CIVIL RIGHTS/CIVIL PROCEDURE—IS IT THE OFFICER OR THE GENTLEMAN?: ISSUES OF CAPACITY IN § 1983 ACTIONS BROUGHT IN FEDERAL COURT

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NOTES

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INTRODUCTION

Robert Biggs had been vomiting every night for sixteen nights. He had yet to receive the new medication that the prison psychiatrist had prescribed for him more than two weeks before. He had been told that the prison did not have any of the medication available and it would have to be ordered from another prison’s pharmacy. The medicine arrived ten days after the prescription was written—unfortunately for Mr. Biggs, it arrived on the last working day before Christmas. Six more days passed before Biggs received the proper medication.

Biggs filed two grievances, both of which were denied, and eventually filed a pro se suit against various prison officials, including the superintendent and the prison nurse. He alleged that the defendants had acted with deliberate indifference to his medical needs and, in so doing, had violated his rights under the Eighth and Fourteenth Amendments to the Constitution. He brought his suit pursuant to 42 U.S.C. § 1983, which provides a federal cause of action against any person who violates the federal rights of another while acting under the color of state law. He sought compensatory

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Section 1983 provides in relevant part,
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
damages for suffering caused by the denial of proper medical treatment. 8

The district court dismissed his complaint. 9 Biggs's pleading was unclear as to whether he was suing the prison officials in their official or personal capacities. Applying a presumption that § 1983 defendants are sued only in their official capacities unless the complaint clearly states otherwise (hereinafter the "bright-line" approach), the court ruled that the Eleventh Amendment to the Constitution bars all claims for damages against state agents sued in their official capacities. 10

Biggs appealed the dismissal. 11 In deciding his claim of error, the U.S. Court of Appeals for the Fourth Circuit could, on the one hand, agree with the district court and uphold the official-capacity presumption, thereby aligning itself with the Eighth and Sixth Circuits. 12 Alternatively, it could, like the majority of federal courts of appeals, adopt a less stringent approach, looking instead to the nature of the claims made, the defenses raised, and the course of the proceedings (hereinafter the "course-of-proceedings" approach) to make a determination of the capacity in which the defendants were sued. 14

The Fourth Circuit adopted the majority position and reversed the dismissal of Biggs's claim; 15 but the choice it faced is one that places two fundamental interests in tension. The first is that the federal system is set up to ensure that, whenever possible, claims are litigated on their merits, rather than disposed of on procedural grounds. 16 On the other hand, federal courts are courts of limited

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8. Biggs, 66 F.3d at 58.
9. Id.
10. Id.
11. Id. at 59.
13. As used in this context, the term appears to come from the Supreme Court's decision in Brandon v. Holt, 469 U.S. 464 (1985). There, the plaintiff's initial pleading was filed prior to the Court's decision in Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658 (1978), partially overruling its holding in Monroe v. Pape, 365 U.S. 167 (1961). In explaining the resulting discrepancies in the complaint when viewed through a post-Monell lens, the Court stated, "The course of proceedings after Monell was decided did, however, make it abundantly clear that the action against [Defendant] was in his official capacity and only in that capacity." Brandon, 469 U.S. at 469.
14. See, e.g., Frank v. Relin, 1 F.3d 1317, 1326 (2d Cir. 1993); Houston v. Reich, 932 F.2d 883, 885 (10th Cir. 1991); Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990); Shockley v. Jones, 823 F.2d 1068, 1071 (7th Cir. 1987).
15. Biggs, 66 F.3d at 60.
jurisdiction and have no power to entertain matters that fall outside the scope of authority granted by the Constitution and Congress.\textsuperscript{17}

From the point of view of the bright-line courts, an explicit statement that a § 1983 defendant is being sued individually is required because the Eleventh Amendment removes official-capacity claims from the subject-matter jurisdiction of the federal courts.\textsuperscript{18} From the countervailing perspective, this is a misunderstanding of the nature of federal jurisdiction and a state's immunity from suit.\textsuperscript{19} Both sides agree that neither a state nor its officials can be sued for damages. Both sides agree that a § 1983 plaintiff should make clear in his complaint that his suit is brought against the defendant official in his or her individual capacity.

But the simple fact is that complaints are often unclear. Are those who leave capacity ambiguous to be denied the opportunity to litigate their rights? On the other hand, should a federal court be permitted to entertain a case over which its jurisdiction is not apparent from the outset?

These questions, and the approaches taken by the U.S. courts of appeals in trying to resolve them, are the focus of this Note. Part I will set out the major points of the Supreme Court's jurisprudence regarding the Eleventh Amendment. Part II traces the progress of the more relevant § 1983 precedents delivered by the Court. Part III details the bases of the majority and minority positions regarding the necessity of specific pleading of capacity. Finally, Part IV examines the majority and minority positions in light of the holdings and statements of the Supreme Court relative to this issue and ultimately concludes that both the majority and minority approaches are unsatisfactory. Instead, this Note suggests, the best approach involves a substantive reading of the complaint to determine whether the defendant has been sued individually or officially. The inquiry should be limited to the four corners of the complaint, but should not hinge on the inclusion of certain magic words or phrases.

It should further be noted at the outset that the Eleventh Amendment and § 1983 are two immense areas of federal law, replete with any number of judicial fictions, inconsistencies and outright contradictions. The intricacies of either subject are beyond

\textsuperscript{17} Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure § 2.2 (3d ed. 1999); Erwin Chemerinsky, Federal Jurisdiction § 3.1 (3d ed. 1999).
\textsuperscript{18} Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989).
\textsuperscript{19} Biggs, 66 F.3d at 60.
the scope of this Note and have been well examined elsewhere.\(^{20}\) The discussion of them here is simply to provide background for the question at hand, rather than attempt to resolve the attendant and lingering questions.

I. THE ELEVENTH AMENDMENT

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.\(^{21}\)

In 1793, in one of its earliest en banc decisions, the U.S. Supreme Court ruled that a resident of South Carolina could sue the State of Georgia for recovery of Revolutionary War debts.\(^{22}\) The states adamantly resisted the decision,\(^{23}\) and within a year the Eleventh Amendment was drafted and submitted to the states specifically to overrule the Court.\(^{24}\)

The Amendment, by its terms, alters the grant of authority contained in Article III, § 2 of the Constitution.\(^{25}\) It removes from


\(^{21}\) U.S. CONST. amend. XI.

\(^{22}\) Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

\(^{23}\) In Georgia, for example, the state House of Representatives passed a bill providing that anyone who tried to enforce the judgment would be “guilty of a felony, and shall suffer death, without the benefit of clergy, by being hanged.” Fletcher, supra note 20, at 1058 (quoting AUGUSTA CHRONICLE, Nov. 23, 1793).

\(^{24}\) U.S. CONST. amend. XI, Historical Notes, in 1 U.S.C. at LXIII (2000). The Amendment was submitted to the states on March 4, 1794 and ten states ratified it the same year. Id. It was declared to be ratified by three quarters of the states on Jan. 8, 1798. Id.

\(^{25}\) Art. III, § 2, cl. 1 provides:

The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors,
the jurisdiction of the federal courts any suits commenced against a
state by a citizen of another state, or by any foreign citizen or sub-
ject. Since at least 1890, however, the Supreme Court has given
the Amendment a reading much broader than its terms, treating it as a
textual reflection of the common law doctrine of sovereign
immunity.26

Accordingly, the Court has indicated that sovereign immunity
is a bedrock principle, incorporated in the very structure of the
Constitution.27 That is, the principle predates the Constitution and
so can be fairly read into the framework of that document.28 Its
supporters contend that state governments, and state treasuries,
need to be protected against the financial drain that would result

other public Ministers and Consuls;—to all Cases of admiralty and maritime
jurisdiction;—to Controversies to which the United States shall be a Party; —
to Controversies between two or more States;—between a State and Citizens of
another State;—between Citizens of different States;—between Citizens of the
same State claiming Lands under the Grants of different States and between a
State, or the Citizens thereof;—and foreign States, Citizens or Subjects.

