Illinois as a defendant, the action was not formally "against one of the United States," in the words of the eleventh amendment. Originally, the Court had relied on the words of the amendment to determine if a suit was against a state. In *Osborn v. Bank of the United States,*[34] Chief Justice Marshall ruled that the eleventh amendment applied only when a state is a party of record.[35] This standard was soon rejected, however.[36] The *Edelman* Court cited *Ford Motor Company v. Department of Treasury*[37] for the modern rule that the state is a real party in interest, and thus can invoke its sovereign immunity "when the action is in essence one for the recovery of money from the state."[38]

Additionally, the Court cited *Kennecott Copper Corporation v. State Tax Commission*[39] and *Great Northern Life Insurance Company v. Read,*[40] two cases which had adopted the *Ford Motor Company* rationale. But in *Kennecott* the Court emphasized that it, *Ford Motor Company* and *Read* all involved state taxation,[41] an area which the Supreme Court[42] and Congress[43] have historically regarded as inappropriate for federal interference. Thus, the cases cited by the *Edelman* Court, although they generally support the view that judges will look beyond the pleadings to determine if a state is a real party-defendant, are arguably distinguishable because they each involved the sensitive area of state taxation which was not at issue in *Edelman.*

C. Ex Parte Young*'s Exception to State Immunity*

1. The *Young* Exception

The Court then considered whether the action fell under the exception to sovereign immunity provided by *Ex parte Young.*[44] In *Young,* decided in 1908, the Supreme Court had held that despite a claim of sovereign immunity, a state

34 22 U.S. (9 Wheat.) 737 (1824).
35 *Id.* at 856.
36 Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 123 (1828); The Court seemed to return to the *Osborn* rule in *Davis v. Gray,* 83 U.S. (16 Wall.) 203, 220 (1872); but later cases clearly indicated that the Court rejected the *Osborn* standard. *See, e.g.,* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 388-89 (1894); Pennoyer v. McConnaughy, 140 U.S. 1, 10 (1891); In re Ayers, 123 U.S. 443, 487 (1887).
37 323 U.S. 459 (1945).
38 *Id.* at 464, quoted in *Edelman,* 415 U.S. at 663.
39 327 U.S. 573 (1946).
40 322 U.S. 47 (1944).
41 The *Kennecott* opinion observes:
> The reason underlying the rule [requiring state consent to being sued in federal court] 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. 327 U.S. at 577.

42 Perez v. Ledesma, 401 U.S. 82, 126-27 (1970) (Brennan, J., concurring).
43 Lynch v. Household Fin. Corp., 405 U.S. 538, 542 n.6 (1971). *See* 28 U.S.C. § 1341 (1970).
44 209 U.S. 123 (1908).

officer could be enjoined by a federal court from acting pursuant to an unconstitutional state statute.[45] The Court reasoned that an officer acting under an unconstitutional state statute loses his status as a representative of the state and becomes liable as an individual for his actions.[46] This view, which actually appeared before *Young*,[47] has since been reaffirmed on numerous occasions.[48]

Obviously, the *Young* rule rests on a legal fiction. It pretends that a suit to enjoin a state officer from acting as the state commands him is not a suit against the state.[49] Despite the beneficial results of this fiction,[50] it has produced anomalous results as well. One example would be a suit against a state officer for allegedly violating the fourteenth amendment. To invoke the fourteenth amendment, the plaintiff must argue that the officer's acts constituted state action.[51] To avoid the immunity barrier, however, the court would have to assume under the *Young* fiction that the officer's acts were not state action. Thus, the same act might be simultaneously considered both state action and nonstate action.[52]

A more critical anomaly arises from the necessary limitation of the *Young* fiction. The fiction is discarded when a judgment nominally against a state official would reach the state itself, either by requiring affirmative action by that state[53] or, more specifically, by requiring the state to spend money from its treasury.[54]

