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**ELEVENTH AMENDMENT IMMUNITY AFTER  
MONELL—  
IS THE SHIELD STILL INTACT?**

by

Hunter W. Lundy\*

Several recent United States Supreme Court decisions have caused many to believe that the eleventh amendment immunity of states has been eroded and that states are now susceptible to damage suits under title 42, section 1983 of the United States Code.<sup>1</sup> The primary basis for these beliefs is the recent decision of *Monell v. Department of Social Services of New York*.<sup>2</sup>

This comment will discuss *Monell* and how it and other decisions have given rise to arguments that state immunity has been completely abrogated in section 1983 suits. The comment will present the arguments for both sides, encompassing a cursory review of many recent decisions, in an effort to determine what the existing law is on the question.

**HAS ELEVENTH AMENDMENT IMMUNITY BEEN ABROGATED?**

*The Affirmative Argument*

The foundation for the argument that section 1983 has abrogated the immunity of states in damage suits was laid in *Fitzpatrick v. Bitzer*.<sup>3</sup> The plaintiffs in *Fitzpatrick* brought a class action suit in behalf of all present and retired male employees of the State of Connecticut. The plaintiffs alleged that certain provisions of Connecticut's statutory retirement plan discriminated against them because of their sex, in violation of Title VII of the Civil Rights Act of 1964.<sup>4</sup>

The district court ruled in the plaintiffs' favor, awarding prospective injunctive relief against the defendant state officials. However, the court denied an award of retroactive retirement benefits and attor-

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<sup>1</sup>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.

<sup>2</sup>42 U.S.C. § 1983 (1976).

<sup>3</sup>436 U.S. 658 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)).

<sup>4</sup>427 U.S. 445 (1976).

<sup>5</sup>*Id.* at 445.

neys' fees saying that such would constitute a recovery of money damages from the state's treasury, an act precluded by the eleventh amendment. The United States Court of Appeals for the Second Circuit remanded the case on the question of attorneys' fees saying that such an award would have little effect on the state treasury.<sup>5</sup>

Mr. Justice Rehnquist, writing for the United States Supreme Court, stated that Title VII allowed suits for damages against the states, regardless of the eleventh amendment immunity.<sup>6</sup> Hence, the plaintiffs were entitled to both back pay and attorneys' fees. He expressed that when Congress passes laws for the purpose of fourteenth amendment enforcement, such as Title VII, suits by individuals against states, pursuant to these laws, will be permissible.<sup>7</sup> This rule was further emphasized by the Court in *Hutto v. Finney*.<sup>8</sup> In *Hutto*, a group of prisoners filed suit against the officials of the Arkansas prison system. The prisoners alleged that the conditions and treatment they were subject to constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.<sup>9</sup> The district court found that the violations did exist and subsequently issued a series of remedial orders. On appeal to the United States Court of Appeals for the Eighth Circuit, the prison officials challenged two aspects of the district court's relief, the most significant being the awarding of attorneys' fees to be paid out of department of correction funds.<sup>10</sup> The court of appeals affirmed and assessed additional attorneys' fees to cover the services on appeal.<sup>11</sup> The Supreme Court affirmed.<sup>12</sup>

The Supreme Court opinion in *Hutto*, released just a few days after *Monell*, reiterated that Congress "has plenary power to set aside State's immunity . . . in order to enforce the Fourteenth Amendment."<sup>13</sup> The Court in *Hutto* disregarded the bar of the eleventh amendment only as to attorneys' fees and costs. Mr. Justice Brennan, in a concurring opinion asserted that the rule of *Edelman v. Jordan*<sup>14</sup> had been eroded by *Fitzpatrick* and *Monell* and therefore the Court should also award damages against the states.<sup>15</sup>

A significant requirement under the express terms of section 1983 is that the defendant must be a "person";<sup>16</sup> however, the Supreme Court elected to redefine the word "person" in *Monell*. In July of 1971, a

<sup>5</sup>519 F.2d 559, 571-72 (2nd Cir. 1975).

<sup>6</sup>427 U.S. at 457.

<sup>7</sup>*Id.* at 456.

<sup>8</sup>437 U.S. 678 (1978).

<sup>9</sup>*Id.* at 678.

<sup>10</sup>548 F.2d 740, 742 (8th Cir. 1977).

<sup>11</sup>*Id.* at 742-43.

<sup>12</sup>437 U.S. at 700.

<sup>13</sup>*Id.* at 693 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445).

<sup>14</sup>415 U.S. 651 (1974), *aff g* *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).

<sup>15</sup>437 U.S. at 700-01 (Brennan, J., concurring).