(emphasis added to indicate the affected language).

26. See Hans v. Louisiana, 134 U.S. 1 (1890). This doctrine, a holdover from En-
glish common law, held that the king could not be sued in his own courts. Sovereignty
was manifest in the person of the King. An incident of that sovereignty was immunity
from suit. As stated in Blackstone’s Commentaries:

[F]irst, the law ascribes to the king the attribute of sovereignty, or pre-emi-
nence. ‘Rex est vicarius ... et minister Dei in terra: omnis quidem sub eo est, et
ipse sub nullo, nisi tantum sub Deo (The king is the vicegerent [sic] and minis-
ter of God on earth: all are subject to him; and he is subject to none but God
alone). . . . Hence it is, that no suit or action can be brought against the king,
even in civil matters, because no court can have jurisdiction over him.

WILLIAM BLACKSTONE, I Commentaries *241-42. Blackstone goes on to write that “if
any person has . . . a just demand upon the king, he must petition him to his court of
chancery, where his chancellor will administer right as a matter of grace, though not
upon compulsion.” Id. at *243. This was seen as a matter of natural law since “[a]
subject . . . so long as he continues a subject, hath no way to oblige his prince to give
him his due . . . though no wise prince will ever refuse to stand a lawful contract.” Id. at
*243-44.


We have . . . sometimes referred to the States’ immunity from suit as ‘Eleventh
Amendment immunity.’ The phrase is convenient shorthand but something of
a misnomer, for the sovereign immunity of the States neither derives from, nor
is limited by, the terms of the Eleventh Amendment. Rather . . . the States’
immunity from suit is a fundamental aspect of the sovereignty which the
States’ enjoyed before the ratification of the Constitution, and which they re-
tain today . . . except as altered by the plan of the Convention or certain con-
stitutional Amendments.

Id.; see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 179
(2d ed. 2002).

28. CHEMERINSKY, supra note 27, at 180.
from damage judgments entered against them.\textsuperscript{29} Those who would do away with the doctrine contend that it has no support in the words of the Constitution and was not something intended to be adopted by the Framers.\textsuperscript{30} This argument reasons that broad state immunity from suit makes it impossible for a wronged citizen to recover when the state infringes on her rights; that a citizen may be deprived of life, liberty or property by a state and have no forum for redress.

The debate, to a certain extent, is over trust. The defenders of sovereign immunity believe that the doctrine places an appropriate faith in government to do right. Detractors argue that history and human nature renders such trust ill-founded.\textsuperscript{31} As the Eleventh Amendment and sovereign immunity play a significant role in the debate over pleading requirements for § 1983 plaintiffs, a review of some of the fundamental principles in this area is appropriate.

\textbf{A. Expansion of the Amendment Beyond its Terms: Hans v. Louisiana}

Whatever one may think of it, the Eleventh Amendment has been interpreted as a bar to all private suits against the states. This is so whether the claim is brought under the federal courts' diversity jurisdiction, or their jurisdiction over questions of federal law. In \textit{Hans v. Louisiana}, the Court recognized that the Amendment did not itself prohibit private suits against a state by its own citizens.\textsuperscript{32} Nevertheless, the Court believed that it would have been absurd for Congress to have intended to bar suits against states by out-of-state residents and aliens, but still permit such suits by in-state residents.\textsuperscript{33} Dealing squarely with the question of whether a state may be sued in federal court by one of its own citizens under the court's federal question jurisdiction, the Court stated that an affirmative answer would give satisfaction to "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."\textsuperscript{34} Despite the petitioner's contention that the Elev-
enth Amendment should be construed on its terms, the Court re­

fused to so limit its scope, declaring, "[t]he suability of a State without its consent was a thing unknown to the law."\textsuperscript{35}

For the \textit{Hans} Court, neither the Eleventh Amendment, nor the original text of Article III, could be read to allow a cause of action to be maintained against a state by an individual, regardless of the individual's in-state status, where the state had not consented to be sued.\textsuperscript{36} Since \textit{Hans}, the Court has held to this interpretation.\textsuperscript{37} In fact, the Court has extended the prohibition to suits in admiralty and to suits commenced by foreign nations against the states.\textsuperscript{38}

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another state” and “between a state... and foreign... citizens or subjects.” U.S. Const. art. III, § 2, cl. 1. The Court quotes Hamilton’s statement that
\[\text{[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.}\]
\textit{Hans}, 134 U.S. at 13. The Court further quotes Madison’s response to Henry and Mason at the Virginia ratifying convention:
\[\text{[The federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court... It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, this court may take cognizance of it.}\]
\textit{Id.} at 14. Marshall is quoted in the same vein:
\[\text{I hope that no gentleman will think that a State will be called at the bar of a federal court... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States.}\]
\textit{Id.}
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\textsuperscript{35} \textit{Hans}, 134 U.S. at 16.

\textsuperscript{36} See \textit{id.} at 12 (citing with approval Justice Iredell’s dissenting opinion in \textit{Chisholm} arguing that the Constitution was not intended to provide for “new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals”).


\textsuperscript{38} Fletcher, supra note 20, at 1040 (citing \textit{Ex parte New York.}, No. 1, 256 U.S. 490 (1921), and \textit{Monaco}, 292 U.S. at 313). Justice Scalia in 1989 wrote of the \textit{Hans} decision,

\[\text{What we said... was, essentially, that the Eleventh Amendment was important not merely for what it said, but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away.}\]

Nevertheless, the Eleventh Amendment, at least as interpreted, has been thought by many to be contrary to this country's founding ideal of government bound by the rule of law.\textsuperscript{39} Perhaps because of this tension, a number of mechanisms have developed to get around the Amendment's prohibitions and to try to ensure the rights of individuals and the compliance of states with federal law.\textsuperscript{40} The Supreme Court has allowed: (1) suits to be maintained against state officers; (2) states to waive immunity and consent to suit; and (3) Congress to abrogate Eleventh Amendment immunity by statute in certain circumstances.\textsuperscript{41}

B. Avoiding the Amendment

1. The \textit{Ex parte Young} Doctrine

The maintenance of a suit against a state officer without running afoul of the Eleventh Amendment is made possible by the Court's decision in \textit{Ex parte Young}.\textsuperscript{42} There, the Court held that a suit commenced against the Attorney General of Minnesota to enjoin him from enforcing a possibly unconstitutional Minnesota statute was not a suit against the state itself and so was not barred by the Eleventh Amendment.\textsuperscript{43} Since the relief sought would operate solely against Young as Attorney General, and since Young was the officer charged with the enforcement of the Act, the Court reasoned that this was not a circumstance in which the state was the real party in interest, and allowed the sought after relief against Young.\textsuperscript{44}

\textsuperscript{39} See, e.g., Vazquez, supra note 20, at 1685-86 ("The Eleventh Amendment has long been regarded as an embarrassment to the United States' aspirations to be a government of laws and not of men. . . . [T]he Amendment is in substantial tension with the rule-of-law axiom that for every federal right there must be a remedy enforceable in federal court."); Fletcher, supra note 20, at 1040-41 ("[A] broad constitutional prohibition against suing states in federal court is unworkable in a federal system premised in important part on controlling state behavior by federal law in order to protect private individuals.").

\textsuperscript{40} CHEMERINSKY, supra note 27, at 180.

\textsuperscript{41} Id.

\textsuperscript{42} \textit{Ex parte Young}, 209 U.S. 123 (1908).

\textsuperscript{43} Id. at 159.

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act on the part of a state official . . . .

