Federal Civil Rights: Fact or Fiction? A Proposal to Remove Eleventh Amendment Immunity in Section 1983 Actions

Introduction

Professor Doe is a woman of color and a faculty member at a state university. The university denied her past two applications for tenure based on a partial hiring freeze for tenured positions. Two faculty positions in Professor Doe's department, however, have been filled with white male professors. Both of the professors were granted tenure during the same time period as Professor Doe's applications.

Professor Doe has applied for faculty positions at other comparable universities, but has not received any offers because she has been denied tenure in her current position. Both university officials and Professor Doe's colleagues insist that her performance is above reproach, and only the lack of adequate funding prevents granting her a tenured position.

Frustrated by the lack of any future advancement or job security, Professor Doe leaves her university position. The university replaces her with a highly recruited white male professor to whom they grant an immediate tenured position.

After learning of the university's action, Professor Doe files suit against the state university in federal court seeking damages for violation of her civil rights under federal civil rights statutes. She cannot bring suit in state court because the "state and its agencies" have not consented to federal civil rights suits brought in the state court system. The defendant university files a motion to dismiss claiming eleventh amendment immunity as a "state agency."

The federal court grants the university's motion. Professor Doe stands before the judicial system with federal civil rights but no judicial forum in which she can seek relief.[1]

The Eleventh Amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citi-

1. The Professor Doe hypothetical is an illustrative example that is referred to throughout this Note. The hypothetical serves to clarify the author's discussion of eleventh amendment immunity and its logical consequences.

zens of another State, or by Citizens or Subjects of any Foreign State."[2] The Eleventh Amendment does not by its terms prohibit citizens from bringing suits in federal courts against their states of residence. The Amendment has evolved, however, to preserve the states' sovereign immunity from private suits brought in federal court,[3] or when a private plaintiff challenges the federal constitutionality of a state official's action.[4] Recent Supreme Court decisions[5] give the states a near impenetrable immunity from suits filed by private citizens such as the suit filed by Professor Doe.[6]

Should federal courts be available to private plaintiffs, like Professor Doe, who seek relief from state actions that violate federal civil rights statutes? The current Supreme Court would answer with a definitive "no" based on its eleventh amendment doctrine. When Congress enacted 42 U.S.C. Section 1983 to protect against state violations of rights,[7] it could not have foreseen the Supreme Court's use of eleventh amendment doctrine to eviscerate Section 1983.[8] Congress must revitalize Section 1983 so it serves the purpose for which it was originally intended. In light of recent Supreme Court cases interpreting the Eleventh Amendment, Congress must mandate federal jurisdiction by depriving state defendants of an eleventh amendment defense when Section 1983 suits are brought by private plaintiffs in federal court. Legislative inaction will leave private citizens with unenforceable rights to equitable relief and damages for state violations of their federal civil rights.

The first section of this Note describes the history of the Eleventh Amendment. Major eleventh amendment cases are presented to demon-

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2. U.S. CONST. amend. XI.

3. United States v. Mississippi, 380 U.S. 128 (1965).

4. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

5. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989).

6. *See supra* text accompanying note 1.

7. 42 U.S.C. § 1983 (1988) 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.

8. *See* H.R. REP. NO. 548, 96th Cong., 1st Sess. 1 (1979). The House Report expressly states that the Ku Klux Klan Act of 1871 "created a right of action in Federal court" so that "an aggrieved citizen is provided a neutral Federal forum in which to air his complaint, instead of being forced to sue his state officials in State Courts." *See also* 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS 591 (1970) (Congress passed § 1 of the Ku Klux Klan Act to provide citizens a federal forum to hear their claims of alleged state violations of federal civil rights).

strate how the Supreme Court's eleventh amendment doctrine has expanded state sovereign immunity to constitutional dimensions.

The second section of this Note discusses Congress's constitutional authority to abrogate the states' eleventh amendment immunity to Section 1983 suits in federal courts. This section also identifies the rigorous standard of clarity that Congress must meet to abrogate effectively the eleventh amendment immunity currently enjoyed by the states.

The third section of this Note proposes an amendment to Section 1983, affirmatively granting federal jurisdiction over private plaintiffs' Section 1983 claims against state defendants.

After summarizing the arguments supporting the adoption of the proposed amendment to Section 1983, this Note concludes by arguing that there is a legislative imperative to revitalize Section 1983 to protect against state actions that violate civil rights guaranteed by the Fourteenth Amendment.[9]

I. History of the Eleventh Amendment

The Eleventh Amendment was ratified in response to *Chisholm v. Georgia*,[10] in which the Supreme Court took original jurisdiction over a common law contract suit filed by private citizens from South Carolina against the State of Georgia. The Court literally translated its Article III[11] grant of powers to exercise jurisdiction over the case based on party diversity.[12] Outraged by the Court's expansive reading of Article III,[13] the states swiftly responded by ratifying the Eleventh Amendment within five years of the unpopular *Chisholm* decision.[14] The Eleventh Amendment thus was intended to limit the diversity jurisdiction of federal courts.[15]

9. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in part that "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."

10. 2 U.S. (2 Dall.) 419 (1793).

11. U.S. CONST. art. III, § 2. Section 2 provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies between two or more States;— between a State and Citizens of another State . . . .

12. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 174-75 (1988).

13. *Id.* at 174.

14. *Id.*

15. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033 (1983).

A. *Hans v. Louisiana*: Changing the Party Diversity Focus

In the seminal case of *Hans v. Louisiana*,[16] the Supreme Court held that the Eleventh Amendment barred suits brought against a state by its own citizens as well as suits brought by citizens of another state. In *Hans*, a Louisiana citizen filed suit in federal court against the State of Louisiana alleging that the state violated the Contract Clause of the Constitution[17] by defaulting on bonds purchased by the plaintiff citizen. The *Hans* Court held that the Eleventh Amendment barred the exercise of federal jurisdiction over suits between a state and its own citizens unless the state expressly consented to suit in federal courts.[18] The Court recognized Louisiana's eleventh amendment defense claim even though the Amendment does not expressly prohibit federal jurisdiction over suits brought by citizens against their own states. Moreover, the *Hans* Court's inferred jurisdictional bar denied the plaintiff a federal forum to address an alleged violation of the federal Constitution.[19]

Hans constitutionalizes[20] state sovereign immunity under the Eleventh Amendment. Under *Hans*, a state cannot be haled into federal court unless it waives its sovereign immunity by consenting to suit in federal court.[21] The Court reasoned that to read the Eleventh Amendment too literally[22] would create an "anomalous result," in which a nonconsenting state may be "sued in the federal courts although not allowing itself to be sued in its own courts."[23] The *Hans* Court concluded that the states never would have ratified the Eleventh Amendment if this interpretation was intended because such a "supposition . . . is almost an absurdity on its face."[24]

The Supreme Court's eleventh amendment interpretation under *Hans* remained unchanged until the Court decided *Ex parte Young*[25] in 1908.

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16. 134 U.S. 1 (1890).

17. U.S. CONST. art. I, § 10, cl. 1.

18. *Hans*, 134 U.S. at 20-21.

19. *Id.* at 15.