<sup>16</sup>*See* note 1, *supra*.

group of female employees of the New York Department of Social Services and of the Board of Education of the City of New York filed a class action suit under section 1983, alleging that the Department and the Board, as a matter of policy, forced pregnant employees to take unpaid leaves of absence before the leaves were required for medical reasons.<sup>17</sup> The plaintiffs sought both injunctive and monetary relief. The defendants were the Board of Education and its chancellor, the department of social services and its commissioner, and the City of New York and its mayor. The individual defendants were sued in their official capacities only.<sup>18</sup>

Prior to trial, the defendants changed their maternity leave policy, an act which resulted in plaintiffs' claims for injunctive and declaratory relief becoming moot. The district court dismissed the case in its entirety for lack of subject matter jurisdiction. The court stated that any damage award would ultimately have to come from the City of New York, an action which would be precluded by municipal immunity under *Monroe v. Pape*.<sup>19</sup>

The plaintiffs argued on appeal that *Monroe* did not extend to public entities such as the Board of Education, and that a damage award could be granted against the individual defendants who were persons within the meaning of section 1983.<sup>20</sup> The court of appeals found that the Board was not a "person" within the meaning of section 1983 and that *Monroe* prohibits a damage award against individual defendants sued in their official capacity because such a judgment would have to be satisfied out of public funds.<sup>21</sup>

The Supreme Court, however, re-examined the legislative history of section 1983<sup>22</sup> and held that a municipality is a "person," and, thus, overruled *Monroe* insofar as it had held that local governments were wholly immune from suits under section 1983.<sup>23</sup> After analyzing the legislative history of the Civil Rights Act of 1871, the Court concluded that Congress had always intended for municipalities and other local government bodies to be included among those persons to whom section 1983 applies. Furthermore, the Court said that municipalities and other local governmental units were subject to suit under 1983 for monetary, declaratory, or injunctive relief when the action alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by

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<sup>17</sup>436 U.S. at 661.

<sup>18</sup>*Id.*

<sup>19</sup>365 U.S. 167 (1961). The Court in *Monroe* stated that it did not believe that the word "person" as used in the act was intended to include a municipality. *Id.* at 191.

<sup>20</sup>532 F.2d 259 (2nd Cir. 1976).

<sup>21</sup>*Id.* at 264-265.

<sup>22</sup>Both 42 U.S.C. § 1983 and 28 U.S.C. § 1343 originated from § 1 of the Civil Rights Act of 1871. They were later separated for the purpose of codification.

<sup>23</sup>436 U.S. at 700-01.

the body's officers."<sup>24</sup> The Court then went a step further and said that the heart of a section 1983 action "is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution. . . ."<sup>25</sup> Local governments, like other 1983 "persons" could be sued pursuant to an allegation of unconstitutional deprivations caused by governmental custom.<sup>26</sup> Also, the Court said the custom does not necessarily have to be one that has been formally approved by the governmental bodies.<sup>27</sup>

The Court did note, however, that the legislative history revealed that Congress "did not intend municipalities to be held liable unless action pursuant to an official municipal policy of some nature caused a constitutional tort."<sup>28</sup> Specifically, the Court concluded that a municipality could not be held liable if it only employs a tortfeasor—or, in other words, a municipality would not be liable under section 1983 on a *respondeat superior* theory.<sup>29</sup>

The *Monell* limitation of the *respondeat superior* theory was recently followed by the United States Court of Appeals for the Fifth Circuit in *Baskin v. Parker*.<sup>30</sup> The plaintiffs in *Baskin* filed suit against the sheriff and deputy of Winn Parish, Louisiana. The plaintiffs alleged that they suffered damages due to an illegal and unreasonable search of their property.<sup>31</sup> The district court awarded damages against the deputy only. The facts revealed that the deputy sheriff obtained warrants to search the Baskin properties for marijuana. The deputy, however, lacked probable cause to obtain the warrants because his informants were not credible.<sup>32</sup> The informants had personal grievances against the Baskins. There was evidence that the sheriff knew of this before the warrant was obtained and yet he participated in the obtaining of the warrant. Furthermore, the group conducting the search met in the sheriff's office prior to approaching the plaintiffs' property. In discussing *Monell*, the court of appeals stated that although the sheriff could not be liable for damages for his deputy's actions under the doctrine of *respondeat superior* or under Louisiana's vicarious liability laws, there was a question of whether the sheriff could be personally liable for damages because of his participation in obtaining the warrants and organizing the search party.<sup>33</sup> The case was reversed and remanded.<sup>34</sup>

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<sup>24</sup>*Id.* at 690.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 691.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>602 F.2d 1205 (5th Cir. 1979).

<sup>31</sup>*Id.* at 1205.

<sup>32</sup>*Id.* at 1207. See *Aguilar v. Texas*, 378 U.S. 108 (1964).

<sup>33</sup>*Id.* at 1208.

<sup>34</sup>*Id.* at 1211.

