The Eleventh Amendment: A Bar to Awards of Attorneys' Fees in Suits Against State Officials?

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THE ELEVENTH AMENDMENT: A BAR TO AWARDS OF ATTORNEYS' FEES IN SUITS AGAINST STATE OFFICIALS?

INTRODUCTION

In recent years federal courts have utilized expanding equitable doctrines to award attorneys' fees to successful litigants in a variety of cases. However, a conflict develops when equity would permit an award of attorneys' fees, but the losing party is a state official protected by the state's immunity through the eleventh amendment. The eleventh amendment was enacted to provide limited sovereign immunity for the state, or specifically, to protect the state from suits by citizens for payment of debts owed by the state. The purpose of the amendment was to insure that the functions of state government would not be disturbed by claims affecting the state treasury. To assure this result, the amendment provides a jurisdictional limitation on the federal courts to prevent such claims from being brought.

Although this immunity seems absolute, it was limited by the Supreme Court's decision in *Ex parte Young*, which held that state officials acting outside the scope of the Constitution may be sued in federal court. The holding in *Ex parte Young* created a

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1. Three basic theories in equity have been held to justify awards of attorneys' fees. Two of the theories, the common benefit theory and the bad faith theory, continue to allow fee awards. The third, the private attorney general theory, has recently been restricted in use by the Supreme Court through *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, U.S. —, 95 S. Ct. 1612 (1975). For cases awarding attorneys' fees under each of these theories see notes 20, 31, 39 and 40 infra.

2. The eleventh amendment provides that:
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. This amendment limits the suits that may be brought against a state in federal court limiting the possible claims on the state treasury.

3. The eleventh amendment was passed in reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that a state was liable for payment of a debt.

new avenue for litigating claims against the state. One possible claim could be for an award of attorneys' fees against defendant state officials which would be payable from the state treasury. This note will analyze the conflicting interests involved in awarding attorneys' fees against defendant state officials in light of the immunity imparted by the eleventh amendment to demonstrate that this amendment does not bar such awards against state officials.

AWARDING ATTORNEYS' FEES

Historically, the English rule of awarding attorneys' fees has differed from the American rule. In England, a successful litigant's right to costs and counsel fees was created in 1278 by the Statute of Gloucester. Later acts extended such awards to a point where English courts were assuming the power to award reasonable attorneys' fees in an effort to "make the prevailing party whole." This power was not assumed by the courts in America, where the rule developed that attorneys' fees were not "ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."

Many arguments have been advanced in support of the American rule denying awards of attorneys' fees. The main contention is that assessing attorneys' fees against the losing parties penalizes them, with the future effect of discouraged them from bringing suits to vindicate their rights. Accordingly the fact that the

6. 6 Edw. 1, c. 1 stating that "costs of his writ purchased" were to be paid the winning party. This phrase was construed to include all costs of the lawsuit, including counsel fees. See also Goodhart, Costs, 38 YALE L.J. 849, 853 (1929).
7. Judicature Acts of 1873 and 1875. See Judicature Act of 1875, sched. 1, providing that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court."
8. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77 (2) at 1703 (2d ed. 1968). See also Goodhart, Costs, 38 YALE L.J. 849, 854 (1929); and McCormick, Counsel Fees and Other Expenses of Litigation As An Element of Damages, 15 MINN. L. REV. 619, 620 (1931).
10. The possibility of having to pay the lawyer's bills of both parties to the action makes a plaintiff think twice before he sues out a writ and a defendant think twice before he defends an action which ought not to be defended, and that is a direct deterrence on the number of cases put or kept in suit.

From the First Report of the Judicial Council of Massachusetts, 1925, as reported in Goodhart, Costs, 38 YALE L.J. 849, 876 (1929). See also McCor-
litigant brought a losing suit is not wrong, and so he should not
be assessed with the opposition's attorneys' fees merely for having
done so. Another factor lending support to the denial of attorneys'
fees is the possible administrative problem in determining an
amount of attorneys' fees which is reasonable under the circum-
stances. Finally, it had been asserted that attorneys' fees are too
"remote, future, and contingent" to be included in costs awarded
the successful litigant.

Whether or not these arguments are valid, the general rule
continues to dominate American courts—in the absence of con-
tract or statute, attorneys' fees are not awarded to the successful
party. Many courts have, however, carved out a limited exception
to this rule by permitting such awards "when overriding con-
siderations of justice seem to compel such a result." This equi-
table exception developed from Justice Frankfurter's opinion in
Sprague v. Ticonic National Bank, in which he stated that at-
torneys' fees are allowable in appropriate situations as part of
the "historic equity jurisdiction of the federal courts." Justice
Frankfurter referred to the English practice of allowing awards of
attorneys' fees as part of the Chancellor's authority to provide
equity. Through Sprague this equitable option was established in

mick, Counsel Fees and Other Expenses of Litigation As An Element of Dam-
ages, 15 MINN. L. REV. 619, 639 (1931) (a litigant having a reasonable doubt
as to the validity of his claim should not be penalized for bringing it).

11. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714,
718 (1967) (award of attorney's fees denied because the statute under which
the suit was brought, detailed the relief available, and attorney's fees were
not included).

12. The time, expense, and difficulties of proof inherent in litigating
the question of what constitutes reasonable attorney's fees would pose
substantial burdens for judicial administration.
The idea that determining what constitutes reasonable attorneys' fees would
present administrative problems was emphasized early in Oelrichs v. Spain,
82 U.S. (15 Wall.) 211, 231 (1872).

13. [T]he expenses of litigation are never damages sued for in any
case when the action is brought for the wrong itself, not even if the
tort be wanton or malicious. They are not the "natural and proximate
consequences of the wrongful act" which is the universal rule, but
are remote, future and contingent.
St. Peter's Church v. Beach, 26 Conn. 355, 366 (1857) (Ellsworth, J.).
14. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714,
718 (1967).
the federal courts. From this power to award attorneys' fees where equity dictates, three broad, and to some extent overlapping, theories developed supporting such awards.

The Private Attorney General Doctrine

The first and formerly the most encompassing theory, the "private attorney general" doctrine, was established in *Newman v. Piggie Park Enterprises.* Newman involved a class action brought under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination at drive-in restaurants operated by the defendants. A portion of Title II specifically allows the courts, in their discretion, to award reasonable attorneys' fees to the prevailing party in suits brought pursuant to the statute. The Court in Newman interpreted this clause as a manifestation of congressional intent to insure the enforcement of the Civil Rights Act. Realizing the problems of attempting to legislatively end discrimination, Congress provided an incentive for private litigation by allowing awards of attorneys' fees as the only practical method of enforcing the Civil Rights Act. Since the only remedy allowed under the Act was injunctive relief, additional compensation, i.e., awards of attorneys' fees for the party acting as a "private attorney general" in vindicating others' rights, was deemed necessary. Newman's private attorney general doctrine is applicable, however, only because Congress expressly indicated the intent to allow shifting of attorneys' fees to the losing party through 42 U.S.C. § 2000a-3(b) of the Civil Rights Act of 1964. This section specifically provides that individuals seeking to vindicate their constitutional rights under the Act should be allowed to place the cost of their attorneys' fees on the losing party. Numerous cases following Newman interpreted the decision as allowing for the shifting of attorneys' fees onto the losing party whenever the private individual sought to enforce a congressional policy, regardless of whether the statute under which the suit was brought specifically allowed for shifting of attorney fee awards.  