20. In this Note, the term "constitutionalize" refers to the Court's determination that the states gain sovereign immunity under the federal Constitution. Prior to *Hans*, states retained sovereign immunity under common law principles. *See* Fletcher, *supra* note 15.

21. *Hans*, 134 U.S. at 13.

22. The Court described the literal application of the Eleventh Amendment as follows: "[I]n cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state . . . ." *Id.* at 10.

23. *Id.*

24. *Id.* at 15.

25. 209 U.S. 123 (1908).

B. *Ex parte Young*: Creating a New Defendant

In *Ex parte Young*, the Supreme Court allowed a federal court to exercise its jurisdiction over a private suit in equity filed against a state official, not the state itself. The plaintiffs in *Young* were stockholders in railroad companies that were subject to a Minnesota rate control statute.[26] The plaintiffs sought an injunction to enjoin the Minnesota state attorney general, Young, from enforcing the Minnesota statute because it allegedly violated the federal Constitution.[27] The federal circuit court issued a temporary injunction enjoining Attorney General Young from enforcing the statute against the railroad companies.[28] Young attempted to enforce the statute in state court despite the federal injunction. The federal circuit court responded by ordering Attorney General Young in contempt.[29] On appeal, the Supreme Court reasoned that state officials whose actions violated the federal Constitution were stripped of any authority associated with their state offices and thus were not legal representatives of the state. The *Young* Court held that state officials who acted unconstitutionally were therefore subject to suit in federal court.[30] *Ex Parte Young* Court pierced the states' armor of eleventh amendment immunity by allowing private plaintiffs to file suits against state officials in federal court. This pleading device creates a legal fiction by which unconsenting states,[31] through their officials, may be subject to federal court jurisdiction.[32]

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26. The Minnesota statutes set maximum rate schedules for both rail freight and passengers. The state law also directed the railroad companies to adopt and publish the statutory rates and imposed stiff fines and prison sentences upon any violators including an "officer, agent or representative . . . [of] any railroad company." *Id.* at 127-29.

27. The plaintiffs alleged that the Minnesota statutes violated the Equal Protection Clause and due process under the Fourteenth Amendment. *Id.* at 144.

28. *Id.* at 132.

29. *Id.* at 134.

30. The *Young* Court determined that the Eleventh Amendment was not relevant when a state official's act was

> alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.

Id. at 159.

Professor Tribe analogizes this result to the corporate ultra vires doctrine, which permits liability to attach to corporate officers who act beyond the scope of their employment. L. TRIBE, *supra* note 12, § 3-27, at 193.

31. This Note defines an "unconsenting state" as a state which retains its common law sovereign immunity because it has not consented to federal court jurisdiction.

32. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1116-17 (3d 1988).

Pursuant to *Ex parte Young*, Section 1983 plaintiffs may seek equitable relief from unconstitutional state actions by naming a state official and not the state as the party defendant.[33] When Section 1983 plaintiffs seek damages, however, is the defendant state official solely liable as an individual? If this is the case, then Section 1983 plaintiffs would be unable to recover substantial damage awards unless the named defendant owned equally substantial assets subject to adverse judgments—an unlikely circumstance. The relevant inquiry is whether a state may therefore be liable to Section 1983 plaintiffs through indemnification of its employees despite the Eleventh Amendment.

C. Relief Allowed Under the Eleventh Amendment

The Supreme Court addressed the relief issue in *Edelman v. Jordan*,[34] in which welfare recipients filed a Section 1983 class action against state officials in the Illinois Department of Public Aid for injunctive and declaratory relief.[35] The plaintiff class alleged that the state officials wrongfully withheld welfare benefits in violation of both federal law[36] and the Fourteenth Amendment[37] by exceeding the statutory time limits allowed to process applications for benefits. The class sought injunctive relief to compel the state officials to pay all benefits owed to wrongfully denied beneficiaries.[38] The federal district court granted the plaintiff class's request for injunctive relief and ordered the defendants to remit the "benefits wrongfully withheld to all applicants . . . who applied . . . and were determined eligible . . . ."[39]

In reversing the district court's judgment, the Supreme Court held that the *Ex parte Young* fiction[40] only applied to state officials when the plaintiff seeks *prospective* injunctive relief—that is, relief that calls for conforming future conduct.[41] The *Edelman* plaintiffs sought *retroactive* relief, however, in the form of "equitable restitution" of their wrongfully

33. *See* Edelman v. Jordan, 415 U.S. 651 (1974); *see also infra* notes 34-45 and accompanying text.

34. 415 U.S. 651 (1974).

35. *Id.* at 653.

36. The plaintiff class alleged that the defendants failed to disburse benefits and determine eligibility within the applicable time frame. The plaintiff class argued that the defendants' delays violated the Social Security Act, 42 U.S.C. §§ 1382-85 (1964). *Id.* at 655-56.

37. U.S. CONST. amend. XIV. The complaint alleged the defendants had violated the Equal Protection Clause of the Fourteenth Amendment by their four month refusal to process and allow the named plaintiff's claim "while processing and allowing the claims of those similarly situated . . . ." *Edelman*, 415 U.S. at 653 n.1.

38. *Id.* at 656.

39. *Id.*

40. *See supra* notes 31-32.

41. *Edelman*, 415 U.S. at 664.

denied benefits.[42] The Court reasoned that the retroactive relief sought

> requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner [the defendant state officials] was under no court-imposed obligation to conform to a different standard.[43]

The *Edelman* Court determined that the relief against the state officials could be satisfied only by placing large burdens on the state's treasury, making the relief sought "indistinguishable" from an award of damages against the state and not the defendant state officials.[44] The Court accordingly found that the State of Illinois was the real party in interest, and allowed Illinois to invoke its eleventh amendment immunity even though the state was not a named defendant in the class action.[45]

Edelman diminished the remedial power of *Ex parte Young* for Section 1983 plaintiffs seeking a federal forum to adjudicate their claims against defendant state officials. The new rule emerging after *Edelman*, expressly limiting *Young*'s fiction, prevents private parties from seeking damage awards against state officials in federal court. Federal courts are therefore limited to granting only prospective injunctive relief.

Only four years later, however, in *Hutto v. Finney*,[46] the Supreme Court allowed retroactive relief when it found that Congress abrogated eleventh amendment immunity by providing for attorneys' fees awards. The *Hutto* Court directed the state to pay the prevailing plaintiff's attorney fees pursuant to 42 U.S.C. Section 1988.[47] While acknowledging the award was a form of retroactive relief, the Court held that Congress abrogated any state claim of immunity when it passed the Civil Rights Attorney's Fees Awards Act pursuant to its "plenary power . . . to enforce the Fourteenth Amendment."[48] Most importantly, *Hutto* explicitly recognized Congress's authority to abrogate the states' eleventh amendment immunity to suits in federal courts, which allowed remedies regardless of their prospective or retroactive nature.

