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42 U.S.C. § 1983: CLAIMS AGAINST STATES FOR DAMAGES

CHARLES E. LEGETTE, JR.

I. INTRODUCTION

Recent United States Supreme Court decisions have created the possibility that states, individually and through their officers,¹ may be sued for damages and other forms of retroactive monetary relief under 42 U.S.C. § 1983.² Historically, states and state officers, acting in their official capacities, have not been proper parties against whom section 1983 damage claims could have been brought.³ This was so primarily because it was felt the eleventh amendment barred such relief,⁴ and the 42d Congress did not intend for section 1983 to apply to states, *i.e.*, states were not "persons" under the Act.⁵ Both of these longstanding rules of section 1983 law are now of questionable validity. Their current and future strength will be examined in the following pages.

This note will discuss the cases giving rise to the possibility of section 1983 claims for monetary relief against states and will analyze the decisions establishing standards governing judicial findings of congressional intent to abrogate the eleventh amendment. Additionally, this note will apply these standards to the language and history of section 1983. Finally, the Court's intentions in this area will be discussed in light of the patent conflict between the concept

1. Based upon these recent cases the Federal District Court for the Northern District of Florida recently held in *Aldredge v. Turlington*, 42 U.S.L.W. 2370 (N.D. Fla. Nov. 17, 1978), that the Florida Commissioner of Education could be sued for damages in his official capacity under 42 U.S.C. § 1983 (1972) notwithstanding the eleventh amendment. This opinion was withdrawn on the court's motion on Jan. 25, 1979, in light of the summary decision by the Fifth Circuit not to allow section 1983 claims for damages against states. *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978).

2. 42 U.S.C. § 1983 (1972) states:

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

3. State officials sued in their individual capacities are clearly "persons" within the meaning of section 1983. *See, e.g., Westberry v. Fisher*, 309 F. Supp. 12, 15 (S.D. Me. 1970). However, when state officials are sued in their official capacities, the courts frequently find that suits are in reality suits against the states, barred by the eleventh amendment. *See Edelman v. Jordan*, 415 U.S. 651 (1974).

4. U.S. CONST. amend. XI states: "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."

5. *See, e.g., United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84, 86 n.2 (3d Cir. 1969).

of federalism and the interest of plaintiffs in being afforded an effective remedy.

II. BACKGROUND

Although 42 U.S.C. § 1983 was enacted into law in 1871, it lay dormant until the great resurgence of civil rights in the early 1960's under the Warren Court. In *Monroe v. Pape* the Court breathed new vitality into the statute by construing it to authorize suit in federal court against thirteen Chicago policemen who entered, searched, and ransacked the Monroe home without cause.⁶ Before *Monroe*, recovery was largely dependent upon remedies provided by state law. However, while the Court allowed suit against the individual policemen, it interpreted the statute to exclude cities from its sweep.⁷ Hence, the plaintiff was forced to look only to the individual defendants and their limited resources for relief.

Since judgments are difficult to obtain⁸ and are frequently impossible to satisfy against individual officials, advocates have made numerous efforts to sidestep the adverse aspects of *Monroe* and reach the financial reserves of governmental entities. Some litigants attempted to limit *Monroe* to cities so that section 1983 damage claims could be brought against other governmental entities such as school boards.⁹ Others attempted to distinguish the case because it referred only to damage claims and not pleas for restitutionary relief.¹⁰ Some imaginative advocates argued that where immunity had been waived for state law purposes, it should be considered waived for section 1983 purposes as well.¹¹ Finally, some claimants, finding section 1983 too restrictive, attempted to imply causes of action for civil rights violations against state and local governments directly from the fourteenth amendment.¹²

When claims were brought against states and their officers rather than local governmental units, the eleventh amendment became an additional complicating factor. The amendment bars suits by citi-

6. 365 U.S. 167 (1961).

7. *Id.* at 187.

8. *Cf. Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting) (difficult to get awards against officials who are "just trying to do their jobs").

9. *Keckeisen v. Independent School Dist.*, 509 F.2d 1062 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975).

10. *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

11. *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971).

12. *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978), *rev'd en banc* 591 F.2d 426 (2d Cir. 1979) (no need to imply remedy in light of *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978)).

zens against nonconsenting states in federal court.¹³ Thus, there is a direct conflict between the states' interest in immunity from suit and the needs of injured claimants attempting to collect for violations of their constitutionally protected rights.

