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Constitutional Law: Edelman and Scheuer: The Relationship Between the Eleventh Amendment and Executive Immunity

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COMMENTS

EDELMAN AND SCHEUER: THE RELATIONSHIP BETWEEN THE ELEVENTH AMENDMENT AND EXECUTIVE IMMUNITY

I. INTRODUCTION

While the language of the Eleventh Amendment may be absolute on its face, it has, nevertheless, been subjected to inconsistent interpretation by the Supreme Court.[1] Recently, the Court delivered two opinions, *Edelman v. Jordan*,[2] and *Scheuer v. Rhodes*,[3] which dealt with Eleventh Amendment problems. The purpose of this article is to examine *Edelman's* effect upon the concept of implied waiver by a state of its Eleventh Amendment protection, to assess its holding as to when a suit against a state officer is barred, and in conjunction with *Scheuer* examine the permissible remedies against such state officers. In addition, *Scheuer's* holding on executive immunity will be discussed. The relationship of these two cases and the possible future problems presented by these cases will also be discussed.

In *Edelman*,[4] the respondent brought a class action against certain Illinois officials who were charged with the administration of a joint state-federal assistance program. The suit sought declaratory and injunctive relief under 42 U.S.C. section 1983[5] for their

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1. U.S. CONST. amend. XI: "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."

The Amendment was proposed and passed to counter the decision of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 16 (1793). *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968); C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY, ch. 3 (1972).

The Amendment has been interpreted to bar suits against states in federal court by citizens of the state, *Hans v. Louisiana*, 134 U.S. 1 (1890); it has also been held to bar suits initiated by foreign governments, *Monaco v. Mississippi*, 292 U.S. 313 (1934). In *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), the Court held that the Amendment could not be circumvented by having a state sue another state on the claim of one of its citizens; however, the Amendment is not a bar to suits against the states initiated by the Federal government, *U.S. v. Mississippi*, 380 U.S. 128 (1965).

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

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

4. 415 U.S. 651 (1974).

5. 42 U.S.C. § 1983 (1970):

Every person who, under the color of any statute, ordinance, regulation, custom, or

failure to process benefit claims under Aid to Aged, Blind and Disabled (AABD)[6] within federal time limits. The district court granted a permanent injunction requiring the officials to comply with the federal time limits, and ordered them to make retroactive payments for the benefits wrongfully withheld.[7] The Court of Appeals for the Seventh Circuit affirmed.[8] In a 5-4 decision, the Supreme Court reversed, holding that the retroactive payments were barred by the Eleventh Amendment.[9]

Less than one month after *Edelman,* the Court announced its decision in *Scheuer. Scheuer* was brought by the personal representatives of students who were killed by National Guard troops, called out to quell a disturbance at Kent State University. The estates sought damages, again under 42 U.S.C. section 1983, from the Governor of Ohio, the Adjutant General of the Ohio Guard, the president of the university, and various guardsmen.[10] The district court dismissed the complaint, without answer, upon an affidavit of the defendants that they were being sued in their official capacity and that the action was in effect against the State and thus barred by the Eleventh Amendment.[11] The Sixth Circuit affirmed, adding an alternative ground for dismissal: the defendants were protected by an absolute bar of common law executive immunity.[12] A unanimous Supreme Court reversed, holding that the district court had jurisdiction to hear the case, and that executive immunity was not absolute.[13]

II. IMPLIED WAIVER OF THE ELEVENTH AMENDMENT

One judicially created exception to the language of the Eleventh Amendment is the doctrine of waiver. While the Amendment poses

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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 the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

6. Social Security Act, 42 U.S.C. §§ 1381-85; effective January 1, 1974. AABD has been replaced by a similar program. *See* 42 U.S.C. §§ 801-805 (1973 Supp.).

7. 415 U.S. at 656.

8. Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973), *rev'd sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

9. 415 U.S. 651 (1974).

10. 416 U.S. at 234.

11. *Id.* at 235-6.

