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EDELMAN V. JORDAN: PROTECTION OF THE GOVERNMENT  
OR PROTECTION FROM THE GOVERNMENT?

When Illinois and Cook County officials administering federal-state programs of aid to the aged, blind and disabled (AABD) refused to process respondent Jordan's claim for four months, he filed a federal civil rights class action<sup>1</sup> alleging that the rules under which the defendant state officials operated<sup>2</sup> were inconsistent with federal law requiring prompt action on AABD claims<sup>3</sup> and that the processing of similar claims in less time denied him the equal protection of the law. He requested declaratory and injunctive relief and punitive damages. The district court granted an injunction requiring the officials to comply with the federal time limits, and it ordered retroactive payment of benefits illegally delayed. No punitive damages were allowed. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed.<sup>4</sup> Because of a conflict with a recent decision of the Second Circuit,<sup>5</sup> the Supreme Court granted certiorari. In reversing and remanding, the Court *held*: (1) The eleventh amendment bars a federal court from awarding to a state citizen retroactive welfare benefits which have been wrongfully withheld, and (2) a state does not waive its eleventh amendment immunity merely by participating in the AABD program. *Edelman v. Jordan*, 94 S. Ct. 1347 (1974).

Without explicit reference to the eleventh amendment,<sup>6</sup> cases in substantial numbers since 1968 have allowed declaratory and injunctive relief in suits to compel state welfare officials to obey federal welfare regulations.<sup>7</sup> In some cases the Supreme Court even affirmed decisions awarding retroactive payments from the treasury of the

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1. The complaint, filed in the United States District Court for the Northern District of Illinois, alleged a cause of action under 42 U.S.C. § 1983 (1970), and federal jurisdiction by virtue of 28 U.S.C. §§ 1331 and 1343(3), (4) (1970).

2. The rules were sections 4004.1, 8255, and 8255.1 of the Categorical Assistance Manual of the Illinois Department of Public Aid. The rules permitted AABD officials to take a maximum of 30 days for the aged or blind and a maximum of 45 days for the disabled to determine whether an applicant was eligible for assistance. Thereafter, as much as a month of additional delay was permitted before the first check was required to be mailed.

3. 42 U.S.C. §§ 1381-1385 (1969); 45 C.F.R. § 206.10(a) (3) (1973). The time limits required the officials to deny eligibility or to mail the first check within 30 days for the aged or blind and within 45 days for the disabled. Effective January 1, 1974, the AABD program has been replaced. 42 U.S.C. § 1381 *et seq.* (Supp. 1973).

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

5. *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972).

6. "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." U.S. CONST. amend. XI. The amendment has consistently been interpreted to preclude suits against states by their own citizens as well. See note 27 *infra* and accompanying text.

7. *E.g.*, *Townsend v. Swank*, 404 U.S. 282 (1971); *Graham v. Richardson*, 403 U.S. 365 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *King v. Smith*, 392 U.S. 309 (1968).

state<sup>8</sup> without reference to the eleventh amendment. On the other hand, where the eleventh amendment has been explicitly interpreted, it has been held an absolute bar to the award of any monies from a state's treasury without the consent of the state.<sup>9</sup> Equitable remedies like mandamus and injunction could be obtained to compel a state official to obey the law,<sup>10</sup> but the rationale in these cases was that the suit was not really one against the state. Illegal acts by state officials are *ultra vires* and suits to prevent such acts are, therefore, against the defendants as private individuals.<sup>11</sup>

*Edelman* recognized the inconsistency represented by the recent welfare cases requiring payments in the nature of damages and equitable relief from state treasuries<sup>12</sup> and the earlier cases decided explicitly under the eleventh amendment which denied such payments. The Court removed the uncertainty engendered by the simultaneous existence of two contrary lines of decision by choosing a compromise. Hereafter, the federal courts may compel a state to comply prospectively with federal welfare requirements even when compliance requires the expenditure of monies from the state's treasury,<sup>13</sup> but retroactive payments in the nature of damages or equitable restitution may not be awarded without the consent of the state to be sued.<sup>14</sup>

*Edelman* also stabilized the law in a related and important area of eleventh amendment interpretation. It has long been held that a state may waive its immunity by voluntary participation in a suit affecting the state's interests.<sup>15</sup> It was established that a state's consent to be sued in its own courts did not by implication permit suit against the state in the federal courts.<sup>16</sup> With a few exceptions<sup>17</sup> weighing the degree of appearance required by a state to constitute a waiver under the principle of *Clark v. Barnard*,<sup>18</sup> the law was applied with monotonous uniformity until 1959.<sup>19</sup> Absent willing participation or

8. *E.g.*, *Department of Health & Rehab. Serv. v. Zarate*, 407 U.S. 918 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

9. *Louisiana v. Jumel*, 107 U.S. 711 (1882). This was true even though the funds were specifically reserved by the state treasurer for payment to holders of the bonds on which suit was brought. Professor Jaffee considers this case one of the two most important in the evolution of 11th amendment interpretation. Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). The other case is *Hans v. Louisiana*, 134 U.S. 1 (1890).

