No. 87-1207

Ray Will

v.

Michigan Department of State Police and Director of State Police

Cert to Michigan Supreme Court
(Mem. Op.; Brickley [conc.]; Boyle [conc. in rel. part];
Levin, Archer [diss. in rel. part])

To Be Argued Monday, December 5, 1988

CONTENTS

November 20, 1988 Malamud

SUMMARY

This case presents the questions whether states, and state officers sued in their official capacity, are "persons" within the scope of 42 U.S.C. §1983. The Mich. S. Ct. concluded that they are not; the dissent below concluded that states are within the scope of §1983, and that sovereign immunity does not (apparently as a matter of state law) bar relief when the state allegedly has violated the constitutional rights of its citizens.

The issue is posed against the backdrop of this Court's decision in Quern v. Jordan that §1983 did not abrogate the Eleventh Amendment immunity of states from suit in federal courts. I conclude that the issue presented here is left open by Quern, that states are within the statutory definition of "persons" in §1983, but that §1983 cannot (consistent with Quern) be understood to have abrogated traditional sovereign immunity by its own force. But at the very least, states are subject to suit under §1983 if they have waived their traditional sovereign immunity. The question of what constitutes a waiver for these purposes may be left to the Michigan courts on remand. Alternatively, I have described a different approach, one that would leave more latitude for contemporary changes in sovereign immunity law that are not readily dealt with in terms of "waiver" or "consent." But that approach is in some tension with the approach this Court has taken to similar questions, and I do not rely on it here.

In sum, my suggested disposition is to reverse and remand.

FACTS AND PROCEEDINGS BELOW

In 1950, Michigan enacted a statute criminalizing a wide range of political advocacy. Pursuant to this statute, the Michigan state police department operated a special investigatory team commonly known as the "Red Squad," which, as required by statute, kept files on subversives. The statute was declared unconstitutional in 1977, and part of the relief ordered was the release of these files to their subjects. Through the release of such a file in 1977, petitioner, an employee of the State of Michigan, learned four years after the fact that he had lost out on a transfer and promotion to a computer analyst position with the Michigan Department of Police because the Red Squad had a file on his brother, who had been a Michigan State University student anti-war activist in the 1960s.

Petitioner filed suit for money damages in Michigan state court against respondents, the Michigan Department of State Police and the Director of Police, alleging violations of his rights under the state and federal constitutions, the latter under 42 U.S.C. §1983, which provides:

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

The state trial court determined that the State of Michigan is the real party in interest, and stated that "the issues presented

before this Court are whether the state is a person within the meaning of §1983 and whether the 11th Amendment provides a bar to the award of damages out of the state treasury." JA61. The court answered the first question in the affirmative. Turning to the second question, the court held that by virtue of the Eleventh Amendment, "without the consent of the State, the State cannot be sued under a federal law in a state court if it cannot be sued under the same federal law in a federal court." The court found such consent in a state statute conferring jurisdiction on the Michigan Court of Claims "to hear and determine any claims or demands" "ex contractu or ex delicto." JA65. After a bench trial, the court awarded approximately $150,000 in damages.

The Michigan Ct. App. reversed. The court agreed as a matter of state law that the Court of Claims has jurisdiction over §1983 claim against the state and state officials. But the court rejected the notion that the states are "persons" under §1983, a question which the Supreme Court did not resolve in Quern v. Jordan, 440 U.S. 332 (1979). The court held that states may be viewed as persons under §1983 only if Congress may be understood to have exhibited an intent in §1983 to abolish the states' sovereign immunity, or if the particular state in question has consented to suit. Finding no such consent or Congressional intent, the court held that the §1983 action against the state must be dismissed. As to the state official petr also sued, the court held that state officials are persons

under §1983, but remanded for consideration of state qualified immunity issues.

A divided Mich. S. Ct. affirmed in part and reversed in part, holding that neither the state nor a state official sued in his official capacity is a person for purposes of a damage suit under §1983.

In an opinion in which three justices joined in relevant part, Justice Brickley observed that "although the cases before us occur in state court, the Eleventh Amendment of the United States Constitution, which bars suit by a citizen against a state in a federal court, is the backdrop to the development and, to some extent, the confusion in the case law on the meaning of 'person' in §1983. ... The United States Supreme Court eventually merged the question of the effect of Eleventh Amendment immunity on suit against a state in a federal court with the question whether the term 'person' includes a state in a §1983 action." After discussing the cases leading up to Quern, Justice Brickley concluded that Quern did not resolve the question whether states may be sued as "persons" for damages in state courts in which the Eleventh Amendment is inapplicable.

