Mississippi College Law Review

Volume 11
Issue 1 *Vol. 11 Iss. 1*

Article 10

1991

The Will Decision - Freedom for States to Discriminate - Will v. Michigan Department of State Police

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THE *Will* DECISION— FREEDOM FOR STATES TO DISCRIMINATE?

Will v. Michigan Department of State Police, 109 S. Ct. 2304 (1989)

I. INTRODUCTION

In *Will v. Michigan Department of State Police*,[1] the United States Supreme Court resolved a split among the circuits over the question of whether a state may be considered a "person" under 42 U.S.C. § 1983.[2] *Will* appears to return to the restrictive view of 42 U.S.C. § 1983 expressed in *Monroe v. Pape*[3] abandoning the broader approach of *Monell v. Department of Social Services of New York*.[4]

Part I of this casenote will consider the facts of *Will v. Michigan Department of State Police*. Part II will address the history of 42 U.S.C. § 1983 and the history of the Court's previous construction of "person" under 42 U.S.C. § 1983. Part III will consider the instant case of *Will v. Michigan Department of State Police*. And, Part IV will include an analysis of the *Will* decision and questions that the *Will* decision may have left unanswered.

II. FACTS

Ray Eugene Will, an employee with the State of Michigan since 1969, sought advancement to a position of data systems analyst with the State Police in late 1973.[5] In spite of the facts that Will was ranked second on the promotional register and the first ranked candidate withdrew, Will was not granted the position with the State Police.[6] Will later found that, when the Department of State Police ran a preliminary check on him, information regarding Will's brother, a student activist, was released.[7]

Will filed a grievance with the Civil Service Commission asserting that the information concerning his brother had influenced the decision regarding his pro-

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1. 109 S. Ct. 2304 (1989).

2. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1983 (1982).

3. 365 U.S. 167 (1961).

4. 436 U.S. 658 (1978).

5. Will v. Department of Civil Serv., 145 Mich. App. 214, 217, 377 N.W.2d 826, 828 (Mich. Ct. App. 1985).

6. *Id.*

7. *Id.*

motion.[8] Will's grievance with the Civil Service Commission was dismissed as untimely.[9] Will then filed suit in the Ingham Circuit Court against the Department of Civil Service, the State Personnel Director, the Department of State Police, and the Director of State Police.[10] The defendants moved to remand for a grievance hearing before the Civil Service Commission, and defendants' motion was granted in June, 1978.[11]

Prior to the grievance hearing before the Civil Service Commission, the plaintiff filed suit in the Michigan Court of Claims in November, 1978.[12] His complaint again included alleged violations under 42 U.S.C. § 1983.[13] The court of claims, on May 7, 1979, denied defendants' summary judgment motion on plaintiff's section 1983 claim but did grant plaintiff's motion for consolidation of the circuit court and court of claims cases.[14] The grievance hearing before an officer of the Civil Service Commission resulted in a finding in plaintiff's favor.[15] The decision was affirmed by the Civil Service Commission in January, 1981.[16] The state court judge, rendering a decision for both the circuit court and the court of claims, held that the plaintiff had "established a violation of the United States Constitution" and that defendants "were persons for purposes of § 1983."[17]

The Michigan Court of Appeals then vacated that part of the judgment finding the Department of State Police a "person" under section 1983 and remanded the case for a determination of the liability of the Director of State Police.[18] The Michigan Supreme Court agreed with the court of appeals, holding that the Department of State Police was not a person under section 1983.[19] Moreover, the Michigan Supreme Court further held that the Director of State Police, while acting in his official capacity, was not a "person" under section 1983.[20]

The United States Supreme Court granted certiorari in order to determine if a state is a "person" under 42 U.S.C. § 1983.[21]

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8. *Id.*

9. *Id.*

10. 428 Mich. 540, 547 n.1, 410 N.W.2d 749, 752 n.1 (1987). Will alleged that: (1) there was a denial of due process of law under the United States and Michigan Constitutions by virtue of the Civil Service Commissions's dismissal of his grievance; (2) there were violations under 28 U.S.C. § 1983; and (3) the denial of promotion because of his brother's political activities constituted a denial of due process. *Id.*

11. *Id.* at 547, 410 N.W.2d at 752.

12. *Id.*

13. *Id.*

14. *Id.* at 547-48, 410 N.W.2d at 752.

15. *Id.* at 548, 410 N.W.2d at 752. The hearing officer of the grievance proceeding "found that the state had violated both Const. 1963, art. 11, § 5 (the civil service provision) and Civil Service Rule 1.2 in making its decision regarding Mr. Will's promotion on the basis of 'partisan considerations.' " *Id.*

16. *Id.*

17. 109 S. Ct. at 2306.

18. *Id.*

19. *Id.*

20. *Id.*

21. 485 U.S. 1005 (1988).