17. 390 U.S. 400 (1968).
18. 42 U.S.C. § 2000a-3(b) (1970) states: [I]n any action commenced pursuant to this subchapter the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
20. The private attorney general doctrine has been used in numerous cases subsequent to Newman to allow the shifting of attorneys' fees onto the losing party. In the area of civil rights these cases include: Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (Title II Civil Rights Act of 1964); Fowler v. Schwarzwelder, 498 F.2d 143 (8th Cir. 1974) (42 U.S.C.
The Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society,*\(^1\) has recently ended this judicial expansion of the private attorney general doctrine.

The *Alyeska* litigation originally began in March of 1970, when the Wilderness Society sought to enjoin the Secretary of the Interior's


Environmental law cases using the private attorney general doctrine include: La Raza Unida v. Volpe, 488 F.2d 559 (9th Cir. 1974) (suit to enjoin construction of California highway until compliance with statutory provisions for relocation assistance and environmental protection); National Resources Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973) (suit to enforce compliance with Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-5 *et seq*).

Prisoner's rights' cases shifting attorneys' fees based on the private attorney general doctrine include: Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (suit under 42 U.S.C. § 1983 against New Hampshire state prison warden for denial of procedural safeguards for prisoners); accord, Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975) (successful challenge to prison regulations limiting inmates' access to attorneys and law students, upholding use of private attorney general doctrine, but denying awards of attorneys' fees based on the eleventh amendment); Incarcerated Men of Allen County v. Fair, 506 F.2d 281 (6th Cir. 1974) (class action by county jail inmates for deprivation of constitutional rights).

Private attorney general cases in the area of teacher's rights include: Stolberg v. Members of the Bd. of Trustees for the State College of Conn., 474 F.2d 485 (2d Cir. 1973) (suit by college professor for reinstatement after termination of employment violating first amendment and due process rights); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974) (reinstatement of two black high school teachers wrongfully dismissed by racially discriminating school board).

Miscellaneous suits also based on the private attorney general doctrine include welfare litigation, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (successfully challenged a Hawaii residency statute that violated recipients' right to welfare); reapportionment suits, Fairley v. Patterson, 495 F.2d 598 (6th Cir. 1974) (challenge to reapportionment plan excluding college students); violations of first amendment rights, Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied,* 410 U.S. 955 (1973) (suit under 42 U.S.C. § 1983 for discharge of chaplain at state mental hospital in violation of chaplain's right to free speech).
terior from issuing right-of-way and special land use permits for the Alaskan pipeline as violations of the Mineral Leasing Act and the National Environmental Policy Act. After lengthy litigation, Congress amended the Mineral Leasing Act to allow permits to be issued to Alyeska. This effectively terminated the litigation on the merits but left the Wilderness Society with 4,455 hours of billable attorneys’ time. The court of appeals held that although there was no specific statutory authorization for an award of attorneys’ fees against the defendants, this was a case where the Wilderness Society had acted to vindicate “important statutory rights of all citizens” thus meriting that half of the fees be paid by Alyeska. This decision was appealed to the Supreme Court where the shifting of fees was denied and a significant constriction of the private attorney general doctrine resulted. The Court not only held that an award of attorneys’ fees was not warranted under the private attorney general doctrine in this case, but that numerous other decisions in recent years allowing such awards have been “erroneously decided.”

In determining that the private attorney general doctrine must be limited solely to statutory authorizations of fee shifting, the Court stressed the development of the American rule denying fee shifting, specifically the applicability of the Act of 1853 limiting awards allowable in federal litigation. The Act of 1853 provided legislation expressly limiting the amounts collectable from the losing party, and the Court held in Alyeska that this statute and its successors have not been “retracted, repealed or

25. Id. at 1032.
26. Id. at 1036.
27. See — U.S. —, 95 S. Ct. 1612, 1678 n.46 (1975), listing those cases held by the Supreme Court to have been erroneously decided, including: Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Cornist v. Richland Danish School Bd., 495 F.2d 189 (5th Cir. 1974); Fairley v. Patterson, 493 F.2d 593 (5th Cir. 1974); Taylor v. Perini, 503 F.2d 143 (8th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973); La Raza Unida v. Volpe, 488 F.2d 559 (9th Cir. 1973); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971).
modified" so as to "extend any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." The holding in Alyeska clearly eliminates the use of judicially created private attorney general fee awards and limits such fee shifting to only those cases where the statute involved specifically warrants that the losing party should bear the expense of the successful litigant's attorneys' fees. Alyeska should not be read, however, as destroying the other two existing equitable doctrines under which attorneys' fees are shifted to the losing party—the "common fund" theory and the "bad faith" doctrine.

Common Fund Theory

The "common fund" or "class benefit" theory for awarding attorneys' fees was originally applied in Trustees v. Greenough, a suit by a bondholder to end the trustee's misapplication of trust funds. The bondholder in Greenough, having borne the cost of the entire litigation, sought to have his litigation expenses, including attorney's fees, paid out of the trust funds on the theory that his efforts benefited the entire group of bondholders. The Court, accepting this argument, noted that equity requires the individual bringing suit be reimbursed for his expenses. Such repayment may come either from the common fund or proportionately from those benefited by the suit. In reaching this decision, the Court analyzed the effect of the Act of 1853 which limits awardable costs in federal litigation. The Court held:

the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

29. — U.S. ——, 95 S. Ct. at 1623.
30. Id.
31. Cases awarding attorneys' fees to successful litigants based on the class benefit theory include: Hall v. Cole, 412 U.S. 1 (1973) (plaintiff furthered interests of union members by vindicating his rights to free speech as a union member); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (plaintiff stockholder's suit benefited entire class of stockholders by enforcing proxy statute); Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974) (plaintiff's successful suit for wrongfully withheld welfare benefits aided all welfare recipients).
32. 105 U.S. 527 (1881).
33. Id. at 533.
34. See note 28 supra and accompanying text.
This determination that the Act of 1853 does not limit the shifting of attorney fee awards in litigation brought under the common fund theory consequently saved this means of awarding attorneys’ fees from the restrictions placed on such awards in Alyeska. Because the Court in Greenough was able to separate the limitations of the Act of 1853 from the equitable granting of fees under the common fund theory, the Court’s subsequent holding in Alyeska followed this determination and left those awards based on this theory free from further limitations.