\textsuperscript{44} Id. at 154-55. "[T]he State might be the real party . . . when the relief sought enures to it alone . . . ." Id. at 155. "[I]t is plain that such officer must have some
The doctrine of *Ex parte Young* has been widely championed as an indispensable means of preventing the states from trampling on the constitutional rights of their citizens.\textsuperscript{45} However, it is founded on the fiction that a state officer executing the duties of his office is somehow separate from the state as an entity.\textsuperscript{46} A state, after all, can only act through its officers and other agents.\textsuperscript{47}

The inherent fiction of *Young* has led at least one commentator to describe the principle as "unsatisfactory" and doctrinally "untidy."\textsuperscript{48} Nevertheless, the *Young* principle does provide "considerable federal judicial control over state behavior and permits generally effective remedies against wrongful acts of state officers."\textsuperscript{49}

Under the *Young* doctrine, prospective injunctive relief, when sought against a state official, is not barred by the Eleventh Amendment. Likewise, injunctive relief is not barred even when compliance with the injunction will lead to funds being expended from the state treasury.\textsuperscript{50} What is categorically not permitted, and where the Supreme Court appears to have hung its hat for the time being, are suits seeking retrospective monetary relief.\textsuperscript{51}

It does not matter whether these suits are for damages or equitable restitu-

\begin{footnotes}
\footnote{See CHEMERINSKY, *supra* note 27, at 200.}
\footnote{See id. at 201.}
\footnote{The *Young* fiction also gives rise to a further question: if, under *Young*, a state officer is stripped of authority when attempting to enforce an unconstitutional law, is there still state action as required for there to be a violation of the Fourteenth Amendment? In such circumstances, the Court has held that the conduct of a state officer that is not entitled to Eleventh Amendment protection is still state action for purposes of the Fourteenth Amendment. See Home Telephone Co. and Telegraph v. Los Angeles, 227 U.S. 278, 285 (1913); CHEMERINSKY, *supra* note 27, at 201-02.}
\footnote{Fletcher, *supra* note 20, 1041. Professor Fletcher notes, [W]hen the dominant form of relief against state officers was the negative injunction, it was generally feasible to distinguish between permitted injunctions that merely required cessation of certain official behavior and forbidden damage awards against state officers . . . . In the last thirty years however, when affirmative injunctions against state officers have become relatively common and when damage awards against state officers are available under certain circumstances, the Court has expanded considerably the potential range of application of the *Ex parte Young* fiction.}
\footnote{Id.}
\footnote{Id.}
\footnote{Edelman, 415 U.S. at 668-69.}
\end{footnotes}
tion. Nor does it matter whether the state is being sued directly or indirectly through a state official sued in his official capacity. So, while the Young doctrine helps to some degree with the problems raised by the Eleventh Amendment, the Amendment still provides a blanket protection to states in situations where retrospective relief is the only appropriate option.

2. State Consent or Waiver

In addition to situations in which the Young doctrine may be applied, the prohibitions of the Eleventh Amendment may be avoided if a state consents to suit. This is where, from a jurisdictional standpoint, the Eleventh Amendment occupies an area unique to itself. In general, restrictions on the subject-matter jurisdiction of the federal courts cannot be "waived" by either party, nor can the parties consent to having the case adjudicated in the federal forum when that forum otherwise lacks jurisdiction.

If the Eleventh Amendment is viewed as a jurisdictional bar, it seems discordant with the principles underlying the limitation of judicial power to allow the bar to be removed by the consent of a party. This apparent inconsistency notwithstanding, however, "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." Here the Eleventh Amendment's relation to the common law doctrine of sovereign immunity becomes clear, as it was historically the prerogative of the sovereign to consent to answer and defend a suit in its courts.

52. Id.
53. SMOLLA, supra note 50, § 14:71.
54. See Vazquez, supra note 20, at 1686.
56. See FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").
57. CHEMERINSKY, supra note 27, at 215.
58. SMOLLA, supra note 50, § 14:74 (quoting Atascadero State Hosp., 473 U.S. at 238).
59. See supra note 26; CHEMERINSKY, supra note 27, at 215.
In the context of a § 1983 action, however, a state's consent to suit may be irrelevant. In Will v. Michigan Department of State Police, the Supreme Court held that states are not "persons" within the meaning of that term as used in § 1983. If states are not even included in the meaning of the statute, then no suit can be maintained against a state under § 1983 even if that state expressly consented.

3. Congressional Abrogation of State Sovereign Immunity

The third mechanism for avoidance of Eleventh Amendment immunity is congressional abrogation. Congress, as part of a particular piece of legislation, may make the Eleventh Amendment inapplicable and open the states up to suit and liability, provided it expressly states its intention to do so in the statute. Whether such abrogation is permissible has been a matter of some controversy and how one answers the question is largely a function of the view one takes of the scope of the Amendment.

If the Amendment is seen as a limitation solely on the federal judicial power, then it has no effect on Congress and that body may remove state sovereign immunity for the purposes of a particular statute. If, on the other hand, the Amendment is seen as a bar to federal subject matter jurisdiction, then under principles that have been settled for over two hundred years, Congress may not expand the jurisdiction of the federal courts beyond the boundaries of the Constitution. It would therefore be outside of the authority of Congress to pass a law purporting to abrogate the Eleventh Amendment.

61. Will, 491 U.S. at 64 (majority opinion).
62. See SMOLLA, supra note 50, § 14:74. "[T]he core holding of Will is to construe the word 'person' under § 1983 to exclude states, and thus 'neither a federal court or a state court may entertain a § 1983 action against such a defendant.'" Id. (quoting Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 376 (1990)).
64. See CHEMERINSKY, supra note 27, at 220.
66. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding § 13 of the Judiciary Act of 1789 to be an unconstitutional expansion of the jurisdiction of the Supreme Court); CHEMERINSKY, supra note 27, at 221.
Amendment immunity of the states. As it stands today, Congress may abrogate the states' Eleventh Amendment immunity by statute, but only when legislating under certain of its enumerated powers.67

Congress may only legislate pursuant to the powers conferred on it by the Constitution.68 Those powers are enumerated in Article I, § 8 of the Constitution and are further granted by several Amendments.69 Section 5 of the Fourteenth Amendment is typical: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."70 In 1976, the Court held that the Civil Rights Act of 196471 permissibly authorized private suits for damages directly against a state since the Act was passed to enforce the provisions of the Fourteenth Amendment.72 Holding that the sovereignty of the states and the principles embodied in the Eleventh Amendment were "necessarily limited" by the enforcement clause of the Fourteenth Amendment, the Court stated,

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for

67. CHEMERINSKY, supra note 27, at 221.
69. The Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments contain enforcement clauses. The Eighteenth Amendment did as well, however the Amendment was repealed by the Twenty-first Amendment. As for the Article I powers, the language of each granting clause makes clear that Congress may make such laws as are necessary to exercise the power granted. The Article then gives Congress the general grant of power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONG. art. I, § 8, cl. 18.
70. U.S. CONG. amend. XIV, § 5. The Fourteenth Amendment provides, in relevant part,

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONG. amend. XIV, § 1.
the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.\(^73\)

In 1989, the Court extended this holding to include Acts of Congress passed under the Interstate Commerce Clause.\(^74\) In finding that Congress may abrogate state immunity from suit when it is legislating under the Commerce Clause, Justice Brennan relied on Court precedent\(^75\) as well as the nature of the Commerce Power.\(^76\)

The Court, however, overruled this opinion in 1996.\(^77\) *Seminole Tribe of Florida v. Florida* involved another congressional act\(^78\) that was clearly intended to abrogate state sovereign immunity and was passed pursuant to the Commerce Power—in this case, Congress's authority to “regulate commerce . . . with the Indian

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\(^73\) *Id.* at 456.

\(^74\) Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); see U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate commerce . . . among the several States.”). *Union Gas* considered whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) expressed a Congressional intent to authorize suits against the states in federal court, and if so, whether that authorization was within the commerce power. The Court answered “yes” to the first question and “yes” to the second, although somewhat tentatively. Justice Brennan wrote the opinion of the Court with respect to the question of congressional intent. This part of the opinion was joined by Justices Marshall, Blackmun, Stevens, and Scalia. The part of Justice Brennan’s opinion addressing the question of abrogation of the Eleventh Amendment under the Commerce Clause was joined only by Justices Marshall, Blackmun, and Stevens. Justice White wrote a separate opinion in which he agreed that Congress has the authority to abrogate state immunity under Article I, but disagreed with the reasoning of the plurality.