Justice Brickley then reviewed the legislative history of §1983, and concluded that Congress was concerned with the inadequacy of state procedures for protecting civil rights, and could not be understood to have created a remedy against the states in §1983 that was enforceable only in state court. Had Congress meant the states to be subject to §1983 liability, it would have afforded a federal-court remedy by abrogating Eleventh

Amendment immunity. Accordingly, he concluded that states are not "persons" under §1983. For much the same reason, he also concluded that a damage suit in state court against a state official sued in his official capacity is not cognizable under §1983: retroactive relief against a state official would be barred by the Eleventh Amendment, so §1983 may not be read to impose such liability in state court suits.

Justice Archer, joined in relevant part by Justice Levin, dissented. Justice Archer agreed with Justice Brennan's position in dissent in Quern that states are persons under §1983, for the reasons set forth in that dissent. He further held that common-law sovereign immunity and state statutory sovereign immunity do not bar such §1983 suits where fundamental federal constitutional rights are at issue. (This position paralleled the holding of a majority of the Mich. S. Ct. in a case consolidated with the instant case, Smith, in which the court held that "neither statutory nor common-law governmental immunity bars a suit in a state court alleging violation by the state of a right protected by our Michigan Constitution." JA117a. Because of its holding in the instant case that the state is not a person under §1983, the majority did not reach the parallel question regarding immunity from suits predicated on federal constitutional violations.)

CONTENTIONS

A. Petr.

1. The legislative history of §1983 reflects an intent to create a cause of action against states and their agents acting in their official capacity.

a. Section 1983 is derived from §1 of the Civil Rights Act of 1871, which was "A Bill to Enforce the Provisions of the Fourteenth Amendment." The revolutionary character of the Fourteenth Amendment was the creation of duties that ran from sovereign states to their own citizens as a matter of federal law. The legislative history of the 1871 Act is full of references to the Fourteenth Amendment having given citizens rights against the states, and of the Act as a complete statutory remedy for violation of those rights. Opponents of the 1871 Act were clearly aware of its impact on the states, and the Act's supporters remained firm in this regard.

b. Congress understood at the time that states were legal persons who could act only through their agents. Since states, like corporations, act through agents and department, the state violates federal rights only through agents. "In subjecting state officers to suit under §1983 -- which no one doubts Congress did -- it understood that it was effectively authorizing claims against the state."

c. That understanding is reflected in the debates on the modified Sherman Amendment, which would have made local governments vicariously liable whenever mob violence took place. The premise of the debates was that local governments could be made liable because they are agents of the states -- and that the

states, via their agents, were liable for constitutional violations.

2. This Court's decisions support that conclusion that states and state officers are persons under §1983 where, as here, Eleventh Amendment considerations are absent.

a. Monell v. New York Dep't of Social Services, 436 U.S. 658 (1978), held that municipalities and their officers acting in their official capacity are persons under §1983. Its reasoning, however, is broader, and extends itself naturally to states and state officers. The Monell Court held that §1 of the 1871 Act extends to legal as well as natural persons, including bodies politic, unless there is a "clear statement in the legislative history" to the contrary. Id. at 701. Leaving Eleventh Amendment considerations aside, this is the same standard used by this Court to include states within generic classes of defendants in other federal statutes. See Parden v. Terminal Railway of Alabama, 377 U.S. 184, 190 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 282 (1959). Cf. Welch v. Texas Dep't of Highways, 107 S. Ct. 2941, 2947 nn. 6&7, 2957 (1987) (overruling Parden to the extent that it held that application of this standard does not establish abrogation of Eleventh Amendment immunity).

b. There would never have been any need for this Court to address Eleventh Amendment questions in the §1983 context if it were not the case that states would be liable under §1983 were it not for the Eleventh Amendment. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974), Kentucky v. Graham, 473 U.S. 159, 167 n. 14

(1985), Alabama v. Pugh, 438 U.S. 781, 782 (1978); Quern v. Jordan, 440 U.S., at 339-40, Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). This Court has decided several cases where a state was sued by name in state court under §1983 and has never raised any question of the propriety of such suits. Maine v. Thiboutot, 448 U.S. 1 (1980), Martinez v. California, 444 U.S. 277 (1980). This Court's attorney fee decisions are also consistent with the assumption that states are "persons." See Hutto v. Finney, 437 U.S. 678 (1978), Pulliam v. Allen, 466 U.S. 522, 543-544 (1984); Thiboutot, supra, Kentucky v. Graham, 473 U.S., at 164, 168.

c. The same is true of state officials, a fortiori. It has long been established that state officers may be sued for prospective relief under §1983 in federal court, establishing thereby that state officers are "persons." There is no reason for that judgment to change depending on the nature of the relief sought. See Monell (Powell, J., concurring).

