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# Dawkins V. Craig: The Eleventh Amendment And Suits For Retroactive Welfare Payments

should indicate, strict reliance on the *Behrend* rationale may result in the continued use of inadequate step transaction analysis by the courts.

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## *DAWKINS v. CRAIG:* THE ELEVENTH AMENDMENT AND SUITS FOR RETROACTIVE WELFARE PAYMENTS

State statutory restrictions on the distribution of funds made available through joint federal-state welfare programs have recently come under wide attack in the courts.[1] Actions challenging the state restrictions have generally been successful in obtaining injunctions against the future enforcement of state regulations deemed unconstitutional or violative of federal law.[2] However, when presented with a prayer for the restoration of benefit payments withheld pursuant to subsequently invalidated state restrictions, the federal courts are in disagreement as to whether these suits are affected by the eleventh amendment's[3] bar to actions against states by private citizens. Some courts, concerned with the alleged injustice prevalent in a situation that would allow a state to retain funds permanently when wrongfully withheld from welfare recipients, have devised techniques to avoid the application of the bar.[4] Other courts have viewed the action

[1]*E.g.*, Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971) (three-judge dist. ct.); Stoddard v. Fisher, 330 F. Supp. 149 (N.D. Tex. 1970); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1969) (three-judge dist. ct.).

[2]State regulations have been held in contravention of the Social Security Act, 42 U.S.C. §§ 301 *et seq.* (1970). Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971) (three-judge dist. ct.); Triplett v. Cobb, 331 F. Supp. 652 (N.D. Miss. 1971); Stoddard v. Fisher, 330 F. Supp. 566 (D. Me. 1971) (three-judge dist. ct.); Grubb v. Sterrett, 315 F. Supp. 990 (N.D. Ind.) (three-judge dist. ct.), *aff'd*, 400 U.S. 922 (1970); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (three-judge dist. ct.); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1969) (three-judge dist. ct.). State regulations have been held violative of the equal protection clause. Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969) (three-judge dist. ct.); Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968) (three-judge dist. ct.).

[3]U.S. CONST. amend. XI reads in pertinent part:

> 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 . . . .

[4]Jordan v. Weaver, 472 F.2d 985, 993 (7th Cir. 1973) (suit for restitution of funds unconstitutionally withheld, not for damages); Henry v. Betit, 323 F. Supp. 418, 421

strictly as a suit for damages and have thus denied relief on the basis of the eleventh amendment.[5] This latter approach was adopted by the Fourth Circuit Court of Appeals in the recent case of *Dawkins v. Craig*.[6]

In *Dawkins*, a mother initiated an action in a three-judge district court,[7] on behalf of her fourteen year old daughter, against the North Carolina Commissioner of Social Services, alleging that § 2210 of the North Carolina Financial Services Manual[8] contravened the Constitution and the Social Security Act.[9] The challenged regulation required that children eligible for welfare under the Aid to Families with Dependant Children Act[10] (AFDC) be denied benefits if their mother refused to institute a criminal support action against an absent father or husband. The plaintiffs sought not only declaratory and injunctive relief from enforcement of the regulation, but also payment of all sums wrongfully withheld. Prior to the scheduled hearing, the regulation was revised, thereby obviating the need for a decision on the constitutional issue and the necessity for prospective relief.

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(D. Alas. 1971) (three-judge dist. ct.) (viewed grant of past due benefits as a redistribution of funds previously allocated). Some courts have simply ignored the eleventh amendment. *See, e.g.*, Grubb v. Sterrett, 315 F. Supp. 990 (N.D. Ind.) (three-judge dist. ct.), *aff'd*, 400 U.S. 922 (1970); Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1969) (three-judge dist. ct.).

[5]Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); Like v. Carter, 353 F. Supp. 405 (E.D. Mo. 1973).

[6]483 F.2d 1191 (4th Cir. 1973).

[7]Three-judge district courts hear allegations of unconstitutionality when four prerequisites are met: a state statute or regulation must be challenged, injunctive relief must be sought, a state official or state board or commission must be a defendant, and the state action must be claimed to be unconstitutional. 28 U.S.C. §§ 2281, 2282 (1970). Such courts are composed of the district court judge in whose court the application was originally filed, and two other judges designated by the chief judge of the circuit, at least one of whom is a circuit judge. 28 U.S.C. § 2284(1) (1970).

Three-judge district courts were devised in reaction to the states' criticism of the decision in *Ex Parte* Young, 209 U.S. 123 (1908), which empowered a single federal judge to declare state action unconstitutional. *See generally*, Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744, 756 (1967); Note, *Three-Judge Court Practice Under Section 2281*, 53 GEO. L.J. 431, 435-44 (1965).