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

13. 416 U.S. 232 (1974). Justice Douglas did not participate in the decision.

a jurisdictional bar[14] to a suit against a state in federal court, it has been recognized that this protection may be waived.[15] In *Clark v. Barnard*[16] the Court explicitly recognized that a state waives its Eleventh Amendment protection when it intervenes in a suit as party plaintiff. However, the Court has held that express waiver by a state which would make it a party defendant must be found in an appropriate statute or constitutional provision,[17] and that such language will be narrowly construed.[18]

The concept of implied waiver of Eleventh Amendment protection was explicitly recognized in the case of *Parden v. Terminal R. Co.*,[19] relied upon as authority in the Seventh Circuit's consideration of *Edelman.*[20] In *Parden* certain Alabama citizens sued a state owned common carrier, in federal court, for personal injuries under the Federal Employers Liability Act (FELA).[21] While the Act granted concurrent jurisdiction to both state and federal courts,[22] the State objected to the suit on the grounds that the Eleventh Amendment barred the litigation in federal court.[23] The Supreme Court, per Justice Brennan, held that Alabama waived its Eleventh Amendment protection by implication when it began operating a railroad subject to the FELA.[24]

After the Seventh Circuit's opinion in *Edelman,* but prior to the Supreme Court's consideration of the case, *Parden* was modified by the Court in *Employees v. Department of Public Health and*

14. 415 U.S. at 677-8. The Court said:

> It has been well settled since the decision in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.

See Note, *A Practical View of the Eleventh Amendment - Lower Court Interpretations and the Supreme Court's Reaction*, 61 GEO. L.J. 1473, 1480-2 (1973).

15. Clark v. Barnard, 108 U.S. 436 (1883); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964); *A Practical View of the Eleventh Amendment, supra* note 14, at 1493-8.

16. 108 U.S. 436 (1883). Clark was subsequently modified by *Missouri v. Fiske*, 290 U.S. 18 (1933), which allowed states to intervene for limited purposes without waiving the Amendment's protection.

17. Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944).

18. *Id.*; Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459 (1945).

19. 377 U.S. 184 (1964).

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

21. Federal Employers Liability Act (Railroads) 45 U.S.C. §§ 51 et seq. (1970).

22. 45 U.S.C. § 56 (1970).

23. Parden v. Terminal Ry. Co. 377 U.S. 184, 185 (1964).

24. 377 U.S. at 192. The Court said:

> Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that act.

Welfare.[25] In that case, workers at a Missouri state hospital sued the State's Department of Public Health and Welfare in federal court for overtime compensation under the Fair Labor Standards Act (FLSA).[26] The Court affirmed the trial court's dismissal of the action, holding that Missouri had not waived its Eleventh Amendment protection.[27] The majority opinion professed an inability to find any congressional intent to subject the states to litigation in Federal court as a result of the 1966 amendments to the FLSA.[28] The Court also distinguished *Parden* on the ground that it involved a profit making activity, as opposed to the nonproprietary function of maintaining a hospital in *Employees*.[29] Although these distinctions have been criticized,[30] *Employees* indicates that mere participation by a state in a federally regulated area is insufficient as an implied waiver.[31] The case also strongly suggests that a state does not waive the Amendment's protection unless there is a specific grant of jurisdiction to federal courts in federal legislation to which the states are subject.[32]

Implied waiver was one of the grounds used by the Seventh Circuit in upholding the award of retroactive benefits in *Edelman*. The Court of Appeals reasoned that Illinois had waived the Amendment's protection by its participation in the AABD program.[33] The Supreme Court rejected the implied waiver concept

25. 411 U.S. 279 (1973).

26. Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1970).

27. 411 U.S. at 285.

28. *Id.* This conclusion is entirely unsatisfactory. The 1966 Amendments to the Act specifically included states within the definition of "Employer." 29 U.S.C. § 203(D) (1970). It makes little sense to subject the states to the provisions of the Act on one hand, yet hold that Congress did not intend the Act to be enforced against the states in federal court. *See* Comment, *Implied Waiver of a State's Eleventh Amendment Immunity*, 1974 DUKE L.J. 925.

29. 411 U.S. at 284.

30. *See Implied Waiver, supra* note 28; Comment, *The Elusive Eleventh Amendment and the Perimeters of Federal Power*, 46 COLO. L. REV. 211 (1974). The Court appears to have made a distinction without a difference. The jurisdictional provisions in the FELA grants concurrent jurisdiction to federal and state courts, 45 U.S.C. § 56 (1970); the jurisdictional provision of the FLSA reads in part, "Action to recover such liability may be maintained in any court of competent jurisdiction." 29 U.S.C. § 216 (1970). The majority opinion apparently grasped at the different wording to bolster its intent argument.