The common fund theory has been somewhat expanded since Greenough to allow awards of attorneys' fees even when there is no pecuniary benefit to the class. The expansion resulted from Mills v. Electric Auto-Lite Co., in which plaintiff stockholders prevailed on the allegation that a merger resulting from the use of a misleading proxy statement was violative of the Securities Exchange Act. When the Court set the merger aside, an entire class of stockholders was benefited. The Supreme Court held:

To award attorney’s fees in such a suit to a plaintiff who has succeeded in establishing a class action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.

In this case, the defendant-corporation paid the plaintiff's attorney’s fees. The effect of this order, however, was to indirectly assess all stockholders who benefited from the litigation. As a result, the major consideration in granting awards of attorneys' fees under this equitable doctrine is to trace the funds paid to the successful litigant to those who have benefited by the suit. Other factors often considered in determining the applicability of the common fund theory include: (1) the number of people benefited by the plaintiff's efforts; (2) the necessity and financial burden of private enforcement; and (3) the strength of the congressional policy sought to be enforced.

**Bad Faith Theory**

The final equitable theory under which federal courts have awarded attorneys' fees involves a determination of whether the defendant has acted “in bad faith, vexatiously, wantonly, or for
The rationale for awarding fees under this doctrine, is that the defendant, whose conduct has forced the plaintiff to institute suit, should pay the costs incident to the litigation. A recent case exemplifying this theory is Gates v. Collier, a class action suit brought on behalf of the inmates of the Mississippi State Prison to vindicate their constitutional rights under the first, eighth and fourteenth amendments. Based on its finding that,

unnecessary delay, extraordinary efforts, and burdensome expenses incurred incident to the resolution of this case were occasioned because of defendants’ maintenance of their defense in an obdurately obstinate manner, the Gates court awarded attorneys’ fees.

Although Alyeska limited the private attorney general doctrine, it noted expressly that the bad faith and common fund theories for granting attorneys’ fees remain viable. These equitable theories were seen by Alyeska as unquestionable “assertions of inherent power in the courts to allow attorneys’ fees in particular situations, unless forbidden by Congress.” It follows from

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the Court’s analysis and Congress’ failure to curtail the use of the bad faith and common fund doctrines, that they may be used by litigators to obtain attorneys’ fees.

**Statutory Awards of Attorneys’ Fees**

In addition to the use of the common fund and bad faith theories for shifting attorneys’ fees, there exists a substantial amount of legislation specifically warranting attorney fee awards in particular types of suits. Prior to *Alyeska*, courts had implied that such fee awards were warranted under a number of statutes which were silent on the issue. This imposition was deemed necessary to effectuate Congressional intent. For example, attorneys’ fees had been granted under 42 U.S.C. § 1981, § 1982, and § 1983 on the ground that these civil rights statutes shared a common goal with the Civil Rights Act of 1964, which had, in fact, specifically allowed for such fees to successful litigants.


45. See note 46 infra.

Alyeska, however, by holding that fees may be awarded under the private attorney general doctrine only where specifically authorized by statute, has effectively eliminated awarding attorneys' fees by implication. Considering one of the civil rights statutes, the Court stated:

if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in § 1983 actions seeking to vindicate constitutional rights?"

In essence, the Court has held that only Congress can authorize awards of attorneys' fees based on the private attorney general doctrine. Underlying this retrenchment, lies the philosophy that the courts should not be left to their unguided discretion in determining which statutes require shifting of attorneys' fees to effectuate Congressional intent. Obviously § 1983 suits would be important enough to warrant such fee shifting, but it is up to Congress to specify that such awards should be made.

For cases awarding attorneys' fees under 42 U.S.C. § 1981, see Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) (discrimination in use of intelligence test in hiring city golf pro); Jinks v. Mays, 350 F. Supp. 1037 (N.D. Ga. 1972) (civil rights class action holding nontenured teachers were eligible for maternity leave).

Cases awarding fees under 42 U.S.C. § 1982 include: Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (discrimination in leasing of apartments); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (suit against real estate developer for refusal to sell lots to blacks).

It should be noted that most of the statutes specifically warranting attorney fee awards and most of the cases awarding fees under the judicially created common fund and bad faith doctrines, are fairly recent. This trend to award attorneys' fees appears to conflict with the eleventh amendment when the losing party is a state official. Since fee awards against state officials would be paid out of the state treasury, the officials contend that the eleventh amendment is a jurisdictional bar to such awards. To determine whether the eleventh amendment supports this contention, a further analysis of the enactment and judicial interpretation of the eleventh amendment is necessary.

THE ELEVENTH AMENDMENT

History and Interpretation

The eleventh amendment is the embodiment of a limited concept of sovereign immunity. Sovereign immunity was established in England during the thirteenth century reigns of Henry III and

48 See notes 31, 40 and 44 supra.


50. Sovereign immunity is explained by Justice Holmes in Kawananakoa v. Polybank, 205 U.S. 349 (1907) as [the] sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

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Edward I. The basic premise was that the king, being sovereign, could not be sued in his own court without his consent. This concept was brought to America, and before the enactment of the United States Constitution the individual states could not be sued without their consent. The Constitution established the jurisdiction of the federal courts in Art. III, § 2 which states *inter alia* that "the judicial power shall extend to all cases, in Law and Equity ... between a State and Citizen of another State. ..." This grant of jurisdiction left open the possibility of suing the individual states. Although some statesmen realized that the Constitution left this question open, very few believed a suit against a state was a possibility due to their common acceptance of the doctrine of sovereign immunity.


52. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. *The Federalist No. 81*, at 548-49 (J. Cooke ed. 1961) (A. Hamilton). There also existed a practical reason why the states prior to the adoption of the United States Constitution could not be sued without their consent—only the state courts existed.

53. Patrick Henry debating James Madison at the constitutional debates claimed:

[1]f gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity .... What! is justice done to one party and not to the other?

3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 555-56 (J. Elliot ed. 1896).

54. John Marshall at the constitutional debates stated, I hope that no gentlemen will think that a state will be called at the bar of the federal court. ... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable states to recover claims of individuals residing in other states.

3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 555-56 (J. Elliot ed. 1896).

James Madison stated, "[i]t is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring suit against a citizen it must be brought before the federal court."
In 1793 that possibility became reality when the Supreme Court in *Chisholm v. Georgia* heard its first suit against a state for payment of a debt. In a four-to-one decision, the Supreme Court retained jurisdiction and held the state liable for payment of the debt. The majority opinions did not accept the principle of sovereign immunity, but rather centered on the lack of any reason why a person could be called into court, but a state could not. The public outcry after the *Chisholm* decision was so intense that it took the United States House of Representatives and the United States Senate less than a year to prepare the eleventh amendment for ratification by the necessary twelve states, and the concept of partial sovereign immunity was enacted.