[8]The North Carolina Financial Services Manual § 2210 reads in relevant part:

> [I]f it is established that a parent (or parents) has deserted or abandoned his children, the applicant or recipient payee should agree to institute a non-support action against the deserting parent (or parents) where the applicant or recipient can identify the parent . . . .

483 F.2d at 1192. The provision has since been revised to meet the plaintiff's objections. *Id.* See text accompanying notes 10, 11 *infra*.

[9]483 F.2d at 1193.

[10]42 U.S.C. §§ 601 *et seq.* (1970).

Due to this revision, the case was removed from the three-judge district court to a single judge district court[11] for consideration of the prayer for retroactive relief. The district court ordered the defendants to pay the plaintiffs the benefits they would have received had the unlawful regulation not been in force.[12]

The sole issue on appeal was whether the district court's order contravened the eleventh amendment. The Fourth Circuit conclusively found that the eleventh amendment forbids the exercise of federal jurisdiction in suits for retroactive welfare benefits where a state has not waived its immunity. In reaching this decision the court rejected two contentions advanced by the appellees. First, they asserted that the eleventh amendment did not apply to suits of this nature. Second, the appellees maintained that, even if the amendment was applicable, North Carolina had nevertheless constructively waived its eleventh amendment immunity by participating in the AFDC program.

### *The Eleventh Amendment*

The eleventh amendment explicitly forbids the exercise of federal jurisdiction in suits brought against a state by citizens of other states.[13] In addition, states are immune from suits commenced against them by their own citizens.[14] This additional immunity, the source of which is unclear, has been attributed both to a judicial expansion of the eleventh amendment[15] and to the common law doctrine of sovereign immunity.[16]

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[11]Because the statute was no longer alleged to be unconstitutional, one of the requirements for three-judge district court jurisdiction no longer existed. See note 7 *supra*.

[12]The decision of the District Court for the Western District of North Carolina, delivered on October 4, 1972, is unreported. The court also held that the case was properly maintainable as a class action and defined the class.

[13]See note 3 *supra*.

[14]See notes 15 and 16 *infra*.

[15]In Hans v. Louisiana, 134 U.S. 1, 15 (1890), the Court stated: "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?"

It is not clear whether the Court based its reasoning on the eleventh amendment or upon common law sovereign immunity. However, many courts have accepted the eleventh amendment rationale. *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140 (1965); Ford Motor Co. v. Department of Treas., 323 U.S. 459, 464 (1945); Scott v. Board of Supervisors, 336 F.2d 557, 558 (5th Cir. 1964); Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (9th Cir. 1959); Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496, 502 (S.D.N.Y. 1955). But see note 16 *infra*.

[16]In McCartney v. West Virginia, 156 F.2d 739, 740 (4th Cir. 1946), the court held

History indicates that this extension of immunity from suit is founded in the common law rather than the Constitution. Prior to the adoption of the eleventh amendment there was an assumption that the Constitution would not alter the common law concept that a state could not be sued without its consent,[17] even though article III extended the judicial power of the United States to controversies between "a State and Citizens of another State."[18] The Supreme Court set aside this assumption in *Chisolm v. Georgia*,[19] when it permitted an action to be brought against the State of Georgia by a citizen of South Carolina.[20] Subsequently, the eleventh amendment was adopted to nullify the holding of that case.[21] However, since immun-

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that states' immunity from suit by their own citizens "does not arise from the restriction of the 11th Amendment. . . . Rather it comes from what Hamilton described in the *Federalist* as the 'inherent . . . nature of sovereignty not to be amenable to the suit of an individual *without its consent*.'" (emphasis in original).

[17]*See* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (Rev. ed. 1947):

> The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such federal power that the Constitution was finally adopted.

[18]U.S. CONST. art. III, § 2 cl. 1 reads:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state . . . .

[19]2 U.S. (2 Dall.) 16 (1793).

[20]In *Chisolm*, Justice Cushing felt that the Constitution was clear in the scope of the jurisdiction granted to the federal courts. Cushing stated: "When a citizen makes a demand against a State of which he is not a citizen, it is really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen." 2 U.S. (2 Dall.) at 56. Chief Justice Jay in his opinion went further than Justice Cushing. The Chief Justice not only found that amenability to suit was compatible with sovereignty but also asserted that the sovereignty of the nation was vested in the people and that the sovereignty of the states only applied to citizens of the particular state. 2 U.S. (Dall.) at 60.