III. BACKGROUND AND HISTORY

Congress, in 1871, enacted the Ku Klux Klan Act (also known as the Civil Rights Act of 1871)[22] in direct response to acts of violence and terrorism against emancipated blacks.[23] State and local officials often participated in these acts of violence.[24] The Ku Klux Klan Act was enacted under section 5 of the fourteenth amendment,[25] which gave Congress the power to enforce the provisions of the fourteenth amendment through legislation.[26] Section 1 of the Act, now 42 U.S.C. § 1983, had three major purposes: (1) to override state laws which infringed upon the privileges and rights of United States citizens; (2) to provide a remedy in the event of inadequate state law; and (3) to provide the plaintiff with a federal remedy where the theoretically adequate state remedy was in actuality not available.[27]

The major force behind the Civil Rights Act of 1871 was not that state remedies for these acts of terrorism were unavailable but that the states had failed to enforce the available laws evenly and equally.[28] "While one main scourge of the evil – perhaps the leading one – was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law."[29]

Because of restrictive judicial interpretation, 42 U.S.C. § 1983 lay dormant until 1961[30] when the Supreme Court issued its decision of *Monroe v. Pape*.[31] In *Monroe* the Court upheld the lower court's dismissal of the complaint against the City of Chicago but reversed the dismissal against the city officials.[32] The Supreme Court held in *Monroe* that Congress did not intend for municipalities to be brought within the scope of section 1983.[33] After a review of the legislative history of the Civil Rights Act of 1871, the Court based its conclusion regarding Congressional intent upon the antagonistic response of Congress to the Sherman

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22. P. SCHUCK, SUING GOVERNMENT 47 (1983) [hereinafter P. SCHUCK]. Section 1 of the Civil Rights Act of 1871 is now codified as 42 U.S.C. § 1983. *Id.*

23. *Id.*

24. *Id.*

25. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

26. Monroe v. Pape, 365 U.S. 167, 171 (1961).

27. *Id.* at 173-74.

28. *Id.* at 174-75.

29. *Id.* at 175-76.

30. Comment, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135-36 (1977).

31. 365 U.S. 167 (1961). The plaintiff in *Monroe* asserted that thirteen Chicago policemen forced their way into his home and made him and his family stand naked in the living room while his house was ransacked by the policemen. *Id.* Plaintiff was taken to the Chicago police station and for ten hours was detained and questioned about a murder. Plaintiff was not allowed to telephone his family or an attorney. Plaintiff was subsequently released without any charges having been filed against him. Plaintiff filed suit against the City of Chicago and against the police officers under 42 U.S.C. § 1983 alleging violations of his civil rights because the officers had no search or arrest warrants. *Id.* at 169.

32. *Id.* at 192.

33. *Id.* at 187.

Amendment,[34] a proposal which would have made "municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, ..."[35] The Sherman Amendment was adopted by the Senate as originally proposed but was rejected by the House.[36] A Conference Committee proposed another version of the Amendment, but the House also rejected that Conference report.[37] A second conference was held in which the Sherman Amendment was dropped and what is now 42 U.S.C. § 1986 was substituted in its place.[38] This substituted provision contained no mention of municipal liability under the Act.[39]

However, because *Monroe* did uphold the plaintiff's right to sue the local officials (the Chicago Policemen),[40] it established section 1983 as a "potent remedy that citizens could invoke affirmatively against official misconduct without the state's help or indeed in the face of its opposition. It swiftly became the legal weapon of the ripening civil rights movement; only two years after the decision, § 1983 litigation had grown by over 60 percent."[41] However, Monroe did deliver bad news in that, if the individual local officials could not pay the judgment against them, plaintiffs were without a federal remedy because the government itself (in this case, the City of Chicago) could not be sued under section 1983.[42] Between the years 1961 and 1978, a significant portion of the caseload of the federal courts was the result of federal civil rights litigation.[43]

In its next major interpretation of 42 U.S.C. § 1983, the Supreme Court, in the decision *Monell v. Department of Social Services,*[44] expressly overruled *Monroe* and its holding that local governments could not be sued under section 1983.[45] In reaching its holding, the *Monell* Court undertook a "fresh analysis" of the congres-

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34. *Id.* at 191. The Sherman Amendment, as proposed, read:

> . . . if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

Cong. Globe, 42d Cong., 1st Sess., p. 663, *quoted in* Monroe v. Pape, 365 U.S. at 188 n.38 (1961).

35. *Monroe,* 365 U.S. at 191.

36. *Id.* at 188.

37. *Id.* at 188-89.

38. *Id.* at 189-90.

39. *Id.* at 190.

40. *Id.* at 192.

41. P. SCHUCK, *supra* note 22, at 48.

42. *Id.*

43. Schapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979).

44. 436 U.S. 658 (1978).