In *Pennhurst State School & Hospital v. Halderman*,[49] the Court resumed its attack on *Ex Parte Young*. *Pennhurst* held that the fiction cre-

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42. *Id.* at 668.
43. *Id.*
44. *Id.*
45. *Id.* at 677-78.
46. 437 U.S. 678 (1978).
47. 42 U.S.C. § 1988 (1988) codifies the Civil Rights Attorney's Fees Awards Act, which awards attorney's fees to prevailing plaintiffs in federal civil rights cases.
48. *Hutto*, 437 U.S. at 693-94.
49. 465 U.S. 89 (1984).

ated by *Ex parte Young* was not applicable when a plaintiff claimed a state official's act violated state rather than federal constitutional law.[50]

The plaintiff class in *Pennhurst* was comprised of residents of a state facility for the mentally retarded. The class members filed suit in federal court alleging violations of their rights under both the federal Constitution and federal law in addition to state law violations.[51] The state facility, facility officials, the State Department of Public Welfare, and other state and county officials were named as defendants. The class sought prospective injunctive relief mandating that state officials provide appropriate living arrangements for the class members.[52]

The Supreme Court reversed the district court's judgment granting plaintiffs prospective injunctive relief under Pennsylvania law.[53] The Court held that the federal court lacked pendent jurisdiction over the state law claims against state officials because the Eleventh Amendment barred relief against an unconsenting state.[54] While the *Pennhurst* Court preserved federal jurisdiction for claims challenging the federal constitutionality of a state official's conduct, it refused to apply *Ex Parte Young* to suits against state officials based on state law violations.[55]

The Court's rationale for limiting the *Ex parte Young* fiction to federal constitutional claims was to recognize the need to "promote the vindication of federal rights."[56] The Court concluded that the need to "vindicate the supreme authority of federal law"[57] was not present when the plaintiff alleged violations of state, not federal, law.[58]

Pennhurst added to the confounding patchwork of eleventh amendment cases that results in a list of compulsory "do's" for Section 1983 plaintiffs seeking to avert the eleventh amendment hurdle. To secure a

50. *Id.* at 106.

51. The plaintiffs claimed that the deplorable conditions at the state facility violated their rights under: (1) the Eighth and Fourteenth Amendments of the federal Constitution, (2) 29 U.S.C. § 794 (1988), which codifies § 504 of the Rehabilitation Act of 1973, (3) 42 U.S.C. §§ 6011, 6063 (1988), which codify the Developmentally Disabled Assistance and Bill of Rights Act, and (4) the Pennsylvania Mental Health and Mental Retardation Act of 1966, codified at PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 and Supp. 1990-1991). The class sought both damages and injunctive relief. *Pennhurst*, 465 U.S. at 92. On an earlier appeal, the Supreme Court remanded the case to the district court after determining that the plaintiff class had no substantive rights under 42 U.S.C. § 6010 (1988). The district court was directed to determine whether the class was entitled to relief under its other causes of action. *Pennhurst*, 465 U.S. at 95.

52. *Id.*

53. *Id.* at 97.

54. *Id.* at 106.

55. *Id.*

56. *Id.* at 105.

57. *Id.* at 106.

58. *Id.*

federal forum to redress their claims against their own states, Section 1983 plaintiffs must satisfy three requisite elements: (1) Name a state official, and *not* the state, as defendant; (2) file for prospective injunctive relief; and (3) allege that the named defendant violated the plaintiff's federally guaranteed civil rights under either a federal statute or the federal Constitution.[59] *Pennhurst* effectively denies Section 1983 plaintiffs of any judicial forum to redress concomitant state law claims by explicitly denying federal court pendent jurisdiction over state law claims. The state court may also lack jurisdiction to adjudicate suits against the state or its officials if state immunity statutes preclude such private actions. Taking the reasoning further, if federal courts lack jurisdiction to adjudicate Section 1983 claims against state officials, must state courts take jurisdiction over Section 1983 claims? The role of state courts in Section 1983 litigation was addressed recently in *Will v. Michigan Department of State Police*.[60]

D. The Eleventh Amendment and State Court Jurisdiction

In *Will v. Michigan Department of State Police*, the Court held that neither "a State nor its officials acting in their official capacities are 'persons' " subject to Section 1983 suits brought in state courts.[61] In *Will*, the plaintiff brought a Section 1983[62] action in state court naming the Director of State Police and the Department of the Michigan State Police as defendants.[63] Will, an employee of the defendant Department, alleged that the defendants denied his promotion "because his brother had been a student activist and the subject of a 'red squad' file maintained by" the defendants.[64] Will filed his Section 1983 action in state court claiming violations of both federal and state constitutions.[65] The Michigan Supreme Court held that the named defendants were not subject to Section 1983 provisions because neither the state nor its officials acting in their official capacities are "persons" for Section 1983 purposes.[66]

The United States Supreme Court affirmed the Michigan Supreme Court's decision, thereby resolving the conflict among the state and federal courts whether state governments were proper party defendant for

59. *See* L. TRIBE, *supra* note 12, § 3-27, at 194.
60. 491 U.S. 58 (1989).
61. *Id.* at 71.
62. 42 U.S.C. § 1983 (1988). For the full text of Section 1983, see *supra* note 7.
63. *Will*, 491 U.S. at 60.
64. *Id.*
65. *Id.*
66. *Id.* at 61.

Section 1983 purposes.[67] The *Will* Court reasoned that a suit against state officials acting in their official capacities was a suit against the state itself.[68] The Court accordingly held that because states are not "persons" under Section 1983, states are not subject to suit in state court under this federal civil rights statute. Although the Court acknowledged that the Eleventh Amendment did not apply to state courts, the Court concluded that the Amendment barred the plaintiff's cause of action because his suit was against the State of Michigan, and Michigan had not waived its immunity to Section 1983 suits.[69]

Will reveals the Supreme Court's alarming willingness to apply the Eleventh Amendment to limit *state* court jurisdiction to adjudicate Section 1983 cases. In the wake of *Will*, the Eleventh Amendment now severely limits Section 1983 plaintiffs' access to any judicial forum—state or federal—that can redress unconstitutional state actions. *Will* constitutionalizes state sovereign immunity so that state governments, agencies and officials are constitutionally protected from private suits in either state or federal courts at the expense of rendering federal civil rights virtually unenforceable.

E. The State's Constructive Waiver of Eleventh Amendment Immunity

A line of cases, developed independently from *Ex parte Young* and its progeny, presented an alternative means by which private plaintiffs could avoid the eleventh amendment bar to federal jurisdiction. In *Parden v. Terminal Railway of the Alabama State Docks Department*,[70] the Court held that Alabama could waive its eleventh amendment immunity by consenting to suit in federal court.