Recalling the Court's conclusion in *Monell*, it is noted that the Court did not decide whether local municipalities would be afforded some official immunity. The Court stated that local municipalities would not be afforded absolute immunity under 1983 but it failed to draw lines as to the scope of municipal immunity.<sup>35</sup>

*Monell* states that Congress in enacting section 1983 as section 1 of the Civil Rights Act of 1871, intended to include within the term "person" municipal corporations<sup>36</sup> and any entity which comes within the term "body politic and corporate."<sup>37</sup> The legislative history, the Supreme Court held, indicates that "Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights."<sup>38</sup> "An examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover legal as well as natural persons."<sup>39</sup> The Court stated that the debates themselves showed that Congress understood "persons" to include municipal corporations.<sup>40</sup> Furthermore, the Court said that contemporary judicial decisions show that in the year of the statute's enactment, 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.<sup>41</sup> In concluding its analysis of the legislative history, the Court noted that the word "person" included municipalities as defined under the Dictionary Act passed prior to the Civil Rights Act.<sup>42</sup> The Act 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 were intended to be used in a more limited sense."<sup>43</sup> The Court determined that the plain meaning of section 1 of the Civil Rights Act included municipal corporations in the phrase "bodies politic and corporate" and, therefore, local government bodies were "persons" under the Act.<sup>44</sup>

Mr. Justice Brennan, in a concurring opinion in *Quern v. Jordan*,<sup>45</sup> reviewed the legislative history, as previously discussed, and expanded

<sup>35</sup>436 U.S. at 701. See also *Owen v. City of Independence*, 48 U.S.L.W. 4389 (1980). The Court held that a municipality has no immunity from liability under § 1983 for constitutional violations. A municipality is not entitled to qualified immunity based on good faith of its officials.

<sup>36</sup>*Id.* at 690.

<sup>37</sup>*Id.* at 688 (citing *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873) (No. 10,336)).

<sup>38</sup>*Id.* at 685.

<sup>39</sup>*Id.* at 683.

<sup>40</sup>*Id.* at 686.

<sup>41</sup>*Id.* at 687.

<sup>42</sup>Act of February 25, 1871, § 2 (16 Stat. 431). See also *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873) (No. 10,336).

<sup>43</sup>Act of February 25, 1871, § 2 (16 Stat. 431). See 436 U.S. at 688.

<sup>44</sup>436 U.S. at 688-89.

<sup>45</sup>440 U.S. 332, 350-66 (1979) (Brennan, J., concurring).

his argument previously made in *Hutto*. Although he concurred with the majority holding in *Quern*, he patently disagreed with the majority that a state is not a "person" for the purposes of section 1983.<sup>46</sup> He stated that the Court's address of this issue in *Quern* was mere dicta.<sup>47</sup> He reviewed the *Monell* discussion of the Dictionary Act, insofar as it held that "[s]ince there is nothing in the 'context' of the Civil Rights Act calling for a restricted interpretation of the word 'person,' the language of that section should prima facie be construed to include 'bodies politic' among the entities that could be sued."<sup>48</sup> Pursuant to this review, Mr. Justice Brennan expressed his opinion that the overwhelming undisputed authority was that in 1871 the phrase "bodies politic and corporate" included states.<sup>49</sup> In concluding his argument, he stated that the legislative history of the Civil Rights Act of 1871 expressed Congress's intention that "States themselves, as bodies corporate and politic, should be embraced by the term 'person' in § 1 of the Act."<sup>50</sup>

Mr. Justice Brennan's view has been supported by several law journals<sup>51</sup> and by members of the profession.<sup>52</sup> One case in particular, *Aldredge v. Turlington*,<sup>53</sup> demonstrates how the Court's decision in *Monell* and Mr. Justice Brennan's arguments have influenced other courts.

In *Aldredge*, District Judge William Stafford of the Northern District of Florida, denied a motion to dismiss made by a Florida state official who was being sued for damages pursuant to section 1983 while acting in his official capacity. Judge Stafford, in reviewing the legislative history of 1983, concluded that a state was a "person" within the meaning of section 1983 and that the eleventh amendment did not bar an award of damages from a state's treasury.<sup>54</sup>

The district judge stated that the numerous federal court decisions prior to *Monell* which held that states were not "persons" under section 1983 had not reached that conclusion because a special status had been conferred on the states by the Constitution.<sup>55</sup> Rather, courts had proceeded on the assumption that if a municipality was not a "person," then a state could not be deemed a "person." "As expressed in *Fitzpatrick v. Bitzer* . . . 42 U.S.C. § 1983, had been held in *Monroe v.*

<sup>46</sup>*Id.* at 350-51.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 356 (citing *Monell*, 436 U.S. at 689-90 n.53).

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 357.

<sup>51</sup>See LeGette, 42 U.S.C. § 1983: *Claims Against States for Damages*, 7 FLA. ST. U. L. REV. 525 (1979); McBirney, *Quern v. Jordan: A Misdirected Bar to Section 1983 Suits Against States*, 67 CAL. L. REV. 407 (1979).

<sup>52</sup>See Brief of Counsel objecting to Report and Recommendation of the United States Magistrate, *Lindsey v. Mississippi*, No. J78-0345(N) (S.D. Miss. filed Aug. 3, 1978).

<sup>53</sup>TCA 78-830 (N.D. Fla. Nov. 17, 1978).

<sup>54</sup>*Id.* slip op. at 8.

<sup>55</sup>*Id.* at 6.