31. 411 U.S. 279 (1973).

32. *Id.*

33. Jordan v. Weaver, 472 F.2d 985, 993 (1973). The Court of Appeals said:

> Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain . . . having to make those payments now, which federal law required it to make in the first place, . . . In accepting the federal assistance program, the state must have calculated the cost . . . .

in essentially a two-pronged argument. First, they held that the recognition of implied waiver in *Parden* and *Employees* could not be used to support Jordan's argument because the AABD program lacked any Congressional authorization to sue for benefit claims.[34] The majority opinion concluded:

> The question of waiver or consent under the Eleventh Amendment was found in those cases [*Parden* and *Employees*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.
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> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent.[35]

The Court also rejected two possible alternatives to the express authorization to sue. First, the majority opinion summarily rejected the use of an individual suit, absent express authorization, to effectuate a statutory purpose. While the Court agreed that such suits were allowed in *J.I. Case v. Borak* to effectuate the Securities and Exchange Act, they concluded that their use in the area of the Eleventh Amendment was inappropriate.[36] In addition, the Court rejected the use of section 1983 as a substitute for an express authorization to sue. The Court said:

> But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself.[37]

The second line of reasoning which the Court relied upon to reject implied waiver also had its roots in *Parden* and *Employees*. The majority opinion reiterated that mere participation in a program which is connected with federal legislation is not of itself sufficient to constitute an implied waiver.[38] In conjunction with

34. 415 U.S. at 672.

35. *Id.*

36. *Id.* at 673-74, citing J. I. Case v. Borak, 377 U.S. 426 (1964). *But see*, Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), in which an individual right of action was found to exist by virtue of the Fourth Amendment.

37. 415 U.S. at 675-7.

38. *Id.* at 673. The majority opinion said:

> The 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.

this line of reasoning, the Court concluded, quoting *Great Northern Insurance Co. v. Read,* that waiver could only be found where there was a ". . . clear declaration of a state's intention to submit . . . to other courts than those of its own creation . . . ."[39]

Edelman thus limits the concept of implied waiver even further than the requirement of an express grant of jurisdiction implied in *Employees. Edelman* requires that the federal legislation which regulates state conduct contain an express authorization to sue a class of defendants including states. Unless these conditions are met, the Court will not find implied waiver of the Eleventh Amendment where a state participates in a federally regulated area.

The majority opinion's analysis of implied waiver is unsatisfactory. First, as pointed out by the dissenting opinion of Justice Marshall, the nature of the program involved in *Edelman* differed greatly from the FLSA or the FELA.[40] Marshall reasoned that since the joint federal-state AABD program was optional, a state's decision to participate would constitute a conscious waiver of immunity.[41] Marshall considered waiver in this case to be a quid pro quo for federal assistance in operating the welfare program. The Seventh Circuit had also reasoned that voluntary participation was conditioned on the acceptance of federal standards. They justified their position in the following words:

> However, the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of financial assistance Congress thought it was giving them convinces us that Congress fully meant to condition the grant of federal funds on the state's being susceptible to a federal court suit to obtain retrospective relief.[42]

The majority opinion, in restricting the application of implied waiver, allows just such a calculated deprivation to occur.

The Court's citation of *Great Northern Insurance* is also questionable.[43] While the quotation from that case accurately represents the prevailing judicial view toward express waiver, it appears out of place in the context of *Edelman.* In *Great Northern Insurance,* the question before the Court was whether a state could be sued in federal court to recover an alleged overcharge of state

39. *Id.*
40. *Id.* at 688 (Marshall, J., dissenting).
41. *Id.* at 688-9.
42. Jordan v. Weaver, 472 F.2d 985, 995 (1973).
43. 415 U.S. at 673, citing Great Northern Ins. Co. v. Read, 322 U.S. 47, 54 (1944).

taxes, under a state statute that provided for suits to recover such amounts.[44] This was a far different factual situation than in *Edelman* where the issue was one of implied waiver.

