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THE EVOLUTION OF GOVERNMENT LIABILITY UNDER SECTION 1983

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A condition of affairs now exists in some states of the Union rendering life and property insecure . . . . [T]he proof that such a condition of affairs exists is now before the Senate. That the power to correct these evils is beyond the control of the state authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.

Therefore I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property and the enforcement of law in all parts of the United States.

President Ulysses S. Grant
Special message to the Senate and House of Representatives,
Washington, D.C., March 23, 1871.[1]

I. INTRODUCTION

The Fourteenth Amendment of the United States Constitution pro-

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1. Ulysses S. Grant, Special Messages, in 9 MESSAGES AND PAPERS OF THE PRESIDENTS 4081, 4081-82 (Bureau of Nat'l Literature, Inc. 1897).

vides that in order to enforce the law, Congress shall have the power to pass enabling legislation.[2] In the exercise of this power, Congress enacted the Civil Rights Act of 1871, 42 U.S.C. section 1983,[3] to implement the prohibition of slavery and involuntary servitude as required by the Thirteenth Amendment.[4] Although the Thirteenth Amendment abolished the institution of slavery, discriminatory actions by private citizens remained prevalent.[5]

In the period following the reconstruction of the southern state governments, congressional legislation shifted focus from prohibiting state action to prohibiting the actions of private individuals who, under color of law, violated the civil liberties of others.[6] Through the passage of the Civil Rights Act of 1871, Congress sought to enjoin discriminatory behavior which interfered with the free exercise of those civil liberties guaranteed by the Constitution.[7] The language of

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2. *See* U.S. CONST. amend. XIV, § 5 (providing that Congress shall have power to enforce provisions of this article by enacting appropriate legislation); *see also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989) (noting congressional power to override state immunity); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (announcing possibility of Congress providing appropriate legislation for private actions against states); Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (discussing ability to vest neither counties of state nor municipalities with state sovereign immunity).

3. Civil Rights Act of 1871, Pub. L. No. 96-170, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)). The Act provides in relevant part:

> 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 a action at law, suit in equity, or other proper proceeding for redress.

Id.

4. *See* U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment provides that, "[n]either slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*

5. *See Will*, 491 U.S. at 67 (Brennan, J., dissenting) (noting well established history of racial discrimination).

6. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968) (defining purpose of Civil Rights Act as prohibiting all racial discrimination). The focus of congressional enactments was to prohibit the discriminatory actions of private parties. *Id.* Congress' attention turned toward organizations such as the Ku Klux Klan which operated outside state laws. *Id.* However, in order to bring action under Section 1983, the plaintiff had the burden to show that the defendant took his or her actions under color of law. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961) (stating that allegation of facts which constitutes deprivation of constitutional right under color of state law is claim under 14th Amendment).

7. *Monroe*, 365 U.S. at 180. Congress sought to protect those rights and privileges afforded to citizens under the Fourteenth Amendment. *Id.* In fact, the title to the Act as origi-

Section 1983[8] prohibits a "person"[9] from denying those civil rights protected by the Constitution and the laws of the United States.[10] Prior to the enactment of Section 1983, Congress passed the Dictionary Act[11] to define the terms and clarify the implications of subsequent congressional enactments.[12] The Dictionary Act provided that a "person" included "bodies politic."[13] However, an ambiguous choice of words and conflicting statements in the legislative history of the Dictionary Act left the scope of Section 1983 indefinite.[14] Because of this uncertainty, courts were divided as to whether municipalities, and the states themselves, were to be considered "persons" liable under a Section 1983 cause of action.[15]

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nally introduced in the Congress was "[a]n Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Id.* at 171.

8. Civil Rights Act of 1871, Pub. L. No. 96-170, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)).

9. *Id.*

10. *See Will*, 491 U.S. at 66 (noting that § 1983 provides forum for deprivations of civil liberties); Monell v. Department of Social Servs., 436 U.S. 658, 672 (1978) (seeking to protect those civil rights which 14th Amendment ensures); *Monroe*, 365 U.S. at 167 (stating that Congress sought to give remedy for any deprivation of civil liberties). *See generally* Don B. Kates, Jr. & J. Anthony Kouba, *Liability of Public Entities under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136 (1972) (noting provision for remedy in federal courts for infringement of civil rights).

11. Dictionary Act of 1871, ch. 71, § 2, 16 Stat. 431 (current version at 26 U.S.C. § 7701 (1982)).

12. *See Will*, 491 U.S. at 78 (Brennan, J., dissenting) (interpreting rules of construction in Dictionary Act); *Monell*, 436 U.S. at 719 (consulting Dictionary Act to interpret § 1983).

13. Dictionary Act of 1871, ch. 71, § 2, 16 Stat. 431 (current version at 26 U.S.C. § 7701 (1982)). The Dictionary Act provided in relevant part: "[I"n all acts hereafter passed . . . the word "person" may extend and be applied to bodies politic and corporate . . . unless the contest shows that such words were intended to be used in a more limited sense." *Id.*

14. *See Will*, 491 U.S. at 69-70 ("[b]odies politic" interpreted as including municipalities or public corporations but not including states). *But see Will*, 491 U.S. at 78 (Brennan, J., dissenting) ("[b]odies politic" understood as including states at time of Dictionary Act's enactment).

15. Quern v. Jordan, 440 U.S. 332, 343 (1979) (affirming precedent that refused to abrogate state's 11th Amendment immunity); *see* Della Grotta v. Rhode Island, 781 F.2d 343, 349 (1st Cir. 1986) (determining that entity waiving its immunity can be person subject to liability under § 1983); Ruiz v. Estelle, 679 F.2d 1115, 1137 (5th Cir.) (concluding that agency of state not person under § 1983), *modified on other grounds*, 688 F.2d 266 (5th Cir. 1982), *and cert. denied*, 460 U.S. 1042 (1983); Gay Student Servs. v. Texas A & M Univ., 612 F.2d 160, 163-64 (5th Cir. 1980) (allowing state university to be considered person under § 1983), *cert. denied*, 449 U.S. 1034 (1980).