45. *Id.* at 663.

sional debate over the Civil Rights Act of 1871.[46] The Court noted that section 1 of the Act, now 42 U.S.C. § 1983, received only limited discussion and debate and was passed with no amendments.[47] The great volume of congressional discussion revolved around sections 2 through 4 of the Act.[48]

The *Monell* Court further noted that the Sherman Amendment was not an amendment to section 1 of the Act, now section 1983, but was to be an addition to section 7 of the Act.[49] The debates relating to the Sherman Amendment, which were relied upon by the Court in *Monroe*, show that the House of Representatives refused to pass the Sherman Amendment, among others, and sent them to a conference committee; however, section 1, presently section 1983, was not discussed at the conference and "was passed verbatim as introduced in both Houses of Congress."[50]

The Court in reaching its decision also relied on the express language of the "Dictionary Act,"[51] passed only several months before the Civil Rights Act of 1871.[52] The Dictionary Act, the Court reasoned, which defined "person" as "bodies politic and corporate," meant to include municipalities within the scope of "person."[53] Further, because the Civil Rights Act of 1871 was passed after the "Dictionary Act," municipalities were meant to be considered "persons" under section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983).[54]

The decision in *Monell* expressly held that local governing units could be sued under 42 U.S.C. § 1983 when the alleged action was an implementation or execution of an officially adopted regulation, policy, or decision by that governmental unit's officers.[55] In other words, an action under *Monell* could be maintained against a local government under section 1983 when based upon an "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy . . . ."[56]

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46. *Id.* at 665.

47. *Id.*

48. Sections 2 through 4 of the Act dealt with "suppressing Ku Klux Klan violence in the Southern States. The wisdom and constitutionality of these sections – not § 1, now § 1983 – were the subject of almost all congressional debate and each of these sections was amended." *Monell*, 436 U.S. at 665.

49. *Id.* at 666.

50. *Id.*

51. *Will*, 109 S. Ct. at 2310 n.8. "The Dictionary Act provided that: 'in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.' Act of Feb. 25, 1871, § 2, 16 Stat. 431." *Id.*

52. *Monell*, 436 U.S. at 688.

53. *Id.*

54. *Id.* at 689.

55. *Id.* at 690. However, the *Monell* Court did hold that a municipality could not be held liable under the theory of *respondeat superior*. *Id.* at 691.

56. *Id.* at 694.

Some courts have extended *Monell* and have held that states and state agencies are "persons" under section 1983.[57] For example, the United States District Court for Wyoming, in *Atchison v. Nelson*,[58] held that it would be inconsistent to hold that municipalities are to be considered "persons" under section 1983 but that states and agencies of the state are not to be considered "persons" under the statute.[59]

However, the *Monell* Court did restrict its holding to "local government units which are not considered part of the State for Eleventh Amendment purposes."[60] It was this specific restriction which led to the Supreme Court's holding in *Quern v. Jordan*.[61] The Court in *Quern* addressed the status of a state's eleventh amendment immunity[62] in light of 42 U.S.C. § 1983, and concluded that Congress did not intend to override the state's eleventh amendment immunity.[63] The Court based its holding on the general language of section 1983[64] and on the fact that there was little or no debate on section 1 of the 1871 Civil Rights Act when it was passed.[65] Surely, the Court reasoned, if Congress had meant to abrogate something as important as eleventh amendment immunity, there would have been lengthy debate on the subject.[66]

The importance of the eleventh amendment is that it immunizes states from suits by private citizens who seek to impose a liability which would ultimately be paid out of the state treasury.[67] In *Owen v. City of Independence*[68] the United States Supreme Court held that the idea of common-law immunities was so firmly entrenched in tradition that Congress would have specifically provided for its abrogation if it had so intended.[69] In order for Congress to abrogate the eleventh amendment, it must do so through specific, unmistakable language in the Act itself.[70]

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57. *See* Gay Student Servs. v. Texas A & M Univ., 612 F.2d 160, 163-64 (5th Cir. 1980), *cert. denied*, 449 U.S. 1034 (1980) (holding that a state university is a "person" under § 1983, relying on *Monell*); Morrow v. Sudler, 502 F. Supp. 1200, 1205 (D. Colo. 1980) (holding that a state historical society is a state agency and a state educational institution and is considered a "person" under § 1983).

58. 460 F. Supp. 1102 (D. Wyo. 1978).

59. *Id.* at 1107.

60. *Monell*, 436 U.S. at 690 n.54.

61. 440 U.S. 332 (1979).

62. "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.

63. *Quern*, 440 U.S. at 341.

64. *Id.* at 345.

65. *Id.* at 343.

66. *Id.*

67. Edelman v. Jordan, 415 U.S. 651, 663 (1974).

68. 445 U.S. 622 (1980).

69. *Id.* at 637.

70. Welch v. Texas Dep't of Highways & Public Transp., 483 U.S. 468, 473 (1987).

The United States Supreme Court explained the need for requiring specific language in the statute itself in the case of *Atascadero State Hospital v. Scanlon.*[71] The Court stated as follows:

> Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain. "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick,* 427 U.S., [sic] at 456. In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.[72]

The Court of Appeals of New Mexico in *Ramah Navajo School Board v. Bureau of Revenue*[73] explained the difference between eleventh amendment immunity and state sovereign immunity. Both concepts were designed to protect state government. The eleventh amendment protects states from interference by the federal courts. Sovereign immunity protects states from intrusion by plaintiffs in state courts.[74] The court in *Ramah* pointed out that *Quern's* holding only addressed a state's eleventh amendment immunity.[75] However, the court went on to state that it "logically follows that Congress also did not intend, in adopting Section 1983, to abrogate the states' sovereign immunity from Section 1983 suits brought in state courts,"[76] thereby extending *Quern's* holding to section 1983 actions filed in state courts.