A literal reading of the eleventh amendment discloses that it prohibits only those suits brought against a state by citizens of another state, or citizens of a foreign state. The amendment does not foreclose suits against a state by its citizens. However, the Supreme Court in *Hans v. Louisiana*, judicially extended the scope of the eleventh amendment to preclude suits by citizens of a state against that state, since the purpose of the eleventh amendment's enactment was to protect the state treasuries from any action that would deplete their funds.

Even after this judicial expansion, the eleventh amendment does not enact the total concept of sovereign immunity, but only limits certain types of suits from being brought against a state in federal court. The doctrine of sovereign immunity would limit all suits against the state to prevent interference with government, while the eleventh amendment is more a means of prohibiting the federal government, through its courts, from interfering with the

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55. 2 U.S. (2 Dall.) 419 (1793).
56. See Justice Wilson's opinion, 2 U.S. (2 Dall.) 419 at 456, finding no difference if an individual, the original sovereign, may be sued for breach of contract on the payment of a debt, or if an aggregate of individuals making up a state could be sued for breach of the contract.
57. The eleventh amendment passed the Senate on January 14, 1794 by a vote of 23 to 2. 3 Annals of Congress 651-52 (1793). While less than two months later, on March 4, 1794, the House also passed the amendment 81 to 9. 4 Annals of Congress 29-30 (1794).
59. 134 U.S. 1 (1889) (suit by citizen of state of Louisiana against that state to collect payment on state bonds). The Supreme Court stated that the eleventh amendment literally would not preclude this type of suit, but to allow it would produce the same reaction as *Chisholm v. Georgia*. 
state governments. Some confusion has resulted in certain court opinions as to whether the eleventh amendment codifies sovereign immunity, or whether it operates as a jurisdictional limitation on the federal courts. The latter interpretation would appear to be the more proper and accurate since it would conform with judicial action which allows the eleventh amendment defense to be raised at any phase of the suit to declare a judgment void for lack of jurisdiction. In this sense it fulfills the purpose of its enactment by protecting state treasuries from claims against them, as in Chisholm. However, the application of the eleventh amendment as a means of protecting the state treasury was significantly limited by the 1908 Supreme Court decision in *Ex parte Young*.

**Limitation of the Eleventh Amendment by *Ex parte Young***

Holding that public officials may be sued for unconstitutional acts, the Court in *Ex parte Young*, greatly restricted the parameters of the eleventh amendment as a jurisdictional defense.

60. By limiting the jurisdiction of the federal courts to hear these suits, the eleventh amendment furthers the principle of separation of powers. Note, *A Practical View Of The Eleventh Amendment — Lower Court Interpretations and The Supreme Court's Reaction*, 61 Geo. L.J. 1473, 1480 (1972).


62. See Edelman v. Jordan, 415 U.S. 651 (1974) (Court held the eleventh amendment to be a jurisdictional bar that need not be raised in trial court); Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974) (eleventh amendment raises the defense of sovereign immunity).

63. The eleventh amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-67 (1945). See also *Fed. R. Civ. P. 60(b)* (which in effect allows defendant's motion to vacate orders awarding attorneys' fees as void for lack of jurisdiction).

64. Prior to the enactment of the eleventh amendment, other suits seeking restoration of property taken by the states were pending; but these were dismissed holding with the purpose of the eleventh amendment to protect the states pecuniary interests. See Comment, *Applicability and Waiver of States Eleventh Amendment Immunity*, 88 Harv. L. Rev. 243, 246 (1974), discussing Vassall v. Massachusetts (unreported case docketed in Supreme Court, Aug. Term. 1793) (suit seeking restoration of confiscated Loyalist property); Hollingsworth v. Virginia (Indiana Co. v. Virginia), 3 U.S. (3 Dall.) 378 (1798) (suit to restore lands legislatively placed in public domain).

The Minnesota legislature had enacted railroad freight and passenger rate schedules, enforceable by the state's attorney general. The act contained several penalties for violations of its provisions.\footnote{67} The railroads immediately sought injunctive relief from the statute's enforcement, arguing that the rates violated their fourteenth amendment protections. A temporary restraining order was issued to forestall enforcement of the act by the state's attorney general Young. Young moved for dismissal claiming the eleventh amendment was a jurisdictional bar when suit was initiated against a state.\footnote{68} Young's motion was denied and when he attempted to enforce the act, he was held in contempt. Young then filed a writ of habeas corpus to the Supreme Court. The Supreme Court in discharging the writ and upholding the contempt order, created the legal fiction that allowed the action of Young as a state official to constitute state action for purposes of the fourteenth amendment, but not for purposes of the eleventh amendment. The eleventh amendment was held not to be a bar to this suit because a state official acting outside the Constitution is "stripped of his official or representative character"\footnote{69} and is subject to suit in an individual capacity. Through \textit{Ex parte Young}, the Supreme Court carved out a broad exception to the eleventh amendment's coverage by allowing suits to be brought against state officials for alleged constitutional violations and violations of federal statutes. The eleventh amendment's original purpose to protect the states and their treasuries was now opened up for attack in the federal judiciary.

\begin{footnotesize}
\begin{enumerate}
\item[67.] Penalty for violation of passenger rate schedules act was a fine up to $5,000 or imprisonment up to five years, or both. Penalty for violation of the commodity rate schedule was imprisonment up to ninety days. \textit{Id.} at 127-29.
\item[68.] The naming of Young as the party defendant merely makes him the party representing the state, and amounts to making the state a party. This allows Young to raise the eleventh amendment defense. Although Young lost his immunity under the eleventh amendment because he was acting outside the constitution, state officials may always raise the eleventh amendment defense because the state is the real party in interest. \textit{See} \textit{Ford Motor Co. v. Department of Treasury}, 323 U.S. 459, 464 (1945), at note 83 \textit{infra} and accompanying text.
\item[69.] If the act which the state attorney general seeks to enforce be violative of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.
\end{enumerate}
\end{footnotesize}
Although the relief sought in *Ex parte Young* was injunctive, the result of the Court's holding was to declare the railroad rate statute unconstitutional under the fourteenth amendment and hold the state's attorney general in contempt for trying to enforce it. By nullifying this statute the Supreme Court did affect the state treasury since the source of revenue that would have been derived from the future operation of the statute was removed. Subsequent suits brought under the doctrine of *Ex parte Young* would enlarge the scope of this effect on state funds.\(^7\)

Through *Ex parte Young*, part of the eleventh amendment's jurisdictional bar was removed, since federal courts were now granted jurisdiction to hear suits alleging constitutional or federal statute violations by state officials. In addition to this means of circumventing eleventh amendment immunity, another avenue has developed through which the eleventh amendment's immunity is completely displaced—if there has been a waiver of immunity, either by statute or by consent.