II. THE EMERGENCE OF MUNICIPAL LIABILITY UNDER SECTION 1983

To resolve conflicting interpretations of the legislative history regarding the scope of Section 1983 and the Dictionary Act, the United States Supreme Court granted certiorari in *Monroe v. Pape*.[16] In *Monroe*, the plaintiff sought Section 1983 damages because of an abusive search and detention by the Chicago police force.[17] In determining the liability of the city of Chicago, the Court held that neither a municipal entity nor a state was to be interpreted as a "person" within the ambit of Section 1983.[18] The Court observed that great uncertainty existed as to whether Congress possessed the power to override the immunity of the states and their municipalities.[19] Furthermore, without evidence in the language or legislative history of the statute of a specific intention to impose liability, the Court felt compelled to exclude states and municipalities from the scope of Section 1983.[20] In dicta, the *Monroe* Court declared that its decision to uphold state and municipal immunity under Section 1983 turned upon the absence of a clear and specific intent to override such immunity.[21]

Seventeen years later, the Court expressly overruled *Monroe* in *Monell v. Department of Social Services*.[22] Without expressed congressional intent to extend liability to states and municipalities, the Court held that precedent provided the basis for imposing liability.[23] Upon analyzing the legislative history of Section 1983 once more, the Court

16. 365 U.S. 167, 170 (1961).

17. *Id.* at 168-69.

18. *Id.* at 191-92. Congressional silence on the issue of liability in the light of the Supreme Court's recent decisions would suggest that Congress did not intend for a state or municipality to be considered a "person" within the language of the act. *See id.* at 186-87 (noting that lack of congressional discussion concerning Courts' interpretation of term "under color of law" indicated correct interpretation of term).

19. *Id.* at 190. The process of proposing, rejecting, and drafting the language of Section 1983 demonstrates Congress' own uncertainty in its ability to impose liability upon public entities. *Id.*

20. *Monroe*, 365 U.S. at 191. The Supreme Court concluded that statements in the legislative history of Section 1983 precluded the imposition of liability upon a municipality. *See id.* at 186-87 (noting congressional response to proposal municipal liability).

21. *Id.*

22. 436 U.S. 658, 701 (1978) (overruling *Monroe* by holding that policy compelling women to take maternity leave is properly contested under § 1983).

23. *Id.* at 663. Analyzing the legislative history of Section 1983 for the second time in *Monell*, the Supreme Court found that while no express intent to impose liability existed, stare decisis did not preclude the imposition of liability upon municipalities. *Id.* at 701.

held that municipalities were indeed persons subject to liability under the provision.[24] However, in *Monell* the Court clearly stated that a municipality will not be held liable under the doctrine of *respondeat superior* merely because it employs a person who violates the rights of others.[25] Rather, the Court held that, for municipal liability to arise under Section 1983, a custom or policy of the municipal entity must itself be the source of the discrimination.[26] Where a discriminatory practice can be justifiably seen as representing the official policy of the municipality, the municipal entity loses its immunity under Section 1983.[27] In addition, while dicta in the case referred to the Eleventh Amendment's grant of sovereign immunity to states,[28] the Court did not expressly voice an opinion upon the status of state immunity under a Section 1983 action.[29]

III. THE DISTINCTION BETWEEN STATE AND MUNICIPAL CORPORATIONS

The Supreme Court drew a distinction between state and municipal corporations for purposes of liability under a federal statute in the

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24. *Id.*

25. *Id.* at 691.

26. *Monell*, 436 U.S. at 690. Only by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be said to represent official policy, inflicts the injury . . ." will the government entity be liable. *Id.* at 694. The official who violates Section 1983 need not have expressed final authority to take the actions he takes. Liability will also extend where an employee of the governmental entity acts pursuant to delegated authority. *See Ex Parte* Young, 209 U.S. 123, 159-60 (1908) (liability for discriminatory actions may arise from actions taken pursuant to policy or custom of entity being sued); Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984) (implied authority given to employee by discretion granted him).

27. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978) (holding that where action of offending party "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" liability may extend to municipality). Likewise, case law has abrogated the immunity of county governments under Section 1983 where a discriminatory policy becomes so prevalent as to become a policy or custom of the county itself. *See* Van Ooteghem v. Gray, 628 F.2d 488, 494-96 (5th Cir. 1980) (county liable when employee dismissed for exercise of free speech), *modified en banc*, 654 F.2d 304 (5th Cir. 1981) (per curiam), and *cert. denied*, 455 U.S. 909 (1982).

28. U.S. CONST. amend. XI. The Eleventh Amendment to the United States Constitution provides: "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." *Id.*

29. *See Monell*, 436 U.S. at 690 n.54 (stating that decision encompassed only liability upon municipalities which are not protected under 11th Amendment).

landmark case, *Owen v. City of Independence*.[30] The Court reiterated that municipalities had consistently been refused immunity under the Eleventh Amendment.[31] By analogy, municipalities were deemed to be the equivalent of private corporations and thus were persons subject to liability under Section 1983.[32] Further, the Court stated that a municipality may not assert the "good faith" of its officials as a defense to avoid liability.[33] Historically, municipalities had not been afforded the same immunity as states and, therefore without express language in Section 1983 to create it, the Court reasoned that municipalities had no immunity.[34] While the issue of municipal liability had been resolved, the Court did not rule on state immunity under Section 1983.