Some courts have enlarged *Quern* further to a holding that totally exempts states from suit under section 1983, whether in state or federal court, by holding that

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71. 473 U.S. 234 (1985).
72. *Id.* at 242-43.
73. 104 N.W. 302, 720 P.2d 1243 (N.M. Ct. App. 1986).
74. *Id.* at 307, 720 P.2d at 1248.
75. *Id.*
76. *Id.*

states are never "persons" under 42 U.S.C. § 1983.[77] For example, the United States District Court for the Eastern District of Ohio, in *Bailey v. Ohio State University,*[78] held that because "Congress did not intend to abrogate eleventh amendment immunity for the states means, necessarily, that a state is not a 'person' under § 1983 and no suit for any relief may be maintained against the state under § 1983."[79]

Meanwhile, other courts have limited *Quern* to its specific holding that section 1983 does not abrogate a state's eleventh amendment immunity.[80] The First Circuit, in *Della Grotta v. State of Rhode Island,*[81] construed the holding in *Quern* narrowly and held that the State of Rhode Island was a "person" under section 1983 and could be sued because Rhode Island had waived its eleventh amendment immunity.[82] The First Circuit stated:

> While the Court expressly limited its holding in *Monell* to 'local governmental units which are not considered part of the State for Eleventh Amendment purposes,' we see nothing in *Monell* to suggest that, apart from eleventh amendment considerations, a state should be viewed differently from other bodies politic. Where, as here, a state has waived its eleventh amendment immunity, there is no principled reason to distinguish between states and municipalities as 'persons' suable under section 1983.[83]

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77. *See* Ruiz v. Estelle, 679 F.2d 1115, 1137 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (holding that neither state agencies nor states are considered "persons" within § 1983); Holladay v. State, 506 F. Supp. 1317, 1321 (D. Mont. 1981) (holding that the State of Montana cannot be sued under § 1983 because it is not a "person" under the statute); Thompson v. State, 487 F. Supp. 212, 226 (N.D.N.Y. 1979) (holding that, in light of *Quern,* the State of New York is not a "person" under § 1983 and cannot be sued thereunder); State v. Green, 633 P.2d 1381, 1382 (Alaska 1981) (interpreting *Quern* as holding that a state is not a "person" under § 1983); St. Mary's Hosp. v. State, 150 Ariz. 8, 11, 721 P.2d 666, 669 (Ariz. Ct. App. 1986) (holding the State of Arizona is not a "person" under § 1983 by virtue of *Quern*); Merritt v. State, 108 Idaho 20, 26, 696 P.2d 871, 877 (1985) (interpreting *Quern* to hold that states are not considered "persons" under § 1983); Bird v. State, 375 N.W.2d 36, 43 (Minn. Ct. App. 1985) (holding that a § 1983 claim is barred against a state); Shaw v. City of St. Louis, 664 S.W.2d 572, 576 (Mo. Ct. App. 1983), *cert. denied,* 469 U.S. 849 (1984) (holding that a state is not a "person" under § 1983); Fuchilla v. Layman, 109 N.J. 319, 324, 537 A.2d 652, 654 (1988), *cert. denied,* 109 S. Ct. 75 (1988) ("[I]f a governmental entity enjoys immunity as the state or its alter ego under the eleventh amendment, it cannot be liable as a 'person' under § 1983."); Burkey v. Southern Ohio Correctional Facility, 38 Ohio App. 3d 170, 171, 528 N.E.2d 607, 608 (Ohio Ct. App. 1988) (holding a state is not a "person" under § 1983 and, therefore, suit cannot be maintained under § 1983); Gay v. State, 730 S.W.2d 154, 157 (Tex. Ct. App. 1987) (holding the State of Texas is not a "person" under § 1983, and "a suit based upon that statute could not be maintained even in the state courts"); Edgar v. State, 92 Wash. 2d 217, 221, 595 P.2d 534, 537 (1979), *cert. denied,* 444 U.S. 1077 (1980) (holding that *Quern* held that the word "person" in § 1983 was clearly not intended to include states); Boldt v. State, 101 Wis. 2d 566, 584, 305 N.W.2d 133, 143-44 (1981), *cert. denied,* 454 U.S. 973 (1981) (holding a state is not considered a "person" under § 1983).

78. 487 F. Supp. 601 (S.D. Ohio 1980).

79. *Id.* at 603.

80. Hodges v. Tomberlin, 510 F. Supp. 1280, 1283 (S.D. Ga. 1980) ("It is clear from *Quern* that a state may be subject to monetary as well as injunctive relief where it has waived immunity under the Eleventh Amendment."); Marrapese v. State, 500 F. Supp. 1207, 1211 (D.R.I. 1980) ("*Quern* concluded only that the Congress which enacted § 1983 did not intend to *force* the states to answer in federal court for their constitutional violations."); Hill v. Department of Corrections, 513 So. 2d 129, 132 (Fla. 1987), *cert. denied,* 108 S. Ct. 1024 (1988) ("[I]t is also necessary to consider whether there has been a waiver of sovereign immunity.").