[21]For a detailed account of the relationship between *Chilsolm* and the eleventh amendment, *see* Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUSTON L. REV. 1, 10-14 (1967); Guthrie, *The Eleventh Article of Amendment to the Constitution of the Unites States*, 8 COLUM. L. REV. 183, 184-86 (1908).

ity for a state when sued by its own citizens was not at issue in *Chisolm*, the amendment arguably does not speak to that situation. Thus, the extension of immunity to suits of this type was apparently nothing more than a judicial reaffirmation of the common law concept of sovereign immunity.

A means of circumventing the jurisdictional bar, imposed either by the eleventh amendment or by concepts of sovereign immunity,[22] was introduced in 1824 when the Supreme Court declared that the amendment prohibited only those suits "in which the state is a party on the record."[23] This decision fostered the practice of naming a state official as the defendant of record, thereby effectively enabling citizens to sue the state. The Supreme Court properly identified this practice as a suit against the state and banned it in *In re Ayers*.[24]

However, an exception to the *Ayers* prohibition survives. Where an action by a state is alleged to contravene the Federal Constitution, the Supreme Court has permitted a suit to be brought in a federal court against a named state official.[25] In *Ex Parte Young*,[26] the Court held:

> [T]he officer in proceeding under such [unconstitutional] enactment comes into conflict with the superior authority of [the] Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has

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[22]For a discussion of the relationship between sovereign immunity and the eleventh amendment, *see* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 215-30 (1968).

[23]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 251 (1824).

[24]123 U.S. 443 (1887). *Ayers* involved an attempt by taxpayers to compel the Commonwealth of Virginia to accept bond coupons as payment for taxes owed. The Attorney General of Virginia was named as the party-defendant. In its determination that the suit was not within the scope of federal jurisdiction, the Supreme Court stated:

> It must be regarded as a settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record." Poindexter v. Greenhow, 114 U.S. 270, 287 [1884]. This, it is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn v. Bank of the United States*, [22 U.S. (9 Wheat.) 251 (1824)].

*Id.* at 487.

[25]Although *Young* only spoke to contraventions of the Constitution, its doctrine has also been applied where state action violates federal law. *E.g.*, Parden v. Terminal Ry., 377 U.S. 184 (1964).

[26]209 U.S. 123 (1908).

> no power to impart to him any immunity from responsibility to the supreme authority of the United States.[27]

Thus, suits to compel state officials to act in accordance with federal law are not considered suits against the state. This "fiction"[28] has been used to gain federal jurisdiction over challenges to a variety of state actions, including collection of taxes from a tax-exempt organization,[29] segregation of schools,[30] failure of a state to act on welfare applications,[31] and patent infringement.[32] However, there has been considerable reluctance on the part of the courts to extend the *Young* fiction to suits that could result in direct expenditures from a state's treasury pursuant to a federal court order.[33]

The jurisdictional bar to suits against a state can be avoided if the state has constructively waived its immunity. This concept was introduced in *Parden v. Terminal Railway*,[34] where the Supreme Court held that Alabama, by operating a railroad in interstate commerce, had constructively consented to suit under the Federal Employers' Liability Act.[35] The Court found that "when a State leaves the sphere that is exclusively its own and enters into activity subject to federal regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."[36] However, the scope of constructive waiver was limited by the recent decision in *Employees v. Department of Public Health & Welfare*.[37] In *Employees*, the Supreme Court considered an action commenced by resident employees of Missouri pursuant to the Fair Labor Standards Act.[38] It found that Missouri had not waived its immunity from suit by simply maintaining an administrative labor force. The Court distinguished *Parden* on the

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[27]*Id.* at 159-60.

[28]Commentators have used this term to describe the doctrine of *Ex Parte Young*. *See* Note, *A Practical View of the Eleventh Amendment—Lower Court Interpretations and the Supreme Court's Reaction*, 61 GEO. L.J. 1473, 1492 (1973).

[29]Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

[30]Orleans Parish School Dist. v. Bush, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

[31]Shapiro v. Thompson, 270 F. Supp. 331 (D. Conn. 1967) (three-judge dist. ct.), *aff'd on other grounds*, 394 U.S. 618 (1969).

[32]Hercules, Inc. v. Minnesota State Highway Dep't., 337 F. Supp. 795 (D. Minn. 1972).

[33]Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); Like v. Carter, 353 F. Supp. 405 (E.D. Mo. 1973).

[34]377 U.S. 184 (1964).

[35]*Id.* at 192. *See* Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1970).

[36]377 U.S. at 196.

[37]411 U.S. 279 (1973).