IV. THE STATE AS A PERSON IN FEDERAL COURT

To address the issue of state liability in a Section 1983 action, the Supreme Court subsequently granted certiorari in *Quern v. Jorden*.[35] In *Quern*, the Court stated that Congress had not expressed the intent to extend liability to the states under Section 1983 when an action was commenced in federal court.[36] The Court could find no clear language which expressed a congressional intent to abrogate state immunity.[37] Without such, the Eleventh Amendment reserves to states the discretion to preserve their immunity.[38] However, *Quern* left unresolved the issue as to whether a state is a person under Section 1983 subject to liability in state courts when the Eleventh Amendment does not apply.[39]

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30. 445 U.S. 622, 638-40 (1980).

31. *Id.* The Supreme Court stated that, under Eleventh Amendment analysis, "municipalities . . . were treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Id.*

32. *Id.* at 638-39.

33. *Id.* at 638.

34. *Owen*, 445 U.S. at 638.

35. 440 U.S. 332 (1979).

36. *Id.* at 345.

37. *Id.*

38. *Id.* at 335. The Supreme Court held that actions against the states are barred by the Eleventh Amendment. *Id.* at 339-41; *see also* Jordan v. Trainor, 563 F.2d 873, 875 (7th Cir. 1977) (to support cause of action notice must lie within confines of 11th Amendment).

39. Smith v. Department of Pub. Health, 410 N.W.2d 749, 763 (Mich. 1987), *aff'd sub nom.*, Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). *See generally* Nancy Black Sagafi-Nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 ST. LOUIS U. L.J. 373, 374 (1983) (discussing many proposed amendments to § 1983).

V. STATE LIABILITY UNDER SECTION 1983 IN STATE COURTS

Ultimately, in *Will v. Michigan Department of State Police*[40], a majority of the Supreme Court held that neither a state nor its officials, when acting within the proper scope of their duties, are persons within the ambit of Section 1983.[41] The Court reasoned that the state is immune under Section 1983 in the absence of the legislature's clear and specific intent to abrogate state sovereign immunity.[42] In so holding, the Court observed that the leading case of *Monell* extended liability to a municipality under Section 1983, but failed to impose such liability upon states.[43] In addition, the Court in *Will* explained that it would uphold the longstanding common law doctrine of sovereign immunity pursuant to the Eleventh Amendment's grant of immunity to states.[44]

In response to the assertion that state officials acting within the scope of their duties are persons under Section 1983, the majority declared that the doctrine of sovereign immunity equates an action against a state official with an action against the state itself.[45] The Court explained that its decision was consistent with *Monell* since the legislative history of Section 1983 does not expressly demonstrate the specific intent to override state Eleventh Amendment immunity.[46] As a result, the Court affirmed the decision of the Michigan Supreme Court by holding that a state is not a person within the meaning of

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40. 491 U.S. 58 (1989).

41. *See id.* at 71 (Chief Justice Rehnquist and Justices White, Rehnquist, O'Connor, Scalia and Kennedy recognized sovereign immunity of states in § 1983 action). *Id.* The state is not a person liable under Section 1983. *Id.* Furthermore, a suit against a state official who acted within the proper scope of his or her duties is in effect a suit against the state which is barred by the Eleventh Amendment. *Id.*

42. *Id.* at 64-65. The rules of statutory construction require express language to broaden the scope of a statute. *Id.*; *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985) (explaining that Congress must use clear and manifest language to override state sovereign immunity).

43. *See Will*, 491 U.S. at 70 (reasoning that Supreme Court could not impose liability upon state government in spite of previously holding that municipalities were not protected by 11th Amendment immunity).

44. *Id.* at 66-67 (assuming Congress was familiar with longstanding common law doctrine of sovereign immunity).

45. *Id.* at 71. An action against a state official acting within the proper scope of her duties is no different than an action against the state itself. *Id.* Therefore, the Supreme Court will preclude such an action as a mere attempt to circumvent congressional intent. *Id.*

46. *Id.* Both the Dictionary Act and Section 1983 fail to demonstrate in their language or legislative history a clear congressional mandate to abrogate the state's Eleventh Amendment immunity. *Id.*

Section 1983.[47]

Justice Brennan was joined by Justices Marshall and Blackmun in dissenting on the grounds that the Supreme Court incorrectly concluded that states possessed Eleventh Amendment immunity in a Section 1983 action.[48] Justice Brennan argued that sovereign immunity under the common law applies only to the sovereign which enacts the statute. Therefore, the dissenters argued that the majority in *Will* was misguided in releasing the states from liability.[49] Instead, Justice Brennan contended that any exemption from liability must depend upon the text, legislative history, and scheme of the law and not simply upon a formalistic rule of exclusion.[50] Justice Brennan stated that a study of the era when Congress enacted Section 1983 and the language of subsequent legislation demonstrates a clear resolve to punish violations of individual civil liberties.[51] Furthermore, Justice Brennan emphasized that aside from the awkward construction of Section 1983, the spirit of its policy to protect civil liberties demands that liability be imposed, regardless of whether the violator is an individual, a municipality, or a state infringing upon those rights.[52]

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47. *Will*, 491 U.S. at 71. The lack of a clear expression of congressional intent solidified the Supreme Court's decision to uphold the sovereign immunity of the states under the Eleventh Amendment and the common law. *See id.* at 69-70 (noting that although state official is person, suit against official's office is actually suit against state).

48. *Id.* at 72 (Brennan, J., dissenting). Criticizing the majority, Justice Brennan noted that "[o]ne might expect that this statutory question would generate a careful and thorough analysis of the language, legislative history, and general background of § 1983. If this is what one expects, one will be disappointed by today's decision." *Id.*

49. *Id.* at 73-74 (Brennan, J., dissenting). Justice Brennan concluded that, the Supreme Court was misguided in implying a preservation of immunity to the states from the language of Section 1983. *Id.* Justice Brennan noted that common law has shown that only the enacting sovereign presumptively retains immunity under its laws. *Id.* at 73. Justice Brennan argued that the Supreme Court should not grant immunity to the states in the absence of a clear expression of legislative intent to do so. *Id.* at 73-74.