3. Considering states and state officers "persons" under §1983, and subject to damages suits in state but not federal courts, would not be inconsistent with either federalism or the Eleventh Amendment.

a. There is nothing strange about such a result. After all, until 1875, federal courts had not federal question jurisdiction, and for another hundred years, the amount-in-controversy requirement kept many other federal question suits out of the lower federal courts. This Court has held that certain federal-question claims may only be brought in state

courts. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 122 (1984); Maine v. Thiboutot (statutory-based §1983 claims are subject to the amount-in-controversy requirement, while constitution-based claims are not); Employees v. Missouri Dep't of Public Health, 411 U.S. 279 (1973) (FLSA); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) (Vocational Rehabilitation Act); Welch, supra (finding no abrogation of Eleventh Amendment, but leaving open the question of a cause of action in state court); see generally Testa v. Katt, 330 U.S. 386 (1947) (duty of state courts to entertain suits on claims of federal rights).

a. Such a result is not inconsistent with Quern or with Eleventh Amendment abrogation law. In Atascadero, Employees, and Welch, this Court separated cause of action and immunity issues, and should do so here.

3. Even assuming the Eleventh Amendment must be considered here, it would not bar the instant suit.

a. Hans v. Louisiana, 134 U.S. 1 (1890), which extended the Eleventh Amendment to federal question suits, was decided after Congress enacted §1983. It made sense that Congress did not show a clear intent to abrogate the Eleventh Amendment: in 1871, it had no reason to believe the Eleventh Amendment would apply. Cf. Owen v. City of Independence, 445 U.S. 622, 638 (1980) (only common law immunities which were well established in 1871 are incorporated in §1983). Indeed, this Court held in 1873 that states may be named as parties in federal-court Contract Clause cases -- in a case in which the arguments made by opposing

counsel paralleled what this Court eventually held in Hans. Davis v. Gray, 83 U.S. (16 Wall.) 203, 21 L.Ed. at 448, 449 (1873).

b. Congress in 1871 would not have thought including states as persons a useless act in the light of the Eleventh Amendment. Congress would have understood that actions would still be available in state courts. And waiver of Eleventh Amendment immunity was easier to demonstrate then than now: it could be demonstrated by the state's entering a general appearance or engaging in proprietary activities.

B. Amicus for Petr.

[Brief filed on behalf of Lawyers' Committee for Civil Rights Under Law, the NAACP, the Center for Constitutional Rights, and several other organizations].

Makes the argument that the Eleventh Amendment is irrelevant to the question at hand, that the absence of discussion of state immunity in the legislative history of §1983 must be understood in the context of civil rights legislation placing substantial burdens on the states, that Congress would have understood that Eleventh Amendment immunity could be waived and that a cause of action would nonetheless be available in state courts, and that Congress intended §1983 to be the broadest possible remedy against state violations of civil rights. Discusses, in part, the 1866 Act, which, directed primarily against the enforcement of state Black Codes (shades of Patterson), criminally punished unconstitutional actions by state officials in their official

capacity. Against that backdrop, §1983 liability was not radical.

Suits against the state or officials in their official capacity are necessary for compensation, because officials in their personal capacity will often be protected by some form of common law immunity, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), Pierson v. Ray, 386 U.S. 547, 557 (1967), because §1988 attorneys' fees are unavailable in personal capacity cases, Kentucky v. Graham, 473 U.S. 159, 167 (1985), and because juries are reluctant to award damages which must come out of civil servants' own pockets. Such suits are also necessary for deterrence.

C. Resps.

1. Congress didn't intend the word "person" to include the states.

a. Congress didn't define "person". Monell, 436 U.S. 658, at 689 n. 53 (1978). Where what is at issue is state liability, the Court should apply a general rule of construction that the state is not to be included. See Wilson v. Omaha Indian Tribe, 442 U.S. 563, 667 (1979).

b. The Dictionary Act, 16 Stat. 431, Ch. 71, passed to give guidance to a codification commission authorized by the 39th Congress, did not include states in the definition of "persons." Although the Dictionary Act as passed in 1871 extended "personhood" to "bodies politic and corporate," the commission revised the Act in 1872 to substitute "partnerships and corporation" for "bodies politic and corporate" -- and did so to

make clear that if legislation intends to include the states as persons, it will do so explicitly (quoting passage from codification notes). The Durant Commission reviewed the work of the original revision commission, and retained the substituted language in his 1874 codification. That version was enacted into law in 1874, and is applicable to all legislation passed after Feb. 25, 1871. The 1871 Act was passed on April 20, 1871. Therefore, absent a clear statement to the contrary, "person" did not mean "state."