The *Parden* plaintiffs were Alabama citizens and employees of the state-run railroad. They sued the state railroad company in federal district court under the Federal Employee's Liability Act (FELA)[71] seeking damages for personal injuries incurred while working for the defendant. Alabama, as the owner-operator of the defendant company, argued that its railroad company "was an agency of the State and the State had not waived its sovereign immunity from suit."[72] The federal district court accepted Alabama's eleventh amendment immunity defense claim and granted the state's motion to dismiss.[73] The Supreme Court granted cer-

67. *Id.*
68. *Id.* at 71.
69. *Id.* at 67.
70. 377 U.S. 184 (1964).
71. 45 U.S.C. §§ 51, 56, 60 (1988).
72. *Parden*, 377 U.S. at 185.
73. *Id.*

tiorari and reversed the judgment of dismissal.[74]

The Supreme Court ruled that Alabama had waived its constitutional immunity to suit in federal court by participating as a common carrier in interstate commerce.[75] The *Parden* Court reasoned that in passing FELA, Congress had the authority to require states to consent to suit in federal court as a condition precedent to participating in the FELA program. Congress had imposed the condition of amenability to suit in federal courts upon common carriers participating in interstate commerce. Alabama, as defendant, voluntarily participated as a common carrier in interstate commerce with prior notice of the condition imposed by Congress.[76] Alabama thus constructively waived its eleventh amendment immunity. The Court flatly rejected Alabama's argument that its state constitution expressly proscribed any waiver of its sovereign immunity, constructive or actual.[77] The Court determined that to find eleventh amendment immunity in FELA

> would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.[78]

Parden's constructive waiver doctrine created a door to federal court for Section 1983 plaintiffs, but the Court quickly slammed the door shut by assaulting the doctrine in *Employees v. Department of Public Health & Welfare of Missouri*.[79] The *Employees* Court affirmed the district court's dismissal of the plaintiffs' complaint by recognizing the State of Missouri's eleventh amendment immunity defense.[80] The Court held that the Eleventh Amendment barred private suits against a nonprofit state agency in federal court under FLSA.[81] The Court distinguished *Parden* by determining that the Missouri health agencies were not operated for profit, which distinguished them from the Alabama railroad company in *Parden*.[82] The Court reasoned that when a state's nonprofit

74. *Id.* at 185, 198.
75. *Id.* at 189-90.
76. *Id.* at 187.
77. *Id.* at 194.
78. *Id.* at 190.
79. 411 U.S. 279 (1973). The plaintiffs were Missouri citizens and employees of various Missouri health agencies. The plaintiffs filed their suit in federal district court seeking: (1) overtime pay due under the Federal Labor Standards Act (FLSA), 29 U.S.C. § 216(b) (1988), (2) damages, and (3) attorneys' fees. *Employees*, 411 U.S. at 281.
80. *Id.* at 280-81.
81. *Id.* at 285-86.
82. *Id.* at 284.

enterprise is concerned,

> [i]t is not easy to infer that Congress in legislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum [when it enacted FLSA].[83]

The Court concluded that Congress had indicated no purpose to remove the states' constitutional immunity by enacting FLSA, thereby placing the states "on the same footing as other [private] employers."[84] Although the Court acknowledged that Congress had the authority to abrogate the states' eleventh amendment immunity under the Commerce Clause,[85] the Court held that Congress failed to make its intent to abrogate state immunity sufficiently clear in either FLSA's statutory language or legislative history.[86] *Employees* weakened the constructive waiver doctrine by requiring Congress to do more than legislate pursuant to the Commerce Clause if it intended to hold states subject to federal court jurisdiction. In its attempt to limit the constructive waiver doctrine, the Court did not overrule *Parden*, but applied an increasingly rigorous standard of clarity that Congress had to satisfy in order to abrogate eleventh amendment immunity. The Court, however, provided little guidance as to what statutory language would meet its standard of clarity.

Edelman v. Jordan[87] continued the Court's erosion of the constructive waiver doctrine. In *Edelman*, the State of Illinois failed to disburse welfare benefits in compliance with federal regulations governing relevant provisions of the Social Security Act (SSA).[88] The plaintiff class was comprised of Illinois citizens whose welfare benefits were withheld by the state in violation of federal regulations. The Seventh Circuit Court of Appeals held that Illinois constructively waived its eleventh amendment immunity when it chose to participate in the federal welfare assistance program pursuant to the SSA.[89]

The Supreme Court disagreed, however, and held that a state's mere participation in a federally funded program was insufficient to compel a

83. *Id.* at 285.

84. *Id.*

85. U.S. CONST. art. I, § 8, cl. 3.

86. *Employees*, 411 U.S. at 285.

87. 415 U.S. 651 (1974); *see supra* notes 34-45 and accompanying text.

88. 42 U.S.C. §§ 1382-85 (1988). Under selected provisions of the SSA, aged, blind or disabled individuals who meet specified requirements are eligible for federal benefits, which are administered through state agencies. Since *Edelman* was decided, §§ 1384-85 have been omitted.

89. *Edelman*, 415 U.S. at 672-73.

finding that the state consented to suits in federal court.[90] The Court also held that "[c]onstructive consent is not a doctrine commonly associated with the [states'] surrender of constitutional rights . . . ."[91] A state therefore waives its eleventh amendment immunity "only where [the relevant federal statute] stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' "[92] The *Edelman* Court determined that the only federal sanction provided by the SSA was "termination of future allocations of federal funds when a participating State failed to conform with federal law."[93] The Court held that without more, the statute's provision did not constitute a state's constructive waiver of its eleventh amendment immunity.[94]

In dicta, the Court further suggested that the *Edelman* plaintiffs could have brought a Section 1983 action in federal court. The Eleventh Amendment, however, limited their remedy to prospective injunctive relief that excluded the recovery of any benefits wrongfully denied prior to the filing of the lawsuit against the state.[95] If federal courts may grant only prospective relief, state welfare agencies may wrongfully withhold welfare benefits until a suit is brought to compel state agencies to conform their future behavior to the statutory requirements. The ability of low income and indigent people to file lawsuits is greatly limited, if not impossible, particularly when their daily subsistence depends upon their welfare benefits.

Atascadero State Hospital v. Scanlon[96] went further than *Edelman* by holding that even a state's "general waiver" of immunity—expressed in the state's constitution—is ineffective against the Eleventh Amendment.[97] The plaintiff, Douglas Scanlon, filed suit against a California state hospital and the California Department of Mental Health for allegedly denying him employment because of his physical disabilities.[98] Scanlon sought compensatory, injunctive, and declaratory relief in federal district court, claiming that the defendants violated the federal Re-

90. *Id.* at 673-74.

91. *Id.* at 673.

92. *Id.* at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).

93. *Id.* at 674.

94. *Id.*

95. *Id.* at 677.

96. 473 U.S. 234 (1985).

97. The *Atascadero* Court rejected the plaintiff's argument that California had "waived its immunity by virtue of Article III, § 5 of the California Constitution," *id.* at 240, which provides that " '[s]uits may be brought against the State in such manner and in such courts as shall be directed by law.' " *Id.* (quoting CAL. CONST. art. III, § 5).

98. The plaintiff suffered from unilateral blindness and diabetes. *Id.* at 236.

habilitation Act of 1973[99] and state fair employment statutes.[100]

The Ninth Circuit Court of Appeals held that California had implicitly consented to suit in federal court by participating in the Rehabilitation Act programs.[101] In reversing, the Supreme Court explicitly endorsed a rule of statutory interpretation now referred to as the "*Atascadero* standard."[102] The *Atascadero* standard defines the degree of specificity that Congress must use when drafting a federal statute to abrogate the states' eleventh amendment immunity. To meet the required standard, Congress may abrogate the Eleventh Amendment "[o]nly by making its intention unmistakably clear in the language of the statute."[103]

The Rehabilitation Act provided that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by *any recipient* of Federal assistance or Federal provider of such assistance . . . ."[104] The *Atascadero* Court held that this "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[105] The *Atascadero* standard eviscerated the constructive waiver doctrine without explicitly overruling *Parden*.