50. *See id.* 73-74 (Brennan, J., dissenting) (explaining that aim of statute should not be disregarded simply because it is not explicit). Brennan's position was that the court should not adhere to a presumption of immunity on behalf of states, but rather, the majority should have considered the purpose for which Section 1983 was enacted. *See id.* at 73 (noting aim of § 1983 was clearly designed for public good).

51. *Will*, 491 U.S. at 84-85 (Brennan, J., dissenting). As Justice Brennan explained, Congress, during the period of Reconstruction, had taken control of the governments of the former Confederate States. *Id.* The balance of powers between the states and the federal government was in a period of flux. *Id.* Therefore, Justice Brennan concluded that it was not unreasonable to assume that Congress intended to extend liability to the states to protect the civil liberties for which a war had just been waged. *Id.* at 85.

52. *See id.* at 82-83 (Brennan, J., dissenting). Justice Brennan criticized the majority for determining that Congress could not have intended that states be persons based upon an awk-

In his dissent, Justice Stevens also argued that the Court should impose liability upon the states.[53] Justice Stevens noted that in a series of decisions, the Court had placed the burden of liability upon states where interests in equity outweighed interests in state sovereign immunity.[54] Justice Stevens also explained that in several prior instances, the Court had extended liability to a state when an agent or public officer was named as a nominal party to the suit.[55] However, Justice Stevens concluded that there is no need to resort to such formalities because states should be named as direct defendants in Section 1983 actions.[56]

In *Will*, the Court correctly reasoned that a state is not a person under Section 1983 within the constraints of the Eleventh Amendment without a clear statement of specific legislative intent to extend liability.[57] The Tenth Amendment reserves to states those powers which are not specifically granted to the federal government.[58] Therefore, in the absence of a statement by the Congress to usurp state sovereign immunity, the Court concluded that the general intent of Congress in enacting Section 1983 should be interpreted as conforming to the Court's decisions in *Monell* and *Quern*.[59] However,

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ward reading of Section 1983 with the term "State" substituted for "person." *See id.* (noting that Court had previously construed awkward term "white persons" to include number of entities other than individuals). Justice Brennan concluded that such a test would be too unforgiving and he further asserted that the spirit of the law demands the extension of liability to states. *See id.* at 82 (emphasizing § 1983's focus on state action).

53. *Id.* at 93 (Stevens, J., dissenting). Justice Stevens concluded that the language of the legislative history and the purpose for which Section 1983 was enacted were sufficient to justify extending liability to the states. *Id.*

54. *Id.* at 89-90 (Stevens, J., dissenting). Furthermore, Justice Stevens stated that in the past, the Supreme Court had held that the desire to deter future deprivation of civil liberties sufficiently outweighs state interest in Eleventh Amendment immunity. *Id.* at 90.

55. *See Will*, 491 U.S. at 89 (Stevens, J., dissenting) (arguing for state liability through procedure of placing name of public official as nominal defendant).

56. *Id.* at 92 (Stevens, J., dissenting). Justice Stevens argued that states should be liable under Section 1983 without the necessity of inventing a nominal party for purposes of the suit. *Id.*

57. *Id.* at 66-67. The Eleventh Amendment grants to the states a general immunity from liability in the federal courts. *Id.* However, this immunity can be revoked by specific language from Congress. *Id.* at 65. In this instance, the Supreme Court stated that such language or expression of intent was lacking and therefore state sovereign immunity must be upheld. *Id.* at 65-67.

58. *See* U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

59. *See Will*, 491 U.S. at 66-67; Quern v. Jordan, 440 U.S. 332, 342 (1979) (finding no

the problem in *Will* flowed from the decision of the Court to preclude a party from filing a Section 1983 suit against a state in any forum, even if the state consented.[60] While the Court's decision affirmed the principles of stare decisis, it left a party without a remedy for the deprivation of his or her civil liberties.[61]

The difficulty with the decision in *Will* stemmed from the fact that a class of potential litigants is left without a forum in which to seek redress for violations of their constitutionally guaranteed civil liberties.[62] By determining that the Eleventh Amendment and an insufficient statement of congressional intent precluded a states from being sued as a person under Section 1983, the Court prevented a plaintiff from litigating a potentially meritorious cause of action simply because of the defendant's status as a state.[63] However, the majority did not preclude Congress from overriding a state's sovereign immunity and granting the plaintiff his or her legal recourse.[64] Nevertheless, the Court correctly preserved state exemption from liability under Section 1983 given the weight of stare decisis and the lack of specific congressional intent.[65]

However, the decision of the majority in *Will* left to the discretion of Congress the possibility of amending Section 1983 to override state Eleventh Amendment immunity.[66] The majority of the Court rea-

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support for proposition that Congress intended to remove state immunity); *see also* Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978) (finding municipalities immune to § 1983 causes of action).

60. *Will*, 491 U.S. at 85 (Brennan, J., dissenting).

61. *Id.* (explaining that states are not within category of permissible defendants).

62. *See id.* at 71 (holding that states and state officials acting in their official capacities are immune from § 1983 action). Because states and state officials acting within their official capacity are not capable of being sued under Section 1983, violations of a citizen's civil liberties by the state are not actionable. *Id.* at 66.