c. The term "corporation" would not have been understood at the time to include states, although it would have been understood to include local governmental units.

d. Nothing in the purpose, subject matter, or content of the 1871 Act suggests that states were to be considered "persons" under §1983. [Followed by a long historical discussion that is not on point, except insofar as it suggests that the problem was the Ku Klux Klan, not the state governments.]

e. There was no affirmative intent to include states as "persons" or to abrogate states' traditional immunity in their own courts. See Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1467-1468 (1975); Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1155-1156 (1977). [The brief takes issue with various legislative history quotations in petr's brief.] Bills have been proposed to include states in the definition of "persons," but have not made it out of committee.

see Sagafi-Nejad, Proposed Amendments to Section 1983 Introduced in the Senate, 27 St. Louis U.L.J. 373 (1983).

f. Concepts of federalism prevalent during Reconstruction support the conclusion that states are excluded from §1983 liability. Although the Civil War and Reconstruction changed federal-state relations, deep respect for the sovereignty of the states remained. Among the well-recognized aspects of sovereignty was sovereign immunity: that states are not subject to suit absent consent. By deciding not to abrogate Eleventh Amendment immunity, Congress must also be understood not to have wanted to abrogate traditional sovereign immunity from suit in state court.

g. Nothing in this Court's prior decisions requires the result petr seeks. [Goes on to distinguish the cases relied upon by petr.]

2. A cause of action against an official in his official capacity is an action against the office and therefore against the state.

D. Amici in Support of Resps.

1. National Governors' Association.

Where federal incursions on state power are involved, this Court has generally required a clear showing that Congress has intended to do so (citing §5 Fourteenth Amendment cases, preemption cases, and commerce clause cases). See Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). This issue of statutory construction is closely related to Eleventh Amendment concerns. In the vast majority of cases, Congress does not expressly

address either the States' susceptibility to liability in general or their susceptibility to suit in federal court, but it seems likely that Congress would expect the two issues to be resolved in the same way. Indeed, it is difficult to see why Congress would wish to create classes of federal claims cognizable only in state court. To avoid this bizarre result, this Court should apply the Eleventh Amendment clear statement rule to the question whether Congress intended states to be liable for damages as persons under §1983. Quern all but compels the answer that states should not be, if the Eleventh Amendment standard is used. But even under ordinary standards of statutory interpretation, the only possible conclusion is that Congress did not intend to impose liability on the states: Justice Brennan was correct when he stated in his dissent in Quern that the Quern majority had decided that the states are not §1983 "persons."

In common usage, the term "person" does not include the sovereign, and statutes using the term "person" are construed to exclude the sovereign, United States v. Cooper Corp., 312 U.S. 600, 604 (1941), particularly where the effect of the statute would otherwise be to burden the states. Wilson, supra; United States v. Knight, 39 U.S. 301, 315 (1840). The presumption may be overcome by evidence of contrary intent, but there is no such evidence here. As the Quern court observed, there would have been lengthy debate had Congress intended to abrogate sovereign immunity. This is particularly the case because southern senators were generally concerned at the time with the condition of their treasuries. But there was no such debate. Instead,

what was discussed was the personal liability of individual state officers: one congressman expressly noted that the states were exempted. As to the modified Sherman Amendment, it cuts against petr, because a suggestion that similar vicarious liability be imposed against the states was rejected.

Congress did not intended to override common-law immunities. Congress was familiar with tort defenses and intended them to apply. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981); Owen v. City of Independence, 455 U.S. 622, 638 (1980). Sovereign immunity was a well-established defense. "For this reason, Congress could not have intended the term 'person' in Section 1983 to include the States."

Given the purposes of §1983, state-court actions against the state make no sense: Congress' primary concern was to provide access to the federal courts, and §1983 does not by its terms require the state courts to open themselves to §1983 claims. The argument that Congress would not have expected Eleventh Amendment immunity to apply is foreclosed by Quern. As to the waivability of sovereign immunity, there had at that time been few waivers of sovereign immunity, and state courts were ill equipped to handle claims against the sovereign.

The result we seek does not leave plaintiffs without a remedy. They can sue state officials in the individual capacity, or sue for injunctive relief. State law may also provide remedies. Indeed, the Sup. Ct. Mich. recognized an analagous state-law action under the Michigan constitution, which petr failed to preserve.