*Pape* . . . to exclude cities and other municipal corporations from its ambit; that being the case, it could not have intended to include States as parties defendant."<sup>56</sup> Therefore, Judge Stafford concluded that there was no reason why states should be treated any differently than local governmental units under section 1983. In reaching the question of eleventh amendment immunity, he stated that the principle announced in *Fitzpatrick* was controlling.<sup>57</sup>

Judge Stafford noted that the *Monell* Court stated that section 1983 was passed by Congress to enforce the fourteenth amendment. Although *Edelman* held that states are immune from suit under the eleventh amendment in a section 1983 action, it is explained in *Fitzpatrick* that the basis for the decision in *Edelman* was that states and their agencies were not at that time proper defendants under section 1983.<sup>58</sup> Since it has now been held that states and their agencies are proper defendants under 1983 suits, the eleventh amendment will no longer prohibit suits.<sup>59</sup>

It is significant to note that although Judge Stafford ruled that states, state agencies and state officers acting in their official capacity are "persons" under section 1983, the defendant, Turlington, was dismissed in his official capacity.<sup>60</sup> The Fifth Circuit in *Bogard v. Cook*,<sup>61</sup> had ruled that *Monell* was limited to local governmental units and did not abrogate eleventh amendment immunity to states.<sup>62</sup> Applying *Bogard*, Judge Stafford entered an order *sua sponte* setting aside his previous ruling and thus dismissing the state official Turlington from the suit.

### *The Eleventh Amendment Shield Intact*

The eleventh amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the eleventh amendment specifically bars only suits against a state by its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought by its own citizens as well as by citizens from other states.<sup>63</sup> It is well settled

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<sup>56</sup>*Id.* (citing *Fitzpatrick*, 427 U.S. at 452). See also *Quern v. Jordan*, 440 U.S. at 351.

<sup>57</sup>*Id.* at 7-8.

<sup>58</sup>427 U.S. at 452.

<sup>59</sup>TCA 78-830, slip op. at 6.

<sup>60</sup>*Id.* at 1.

<sup>61</sup>586 F.2d 399 (5th Cir. 1978).

<sup>62</sup>*Id.* at 410.

<sup>63</sup>*Alabama v. Pugh*, 438 U.S. 781 (1978); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Parden v.*



that a state is not a "citizen" within the meaning of the Constitution or the acts of Congress.<sup>64</sup> Therefore, since a state is not a citizen, no diversity of citizenship can exist between a state and any other party.<sup>65</sup>

To fall within the confines of the defense of eleventh amendment immunity, a state need not be named as a party defendant if the state is, in fact, the real party in interest.<sup>66</sup> The Fifth Circuit Court of Appeals, in deciding whether eleventh amendment immunity is applicable has placed strong emphasis upon whether a named party has been treated as an "agency" or "alter ego"<sup>67</sup> of the state by the state courts.<sup>68</sup>

In the early part of this century, the Court realized that the needs of injured claimants should be cared for, irrespective of state immunity. This realization was first seen in the Court's decision in *Ex parte Young*.<sup>69</sup> In *Young* a group of railroad stockholders sued Minnesota state officials in federal court seeking equitable relief from an alleged unconstitutional confiscatory tax statute.<sup>70</sup> The Minnesota Attorney General raised the defense of eleventh amendment immunity.<sup>71</sup> The Court concluded that injunctive relief should be granted against the state officer, not in his official capacity, but as an individual since a state officer who seeks to carry out an unconstitutional act is "stripped" of his official capacity.<sup>72</sup>

In *Ford Motor Co. v. Department of Treasury of Indiana*<sup>73</sup> the

Terminal Ry. Co., 377 U.S. 184 (1964); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Hans v. Louisiana*, 134 U.S. 1 (1890). See also *Bogard v. Cook*, 586 F.2d 399.

<sup>64</sup>*Moor v. County of Alameda*, 411 U.S. 693 (1973); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

<sup>65</sup>*Skandia American Reinsurance Corp. v. Schenck*, 441 F. Supp. 715 (S.D.N.Y. 1977). See also *Postal Telegraph Cable Co. v. United States*, 155 U.S. 482 (1894). The Supreme Court stated in *Postal Telegraph* that:

A state is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States.

*Id.* at 487.

<sup>66</sup>See *Dacy v. Florida Bar, Inc.*, 414 F.2d 195 (5th Cir. 1969) *cert. denied*, 397 U.S. 909 (1970); *Krisel v. Duran*, 386 F.2d 179 (2nd Cir. 1967) *cert. denied*, 390 U.S. 1042 (1968).

<sup>67</sup>*Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dep't*, 415 F.2d 452, 455 (5th Cir. 1969).

<sup>68</sup>See *Building Engineering Services Co. v. State of Louisiana*, 459 F. Supp. 180 (E.D. La. 1978); *Usury v. Louisiana Dep't of Highways*, 459 F. Supp. 56 (E.D. La. 1978); *Edward E. Morgan Co. v. State Highway Comm'n*, 212 Miss. 504, 54 So. 2d 742 (1951).

<sup>69</sup>209 U.S. 123 (1908).