The Court's rejection in *Edelman* of section 1983 as an authorization to sue was also criticized in Marshall's dissent. Although he recognized that the Social Security Act, of which AABD was a part, contained no provision for a private cause of action, Marshall felt that section 1983 clearly remedied this deficiency.[45] Not only did Jordan's claim satisfy the language of 1983, but Marshall pointed to *Rosado v. Wyman* for the proposition that section 1983 was the proper vehicle to seek enforcement of the Act even though there was no authorization for individual suits.[46] In striking down a New York provision which conflicted with the Social Security Act, the Court in *Rosado* had said:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress had lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume that Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.[47]

The holding in *Edelman* appears to have closed the door "to those most directly affected" at least in regard to a monetary recovery. The opinion partially frustrates the purpose of section 1983, and indicates a judicial attempt to cut down the number of such actions by denying their use as an authorization to sue in the context of implied waiver.[48]

III. SUITS AGAINST STATE OFFICERS

Another exception to the absolute language of the Eleventh Amendment is found in a line of cases which established the right of an individual to sue state officers in order to prevent the enforcement of unconstitutional state laws. This exception developed historically from judicial attempts to define the scope of the Amendment.

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44. Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944).

45. 415 U.S. at 690 (Marshall, J., dissenting).

46. *Id.* at 690-1.

47. Rosado v. Wyman, 397 U.S. 397, 420 (1970).

48. *See generally,* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1 (1974).

In *Osborn v. Bank of the United States*,[49] Chief Justice Marshall announced a rule which, "admits of no exception," that for purposes of the Eleventh Amendment the Court would look to the party of record to determine if it had jurisdiction. Almost immediately this rule began to undergo redefinition as suits were brought against state officers to circumvent the Amendment.[50] In the case of *In re Ayers*,[51] the Court attempted to harmonize previous decisions regarding the Eleventh Amendment. In *Ayers*, the Court dismissed a contempt citation against the Attorney General of Virginia who had violated a federal court injunction. The injunction would have prevented Ayers from instituting court proceedings under a state law which was designed to facilitate the dishonor of state bonds. The opinion distinguished *Osborn* on its facts, and held that the "party of record doctrine" announced in that case would not apply when the officer named as defendant was merely a nominal party.[52] More importantly, the opinion held that state officers could not be sued to prevent the enforcement of unconstitutional state laws.[53]

Although *Ayers* retained its vitality for some time, it too began to undergo a reexamination.[54] In *Ex Parte Young*,[55] the Court was faced with a case similar to *Ayers*. In *Young*, the Attorney General of Minnesota had been enjoined by a federal court from enforcing state rate regulations on common carriers. In violation of the injunction, Young took state court action against a railroad, and the federal court cited him for contempt. Young argued that the federal court was without jurisdiction to enjoin him or find him in contempt.[56] On appeal, the Court disagreed with Young's contentions, and announced what has become a major exception to the scope of the Amendment. After finding the rate scheme to be an unconstitutional deprivation of property,[57] the Court said:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior au-

49. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 251, 277 (1824).

50. *See, e.g.*, Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 481 (1828); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Louisiana v. Jumel, 107 U.S. 711 (1883).

51. In re Ayers, 123 U.S. 443 (1887).

52. *Id.* at 488.

53. *Id.* at 506-7.

54. *See, e.g.*, Regan v. Farmers' Loan and Trust Co., 154 U.S. 362 (1894).

55. Ex Parte Young, 209 U.S. 123 (1908).

56. *Id.* at 149.

57. *Id.* at 148.

> thority 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.[58]

The distinction, of course, between the state, and its officer who is enforcing state law, is purely fictitious. Nevertheless, *Young* allows suits against state officers for equitable relief from unconstitutional state laws.

The fiction announced in *Young* is important in two respects. First, by allowing suits against state officers, the decision brought greater federal judicial scrutiny of state enactments. At the time the decision was announced, it showed a marked disposition by the Court to modify the Eleventh Amendment by the Fourteenth Amendment.[59] The Court, however, has never since squarely faced the issue of what effect the Fourteenth Amendment has on the Eleventh. The closest the Court has come to a resolution of this question is dicta in the case of *Prout v. Starr*,[60] indicating that the Eleventh Amendment should not be a bar to judicial determination of whether state laws deprive citizens of their Fourteenth Amendment rights. The question was presented to the Court in *Edelman* in an amicus brief, but the opinion failed to mention the issue.[61] It appears that until the question is directly presented to the Court, the relationship between the two will ebb and flow with the prevailing judicial attitudes.

The second feature of *Young* that merits examination is the opinion's implication that only prospective equitable relief is proper in a suit of this nature against a state officer.[62] It has long been held that relief that must necessarily come from state coffers is barred unless the state consents.[63] When the majority opinion

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58. *Id.* at 159-60.