The basic pattern for resolving this conflict was established in *Ex parte Young*, where railroad stockholders sued Minnesota state officials in federal court seeking equitable relief from an allegedly confiscatory tax statute.¹⁴ The attorney general of Minnesota raised the eleventh amendment as a defense to the federal court suit.¹⁵ The Court reconciled the conflicting interests by granting equitable relief against the attorney general who would enforce the taxing statute. The Court said the injunctive relief granted against the state official, in his official capacity, was not the equivalent of a suit against the state which the eleventh amendment would bar.¹⁶ Following *Young*, section 1983 claimants attempted to avoid conflicts with the eleventh amendment and reach the states' financial resources by bringing claims against state officers in their official capacities.

The Court has been unwilling, however, to push the *Young* fiction to its logical extreme. In *Ford Motor Co. v. Department of Treasury* the Court held that the eleventh amendment bars damage claims against state officers because monetary judgments would be satisfied out of the state treasury.¹⁷ Several years later, the Court in *Edelman v. Jordan* further refined the rules of relief when the fourteenth amendment, through section 1983, clashed with the protection afforded states by the eleventh amendment.¹⁸ In *Edelman*, Illinois state officials failed to issue welfare payments in compliance with federal regulations. In addition to the injunctive relief clearly authorized by *Young*, the plaintiffs requested an award of the wrongfully withheld welfare benefits as "equitable restitution."¹⁹ The Court focused on the fact that the restitutionary relief, though directed in form at the state officer, was retroactive in nature and would be satisfied by the state's general revenues. Hence, the Court concluded that the restitutionary relief was indistinguishable from an award of damages against the state and was barred by the elev-

13. Even though the express language of the eleventh amendment clearly indicates that it does not apply to suits by citizens against their home states, it has historically been read to ban these suits. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

14. 209 U.S. 123 (1908).

15. *Id.* at 134.

16. *Id.* at 159-60.

17. 323 U.S. 459, 464 (1945).

18. 415 U.S. 651 (1974).

19. *Id.* at 664.

enth amendment.²⁰

After the *Edelman* decision, it appeared that states and state officials were well protected from damage claims for violations of civil rights. Apparently section 1983 failed to provide a remedy, forcing advocates to develop other theories of relief. However, following *Edelman*, the Court decided *Fitzpatrick v. Bitzer*²¹ and *Monell v. Department of Social Services*,²² two cases that rekindled interest in section 1983 as a viable means of obtaining damage awards against states.

For a number of years, the Court has recognized that in certain circumstances Congress has the constitutional power to withdraw the states' eleventh amendment immunity from damage suits. This authority was first recognized under Congress' broad commerce power.²³ More recently, the Seventh Circuit has recognized this authority under Congress' war powers.²⁴ *Fitzpatrick* extended this abrogation authority to congressional action based upon the fourteenth amendment.²⁵ Hence, *Fitzpatrick* raises the possibility that the enacting Congress might have intended section 1983 to apply to states and thereby implicitly abrogate the states' eleventh amendment immunity.

In *Monell* the Court undertook an extensive evaluation of the legislative history of section 1983 and concluded that the enacting Congress did intend for the Act to authorize suit against local governmental entities.²⁶ In so doing *Monell* expressly overruled the portion of *Monroe v. Pape* that held cities were not persons under section 1983.²⁷

III. CONGRESSIONAL INTENT: THE REQUISITE SHOWING

For a number of years courts, advocates and commentators have struggled over the clarity and extent of congressional intent that must be present before courts should hold that Congress removed

20. *Id.* at 668.

21. 427 U.S. 445 (1976).

22. 436 U.S. 658 (1978).

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

24. *Jennings v. Illinois Office of Educ.*, 589 F.2d 935 (7th Cir.).

25. *Fitzpatrick* settles any question following *Edelman* that state consent is necessary. The fact that state consent is unnecessary is clearly demonstrated by the circuit court's treatment of the issue in *Fitzpatrick*. The circuit court found clear congressional intent to authorize suit against the states; yet, it denied relief because there was no showing of state consent to suit. *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975). In contrast, the Supreme Court opinion, upon finding that Congress authorized suit, concluded that the eleventh amendment was not a bar, making no mention whatsoever of the absence of consent by the state. 427 U.S. at 456. *Fitzpatrick* also settles any question that Congress does not have constitutional power to unilaterally abrogate the states' eleventh amendment immunity.