[38]29 U.S.C. §§ 201 *et seq.* (1970).

grounds that Alabama had a proprietary interest in its venture into a federally regulated area, as opposed to Missouri's strictly governmental interest in *Employees*. The Court characterized the state activity in *Parden* as "dramatic" and "isolated," while stating that the problems in *Employees* "may well implicate [all employees] . . . in every office building in a State's governmental hierarchy."[39] However, since the Supreme Court chose to distinguish rather than to overrule *Parden*, the present scope of implied waiver remains uncertain.

*Application of the Eleventh Amendment*

In *Dawkins*, the Fourth Circuit noted the uncertainty of the extent of implied waiver[40] but held that North Carolina's participation in the AFDC program was not a sufficient entry into an area of federal regulation to apply the concept of constructive waiver found in *Parden*.[41] Instead, the court relied upon *Employees* as support for its contention that there had been no waiver.[42] The court in *Dawkins* also refused to extend the *Young* fiction to suits for retroactive welfare payments and therefore declined jurisdiction.[43] In establishing its position on the issues of the application of the eleventh amendment and waiver of immunity, the Fourth Circuit aligned itself with the Second Circuit.[44]

The *Dawkins* court recognized the basic principle of the *Young* fiction by conceding that the district court may have had jurisdiction to enjoin the enforcement of the regulation as initially challenged had it not been satisfactorily amended.[45] Thus, when faced with the claim for retroactive payments, the Fourth Circuit unequivocally asserted that its jurisdiction over the action was barred by the eleventh amendment, because the relief sought "look[ed] directly to the payment of public funds out of the State treasury."[46] The opinion provided no elaboration on this issue but cited the Second Circuit case, *Rothstein v. Wyman*,[47] as support for its conclusion.

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[39]411 U.S. at 285.

[40]483 F.2d at 1195.

[41]*Id.*

[42]*Id.*

[43]*Id.* at 1195-96.

[44]See notes 46-49 and accompanying text *infra*.

[45]483 F.2d at 1194.

[46]*Id.*

[47]*Id.* Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), involved a constitutional challenge to a New York statute that provided for a higher level of payments to recipients in the New York City area than to those in the

As in *Dawkins*, the *Rothstein* court considered the effect of the eleventh amendment upon a suit to compel a state to make retroactive welfare payments. Concluding that such a suit is barred from a federal forum, the court stated:

> It is equally a part of the lore of the Eleventh Amendment that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh Amendment; and a court will, absent the state's consent, be deemed without jurisdiction to enter such a judgment.[48]

The Second Circuit cited *Ford Motor Co. v. Department of Treasury*[49] as authority. In *Ford*, the Supreme Court identified the state as "the real, substantial party in interest"[50] when plaintiffs seek a monetary judgment against the state but name individual officials as defendants. Because Indiana was the actual defendant, the Court sustained the invocation of sovereign immunity.[51]

*Ford* involved an action to recover state taxes which had been collected under an allegedly unconstitutional statute. Superficially, this case appears distinguishable from the welfare cases because the action was initiated pursuant to a state statute creating a cause of action for tax refunds in state courts.[52] However, this distinction was

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surrounding seven counties under the joint federal-state program of Aid to the Aged, Blind and Disabled, 42 U.S.C. §§ 301 *et seq.* (1970). The Second Circuit enjoined the enforcement of the state statute but refused to entertain the suit for retroactive payments on the grounds that the principles of equity, comity, and federalism preclude federal courts from ordering states to make retroactive payments. The court bolstered its decision by the use of the eleventh amendment, but it could have relied solely on equitable principles.

[48]467 F.2d at 236.

[49]323 U.S. 459 (1945). This case is often cited in connection with Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946), and Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[50]323 U.S. at 464.

[51]*Id.*

[52]The Seventh Circuit did attempt to make this distinction. Speaking of *Ford*, the *Jordan* court stated:

> [T]hose cases involved non-resident suits under state-created causes of action for a refund of state taxes allegedly assessed in violation of the Constitution. They reflect the special considerations that dictate noninterference by the federal judiciary in the enforcement of state tax laws where there is an express remedial procedure provided in state courts.