63. *Id.* The Eleventh Amendment grants a general immunity to states from liability in a federal forum. *Id.*

64. *Will*, 491 U.S. at 66-67. Congress does possess the power to override a state's Eleventh Amendment immunity. However, to do so, Congress must explicitly declare their intent. *Id.* at 66. The Supreme Court stated that Congress possessed "undoubted power under § 5 of the Fourteenth Amendment to override that immunity." *Id.*

65. *See id.* at 63-64 (citing cases in support of maintaining state immunity). In affirming the lower court's decision, the Supreme Court cited precedent which implicitly maintained that states are not persons subject to liability under Section 1983. *Id.* Furthermore, the language in the legislative history of Section 1983 falls far short of satisfying the need for explicit language to override state sovereign immunity. *Id.* at 65.

66. *Id.* at 66. Congress has the express power to override state Eleventh Amendment immunity.

soned that it is within Congress' power to remove state immunity under Section 1983. However, such a decision must be expressed by clear and specific language.[67] While the Tenth Amendment reserves to the states those powers not enumerated in the Constitution,[68] the Supremacy Clause provides that federal law supersedes state law when it governs the same subject.[69] Therefore, it is possible for Congress to remove state immunity by federal statute.[70] However, the majority found no explicit language aimed at this purpose in the legislative history of Section 1983.[71] The majority opinion in *Will* quite properly determined that until Section 1983 is amended with clear language to abrogate state immunity, a Section 1983 action cannot be sustained against a state.[72]

In *Will*, the dissenting Justices complained that the majority's holding incorrectly turned upon the application of the Eleventh Amendment.[73] However, the majority opinion stated that such an application of the Eleventh Amendment was necessitated by an absence of specific legislative intent, a conclusion which the dissenting

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67. *Id.* Congress' power to override the Eleventh Amendment's grant of sovereign immunity to the states must be exercised by express language conveying a clear intent. *Id.* at 65-66.

68. U.S. CONST. amend. X.

69. *See* U.S. CONST. art. VI, cl.2. The clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

70. *See* Smith v. Department of Pub. Health, 410 N.W.2d 749, 763 (Mich. 1987) (noting that state courts must recognize federal statutes), *aff'd sub nom.*, *Will*, 491 U.S. at 58; *see also Atascadero State Hosp.*, 473 U.S. at 242 (stating that for Congress to abrogate state immunity, its intentions must be unmistakably clear).

71. *See Will*, 491 U.S. at 65 (noting lack of language in § 1983 evidencing intent to abrogate immunity of states from liability in federal courts). Such a conclusion is evidenced through a study of the legislative history behind the enactment of Section 1983. *Id.* at 68-69.

72. *Id.* at 65. The Supreme Court asserted that state sovereign immunity could not be overturned in the absence of a clear expression of intent to do so by the legislature. *Id.* The majority stated that the legislative history does not evidence a clear intent to extend liability. *Id.* Therefore, the Supreme Court held that a state is not a person subject to liability under Section 1983. *Id.* at 71.

73. *Id.* at 76 (Brennan, J., dissenting). Justice Brennan concluded that since this action was filed in state court, the Eleventh Amendment did not apply. *Id.* The strictures which the Eleventh Amendment imposes on legislative construction do not pertain to actions in state courts. *Id.* Therefore, Justice Brennan argued, the majority incorrectly assessed that Section 1983 was unenforceable against the states. *Id.*

Justices were unable to refute.[74] In response, the dissenting Justices called upon the Court to expand its inquiry into the intent of the framers of Section 1983 by looking into the scheme of the law. Nevertheless, such an inquiry demonstrated that a state is not a person under Section 1983.[75] Furthermore, the majority denied the dissenters' calls for an application of the spirit of the law. The majority stated that, in the absence of a clear statement of that spirit, it is the prerogative of the legislative branch rather than the judiciary to draft legislation to override existing state sovereign immunity.[76]

The preservation of state sovereign immunity under a Section 1983 action in a state court clarified the confusion created by prior case law. In so deciding, the *Will* Court preserved the legislature's role to make law. By not amending Section 1983 after a series of Supreme Court decisions restricting its scope, Congress left the Court with no option under the strictures of stare decisis but to uphold state immunity. While a class of plaintiffs are left without a judicial cause of action, the Court in *Will* left an avenue open for the legislature to afford plaintiffs judicial recourse by amending Section 1983. In its decision to limit the scope of Section 1983, the Court discerned that the legislature is more properly equipped to determine the propriety of extending liability to states under a Section 1983 action.

VI. ARE STATE OFFICIALS LIABLE UNDER SECTION 1983?

While the *Will* decision ended the debate over whether states can be

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74. *Will*, 491 U.S. at 65-66. The Eleventh Amendment is a law of the United States which cannot be superseded unless a clear intent to do so is expressed by Congress. *Id.* at 65. Section 1983 provides for a federal forum in civil rights actions. If states are persons subject to such an action, federal courts would in effect be hearing an action against a state. *Id.* at 65-66. Therefore, absent a specific congressional intent to abrogate the Eleventh Amendment's grant of immunity to states, and absent the consent of states, the federal judiciary is an improper forum in which to seek redress. *Id.* at 66.

75. *Id.* at 92 (Stevens, J., dissenting). The intent of Congress was to prevent violations of federally protected civil rights. *Id.* In pursuit of this goal, the Supreme Court should broadly interpret the scope of Section 1983 and thus include states as persons subject to liability. *Id.* However, the majority stated that the legislative history as well as the statute itself fail to evidence a clear resolve to impose liability upon the states. *Id.* at 64-65.