2. *Young*'s Application to *Edelman*

Edelman rests precisely on the latter ground. As explained by Justice Rehnquist, since the lower court's award of retroactive benefits would necessarily be paid by Illinois, the situation resembled more closely *Ford Motor Company*, where monetary damages against the state were denied, than it did *Ex parte Young*, where injunctive relief against the state was granted.[55] So a critical distinction lies between the prospective relief allowed in *Young* and the monetary relief disallowed in *Ford Motor Company*. If the effect of the relief sought

45 *Id.* at 155-56. An injunction is also available where the statute is constitutional on its face but unconstitutional in operation. *See, e.g.*, Sterling v. Constantin, 287 U.S. 378, 393 (1932); Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426, 434 (1926); Green v. Louisville & Interurban R.R., 244 U.S. 499, 507 (1917); Reagan v. Farmers' Loan & Trust Co., 154 U.S. at 390-91; Poindexter v. Greenhow, 114 U.S. 270, 295 (1885).

46 Ex parte Young, 209 U.S. at 159-60.

47 *See, e.g.*, Fitts v. McGhee, 172 U.S. 516, 530 (1899); Pennoyer v. McConnaughy, 140 U.S. at 10; Poindexter v. Greenhow, 114 U.S. at 288.

48 *See, e.g.*, Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952); Sterling v. Constantin, 287 U.S. at 393; Truax v. Raich, 239 U.S. 33, 37 (1915); Western Union Tel. Co. v. Andrews, 216 U.S. 165, 166 (1910).

49 Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962): "The courts do not violate the doctrine of sovereign immunity except in substance." *Id.*

50 415 U.S. at 664.

51 U.S. Const. amend. XIV provides in part: "No State shall make or enforce any law . . . nor shall any State deprive any person . . . ."

52 *See, e.g.*, Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913).

53 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949); Land v. Dollar, 330 U.S. 731, 738 (1947).

54 Land v. Dollar, 330 U.S. at 738. *See* note 38 *supra* and accompanying text.

55 415 U.S. at 665.

would be to deplete the state's treasury, it is barred by state immunity. On this basis, Justice Rehnquist rejected the court of appeals' denomination of the award of retroactive benefits in *Edelman* as "equitable restitution,"[56] arguing that *Young* does not allow any form of relief which may be called "equitable."[57]

3. Criticism of *Edelman*'s Analysis of *Young*

The case law lends uncertain support to the *Edelman* Court's view that *Young* does not allow an award of retroactive benefits against the state. In *Young* itself, the Court commented that affirmative relief may be available when a state officer refuses to perform a purely ministerial duty.[58] *Porter v. Warner Holding Company*[59] went beyond *Young* by stating that once a court acquires jurisdiction, it "has the power . . . to award complete relief."[60] In words even more applicable to *Edelman*, *Sterling v. Constantin*[61] held that federal courts can award "appropriate relief" against state officials who violate the constitutional rights of citizens.[62]

These decisions[63] cast doubt on the view that the *Young* fiction cannot accommodate affirmative or monetary relief. Under these cases, it is difficult to understand how the form of relief can make any difference. If the doctrine of state immunity is a limitation on federal court jurisdiction, as it appears to be,[64] then once the *Young* fiction is employed to grant federal jurisdiction, the form of relief sought or granted should not destroy that jurisdiction.

Even assuming that the form of relief can affect jurisdiction, a more troubling question arises. The purpose of state immunity from federal suit has been alternately stated as either the prevention of interference with state treasuries and governmental functions[65] or the protection of states from the "indignity" of "the coercive process of judicial tribunals at the instance of private parties."[66] Yet these supposed evils are realized whether the relief granted is monetary, injunctive, or both. The majority in *Edelman* admitted that injunctive relief may severely affect a state's treasury,[67] echoing Justice Douglas' observation in dissent that "the nature of the impact on the state treasury is precisely the same" whether the Court grants both retroactive and prospective relief or prospective relief alone.[68]