\(^75\) *Union Gas*, 491 U.S. at 14-19 (Part III.A of the opinion). Acknowledging that the Court had never “squarely resolved” the issue of the relation between the Commerce Power and the Eleventh Amendment, Justice Brennan nevertheless concluded that the Court’s prior cases unmistakably sent the message that “the power to regulate commerce includes the power to override States’ immunity from suit, but [the Court] will not conclude that Congress has overridden this immunity unless it does so clearly.” *Id.* at 14-15.

\(^76\) *Id.* at 19-23 (Part III.B of the opinion). For Justice Brennan, the very nature of the power conferred by the Commerce Clause included the power to abrogate state immunity. He reasoned that, just as the states assented to national control over the regulation of commerce, so too they agreed to relinquish their immunity in the event that Congress found it necessary, in exercising the power granted by the Commerce Clause, to hold the states liable for damages. The states, therefore, are “not ‘unconsenting’; they gave their consent all at once, by ratifying the Constitution, rather than on a case-by-case basis.” *Id.* at 19-20.


tribes."

In overruling *Union Gas*, the Court held that Article I of the Constitution may not be used to circumvent the limitations placed on judicial power by the Eleventh Amendment. It is worth quoting the Court's rationale:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Under the law as it stands today, the Eleventh Amendment presents a jurisdictional bar to all suits commenced against a state by a private citizen. It does not, however, bar suits against a state by another state; nor does it bar suits commenced against a state by the United States. There are three mechanisms of ameliorating the impact of the Eleventh Amendment. First, an individual may seek prospective injunctive relief from an ongoing violation of federal law by bringing an *Ex parte Young* action against a state officer. Second, a state may consent to suit and thereby waive the immunity conferred by the Eleventh Amendment. Finally, Congress may abrogate state immunity by clear statutory intent; however, after *Seminole Tribe*, it appears that this is only available

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79. U.S. Const. art. I, § 8, cl. 3. In the six years since *Union Gas*, the makeup of the Court had changed. Three of the four members of the *Union Gas* plurality (Justices Brennan, Marshall, and Blackmun) had left the Court. Gone also was Justice White, who had agreed that Congress could abrogate under the Commerce Clause. Justice Clarence Thomas replaced Justice Marshall and aligned himself with the *Union Gas* dissenters (Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy). While concluding that Congress clearly intended to make the states subject to suit under the statute, and finding that "no principled distinction" could be drawn between the Interstate and Indian Commerce Clauses, *Seminole Tribe*, 517 U.S. at 63, the Court held that "*Union Gas* has proved to be a solitary departure from established law" and that "both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* at 66.


81. *Id.* at 72.

82. See supra notes 30-37 and accompanying text.


84. See supra notes 41-53 and accompanying text.

85. See supra notes 54-61 and accompanying text.
when Congress is legislating pursuant to the enforcement power conferred by § 5 of the Fourteenth Amendment.\footnote{86}{See supra notes 62-80 and accompanying text.}

Plaintiffs in federal court are obliged to state the grounds on which the jurisdiction of the court rests in their initial pleading.\footnote{87}{FED. R. CIV. P. 8(a)(1).} They are further obliged to state the capacity of the parties to sue or be sued, if such a statement is necessary to show jurisdiction.\footnote{88}{FED. R. CIV. P. 9(a).} The Eleventh Amendment is one of the provisions by which the federal courts are limited in the types of suits they can entertain. The disagreement between the bright-line and course-of-proceedings rationales centers on the nature of the limitation imposed by the Amendment and the extent of responsibility that can, in fairness, be placed on the § 1983 plaintiff to clearly identify in her complaint the capacity in which she is suing the defendant.\footnote{89}{See infra Part IV.}

\section*{II. Section 1983}

Section 1983 of Title 42 of the United States Code is one of the most important, and most often used, federal laws on the books.\footnote{90}{CHEMERINSKY, supra note 17, at 451 (quoting MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES 2 (3d ed. 1997))}. The statute provides a private cause of action against any person who, while acting under the color of state law, infringes on another's rights under the Constitution or federal law.\footnote{91}{See text of statute, supra note 7.} Consequently, it is most often state or local government officials who are sued under § 1983. Thus, the Eleventh Amendment can play a significant role in the direction of § 1983 litigation and the body of case law in this area. The discussion below sets out a brief history of § 1983 and traces some of the milestone § 1983 decisions of the Supreme Court.

\addcontentsline{toc}{section}{II. Section 1983}

\begin{footnotesize}
\item[86] See supra notes 62-80 and accompanying text.
\item[87] FED. R. CIV. P. 8(a)(1).
\item[88] FED. R. CIV. P. 9(a).
\item[89] See infra Part IV.
\item[90] CHEMERINSKY, supra note 17, at 451 (quoting MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES 2 (3d ed. 1997)). Between April 1, 2004 and March 31, 2005, 35,364 private civil rights actions were filed in federal district courts. A further 22,745 actions were brought by prisoners over prison conditions or civil rights violations. FEDERAL JUDICIAL CASELOAD STATISTIC, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT AND DISTRICT, DURING THE 12 MONTH PERIOD ENDING MARCH 31, 2005 (2005), http://www.uscourts.gov/caseload2005/tables/C03mar05.pdf. While an exact breakdown of the particular statutes under which each case was filed is unavailable, § 1983 provides for a general remedy for violations of any individual right secured by the Constitution or federal law. See supra note 7. Thus, § 1983 claims are often included in actions brought pursuant to federal statutes regarding voting, employment, accommodations, welfare, or other rights.
\item[91] See text of statute, supra note 7.
\end{footnotesize}
A. Early History, Monroe, and Monell

Section 1983 was originally enacted as part of the Civil Rights Act of April 20, 1871, also known as the Ku Klux Klan Act.\textsuperscript{92} On March 23 of that year, President Ulysses S. Grant sent a message to Congress stating,

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.\textsuperscript{93}

Five days later, H.R. 320 was introduced on the House floor by Representative Shellabarger.\textsuperscript{94}

The Supreme Court has summarized the congressional debate on H.R. 320 on a number of occasions.\textsuperscript{95} In referring to the portion of the Act that became § 1983, the Court has stated that three goals are apparent.\textsuperscript{96} First, the Act sought to override certain state laws.\textsuperscript{97} Second, the Act sought to give a federal remedy in cases where state law was inadequate.\textsuperscript{98} Finally, the Act sought to provide a federal remedy in cases where, although there was a state

\textsuperscript{92} Ch. XXII, 17 Stat. 13 (1871). Section 1 of the Act, which became § 1983, provided in relevant part:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.


\textsuperscript{94} Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 665 (1978). The bill as it was introduced, and as it was adopted into law, was entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. at 13.

\textsuperscript{95} See, e.g., Monroe, 365 U.S. at 172-90; Monell, 436 U.S. at 665-95.

\textsuperscript{96} Monroe, 365 U.S. at 173.

\textsuperscript{97} Id.