81. 781 F.2d 343 (1st Cir. 1986).

82. *Id.* at 349.

83. *Della Grotta,* 781 F.2d at 349 (citations omitted) (quoting Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978)).

In *Gumbhir v. Kansas State Board of Pharmacy,*[84] the Supreme Court of Kansas held that, after a careful reading of *Quern,* it was evident that *Quern* did not hold that state agencies or states could never be held to be "persons" under 42 U.S.C. § 1983, only that eleventh amendment immunity may apply to the action.[85]

This conflict between various courts and their interpretations of "person" under 42 U.S.C. § 1983 is what the Supreme Court sought to resolve with the decision of *Will v. Michigan Department of State Police.*[86]

IV. INSTANT CASE

Justice White delivered the majority opinion in *Will*[87] and articulated the issue as being whether a state, or a state official acting within his official capacity, is to be considered a "person" under 42 U.S.C. § 1983.[88] The Supreme Court noted that the lower court's holding that the State of Michigan was not a "person" under section 1983 conflicts with several state and federal court cases which have held that states are "persons" under section 1983.[89] The Supreme Court granted certiorari in order to resolve the conflict.[90] The Court acknowledged that it had never expressly dealt with the issue of whether a state is a "person" under section 1983.[91]

The Court took note of the fact that many courts had construed *Quern v. Jordan*[92] as holding that a state is not a "person" under section 1983.[93] However, the Supreme Court pointed out that *Quern* only held that section 1983 was not an abrogation of a state's eleventh amendment immunity.[94] Because *Will* was filed in a Michigan state court, the eleventh amendment clearly did not apply; and the issue of whether a state is a "person" under section 1983 was placed squarely before the Supreme Court.[95]

The Court in *Will* explicitly held that a state is not considered a "person" under section 1983.[96] This decision was based upon the Court's determination that, in common usage, "person" is not construed to include states or sovereign governments, and statutes which include the word "person" are usually construed to exclude states from their meaning.[97] Dissenting, Justice Brennan asserted that this

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84. 231 Kan. 507, 646 P.2d 1078 (1982), *cert. denied,* 459 U.S. 1103 (1983).

85. *Id.* at 513, 646 P.2d at 1084.

86. *Will,* 109 S. Ct. at 2307.

87. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2305 (1989). White, J., delivered the opinion of the Court in which Rehnquist, C.J., and O'Connor, Scalia, and Kennedy, JJ., joined. *Id.* Brennan, J., filed a dissenting opinion in which Marshall, Blackmun, and Stevens, JJ., joined. Stevens, J., also filed a dissenting opinion. *Id.*

88. *Id.*

89. *Id.* at 2306.

90. *Id.* at 2307.

91. *Id.*

92. 440 U.S. 332 (1979).

93. *Will,* 109 S. Ct. at 2307.

94. *Id.*

95. *Id.*

96. *Id.* at 2308.

97. *Id.*

interpretive rule relied upon by the majority was merely an aid to construction of a statute and that the legislative history, the subject matter, and the executive interpretation of the statute are also to be considered.[98]

The Supreme Court next relied upon its major argument in *Quern v. Jordan* that had Congress intended to change the balance between the federal and state governments, it would have done so expressly in the statute itself.[99] This requirement of express language ensures that Congress has intended to call into issue the matter being decided by the judiciary.[100] Congress, according to the Court, had no intention, when enacting section 1983, of altering the eleventh amendment immunity enjoyed by the states.[101]

In addressing plaintiff's argument regarding the applicability of section 1983 to a state court action, the Court held that the doctrine of state sovereign immunity was also a well-established doctrine at common law.[102] Once again, because of no express language in the statute so indicating, Congress was held not to have intended to override such a well-established and familiar doctrine.[103] In putting to rest the plaintiff's argument on this point, the Court stated:

> Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, [by virtue of the eleventh amendment] we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.[104]

Justice Brennan, in his dissenting opinion, disagreed with this reverse reasoning by the Court and noted that this clear-statement principle is applicable only to eleventh amendment interpretational cases.[105] Since *Will* was a suit filed in state court, Brennan argued, the eleventh amendment and, therefore, the clear-statement principle had no application to *Will,* and *Quern's* conclusion was irrelevant to the question addressed in *Will.*[106]

The plaintiff also contended the Congressional debates regarding what is presently section 1983 indicate Congress intended the statute "to extend to the full reach of the Fourteenth Amendment" and to supply a remedy for all types of governmental violations of rights of federal protection.[107] Plaintiff's argument was based on the passages of debate evidencing that the passage of section 1983 was motivated by failure of the states to appropriately remedy the violation of rights

98. *Id.* at 2312-13 (Brennan, J., dissenting).
99. *Id.* at 2309.
100. *Id.* at 2308-09.
101. *Id.* at 2309.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Will,* 109 S. Ct. at 2314-15 (Brennan, J., dissenting).
106. *Id.*
107. *Id.* at 2310.