As this passage noted, prospective and retroactive relief would affect the Illinois treasury in the same way, in that each would deplete it. The only differ-

56 472 F.2d at 994.
57 415 U.S. at 666.
58 209 U.S. at 158.
59 328 U.S. 395 (1946).
60 *Id.* at 399.
61 287 U.S. 378 (1932).
62 *Id.* at 393.
63 *See also* Scott v. Donald, 165 U.S. 58, 67-70 (1897); Pennoyer v. McConnaughy, 140 U.S. at 10.
64 *But see* Illinois C.R.R. v. Adams, 180 U.S. 28, 37-38 (1901).
65 Land v. Dollar, 330 U.S. at 738.
66 In re Ayers, 123 U.S. at 505.
67 415 U.S. at 667, citing *Griffin v. County School Board*, 377 U.S. 218, 233 (1964), where a district court was authorized, under *Ex parte Young*, to order the levy of taxes to reopen and operate racially nondiscriminatory schools.
68 415 U.S. at 682.

ence between these forms of relief would be that retroactive relief would award the back benefits claimed by the plaintiff-respondent, while prospective relief would not do so. Surely this difference would be inconsequential compared to the potential effects of the injunctive relief requested and ultimately granted. Yet the majority called the fiscal effects of the injunction "ancillary," in contrast to the retroactive benefits which were styled "a form of compensation" that "will to a virtual certainty be paid from state funds."[69]

Thus, the test for determining what relief will lie against a state is, in reality, not whether the relief will reach the state treasury. Nor can it be viewed to depend on the extent to which the state treasury will be affected. If it did, the Court in *Edelman* would have granted the monetary relief and denied the injunctive relief. Despite Justice Rehnquist's protest against overemphasis on the label "equitable,"[70] the rule of *Edelman* must be regarded as permitting relief against a state if the court chooses to call the relief "equitable" or "prospective" but not if it calls the relief "damages" or "retroactive."

D. *Waiver of Immunity*

The last major issue decided by the Court was whether Illinois, by participating in the Aid to the Aged, Blind and Disabled program, had waived its immunity from federal suit. The court of appeals thought it had. It argued that 42 U.S.C. § 1983 (1970),[71] its jurisdictional counterpart, 28 U.S.C. § 1343(3) (1970),[72] and HEW regulations[73] providing for federal payment under federal court order had by implication created a cause of action against participating states. In affirming the lower court, the court of appeals concluded "that Congress fully meant to condition the grant of federal funds on the states' being susceptible to a federal court suit to obtain retrospective relief."[74]

In its response, the Supreme Court first considered two cases relied on by the

69 *Id.* at 668.

70 *Id.* at 666. See text accompanying note 57 *supra.*

71 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 proceeding for redress.

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

. . . .

(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.

73 45 C.F.R. § 205.10 (1973) provides:

(b) Federal financial participation is available for the following items.

. . . .

(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

74 472 F.2d at 995.

court of appeals: *Parden v. Terminal Railway*[75] and *Petty v. Tennessee-Missouri Bridge Commission*.[76] *Parden* held that Alabama, by operating an interstate railroad, consented to suit under the Federal Employers' Liability Act,[77] which purported to cover "[e]very common carrier,"[78] even though the Alabama constitution expressly asserted the state's immunity from suit.[79] *Parden* established the rule that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."[80]

Petty held that an interstate commission[81] was amenable to federal suit under the Jones Act[82] despite claims of sovereign immunity. Congress had approved the compact[83] with the proviso that it would not "affect . . . [the] jurisdiction . . . of any court . . . ."[84] Even after noting that a waiver of immunity cannot be lightly inferred,[85] *Petty* found that the states had clearly waived their immunity by accepting the compact.[86]