\textsuperscript{98} Id.
remedy that was theoretically applicable and adequate, the state remedy was unavailable in practice.99

Section 1 of the Act, which was eventually codified as § 1983, created a federal cause of action for the violation of constitutional rights committed "under color of" state law.100 Though the Senate Report focused heavily on violations committed by the Klan and its members, § 1 was not directed at them, but rather at the state officials who allowed such violations to go without redress.101 The subsequent sections of H.R. 320 and of the Act as adopted dealt more specifically with activities and conspiracies such as those engaged in by the Klan.102 Section 1 made it through both the House and Senate without amendment and was enacted as introduced.103 The Civil Rights Act of 1871 passed the Senate by a vote of 36 to 13 on April 19.104 The Act was passed by the House the next day, less

99. Id. at 174. The situation in the South, at least in the minds of the supporters of the bill, was grave enough to warrant federal intervention. This much is clear from statements on the House and Senate floors that presented a dramatic picture of torture and murder committed against black citizens as well as white Unionists and agents of the federal government while the state authorities did little to bring the offenders to justice. Representative Lowe of Kansas spoke of "murder... stalking abroad in disguise" and stated that "while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective." Id. at 175 (quoting Cong. Globe, 42d Cong., 1st Sess. 374 (1871)). Representative Beatty of Ohio pointed to "voluminous and unquestionable" proof that states were denying their citizens the equal protection of the law: "Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent." Id. (quoting Cong. Globe, 42d Cong., 1st Sess. 428 (1871)).

100. Ch. XXII, § 1, 17 Stat. 13 (1871).

101. Monroe, 365 U.S. at 175-76. During its consideration of the proposed legislation, Congress had before it the 600 page report of the Select Committee of the Senate to Investigate Alleged Outrages in the Southern States, detailing the civil rights violations in the South and the lack of action on the part of state authorities in dealing with the perpetrators. S. Rep. No. 42-1 (1871). The Committee had taken testimony from "representatives of all shades of political opinion," including "State and Federal judges, prosecuting officers, political editors, ministers of the gospel, private citizens both white and colored, members of what is popularly known as the Ku Klux Klan, magistrates, constables, members of the bar, [and] men who have been scourged and abused by bands of men in disguise." S. Rep. No. 42-1, at 2 (1871). The conclusion drawn by Congress that the situation in the South required federal intervention was based on this report. Monroe, 365 U.S. at 174, 183; Chemerinsky, supra note 17, at 454.


than a month after its introduction.\textsuperscript{105}

Though it seems somewhat incongruent with the apparent enthusiasm with which the Act was passed, for many years after its enactment, § 1983 seemed almost a dead letter.\textsuperscript{106} From 1871 to 1920 a mere twenty-one cases were decided under § 1983, and none under the conspiracy provisions\textsuperscript{107} of the Act.\textsuperscript{108} As late as 1960, § 1983 litigation made up a miniscule portion of the federal docket, with only 287 cases being commenced in or removed to federal court in that year.\textsuperscript{109} This trend began to change dramatically in 1961 with the Court’s decision in \textit{Monroe v. Pape}.\textsuperscript{110}

In \textit{Monroe}, the Court held that Congress intended § 1983 “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.”\textsuperscript{111} Thus, the “under color of law” language of the statute did not merely mean that liability would attach only when the wrongful acts were committed with the authority of some state statute or regulation.\textsuperscript{112} Rather, the actions of an official that are outside of his authority,

\textsuperscript{105}. \textit{Id.}

\textsuperscript{106}. \textit{See} \textit{Chemerinsky, supra} note 17, at 455-56.

\textsuperscript{107}. Ch. XXII, § 2, 17 Stat. 13-14 (1871).

\textsuperscript{108}. Comment, \textit{The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?}, 26 \textit{Ind. L.J.} 361, 363 (1951). The reasons for this lack of vitality lie largely in the shifting of the historical tides. The Act had been passed by the Reconstruction Congress. Reconstruction came to an end in 1877 after the Republican Party agreed to abandon it in exchange for Rutherford Hayes being declared President over Samuel Tilden. American Experience, \textit{Reconstruction: the Second Civil War}, timeline, http://www.pbs.org/wgbh/amex/reconstruction/states/sf_timeline2.html (last visited March 27, 2006). With the end of Reconstruction, so too came the end of Northern interest in the rights of African Americans in the South. Furthermore, as it turned out, federal judges had no more of an interest in allowing the vindication of black rights than did state judges. \textit{Chemerinsky, supra} note 17, at 455. Also, the Supreme Court at this time took a restrictive view of the authority of the federal government to pass civil rights legislation. \textit{See}, \textit{e.g.}, \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896); \textit{The Civil Rights Cases}, 109 U.S. 3 (1883); \textit{The Slaughterhouse Cases}, 83 U.S. (16 Wall.) 36 (1873); \textit{Chemerinsky, supra} note 17, at 455.

\textsuperscript{109}. \textit{Chemerinsky, supra} note 17, at 456 (citing \textit{Theodore Eisenberg, Civil Rights Legislation: Cases and Materials} 86 (2d ed. 1987)).

\textsuperscript{110}. 365 U.S. 167 (1961). The case arose out of a raid on the petitioners’ home by the Chicago Police Department. The Monroes filed suit under § 1983 alleging that their home was entered and searched without warrant and that Mr. Monroe was arrested and detained without warrant in violation of their constitutional rights. Thirteen police officers and the City of Chicago were named as defendants. \textit{Id.} at 169-70. The District Court dismissed the complaint, agreeing with the City that it could not be held liable under § 1983, nor could it be held liable for “acts committed in performance of its governmental functions.” \textit{Id.} The Court of Appeals affirmed. \textit{Id.}

\textsuperscript{111}. \textit{Id.} at 172.

\textsuperscript{112}. \textit{See} \textit{id.}
but "made possible only because the wrongdoer is clothed with the authority of state law," and which violate the federal rights of another, "[are] action[s] taken under color of state law." This holding significantly expanded the range of possible defendants under § 1983.

But where the Court gave, the Court also took away. In the same opinion, the Court upheld co-defendant City of Chicago's contention that Congress did not intend to include municipalities within the meaning of "persons" as used in § 1983. This limit remained in place for seventeen years until the Court decided *Monell v. Department of Social Services of the City of New York*, which represents the second major expansion of the scope of liability under § 1983.

*Monell* provided an opportunity for the Court to revisit its analysis of the legislative history of § 1983. The Court began by recapping the *Monroe* Court's reasoning that the 42d Congress's rejection of the Sherman Amendment was conclusive evidence of Congressional intent to exclude municipal corporations from liability under § 1983. After re-examination, however, the *Monell*

113. *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
115. The Court found compelling the fact that a proposed amendment to the Act of 1871 (the Sherman Amendment) that would have imposed municipal liability for violent acts committed within its boundaries was rejected by the House and by the Conference Committee and ultimately not included in the Act. *Monroe*, 365 at 188-90. The Court concluded that the response to the Sherman Amendment "was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include [municipalities]." *Id.* at 191. The Court found further support for its position in the permissive wording of the Act of February 25, 1871 (the Dictionary Act, Ch. LXXI, § 2, 16 Stat. 431 (1871)), which stated that the word "person" may be interpreted to include "bodies politic and corporate" but did not require such an interpretation. *Monroe*, 365 U.S. at 190-91.
116. 436 U.S. 658 (1978). The suit was brought by a class of female employees of the Department of Social Services and the Board of Education of New York City. *Id.* at 660. The basis of their complaint was that the Department and the Board had compelled pregnant employees to take unpaid leaves of absence prior to the time such leave was required for medical reasons. *Id.* at 660-61. Though the District Court held that the practice was unconstitutional, the plaintiffs' claim for back pay was denied "because any such damages would come ultimately from the City of New York and... circumvent the immunity conferred on municipalities by *Monroe v. Pape.*" *Id.* at 662. The Court of Appeals affirmed and held that, despite being sued solely in their official capacities, the individual defendants were "persons" within the meaning of § 1983. However, a damages action against them could not go forward since any damages assessed against them would "have to be paid by a city that was held not to be amenable to such action in *Monroe v. Pape.*" *Id.*
117. *Id.* at 664.
Court found that the "liability imposed by [§ 1983] was something very different from that imposed by the amendment."\footnote{118} On the basis of its review of the legislative history, the Monell Court concluded that the Monroe Court had "incorrectly equated" the objections to the Sherman Amendment with objections to municipal liability under § 1983.\footnote{119} Accordingly, the Court held that Congress did not intend to exclude municipalities from the scope of § 1983, and overruled Monroe "insofar as it [held] that local governments are wholly immune from suit under § 1983."\footnote{120}

