Will v. Michigan State Police
No. 87-1207

Lisa's Outline
Argument: Mon., Dec. 5

Cert to Mich. S.Ct.
G: CJ; WJB; BRW; TM; HAB; AS; AMK
D: JPS; SOC
Recommendation: Affirm (if Quern v. Jordan followed)

Section 1983 provides that "every person who, under color of any statute, ordinance, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 question in this case is whether a state and its officers, acting in their official capacities, are among the "persons" subject to liability under this statute.

For about 25 years, a special investigations unit in Michigan (known as the "Red Squad"), acting under the authority of a state statute, gathered information on organizations and persons that it suspected of engaging in or advocating certain subversive activities, including "criminal syndicalism." Another Michigan statute made the advocacy of criminal syndicalism (defined as "the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accmplishing industrial or political reform") a felony, and the Red Squad investigated people that it suspected of criminal syndicalism. In 1976, a Michigan state court declared both statutes unconstitutional and ordered the state police to disband the special investigations unit. At the same time, it directed the state police to release the files collected by the investigations unit to the people who were the subject of the files.

It was not until ptr Will's brother obtained the file that the investigations unit had kept on him that ptr found out that the state police had denied him a promotion in 1973 as the result of his brother's political activities. Ptr first filed a grievance with the state police and eventually obtained about $200 in lost wages; he relinquished this award when he filed lawsuits against resps (the Michigan Dept. of State Police and the Director of State Police) in the local circuit court and in the Michigan Court of Claims, alleging that resps had violated his rights under the state and federal constitutions. After consolidating the cases for trial in one court, the trial judge concluded that resps had violated ptr's right to due process by denying him a promotion based on his brother's political beliefs. He also de-

cided that resps were "persons" subject to suit under § 1983, and awarded ptr over $150,000--for lost wages, career loss, emotional distress, and exemplary damages. Resps do not argue that the finding of a violation of due process was in error.

Both the Michigan Court of Appeals and the Michigan Supreme Court disagreed with the trial court's conclusion that a state and its officers (sued in their official capacities) are "persons" within the meaning of § 1983. Since Will had failed to preserve for appeal his claims based on Michigan's own constitution, the courts' interpretation of § 1983 effectively denied him all relief.

In Quern v. Jordan, 440 U.S. 332 (1979), this Court held that, in enacting § 1 of the Civil Rights Act of 1871 (today's § 1983), the 42nd Congress did not intend to override the states' immunity from suit under the eleventh amendment. Will does not attack that decision head-on. Instead, he argues that even if Congress did not mean to overcome the states' eleventh-amendment immunity by subjecting them to suit in federal court, it did mean to subject them to liability in state court for their constitutional violations.

Section 1983 itself provides no definition of the word "persons." But the Dictionary Act (§ 2, 16 Stat. 431), passed two months before § 1, provided that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense" (emphasis added). At the time of § 1's enactment, the general understanding was that states were "bodies politic and corporate." And in Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978), the Court held that "may" should be interpreted as "shall"--that is, that the interpretation indicated by the Dictionary Act should control unless a contrary intent appeared. The Court in Monell further decided that Congress had indicated no such contrary intent with respect to § 1. Thus, it would seem that the word "persons" in § 1 should be interpreted to include the states.

The general history of the civil rights laws of the 1860s and '70s, familiar to us from Patterson, is also instructive. These laws were, of course, a dramatic response to dramatic times; the reluctance and even outright refusal of the states to accord equal rights and equal protection to blacks had forced Congress to step into the breach. Although § 1 of the 1871 Act was not extensively debated, many of the statements that legislators did make indicated an intent to accord § 1 as broad a sweep as possible under the powers given to Congress by § 5 of the fourteenth amendment--which, we know from Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), include the power to subject states to suits for damages. In particular, when the Sherman amendment (which would have imposed vicarious liability on municipalities for certain acts of private individuals occurring within their jurisdiction) was introduced in Congress, many legislators who opposed

the amendment asserted that it was the states and not the municipalities who should bear the responsibility of protecting citizens. Many of the representatives also indicated that § 1 would not serve its purpose unless it could be applied against the states. I will not describe the legislators' remarks in detail here; they are well canvassed in WJB's concurring opinion in Quern, 440 U.S. at 349-66, and he found them significant enough to warrant a conclusion that Congress had, in fact, intended to override states' immunity from suit in that statute.

Not only do the legislative debates signal that Congress meant to subject the states to liability, but it is also significant that at the time § 1 was enacted, Hans v. Louisiana had not yet been decided. It is at least arguable that Congress would not have thought that the eleventh amendment limited the federal-question jurisdiction of the federal courts and thus would not have thought to indicate a clear intent--especially the kind of clear intent that this Court only recently has begun to require--to override an immunity that it did not know existed.

The trouble with these arguments is that they already have been rejected, in Quern. It may be that WJB, in this case, will want to adhere to his view that Quern incorrectly interpreted § 1; that certainly would be a reasonable position, and it would make this an easy case for Will. If we take Quern as a given, however, Will has a tougher row to hoe. He emphasizes that this Court requires a clear statement from Congress when it intends to override states' eleventh-amendment immunity and that the Court does not require this clear statement when Congress merely intends to subject states to suit in their own courts. Thus, he basically concludes, it is clear enough that Congress intended that states be liable under § 1 even if it is not clear enough that it intended that they be liable in federal court.