Petr asserts that an official-capacity suit against an officer is not really an action against the state. This is wrong. See, e.g., Karcher v. May, 108 S. Ct. 388, 393 (1987). The Ex Parte Young fiction that official capacity suits are actually suits against the officer in his personal capacity has never been extended to actions for retrospective relief. 209 U.S. 123 (1908).

2. Amicus States (38 states + Puerto Rico).

By 1871, state sovereign immunity was well established (citing cases and state constitutional provisions). None of the statements in the legislative history relied upon by petr relate directly to the question presented. Although Congress has the power under §5 of the Fourteenth Amendment to abrogate state sovereign immunity, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), it did not do so in §1983.

E. Petr's Reply.

The Civil War and Reconstruction periods were a battle of human rights vs. state sovereignty, and human rights won. The reason there was no direct debate on state §1983 liability is that it was obvious: the controversy was over individual action as state action. [The brief appends photocopies of the speeches relied on by both sides in their legislative history discussions.]

There is no evidence that the 1874 change in the Dictionary Act was meant to apply retroactively -- if (as is doubtful) Congress intended to change the meaning of this provision of the Act at all. The original Dictionary Act, which counts bodies

politic as persons, was passed 2 months prior to §1983 and controls. In any event, this Court has included states as persons in statutes including substantially identical language to the 1874 revision. Ohio v. Helvering, 292 U.S. 360, 370 (1934); California v. United States, 320 U.S. 577, 585 (1944). There is no basis for the proposed "sovereign exception rule of statutory construction," drawn by NGA Amicus from Wilson. This Court has made clear that the exception applies only to the sovereign which enacts the statute. Jefferson County Pharmaceutical Assoc. v. Abbott Laboratories, 400 U.S. 150, 155-162 (1983).

The existence of state common law sovereign immunity has no bearing on this case. State sovereign immunity does not apply to federal constitutional claims brought in state court. Martinez, 444 U.S. 277, 284 n. 8 (1980); Monell, 436 U.S., at 695 n. 59; Owen, 445 U.S., at 647 n. 30; Felder v. Casey, 108 S. Ct. 2303, 2313-14 (1988). Accord General Oil v. Crain, 209 U.S. 211 (1908). This principle is based on the notion that the sovereign is immune from suit only for violations of rights of its own creation. Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907). In the Contracts Clause context, plaintiffs had successfully sued states in state court notwithstanding sovereign immunity. New Jersey v. Wilson, 11 U.S. (7 Cranch.) 164 (1812); Woodruff v. Trapnell, 51 U.S. (10 How.) 190 (1850); Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853). In any event, this Court extended §1983 to municipalities in Monell, notwithstanding the fact that municipalities are arms of the state and share state sovereign immunity. Owen, 445 U.S., at 644-645. The same should be true

for states. Monell thus demonstrates that no special showing of intent need be shown to oust states of their non-Eleventh Amendment sovereign immunity: simple inclusion in the federal statute is enough. In any event, state sovereign immunity is no barrier where, as here, the state itself does not claim sovereign immunity for unconstitutional conduct. (The brief cites the opinion in the consolidated case below, and argues that although it refers to state rather than federal constitutional claims, the reasoning would be applicable to both, citing Testa v. Katt, 330 U.S. 386 (1947).)

There is no reason to have a bifurcated definition of "person," depending on the remedy sought. In any event, Young-type suits should be viewed as official capacity suits. Congress in 1871 would have understood titular-party suits as official capacity suits which are permitted under the Eleventh Amendment, the understanding of Davis v. Gray, 83 U.S. (16 Wall.) 203, 220 (1873).

There is no reason to read immunity defenses into §1983. They can be dealt with, as defenses, in the course of state court litigation.

DISCUSSION

A. States as "Persons".

I will first, and most generally, address the question of states as "persons" under §1983. I will then turn to officers sued in their official capacity.

1. Introduction. For anyone who thinks Hans v. Louisiana was wrongly decided, there can be nothing satisfying about Quern.

Quern was an anachronistic decision. The Court in Quern took as a given that the Eleventh Amendment would apply to a federal question, read that assumption, not firmly established until 1890, back into the minds of members of the 1871 Congress, and in essence required the 1871 Congress to make clear its intention to diverge from it. It has been suggested that a narrower view of the Eleventh Amendment prevailed in the early stages of Reconstruction, one which was later repudiated in Hans. See Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423 (1983). But we have Hans, and we have Quern.