The Court completed its dismantling of the constructive waiver doctrine by expressly overruling *Parden* in *Welch v. Texas Department of Highways & Public Transportation*.[106] The plaintiff, Jean Welch, filed a suit against the State of Texas and the State Highway Department under the Jones Act,[107] which incorporated the remedial provision in FELA. The Court held that the Eleventh Amendment barred the plaintiff's suit against Texas—and its state agency—because it did not consent to such suits by merely employing people eligible for relief under the Jones Act.[108] The Court applied the *Atascadero* standard to the Jones Act and concluded that the statutory language lacked the requisite clarity to re-

99. 29 U.S.C. §§ 794-99 (1988).

100. *Atascadero*, 473 U.S. at 236.

101. *Id.* at 237.

102. *See* Dellmuth v. Muth, 491 U.S. 223 (1989); *see also infra* notes 152-165 and accompanying text.

103. *Atascadero*, 473 U.S. at 242.

104. *Id.* at 245 (brackets in original) (emphasis added).

105. *Id.* at 246.

106. 483 U.S. 468 (1987).

107. 46 U.S.C. § 688 (1988). The Jones Act expressly provided for federal jurisdiction and expressly incorporated the remedies authorized by FELA, 45 U.S.C. §§ 51, 56, 60 (1988). *Welch*, 483 U.S. at 471 n.1.

108. *Id.* at 476.

move the state's eleventh amendment immunity.[109]

Welch illustrates the Supreme Court's expansive reading of the Eleventh Amendment. The Court interprets the Eleventh Amendment such that it swallows up the Article III[110] grant of federal jurisdiction to hear cases based on questions of federal law.[111] The Article III grant of jurisdiction over questions of federal law gives federal courts the power to adjudicate claimed violations of Section 1983—a federal law designed to protect individuals from unconstitutional state actions. The Supreme Court's reading of the Eleventh Amendment not only destroys the federal courts' power to hear Section 1983 cases, but precludes the federal courts from granting individuals any effective relief from state actions that violate federal civil rights laws.

The cases discussed illustrate the Supreme Court's inconsistent definitions of eleventh amendment immunity parameters. By refusing to overrule *Hans v. Louisiana*,[112] the Court has created an assortment of legal devices and arbitrary line-drawing in its eleventh amendment jurisprudence. As a result, the federal courts are denied jurisdiction in cases based on questions of both federal constitutional and statutory law. Section 1983 plaintiffs[113] are entitled to relief from violations of their civil rights, but states may use the Eleventh Amendment to deny plaintiffs a judicial forum to vindicate their right to redress.

II. Proposal to Achieve Congressional Abrogation of the States' Eleventh Amendment Immunity

This Note proposes that Congress amend Section 1983 to grant federal courts jurisdiction over private suits against states and their officials for violations of federal civil rights,[114] and to grant all the relief available under Section 1983 regardless of the relief's nature—prospective or retroactive.[115]

Congress finds its authority to abrogate states' eleventh amendment immunity pursuant to either the Fourteenth Amendment or the Commerce Clause.

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109. *Id.*

110. U.S. CONST. art. III, § 2, cl. 1.

111. *See* Employees v. Missouri Pub. Health Dep't., 411 U.S. 279, 313-15 (1973) (Brennan, J., dissenting); Fletcher, *supra* note 15.

112. 134 U.S. 1 (1890); *see supra* notes 16-24 and accompanying text.

113. For example, Professor Doe's case illustrates the severe limitations that the Eleventh Amendment imposes upon Section 1983 plaintiffs. *See supra* text accompanying note 1.

114. Whether Congress will enact an amendment to Section 1983 to meet these objectives is subject to political speculation and beyond the scope of this Note.

115. *See supra* notes 41-42 and accompanying text.

A. The Fourteenth Amendment as a Source of Authority

Commentators assert that Congress may abrogate eleventh amendment immunity when it acts pursuant to its Article I powers or "to the enforcement clauses of various constitutional amendments . . . ."[116] The Supreme Court also has acknowledged that Congress may abrogate eleventh amendment immunity "pursuant to a valid exercise of power."[117] Although the authorization to abrogate is vague, the Court has shed some light on what "exercise of power" passes constitutional muster.

In *Fitzpatrick v. Bitzer*,[118] the Court held that Congress has the authority to abrogate eleventh amendment immunity under Section 5 of the Fourteenth Amendment.[119] Justice Rehnquist, writing for the majority, concluded that Congress had clearly stated its intent to hold the states subject to the provisions of Title VII of the Civil Rights Act of 1964[120] when amendments to Title VII were enacted in 1972.[121] The Court held that Congress had the requisite authority under the Fourteenth Amendment to grant federal jurisdiction notwithstanding the Eleventh Amendment. The Court explained that

> [w]hen Congress acts pursuant to Section 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on

116. L. TRIBE, *supra* note 12, § 3-26, at 185-86. *See generally* E. CHEMERINSKY, FEDERAL JURISDICTION § 7.7, at 365-66 (1989) (discusses how and under what powers Congress may override the Eleventh Amendment).

While the Court acknowledges that Congress has the power to abrogate validly the states eleventh amendment immunity, the Court offers no rationale that reconciles Congress's acknowledged power to abrogate with the majority's view that state sovereign immunity is constitutionalized under the Eleventh Amendment. If state sovereign immunity is based on federal constitutional provisions, then its abrogation can only be achieved by constitutional amendment; not by an act of Congress.

117. Green v. Mansour, 474 U.S. 64, 68 (1985). In *Green*, welfare recipients, who were also citizens of Michigan, filed a § 1983 class action in federal court against the director of the Michigan Department of Social Services. The class sought declaratory and notice relief. The Supreme Court affirmed the judgment granting the defendant's motion to dismiss because the Eleventh Amendment barred relief to Michigan citizens filing suit against their own state in federal court. The Court stated that "States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, *pursuant to a valid exercise of power*, unequivocally expresses its intent to abrogate the immunity." *Id.* (emphasis added).

118. 427 U.S. 445 (1976).

119. *Id.* at 456. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

120. 42 U.S.C. §§ 2000a-2000h-6 (1988).

121. *Fitzpatrick*, 427 U.S. at 453 n.9. The 1972 amendments expressly included employees of "a State government, governmental agency or political subdivision." *Id.* at 449 n.2.

state authority.[122]

Fitzpatrick underscores the Fourteenth Amendment's role in limiting state government conduct to protect individual citizens from unlawful state actions.[123] The *Fitzpatrick* Court subordinated the Eleventh Amendment to the Fourteenth Amendment by recognizing that the "Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[124]

The Supreme Court's holding that Congress may abrogate eleventh amendment immunity pursuant to the Fourteenth Amendment[125] was affirmed one year later in *Hutto v. Finney*.[126] The *Hutto* Court awarded the plaintiffs attorneys' fees under 42 U.S.C. Section 1988 stating that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment."[127] The Court again emphasized that the Eleventh Amendment is subject to the limitations imposed by Section 5 of the Fourteenth Amendment.[128]

The Supreme Court held that the Eleventh Amendment did not bar a fourteenth amendment equal protection claim in *Papasan v. Allain*.[129] The *Papasan* plaintiffs were local school officials and schoolchildren in Mississippi who filed suit in federal court against various state officials for allegedly violating the Equal Protection Clause[130] of the Fourteenth Amendment.[131] The plaintiffs alleged that in the 1850s, Mississippi mismanaged lands held in trust for the plaintiff schoolchildren.[132] The plaintiffs asserted that this past state conduct resulted in the current unequal state financial support to their school district as compared with other public schools in Mississippi.[133] The disparity in the state's funding was the basis of the plaintiffs' equal protection claim.