59. C. JACOBS, *supra* note 1, at 142.

60. 188 U.S. 537, 543 (1903). The Court said:

> It would indeed be most unfortunate if the immunity of the individual States . . . , provided in the Eleventh Amendment, were to be interpreted as nullifying those other provisions [of the Constitution] which confer power on Congress . . . all of which still exist, and which would be nullified . . . if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State Laws disregarding these Constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactment.

61. 415 U.S. at 694, n. 2 (Marshall, J., dissenting).

62. 209 U.S. at 163, 165.

63. *See, e.g.*, Smith v. Reeves, 178 U.S. 436 (1900); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

declined to find waiver, the key question in *Edelman* became whether the retroactive award was equitable relief within the scope of *Young,* or whether it was barred by the Amendment.

Certiorari was granted in *Edelman*[64] to resolve the conflict between the Seventh Circuit's analysis of retroactive benefit payments, and a contrary result reached by the Second Circuit.[65] In *Jordan,* the Court of Appeals read *Young* broadly, and found the retroactive award to be justified not only on grounds of fairness, but also on the ability of an equity court to fashion an appropriate remedy.[66]

The opposite result was reached in *Rothstein v. Wyman,*[67] a case which arose out of unequal distributions of AABD benefits in New York. In that case, the Second Circuit found that retroactive benefits were not appropriate relief,[68] and in any event, would be barred by the Eleventh Amendment.[69] Although *Rothstein* had been criticized,[70] the Court in *Edelman* adopted its narrower reading of *Young,* excluding equitable restitution as a permissible remedy.[71]

While the majority opinion in *Edelman* recognized that prospective injunctional relief, sanctioned by its reading of *Young,* had an ancillary effect on state funds,[72] it rejected any direct attack on state treasuries, regardless of how they are denominated.[73] For all practical purposes, the Court said, equitable restitution was an award of money damages.[74] The Court assumed that since these payments would not come from *Edelman,* but the state, they were barred by the Amendment.[75] That assumption, however, would not so easily follow if the suit had been brought by an individual rather than as a class action.[76]

In rejecting the retroactive payments, the Court professed to

64. 415 U.S. at 658.
65. Rothstein v. Wyman, 467 F.2d 226 (1972).
66. 472 F.2d at 994-5.
67. 467 F.2d 226 (1972).
68. *Id.* at 235.
69. *Id.* at 236.
70. *See,* McCormack, *supra* note 48, at 46-8.
71. 415 U.S. at 666.
72. *Id.* at 667-8.
73. *Id.*
74. *Id.* at 668.
75. *Id.*
76. Apparently the size of the award of retroactive benefits to the class, coupled with the fact that Edelman was not the original defendant, was the basis of the Court's assumption.

adhere to the rule of *Ford Motor Co. v. Dept. of Treasury,* which held that awards which must necessarily come from the state are barred.[77] The opinion reasoned that *Ford Motor Co.* would have to be overruled if the retroactive payments were upheld.[78] In so stating, the Court overlooked the fact that *Ford Motor Co.* was a case involving state taxes, similar to *Great Northern Insurance Co.,*[79] and that the main issue in *Ford Motor Co.* was express waiver.[80] The Court could have more clearly made the distinction between cases in which the Supreme Court has allowed recovery against officers that effect state coffers, and those in which the Amendment has been interposed as a bar. In the first line of cases, recovery has been allowed where the state, through its officers, has wrongfully withheld the plaintiff's property.[81] In the second line of cases, recovery has been denied where the action seeks specific performance of contract obligations.[82] *Edelman* would appear to fall within the second category, making the reference to *Ford Motor Co.* more confusing than illuminating.

In addition to clearly limiting *Young* to prospective injunctional relief, *Edelman* accomplished two other results. First, it explicitly overruled four cases in which retroactive benefits were ordered.[83] Because three of these were summary affirmances, and the fourth did not discuss the Eleventh Amendment, the majority opinion did not feel restricted by stare decisis.[84] The second ancillary effect of the decision was to limit the usefulness of section 1983. Although the section allows both equitable and legal relief, the decision in *Edelman* limits suits against officers carrying out state policy to prospective injunctional relief for a deprivation of constitutional rights.