**Waiver of the Eleventh Amendment**

Two means exist through which the protective immunity of the eleventh amendment may be waived. The first, statutory waiver, is when a statute specifically allows certain awards against the state. In such a case, the defense of the eleventh amendment will not preclude the award.\(^7\) The second means of eliminating eleventh amendment immunity is by finding the state has consented to the suit.\(^7\) The factors determining consent differ, depending upon the type of statute under which the action arises. If the action arises solely from state law, the state must have given "clear consent" before the suit may be brought in federal court.\(^7\)

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70. *See Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927) (Court held that in suits against a state for enforcing unconstitutional statutes the successful plaintiffs may recover costs against the state, whether the suit be civil or criminal).

71. *See note 44 supra.*

72. The state may waive its eleventh amendment immunity by consenting to the suit. *See Beers v. Arkansas*, 61 U.S. (20 How.) 564 (1857) (it is a long established principle that the sovereign cannot be sued without its consent); *Ex parte York*, No. 1, 256 U.S. 490 (1921) (eleventh amendment and doctrine of sovereign immunity do not allow suits against a state by its citizens, citizens of another state, or citizens of a foreign state absent consent). *See also* Petty v. Tennessee-Missouri Bridge Comm's., 359 U.S. 275 (1959); Gunther v. Atlantic Coast Line R. R. Co., 200 U.S. 273, 284 (1906); Clark v. Barnard, 108 U.S. 436 (1883).

73. *Ford Motor Co. v. Department of Treasury*, 328 U.S. 459, 464-66 (1945) (eleventh amendment denies federal courts authorization to hear suits brought by individuals against a state without state's clear consent).
However, if the cause of action arises under a federal statute, there may be a constructive waiver of immunity depending on the circumstances. 74

The doctrine of constructive waiver was enunciated in *Parden v. Terminal Railway Co.*, 75 in which the Supreme Court found the state of Alabama had consented to suit in federal court under the Federal Employers' Liability Act (FELA) 76 by operating a railroad in interstate commerce. The Court, in determining if the state had consented to suit by its actions, looked to the statute to ascertain if Congress intended to allow suits against the states. The Court found the FELA applied to "every" common carrier, and that such language was not meant by Congress to preclude suits under the FELA if the defendant happened to be a state operated unit. 77 The rationale of this finding of a constructive waiver was that the states, in adopting the Constitution, surrendered a portion of their immunity so that whenever the states entered a sphere of activity regulated by Congress under its constitutional powers, the states subjected themselves to enforcement of that statute in federal court. In *Parden*, the state of Alabama, by operating a railroad in interstate commerce "necessarily consented to such suits as authorized by the Act," 78 passed by Congress pursuant to the commerce clause. Thus, a constructive waiver of eleventh amendment immunity arises,

[w]here a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government. [T]hen the question whether the State's act constitutes the alleged consent is one of federal law. 79

The decision in *Parden*, which would authorize finding a constructive waiver of the eleventh amendment's immunity whenever the state entered into operations regulated by any statute passed pursuant to congressional power under the Constitution, was recently limited by *Employees v. Missouri Public Health Department.* 80 The Supreme Court in *Employees*, a suit by workers

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75. *Id.*
77. 377 U.S. 184, 187 (1964).
78. *Id.* at 192.
79. *Id.* at 196.
in state hospitals seeking overtime compensation due them under the Fair Labor Standards Act (FLSA), failed to find a constructive waiver by the state through its operation of state health institutions. Although the FLSA was passed by Congress pursuant to its power under the commerce clause, the Court would not extend Parden "to cover every exercise by Congress of its commerce power." The Court noted that legislation under the commerce clause has been quite prolific. Consequently, to hold that every state operation falling within legislation pursuant to the commerce clause was a waiver by that state of its eleventh amendment immunity, would in effect remove most of the sovereignty of the states. Such a removal of sovereign immunity would cause enormous fiscal consequences to the states; for example, in Employees, all the workers in state health institutions would be allowed to sue the state in federal court under the FLSA for overtime compensation. To protect the states' treasuries, Employees limited the scope within which a constructive waiver of the eleventh amendment may be found.

The result of Employees is not to destroy the doctrine of constructive waiver, but to limit it to those suits brought under federal statutes in which Congress implies a waiver of the state's immunity, as in Parden, by regulating a sphere of activity that if the state enters, it will be held to have consented to the suit. Congressional intent, shown either specifically in the language of the statute, or reasonably implied in viewing the legislation as a whole, is the key factor in finding a constructive waiver of the state's eleventh amendment immunity.

The concept of waiver is initially important in all cases attempting to determine if awards of attorneys' fees against a state are permissible. Finding a waiver would effectively eliminate the jurisdictional bar of the eleventh amendment and allow an award of attorneys' fees against state officials. A recent Supreme Court case, Edelman v. Jordan, examined the waiver doctrine in the eleventh amendment context. In addition, Edelman discussed what types of relief are allowable under Ex parte Young where the eleventh amendment is applicable.

EDELMAN V. JORDAN AND ITS EFFECTS ON AWARDS OF ATTORNEYS' FEES

The Edelman Test

*Edelman* is significant in determining whether the eleventh amendment bars the award of attorneys' fees since it discusses the issue of waiver and the types of relief allowable under *Ex parte Young* if the eleventh amendment is not waived. *Edelman* was a class action suit brought under 42 U.S.C. § 1983 which attempted to secure compliance of Illinois state officials with regulations promulgated by the Department of Health, Education, and Welfare (HEW) for timely processing of benefits under the federal-state Aid to the Aged, Blind and Disabled (AABD) program established by the Social Security Act. The plaintiffs alleged a denial of equal protection and violation of the Social Security Act due to the untimely processing of their welfare applications and sought an order compelling payment of the wrongfully withheld benefits. In its decision, the Supreme Court analyzed the type of relief permissible under *Ex parte Young* and the eleventh amendment. It also determined whether the state had waived its immunity by participating in this federally funded program. Each of these discussions were crucial to the 5-4 decision denying payment of retroactive benefits.

In determining whether there had been a waiver, the Court first examined whether Congress intended that the states waive their immunity by participating in the AABD program. By analyzing the wording of the Social Security Act, the *Edelman* Court found no such congressional intent. Based upon this conclusion, the Court distinguished *Parden* and *Employees*, both of which involved federal statutes authorizing suits against a "general class of defendants which literally included states." The Court also held that mere participation by the state in the AABD program was not a waiver of immunity. The Court's

84. *Id.* at 1360-62.
87. The waiver issue is discussed in the Court's opinion after the allowable relief issue, however, for purposes of this analysis they are discussed in reverse order.
89. See note 75 supra and accompanying text.
90. See note 80 supra and accompanying text.
91. The *Edelman* decision found the Social Security Act did not authorize suits against a class of defendants, including the states. *Id.* at 1360.
analysis indicates that the majority in Edelman requires both express congressional authorization allowing the suit to be brought and a clear state waiver of immunity before the eleventh amendment will be held inapplicable.\(^92\)