26. 436 U.S. at 700-01.

27. *Id.*

the states' immunity.²⁸ The cases do not clearly and consistently proclaim whether the necessary intent need be found in the express statutory language or if it may be found in the legislative history. Although they do not consistently indicate how clear the congressional expression must be in order for the requisite intent to exist, these determinations are of crucial importance in order to develop rules by which section 1983 causes of action may be judged.

The Court's first two decisions dealing with congressional efforts to remove the states' immunity—*Parden v. Terminal Railway* in 1964²⁹ and *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare* in 1973³⁰—establish significantly different approaches for ascertaining congressional intent. In *Parden* the Court focused upon the broad language of the Federal Employers' Liability Act (FELA)³¹ and the need to provide plaintiffs with an effective remedy.³² In contrast, the *Employees* Court required clear language of congressional intent to remove state immunity, with little concern for the adequacy of the remaining remedy.

In *Parden*, employees of the state-owned railroad who were injured in the course of their employment sued the State of Alabama through its railroad company for monetary relief under the FELA.³³ The Act provided that “[e]very common carrier by railroad while engaging in commerce between any of the several States”³⁴ would be liable for injuries suffered by its employees, but it made no express mention of states or the eleventh amendment. The Court focused on the broad language of the Act and its purpose of providing all railroad workers with a viable, uniform remedy in federal court.³⁵ In concluding that Congress intended for the Act to apply to states, the Court reasoned that one class of plaintiffs would be without a remedy if it recognized the state's immunity.³⁶ The Court found that

28. Compare Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PENN. L. REV. 1203, 1272-77 (1978) with Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-95 (1976).

29. 377 U.S. 184 (1964).

30. 411 U.S. 279 (1973).

31. 45 U.S.C. §§ 51-60 (1972).

32. Justice Brennan, the author of *Parden*, is much more willing to find congressional intent to authorize citizen suits against states because, in his view, the states' immunity rests upon common law principles of sovereign immunity rather than the eleventh amendment. See *Fitzpatrick*, 427 U.S. at 457 (Brennan, J., concurring); *Employees*, 411 U.S. at 309 (Brennan, J., dissenting).

33. 377 U.S. at 184-85.

34. 45 U.S.C. § 51 (1972).

35. 377 U.S. at 188-90.

36. *Id.* at 190.

Congress' plenary commerce power provided constitutional authority to enact this legislation and that by commencing the operation of a railroad twenty years after passage of the Act the State of Alabama had consented to being governed by the FELA.³⁷

In *Employees*, workers in state mental hospitals sued Missouri state officials to recover overtime pay to which they were entitled under the Fair Labor Standards Act (FLSA).³⁸ The statutory language, extending to "[a]ny employer,"³⁹ literally covered the state just as in *Parden*. Since the definition of "employer" had been amended in 1966 to remove a clause which had previously excluded employers of state and local workers in hospitals, schools and public institutions, the Act clearly applied to states and state employees.⁴⁰ Nevertheless, the Court barred the federal court suit, finding the statutory language insufficient due to lack of "clear language that the constitutional immunity was swept away."⁴¹ Unfortunately, the Court did not indicate what type of clear language would satisfy its standards.⁴²

It is likely that the *Employees* Court's strict clear language rule reflects the majority's unexpressed fear that Congress did not have the constitutional power to regulate the wages of state employees.⁴³ Mr. Justice Douglas, the author of the *Employees* opinion, had dissented in *Maryland v. Wirtz* where the Court denied a constitutional challenge to the FLSA.⁴⁴ In *Wirtz*, Justice Douglas argued that the statute was an unconstitutional intervention into state fiscal affairs.⁴⁵ His fears came to fruition in *National League of Cities v. Usery* where the Court overruled *Wirtz* and found the FLSA to impinge unconstitutionally upon integral state functions reserved to the states by the tenth amendment.⁴⁶ *National League* moots *Employees* on its facts, but the rules of construction established in *Employees* have been carried forward in varying degrees to later cases.

37. *Id.* at 192.

38. 29 U.S.C. §§ 201-219 (1972).

39. *Id.* § 216(b).