<sup>70</sup>*Id.* at 129.

<sup>71</sup>*Id.* at 132.

<sup>72</sup>*Id.* at 159-60, 168.

<sup>73</sup>323 U.S. 459 (1945).

plaintiff brought suit against the Department of Treasury of the State of Indiana and the state's governor, treasurer and auditor for a refund of taxes alleged to have been collected illegally.<sup>74</sup> In reviewing the allegations the Supreme Court stated that the plaintiff had failed to assert a claim for a personal judgment against the individual defendants for the contested tax payments.<sup>75</sup> The Court noted that the plaintiff's claim was for a tax refund and not for imposition of personal liability on the individual defendants for collecting the taxes illegally. The Court concluded that the State of Indiana was the real party in interest, since the recovery of any money would come from the state. Therefore, in the absence of the state's consent, the suit was barred by the eleventh amendment.<sup>76</sup>

A number of years after *Young and Ford Motor Co.*, the United States Supreme Court in *Edelman v. Jordan*,<sup>77</sup> further defined the test for determining the application for eleventh amendment immunity—a test which is evidently the law today.<sup>78</sup>

Jordan filed a complaint under section 1983 in federal court in Illinois, individually and as a representative of a class seeking declaratory and injunctive relief against two former directors of the Illinois Department of Public Aid, the director of the Cook County Department of Public Aid, and the comptroller of Cook County.<sup>79</sup> He alleged that these state officials were administering the federal-state programs in a manner inconsistent with various federal regulations and in violation of the fourteenth amendment. The district court issued a permanent injunction requiring compliance with federal time limits and also ordered state officials to remit the wrongfully withheld benefits to all persons who were found eligible. The Court of Appeals for the Seventh Circuit affirmed.<sup>80</sup>

On appeal the Supreme Court reversed the Seventh Circuit on the award of retroactive benefits.<sup>81</sup> The Court made it apparent that in an action against a state pursuant to section 1983, a federal court's remedial power, consistent with the eleventh amendment, is limited to prospective injunctive relief. The Court also recognized that an action may be barred by the eleventh amendment even if the state is not named as a party to the action, *if the judgment will have to be paid from public funds in the state treasury*.<sup>82</sup> (Emphasis added.)

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<sup>74</sup>*Id.* at 460.

<sup>75</sup>*Id.* at 464.

<sup>76</sup>*Id.*

<sup>77</sup>415 U.S. 651, *affg* *Jordan v. Weaver*, 472 F.2d 985.

<sup>78</sup>*Edelman* has not been overruled by *Fitzpatrick*, *Monell*, nor *Hutto*. Furthermore, it was cited as controlling in *Quern*.

<sup>79</sup>415 U.S. at 653.

<sup>80</sup>*Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).

<sup>81</sup>415 U.S. at 659.

<sup>82</sup>*Id.* at 663.

The Court in a footnote<sup>83</sup> to *Monell*, emphatically stated that its holding was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes."<sup>84</sup> For some unapparent reason, Mr. Justice Brennan in reaching his conclusions about the application of section 1983 has elected to rely on the *Monell* Court's analysis of the legislative history of the section, but has refused to give weight to the Court's comment in note fifty-four. Contrary to Mr. Justice Brennan's beliefs, federal courts have subsequently cited footnote fifty-four as representing the *Monell* Court's intentions.<sup>85</sup>

This restriction on *Monell* was noted by the Fifth Circuit Court in *Bogard*.<sup>86</sup> *Bogard*, a former prisoner at Parchman Penitentiary in Mississippi, filed suit pursuant to section 1983 against various supervisory officials, employees, and inmates at Parchman to recover damages for personal injuries.<sup>87</sup> He had been subjected to a series of corporal punishments and had suffered two incidents of prison violence, one that had left him a permanent paraplegic.<sup>88</sup> The district court directed a verdict in favor of the prison officials, holding, that the eleventh amendment barred a judgment against the state.<sup>89</sup> The Fifth Circuit Court affirmed.<sup>90</sup> In discussing the question of immunity, the Fifth Circuit stated:

The plaintiff contends that the recent Supreme Court decision in *Monell* . . . had abrogated the state's eleventh amendment immunity when it is sued pursuant to 42 U.S.C. § 1983. Nothing in *Monell*, however, goes that far. The Supreme Court explicitly noted that its *Monell* holding was 'limited to local government units which are not considered part of the state for eleventh amendment purposes.' . . . *Monell* did not discuss *Edelman v. Jordan* and did not overrule it.<sup>91</sup>

The Fifth Circuit's interpretation in *Bogard* was applied by a Texas federal court in *Zaragoza v. City of San Antonio*.<sup>92</sup>

In *Zaragoza*, the plaintiff brought suit pursuant to title 42, sections 1981, 1983, 1985 and title 28, section 1343 of the United States Code alleging personal injuries from police brutality.<sup>93</sup> A motion to dismiss was filed by the defendants, the City of San Antonio, the mayor and

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<sup>83</sup>436 U.S. at 690 n.54.