The Court's cases provide Will with some support. In Employees v. Missouri Dept. of Public Health, 411 U.S. 279 (1973), Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), and Welch v. Texas Dept. of Highways, 107 S.Ct. 2941 (1987), this Court decided that Congress had not expressed a clear enough intent to override states' immunity from suit under the eleventh amendment--but each case contained the suggestion that the question whether Congress intended states to be liable in their own courts was different from the eleventh-amendment question. See 411 U.S. at 293-94 (Marshall, concurring); 473 U.S. at 239 n.2; 107 S.Ct. at 2947 n.6, 2957 (White, concurring). Thus, it is true as a general matter that Congress may identify a state as a potential defendant to a federal claim even though it has refused to provide a federal forum for that claim.

It is also true, as Will points out, that if Congress creates a federal cause of action but does not furnish federal jurisdiction for that cause of action, and if state courts generally hear similar claims, those state courts may be required to entertain the federal cause of action. See Testa v. Katt, 330

U.S. 386 (1947). This observation does not, however, answer the question posed here, since the whole question is whether Congress did, in fact, create a cause of action against states for money damages under § 1983. (If Congress did do this, then it may be that Testa requires that the question left open in Maine v. Thiboutot, 448 U.S. 1, 3 n. 1 (1980)--whether state courts must entertain § 1983 actions--must be answered in the affirmative where states are sued.)

Will also argues that neither Maine v. Thiboutot, 448 U.S. 1 (1980), nor Martinez v. California, 444 U.S. 277 (1980), would have been possible unless states were "persons" under § 1983; in those cases, Maine and California were sued in their own names and in their own courts under § 1983. The short answer to Will's argument is that the question he presents simply wasn't raised or discussed in those cases; it is a stretch, therefore, to say that those cases firmly decided that states are "persons" within the meaning of § 1983. More important, the plaintiffs in Martinez sought only prospective, not retrospective, relief; therefore, that case says nothing about Congress's intent to furnish a damages remedy against the states themselves. It is true that part of the relief obtained in Thiboutot included a retroactive award of welfare benefits--but the Court specifically noted that the state had not appealed this award, 448 U.S. at 3 n. 2, and therefore the Court was not asked to judge its propriety. Nevertheless, Will's argument does have some force: Maine and California were not properly before the Court unless they were "persons" within the meaning of § 1983 and, moreover, it would be strange to say that their "personhood" under that statute depends on the nature of relief sought.

Similarly, Will argues that since the Court recognized official-capacity actions against state officers under § 1983 in Ex parte Young, 209 U.S. 123 (1908), it must be the case that state officials sued in their official capacities are "persons" within the meaning of § 1983. And, unlike his arguments based on Thiboutot and Martinez, this particular argument cannot be answered by the observation that the question he raises was not a necessary part of the Court's holding in Young. Nor is resps' argument that official-capacity actions are really actions against the state persuasive here; as Will points out, the entire premise of Young was that actions to bar unlawful conduct by state officials are not actions against the state. Resps' amici have a better rejoinder to Will's argument: since Ex parte Young gets around the eleventh amendment only by treating official-capacity suits as if they are brought against the official herself, they really are personal-capacity suits. Thus, under this argument, the definition of "person" does not vary according to the nature of the relief sought; all suits brought against individuals are, for purposes of the definition of "person," personal-capacity suits.

One might say that this emphasis on the definition of "person" is misplaced. It could be argued that states and state of-

ficers acting in their official capacities are, indeed, "persons" within the meaning of § 1983, but that a proceeding seeking damages from these defendants is never a "proper proceeding for redress" within the meaning of § 1983.

In any event, even the proposition that the meaning of "person" varies depending on the type of relief sought does not seem as implausible as the notion that states and their officials acting within their official capacities are "persons" within the meaning of § 1983, when the latter idea is viewed against the backdrop of Quern v. Jordan's holding that Congress did not intend to hold states liable for damages in federal court.

The legislative history of § 1 is filled with descriptions of the states' unwillingness to enforce state laws for the benefit of blacks, and the state courts played a major role in the denial of the states' enforcement powers to black citizens. Recall that there was no general federal-question jurisdiction in those days; the state courts generally were thought competent to handle most federal questions. Congress's decision to vest the federal courts with jurisdiction over § 1 claims, therefore, must have stemmed from a recognition that the state courts could not be trusted with these claims. And, contrary to Will's argument, the state courts' concurrent jurisdiction over these claims (see Thiboutot, 448 U.S. at 3 n. 2) does not refute the point that Congress was unwilling to entrust such cases to state courts generally. If a particular plaintiff has faith in the state courts, she may bring her § 1983 claim there; the point is, the 42nd Congress did not force her to do so because it did not have enough faith in the state courts.

Justice Douglas's majority opinion in Monroe v. Pape, 365 U.S. 167 (1961), thoroughly discusses this point and his conclusion there depends almost entirely on the principle that § 1 of the 1871 Act was intended to provide a federal forum for those actions to which state courts would not give their full respect. In these circumstances, it is highly implausible that Congress would have chosen not to provide a federal forum for a certain class of claims brought under § 1 but would have decided, instead, to channel those claims to state court. This proposition becomes especially implausible when one remembers the nature of the claims involved here; they are claims brought directly against the state or its officers acting in their official capacities, and therefore they would seem to be the claims most likely to receive scant or biased attention from the courts of that state.

I thus would conclude that it is unreasonable to say, with Quern, that Congress did not intend to provide a federal forum for damages actions against the state and yet also to say that it did mean to allow such actions in state court. If WJB adheres to his view that this part of Quern was incorrect, then I would recommend a reversal of the decision below; but if Quern is not disputed, then I would recommend an affirmance of the Michigan

Supreme Court's decision because Will's position is impossible to square with Quern.