10. *Board of Liquidation v. McComb*, 92 U.S. 531 (1875).

11. *Ex parte Young*, 209 U.S. 123 (1908); *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273 (1906); *Prout v. Starr*, 188 U.S. 537 (1903); *Smyth v. Ames*, 169 U.S. 466 (1898); *Tindal v. Wesley*, 167 U.S. 204 (1897).

12. See cases cited at notes 7 and 8 *supra*.

13. 94 S. Ct. at 1358, *citing* *Goldberg v. Kelly*, 397 U.S. 254 (1970).

14. Cases holding to the contrary by implication were expressly disapproved. 94 S. Ct. at 1360.

15. *Clark v. Barnard*, 108 U.S. 436 (1883).

16. *Smith v. Reeves*, 178 U.S. 436 (1900).

17. *E.g.*, *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Missouri v. Fiske*, 290 U.S. 18 (1933).

18. See note 15 *supra* and accompanying text.

19. *Kennecott Copper Co. v. State Tax Comm'r*, 327 U.S. 573 (1946); *Ford Motor Co. v.*

express waiver, the state's interests could not be litigated without its consent, even in a suit in which the state was not named a party.<sup>20</sup>

Two decisions on waiver began to unsettle the old scheme, however. In *Petty v. Tennessee-Missouri Bridge Commission*<sup>21</sup> the Court permitted suit on the ground that the state had by *implication* waived its eleventh amendment immunity when it voluntarily joined an interstate compact approved by Congress. This was extended in *Parden v. Terminal Railway*<sup>22</sup> which held that by operating a railroad in interstate commerce, the state had waived its immunity to suit under the Federal Employees Liability Act.<sup>23</sup> The Court said that the state surrendered part of its sovereignty when it dealt with matters such as interstate commerce over which the Constitution gives supreme power to Congress. The question of whether these holdings would be further extended to all suits involving federal questions was expressly reserved in *Maryland v. Wirtz*.<sup>24</sup> *Edelman* firmly answered the question in the negative.<sup>25</sup>

The Court, in a 5-4 decision delivered by Mr. Justice Rehnquist, asserted four propositions which led to the result obtained. The first was that "[w]hile the Amendment by its terms does not bar suits against a State by its own citizens . . . an unconsenting State is [nonetheless] immune from suits brought in federal courts by her own citizens . . . ." <sup>26</sup> This proposition has been so firmly established by the authorities cited by the Court<sup>27</sup> that it would hardly have needed mention were it not for Mr. Justice Brennan's dissent on the point.<sup>28</sup>

The second proposition, asserted without dissent, is also well established. The Court held that "even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment."<sup>29</sup> Again a long line of cases more than adequately supports the proposition.<sup>30</sup>

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Department of Treasury, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); *Duhne v. New Jersey*, 251 U.S. 311 (1920). See Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

20. *Cunningham v. Macon & B.R.R.*, 109 U.S. 446 (1883).

21. 359 U.S. 275 (1959) [hereinafter referred to as *Petty*].

22. 377 U.S. 184 (1964) [hereinafter referred to as *Parden*].

23. 45 U.S.C. §§ 51-60 (1939).

24. 392 U.S. 183 (1968).

25. "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." 94 S. Ct. at 1360-61.

26. 94 S. Ct. at 1355.

27. The rationale for so interpreting the amendment is the same as that used to justify the sovereign immunity enjoyed by the federal government without benefit of an express constitutional provision. The argument is presented in *United States v. Lee*, 106 U.S. 196 (1882).

28. 94 S. Ct. at 1367. The dissent seems frivolous in that it cited no cases which have held to the contrary. The leading case is *Hans v. Louisiana*, 134 U.S. 1 (1890), and it has been followed without exception. See, e.g., the authorities cited by the Court, 94 S. Ct. at 1355.

29. 94 S. Ct. at 1355.

30. E.g., the cases cited by the Court, 94 S. Ct. at 1356. The earliest decisions held to the contrary. *Osborne v. Bank of the United States*, 22 U.S. 737 (9 Wheat. 738) (1824), followed in *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872), but these were soon overruled. In *Cunningham v.*

The remainder of the Court's argument is more controversial. The third proposition asserted by the majority is that even where the challenged action of the state officials is illegal or unconstitutional under federal law, the eleventh amendment bars a judgment for retroactive damages or equitable restitution when such judgment must be paid from the treasury of the state.<sup>31</sup> This required the disapproval of several recent cases<sup>32</sup> and drew a vigorous, if not rigorous, dissent from Mr. Justice Douglas.<sup>33</sup> Had this decision been rendered prior to *Shapiro v. Thompson*<sup>34</sup> there would scarcely have been any reason to note it, but since *Shapiro*, a line of authority relied on by Mr. Justice Douglas has permitted such awards<sup>35</sup> and by implication held the amendment no bar thereto.