occurring at that time.[108] The Court, in briefly reviewing the history of the Civil Rights Act of 1871, did not agree with the plaintiff and held again that Congress' intention to create a cause of action against a state was not clear and there was nothing in the debates to evidence such an intent on the part of Congress.[109]

Next, the Court addressed the issue of whether the Dictionary Act,[110] under which "person" was to mean in all acts thereafter passed "bodies politic and corporate," was applicable to section 1983.[111] This meaning of "person," plaintiff argued, was meant to include state governments; and because section 1983 was passed after the Dictionary Act, plaintiff reasoned that this meaning of "person" applied.[112] The Court, however, held that the Dictionary Act was inapplicable to section 1983 because section 2 of the Civil Rights Act of 1866, upon which section 1 of the 1871 Act was based (presently section 1983), was passed before the Dictionary Act was enacted.[113] Moreover, the Court reasoned that in 1871 the phrase "bodies politic and corporate" was construed as meaning both private and public corporations but was not construed to include states.[114] However, Justice Brennan countered that "[b]oth before and after the time when the Dictionary Act and § 1983 were passed, the phrase 'bodies politic and corporate' was understood to include the States."[115]

The Court next considered the effect of its holding in *Monell*[116] on the instant case. Distinguishing *Monell* from the instant case, the Court held, that states gain protection from eleventh amendment immunity while municipalities do not.[117] Also, the Court in *Monell* had expressly limited its decision "to local government units which are not considered part of the State for Eleventh Amendment purposes."[118]

Alternatively, the plaintiff argued that officials of the State of Michigan should be considered "persons" under 42 U.S.C. § 1983.[119] The Court dismissed this argument by holding that a suit against an official of the state in his official capacity is, in actuality, a suit against that official's office and is, therefore, "no different from a suit against the State itself."[120] The Court did make an exception to this particular holding by noting that if suit is for injunctive relief and not for monetary relief, the state official is considered a "person" under section 1983.[121]

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108. *Id.*
109. *Id.*
110. *See supra* notes 50-52 and accompanying text.
111. Act of Feb. 25, 1871, § 2, 16 Stat. 431, *quoted in* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2310 n.8l (1989).
112. *Will*, 109 S. Ct. at 2310.
113. *Id.*
114. *Id.* at 2311.
115. *Will*, 109 S. Ct. at 2315 (Brennan, J., dissenting).
116. *See supra* notes 42-58 and accompanying text.
117. *Will*, 109 S. Ct. at 2311.
118. *Monell*, 436 U.S. at 690 n.54.
119. *Will*, 109 S. Ct. at 2311.
120. *Id.*
121. *Id.* at 2311-12 n.10.

V. ANALYSIS AND CONCLUSION

In *Will v. Michigan Department of State Police*, the Supreme Court resolved the question of whether a state is ever to be considered a "person" under 42 U.S.C. § 1983. The Court concluded that in all cases, whether actions in state or federal court, a state is not a "person" under the statute.[122] In so restricting the scope of section 1983, the Court has seemingly circumvented the true and original purpose of the Civil Rights Act of 1871 from which 42 U.S.C. § 1983 originated.

Congress in enacting section 1983 sought to create a federal remedy by which to enforce the fourteenth amendment "against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[123] There was much oppression in the United States at that time involving recently emancipated blacks. The author of section 1 of the fourteenth amendment, Representative Bingham, during the debates regarding what is presently section 1983, stated as follows:

> The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . [and] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy . . . . They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy . . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?[124]

It is apparent from this excerpt from the debates surrounding the passage of the Civil Rights Act of 1871 that one main purpose of the Act was to give plaintiffs, whose constitutional rights had been violated, a forum against those who had ignored or violated their civil rights. These violators were often state officials or state personnel who simply refused to enforce the law.[125] Section 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[126] Does this "broad construction" not extend to actions against states? It would appear to offend the intentions of the drafters of section 1983 and those who enacted it to exclude from possible liability the most powerful entities which "pose the greatest threat to the constitutional rights of citizens . . . ."[127]

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122. *Will*, 109 S. Ct. at 2312.

123. *Monroe*, 365 U.S. at 172.

124. Cong. Globe, 42d Cong., 1st Sess. App. 815 (1871), *quoted in* Monell v. New York Dep't of Social Servs., 436 U.S. 658, 685 n.45 (1978).

125. Maine v. Thiboutot, 448 U.S. 1, 20 (1980).

126. *Monell*, 436 U.S. at 700-01.