76. *Id.* at 89-90 (Stevens, J., dissenting). Justice Stevens called on the Supreme Court to weigh the concern for equity against state sovereign immunity. *Id.* at 89. In Justice Stevens' opinion, the interests in ending or preventing civil rights violations outweighed state interests in immunity. *Id.* However, the majority explained that it saw no reason to abandon a policy well grounded in stare decisis when to do so would clearly act to circumvent the intent of Congress. *Id.* at 71.

sued under Section 1983 in the state courts, it did not resolve the question of whether state officials can be sued individually.[77] Recently, in *Hafer v. Melo*[78] the Supreme Court revisited its decision in *Will* in order to determine whether state officials acting within their official capacities are persons subject to individual liability under Section 1983.[79] *Hafer* involved a suit by discharged employees of the Auditor General of Pennsylvania.[80] Following the election of Barbara Hafer to the position of Auditor General, she fired a number of employees who she alleged had received their positions through illegal payments to one of her predecessor's employees.[81] Melo and other employees brought suit under Section 1983 alleging that they were dismissed for their political affiliation.[82]

The district court dismissed their cause of action concluding that it was barred because state officials could not be held liable for actions taken in their official capacity.[83] The trial court based its holding on the *Will* decision which affirmed state immunity in Section 1983 actions.[84] Upon appeal, the Third Circuit Court of Appeals reversed the trial court.[85] The appellate court based its decision upon a statement in *Will* which asserted that state officials could be sued in their official capacities for injunctive relief.[86] The court of appeals interpreted that statement as demonstrating a broader intent by the Supreme Court to extend individual liability to state officials acting within their official capacities.[87]

Upon appeal to the Supreme Court, the decision of the court of

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77. *Compare* Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (state officials sued in official capacity not persons subject to liability under § 1983) *with* Hafer v. Melo, __ U.S. __, __, 112 S. Ct. 358, 365, 116 L. Ed. 2d 301, 313 (1991) (state officials are liable under § 1983 for actions taken in their individual capacities).

78. __ U.S. __, 112 S. Ct. 358, 116 L. Ed. 2d 301.

79. *Id.* at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 309.

80. *Id.* at __, 112 S. Ct. at 360, 116 L. Ed. 2d at 308.

81. *Id.* at __, 112 S. Ct. at 360-61, 116 L. Ed. 2d at 308.

82. *Hafer*, __ U.S. at __, 112 S. Ct. at 360-61, 116 L. Ed. 2d at 308.

83. *Id.* at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 308.

84. *Id.*; *see also Will*, 491 U.S. at 71 (holding that state are immune from § 1983 actions).

85. Melo v. Hafer, 912 F.2d 628, 643 (3d Cir. 1990).

86. *Id.* at 635 (citing *Will*, 491 U.S. at 71 n.10).

87. *Id.* at 635-36; *see also Hafer*, __ U.S. at __, 112 S. Ct. at 365, 116 L. Ed. 2d at 313 (stating that state officers are not immune from liability under § 1983). The court of appeals reasoned that an individual could be considered a "person" if he were also a public official being sued in his individual capacity or a private person who has conspired in concerted and illegal action with a public official. *Melo*, 912 F.2d at 635-36. *See generally* William Burnham & Michael C. Fayz, *The State as a "Non-Person" under § 1983: Some Comments on Will and*

appeals was affirmed.[88] Justice O'Connor wrote the opinion of the Court in which all of the members joined except Justice Thomas who took no part in the proceedings.[89] The Court stated that it was forced to revisit its earlier decision in *Will* in order to determine whether a cause of action under Section 1983 may be sustained against a state official in an individual capacity rather than against the state itself.[90]

Hafer argued that the language in *Will* forbade all suits against state officials for damages arising from their official acts.[91] This contention arose from language in *Will* which prohibits a cause of action against state officials "acting in their official capacities."[92] However, the Court chose to interpret the language in *Will* as specifying the capacity in which the defendant was sued rather than the capacity in which the actions were taken.[93]

A distinction was made on the basis of whether the defendant was sued in his or her official rather than individual capacity.[94] The Court reasoned that a suit against a state official in his or her official capacity represents nothing more than a suit against the state.[95] As noted by the Court, *Will* clearly stated that "neither a state nor its officials acting in their official capacities are 'persons' under § 1983."[96] In official capacity suits, the immunity of the state is extended to its officials because the official is merely a nominal defendant standing in the place of the state.[97]

Suggestions for the Future, 70 OR. L. REV. 1, 42 (1991) (quoting Third Circuit's use of *Will* in deciding *Melo*).

88. *See Hafer*, __ U.S. at __, 112 S. Ct. at 365, 116 L. Ed. 2d at 313 (1991) (affirming Third Circuit decision).

89. *Id.* at __, 112 S. Ct. at 360, 116 L. Ed. 2d at 307.

90. *Id.* at __, 112 S. Ct. at 360-61, 116 L. Ed. 2d at 308-09.

91. *Id.* at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 308.

92. *Hafer*, __ U.S. at __, 112 S. Ct. at 362, 116 L. Ed. 2d at 310 (citing *Will*, 491 U.S. at 71).

93. *Id.* In particular, the Supreme Court explained that "the claims considered in *Will* were official-capacity claims, and the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id.*

94. *Id.* at __, 112 S. Ct. at 361-62, 116 L. Ed. 2d at 309-10.

95. *Id.* at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 309 (citing Monell v. Department of Social Servs., 436 U.S. 658, 690 n.55 (1978)). An official sued in her official capacity is merely a nominal defendant standing in the place of the governmental entity for which she serves. *Id.*

96. *Hafer*, __ U.S. at __, 112 S. Ct. at 362, 116 L. Ed. 2d at 310 (citing *Will*, 491 U.S. at 71). The Supreme Court in *Will* merely addressed official capacity suits against state officials. *Id.*

97. *See id.* at __, 112 S. Ct. at 361-62, 116 L. Ed. 2d at 309-10 (reasoning that official

To the contrary, Justice O'Connor reasoned that state officers sued in their individual capacities are persons subject to liability under Section 1983.[98] However, the Court did not embrace Melo's argument that there should be no distinction between individual capacity suits which complain of official rather than personal actions.[99] The goal of Section 1983 is to remedy the abuse of power by state officials.[100] Such abuse renders their actions outside the scope of their official capacity.[101] Therefore, the Court held that a state official may be sued in his or her individual capacity for actions taken in his or her official capacity which violate Section 1983.[102]