The *Edelman* Court distinguished *Parden* and *Petty*, finding that they both contained "the threshold fact of congressional authorization to sue a class of defendants which literally includes States . . . ."[87] Arguably, such congressional authorization was not readily apparent in *Parden* and *Petty*. In *Parden*, authorization was found in the words "*every* common carrier."[88] In *Petty*, authorization was found in an interstate compact which, according to Congress, did not "affect . . . [the] jurisdiction . . . of any court . . . ."[89] In addition, the Court also cited *Murray v. Wilson Distilling Company*[90] for the rule that waiver of immunity will be found only where stated "by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction."[91] If this were in fact the rule, neither *Parden* nor *Petty* could pass muster. But *Murray* does not actually go so far. It applied this rule not to determine whether a state had waived its immunity from a suit, as *Edelman* indicated, but to interpret a state statute which allegedly divested the state of its rights in certain assets.[92]

To further buttress its position on the issue of implied waiver of immunity, the Court then quoted *Great Northern Life Insurance Company v. Read* for the

75 377 U.S. 184 (1964).
76 359 U.S. 275 (1959).
77 45 U.S.C. §§ 51-60 (1970).
78 *Id.* at 51.
79 ALA. CONST. art. I, § 14: "That the State of Alabama shall never be made a defendant in any court of law or equity."
80 377 U.S. at 196.
81 Creation of the interstate commission was authorized by the General Bridge Act of 1946, 33 U.S.C. §§ 525-34 (1970). The commission was created by the joint acts of the legislatures of Tennessee, Tenn. Pub. Acts ch. 167-68 (1949), and Missouri, Mo. Laws 622 (1949).
82 46 U.S.C. § 688 (1970).
83 Act of Oct. 26, 1949, ch. 758, 63 Stat. 930.
84 *Id.*
85 359 U.S. at 276.
86 *Id.* at 280.
87 415 U.S. at 672.
88 45 U.S.C. § 51 [emphasis added].
89 63 Stat. 930. *See* text accompanying note 84 *supra*.
90 213 U.S. 151 (1909).
91 *Id.* at 171, cited at 415 U.S. at 673.
92 213 U.S. at 170-71.

rule that interference with state fiscal affairs would be justified only after "a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation."[93] However, in *Read* the Court was considering whether a state's consent to suit in its own courts implied consent to suit in federal courts as well.[94] This is a far different question from whether Congress had conditioned state participation in a federally funded welfare program on the states' waiver of immunity to suit in federal court, the question posed in *Edelman*.

Thus, the authorities cited by the Court on the waiver question, *Murray* and *Read,* did not in fact address that specific question. Moreover, no clear rule emerges from those cases which are pertinent to that question. *Petty,* quoted by the Court, cautioned that a waiver cannot be lightly inferred.[95] *Ohio v. Helvering,*[96] in finding Ohio a "person" subject to excise taxation under 26 U.S.C. § 205 (1939), demonstrated greater willingness to infer congressional intent to dispense with state immunity.[97] *United States v. United Mine Workers*[98] relied on the "old and well-known rule" against statutorily depriving the sovereign of rights and privileges unless the statute expressly so provides.[99] But on a similar question, *United States v. Shaw*[100] ruled that "[w]hen authority is given [to sue the United States], it is liberally construed."[101]

Edelman did little to reconcile these cases, leaving the rule governing waiver of immunity unsettled.

IV. Alternatives to *Edelman*

Edelman v. Jordan and its inevitable repercussions[102] will surely support Justice Frankfurter's caveat in his dissent to *Read* that sovereign immunity "undoubtedly runs counter to modern democratic notions of the moral responsibility of the State."[103] Proceeding on this assumption, commentators have suggested several alternatives to the present scope of state immunity.