472 F.2d at 992. But the court in *Jordan* failed to mention *Redwine*, note 29 *supra*.

arguably rendered invalid when the Supreme Court indicated in *Georgia Railroad & Banking Co. v. Redwine*[53] that the restriction found in *Ford* also applied to parties that invoked the *Young* fiction to gain federal jurisdiction for their claims. In *Redwine*, the Court held that a suit to enjoin the State Revenue Commissioner from levying a tax in violation of the Constitution was within the scope of the *Young* fiction and thus was not a suit against the state.[54] In dictum, Chief Justice Vinson emphasized that because the suit did not request affirmative relief in the form of a monetary judgment from the state, it was not restricted by the *Ford* decision.[55] Accordingly, the Fourth Circuit in *Dawkins* was able to cite substantial authority in support of its assertion that suits against a state for monetary relief are not within the parameters of *Young* and are barred by the eleventh amendment.

Despite this authority supporting the Fourth Circuit's position on the application of the eleventh amendment, the Seventh Circuit has held that the amendment does not bar suits for retroactive welfare payments. In *Jordan v. Weaver*,[56] the Seventh Circuit asserted that "[w]hether a liability is declared which must be met from the state's public funds is not the touchstone of the Eleventh Amendment's applicability."[57] The court explained that injunctive relief from the enforcement of unconstitutional regulations, the type of relief considered within the bounds of a legitimate suit, would necessarily require the state to disburse more money than it had been spending under a lawful statute. This additional expenditure would be attributable to the increase in the number of eligible recipients, an increase resulting from the nullification of the restrictive regulation. The Seventh Circuit did not feel a distinction should be drawn between the latter type of expenditure and retroactive relief since both resulted from judicial mandate.[58]

The court in *Jordan* also indicated that a number of three-judge district courts[59] had resolved the issue of the applicability of the

Had it done so it may have reached an opposite conclusion. See text accompanying note 53-55, *infra*.

[53]342 U.S. 299 (1952).

[54]*Id.* at 304. *See* U.S. CONST. art. I, § 10, cl. 1.

[55]342 U.S. at 304-05 n.15.

[56]472 F.2d 985 (7th Cir. 1973).

[57]*Id.* at 991.

[58]*Id.*

[59]Zarate v. Department of Health & Rehabilitative Svcs, 347 F. Supp. 1004 (S.D. Fla. 1971) (three-judge dist. ct.), *aff'd mem.*, 407 U.S. 918 (1972); Wyman v. Bowens, 397 U.S. 49 (1970), *aff'g per curiam*, Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969) (three-judge dist ct.); Shapiro v. Thompson, 394 U.S. 618 (1969), *aff'g* 270 F.

eleventh amendment to suits for retroactive welfare benefits. Each of these courts reached the same result as the *Jordan* court and each case was affirmed on appeal to the Supreme Court. However, only one, *Shapiro v. Thompson*,[60] was the subject of a full opinion by the Court, and the eleventh amendment was not discussed.

These three-judge district court cases were also presented by the appellees in *Dawkins* to support their contention that the eleventh amendment was inapplicable. The Fourth Circuit challenged the precedental value of these decisions by citing *Francis v. Davidson*,[61] a three-judge district court case that forbade the exercise of federal jurisdiction. The court in *Francis*, dealing with a constitutional challenge to a Maryland regulation that restricted the availability of AFDC funds to families with unemployed fathers, disposed of the issue, stating that "the Eleventh Amendment does not permit this Court to require the State of Maryland . . . to pay AFDC-E claims which would have been presented to and paid by the State of Maryland . . . but for the disqualifying provision . . . ."[62] The Fourth Circuit in *Dawkins* recognized the conflicts among these three-judge district courts but noted that the Supreme Court did not discuss the application of the eleventh amendment in any of them.[63] This conflict illustrates the necessity for resolution of the issue by the Supreme Court, which will apparently have to choose between the palatable rationale in *Jordan* and the reasoning in *Dawkins*, which is more consistent with judicial precedent.[64]

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Supp. 331 (D. Conn. 1967) (three-judge dist. ct.).

[60]394 U.S. 618 (1969).

[61]340 F. Supp. 351 (D. Md.) (three-judge dist. ct.), *aff'd mem.*, 409 U.S. 904 (1972). The district court in *Francis v. Davidson* determined that the suit was one for damages and, hence, was against the state. Without further elaboration the court dismissed the claim as violative of the eleventh amendment. 340 F. Supp. at 370.

The district courts in Shapiro v. Thompson, 270 F. Supp. 331 (D. Conn. 1967) (three-judge dist. ct.) *aff'd on other grounds*, 394 U.S. 618 (1969), and Zarate v. Department of Health & Rehabilitative Svcs. 347 F. Supp. 1004 (S.D. Fla. 1971) (three-judge dist. ct.) *aff'd mem.* 407 U.S. 918 (1972), are diametrically opposed to the position taken in *Francis*. *Zarate* did not discuss the eleventh amendment but established jurisdiction by stating that "as a rule where a Three-Judge Court has jurisdiction to grant or refuse an injunction, it has jurisdiction to impose conditions upon the granting of an injunction." 347 F. Supp. at 1009. The three-judge court in *Thompson* discussed the eleventh amendment in a footnote to the opinion but concluded that *Ex Parte Young* permitted the ordering of retroactive relief. 270 F. Supp. at 338 n.5.