<sup>84</sup>*Id.*

<sup>85</sup>*See, e.g.*, 440 U.S. at 338-39.

<sup>86</sup>586 F.2d 399, 410.

<sup>87</sup>*Id.* at 401.

<sup>88</sup>*Id.*

<sup>89</sup>405 F. Supp. 1202, 1208 (N.D. Miss. 1975).

<sup>90</sup>586 F.2d at 421.

<sup>91</sup>*Id.* at 410.

<sup>92</sup>464 F. Supp. 1163, 1165 (W.D. Tex. 1979).

<sup>93</sup>*Id.* at 1163.

chief of police and members of the city council. In granting the dismissal the district court stated:

This court is mindful of the recent Opinion of Judge William Stafford of the Northern District of Florida in *Aldredge* . . . which I feel overdevelops this 'action' to an extreme not contemplated by *Monell* and goes so far as to hold that a 'State is a person within the meaning of 42 U.S.C. § 1983 and that in such an action the Eleventh Amendment is not a bar to a damage award payable from the State Treasury.' . . . While I have the highest personal affection, respect and admiration for Judge Stafford, I disagree with his holding. . . .

This Court believes the correct Opinion is expressed in *Bogard* . . .<sup>94</sup>

Shortly after *Monell* the Supreme Court reviewed another section 1983 suit in *Alabama v. Pugh*.<sup>95</sup> Pugh and other inmates of the Alabama prison system sued the State of Alabama, the Alabama Board of Corrections, and a number of other state officials responsible for the administration of Alabama's prisons.<sup>96</sup> The suit alleged that conditions in Alabama prisons constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.<sup>97</sup> The district court agreed and issued an order prescribing measures designed to end the conditions.<sup>98</sup> The Fifth Circuit affirmed but modified some aspects of the order.<sup>99</sup>

The Supreme Court, however, reversed stating that there was "no doubt" that the suit was barred by the eleventh amendment unless the state had consented.<sup>100</sup>

In March of 1979, the Supreme Court in *Quern* eliminated all doubt on the question of eleventh amendment immunity of states in section 1983 suits. *Quern* was a sequel to *Edelman* which had held, as discussed above, that the eleventh amendment barred an award from a state treasury of back welfare benefits wrongfully withheld by state officials.<sup>101</sup> The *Edelman* Court had specifically limited relief under section 1983 to prospective injunctive relief,<sup>102</sup> disallowing any retroactive compensation that would come from the state treasury.<sup>103</sup> Relying on the remand order in *Edelman*, the district court in *Quern* ordered the state officials to send each member of the plaintiff class a notice informing them that they had been wrongfully denied public assis-

<sup>94</sup>*Id.* at 1165.

<sup>95</sup>438 U.S. 781.

<sup>96</sup>*Id.* at 781.

<sup>97</sup>*Id.*

<sup>98</sup>*Pugh v. Locke*, 406 F. Supp. 318, 331-32 (N.D. Ala. 1976).

<sup>99</sup>*Newman v. Alabama*, 559 F.2d 283, 292 (5th Cir. 1977), *aff g.*, *Pugh v. Locke*, 406 F. Supp. 318 (N.D. Ala. 1976).

<sup>100</sup>438 U.S. at 782.

<sup>101</sup>440 U.S. at 337.

<sup>102</sup>415 U.S. at 677.

<sup>103</sup>*Id.*

tance.<sup>104</sup> An application for an administrative hearing was to be enclosed with the notice. The Court of Appeals for the Seventh Circuit, sitting *en banc*, found that this proposed form of notice was barred by the eleventh amendment, since it attempted to decide that state funds would be used to satisfy claims without the consent of the state through its appropriate officials.<sup>105</sup> The Seventh Circuit reversed the district court's order.<sup>106</sup> It stated that on remand the district court could order state officials to mail the plaintiff class a similar notice advising them that the state's administrative procedure was available if they desired to have the state determine whether each was eligible for past benefits.<sup>107</sup> The Illinois state officials appealed.

The Supreme Court, in affirming the Seventh Circuit, determined that the notice simply apprised the plaintiff class members of their available administrative procedures.<sup>108</sup> The Court noted that its holding was not an award of retroactive benefits prohibited by *Edelman*, since the determination of retroactive benefits would be decided by the state, its agencies and courts, and not the federal court.<sup>109</sup>

Mr. Justice Rehnquist, writing for the Court, said that neither the legislative history nor cases subsequent to *Edelman* cast any doubt on *Edelman's* holding that section 1983 does not abrogate the eleventh amendment immunity of states.<sup>110</sup> The Court, being fully aware of Mr. Justice Brennan's concurring opinion in *Quern* and *Hutto*, stated that "unlike our Brother BRENNAN, we simply are unwilling to believe, on the basis of such slender 'evidence,' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States."<sup>111</sup>

*Quern* was recently relied on by two cases before the United States District Court for the Southern District of Mississippi. In *Lindsey v. Mississippi*,<sup>112</sup> the plaintiff, a black woman, alleged that she had been unlawfully discriminated against and that her employment was unlaw-

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<sup>104</sup>405 F. Supp. at 809 (1975).