One alternative suggested is not to read the eleventh amendment as a prohibition of suits under federal question jurisdiction.[104] This suggestion is grounded on the assertion that the narrow purpose of the eleventh amendment was to prevent suits under diversity jurisdiction against several states on the large

93 322 U.S. at 54, quoted at 415 U.S. at 673.
94 322 U.S. at 54.
95 359 U.S. at 276.
96 292 U.S. 360 (1934).
97 *Id. Ohio v. Helvering* dealt with state immunity from federal taxation, not federal judicial process, but the areas are analogous. If Illinois were considered a "person" under 42 U.S.C. § 1983, as Ohio was under 26 U.S.C. § 205, its immunity from federal suit would be effectively destroyed. For other cases which avoided state immunity from federal taxation, *see* United States v. California, 297 U.S. 175 (1936), and South Carolina v. United States, 199 U.S. 437 (1905).
98 330 U.S. 258 (1947).
99 *Id.* at 272.
100 309 U.S. 495 (1940).
101 *Id.* at 501.
102 *See, e.g.,* Adams v. Harden, 493 F.2d 21 (5th Cir. 1974).
103 322 U.S. at 59.
104 Comment, *Monetary Remedies Against the State in Federal Question Cases,* 68 NW. U.L. REV. 544, 557, 562-64 (1973).

debts they had accumulated prior to the enactment of the amendment.[105] Despite the questionable historical accuracy of this assertion,[106] it implicitly recognizes that the federal government should be able to control areas where federal law and federal policy dominate. The same consideration lay beneath the *Parden* holding that states which engage in "activities subject to congressional regulation" impliedly waive their immunity from suit.[107]

Another alternative proposed is that the doctrine of *Erie R.R. v. Tompkins*[108] be adapted to the immunity area.[109] Specifically, this would require that state immunity apply only to state created rights, leaving the federal courts free to enforce federally created rights against the states.[110] A third alternative advocated that the eleventh amendment be narrowly read to prohibit only common law claims against states.[111] To the extent that common law claims are state created, and therefore not federal questions, this alternative resembles closely the preceding two proposals and reflects the same policy of federal dominance in federal areas.

As these three suggestions imply, the fundamental problem with state immunity is that it allows the states to contravene with impunity federal policy in areas ostensibly under federal control. Justice Marshall recognized this in his dissent to *Edelman* by commenting that without retroactive remedies, "state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate." In *Edelman* itself, as Justice Marshall explained, Illinois officials had withheld welfare benefits since 1968 by arguing that the federal regulation they were violating was invalid, an argument "which even the majority deems unworthy of discussion."[112]

The three proposals discussed above, while they illuminate the problem of state immunity in federally controlled areas, would require repeal or revision of the eleventh amendment, events which are unlikely. Barring this and barring any wholesale waiver of immunity by the states,[113] no easy solution to the broad problem of state immunity exists. The solution implicit within the three alternatives examined above and in *Parden*[114] involves a balancing of federal and

105 *Id.* at 561 n.84 and accompanying text.

106 C. JACOBS, *supra* note 28, disputes this premise. He points out that by 1794 the federal government had assumed over two-thirds of the states' debts, that the states were willing and able to pay the rest, and that most were in fact paid during the period 1790-1810. Drawing on these facts, he concludes that the evidence does not support the conclusion that the eleventh amendment was intended to relieve the states of existing debts. *Id.* at 69-70.

107 377 U.S. at 196.

108 304 U. S. 64 (1938).

109 Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUSTON L. REV. 1 (1967).

110 *Id.* at 19.

111 Comment, *A Practical View of the Eleventh Amendment — Lower Court Interpretations and the Supreme Court's Reaction*, GEO. L. J. 1473, 1499 (1973).

112 415 U.S. at 692. The argument Justice Marshall was referring to was the contention, dismissed by the majority at 659-60 n.8, that the time limits set by the HEW regulations appearing at 45 C.F.R. § 206.10 (a)(3) were inconsistent with the requirement of § 1602(a)(8), 76 Stat. 197, that aid be furnished "with reasonable promptness," and so were invalid.