[62]340 F. Supp. at 370.

[63]483 F.2d at 1194.

[64]See note 92 *infra* and accompanying text.

*Waiver*

The question of the extent of the eleventh amendment's jurisdictional bar could have been resolved had the Fourth Circuit held that AFDC funding was conditioned upon a constructive waiver of North Carolina's immunity from suit. However, the court chose to align itself with the *Employees* decision[65] rather than to find an implied waiver of immunity. In support of its position, the *Dawkins* court relied upon a narrow interpretation of the distinction between *Employees* and *Parden*.[66] The court assumed that, after the *Employees* decision, constructive waiver could be applied only where the state had entered a sphere of activity subject to federal regulation and was also involved in interstate commerce for proprietary purposes. The Fourth Circuit declared:

> We believe that the distinction drawn in *Employees* should equally apply here. North Carolina's purpose in operating an AFDC program is purely humanitarian, not proprietary as was the railroad in *Parden*. We note also that while there has been a tremendous increase in involvement by the federal government in the area of public health and welfare, that area is still the primary domain of the State governments. In any event, the connection with interstate commerce, which was a substantial factor in the outcome of *Parden*, is lacking here.[67]

This interpretation is valid only if the sole considerations involved in the determination of the existence of implied waiver are those mentioned by the Fourth Circuit. However, in *Employees* the Supreme Court considered two other factors which were not mentioned by the court in *Dawkins*. First, § 16(b) of the Fair Labor Standards Act[68] (FLSA) provides not only for the recovery of unpaid wages but also for the recovery of an equal amount as liquidated damages and attorneys' fees. While refusing jurisdiction in the FLSA claim, the Supreme Court noted that it is "one thing . . . to make a state employee whole; it is quite another to allow him to recover double

[65]Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973). See notes 37-39 *supra* and accompanying text.

[66]Parden v. Terminal Ry., 377 U.S. 184 (1964). See notes 34-39 *supra* and accompanying text.

[67]483 F.2d at 1195.

[68]29 U.S.C. § 216(b) (1970) provides in relevant part: "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages."

against a State."[69] Although the Fourth Circuit did not consider this factor, the plaintiffs' claim in *Dawkins* could not have resulted in an inflated judgment against the state because they sought only the amount of benefits wrongfully withheld.[70] In fact, one court has even categorized the claim in *Dawkins* as one for restitution instead of damages.[71]

Second, under the FLSA, the employees can sue to obtain actual and punitive damages;[72] but the Supreme Court is on record as opposing the claim for punitive damages if it is directed toward a state.[73] The FLSA also empowers the Secretary of Labor to sue on behalf of the workers to obtain actual damages,[74] and the Supreme Court supports the availability of such a remedy.[75] Thus, while the FLSA provides avenues by which the injured employee can obtain either actual and punitive damages or just actual damages, the Court favors only the provision for actual damages if the suit is against a state in its capacity as an employer. However, even this limited remedy exceeds that available to the plaintiffs in *Dawkins*.

The availability of a forum in which to assert claims for retroactive welfare payments has been of concern to the Department of Health, Education and Welfare. Legislation has been proposed which would require retroactive payments in cases of conflict between state and federal statutes,[76] as was present in *Dawkins* before the regulation was revised.[77] Further, federal regulations already provide for retroactive relief if it is determined at an administrative hearing that a recipient was denied assistance by improper agency action.[78] The proposal coupled with the regulations indicate the desire of the De-

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[69]411 U.S. at 286.

[70]483 F.2d at 1192.

[71]Jordan v. Weaver, 472 F.2d 985, 993 (7th Cir. 1973).

[72]See note 68 *supra*.

[73]411 U.S. at 286.

[74]29 U.S.C. § 216(c) (1970).

[75]411 U.S. at 285-86.

[76]H.R. 16311, 91st Cong., 2d Sess. §§ 169-70 (1970).

[77]See note 8 *supra*.

[78]45 C.F.R. § 205.10(b) provides in pertinent part:

(b) *Federal Financial participation.*
Federal Financial participation is available for the following items:

. . . .