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77. 415 U.S. at 665.

78. *Id.* at 668.

79. 322 U.S. 47 (1944).

80. 323 U.S. 459 (1945).

81. *See, e.g.,* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 251 (1824); Poindexter v. Greenhow, 114 U.S. 270 (1885); *c.f.* U.S. v. Lee, 106 U.S. 196 (1882).

82. *See, e.g.,* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 480 (1828); Louisiana v. Jumel, 107 U.S. 711 (1883); *c.f.* Larsen v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949).

83. State Dept. of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972); Sterrett v. Mothers' and Children's Rights Organization, 409 U.S. 809 (1972); Wyman v. Bowens, 397 U.S. 49 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969).

84. 415 U.S. at 671. Only *Shapiro v. Thompson,* 394 U.S. 618 (1969), was considered in detail by the Court. It is interesting to note the Seventh Circuit took just the opposite approach; they initially considered the retroactive benefit issue foreclosed on stare decisis grounds. 472 F.2d at 989.

IV. EXECUTIVE IMMUNITY

As the foregoing analysis indicates, suits against a state officer in his official capacity may be barred by the Eleventh Amendment unless they fit into the *Young* exception for prospective injunctional relief. Since the Amendment is a bar to recovering money damages from officers when the award must necessarily come from the state treasury, the only avenue open for the plaintiff seeking compensatory damages is to sue the policy making official under section 1983. In *Scheuer* the Court recognized a partial barrier to such suits.[85]

After a brief discussion of the history and function of sovereign immunity, the Court announced for section 1983 purposes:

> . . . [A] qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.[86]

The opinion relied upon the Court's earlier decisions in *Tenney v. Bradhove*,[87] and *Pierson v. Ray*,[88] which recognized absolute immunity from section 1983 actions for legislators and judges acting within the scope of their offices. In excluding legislators from the reach of section 1983, the opinion in *Tenney* traced the history of English immunity for members of Parliament. The opinion noted that the English immunity for statements made in Parliament had been carried over to the United States and codified in the speech and debate clause of the Constitution, and incorporated into the constitutions of most of the states.[89] The Court assumed that Congress, itself a legislative body, did not intend to abrogate this long standing immunity in creating section 1983.[90]

In *Pierson*, the Court held that an equally well established immunity for members of the judiciary extended to civil rights legislation as well. The Court said that it could find no evidence that Congress intended to "abolish wholsesale all common law immunities" with the passage of the civil rights legislations.[91]

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85. 416 U.S. at 247-8.

86. 416 U.S. at 247.

87. Tenney v. Bradhove, 341 U.S. 367 (1951).

88. Pierson v. Ray, 386 U.S. 547 (1967).

89. 341 U.S. at 372-75. *See also*, Comment, *Brewster, Gravel and Legislative Immunity*, 73 COLUM. L. REV. 125 (1973).

90. *See*, 341 U.S. at 376.

91. 386 U.S. at 554.

While the English history of judicial and legislative immunity is long and rather clear, the origins and extent of executive immunity do not enjoy such an established tradition.[92] As Chief Justice Warren noted in his dissent in *Barr v. Matteo,* an executive privilege for libelous statements is less than 100 years old.[93] Indeed, while the entire nature of sovereign immunity may be traced to the English notion that "the King can do no wrong," in England at least this did not mean that the King's officers shared the same privilege. There existed in England recognized remedies against the abuses of the King's officers, but these never became part of American common law.[94]

The *Scheuer* opinion also placed great reliance upon the need for state executives to make rapid decisions based on limited information when compelled by circumstances to do so.[95] Drawing an analogy from the "good faith—probable cause" immunity that police have to section 1983, the Court said:

> In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.[96]

Against the need for decisive executive action the Court purported to balance the purpose of section 1983. Quoting *Sterling v. Constantin,* the Court held that the actions of state officers could not take on the quality of "a supreme and unchangeable edict," and that official excesses were the subject of judicial review.[97] The result of this balancing is the Court's statement of a qualified immunity:

> It is the existence of reasonable grounds for belief formed at the time and in light of all the circumstances, coupled with good-

92. *See generally,* McCormack, *Intergovernmental Immunity and the Eleventh Amendment,* 51 N.C. L. REV. 485 (1973); C. JACOBS, *supra* note 1, ch. 6.