Within the time periods toward which each looks, both the majority opinion and the dissent are well founded. The recent cases cited in the dissent did not, however, expressly decide the matter and, on balance, the majority opinion seems better. Adoption of the dissenting view would amount to judicial repeal of the eleventh amendment where federal questions are concerned, and the Court should be hesitant to so weaken the protection afforded by the Constitution against federal power.

The final proposition drew a dissenting opinion authored by Mr. Justice Blackmun and Mr. Justice Marshall.<sup>36</sup> Answering the question left unresolved since *Maryland v. Wirtz*,<sup>37</sup> the Court held that

[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.<sup>38</sup>

Once again, the Court returned to the law as it was applied during the earlier part of this century, and once again the dissent was based on the more recent cases. Until *Petty* and *Parden*,<sup>39</sup> there was no doctrine recognizing an "implied waiver" of eleventh amendment rights. The

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Macon & B.R.R., 109 U.S. 446 (1883), the Court barred a suit by the holder of a second mortgage to set aside a foreclosure sale of the mortgaged property to the state by the holder of the first mortgage. The Court found the suit to be one against the state even though the state was not a named party to the action. The Court limited its holding in *Davis* and distinguished *Osborne*. The subterfuge of distinguishing and delimiting was finally dropped and the modern position adopted in *In re Ayers*, 123 U.S. 443 (1887), where the Court established the "real party in interest" rule.

31. 94 S. Ct. at 1356-59.

32. *Id.* at 1359-60.

33. *Id.* at 1363.

34. 394 U.S. 618 (1969).

35. See note 8 *supra* and accompanying text.

36. 94 S. Ct. at 1368.

37. 392 U.S. 183 (1968). See note 24 *supra* and accompanying text.

38. 94 S. Ct. at 1361.

39. See notes 20 and 21 *supra* and accompanying text.

dissent found the approach in *Petty* controlling,<sup>40</sup> but the states involved in that situation had joined an interstate compact which expressly provided for suit against member states, and the question of waiver turned on whether Congress had intended that provision to abrogate eleventh amendment immunity. The majority properly distinguished the case<sup>41</sup> since no such provision appeared in the federal regulations here involved. *Parden* was similarly distinguished<sup>42</sup> as involving a commercial venture of a kind not relevant to the situation in *Edelman*.

The result is a good one. "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."<sup>43</sup> It would have been better, in fact, if the Court's language had been stronger and completely unambiguous. The Court's implication<sup>44</sup> that a civil rights action by a citizen against his state might be permitted<sup>45</sup> under the authority of 42 U.S.C. § 1983 if Congress so intended, is contrary both to the spirit of the amendment and to the spirit and the balance of the decision. To the extent that it dealt with Congress at all, the amendment dealt with congressional power, not congressional intent. The Court should have made it quite clear that Congress cannot by statute abrogate a constitutional right, and that a state's waiver must be informed and deliberate to be effective.

*Edelman v. Jordan* gives some new vitality to the unjust and archaic doctrine of sovereign immunity,<sup>46</sup> but it also revitalizes the important idea that the Constitution is meant to serve as a limit on the power of the federal government—a limit not to be laid aside for the convenience of the moment. Considering the legislative trend away from sovereign immunity,<sup>47</sup> the lasting effect of this case may be salutary since the major threat to justice for the foreseeable future seems to be the ever-expanding power of the federal bureaucracy. In the short run, the case stabilizes the law and reaffirms the traditional cases on state sovereign immunity while allowing the courts to intervene to halt continuing violations of federal law. This should enable attorneys and the courts to select appropriate forms of action and remedies more confidently.

FRANCIS J. MERCERET

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40. 94 S. Ct. at 1372.

41. *Id.* at 1360.

42. *Id.*

43. *Id.* See *Brookhart v. Janis*, 384 U.S. 1 (1965).

44. 94 S. Ct. at 1361-62.

45. But see *Kates and Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972).

46. See, e.g., *Jorden v. Metropolitan Util. Dist.*, 498 F.2d 514 (8th Cir. 1974); *San Antonio Con. Soc. v. Texas Hwy. Dept.*, 496 F.2d 1017 (5th Cir. 1974); *Rodriguez v. Swank*, 496 F.2d 1110 (7th Cir. 1974); *Adams v. Hardon*, 493 F.2d 21 (5th Cir. 1974), each expressly relying on the authority of *Edelman v. Jordan*.

47. See, e.g., *Kionka, The King is Dead, Long Live the King: State Sovereign Immunity in Illinois*, 59 ILL. B.J. 660 (1971).