40. 411 U.S. at 283. *Employees* clearly illustrates that two related issues are involved. First, does the Act literally reach states, *i.e.*, are states "persons" under the Act? Second, did Congress intend to remove the states' immunity? The "clear language requirement" speaks to the second issue and will be used in that fashion in this note.

41. 411 U.S. at 285. Only Justice Brennan felt that *Parden* controlled this case. *Id.* at 298 (Brennan, J., dissenting).

42. *But see Fitzpatrick*, 427 U.S. 445 (1976).

43. *See Field*, *supra* note 28, at 1257.

44. 392 U.S. 183 (1968).

45. *Id.* at 203 (Douglas, J., dissenting).

46. 426 U.S. 833 (1976).

In *Fitzpatrick*⁴⁷ male state employees challenged a Connecticut state retirement plan which allegedly discriminated against their sex in violation of Title VII of the Civil Rights Act of 1964.⁴⁸ Title VII forbids discrimination in employment based on race, sex, color or national origin. It was clear that Title VII applied to states and state employees. The definition of "person" was amended to include "governments, governmental agencies, [and] political subdivisions."⁴⁹ The exclusion of "a state or political subdivision" was removed from the definition of "employer."⁵⁰ Finally, the amendments broadened the civil remedies previously available to persons aggrieved by public employers.⁵¹

Fitzpatrick is significant because the Court concluded that Title VII allowed suits for damages against the states without mentioning the *Employees*' requirement of clear language of congressional intent to lift eleventh amendment immunity.⁵² The Court's silence can be interpreted in either of two ways. First, the clear language rule of *Employees* was prompted by the suspected unconstitutionality of the FLSA.⁵³ Hence, the rule should not be strictly applied where the legislation is on firm constitutional ground. Second, the Civil Rights Act of 1964 was enacted under section five of the fourteenth amendment,⁵⁴ and section five legislation may require a lesser showing of congressional intent to overcome the eleventh amendment barrier.⁵⁵ This interpretation is supported by the Court's evident reliance on the fact that the fourteenth amendment, unlike article I,⁵⁶ was addressed directly to the states, and the

47. 427 U.S. 445 (1976).

48. 42 U.S.C. §§ 2000e-2000e-17 (1972).

49. *Id.* § 2000e(a).

50. *Id.* § 2000e(b).

51. *Id.* §§ 2000e-5(a) to -5(g).

52. Nonetheless, Justice Rehnquist, the author of *Fitzpatrick*, writing in a later case, indicated that the statutory language reviewed in *Fitzpatrick* constituted "express statutory waiver of the State's immunity." *Quern v. Jordan*, 99 S. Ct. 1139, 1147 n.16 (1979).

53. See *Field*, *supra* note 28, at 1251.

54. U.S. CONST. amend. XIV, §§ 1, 5 state in relevant part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

55. In *Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978), also involving legislation based on section five, the Court allowed a lesser showing of congressional intent to overcome the eleventh amendment barrier. However, in *Quern v. Jordan*, 99 S. Ct. 1139 (1979), the Court placed little significance on this when it was raised by Justice Brennan in dissent.

56. Both the Federal Employers' Liability Act in *Parden* and the Fair Labor Standards Act in *Employees* were enacted under Congress' article I commerce power. See *Parden*, 377

Court's assertion that the eleventh amendment is limited by section five of the fourteenth amendment.⁵⁷

Two years following *Fitzpatrick*, in 1978, the Court again found congressional abrogation of eleventh amendment immunity in a fourteenth amendment context. In *Hutto v. Finney* prisoners in Arkansas state prisons brought a section 1983 action alleging cruel and unusual punishment in violation of the eighth and fourteenth amendments.⁵⁸ The plaintiffs obtained prospective injunctive relief which was permissible in accordance with established Supreme Court decisions.⁵⁹ The plaintiffs' lawyers received an award of attorney fees under an amendment to 42 U.S.C. § 1988, the Civil Rights Attorney Fees Award Act of 1976,⁶⁰ for their efforts on appeal. The state challenged the attorney fees as an award of damages against the state barred by the eleventh amendment.

Mr. Justice Stevens, writing for the majority in *Hutto*, recognized that the Act's broad language speaking to "any action or proceeding to enforce . . . [42 U.S.C. § 1983]" literally applied to actions against states.⁶¹ Moreover, in response to the state's argument that the *Employees'* clear language test required explicit statutory language removing the immunity, the Court relied upon the legislative history.⁶² The House and Senate Reports clearly showed that Congress intended for states to pay attorney fees awards.⁶³ This is significant because the Court had never before relied upon legislative history to find congressional intent to abrogate the states' immunity.