While the distinction between official capacity and individual capacity suits is confusing, once clarified it is quite simple. The Court's

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capacity suits are barred as infringing on state immunity). The Supreme Court cited an earlier decision as distinguishing between personal and official capacity suits. *Id.* (citing Kentucky v. Graham, 473 U.S. 159, 165 (1985)). Official capacity suits are nothing more than a pleading method by which to sue the state. *Id.* at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 309 (citing *Graham*, 473 U.S. at 165). In furtherance of this conclusion is the fact that when an official leaves office, his successor's name is automatically substituted for his own in the pleadings of official capacity suits in the federal courts. *Id.* (citing *Graham*, 473 U.S. at 166). *See generally* FED. R. CIV. P. 25(d)(1) (stating that officer's successor is substituted as party when public officer leaves office); FED. R. APP. P. 43(c)(1) (reciting same substitution principle). The state is the real party in interest in official capacity suits and it is the state's actions under color of law that are at issue. *See Hafer*, __ U.S. at __, 112 S. Ct. at 361-62, 116 L. Ed. 2d at 307-08 (citing *Graham*, 473 U.S. at 166). Therefore, the nominal party shares the same privileges as the real party, namely, state immunity. *Id.* at __, 112 S. Ct. at 362, 116 L. Ed. 2d at 309 (citing *Graham*, 473 U.S. at 167). Thus, official capacity suits are barred by state immunity. *Id.*

98. *Hafer*, __ U.S. at __, 112 S. Ct. at 365, 116 L. Ed. 2d at 313 (holding that suits against state officials in their individual capacity may be sustained under § 1983).

99. *Id.* at __, 112 S. Ct. at 364-65, 116 L. Ed. 2d at 312-13 (reasoning that officials sued in official capacity are immune from § 1983 liability because 11th Amendment bars such suits). *Contra* Cowan v. University of Louisville School of Medicine, 900 F.2d 936, 942 (6th Cir. 1990) (noting that officials can be personally liable for actions not taken in official capacity).

100. *See Hafer*, __ U.S. at __, 112 S. Ct. at 363, 116 L. Ed. 2d at 311 (citing Monroe v. Pape, 365 U.S. 167, 172 (1961)). Hafer asserted that there are two categories of official actions that can be taken by state officials. *Id.* The first are those actions necessary to the performance of the official's office. These cannot be a wellspring of Section 1983 liability. *Id.* The second are those actions which are not essential to the office and are subject to Section 1983 liability. *Id.* However, the Supreme Court rejected this distinction because state officials do not enjoy absolute immunity in their official acts. *Hafer*, __ U.S. at __, 112 S. Ct. at 364, 116 L. Ed. 2d at 312 (citing Scheuer v. Rhodes, 416 U.S. 232, 243 (1974)).

101. *Id.* at __, 112 S. Ct. at 364-65, 116 L. Ed. 2d at 312-13. State officials may be held liable in their personal capacity under Section 1983 for discriminatory acts regardless of whether these actions were outside regular governmental duties. *Id.* The mere fact that persons act within the powers of their office does not make them immune from liability. *Id.*

102. *Id.* at __, 112 S. Ct. at 364, 116 L. Ed. 2d at 312. A state official is not afforded state immunity when sued in an individual capacity. *Id.*

decision in *Will* distinguishes between official capacity and personal or individual capacity suits under Section 1983.[103] This distinction determines the capacity in which the party is sued.[104] If the defendant is sued in her official capacity, she is a nominal defendant standing in the place of the real defendant, namely the state.[105] In such instances, the state's immunity is extended to the defendant.[106] However, if the defendant is sued in her individual capacity the suit is not barred by the state's Eleventh Amendment immunity.[107]

The second distinction made by the Court does not turn upon the capacity in which the defendant is sued but rather upon the capacity in which the defendant acted when he allegedly violated Section 1983.[108] The Court held that an official of the state may be held liable when sued in an individual capacity for actions taken in the official capacity.[109] Clearly, by enacting Section 1983 Congress intended to prevent those who carry the authority of the state from infringing upon the civil rights of citizens.[110] Therefore, the Court rejected Hafer's contention that no liability can arise from actions taken in the official capacity of a state official.[111] On this basis, the Court affirmed

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103. *Id.* at __, 112 S. Ct. at 362-63, 116 L. Ed. 2d at 310-11 (citing *Will*, 491 U.S. at 71). The Supreme Court chose to use the distinction between official and personal capacity as the status in which the party is sued rather than the capacity in which the party acted when allegedly injuring the plaintiff. *Id.*

104. *Hafer*, __ U.S. at __, 112 S. Ct. at 362-63, 116 L. Ed. 2d at 310-11 (citing *Will*, 491 U.S. at 71).

105. *Id.*

106. *Id.*

107. *Id.* at __, 112 S. Ct. at 364, 116 L. Ed. 2d at 312-13. *See also* U.S. CONST. amend. XI (providing for state immunity in federal court).

108. *See Hafer*, __ U.S. at __, 112 S. Ct. at 363-64, 116 L. Ed. 2d at 312.

109. *Id.* at __, 112 S. Ct. at 365, 116 L. Ed. 2d at 313 (finding individual capacity suits based on official capacity actions permissible). However, Hafer argued that a further distinction should be made between actions taken which are essential and necessary to the performance of an official's duties and those which are not. *Id.* at __, 112 S. Ct. at 363, 116 L. Ed. 2d at 311. It was Hafer's contention that only those actions which were not essential or necessary to the performance of the office may subject the defendant to liability under Section 1983. *Id.* The Supreme Court rejected this view. *Id.* at __, 112 S. Ct. at 363-64, 116 L. Ed. 2d at 312.