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

partment of Health, Education and Welfare to insure the availability of a forum in which retroactive welfare benefits can be claimed. Pursuant to judicial interpretation of the state constitution, North Carolina courts are closed to suits for retroactive welfare payments.[79] Thus, the appellees in *Dawkins* lacked a forum in which to seek such relief. By barring access to the federal courts, the Fourth Circuit has effectively denied welfare recipients any possibility of gaining a viable remedy when benefits have been wrongfully withheld.

In addition to the considerations of alternative methods of relief and double damages, certain discrepancies between the facts in *Employees* and those in *Dawkins* weaken the Fourth Circuit's reliance on *Employees*. In both cases, state action was governed in part by federal regulations.[80] However, in *Dawkins*, as opposed to *Employees*, the federal government not only regulated but also provided funds to the state for use in the effectuation of the AFDC program. By accepting federal monies, states may subject themselves to regulation by the Congress and the Executive concerning the disbursement of those federal funds. Since the federal judiciary is the primary interpreter of federal regulations and statutes, states receiving such grants may thus constructively subject themselves to the jurisdiction of federal courts to facilitate the uniform interpretation and application of those regulations. Thus, while the Fourth Circuit's refusal to find a constructive waiver of immunity by North Carolina was not unfounded, there are ample rationale for an opposite result.

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[79]N.C. CONST. art. V, § 7(1) (1970) provides:

> (1) *State Treasury*. No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be annually published.

The North Carolina courts have held that this section bars any judicial action to enforce collection of liabilities against the state. Also, courts cannot direct the state treasurer to pay such claims, however just and unquestioned, unless there is a legislative appropriation to pay the same. Garner v. Worth, 122 N.C. 250, 29 S.E. 364 (1898). The holding in *Garner* was effectively incorporated into the 1970 constitution.

[80]The AFDC program is authorized by 42 U.S.C. §§ 601 *et seq.* (1970), which provides that sums will be made available to states which have submitted a suitable plan for aid and services to needy families to the Secretary of Health, Education and Welfare. The actual administration is left to the states, but the states must conform to federal regulations promulgated by HEW pursuant to 42 U.S.C. § 1352 (1970). North Carolina indicated its statutory acceptance of the program at N.C. GEN. STAT. § 108-45 (Repl. vol. 1966).

The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1970) applies to employers engaged in interstate commerce. In 1966, the act was made applicable to states in their capacities as employers with regard to hospitals, institutions, and schools. 29 U.S.C. § 203(d) (1970), *amending* 29 U.S.C. § 203(d) (1962).

*Effect of the Fourth Circuit's Position*

The Fourth Circuit's disposition of the issue of waiver would have been more appealing had it examined some of the ramifications of its decision. The Second Circuit in *Rothstein* contemplated three variables that would be affected by barring suits for retroactive welfare payments from the federal courts. These variables were the possibility of wilful state violations of federal welfare regulations, the probability of increased tension in federal-state relations, and the fulfillment of the ascertained needs of impoverished persons.[81]

The Second Circuit raised and subsequently discarded the contention that by denying retroactive welfare payments, a state could wilfully contravene federal laws and the Constitution without fear of reprisal. The court in *Rothstein* concluded that nothing in the facts of that case indicated any wilful action on the part of the state, and mere conjecture as to the possibility of its occurence was not a sufficient impetus to establish federal jurisdiction over the claim for retroactive payments.[82] However, the Seventh Circuit in *Jordan* indicated that even the possibility of calculated state action designed to violate federal plans was a substantial threat to congressional interests and, consequently, the court ordered the State of Illinois to make reparations to the plaintiff.[83]

Many invalidated state statutes have conditioned welfare payments on some moral standard.[84] Others have made payments contingent upon forbearance of action by the recipients.[85] Conceivably, a state legislature might feel justified in subjecting potential welfare recipients to higher standards than those prescribed by the federal government. In this more restrictive form, such statutes would not imply a malicious intent on the part of the state, but the wilful contravention of a federal regulation or constitutional standard would

[81]467 F.2d at 235.

[82]*Id.* In *Rothstein*, the court stated "[t]here is nothing to suggest that the state consistently follows a course of unlawful conduct which requires that it be dramatically confronted by the minatory face of the federal courts." *Id.*

[83]472 F.2d at 994-95.

[84]Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (three-judge dist. ct.) (state regulations conditioned AFDC benefits to unwed mothers on the disclosure of the father's name); Machado v. Hackney, 299 F. Supp. 644 (W.D. Tex. 1969) (three-judge dist. ct.) (state regulations forbade benefits under AFDC if there was a man other than the father living with the mother).