The Court justified its relaxation of the clear language rule and reliance on the legislative history by emphasizing that in section 1988 attorney fees were awarded as "costs" which have always been awarded independently of the eleventh amendment.⁶⁴ The Court

U.S. at 190; *Employees*, 411 U.S. at 289 (Marshall, J., concurring).

57. 427 U.S. at 453-56.

58. 437 U.S. 678 (1978).

59. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908).

60. The Act states: "In any action or proceeding to enforce a provision of . . . [42 U.S.C. § 1983] . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1978).

61. 437 U.S. at 693-94.

62. The Court disregarded the clear language rule which had previously been read to require express congressional intent to remove the eleventh amendment immunity on the face of the statute. See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare*, 411 U.S. 279, 285 (1973); Tribe, *supra* note 28, at 694-95.

63. 437 U.S. at 694 (quoting H.R. REP. No. 1558, 94th Cong., 2d Sess. 7 (1976) and S. REP. No. 1011, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908).

64. 437 U.S. at 695.

also reasoned that section 1988 attorney fees were not damage awards but rather recovery of expenses necessarily incurred to effectuate constitutional rights.⁶⁵ Finally, the award of attorney fees in *Hutto* was not considered to be a significant financial burden on the states as was the award of overtime wages sought in *Employees*.⁶⁶

The Court's felt need to justify its reliance upon the legislative history is without basis. In making its decisions, the Court should rely upon whatever relevant and credible evidence the parties offer regardless of its source. To do less is to suggest that judicial blinders will result in a superior decision. Some of these factors may be relevant in determining whether Congress intended to abrogate the states' immunity but their use here is unjustified.⁶⁷ The courts should have the ability to distinguish between legislative histories that illuminate and those that obfuscate.

IV. 42 U.S.C. § 1983: DID THE 42D CONGRESS INTEND FOR THE REMEDY TO REACH THE STATES?

The rampant lawlessness and violence perpetrated upon Negro citizens and their supporters in the South following the Civil War motivated Congress to enact the Civil Rights Act of 1871.⁶⁸ The Act was designed to accomplish two purposes. First, it created a civil remedy for persons deprived of their rights under color of state law and imposed criminal penalties upon members of conspiracies formed to deprive citizens of their rights. Second, it empowered the President to intercede into the internal affairs of the states to put down lawless activities which threatened the people and prevented the public officers from fulfilling their duties.⁶⁹

The Act as passed contained seven sections, the first of which, providing for civil remedies, was later codified as 42 U.S.C. § 1983. In this section, Congress chose broad language intended to provide a remedy reaching far beyond the immediate problems caused by

65. *Id.* at 695 n.24.

66. *Id.* at 697 n.27.

67. The extent of the financial burden that the remedy will place on the states may be relevant in determining whether sufficient evidence exists to infer congressional intent to remove state immunity. But note that the federal courts have frequently imposed substantial fiscal strains on states when exercising judicial power. *See, e.g.,* *Milliken v. Bradley*, 433 U.S. 267, 293 (1977) (Powell, J., concurring) (eleventh amendment defense rejected and federal injunction upheld even though it ordered the State of Michigan to contribute nearly 6 million dollars to help desegregate the Detroit school system).

68. Congressional committees recorded volumes of testimony documenting the violence caused by the Ku Klux Klan. Excerpts of this testimony were read on the floor of Congress during the debate and can be found at CONG. GLOBE app., 42d Cong., 1st Sess. 117 (1871). *See also* 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 600 (1970).

69. B. SCHWARTZ *supra* note 68, at 591.

the Ku Klux Klan.⁷⁰ Since the 1960's, it has grown to become one of the most important remedies available to citizens wronged by the acts of governments and their agents.⁷¹

In *Monroe v. Pape*⁷² the Court exempted cities from the Act's sweep without undertaking a careful and thorough analysis of the 1871 Act to determine if Congress intended the statute to reach governmental entities.⁷³ The Court relied almost wholly upon the enacting Congress' rejection of the Sherman Amendment which would have made cities and towns liable for the damage caused by *all* persons within their borders.⁷⁴ However, the Sherman Amendment was not a proposal to change section 1 which was later codified as section 1983; rather it was an effort to add an additional section to the Act.