Having concluded that municipalities were not excluded from the scope of § 1983, the question still remained as to whether they were actually included; that is, whether Congress intended that municipal corporations be included in the statutory language "any person."\footnote{121} Again, the Court looked to the debates surrounding the passage of the 1871 Act and concluded that Congress meant to provide a broad remedy for civil rights violations in enacting § 1983.\footnote{122} Since municipal corporations could, just as well as natural persons, violate these rights through their policies and official acts, and since Congress intended the section to be broadly interpreted, "there is no reason to suppose that municipal corporations would have been excluded from the sweep of [§ 1983]."\footnote{123}

\footnote{118} Id. at 682.
\footnote{119} Id. at 665. The Court sets out three distinctions between the Sherman Amendment and § 1983 in support of its conclusion. First, the Sherman Amendment was not an amendment to the section that became § 1983; rather it was to be included as a separate section of the Act. Id. at 666. Second, the main objection to the Sherman Amendment was that it sought to unconstitutionally impose a requirement on municipalities to keep the peace. Id. at 674. There was no such objection to § 1983. The Court here points to a distinction that was recognized in the debates on the Act between imposing a federal obligation to keep the peace (as would be required by the amendment) and imposing civil liability for damages on a municipal corporation that was obligated under state law to keep the peace but had failed to do so and thus violated the Fourteenth Amendment. Id. at 679. Finally, many of those who voted against the amendment voted in favor of the section of the Act that became § 1983, thus confirming that Congress recognized the difference between the obligation sought to be imposed by the amendment and the liability sought to be imposed by § 1983. Id. at 682.
\footnote{120} Id. at 663.
\footnote{121} Id. at 683.
\footnote{122} Id. at 685. Noting that the remedy provided by § 1983 applied to whites as well as blacks, the Court pointed to the statement of Congressman Shellabarger, the sponsor of the bill, who identified § 1983 as remedial, and quoted Justice Story: "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally . . . ." Id. at 684.
\footnote{123} Id. at 686. As further support for this view the Court pointed, in the first place, to Congressman Bingham's belief that uncompensated takings by municipalities, such as the one at issue in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the provisions of the Fifth Amendment were enforceable only against the Federal Gov-
B. Quern v. Jordan

With *Quern v. Jordan*, the Court began to delineate the boundaries of state liability and immunity under § 1983. The action arose out of the wrongful denial of welfare benefits to a class of plaintiffs. At its core, the decision reaffirmed the Court’s earlier holding in *Edelman v. Jordan* that retrospective monetary relief against states is barred by the Eleventh Amendment, while prospective injunctive relief against state officers, even if such relief will deplete funds from the state treasury, is allowed. Quern went further, however, and considered whether the *Monell* holding could be extended to cover state as well as municipal governments. Addressing the respondent’s contention that the *Edelman* holding had been “eviscerated” by the Court’s holding in *Monell*, Justice Rehnquist, writing for the Court, stated, “This court’s holding in *Monell* was ‘limited to local government units which are not considered part of the State for Eleventh Amendment purposes . . . .'”

While admitting that both the supporters and opponents of the 1871 Act believed that it drastically changed the relationship between the federal government and the governments of the states, the Court found that

> neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of

125. Id. at 333.
127. Quern, 440 U.S. at 337.
128. Id. at 338.
the several States.\footnote{Id. at 342.}

The Court found no evidence that Congress "considered and firmly decided to abrogate" the states' immunity under the Eleventh Amendment and concluded that Congress did not intend to do so by enacting § 1983.\footnote{Id. at 345.}

C. Will v. Michigan Department of State Police

The question before the Court in Will was whether a state, or state official acting in his official capacity, is considered a "person" within the meaning of § 1983.\footnote{Will v. Mich. Dep't of State Police, 491 U.S. 58, 60 (1989).} The case came to the U.S. Supreme Court from the Supreme Court of Michigan, which had held in the negative as to both questions.\footnote{Smith v. Mich. Dep't of Public Health, 410 N.W.2d 749, 750 (Mich. 1987).} The Court took the case to resolve a conflict that had arisen since its holding in Monell.\footnote{Will, 491 U.S. at 61-62.}

Over a decade earlier, in Fitzpatrick v. Bitzer, the Court had used Monroe's holding that a city is not a "person" under § 1983 to reason that the statute "could not have been intended to include States as parties defendant."\footnote{Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976).} After Monell's partial overruling of Monroe, it was thought by some courts that the rationale for excluding states from the sweep of "persons" under § 1983 had also been undercut.\footnote{Will, 491 U.S. at 61-62.} As the Will case came from a state court system, the Eleventh Amendment did not apply and the question of a state's "personhood" was squarely at issue.\footnote{Id. at 63-64. This would no longer be entirely true in light of the Court's holding in 1999 that a state enjoys immunity from suit in its own courts, as well as in federal courts. Alden v. Maine, 527 U.S. 706, 754 (1999). Under Alden, while the text of the Amendment applies only to the federal judiciary, the structural principle of sovereign immunity retains equal significance in both the federal and state systems.}

While not an Eleventh Amendment case, the Amendment played a strong role in the Court's reasoning that the phrase "any person" in § 1983 was not intended to include states. First, the Court applied the rule that if Congress intends to "alter the usual Constitutional balance" of power between the state and federal governments, that intent must be "unmistakably clear" in the language of the statute.\footnote{Will, 491 U.S. at 65.} Finding the language of § 1983 to fall "far short" of that mark, the Court then stated that although Congress
intended to provide a federal forum for the litigation of civil rights claims, it did not intend to provide such a forum when the claim was asserted against a state. 138 The Eleventh Amendment still bars such suits unless the state has consented or Congress has abrogated the state's immunity. 139

Having already concluded in Quern that Congress did not intend § 1983 to abrogate state immunity, and so did not intend to provide a vehicle for states to be sued in federal court, the Court found the suggestion that Congress nevertheless intended to create a vehicle for states to be sued in state court to be unacceptable. 140 Congress was aware of, and intended to incorporate, common law immunities and defenses in enacting § 1983. 141 According to the Court, the principle that a state cannot be sued in its own courts without its consent was one of the most fundamental of these common law immunities. 142

Under Will, § 1983 is a means of redress for the “official violation of federally protected rights.” 143 However, this “does no more than confirm that the section is directed against state action—action ‘under color of’ state law.” 144 To make the leap to the proposition that Congress intended to make the states themselves liable for such actions—that it intended to make them “persons” under § 1983—is something the Court was unwilling to do. 145

From its conclusion that states are not “persons” for the purpose of § 1983, the Court quickly rejected the proposition that state officials are § 1983 “persons” when acting in their official capacity. 146 A suit against an official in his official capacity is not a suit against the office-holder but a suit against the office. 147 It is the same as suing the state itself. 148 Thus, not only are suits against states under § 1983 barred in federal court, but they are barred in state court as well. Suits against state officials that have the charac-

138. Id. at 65-66.
139. Id. at 66. For discussion of state consent and congressional abrogation, see supra Parts I.B.2 and I.B.3.
140. Id. at 67.
141. Id.
142. Id.
143. Id. at 68.
144. Id.
145. Id.
146. Id. at 70-71.
147. Id. at 71 (citing Brandon v. Holt, 469 U.S. 464, 471 (1985)).
148. Id. (citing Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)).
ter of suits against the office, rather than the individual, are also barred.