Unless this Court decides to overturn Quern, which it is not being asked to do and which it is sure not to do, a decision in this case that states are "persons" under §1983 and potentially subject to damage suits in their own courts would lead to results that are not aesthetically pleasing or logically compelling. If this Court reverses the judgment below, the Will-plus-Quern universe would be a strange one indeed. A statute passed in 1871, a time when Congress was deeply concerned about the willingness or ability of state courts to remedy violations of federal rights, would be construed to exclude the category of such claims least likely to be dealt with fairly in state court (claims against the state itself) from the federal courts and to leave them in the hands of the state courts. The game may not be worth the candle.

2. Is the question open? As a preliminary matter, we need go no further if Quern is taken to have resolved the issue

presented here. In his concurrence in Quern, Justice Brennan, joined by Justice Marshall, stated that the majority had "conclud[ed], in what is patently dicta, that a State is not a 'person' for purposes of 42 U.S.C. §1983." 440 U.S., at 350. I do not think Quern answered that question.

At no point did the majority in Quern state in so many words (in dicta or otherwise) that the state is not a "person" under §1983. The issue addressed in Quern was whether §1983 may properly be read as an abrogation of Eleventh Amendment immunity. The majority understood the concurrence to be complaining about the reaffirmance of the Court's Eleventh Amendment holding in Edelman in the aftermath of Monell. Quern, 440 U.S., at 332 n. 8. There was no mention in the majority of any more narrowly definitional implications of its decision, or of any implications for the status of states under §1983 outside the Eleventh Amendment context.

There is language in the majority opinion in Quern, however, that suggests that the Eleventh Amendment issue was viewed as an instance of a more general problem, that being the question whether §1983 generally meant to deprive the states of sovereign immunity. The Court spoke at one point about the States' "constitutionally guaranteed immunity," id. at 342, but it also spoke more generally of "the traditional sovereign immunity of the States." Id. at 341, 343. The Court analogized to its prior decision that §1983 did not abrogate the "historic immunity of state legislators," see Tenney v. Brandhove, 341 U.S. 367, 376 (1951), a decision which did not involve the Eleventh Amendment.

Most significantly, the Court noted that in the 1871 debates, "not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting §1" of the 1871 Act, an observation used to support the inference that Congress did not mean to interfere with "traditional sovereign immunity." Quern, at 343. Most important, the Court made clear that its Eleventh Amendment holding was not based on any special Eleventh Amendment requirement of "express waiver," but, rather, on more traditional methods of statutory construction. Id. at 345 n.16. Thus, the outcome of Quern cannot be readily said to turn on special rules of statutory construction for Eleventh Amendment cases.

The inference is strong that had the Quern Court been faced with the question raised by the instant case, it would have decided that Congress did not intend to interfere with traditional common-law state sovereign immunity, any more than it intended to interfere with Eleventh Amendment immunity. The Quern Court was driven by a concern for state treasuries, not only by a concern for the forum in which suit could be brought.

But to say that Quern implies a similar approach to state sovereign immunity as to Eleventh Amendment immunity is not to say that the Quern approach answers the definitional question of whether states are "persons" within the scope of §1983. As the Court recognized in Quern, the Court had previously held that a state may be sued under §1983 if it waives its Eleventh Amendment immunity. See Alabama v. Pugh, 438 U.S. 781, 782 & n. 2 (1978) (per curiam) ("suit against the State and the Board of

Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such suit"); Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985) (citing Pugh); Quern, 440 U.S., at 330-340 (1979) (citing Pugh). This result is inconsistent with the notion that states are not §1983 "persons" under §1983 as a definitional matter (i.e., that a suit against a state is not within the compass of §1983, leaving questions of immunity aside). Although Pugh was an action for injunctive relief, I agree with petr that there is no basis for bifurcating the statute, and saying that the word "person" means one thing for prospective relief and other for retrospective relief.

Thus, it seems to me that the definitional question is open after Quern. Quern stands for the proposition that §1983 did not abrogate state Eleventh Amendment immunity, and is strongly suggestive that §1983 did not abrogate traditional state sovereign immunity. But Quern and Pugh seem to imply that a consenting state can be sued for damages under §1983, a result which requires states to be viewed as within the scope of §1983.

3. States as "persons".

a. In my view, the question whether states are "persons" is to be addressed through the use of normal standards of statutory construction. See, e.g., California v. United States, 320 U.S. 577, 585 (1944) (answering the question whether state-owned wharves are included in a regulatory statute by examining "whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed," applies to them).