In *Monell v. Department of Social Services*, female employees of the New York City Department of Social Services challenged an official policy mandating maternity leave without pay prior to medical necessity as violative of their rights protected by section 1983.⁷⁵ The Court undertook an extensive analysis of the 1871 Act and concluded that its prior holding in *Monroe*—that cities were not persons for section 1983 purposes—was incorrect. The Court noted that Congress rejected the Sherman Amendment believing that it did not have the power to make local communities responsible for the acts of *all* persons in the locale.⁷⁶ Thus, the *Monell* Court held

70. In the words of Mr. Shellabarger, the bill's sponsor in the House of Representatives: [§ 1983] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship. CONG. GLOBE app., 42d Cong., 1st Sess. 68 (1871). See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

71. See Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904, 915 (1976).

72. 365 U.S. 167 (1961).

73. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 705, 708 (1978) (Powell, J., concurring).

74. For the final text of the Sherman Amendment see CONG. GLOBE, 42d Cong., 1st Sess. 749 (1871).

75. 436 U.S. 658 (1978).

76. In arguing against the Sherman Amendment, Representative Willard stated: [T]he Constitution has not imposed, . . . any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws . . . The Constitution has declared that to be the duty of the State. . . . What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State.

. . . . We should not require a county or a city to protect persons in their lives or property until we confer also upon them the power to furnish that protection. CONG. GLOBE, 42d Cong., 1st Sess. 791 (1871).

that due to the Act's broad language there was no reason why local governments should not be "persons" within the scope of section 1983.⁷⁷

The plain language of section 1983 satisfactorily complies with the standards applied by the Court in prior eleventh amendment cases. First, *Monell* clearly indicates that the term "person" reaches beyond natural persons to some types of legal entities.⁷⁸ Moreover, the plain language of the statute—"[e]very person who, under color of any statute"⁷⁹—is literally broad enough to reach the states. Just as the words "every common carrier"⁸⁰ in *Parden*, "employer"⁸¹ in *Employees* and the phrase "[i]n any action or proceeding to enforce a provision of . . . [42 U.S.C. § 1983]"⁸² in *Hutto* were found to literally reach the states, so too is the language of section 1983 of sufficient breadth to cover states in actions brought under this section.⁸³ Second, there is no language suggesting that states should be excluded.⁸⁴ In fact, the bill as originally introduced was entitled a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States."⁸⁵ Moreover, the fourteenth amendment, as the Court emphasized in *Fitzpatrick*, is expressly directed at the states and is a limit on the eleventh amendment.⁸⁶

77. 436 U.S. at 690. The Court also relied upon the definition of "person" in the Dictionary Act. This Act became law only two months prior to the passage of the Civil Rights Act of 1871, and it was intended to serve as a guide for interpreting the legislation that would follow. It 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, ch. 71 § 2, 16 Stat. 431 (current version at 1 U.S.C. § 1 (1972)).

78. 436 U.S. at 690. Following *Monell* the Court recognized that it was an open question whether states could be sued for all kinds of relief regardless of the eleventh amendment. See *Hutto v. Finney*, 437 U.S. 678, 703 (1978) (Brennan, J., concurring).

79. 42 U.S.C. § 1983 (1972).

80. 45 U.S.C. § 51 (1972).

81. 29 U.S.C. § 216(b) (1972).

82. 42 U.S.C. § 1988 (1972).

83. In the words of Senator Thurman, a chief opponent of the Act, "there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." CONG. GLOBE app., 42d Cong., 1st Sess. 217 (1871).

84. The Court in both *Parden*, 377 U.S. at 189, and more recently in *Hutto*, 437 U.S. at 694, relied in part upon the absence of exclusionary language to infer congressional intent to abrogate the states' immunity. Moreover, in *Hutto*, when Justice Stevens argued that section 1988 authorized fee awards against the states due to the Act's broad language and absence of exclusionary language, he cited section 1983 to support his argument. *Id.* at 694. This suggests that the language of section 1983, like that of section 1988, is sufficient to reach the states.