D. Hafer v. Melo

In 1991, the Supreme Court granted certiorari in Hafer v. Melo149 to resolve what it saw as a misinterpretation of the Will holding.150 Justice O'Connor's opinion for a unanimous Court began with the following statement:

In [Will], we held that state officials 'acting in their official capacities' are outside the class of 'persons' subject to liability under [§ 1983]. Petitioner takes this language to mean that § 1983 does not authorize suits against state officials for damages arising from official acts. We reject this reading of Will and hold that state officials sued in their individual capacities are 'persons' for purposes of § 1983.151

Hafer argued that liability under § 1983 depends on the capacity in which the official was acting at the time the plaintiff was injured.152 According to Hafer, if an official is sued over conduct occurring in the course of the exercise of her duties and within her authority, the action is an official-capacity suit. Therefore, it cannot proceed under § 1983 because, under Will, state officials acting in their official capacities are not "persons" for the purpose of the statute.153

The Court disagreed, holding that "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the officer was sued, not the capacity in which the officer inflicts the alleged injury."154 The Court then expressly foreclosed any interpretation that could give rise to arguments like Hafer's.155 State officers are not "persons" when sued in their official capacities because, for purposes of the suit, they stand in the place of the government for which they work.156 As Will pointed out, to hold otherwise would allow suits to proceed against the state simply by a renaming of the parties.157

150. Id. at 22-23.
151. Id.
152. Id. at 26.
153. Id.
154. Id.
155. Id. at 27.
156. Id.
157. Id. (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989)).
Hafer's argument was built on flawed logic. As is familiar by now, § 1983 was enacted to provide a remedy against the deprivation of federal rights by those acting with the apparent authority of the state—i.e., under color of state law. 158 To allow Hafer's argument to succeed would be to allow her to be immunized by the same authority that gave her the opportunity to commit the violation of rights in the first place. 159

Hafer also advanced the argument that the suit should be barred on Eleventh Amendment grounds. 160 She contended that allowing personal capacity suits against state officers would infringe on state sovereignty by making state government less effective. 161 The Court quickly dispensed with this argument as well, declaring that it has been settled law since the time of Ex parte Young that the Eleventh Amendment does not provide cover to a state official sued as an individual. 162 Thus, the Court held (1) that state officials sued in their individual capacities are "persons" within the meaning of § 1983, (2) that the Eleventh Amendment presents no barrier to such suits, and (3) that the official nature of a state official's acts does not confer an absolute immunity from liability. 163

One issue the Hafer Court left unresolved was how the nature of the suit, whether personal or official capacity, is to be determined in cases where it is not made clear in the pleadings. Noting that the U.S. courts of appeals were divided on the question, the Court suggested that it would be preferable to be clear from the start. 164 However, as the matter was not properly before it, the Court declined to resolve the issue. 165

III. The Disagreement in the Circuits

A. The Minority Position

The United States Court of Appeals for the Eighth Circuit has long required § 1983 plaintiffs to make an explicit statement of capacity in their complaints. 166 Absent an express statement that the

158. Id.
159. Id. at 28.
160. Id. at 29.
161. Id.
162. Id. at 30.
163. Id. at 31.
164. Id. at 24 n.*.
165. Id.
166. See, e.g., Larson v. Kempker, 414 F.2d 936, 939 (8th Cir. 2005); Johnson v. Outboard Marine Corp., 172 F.3d 531 (8th Cir. 1999); Murphy v. Arkansas, 127 F.3d
defendant is being sued individually, rather than officially, the court
has applied the conclusive presumption that the suit was brought
against the defendant in his or her official capacity only. As
such, if the plaintiff sought a remedy other than the sort of injunc­
tive relief allowed under Ex parte Young, the suit was deemed to be
barred by the Eleventh Amendment. The court went so far as to
prescribe specific language that plaintiffs were to include in order to
ensure clarity.

For a while the Court of Appeals for the Sixth Circuit agreed
with the Eighth Circuit approach and adopted it for itself. Where the Sixth Circuit stands today is questionable. In any event,
two concerns were at the heart of the position adopted by these
courts. First, they wanted to ensure that a government officer de­
defendant had adequate notice of personal liability to the plaintiff.
Second, in the courts’ view, only a clear statement of capacity
would negate the Eleventh Amendment problem that would other­
wise be raised by the suit.

As to the first concern, under the bright-line view, government
officials should be made aware of the possible consequences of the
suit against them at the outset of the litigation. We want qualified
individuals to go into government service, and this goal would be

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167. Egerdahl, 72 F.3d at 619 (“If a plaintiff’s complaint is silent about the capac­
ity in which she is suing the defendant, we interpret the complaint as including only
official-capacity claims.”).

168. Nix, 879 F.2d at 432 (citing Will v. Mich. Dep’t of State Police, 491 U.S. 58
(1989)) (“[U]nder the formal terms of the Eleventh Amendment, [a plaintiff] may not
bring an action solely against either the state or one of its agencies . . . . A state agent,
however, may be sued in his official capacity if the plaintiff merely seeks injunctive or
prospective relief for a legally cognizable claim.”).

169. Id. at 431 (requiring the statement “Plaintiff sues each and all defendants in
both their individual and official capacities”).

170. Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989) (“We adopt the Eighth
Circuit’s interpretation of Will, which requires that plaintiffs seeking damages under
§ 1983 set forth clearly in their pleading that they are suing the state defendants in their
individual capacity for damages, not simply in their capacity as state officials.”).

171. Nix, 879 F.2d at 431 (requiring specific language that “guarantees that the
defendant receives prompt notice”); Wells, 891 F.2d at 593 (stating that the complaint in
this case insufficiently “alert[ed the defendant] officials that they may be personally
accountable for any damages liability”).

172. Nix, 879 F.2d at 430 (citing Rose v. Nebraska, 748 F.2d 1258, 1262 (8th Cir.
1984)) (“The Eleventh Amendment presents a jurisdictional limit on federal courts in
civil rights cases against states and their employees.”); Wells, 891 F.2d at 593 (“[E]ven
liberalized pleading . . . cannot confer jurisdiction on this Court to entertain suits
against states and state officials when the Eleventh Amendment bars us from doing
so.”).
undermined if public servants could be surprised by a personal judgment against them, the possibility of which they may not have been aware at the outset of the litigation.\textsuperscript{173} Further, the public servant defendant has certain choices to make regarding defense strategy and the retaining of counsel that cannot be effectively made unless the defendant knows in what capacity he or she is being sued.\textsuperscript{174} Additionally, without notice of the nature of the suit, the "government defendant may . . . fail to plead the affirmative defense of qualified immunity and thereby waive [it]."\textsuperscript{175} This concern with providing adequate notice to the government defendant is relevant both when the defendant is an employee of a local government and an employee of a state government.

The second concern of the bright-line position—the jurisdictional restriction imposed by the Eleventh Amendment—is only present when the defendant is an employee of a state government. Under this view, the Eleventh Amendment, combined with the pleading requirements of the Federal Rules, requires that capacity be specifically pled in the complaint.\textsuperscript{176} This jurisdictional argument only applies when defendants are state employees because the Eleventh Amendment is not implicated when an action is brought against a local government or its employees.\textsuperscript{177}

As articulated by the Eighth Circuit in \textit{Nix v. Norman}, "[t]he
Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees. That being the case, Rule 9(a) appears to require [the plaintiff] to make a capacity stipulation in the complaint. 178 Though the court did not go into much detail regarding its reasoning, it appears that the court's conclusion was the result of a straight application of the text of the Amendment, as well as the holdings of Hans and Will.

First, the Amendment provides that "[t]he judicial power shall not be construed to extend" to suits brought against a state by citizens of another state 179 Second, the holding in Hans further removed from the judicial power suits brought against a state by one of its own citizens 180 Finally, the holding in Will established that an official-capacity suit for damages against a state official is no different than a suit against the state for which that official works; as such, a state official acting in his official capacity is not a "person" within the meaning of § 1983 181

Taken together, the only way for a § 1983 plaintiff to recover money damages in a suit against a state official is to sue the official in his individual or personal capacity, causing the judgment to run against the official's personal finances, rather than the state treasury 182 It further seems to be the reasoning of the Eighth Circuit that this is the only way by which a federal court could gain the power to entertain the matter in the first place—if sued officially, (1) the state agent is not a person within the meaning of the statute and so cannot be sued under it, and (2) any judgment would run against the state itself, a circumstance not permitted by the Eleventh Amendment. Accordingly, the individual capacity nature of the suit is necessary to show the jurisdiction of the court and so must be specifically averred in the complaint.