After holding that the eleventh amendment was applicable, the Court determined whether the relief requested was proper under Ex parte Young. In Ex parte Young, the state's attorney general was enjoined from future enforcement of the rate penalties.\(^93\) This prospective relief differs from the retroactive relief requested in Edelman. In Edelman, the officials would have been required to use state funds to compensate for breaches of a past legal duty to process applications timely. The Court held that the relief requested in Edelman, if awarded, would be comparable to a monetary recovery against the state which is barred by the decision of Ford Motor Co. v. Department of Treasury.\(^94\)

Ford involved a suit brought against the state of Indiana for a refund of taxes wrongfully collected. In holding the eleventh amendment barred the federal courts from entertaining such a suit, the Supreme Court stated:

> [W]hen the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.\(^95\)

In Edelman, the court of appeals distinguished the damages sought in Ford from a request for retroactive welfare benefits,\(^96\) by holding Edelman's relief to be a form of "equitable restitution."\(^97\) The Supreme Court failed to accept the principle that the equitable relief sought in Edelman was not barred by the eleventh amendment for three reasons. First, the Court stated the relief sought in Ford, a refund of taxes, was more analogous to equitable restitution than Edelman's payment of welfare benefits. Since Ford's refund had been denied on eleventh amendment grounds, there should be no difficulty denying the retroactive

\(^92\) See also Comment, Applicability and Waiver of State's Eleventh Amendment Immunity, 88 Harv. L. Rev. 243, 249 (1974).
\(^93\) See note 67 supra and accompanying text.
\(^94\) 323 U.S. 459 (1945).
\(^95\) Id. at 464.
\(^97\) Id.
welfare payments. Second, previous cases had specifically held equitable relief to be barred by the eleventh amendment. Finally, even though the relief sought in Edelman was equitable, the Court stated it was indistinguishable from an award of damages, and is therefore barred by the eleventh amendment. Consequently, the only remedies allowable against a state must fit under the prospective relief permissible by Ex parte Young.

Although the Court determined that any type of award against a state must fit within Ex parte Young, it does not require that the impact on state treasuries be as restrictive as Young since relief having a greater effect on state funds has been allowed. Rather, any effect on state treasuries from compliance with prospective decrees is classified by the Court as a permissible "ancillary effect." The result of Edelman is to eliminate effectively...

98. In Ford, the taxes would have been refunded because they were collected under an unconstitutionally imposed taxing statute, so a refund would be merely restoring the taxpayer to his previous condition; a classic case of equitable restitution. See 415 U.S. at ——, 94 S. Ct. at 1358. In Edelman if the requested relief had been allowed, the welfare beneficiaries would have received payments due to them but unconstitutionally delayed by the untimely processing of their applications. To make such an award would not be restoring these beneficiaries to their original condition, but allowing them to receive a monetary compensation wrongfully withheld.

99. Id. at 1357. The Court's opinion specifically refers to Hagood v. Southern, 117 U.S. 52 (1886) and In re Ayers, 123 U.S. 443 (1887), suits against state officials for specific performance on a contract to which the state was a party, as cases in which the eleventh amendment precluded equitable relief.

100. The Court's determination that payment of retroactive welfare benefits was "indistinguishable" from an award of damages appears to be logically tenuous since the basis of such an award would seem to satisfy "the ascertained needs of impoverished people," Rothstein v. Wyman, 467 F.2d 226, 235 (2d Cir. 1972) (McGowan, J.), not merely to compensate for past injury inflicted by the defendant, which is usually the situation when damages are awarded.

101. Justice Douglas found the practical effect on the state treasuries from retroactive or prospective decrees to be essentially the same. Both types of decrees, Douglas states, will effectively deplete state treasuries. 415 U.S. 651, ——, 94 S. Ct. 1347, 1357 (1974) (Douglas, J., dissenting). However, Justice Rehnquist, for the majority, held a retroactive award to be more disruptive since it would deplete a welfare allowance already established by requiring retroactive payments, invariably making less money available for the welfare program. Id. at 1357.

BAR TO AWARDS OF ATTORNEYS' FEES

from the *Ex parte Young* exception any claim for retroactive welfare benefits.

Prior to *Edelman*, the Supreme Court had summarily affirmed three other cases similar to *Edelman* requiring public aid directors to make retroactive payments.**1** All three cases raised the eleventh amendment objection; two were summarily decided and the other did not treat the issue substantively.**10** The Supreme Court overruled these cases to the extent that the relief granted was inconsistent with *Edelman*. In analyzing the retroactive relief permitted by the lower courts in these cases, the Court concurred with the opinion of Judge McGowan in *Rothstein v. Wyman*.**104* *Rothstein* was another class action suit by welfare recipients under the AABD program to obtain retroactive welfare payments. *Rothstein* noted that although *Young* provided a means of bringing a suit of this nature, the available remedies were limited to those permitted under *Young*—prospective relief.**105** Judge McGowan held that *Young* did not provide a means of awarding relief which could be paid only through liquidation of state funds, unless there was clear congressional intent to allow such payments from the state treasury. Even in light of the federal policy to be furthered by retroactive welfare payments in this case—fulfilling the "fundamental goal of congressional welfare legislation [which is] the satisfaction of the ascertained needs of impoverished persons"**106**—there does not appear to be a sufficiently clear showing of congressional intent to allow such payments from state treasuries. Furthermore, after a passage of time, Judge McGowan stated, these needs of welfare recipients cannot be remedied by payments of retroactive relief. Rather the effect of such awards becomes compensatory and of the type specifically barred by the eleventh amendment.**107** The majority in *Edelman* also

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**105.** See Shapiro v. Thompson, 394 U.S. 618 (1969) (eleventh amendment raised but not treated substantively by the Court).

**106.** 467 F.2d 226 (2d Cir. 1972).

**107.** *Id.* at 238.

**108.** *Id.* at 235.

109. The conclusion of Judge McGowan that the needs of welfare recipients cannot be remedied by payments of retroactive relief because with the passage of time these needs become compensatory and not remedial was concurred in by the Court in *Edelman* despite the fact that it seems to overlook the practical aspects of the welfare recipient's situation. This conclusion ignores the fact that during the period when the welfare recipient should have been receiving aid, but was not due to the state's illegal action, bills
accepted this determination. As a result, courts awarding relief under the eleventh amendment are left with the following precedent: relief is permissible only when the fiscal consequences to the state result from compliance with prospective orders, and although these awards will deplete state treasuries, any effect on the treasuries is merely ancillary. Those cases attempting to award attorneys' fees against state officials subsequent to Edelman have attempted to apply this test to circumvent the bar of the eleventh amendment.