85. CONG. GLOBE, 42d Cong., 1st sess. 317 (1871).

86. [W]e think that the Eleventh Amendment . . . [is] necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the

In addition to the broad language of the statutes, the Court has focused upon the effect that denial of the remedy would have upon plaintiffs. The Court in *Hutto* focused in part upon the fact that if the eleventh amendment barred relief, then the Act would be meaningless as applied to states.⁸⁷ In *Parden* the Court emphasized that without the FELA injured plaintiffs would not have a remedy.⁸⁸ Similarly, if section 1983 does not reach the states, plaintiffs injured by the wrongful acts of government officials and officers pursuant to official policy or custom would have to seek monetary or retroactive relief against the individuals involved. Many times these judgments would be uncollectable, and plaintiffs would in effect have no remedy.⁸⁹ Furthermore, prospective injunctive relief is of limited assistance to an individual already injured in a tortious fashion by government officials under color of state law.⁹⁰

Even though a good basis exists to support extension to states of section 1983 claims for damages, the Supreme Court has strongly suggested that it will not approve these claims. In *Quern v. Jordan*⁹¹ the Court, in what Justice Brennan aptly described as "patently dicta,"⁹² reached out and ruled that states are not persons under section 1983. Thus, the eleventh amendment is a bar to monetary relief from states in section 1983 actions.⁹³ This issue was neither raised, briefed, nor argued by the parties to the suit.⁹⁴ In *Quern* the Court affirmed its earlier holding in *Edelman*⁹⁵ that section 1983 did

substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5 . . . it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

427 U.S. at 456 (citation omitted).

87. 437 U.S. at 698 n.31.

88. 377 U.S. at 190.

89. Assuming that the plaintiff obtained a judgment, if the defendant did not have tort insurance covering personal liability, the judgment may very well go unsatisfied. See FLA. CONST. art. X, § 4 (exempting the family residence from judicial liens); FLA. STAT. § 222.11 (exempting 100% of wages for personal labor or services of head of household from garnishment). See also *Bivens v. Six Unknown Agents*, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting).

90. The significance of this observation is limited by the fact that in recent years the Court has significantly limited the use of section 1983 for recovery for the tortious acts of state and local officials, agents and employees. See *Paul v. Davis*, 424 U.S. 693 (1976).

91. 99 S. Ct. 1139 (1979).

92. *Id.* at 1150.

93. *Id.* at 1146-47.

94. *Id.* at 1152 (Brennan, J., concurring in the judgment).

95. In affirming the holding of *Edelman*, the Court extended its rule to cover section 1983 suits against states for retroactive relief. *Edelman* did not control the case at hand by its own force and was subject to attack for two reasons. First, *Edelman* relied somewhat upon the erroneous holding in *Monroe*, that cities are not section 1983 persons, which was later overruled in *Monell*. See *Fitzpatrick*, 427 U.S. at 452. But see *Quern*, 99 S. Ct. at 1144 n.7 (Justice Rehnquist attempts to repudiate his own argument in *Fitzpatrick*). Second, in *Edelman*

not authorize retroactive awards against states by stating that any question about the validity of *Edelman* raised by *Fitzpatrick* and *Monell* were "largely dispelled"⁹⁶ in *Alabama v. Pugh*.⁹⁷

In *Pugh*, inmates of Alabama state prisons sued the State of Alabama and the Alabama Board of Corrections as well as numerous individual officials for violations of the eighth and fourteenth amendments. The federal district court granted and the Fifth Circuit Court of Appeals affirmed prospective, injunctive relief. Following a grant of certiorari, the Supreme Court held that the State of Alabama and the Alabama Board of Corrections could not be sued, without Alabama's consent, due to the eleventh amendment and ordered the circuit court on remand to dismiss the governmental entities from the suit.⁹⁸ Of course, all of the equitable orders were valid and enforceable against the state through its officers, amounting merely to harmless error.⁹⁹

In *Quern* the Court relied upon *Pugh*, a brief per curiam opinion issued on the last day of the term without briefs or arguments, to settle "any questions" raised concerning the continuing validity of *Edelman*. As Justice Brennan points out in *Quern*, *Pugh* did not even mention section 1983, and it did not deal with the issue of whether Congress abrogated Alabama's eleventh amendment immunity by making states "persons" for section 1983 purposes.¹⁰⁰ The Court's use of *Pugh* to "dispel" questions about the soundness of *Edelman* following *Monell* borders on the absurd.