93. Barr v. Matteo, 360 U.S. 564, 582 (1959) (Warren, C.J., dissenting).

94. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 18-19 (1963).

95. 416 U.S. at 241-2. The Court said:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices . . . . The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

96. *Id.* at 246.

97. *Id.* at 248-9, quoting from Sterling v. Constantin, 287 U.S. 378, 397-8 (1932).

> faith belief, that affords the basis for qualified immunity of executive officers for acts performed in the course of official conduct.[98]

The Supreme Court's treatment of sovereign immunity, whether involving state or federal officers, has often been inconsistent.[99] Cases dealing with sovereign immunity have generally fallen into four groups.[100] One category includes, "cases in which a plaintiff suffers legal detriment through action of an officer who has exceeded his statutory authority."[101] It is into this group that *Scheuer* would fit. The allegations of the compliant were that the Governor "intentionally, willfully and wantonly" caused an unnecessary deployment of the Guard which resulted in the deaths of the plaintiff's decedents.[102] The fact that he did so pursuant to statutory authority and in his capacity as a state officer made his actions under the "color of state law."[103] It is this situation that section 1983 was designed to rectify: the alleged abuse of state power to deprive the plaintiff of his constitutional rights. As Justice Douglas noted in his dissent in *Pierson*, Congress enacted the section with the words "every person" in spite of the fears of some members that the wording would subject members of the judiciary [and by implication, other state officers] to liability.[104] Even a qualified

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98. *Id.* at 247-8.

99. *See,* Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting). Justice Frankfurter wrote:

> The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process . . . . In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to the prevailing notions of reason and justice.

100. *Id.* at 709-10. Justice Frankfurter classified the cases as follows:

> (1) Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of the complaint, belongs to the government, or calls for an assertion of what is unquestionably official authority.
>
> (2) Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute.
>
> (3) Cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority.
>
> (4) Cases in which an officer seeks shelter behind statutory authority or some other sovereign command for the commission of a common-law tort.

Frankfurter's dissent also contains a lengthy appendix which purports to list all the sovereign immunity cases under these categories from *Osborn* to *Larson. See also,* McCormack, *supra* note 48, at 36-7.

101. 337 U.S. at 710.

102. 416 U.S. at 235.

103. *See,* Monroe v. Pape, 365 U.S. 167 (1961).

104. 386 U.S. at 561-63 (Douglas, J. dissenting).

immunity defeats the historical purpose and the explicit wording of the section.

It has been suggested that *Scheuer* has fashioned an immunity to section 1983 similar to the "discretionary function" exception found in the Federal Tort Claims Act,[105] but since the case was decided at the pleading stage, the nature of the immunity has been left to subsequent cases. An indication of the scope of the immunity, however, can be found in the recent decision of *Wood v. Strickland.*[106] In *Wood,* two high school students were expelled from school after they admitted "spiking the punch" at a school related function. The students brought suit against the principal of the school, and the members of the local school board, under section 1983. The district court directed a verdict for the defendants.[107] The court of appeals reversed, finding that the students had been denied "substantive due process."[108] The Court vacated and remanded the case in an opinion that dealt largely with the board's claim of immunity.[109]

In extending the qualified immunity from section 1983 to school board members, the Court relied primarily on *Scheuer, Pierson, Tennery,* and "strong public policy reasons."[110] First, the Court stressed the need for board members to make the same type of discretionary judgments that it found essential for state officers to make.[111] Notwithstanding the fact that the case in *Wood* arose out of an expulsion, voted upon at a regular board meeting, the opinion likened the board's discipline action to a state executive threatened with immediate civil disorder.[112]

The Court next addressed itself to the policy reasons for extending immunity. The opinion was concerned that it would be unfair for board members to be subject to damage awards for actions made in good faith. The opinion feared that such a result

105. Aiken, *Tort Liability of Governing Boards, Administrators, and Faculty in Higher Education,* 2 THE JOURNAL OF COLLEGE AND UNIVERSITY LAW 129, 138 (1975). The "discretionary function" exception is codified in 28 U.S.C. § 2680(a) (1970). An infamous example of its application is found in *Dalehite v. United States,* 346 U.S. 15 (1953).

106. Wood v. Strickland, ___ U.S. ___, 95 S.Ct. 992 (1975).

107. 348 F.Supp. 244 (W.D. Ark. 1972).

108. 485 F.2d 186 (8th Cir. 1973).