113 Only one state, Montana, has absolutely waived its immunity from suit. MONT. CONST. art. 2, § 18. Illinois has completely waived its immunity but subject to later modification and limitation by the state legislature. ILL. CONST. art. 13, § 4.

114 *See* text accompanying note 107 *supra*.

state priorities in specific problem areas. Such an approach would confront the Court with the same type of task it faced in *Helvering v. Gerhardt*,[115] where it sought to balance the conflicting interests of federal and state government in defining the limits of state tax immunity. There, the Court denied state tax immunity because to honor it would "restrict the federal taxing power" without providing the state any tangible protection in return.[116]

Similarly, state immunity from federal judicial process should be denied when it would place an unwarranted burden on the implementation of federal policy without affording tangible protection to the state. Under this rule, the artificial distinction between prospective and retrospective relief would lose all importance. Instead, courts considering cases such as *Edelman* would ask three questions:

1. Is this an area where federal law and policy should dominate?
2. Would observance of state immunity destroy the federal government's ability to enforce its law and policy?
3. Do these two considerations outweigh the state's need for protection from liability?

If a court answered all three questions affirmatively, the state would be subject to suit in federal court. If not, the state's immunity would bar the suit.

V. Conclusion

From the standpoint of precedent and logic, the decision in *Edelman v. Jordan* is unsatisfactory. It rests on ambiguous, doubtful precedent and tenuous reasoning. But the 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. Despite this history, however, it remains useful to consider what the Court should have decided.

Edelman's reception will ultimately depend on the political philosophy of its audience. To those who support state independence and decry federal involvement in matters arguably under the states' province, *Edelman* is a significant step forward. It resolves in clear terms the problem of what relief *Young* authorizes against the states. After *Edelman*, states need no longer fear that their treasuries will be exhausted and their financial plans disrupted by some failure, intentional or otherwise, to observe the letter of federal law.[117] Moreover, states can still individually waive their immunity if they wish,[118] leaving other states to do as they wish. So on these grounds, the *Edelman* opinion might well be applauded.

But to those who believe that the federal government should bear primary

115 304 U.S. 405 (1938).
116 *Id.* at 420.
117 The fact that the two states listed in note 113 *supra* which have wholly or partly waived their immunity from suit have not yet suffered serious financial disruption may indicate that fears such as these are unfounded.
118 *See* note 113 *supra.*

responsibility for the well-being of its citizens, *Edelman* erects substantial obstacles. These obstacles can be overcome either by overruling *Edelman,* legislatively or judicially, or by avoiding its effects. The three alternatives discussed above are proposals to overrule *Edelman* by the unlikely routes of repeal or revision of the eleventh amendment itself. Equally remote is the chance that the Court will overrule *Edelman,* since the decision generally follows the trend of past eleventh amendment cases.

In contrast, avoiding the effects of *Edelman,* either legislatively or judicially, may provide more feasible although more limited solutions. The federal government could easily resolve the *Edelman* dilemma by requiring that each state, as a condition to its participation in a federally funded program, waive its immunity in suits arising from its administration of that program.

But the "modern democratic notions of the moral responsibility of the State" to which Justice Frankfurter[119] referred are not inherently or logically limited to federally funded programs. More broadly, lower courts could eviscerate *Edelman* by limiting it to its facts or distinguishing it as a case involving welfare laws, a joint federal-state program, or on any other grounds. Lower courts may also attempt to limit the *Edelman* holding by arguing that it concerned common law immunity, not eleventh amendment immunity, since the case did not fall within the precise language of the amendment.[120] But Justice Rehnquist's broadly worded opinion may well work to frustrate such lower court efforts. The holding is not limited to the facts of the case, and it certainly does not rest on any distinction between common law and eleventh amendment immunity. 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 whose federal rights they violate.

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119 Great Northern Life Ins. Co. v. Read, 322 U.S. at 59.
120 *See* parts III. A. and B. *supra.*