127. Marrapese v. State, 500 F. Supp. 1207, 1212 (D.R.I. 1980).

Congress may, by virtue of section 5 of the fourteenth amendment, enact legislation which serves the purpose of enforcing the fourteenth amendment. This legislation may allow private suits against officials of a state or against the state itself.[128] Section 1983 is an example of such legislation enacted for the purpose of enforcing the fourteenth amendment.[129] The Court has acknowledged that section 5 of the fourteenth amendment may limit the eleventh amendment and the concept of state sovereign immunity.[130] However, this intention to remove or override a state's eleventh amendment immunity must be explicit, and, as held in *Quern v. Jordan*, Congress' language in section 1983 was not explicit enough.[131]

After the Court's holding in *Quern*, courts interpreted the status of a state under section 1983 in two different ways: (1) some courts held that a state's eleventh amendment immunity was left intact after section 1983, but that suit against a state was still possible if said immunity was waived;[132] (2) some courts found implied in *Quern* the holding that a state is never a "person" under section 1983.[133] It is the latter interpretation which the *Will* Court adopted.

The Court reasoned that, because the eleventh amendment immunity was not expressly abrogated by section 1983, the concept of state sovereign immunity protecting states from suit in their own courts was also left intact.[134] Justice Brennan, dissenting, stated:

> [T]he answer to the question whether § 1983 provides a federal forum for suits against the States may be, and most often will be different from the answer to the kind of question before us today. Since the question whether Congress has provided a federal forum for damages suits against the States is answered by applying a uniquely strict interpretive principle [in relation to eleventh amendment abrogation], . . . the Court should not pretend that we have, in *Quern*, answered the question whether Congress intended to provide a federal forum for such suits, and then reason backwards from that 'intent' to the conclusion that Congress must not have intended to allow such suits to proceed in state court.[135]

This holding by the Court that a state is never a "person" under section 1983 ignores the power of Congress to enact legislation for the purpose of enforcing the fourteenth amendment and precludes an action by the plaintiff even in the event that the state has consented to suit or waived its immunity.[136] Although a waiver by a state of its eleventh amendment immunity will be found only through express language or by implications which leave no room for doubting the state's intention

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128. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

129. *See supra* notes 24-25. Section 1983 was originally § 1 of "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes." Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2715 (1989).

130. *See supra* notes 24-25.

131. 440 U.S. 332, 343 (1979).

132. *See supra* notes 78-83 and accompanying text.

133. *See supra* notes 75-77 and accompanying text.

134. *Will*, 109 S. Ct. at 2309.

135. *Id.* at 2315.

136. Welch v. Texas Dep't of Highways & Transp., 483 U.S. 468, 474 (1987).

to waive the immunity,[137] states have been held in the past to have so waived their immunity;[138] and a plaintiff should not be foreclosed from pursuing that avenue of recovery. Had the Court in *Will* limited its holding to a recognition of a state's sovereign immunity and/or eleventh amendment immunity in the face of a section 1983 action, it would have allowed plaintiffs whose civil rights had been violated the "largest possibility for redress."[139] The Court, had it so held, would have left open to plaintiffs the possibility of pursuing an action against a state under section 1983.

The *Will* decision is but one example of the Court's shift toward a "literalist reading of statutory terms as a surrogate for actual legislative intent."[140] The Court portrays itself to be bound by the express terms of congressional enactments, thereby failing to address the true issues placed before the Court.[141] The most apparent weakness in the Court's clear-statement approach is that it thrusts upon Congress the unrealistic responsibility of constantly updating the law.[142] Congress, in enacting a piece of legislation, cannot foresee all of the problems which may arise, nor can words be counted upon to "fully capture congressional meaning."[143] This clear-statement approach removes from the Court the opportunity to measure and test Congress' expressed purposes in enacting a statute with the actual statutory outcomes. In using this approach the Court's actions often amount to little more than a rubber-stamping of, what are at times, unjust statutory results.[144]

Another argument against the recognition of states as "persons" under section 1983 has been what some have seen as the possible extension of liability and financial responsibility to states and local governments for violations under section

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137. *Id.* at 473.

138. *See, e.g.*, Della Grotta v. State, 781 F.2d 343 (1st Cir. 1986); Marrapese v. State, 500 F. Supp. 1207 (D.R.I. 1980); Ramah Navajo School Bd. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M. Ct. App. 1986).

139. *Marrapese*, 500 F. Supp. at 1212.

140. Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 (1982).

141. *See, e.g.*, Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989). In *Jett* a white former head football coach and athletic director brought an action alleging discrimination in his job reassignment under 42 U.S.C. §§ 1981 and 1983 against the public school district and the black principal. *Id.* at 2703. The Court held that a municipality could not be held liable under a *respondeat superior* theory for violations of its employees under § 1981. *Id.* at 2704. The Court, in reaching this conclusion, held that the damages remedy provided under 42 U.S.C. § 1983 constitutes the "exclusive federal remedy" for rights found to have been violated by state governmental units under 42 U.S.C. § 1981. *Id.* at 2721. The Court once again relied upon its clear-statement principle and held "whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Id.* at 2720. *See also* Martin v. Wilks, 109 S. Ct. 2180 (1989). In *Martin* the Supreme Court relied on the express language of Federal Rule of Civil Procedure 24 in holding that intervention is cast in permissive terms. *Id.* at 2185. Therefore, white firefighters who failed to intervene in a previous employment discrimination action were not bound by consent decrees entered pursuant to that action, even though notice of the hearings was published and the Birmingham Firefighters Association and two of its members had moved to intervene in that action. *Id.* at 2183.