<sup>105</sup>440 U.S. at 335 (citing 563 F.2d 873, 875 (7th Cir. 1977)).

<sup>106</sup>563 F.2d at 878.

<sup>107</sup>*Id.* at 875.

<sup>108</sup>440 U.S. at 349.

<sup>109</sup>*Id.* at 347.

<sup>110</sup>*Id.* at 345. It is interesting to note that Mr. Justice Rehnquist also wrote the opinion for the court in *Fitzpatrick*. In that opinion he stated that the language of Title VII constituted an express statutory waiver of state immunity, but that Congress never intended for § 1983 to be a waiver.

<sup>111</sup>*Id.* at 341. However, a state official is a person under § 1983. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Rochester v. White*, 503 F.2d 263 (3rd Cir. 1974). As established in this comment, state agencies are considered to be arms of the state, and, therefore, should not be considered a "person" within § 1983. See *Edelberg v. Illinois Racing Board*, 540 F.2d 279, 281 n.2 (7th Cir. 1976).

<sup>112</sup>See Defendants' Memorandum in Response to Plaintiff's Objections to Report and Recommendation of the United States Magistrate at 5, *Lindsey v. Mississippi*, No. J78-0345(N) (S.D. Miss. filed Aug. 3, 1978).

fully terminated. The defendants were the State of Mississippi, Governor Cliff Finch, the Mississippi Research and Development Center, the director, the Mississippi Research and Development Council, the Board of Trustees of Institutions of Higher Learning, the Mississippi Classification Commission and its director. The plaintiffs in *Cormier v. Estess*<sup>113</sup> charged the state, Pike County, its sheriff's department and the Southwest Mississippi Regional Medical Center in a wrongful death action allegedly attributable to their negligence. In both cases, District Judge Walter L. Nixon, Jr. dismissed the State of Mississippi on the basis that the state was not a "person" under section 1983.<sup>114</sup>

#### THE APPARENT SCOPE OF "PERSONS" UNDER SECTION 1983

It is asserted from the above discussion that a state may not be a "person" under section 1983.<sup>115</sup> This portion of the comment will summarize who the courts have allowed as "persons" under the section.

The eleventh amendment does not bar actions against state officials who are charged with violating a person's constitutional rights under color of state law. This rule was reinforced in *Scheuer v. Rhodes*.<sup>116</sup>

The plaintiffs in *Scheuer* were the personal representatives of the three students who died in the episode occurring at Kent State University during May, 1970. The plaintiffs brought an action for damages under section 1983 against the governor, adjutant general and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard and the president of Kent State University.<sup>117</sup> The plaintiffs alleged that these officials, acting under color of state law, "intentionally, recklessly, willingly and wantonly"<sup>118</sup> caused an unnecessary National Guard deployment on the Kent State University campus and ordered the guard members to perform allegedly illegal acts resulting in the students' deaths.<sup>119</sup>

The district court dismissed the complaints for lack of jurisdiction, because the action was, in effect, against the State of Ohio, and, thus, barred by the eleventh amendment. The Court of Appeals affirmed.<sup>120</sup>

<sup>113</sup>*Cormier v. Estess*, No. J79-0368(N) (S.D. Miss. 1980).

<sup>114</sup>*Lindsey v. Mississippi*, No. J78-0345(N) (S.D. Miss. filed Aug. 3, 1978) (order dismissing State of Mississippi and its agencies granted Sept. 28, 1979); *Cormier v. Estess*, No. J79-0368(N) (S.D. Miss. 1980) (order dismissing State of Mississippi granted Nov. 26, 1979).

<sup>115</sup>*Quern v. Jordan*, 440 U.S. 332.

<sup>116</sup>416 U.S. 232 (1974), *aff g* *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972). *See Ex parte Young*, 209 U.S. 123.

<sup>117</sup>*Id.* at 234.

<sup>118</sup>*Id.* at 235.

<sup>119</sup>*Id.*

<sup>120</sup>471 F.2d 430, 443 (6th Cir. 1972).

The Supreme Court reversed, holding that the eleventh amendment does not in some circumstances bar an action for damages against a state official charged with depriving a person of a federal right under color of state law;<sup>121</sup> furthermore, the Court held that immunity of officers of the executive branch of a state government for their acts is not absolute, but qualified and of a varying degree, depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time of the challenged action.<sup>122</sup> The Court also noted that the eleventh amendment's applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record."<sup>123</sup>

The rule in *Scheuer* was recently followed in the Fifth Circuit's opinion in *Cruz v. Beto*.<sup>124</sup> Twelve prisoners of the Texas Department of Corrections and their attorney, Cruz, instituted the action pursuant to section 1983, asserting that the defendant, a former director of the Texas Department of Corrections, had unlawfully interfered with the plaintiffs' attorney-client relationship.<sup>125</sup> The district court entered an injunction against further violations and awarded money damages against the defendant. The Fifth Circuit affirmed, holding that although Beto was a state official with qualified immunity, this immunity was stripped because of his bad faith action in interfering with the prisoners' attorney-client relationship.<sup>126</sup>