In *Quern* the Court also relied upon *Fitzpatrick*, stressing that the amendments to Title VII of the Civil Rights Act of 1964 made express mention of states and state employees and clearly indicated that suit was authorized against them, whereas section 1983 speaks only to "persons."¹⁰¹ Nonetheless, the Court has previously authorized suits against states notwithstanding the eleventh amendment where express statutory mention of states was absent.¹⁰²

neither the parties nor the Court addressed the issue of whether a state is a person for section 1983 purposes.

96. 99 S. Ct. at 1144.

97. 438 U.S. 781 (1978).

98. *Id.* at 782.

99. Ever since the historic decision of *Ex parte Young*, 209 U.S. 123 (1908), the Court has enforced equitable decrees against state officers and, thereby, indirectly against the state. Nothing is changed by dismissing the action against the state. It is fully enforceable against the state through its officials.

100. 99 S. Ct. at 1151. *Pugh* noted only that the State of Alabama had not given its consent to suit. 438 U.S. at 782. Consent is relevant only where Congress has not removed the eleventh amendment immunity.

101. 99 S. Ct. at 1146-47.

102. Express mention of states in the statute is only one way that a showing of the requisite congressional intent may be made. *Quern* suggests that the Court will require a

The Court's holding in *Quern* is based upon the conclusion that the language and history of section 1983 do not reveal sufficient congressional intent to authorize suits against states. This conclusion is largely unfounded. When viewing all of the eleventh amendment cases and not just the ones that support the Court's present position, it is evident that sufficient evidence does exist for the Court to justify extension of the section 1983 remedy to the states.

V. CONCLUSION

In recent years the Burger Court's decisions have substantially reduced the scope and volume of section 1983 litigation.¹⁰³ The Court has heeded complaints that ready access to the federal forum has strained federal-state relations, overloaded the federal courts,¹⁰⁴ watered down the Constitution, and removed any incentive for state courts to assume responsibility for protecting civil rights of individuals. These considerations undoubtedly influence the Court's eleventh amendment decisions as well. In addition, the Court is clearly guided by its desire not to usurp congressional power by prematurely inferring intent to remove state immunity. While these considerations have merit, the Court should not be so overly cautious or sensitive to intergovernmental relations that individuals with legitimate claims are forced to seek relief solely in the very state courts that were found to be deficient in the past.

The requirement of a clear showing of congressional intent to authorize suit against states to overcome the eleventh amendment is justified.¹⁰⁵ However, the Court should be willing to locate this intent by reference to the history and purpose of the statute as well as to its express language.¹⁰⁶ If the Court stands by its dicta in *Quern*, it had adopted an unduly restrictive view of the statutory language and history of section 1983, and has given no weight to the broad purpose of the statute. Certainly, the statutory language of section 1983 is not as explicit as that examined in *Fitzpatrick*, nor is the legislative history as clear as that found sufficient in *Hutto*. However, nothing in those cases suggests that they establish

literal reference to states. Such a strict rule of construction would insure that the Court would not remove immunity when it was not intended though it may well deny intended relief and require too much of Congress. A preferable approach is that adopted in *Hutto*, a full search of legislative history and reasonable interpretation of statutory language.

103. See generally 15 DUQ. L. REV. 49 (1976).

104. *Section 1983 and Federalism: The Burger Court's New Direction*, *supra* note 71, at 915.

105. Cf. Tribe, *supra* note 28, at 693-96 (Congress rather than the Court must abrogate the states' immunity).

106. See generally 1974 DUKE L.J. 925, 961.

minimum standards. The broad language of the Act and the sweeping statements of the legislative proponents of section 1983 when coupled with the beneficial purpose of the Act should satisfy the abrogation requirements of the eleventh amendment.

Unquestionably, the Court's review of the legislative histories in *Quern* and *Hutto* and apparent rejection of the strict version of the *Employees* clear meaning rule is laudable.¹⁰⁷ Unfortunately, the Court stops short of the mark. The prospective, injunctive relief now available, if the Court stands by *Quern*, will not make plaintiffs whole for the physical, mental and financial injuries resulting from governmental violations of civil rights. It appears that civil rights advocates will either have to get the language of section 1983 amended or turn to other provisions of federal law such as the Civil Rights Act of 1964 to secure a viable damages remedy against the states.

107. The Court has constantly relied upon the legislative history of section 1983 when searching for congressional intent, and there is little reason for the Court to close its eyes to legislative histories merely because constitutional principles are involved. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 238 (1972).