142. *See* Note, *supra* note 140, at 905.

143. *See* Note, *supra* note 140, at 899.

144. *See* Note, *supra* note 140, at 906-07.

1983.[145] The fear has been that all taxpayers will, in the end, be penalized for the deeds of their government officials and the government itself.[146] But, as pointed out in *Owen v. City of Independence*,[147] the general public enjoys the fruits of the governmental activities; and it is the ultimate responsibility of the public to see that governmental activity is properly conducted.[148] "[I]t is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated."[149] A provision of damages either ensures or deters a certain activity.[150] Although the Court in *Owen* was addressing the imposition of fines against a municipality, the same arguments apply to state liability. The knowledge that damages might be imposed would create incentive for the state officials to ensure that its citizens' civil rights are upheld and protected. It would encourage states to create and put into practice internal policies and procedures to ensure that constitutional rights are not violated. In the end, it seems only fair that the one causing the injury should pay for any damage incurred thereby.[151]

This argument regarding the financial burden to be placed on the government no longer has credence in the face of *Monell*. The allowance of damages against a municipality supported by taxpayers is no different from imposing damages against a state which is likewise supported by taxpayers. Moreover, the right to pursue an action against a state under section 1983 for alleged violation of civil rights seems even more important in light of the fact that it is the state that is charged with the responsibility of protecting those civil rights.[152]

Another major purpose of section 1983 was the prevention of future deprivations and abuses of citizens' constitutional rights.[153] Since the states were the ones failing to recognize their citizens' constitutional rights, as shown through the legislative history of the Act, it seems evident that section 1983 was enacted to prevent and deter future deprivations by the states themselves. This purpose may still be accomplished after *Will* through suit against a state official for injunctive or prospective relief.[154] This remedy would appear to appease those who opposed the Act because it might financially burden a state.[155] However, by denying action directly against a state, but allowing action against state officials acting in their official capacities in certain situations, the Court has succeeded in formulating a series of hoops through which a plaintiff must jump before being able to ensure that a state will not violate his constitutional rights. The plaintiff must first name a

145. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 265-66 (1981).
146. *Id.*
147. 445 U.S. 622 (1980).
148. *Id.* at 655.
149. *Id.*
150. *Id.* at 651-52.
151. *Id.* at 654.
152. *Id.* at 651.
153. *City of Newport*, 453 U.S. at 268.
154. *Will*, 109 S. Ct. at 2311 n.10.
155. *See supra* notes 138-41 and accompanying text.

state official, allege that he acted within his official capacity, and then seek an injunction or prospective relief. Justice Brennan, in his dissenting opinion in *Atascadero State Hospital v. Scanlon*,[156] pointed out the weaknesses in this procedure.

> These intricate rules often create manifest injustices while failing to respond to any legitimate needs of the States. A damages award may often be the only practical remedy available to the plaintiff, and the threat of a damages award may be the only effective deterrent to a defendant's willful violation of federal law.[157]

If prospective or injunctive relief can be awarded in the instance of suit against officials of the state, and, as the majority in *Will* stated, "[a]s such, it is no different from a suit against the State itself,"[158] then it follows that a state is a "person" under section 1983 in such actions.[159] The Court has, whether it realized it or not, acknowledged that suit against the state is permitted when the correct relief is sought.

The end result of the *Will* decision is to leave the plaintiff whose civil rights have been violated with only one remedy under section 1983: to file suit against a state official acting in his official capacity but only for prospective injunctive relief. The plaintiff whose damage has already occurred, as was the case in *Will*, or the plaintiff who will not benefit from prospective injunctive relief is effectively foreclosed from any avenue of recovery under section 1983. This result falls far short of the original intent of section 1983 and of what its supporters sought to achieve by enacting it. The Supreme Court stated it best in *Owen v. City of Independence*:[160]

> How 'uniquely amiss' it would be, therefore, if the government itself—'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct'—were permitted to disavow liability for the injury it has begotten.[161]

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156. 473 U.S. 234 (1985).

157. *Atascadero State Hosp.*, 473 U.S. 234, 256-57 (Brennan, J., dissenting). In *Atascadero* the Supreme Court held that Congress in enacting the Rehabilitation Act, had not abrogated the states' eleventh amendment immunity because there was not a clear-statement of intent to so abrogate. *Id.* at 246. Justice Brennan, dissenting, stated that the rules of statutory drafting relied upon by the majority did little to determine the actual intent of Congress and served as a hurdle used to keep disfavored actions outside the federal courts. *Id.* at 254. The principle also acted as an obstruction to the will of Congress. *Id.* at 255 n.7.

158. *Will*, 109 S. Ct. at 2311.

159. *Will*, 109 S. Ct. at 2323 (Stevens, J., dissenting).

160. 445 U.S. 622 (1980). The Court in *Owen* recognized a § 1983 action against a municipality but held that eleventh amendment immunity forecloses suit against a state unless waived.

161. *Id.* at 651 (quoting Adickes v. Kress & Co., 398 U.S. 144, 190 (1970)).