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122. *Id.* at 456.

123. *Id.* at 455.

124. *Id.* at 456.

125. It remains an open question whether private plaintiffs may sue their own state in federal court for violations of the Fourteenth Amendment alone—without resorting to any federal statutory violations. *See* Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977). *See generally* E. CHEMERINSKY, *supra* note 116, § 7.7, at 366 (discussing how federal courts have treated suits directly under the Fourteenth Amendment).

126. 437 U.S. 678 (1978); *see supra* notes 46-48 and accompanying text.

127. *Hutto*, 437 U.S. at 693.

128. *Id.* at 698-99 n.31.

129. 478 U.S. 265 (1986).

130. U.S. CONST. amend. XIV, § 1.

131. *Papasan*, 478 U.S. at 274.

132. *Id.*

133. *Id.*

The Supreme Court ruled that the "Eleventh Amendment would not bar relief necessary to correct . . . [Mississippi's] current violation of the Equal Protection Clause" because the state's unequal distribution of funds was "precisely the type of continuing violation for which a remedy may permissibly be fashioned . . . ."[134]

While the Supreme Court recognizes that Congress has the power to abrogate eleventh amendment immunity, the Court has been reluctant to find that Congress has exercised its power pursuant to Section 5 of the Fourteenth Amendment. In *Quern v. Jordan*,[135] *Atascadero State Hospital v. Scanlon*,[136] *Will v. Michigan Department of State Police*,[137] and *Dellmuth v. Muth*,[138] the Court determined that Congress failed to make its intent sufficiently clear in various federal statutes to abrogate the Eleventh Amendment.

Quern v. Jordan held that Congress had not intended to override the states' eleventh amendment immunity when it enacted Section 1983.[139] The *Quern* plaintiffs were Illinois welfare recipients who had filed an earlier Section 1983 class action in federal court against officials of the Illinois Department of Public Aid.[140] The class sued the defendants for failing to process properly applications for welfare benefits. The defendant state officials appealed from the federal court order that directed the state public aid office to send advisory notices to all class members informing them of procedures by which they could apply for wrongfully denied welfare benefits.[141] The state officials asserted that the Eleventh Amendment barred the ordered relief, while the plaintiff class argued that Section 1983 abrogated Illinois' eleventh amendment immunity.[142]

The *Quern* Court determined that although Congress acted pursuant to Section 5 of the Fourteenth Amendment in enacting the Civil Rights Act of 1871,[143] the statutory language failed to sufficiently express the requisite legislative intent to abrogate the Eleventh Amendment.[144] The Court held that

134. *Id.* at 282.

135. 440 U.S. 332 (1979).

136. 473 U.S. 234 (1985); *see supra* notes 96-105 and accompanying text.

137. 491 U.S. 58 (1989); *see supra* notes 60-69 and accompanying text.

138. 491 U.S. 223 (1989).

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

140. *See supra* notes 34-45 and accompanying text.

141. *Quern*, 440 U.S. at 334.

142. *Id.* at 335-38.

143. 42 U.S.C. § 1983 finds its origin in this Act. See *supra* note 7 for the full text of the statute.

144. *Quern*, 440 U.S. at 343.

> Section 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.[145]

Quern foreshadowed the Court's subsequent decision in *Atascadero*, which articulated the standard that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."[146] The *Atascadero* Court held that the Rehabilitation Act[147] failed to "evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts."[148]

In *Will v. Michigan Department of State Police*[149] the Court applied the strict *Atascadero* standard to Section 1983. The *Will* Court determined that although Section 1983

> provides a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its *undoubted* power under § 5 of the Fourteenth Amendment to override that immunity.[150]

The *Will* Court concluded that although Congress could have abrogated the Eleventh Amendment when it enacted Section 1983, it had failed to use the statutory language required by the *Atascadero* standard.[151] *Will* incredibly extends the eleventh amendment jurisdictional bar to *state* court adjudication of Section 1983 actions even though the Amendment only applies to *federal* courts.

In *Dellmuth v. Muth*,[152] decided in the same term as *Will*, the Court applied the *Atascadero* standard to another federal statute enacted pursuant to Section 5 of the Fourteenth Amendment. The *Dellmuth* Court again held that Congress could have abrogated the states' eleventh amendment immunity when it enacted the Education of the Handi-

145. *Id.* at 345.

146. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985); *see supra* notes 96-105 and accompanying text.

147. 29 U.S.C. §§ 794-99 (1989).

148. *Atascadero*, 473 U.S. at 247.

149. 491 U.S. 58 (1989); *see supra* notes 60-69 and accompanying text.

150. *Id.* at 66 (emphasis added) (citation omitted).

151. *See id.* at 65.

152. 491 U.S. 223 (1989).

capped Act (EHA)[153] pursuant to its power in Section 5 of the Fourteenth Amendment.[154] The Court, however, tempered this grant of authority by emphasizing that Congress could achieve eleventh amendment abrogation only by satisfying the *Atascadero* standard in the statutory language itself.[155]

Justice Kennedy, writing for the 5-4 majority,[156] held that the EHA failed to meet the *Atascadero* standard because it contained no specific reference to abrogate "either the Eleventh Amendment or the States' sovereign immunity."[157] Justice Kennedy gave the EHA's abundant references to the "states" and "its delineation of the States' important role in securing an appropriate education for handicapped children," no more weight than a "permissible inference" to make states "logical defendants."[158] The inference, however, would not support a determination that Congress intended to abrogate eleventh amendment immunity.[159] The majority went so far as to hold that "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment."[160]

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented declaring that a "genuine concern to identify Congress' purpose would lead the Court to consider both the logical inferences to be drawn from the text and structure of the EHA, . . . *and* the statute's legislative history . . . in deciding whether Congress intended to subject States to suit in federal court."[161] The dissent concluded that the majority's specialized drafting rules were unjustified and completely ignored Congress's intent.[162]

The Supreme Court clearly has acknowledged that Congress has the power to abrogate the Eleventh Amendment by exercising its power to enforce the Fourteenth Amendment. The Court has added an exacting burden, however, by imposing the *Atascadero* standard on the language of any statute that Congress legislates. *Dellmuth* forces Congress to meet an even greater degree of clarity in its legislative drafting because (1) the

153. 20 U.S.C. §§ 1400(b)(9), 1415(e)(2), 1415(e)(4)(G) (1988).

154. *Dellmuth*, 491 U.S. at 227-28.