The United States Court of Appeals for the Third Circuit followed this rule in *West v. Keve*<sup>127</sup> when it held that damage suits against state officials in their individual capacities are not barred by the eleventh amendment.<sup>128</sup> The plaintiff alleged that the defendant prison officials had shown indifference to his serious medical need by denying him adequate medical treatment. The appeals court stated that although the eleventh amendment bars damage suits against state officials in their official capacities when damages will be paid out of state funds, it does not bar damage claims against state officials in their individual capacities.<sup>129</sup>

In *Mt. Healthy City School District v. Doyle*<sup>130</sup> the Supreme Court expressed much of the same reasoning that it subsequently stated in *Monell*. The suit evolved from the school board's failure to renew

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<sup>121</sup>416 U.S. at 238.

<sup>122</sup>*Id.* at 244-45.

<sup>123</sup>*Id.* at 237 (citing *Ex parte New York*, 256 U.S. 490, 500 (1921)).

<sup>124</sup>603 F.2d 1178 (5th Cir. 1979).

<sup>125</sup>*Id.* at 1180.

<sup>126</sup>*Id.* at 1186.

<sup>127</sup>571 F.2d 158 (3rd Cir. 1978). See also, Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

<sup>128</sup>*Id.* at 163.

<sup>129</sup>*Id.*

<sup>130</sup>429 U.S. 274 (1977).

Doyle's teaching contract. Although the Court found that jurisdiction had been pleaded under title 28, section 1331 and not section 1983, it did address the question of the board of education's eleventh amendment immunity.<sup>131</sup> The Court stated that the question of immunity was dependent on whether the board of education was to be treated as an arm of the State of Ohio or was to be treated as a municipal corporation to which the eleventh amendment does not apply.<sup>132</sup> The Court concluded that since school districts were included as political subdivisions, and political subdivisions were not included as arms of the state, the school board was more like a county or city than an arm of the state, and thus, was not entitled to eleventh amendment immunity.<sup>133</sup>

In summary, it would be reasonable to assume that neither a state nor a state agency would be a "person" under section 1983.<sup>134</sup> Also, it is reasonable to state that no state boards, such as a parole<sup>135</sup> or prison board,<sup>136</sup> will be considered "persons" under 1983.<sup>137</sup>

The scope of 1983, in regard to who will be "persons," however, should include counties, cities, municipalities, and entities thereof. Also, state officials sued in their individual and official capacities will be considered as "persons" for purposes of the section. As stated previously in *Fitzpatrick* and *Hutto*, Congress may authorize by statute others to be included within the ambit of the "persons" designation.

#### CONCLUSION

The Court's analysis of the legislative history of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, in *Monell*, accompanied by Mr. Justice Brennan's argument, have implanted serious doubts in many minds as to whether states should be excluded as "persons" under section 1983. *Fitzpatrick* and *Hutto*, furthermore, have emphasized Congress's power to disregard eleventh amendment immunity when passing federal laws for the purpose of fourteenth amendment enforcement. However, in spite of the implications of *Monell*, *Fitzpatrick*, and *Hutto*, the Court has found the roots of the eleventh amendment well planted and has ruled that states themselves are still immune from section 1983 damage suits.

In recent years the Court has had more than ample opportunity to

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<sup>131</sup>*Id.* at 279.

<sup>132</sup>*Id.* at 280. See also *Monell*, 436 U.S. 658.

<sup>133</sup>*Id.*

<sup>134</sup>See *Edelberg v. Illinois Racing Board*, 540 F.2d 279 (7th Cir. 1976).

<sup>135</sup>See *Thompson v. Burke*, 556 F.2d 231 (3rd Cir. 1977); *Bricker v. Michigan Parole Bd.*, 405 F. Supp. 1340 (E.D. Mich. 1975).

<sup>136</sup>See note 128, *supra*.

<sup>137</sup>See generally *Martinez v. California*, 48 U.S.L.W. 4076 (1980). In this case the appellants' decedent was murdered by a parolee. Action by the parents was brought under state law and 42 U.S.C. § 1983. The Court held that the girl's death was too remote from the parole officers' action to hold the state liable under federal civil rights law.



review the legislative history of section 1983 and it has rejected Mr. Justice Brennan's argument on numerous occasions. In all of the recent cases, the Court recognized *Edelman* as the controlling rule. In *Monell* the Court specifically stated that its opinion was limited to local municipalities which are not considered part of the state for eleventh amendment purposes.

Allegations that the Court's discussion of this issue in *Quern* was mere dicta are clearly erroneous. The crux of *Quern* was the discussion of eleventh amendment immunity and its effects on section 1983. Furthermore, the Court since *Edelman* has decided no case that would change the immunity of states in actions filed pursuant to section 1983.

It might be said that the Court's opinion in *Monell* rekindled a fire for those seeking to hold states liable in section 1983 suits. This fire, however, has undoubtedly been extinguished by later Court decisions.