109. ___ U.S. ___, 95 S.Ct. 992 (1975).

110. *Id.* at ___, 95 S.Ct. at 998-9. The Court acknowledged that prior to *Wood* there had been a split of authority over immunity for school board members. *See also,* Comment, *Smith v. Losee: Official Immunity of School Board Members Under Section 1983,* 1973 UTAH L. REV. 820, 822-5.

111. ___ U.S. at ___, 95 S.Ct. at 999.

112. *Id.* at ___, 95 S.Ct. at 999.

would discourage capable citizens from seeking office.[113] It was this combination of *Scheuer* principles and public policy which persuaded the Court to extend the qualified immunity to the board members for their good faith attempts to fulfill their positions.

More important to the issue of immunity was the Court's discussion of what constituted "good faith." The Court said:

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official must himself be acting sincerely and with the belief that he is doing right, but an act violating a student's constitutional rights can no more be justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice.[114]

Although the Court notes that the definitions of good faith are not mutually exclusive, the apparent equation of ignorance of the law with actual malice raises a question for those who seek to claim the immunity.[115] While the majority opinion maintains that board members need not predict the future course of constitutional law, it also suggests that the penalty for failure to keep up with the law will be an award of compensatory damages to the plaintiff.[116] Moreover, officials who are subject to section 1983 are faced with potential liability for harm that is reasonably foreseeable as a result of a constitutional deprivation.[117] Thus even those members of a school board who qualify for the immunity may be held liable under section 1983 for the malicious deprivation of a student's rights, or for their failure to foresee, in light of existing law, that their actions would cause such a deprivation.

Wood thus begins what may well be a long line of cases setting the boundaries of the qualified immunity announced in *Scheuer*. The case indicates that one need not be a full time state official to avail himself of the immunity, rather the focus is on discretionary decision making as a prerequisite to it.

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113. *Id.* at ___, 95 S.Ct. at 999-1000.

114. *Id.* at ___, 95 S.Ct. at 1000.

115. Chief Justice Warren, and Justices Powell, Blackmun, and Rehnquist dissented in part over this issue. It was their belief that the restatement of immunity by the majority opinion actually imposed a heavier standard than was announced in *Scheuer*. ___ U.S. at ___, 95 S.Ct. at 1005.

116. *Id.* at ___, 95 S.Ct. at 1001.

117. Monroe v. Pape, 365 U.S. 167, 187 (1961).

V. CONCLUSION

The language of the Eleventh Amendment has been subjected to two major judicial exceptions: waiver, and the rule of *Ex Parte Young*.[118] In deciding the cases of *Edelman v. Jordan*,[119] and *Scheuer v. Rhodes*,[120] the Supreme Court has combined the Eleventh Amendment with the doctrine of executive immunity to restrict the reach of 42 U.S.C. section 1983.

Edelman indicates that implied waiver of a state's Eleventh Amendment protection will be difficult for plaintiffs to establish. The case also clearly indicates that equitable relief, in a suit against a state officer, must be prospective only, or it will be barred by the Amendment. In limiting the doctrine of implied waiver, the Court has made federal forums unavailable to plaintiffs who have been subjected to deprivations of their constitutional rights by state officers. Such a limitation allows the possibility of intentional violations of federal standards by states in areas subject to federal regulation. Absent implied waiver, individual plaintiffs are foreclosed from anything except prospective injunctional relief when they sue state officers acting in a ministerial capacity.

Scheuer, in turn, interposes a qualified good faith immunity between the plaintiff and the only remaining source of money damages in cases where the deprivation is caused by a state officer — the policy making official. As the official's discretionary responsibilities increase, so does the immunity. Apparently, only such willful deprivations that evidence bad faith are compensable. Thus the plaintiff seeking money damages from state officers is caught between the Eleventh Amendment and qualified immunity.

Wood v. Strickland,[121] indicates that the qualified immunity announced in *Scheuer* is applicable even to those who engage in limited public duties, as long as they have discretionary responsibilities. *Wood* demonstrates the Court's propensity to extend the immunity as long as the person seeking its protection does not stray out of the area of "good faith."

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118. 209 U.S. 123 (1908).
119. 415 U.S. 651 (1974).
120. 416 U.S. 232 (1974).
121. ___ U.S. ___, 95 S.Ct. 992 (1975).