155. *Id.*

156. Justice Kennedy, who delivered the opinion of the Court, was joined by Justices White, O'Connor, Scalia, and Chief Justice Rehnquist. Justice Scalia filed a concurring opinion. *Id.* at 224.

157. *Id.* at 231.

158. *Id.* at 232.

159. *Id.*

160. *Id.* at 230.

161. *Id.* at 239 (emphasis in original) (Brennan, J., dissenting).

162. *Id.* at 238-40.

Court may consider legislative history generally irrelevant when interpreting a federal statute in light of the Eleventh Amendment,[163] (2) statutes replete with references to the states fail to satisfy the *Atascadero* standard,[164] and (3) explicit references to abrogate state sovereign immunity or the Eleventh Amendment may be required.[165] Short of creating boiler plate language, Congress is not likely to consider the *Dellmuth* requirements when it legislates in the future.

B. The Commerce Clause as a Source of Authority to Abrogate Eleventh Amendment Immunity

Congress may abrogate eleventh amendment immunity pursuant to its commerce clause power to regulate interstate commerce.[166] In *Parden v. Terminal Railway of Alabama State Docks Department*,[167] the Court held that states surrendered a portion of their sovereignty when they granted Congress the power to regulate interstate commerce.[168] The states retained no immunity privilege with respect to interstate commerce when they ratified the federal Constitution. Given their abdication to Congress in the area of commerce, the states have no immunity to assert when sued by private citizens claiming state violations of federal statutes enacted pursuant to the Commerce Clause.

Employees v. Department of Public Health & Welfare of Missouri[169] limited Congress's authority to abrogate eleventh amendment immunity under the Commerce Clause. The *Employees* Court implied that Congress could abrogate eleventh amendment immunity pursuant to the Commerce Clause by "indicating in some way by clear language that the [states's] constitutional immunity was swept away."[170] Similar to the fourteenth amendment cases,[171] the *Employees* Court began to require greater clarity of legislative intent to abrogate eleventh amendment immunity when Congress exercised its commerce clause powers.

More recently, in *Welch v. Texas Department of Highways & Public Transportation*,[172] the Court intimated that the Commerce Clause may be a separate source of authority to abrogate the Eleventh Amend-

163. *See supra* note 160 and accompanying text.
164. *See supra* notes 158-159 and accompanying text.
165. *See supra* note 157 and accompanying text. *But see Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring).
166. *See supra* note 85 and accompanying text.
167. 377 U.S. 184 (1964); *see supra* notes 70-78 and accompanying text.
168. *Parden*, 377 U.S. at 191.
169. 411 U.S. 279 (1973); *see supra* notes 79-84 and accompanying text.
170. *Employees*, 411 U.S. at 285-87.
171. *See supra* notes 117-162 and accompanying text.
172. 483 U.S. 468 (1987); *see supra* notes 106-111 and accompanying text.

ment.[173] The *Welch* Court expressly assumed "that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment."[174]

In *Pennsylvania v. Union Gas Company*, the Supreme Court definitively determined that "Congress has the authority to . . . [render states liable in money damages in federal court] . . . when legislating pursuant to the Commerce Clause."[175] The critical issue before the *Union Gas* Court was whether Congress had the constitutional authority—pursuant to the Commerce Clause—to abrogate the states' eleventh amendment immunity when it enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[176] Justice Brennan, writing for the Court, reasoned that

> [b]ecause the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable . . . . [The states] gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.[177]

After *Union Gas*, Congress may abrogate pursuant to its commerce clause powers and, more remarkably, the Court will not apply the rigorous *Atascadero* standard to legislation enacted pursuant to the Commerce Clause.

Congress may abrogate the Eleventh Amendment if the statutory language clearly expresses Congress's intent to do so. In the past, the Court has found the requisite intent in statutes enacted pursuant to either the Fourteenth Amendment or the Commerce Clause. The Court, however, will apply the exacting *Atascadero* standard of intent to statutes enacted pursuant to the Fourteenth Amendment.[178] The Court will not apply the *Atascadero* standard to statutes enacted pursuant to the Commerce Clause.[179]

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173. *Id.* at 475 n.5.

174. *Welch*, 483 U.S. at 475.

175. Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989).

176. 42 U.S.C. §§ 9601, 9604, 9606, 9607(a) (1988).

177. *Union Gas Co.*, 491 U.S. at 19-20.

178. *See* Dellmuth v. Muth, 491 U.S. 223 (1989); *see also supra* notes 152-165 and accompanying text.

179. *See supra* notes 167-177 and accompanying text.

An explanation for the Court's disparate review of legislative intent may be its deep concern that federal civil rights litigation, particularly Section 1983 suits, would substantially overburden the courts and place an excessive burden of liability for civil rights violations upon state defendants.[180]

The Court has also expressed great reluctance to limit states' eleventh amendment immunity by refusing to overrule *Hans v. Louisiana*[181] in Fourteenth Amendment enforcement cases.[182] The Court's reluctance illustrates its move toward increased deference to federalism and majoritarian interests when individual rights are jeopardized by state government actions. The Court's reticence renders Section 1983 ineffective in protecting individuals from unlawful state actions. Congress, therefore, must amend this important civil rights statute to abrogate eleventh amendment immunity.

C. Statutory Language Necessary to Abrogate Eleventh Amendment Immunity

The Supreme Court has endorsed fully the *Atascadero* standard[183] of unmistakably, unequivocal, clear legislative intent to abrogate successfully the states' eleventh amendment immunity. In so doing, the Supreme Court eviscerates many federal statutes, particularly those protecting federal civil rights, by applying the *Atascadero* standard retroactively to laws enacted prior to the Court's unmistakable, unequivocal adoption of this rigorous standard.[184] This rigid, judicially created rule for legislative drafting demands that Congress take affirmative steps to ensure that states may not violate federal civil rights with impunity.

The *Dellmuth* decision provides the clearest and most recent guidance as to what statutory language the Court will regard as meeting the *Atascadero* standard. *Dellmuth* specifies that a statute must (1) make direct reference to the Eleventh Amendment, or (2) make direct reference to the states' sovereign immunity, in order to abrogate the Eleventh

180. *See* Maine v. Thiboutot, 448 U.S. 1, 20 (1980) (Powell, J., dissenting). Chief Justice Rehnquist, then an Associate Justice, joined in Justice Powell's dissenting opinion.

181. 134 U.S. 1 (1890); *see supra* notes 16-24 and accompanying text.

182. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987); *Dellmuth*, 491 U.S. at 229 n.2.

183. *See supra* notes 96-105 and accompanying text.

184. In Justice Brennan's strong dissent in *Dellmuth*, joined by Justices Blackmun, Marshall, and Stevens, he stated that the "[r]etroactive application of [the *Atascadero* standard] is simply unprincipled." *Dellmuth*, 491 U.S. at 240 (Brennan, J., dissenting). The dissent attacked the majority's imposition of "an interpretative standard that Congress could have anticipated only with the aid of a particularly effective crystal ball." *Id.* at 241.