The cases relied on by the NGA do not call for a contrary result. In Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), the Court noted that although statutes employing the term "person" are ordinarily not construed to include the sovereign because sovereigns are not "persons" in common parlance, there is "'no hard and fast rule of exclusion,'" and much depends on the context, the subject matter, legislative history, and executive interpretation." Id., at 667 (quoting United States v. Cooper, 312 U.S. 600, 604-605 (1941)). The Court in Wilson relied on the current version of the Dictionary Act; the Dictionary Act has a role in the analysis of the instant case, to which I shall turn shortly. But whatever may be said about how "person" is generally to be construed, my point here is simply that Wilson and Cooper do not come close to the kind of rigid clear statement rule that the Court has come to use in the Eleventh Amendment context.

b. On the merits, I have already explained that this Court's prior cases appear to contemplate the inclusion of states in the scope of the definition of "persons" in §1983. I turn now to statutory language and legislative history.

i. The statutory language argument for the meaning of "person" turned, in Monell, on the Dictionary Act, which, as passed in February of 1871 (two months before the passage of §1983), included in the definition of "person" "bodies politic and corporate." The Court in Monell did not rely entirely on the Act, but also on prior authority that corporations, including municipal corporations, were "persons" for general purposes and

were subject to suit. The Monell Court did not lean as heavily on the "bodies politic" language, but did cite authority for the proposition that all governments, including the United States, are "bodies politic and corporate." 436 U.S., at 688 n. 51.

Resp in this case has challenged the validity of the "bodies politic and corporate" language, by stating that the language was curtailed, precisely to avoid its application to states. When enacted in 1874, the new version of the Dictionary Act purported to apply retroactively back to the date of the original Act. Thus, the argument goes, §1983 must be read according to a rule of construction in which "persons" excludes states unless the context suggests otherwise.

I have some concern that this newly-discovered retroactive change in the Dictionary Act will threaten Monell (at least in those instances in which local government is arguably not "corporate" in form), and am troubled by its application here. The purpose of the Dictionary Act as originally passed was to instruct the statutory codifiers about the meaning of certain statutory language. Very soon after the original version of the Dictionary Act was enacted, Congress used that language in §1983. A retroactive change in the construction rule would constitute a great change in the meaning of intervening legislation of major public significance. I do not think the changed version need be given such effect. The Dictionary Act versions did not purport to be absolutes: context can be understood to require a different meaning. Here, the context -- major legislation to redress violations of civil rights in and by the states, passed

two months after Congress' initial inclusion of "bodies politic" in the definition of "persons" -- argues for a broader meaning. But the "retroactive" change in the meaning of "person" to eliminate "body politic" language diminishes the force of the Dictionary Act argument.

ii. As Monell's discussion of the legislative history regarding municipalities would suggest, the legislative history borders on the useless. There can be no doubt that the Fourteenth Amendment and the 1871 Act were intended to protect citizens against the States, and that the statute had broad remedial purposes. The legislative history does not, to my mind, establish any more than these broad propositions. The best authority for the proposition that Congress thought it could provide for state liability was a proposed modification to the modified Sherman Amendment by an opponent, whose opposition would have been diminished had the state (which had authority to protect constitutional rights), rather than the municipalities, been made vicariously liable for riotous acts. Petr. Br. 21. But this is a thin reed. We are left knowing that Congress had broad purposes, and that nothing in the legislative history precludes suits against the state, for damages or otherwise.

I think there is enough here to support a holding that states were within the intended scope of "person" as used in §1983. But it is not a strong case by any means. If you agree that states are definitionally "persons," some sort of reversal of the judgment below is in order.

iii. That states are definitionally "persons" does not conclusively establish that they may successfully be sued. As noted above, I think it clear that states were thought in 1871 generally to be immune in their own courts from suits on state-law causes of action, absent consent. See Beers v. Arkansas, 20 How. 527 (1857) (describing a state's legislative consent, followed by withdrawal of consent); Railroad Co. v. Tennessee, 101 U.S. 337, 339 (1880) (same). See also Nevada v. Hall, 440 U.S. 410, 427, 430 (1979) (Blackmun, J., dissenting) (arguing on this basis for a constitution doctrine of interstate sovereign immunity). Under the general approach taken to the construction of §1983 in Quern, the statute must be read as consistent with then-prevailing notions of sovereign immunity.[1] But petr argues

---

[1]The approach adopted in text is similar to this Court's approach to the Eleventh Amendment question in Quern. It imputes to Congress an expectation regarding the scope of sovereign immunity defenses -- the traditional notion that states may only be sued if they consent -- and builds that expectation into the scope of §1983. That approach assumes that the 1871 Congress would have anticipated defenses to state liability, and would not have passed a statute which could not provide relief. Any claim to which immunity would have been a complete defense would not be understood to have been included in the scope of the statute ab initio. The effect of this approach is to freeze the law of immunities in time. A claim to which immunity would have been a defense in 1871 but is not a defense today may not be brought today, because Congress would not have included that claim within the scope of the statute.