110. *Id.* at __, 112 S. Ct. at 363, 116 L. Ed. 2d at 311 (citing *Scheuer*, 416 U.S. at 243). Congress' intention upon enacting Section 1983 was "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority for a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.*

111. *Id.* Hafer's position would extend an absolute immunity to state officials for their actions taken in their official capacity. *Id.* In rejecting this argument, the Supreme Court noted that it had previously extended absolute immunity to a very limited class of individuals in society. *Id.* at __, 112 S. Ct. at 363-64, 116 L. Ed. 2d at 312. The Eleventh Amendment only bars actions against state officials where recovery is sought from the state treasury. Such

the decision of the court of appeals and upheld suits under Section 1983 against state officials in their individual capacity for actions taken in their official capacity.[112]

VII. UNRESOLVED ISSUES: THE PLEADING PROBLEM

Justice O'Connor noted that the Third Circuit Court of Appeals looked to Melo's pleadings to determine whether Melo properly pled a cause of action against Hafer in her personal capacity.[113] Although the Supreme Court took note that various courts of appeals differ as to the stringency of their pleading requirements in Section 1983 actions, the Justices declined to resolve this issue because it was not properly before the Court.[114] However, the Court did reiterate the language in the court of appeals' decision that "it is obviously preferable for the plaintiff to be specific in the first instance to avoid ambiguity."[115] While this language is instructive, it is not a definitive proclamation by the Court as to the pleading standard.[116] By failing to enunciate a clear pleading requirement, the Court has left the courts of appeals in a quandary as to the proper standard. While the Court noted that it is always better to be as specific as possible in the pleadings of a case, its commentary does not advise the courts on a course of action when pleadings are not specific.[117]

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is the case where an official capacity suit is brought with a nominal defendant. *Id.* at __, 112 S. Ct. at 364, 116 L. Ed. 2d at 313 (citing *Scheuer*, 416 U.S. at 237).

112. *Hafer*, __ U.S. at __, 112 S. Ct. at 365, 116 L. Ed. 2d at 313.

113. Hafer v. Melo, __ U.S. __, __, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301, 308-09 (1991).

114. *Id.* The Court cited numerous circuits of the courts of appeals which did not have a stringent pleading requirement for a suit against a government official in their individual rather than official capacities. *Id.* (citing Houston v. Reich, 932 F.2d 883, 885 (10th Cir. 1991) (suit brought against police officer for using excessive force); Conner v. Reinhard, 847 F.2d 384, 394 n.8 (7th Cir. 1987) (city employee brought suit against city employer for retaliatory discharge), *cert. denied*, 488 U.S. 856 (1988); Lundgren v. McDaniel, 814 F.2d 600, 603-04 (11th Cir. 1987) (wife sued police for wrongful death of husband)). To the contrary, the Court also cited numerous circuits of the courts of appeals which apply a stringent pleading requirement. *Id.* at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 309 (citing Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989) (prisoners specifically pled individual capacity when suing Department of Corrections officials); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989) (fired secretary sued state official in official capacity to enjoin discharge as discriminatory)).

115. *Hafer*, __ U.S. at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 309 (citing Melo v. Hafer, 912 F.2d 628, 636 n.7 (3d Cir. 1990)).

116. *See id.* (stating that Court would not rule on pleading issue).

117. *See id.* (re-interating Third court's suggestion that pleadings be specific).

VIII. CONCLUSION

The Supreme Court's decision in *Hafer* culminates the quest to mark the boundaries of a Section 1983 action. The debate over who is subject to liability under Section 1983 has focused on the meaning of the term "person."[118] In the beginning, the term "person" was so narrowly construed that not even municipalities were included within its scope.[119] Subsequently, Section 1983 liability was extended to municipalities.[120] When confronted with the question of whether states are persons under Section 1983, the Court first held that states are not liable as persons in federal court[121] and later asserted that states are not persons for purposes of a suit in state court either.[122] In so holding, the Court announced that a government official could not be sued as an official of a state because to do so would indirectly impose liability upon the state.[123] However, under the Court's most recent decision in *Hafer*, a state official may be sued in his individual capacity for actions taken in his official capacity which infringe upon the individual civil rights of others.[124]

The outcome of the *Will* and *Hafer* decisions preserves the immunity of the states but also affords redress by allowing suits against the individual who discriminated. While action may be directly taken against municipalities and counties which deprive civil rights, an ac-

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118. Civil Rights Act of 1871, Pub. L. No. 96-170, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)). The Act provides that:

> 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.

Id.

119. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) (determining that municipalities do not qualify as persons under § 1983).

120. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978) (concluding that municipality is person under § 1983).

121. *See* Quern v. Jordan, 440 U.S. 332, 342 (1979) (holding that states not persons under § 1983 in federal court).

122. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989) (holding that states not persons under § 1983 in state courts).

123. *See* Hafer v. Melo, __ U.S. at __, 112 S. Ct. at 361, 116 L. Ed. 2d at 309 (citing *Monell*, 436 U.S. at 690 n.55 (1978) which states that suing state official makes official mere nominal defendant because liability would ultimately lie with state).

124. *Id.* at __, 112 S. Ct. at 365, 116 L. Ed. 2d at 313 (holding that state officials may be sued in their individual capacity).

tion may not be sought against a state until Congress amends Section 1983 to provide clear and explicit language overriding state Eleventh Amendment immunity. The historical distinction between the state government and that of a municipality or county precludes the extension of liability absent language which demonstrates congressional intent to do so. Therefore, the Court has left open the possibility that Congress could impose Section 1983 liability upon the states. After all, the premise of a policy which extends Section 1983 liability for civil rights violations to government entities is the belief that no one, not even the government, may violate those civil liberties guaranteed by the Constitution and laws of the United States.