[85]Stoddard v. Fisher, 330 F. Supp. 566 (D. Me. 1971) (three-judge dist. ct.) (state regulations forbade welfare assistance if the father had enlisted in the army, while there was no such restriction on draftees); Ojeda v. Hackney, 319 F. Supp. 149 (N.D. Tex. 1970) (state regulations forbade benefits under the AFDC if the child had a stepparent).

still be present. The absence of malice, coupled with the present concern of the federal courts over the concept of "co-operative federalism,"[86] renders unlikely any finding by federal courts of a wilful state violation. If this finding is considered a prerequisite to an award of retroactive payments, then the subsequent award of such payments is improbable. In effect, a state could violate federal standards without fear of reprisal. Thus, the Seventh Circuit's concern over what amounts to wilful state violations appears well founded.

The Fourth Circuit should also have considered the effect of its decision in *Dawkins* upon the relationship between the state and federal governments. The Second Circuit in *Rothstein* advanced the contention that Congress' purpose in enacting welfare programs such as the AFDC was to encourage the state to make generous use of their own funds to aid their impoverished citizens through the incentive of matching grants.[87] However, the degree of control the federal government, as grantor, sought to retain over the use of the funds is unclear. The *Rothstein* court did not accept the contention that the "federal interest in retroactively correcting the misuse of federal funds . . . can by itself justify the significant increase in federal-state tension which would result from a court order requiring the state to expend its funds against its will."[88] This position is supported by the fact that the Supreme Court has recently described the AFDC program as "based upon a scheme of co-operative federalism."[89] The court in *Rothstein* held that this co-operative federalism dictated a hands-off policy to the federal judiciary when faced with a claim for retroactive welfare payments. By declining to exercise federal jurisdiction over the claims, the Fourth and Second Circuits in *Dawkins* and *Rothstein* did not add to this tension.

Finally, the decision in *Dawkins* affected the fundamental goal of national welfare legislation, which is the satisfaction of the ascertained needs of impoverished persons.[90] The *Rothstein* court discussed this goal and concluded that the satisfaction of ascertained needs was of little consequence on the facts of that case because of the interval between the last contested payment and the district court's order of retroactive relief. Since the time lapse was sixteen months, the Second Circuit ruled that the retroactive order would be

[86] *See, e.g.*, King v. Smith, 392 U.S. 309, 316 (1968). See text accompanying note 89 *infra*.

[87] 467 F.2d at 235.

[88] *Id.*

[89] King v. Smith, 392 U.S. 309, 316 (1968).

[90] 467 F.2d at 235.

compensatory rather than remedial.[91] While this analysis is appealing at first glance, it is based on a questionable proposition. To justify this premise, the assumption must be accepted that persons who are once deprived of an ascertained level of subsistence no longer suffer the consequences of their deprivation. This assumption is questionable because it does not consider loss of health, dignity, proper housing, and various other events that could occur when funds are withheld from an indigent.

The most equitable solution to a claim for retroactive welfare benefits in relation to fulfilling the ascertained needs of impoverished persons was provided by the district court in *Machado v. Hackney*.[92] The court in *Machado* allowed the plaintiff to recover retroactive payments, but only to the extent that they exceeded the actual amount of financial support the plaintiff received during the contested time period.[93] While this method of resolution poses several proof problems, it would restore to the welfare recipient only the amount determined to be a proper level of subsistence. Such a remedy may still be compensatory but it allows for the fact that the plaintiff was sustained upon something while welfare benefits were withheld. If the Fourth Circuit had disposed of the claim in *Dawkins* in the manner suggested by *Machado*, the tension between the federal and state governments conceivably would have been increased, but this result would have fulfilled the needs of the impoverished plaintiff and acted as a deterrent to wilful state violations of federal regulations.

### *Conclusion*

In view of the conflict between the circuits, the Supreme Court should resolve the issue of the eleventh amendment's bar to suits for retroactive welfare payments. The Fourth Circuit's position in *Dawkins* is amply supported by judicial precedent, but the rationale and the result reached by the Seventh Circuit in *Jordan* is the more equitable resolution of the controversy. The Court will have to consider the controversy in light of its past decisions while balancing the interests affected. To preserve both the integrity of past decisions and the sanctity of a constitutional protection, the Court should rule the eleventh amendment applicable to suits against states for retroactive welfare payments. However, in the interest of providing a forum for the complete adjudication of controversies involving a federal consti-

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[91] *Id.*

[92] 299 F. Supp. 644 (W.D. Tex. 1969) (three-judge dist. ct.).

[93] *Id.* at 646.