Amendment.[185] *Dellmuth* further specifies that legislative history "generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. . . . [And] if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met."[186] *Dellmuth* clearly states that any legislative history that Congress generates is insufficient to bring states within federal jurisdiction for violations of federal statutes.[187]

Based on the *Dellmuth* guidelines, Congress must explicitly refer to the Eleventh Amendment or state sovereign immunity to guarantee that the *Atascadero* standard is met. Justice Kennedy used the 1986 Amendments to the Rehabilitation Act (ARA)[188] to "underscore the difference" between statutory language that meets the *Atascadero* standard and that which fails.[189] The ARA provides that "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of [several enumerated provisions] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[190]

The majority in *Dellmuth* determined that "[w]hen measured against such explicit consideration of abrogation of the Eleventh Amendment, the EHA's treatment of the question appears ambiguous at best."[191] The majority was careful not to expressly judge whether the ARA met the *Atascadero* standard,[192] but its use of the ARA as a comparative model of legislative drafting indicates that the ARA defines the level of clarity required by the Court. The high degree of specificity of legislative intent to abrogate is absolutely essential to ensure that an amendment to Section 1983 will bring the states within the jurisdiction of the federal courts.

III. Proposed Amendment to 42 U.S.C. Section 1983

In order to protect individuals from unconstitutional state actions, 42 U.S.C. Section 1983 should be amended as follows:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for

185. *Id.* at 231.
186. *Id.* at 230.
187. *See supra* notes 138-165 and accompanying text.
188. 42 U.S.C. § 2000d-7(a)(1) (1988).
189. *Dellmuth*, 491 U.S. at 229; *see supra* notes 152-160 and accompanying text.
190. 42 U.S.C. § 2000d-7(a)(1) (1988).
191. *Dellmuth*, 491 U.S. at 230.
192. *Id.* at 229.

> a violation of this Section or the provisions of any other Federal statute enacted pursuant to Section 5 of the Fourteenth Amendment of the Constitution of the United States.

The adoption of this proposed amendment is compelled for at least two reasons. First, the Supreme Court's retroactive application of the *Atascadero* standard to federal civil rights statutes virtually strips these laws of any enforcement value. Second, the Court's refusal to look at legislative history to inform its statutory interpretation of federal civil rights statutes requires an explicit statement of intent to abrogate the Eleventh Amendment.

The applicability of Section 1983 against states in light of the Eleventh Amendment has been an interpretive "bouncing ball" for the Supreme Court.

The Court has demonstrated particular difficulty identifying proper party defendants when private plaintiffs seek vindication of Section 1983 rights in federal court. In *Monroe v. Pape*,[193] for example, the Court held that Section 1983 did not extend liability to cities and municipalities. Nearly twenty years later, *Monroe* was overruled in *Monell v. Department of Social Services*,[194] and local government entities were defined as "persons" under Section 1983.

Prior to *Monell*, the Supreme Court had alluded, in dicta, to the fact that if "cities and other municipal corporations" were excluded from the reach of Section 1983,[195] then Section 1983 "could not have been intended to include States as parties defendant."[196] After *Monell*, the question remained whether a state, like a local government entity, was a "person" under Section 1983.

Quern v. Jordan[197] held that the Eleventh Amendment barred Section 1983 suits against states in federal court because the statute did not "explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States."[198] The *Quern* Court, however, did not address the issue of whether the state is a proper Section 1983 defendant in federal court if the state expressly waives its Eleventh Amendment immunity. The question presented after *Monell*, therefore, remains unanswered.

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193. 365 U.S. 167 (1961).

194. 436 U.S. 658 (1978).

195. The Court relied on its holding in *Monroe*. *See supra* note 193 and accompanying text.

196. Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976); *see supra* notes 118-124 and accompanying text.

197. 440 U.S. 332 (1979); *see supra* notes 139-145 and accompanying text.

198. *Quern*, 440 U.S. at 345.

In its 1989 term, the Court held that a state is not a "person" for Section 1983 purposes when suit is brought in *state* court.[199] In light of this recent decision, it is unlikely that the Court will find states to be "persons" for Section 1983 purposes in private suits brought in federal courts despite any state waiver of eleventh amendment immunity.

Where does the array of eleventh amendment decisions leave prospective Section 1983 plaintiffs? Given the departure of Justice Brennan and the majority of Justices' entrenched respect for the Eleventh Amendment, states are immune from private Section 1983 suits in any courtroom, federal or state. Citizens who seek relief under Section 1983 are left with federal civil rights but no guaranteed means of enforcement. Congress could not have intended or envisioned such an irrational result when it passed the Reconstruction Amendments. This assertion is supported by the Reconstruction Congress's debates that addressed the issue of federal jurisdiction, as the Supreme Court itself recognized in *Monroe v. Pape*.[200] The *Monroe* Court stated that

> [t]he [Reconstruction Congress's] debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[201]

Congress must act now to restore federal civil rights because the Supreme Court has refused to do so. Section 1983's erosion substantially weakens the rights of the nation's poor and underrepresented, and moreover the rights of every individual, as represented by Professor Doe.[202]

The legislative path is fraught with obstacles to expedient abrogation of eleventh amendment immunity, particularly considering Congress's recent refusal to pass the Civil Rights Act of 1990. Despite this grim political climate, Congress must act because the Supreme Court has abdicated its role in protecting against state actions that violate both the letter and spirit of Section 1983.

IV. Conclusion

The Eleventh Amendment, as currently interpreted by the Rehnquist Court, allows state agencies to violate federal statutory and consti-

199. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); *see supra* notes 60-69 and accompanying text.

200. 365 U.S. 167 (1961).

201. *Id.* at 180.

202. *See supra* text accompanying note 1.

tutional law with impunity. The Court's eleventh amendment doctrine devalues the individual's constitutional rights and guarantees by subordinating them to state autonomy. The Rehnquist Court's continued endorsement of *Hans v. Louisiana*[203] and its progeny achieves what the Civil War barely averted—a country divided into independent state sovereignties that are subject to federal civil rights statutes by consent only.

Legislative actions alone cannot guarantee individuals' civil rights and liberties. A state may enact a law that expressly withholds its consent to Section 1983 suits in the state court system. Should the state violate an individual's or an underrepresented group's federally protected civil rights, there is no judicial forum to hear the claims against the state. The state courts lack jurisdiction because of the state's "no consent" statute. The federal courts lack jurisdiction because of the state's eleventh amendment immunity—even for violations of federal statutory and constitutional law! Congress must respond to the Supreme Court's eleventh amendment doctrine if Section 1983 is to have any practical application. States must not retain the arbitrary power to immunize themselves from federal laws enacted to protect constitutionally guaranteed civil rights. Federal court jurisdiction is compelled to ensure that all individuals and underrepresented groups will have the means to attain the protections and benefits Congress intended by enacting Section 1983 over a century ago.

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203. 134 U.S. 1 (1890); *see supra* notes 16-24 and accompanying text.

* J.D., University of California, Hastings College of the Law, 1991; M.S., University of California, Los Angeles, 1980; B.S., University of California, Los Angeles, 1978. I dedicate this Note to my parents, Thomas Takashi and Sumiye Hayashi Watanuki. Their courage and sacrifice as Nisei serve as my impetus to ensure that civil rights never again fall to fear and ignorance. I am most grateful to my husband, Tim Wong, for his unwavering support, patience and understanding.