I find this form of analysis disturbing. The law and practice of state sovereign immunity, like most areas of law and practice, change over time. The effect of reading 1871 sovereign immunity law into the intent of Congress in 1871 is that the modern-day §1983 is given narrower scope than modern-day sovereign immunity law might bear. See generally S. Steinglass, Section 1983 Litigation in State Courts §15.3 (1988); Note, Amenaibility of States to Section 1983 Suits: Reexamining Quern v. Jordan, 62 B.U.L. Rev. 731, 772-775 (1982); Owen v. City of Independence, 445 U.S. 622, 645 n. 28 (1980) (charting movement

(Footnote continued)

that consent should not be required in a §1983 case, because it was not well established in 1871 that a state would be generally immune from suit on causes of action created by federal law.

Even if petr is correct that federal-claim immunity was not well established, his analysis must fail under the Quern approach, in my view, because it is too circular. By definition, the very fact that Congress was passing a statute would mean that

---

(Footnote 1 continued from previous page)
away from absolute sovereign immunity); id. at 645 n. 27 (describing earlier, more traditional, broader notions of state sovereign immunity). The body of the cause of action is truncated, cut off from changes in societal notions of the responsibility of the state towards its citizens. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972).

It is easy to illustrate why this is the case. Suppose the Court had decided to overrule Hans this term in Union Gas. Whether Quern withstood the overruling of Hans would depend on the rationale of the holding in Union Gas. If Hans were held properly to have stated the general understanding of the Eleventh Amendment at that time (and back to 1871), but were held no longer to comport with the general state of the law, Quern would stand under the Quern Court's approach even if the Eleventh Amendment no longer requires immunity from federal question suits. Under my approach, Quern would fall.

I would think it analytically preferable, if writing on a clean slate, that the question of immunities be answered according to current law, and the intent of the 1871 Congress vis-a-vis the scope of §1983 should be discerned without reference to its likely views about the availability vel non of common-law or statutory immunities. That course is wise, given the absence (acknowledged in Quern) of any discussion of immunity issues in the legislative history of §1983.

But I think that the approach I suggest is inconsistent with that of the Court in Quern, and also with the historical approach this Court has taken to the question of §1983 immunities. See Owen, supra, at 637-650 (analyzing municipal good-faith immunity in terms of whether any such immunity was "well established at common law at the time §1983 was enacted"). Although there is a difference between the Owen problem of determining whether to recognize a defense and the problem of defining the scope of the cause of action, a historical approach to defenses could, if carried to its limits, render the "scope" exercise meaningless.

state sovereign immunity was not at issue. I think what the Quern approach requires is a broader view of the potential conflict. If states could not generally be sued for damages for their wrongful conduct, Congress will be presumed to have considered immunity as the status quo and not to have intended to trump it, absent a clear statement of intent to do so which is lacking in this statute.

Thus, I think that under this Court's traditional approach, one which assumes that Congress limited the scope of §1983 according to its contemporaneous expectations regarding traditional immunities, states cannot be sued under §1983 unless they have waived their immunity.

Under this approach, which is similar to the approach taken by the dissent below, important questions regarding waiver would have to be addressed. These would include the question whether waiver of immunity for §1983 purposes is a question of state or federal law, and the question whether the waiver must be §1983-specific or federal-claim-specific. On the latter question, it could be argued that a state which has waived its immunity for similar state claims must, under general principles of non-discrimination against federal claimants, be understood to have waived immunity for §1983 purposes as well.

These questions need not be addressed in this case. This Court may go no further than deciding that states are included in the scope of §1983, and the remaining questions could be dealt with by Mich.S.Ct. on remand. If the approach of the dissenters

is any indication, that court may well decide that petr is entitled to relief.

B. State Officers. I think that resp is correct that it is well established that a suit against state officers in their official (as opposed to personal) capacity is to be viewed as a suit against the state for §1983 purposes, and is subject to whatever immunities apply to suits against the state.

CONCLUSION

For the reasons stated, I think the judgment below (that states are not "persons" under §1983) should be reversed, and the case remanded for a consideration of sovereign immunity defenses.