Awarding Attorneys’ Fees Under The Edelman Test

Some courts have interpreted Edelman as barring awards of attorneys’ fees against state officials. These cases have followed the reasoning of Skehan v. Board of Trustees of Bloomsburg State College, a § 1983 action brought by a professor to obtain reinstatement and back pay, punitive damages and attorney's fees. The Third Circuit Court of Appeals held that Skehan had been wrongfully discharged and remanded the case to determine if the defendant-college was a governmental entity entitled to eleventh amendment protection. The court of appeals stated that the award of attorney’s fees would be barred if on remand the college was found to be a governmental unit. Skehan’s analysis of attorneys’ fees found that although Edelman did not rule on the accrued, i.e., rent, utilities, food, which must be paid. It is quite possible that these bills may remain unpaid at the time in which the recipients finally receive welfare payments, and an award of retroactive relief could still provide the remedial effect intended. The remedial effect of retroactive welfare payments would seem to only become compensatory after a significant passage of time.

110. The Court in Edelman stated:
the fiscal consequences to state treasuries . . . were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.


112. 501 F.2d 31 (3d Cir. 1974), vacated and remanded, 95 Ct. 1986 (1975). (Remand based on the Alyeska decision, not on the eleventh amendment issue.)
matter specifically, the case "appeared to bar the award of attorney's fees from the state treasury."  

_Skehan_ referred to language in Justice Marshall's dissent which stated _Edelman_ did not determine relief allowable under the fourteenth amendment since suit was brought under a federal statute.  

_Justice Marshall stated:

[T]he court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment.

In analyzing this statement, _Skehan_ pointed out that three categories exist under which claims can be made against a state. These are claims based on state law, federal law binding on the states by the supremacy clause, and claims brought under the fourteenth amendment binding on the states under section five which enables Congress to create remedies to protect fourteenth amendment rights. Within this framework Justice Marshall was technically correct that _Edelman_ did not dispose of relief allowable under the fourteenth amendment since _Edelman_ was brought under the second category—the Social Security Act. However, _Skehan_ did not accept Justice Marshall's position because _Edelman_ had specifically overruled three cases granting relief under the fourteenth amendment where the relief did not meet the _Edelman_ test. As a result, the _Skehan_ court found _Edelman_ to govern claims allowable under all three categories regardless of the limiting effect this could have on permissible remedies under the fourteenth amendment.

At this point the _Skehan_ court ended its analysis, failing to determine if awards of attorneys' fees met the prospective monetary relief allowable under _Edelman_. Rather, the court merely concluded attorneys' fees and back pay are both types of relief are barred if the defendant is a governmental entity able to

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113. _Id._ at 42.
115. _Id._
116. 501 F.2d 31, 42 n.7 (3d Cir. 1974).
invoke eleventh amendment immunity. The Sixth Circuit has similarly adopted this analysis and interpreted Edelman as barring awards of attorneys' fees solely on the ground that such awards impose a claim that must be paid out of public funds.\footnote{119. See Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert denied, 95 S. Ct. 1996 (1975) (§ 1983 reapportionment action); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated and remanded, 95 S. Ct. 1985 (1975) (§ 1983 action to vindicate inmates' constitutional rights).}

Although Skehan's conclusion is generally accurate\footnote{120. Strong arguments may be asserted showing that fourteenth amendment rights should not be limited by the previous enactment of the eleventh amendment. See Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 1371 (1974) (Marshall, J., dissenting); General Oil Co. v. Grain, 209 U.S. 211, 226-27 (1908) (if the eleventh amendment is held to bar suits against state officials "it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation."); Virginia Coupon Cases, 114 U.S. 269, 331 (1885) (more recent amendments control when two amendments conflict. "It is the last declared will of the law-maker [that] has paramount force and effect."); Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 YALE L.J. 371 (1938) (historical argument asserting the eleventh amendment should not limit the remedies of the fourteenth amendment since the framers of the Constitution believed the rights of the fourteenth amendment already existed by virtue of the privileges and immunities clause and the Bill of Rights); Note, A Practical View of the Eleventh Amendment — Lower Court Interpretations and the Supreme Court's Reaction, 61 GEO. L.J. 1473, 1475 (1972) (the eleventh amendment is not an unconditional recognition of absolute sovereignty of the states, but must be read with the rest of the Constitution so the eleventh amendment is not read to nullify other provisions of the Constitution).} that the allowable relief test enunciated in Edelman governs all types of claims against a state treasury—claims based on state law, federal law and claims brought under the fourteenth amendment—Skehan's holding that the Edelman test bars awards of attorneys' fees is incorrect. The Edelman test will permit awards against the state which are prospective, remedial and ancillary in nature. A number of cases subsequent to Edelman have awarded attorneys' fees against state officials by finding these awards prospective, remedial and ancillary.\footnote{121. Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975); Class v. Norton, 505 F.2d 123 (2d Cir. 1974); Jordon v. Fusari, 496 F.2d 646 (2d Cir. 1974); Downs v. Department of Public Welfare, 65 F.R.D. 557 (E.D. Pa. 1974). See generally note 49 supra.}

In Class v. Norton,\footnote{122. 505 F.2d 123 (2d Cir. 1974).} the Second Circuit ordered Connecticut state welfare officials to comply with federal regulations for timely processing of applications. The court noted that the de-
fendant officials in meeting this order will deplete the state treasury prospectively because they will be processing the applications faster in the future to meet federal regulations. In *Class*, the court, exercising its equitable discretion identified in *Sprague*, allowed the award of attorneys’ fees since the court held it has at most an ancillary effect on the state treasury permissible under *Edelman*. Clearly to classify awards of attorneys’ fees as ancillary is correct, since such fees are often minimal and merely an attached cost of bringing the suit, having less of a financial effect on the state treasury than the court’s order for timely processing will have in depleting funds. The *Class* court further stressed the “forward-looking deterrent nature” of an award of attorneys' fees. Such an award would tend to reinforce compliance with the decree by the threat of further awards of attorneys' fees if additional suits to force compliance with the decree are necessary. Under this analysis, the fee awards themselves have a prospective remedial effect. The *Class* court held that even if the effect of the attorneys’ fee award was more than ancillary, the award could still be made because it meets the prospective requirement of the *Edelman* test.

Under the *Class* decision and other recent decisions, attorneys’ fees to be ancillary, in is accord with a prior Second Circuit decision, Jordon v. Fusari, 496 F.2d 646 (2d Cir. 1974), in which the court stated:

> [I]t appears to us that the allowance awarded here, as part of an order granting injunctive relief, has at most the “ancillary effect on the state treasury” which *Edelman v. Jordan*, supra, 415 U.S. at 669, characterizes as “a permissible and often inevitable consequence of the principle announced in *Ex parte Young*.”

*Id.* at 651. See also Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975) (the most recent Second Circuit decision finding the eleventh amendment does not bar awards of attorneys’ fees).

124. See Souza v. Travisono, 512 F.2d 1137, 1139 (1975) (suit by Rhode Island inmates successfully challenging prison regulations limiting access to attorneys which in awarding attorneys’ fees over the eleventh amendment objection stated, “fees are incidental to the main litigation, which, being for injunctive and declaratory relief, was permissible under the Eleventh Amendment. An award of attorney’s fees is perhaps so ‘ancillary’ as to be constitutional, even though there will be some drain on the state treasury.”).

125. 505 F.2d 123, 127 (2d Cir. 1974).

126. *Id.*


> [W]e believe that an award of counsel fees is both clearly remedial and an integral part of a decree providing for prospective relief from violations of federal statutory and/or constitutional rights. In light of the realities of the economic conditions of those for whom such
ney fee awards are viewed as an incentive to accomplish future compliance with federal statutes or to vindicate constitutional rights. In these decisions, awards of attorneys’ fees are clearly remedial rather than compensatory. This view of attorney fee awards fully meets the requirements of the Edelman test since the remedial effect is a prospective result of the order having at most a permissible ancillary depletion of the state treasury.

Rather than asserting that attorney fee awards are prospective, remedial and ancillary in nature under the Edelman test, other courts have held that such awards are not barred by the eleventh amendment because they are analogous to awards of court costs. In Fairmont Creamery Co. v. Minnesota, a suit to enjoin officials from enforcing a conviction under an unconstitutional state statute, the Supreme Court held that a state could be taxed court costs in criminal as well as civil cases just as any other litigant. Although the state had argued costs could not be awarded against a sovereign, the Supreme Court found that costs are incidental to the hearing and not protected against by the state’s sovereign immunity as long as the federal court has jurisdiction over the main action. The supremacy clause gives the federal courts this right to limit a state’s sovereignty and to award costs against the state as one of the incidents of hearing the case. From the federal courts’ ability to award costs against the states despite eleventh amendment immunity, attorney fee awards can be upheld in suits against state officials as being an award analogous to an award of costs.

Several recent cases have based their awards of attorneys’ fees on this analogy of costs and fee awards. These cases stress the fact that attorney fees are incidental costs incurred in the course of litigation. Costs are “not awarded for accrued liability” but instead are awarded as litigation expenses. Attempts to distinguish awards of costs and awards of attorneys’ fees would seem to disregard the obvious similarity both awards have as litigation

suits are most frequently brought and the expense of litigation, the fiscal impact of such awards upon the state treasury must be considered an inevitable, and so a permissible, consequence of the principle of Ex parte Young, if that principle is to have any practical impact.

Id. at 561.

128. 275 U.S. 70 (1927).
expenses, "generically"\textsuperscript{131} and "analytically."\textsuperscript{132} The result of this argument is to find attorneys' fee awards permissible against state officials since \textit{Fairmont} upheld awards of costs against states in spite of eleventh amendment considerations.

The conclusion that attorneys' fees are similar to awards of court costs was made in \textit{Sims v. Amos},\textsuperscript{133} a reapportionment suit awarding attorneys' fees to the plaintiffs after finding the Alabama legislature's deliberate failure to act had necessitated the litigation. In making its determination, the court added in footnote eight:

Individuals who, as officers of a state, are clothed with some duty with regard to a law of the state which contravenes the Constitution of the United States, may be restrained by injunction, and in such a case the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the \textit{court costs} incident thereto, (emphasis added). \textit{Ex parte Young}, 209 U.S. 123 (1908).\textsuperscript{134}

Since \textit{Sims} was summarily affirmed by the Supreme Court in 1972, numerous cases have followed the \textit{Sims} assertion that attorney fee awards are allowable against state officials even when the eleventh amendment defense is raised.\textsuperscript{135} Even in cases subsequent to \textit{Edelman} (which was decided in 1974) courts continue to use the summary affirmation of \textit{Sims} as a basis for their decision. These courts however, only go so far as to say attorneys' fees are court costs incident to injunctive relief allowable under \textit{Ex parte Young}. Although such an analogy is correct, a more definite decision would be to determine that attorneys' fees are allowable not only because they are costs but also because they are a prospective, remedial and ancillary award permissible under the \textit{Edelman} test.

\textsuperscript{131} Souza v. Travisono, 512 F.2d 1137, 1140 (1st Cir. 1975).
\textsuperscript{132} Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1029 (1st Cir. 1974).
\textsuperscript{134} Id. at 694 n.8 (M.D. Ala. 1972).
\textsuperscript{135} Pre-\textit{Edelman} cases following \textit{Sims}: La Raza Unida v. Volpe, 488 F.2d 559 (9th Cir. 1974); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); Gates v. Collier, 489 F.2d 298 (5th Cir. 1973); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1973).
\textsuperscript{136} Post-\textit{Edelman} cases still following \textit{Sims}: Bond v. Stanton, No. 75-1459 (7th Cir., Jan. 7, 1976); Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975); Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974); Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974); Kirkland v. State Dep't of Correctional Serv., 374 F. Supp. 1361 (S.D.N.Y. 1974).
The main weakness in relying solely on *Sims* to grant awards of attorneys' fees is that although the analogy to costs is a strong factor supporting the appropriateness of such awards, the analogy was only asserted in a footnote, and the case itself was only summarily affirmed by the Supreme Court. Summary affirmances often have little precedential value in guiding the outcome of a hearing on the issue. So although *Sims* presents some precedent for the award of attorneys' fees against state officials, stronger precedents can be found in cases following *Class* because they base their awards on the type of relief allowed by *Edelman*.

**CONCLUSION**

The trend to find exceptions to the American rule and shift attorneys' fees to the losing party has created the issue of whether or not such attorney fee awards are allowable under the restraints the eleventh amendment places on claims against the state treasuries. Obviously, this issue only arises when the defendant is a state official entitled to the jurisdictional immunity of the eleventh amendment and where the eleventh amendment has not been statutorily waived or clear consent to the suit given by the state. But this issue has been increasingly presented due to the increase in litigation against state officials after *Ex parte Young*. When *Ex parte Young* opened the door to suits against state officials in federal court, it also opened the way for claims against state treasuries. The types of claims that are allowable was recently clarified by *Edelman* which held *Ex parte Young* meant to allow those awards that result from orders that are prospective in nature and thus have only an ancillary effect on the state treasury.

Cases attempting to determine if awards of attorneys' fees against state officials fit within the *Edelman* test, such as *Skehan*, have often failed to analyze clearly the type of award attorney fee-shifting presents. Other cases like *Sims*, have only cursorily treated the issue by analogizing attorneys' fees to costs. The proper discussion of attorney fee awards would not only emphasize their similarity to costs but their prospective ancillary nature as well. Although the circuits currently remain divided on this issue, more recent decisions tend to present the correct result, which is to state that attorney fee awards are not barred by the eleventh amendment, since they are merely incidental costs to litigation, prospective in nature and having at most an ancillary effect on the state treasury.

136. 18 J. Moore, Federal Practice ¶ 0.401[2], at 13-14 (Supp. 1973) (summary affirmances frequently prove to be a shaky guide to the later outcome of full consideration of the issue).