B. The Majority Position

The Eighth Circuit does not have much company in its position on the necessity of specific pleading of capacity 183 In 2001, the

178. 879 F.2d at 431 (citation omitted). "It is not necessary to aver the capacity of a party to sue or be sued . . . except to the extent required to show the jurisdiction of the court." Fed. R. Civ. P. 9(a).
179. U.S. Const. amend. XI.
182. See Nix, 879 F.2d at 433 ("Monetary damages are unrecoverable against [the official] in his official capacity . . . as such an award would require an expenditure of state funds.").
183. See Powell v. Alexander, 391 F.3d 1, 22 n.25 (1st Cir. 2004) (assembling opin-
Sixth Circuit, which had previously adopted the Eighth Circuit’s reasoning, appeared to reverse its position. The majority in *Moore v. City of Harriman* stated that its prior decision specifically endorsing that part of the Eighth Circuit’s position that required an express statement was not actually to be interpreted so strictly. In an opinion written by Chief Judge Boyce F. Martin, Jr., and joined by six other members of the court, the Sixth Circuit announced that, despite its seeming adoption of the bright-line analysis, it found a course-of-proceedings test to be the way to go. In fact, the court said it had always applied this test and had “never applied such a strict interpretation” of its *Wells* decision as to “requir[e] § 1983 plaintiffs to affirmatively plead ‘individual capacity’ in the complaint.” Thus, despite a strident protest from the dissenting judges, it would appear that the Sixth Circuit has repudiated its former position and joined those circuits that apply what has come to be known as the course-of-proceedings test to § 1983 complaints that leave ambiguous whether the defendant is being sued personally or officially.

For the course-of-proceedings courts, an examination of the nature of the complaint, the relief sought, and the litigation process is the proper method to determine what was meant by the plaintiff who has left capacity questionable. First, the majority position
holds that much can be learned regarding the defendant’s level of notice from an examination of the claims and defenses raised and the way the parties have treated the suit. The First Circuit, for example, has found instructive whether a plaintiff seeks punitive damages, since this is a remedy that can only be assessed against an individual. Likewise, making a qualified immunity defense is indicative of the fact that the defendant had notice that the suit was against him or her individually, since the qualified immunity defense is only available in the context of a personal capacity action. Going perhaps a step further, the Court of Appeals for the Ninth Circuit has stated that the very fact that a § 1983 plaintiff is seeking damages at all is sufficient to indicate that the government official defendant is to be held personally liable.

Given the fact that the Federal Rules of Civil Procedure were intended to tip the balance in favor of adjudication on the merits, the Court of Appeals for the Seventh Circuit, while adopting a presumption that a § 1983 claim against a public official is an official-capacity claim, nevertheless held that the presumption cannot be applied conclusively. Instead, the court advocated examining the way the “parties have treated the suit.” In one instance, the court found that the claims asserted in the pleadings, in addition to any defenses raised in response to the complaint, particularly claims of qualified immunity.”

190. Id. at 23.
191. Id.
192. Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990).
193. Shockley v. Jones, 823 F.2d 1068, 1071 (7th Cir. 1987) (quoting Duckworth v. Franzen, 780 F.2d 645, 649 (7th Cir. 1985)) (“[T]he . . . presumption ‘cannot be conclusive in a system such as the Federal Rules of Civil Procedure create, in which the complaint does not fix the plaintiff’s rights but may be amended at any time to conform to the evidence.’”). The Reporter of the Advisory Committee on Rules of Civil Procedure was Professor Charles A. Clark, who was later the Dean of Yale University Law School. As the “dominant intellectual and operational force” behind the drafting of the Rules, he brought to the task a commitment to reform and a conviction “that procedure should be [something] entirely separate from substance.” Jay S. Goodman, On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What did the Drafters Intend?, 21 SUFFOLK U. L. REV. 351, 356-57 (1987). Clark’s philosophy translated into two core beliefs that can be seen throughout the Rules: first, “that all cases should be decided on their merits,” rather than won or lost by procedural tactics; second, that a fundamental goal of all “litigation should be economy of time and resources.” Id. at 357.
194. Shockley, 823 F.2d at 1071.
the plaintiff's motion in limine and the good faith immunity defense raised by the defendant, were sufficient to allow the conclusion that the defendants were sued in their personal capacities.\textsuperscript{195} Though generally unstated, the courts adopting the majority position seem to exercise the principle that ambiguity in the pleadings should be resolved in favor of the pleader in order to further the goal of meritorious claims being fully and fairly litigated.\textsuperscript{196}

Finally, the courts that use a course-of-proceedings analysis disagree with the minority position on the applicability and scope of the Eleventh Amendment in this situation. As characterized by the Court of Appeals for the Fourth Circuit in \textit{Biggs v. Meadows}, the minority view is based on the premise that "the Eleventh Amendment operates as a substantive limitation on the subject-matter jurisdiction of the federal courts."\textsuperscript{197} As such, the minority position requires an express averment of individual capacity "to demonstrate that Eleventh Amendment immunity is not implicated and that jurisdiction is proper."\textsuperscript{198} However, this view, according to the Fourth Circuit, "neglects the considerable differences between Eleventh Amendment immunity and federal jurisdiction."\textsuperscript{199} The court points to three of these differences to illustrate its point.

First, the court states that Eleventh Amendment immunity is an issue that may be raised at the court's discretion.\textsuperscript{200} This is in contrast with other subject-matter jurisdiction questions which the court "must evaluate independent of the parties' contentions."\textsuperscript{201} This assertion is based on a footnote in a Supreme Court decision stating that the Court "[has] never held that Eleventh Amendment immunity is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."\textsuperscript{202} Second, the \textit{Biggs} court pointed to the ability of a state to waive its immunity under the Eleventh Amendment.\textsuperscript{203} Such a waiver would allow a claim

\textsuperscript{195} \textit{Id.}
\textsuperscript{196} See generally Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (holding a self-drafted complaint by a non-native English speaking plaintiff to be sufficient under the Federal Rules).
\textsuperscript{197} \textit{Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995).}
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.; see FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").}
\textsuperscript{202} Biggs, 66 F.2d at 60 (quoting Patsy v. Bd. of Regents, 457 U.S. 496, 515 n.19 (1982)).
\textsuperscript{203} \textit{Id.}
against a state to go forward in federal court where otherwise the state would be immune. In contrast, other limitations on the subject-matter jurisdiction of the federal courts will stand regardless of anything the parties do because "no action of the parties can confer subject-matter jurisdiction upon a federal court." Finally, according to the Biggs court, "Congress has no power to override a constitutional limitation on the subject-matter jurisdiction of the federal courts." It is well settled, however, that Congress can abrogate the Eleventh Amendment immunity of the states, provided it is legislating under § 5 of the Fourteenth Amendment and clearly states its intention to do so.

Taking these distinctions into account, the court concluded that "Eleventh Amendment immunity is not truly a limit on the subject-matter jurisdiction of the federal courts, but a block on the exercise of that jurisdiction." Once this distinction is appreciated, says the court, the reasoning of the minority position collapses and the reverse becomes true—not only is an averment of capacity unnecessary under Rule 9, but the Rule actually prohibits the imposition of a standard of pleading more stringent than that set out in Rule 8.

As of today, the Sixth Circuit is generally cast as adhering to the course-of-proceedings standard, leaving the Eighth Circuit as the sole proponent of the bright-line approach. The Eighth Circuit's position does not appear to have weakened at all, however. As recently as July of 2005 it reaffirmed the position it took in Nix.


205. Biggs, 66 F.3d at 60 (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)).

206. Id.

207. Id. In support of its assertion, the Biggs court compares Atascadero, which affirmed that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear," with Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., which noted that "Congress cannot expand the jurisdiction of the federal court beyond that granted in the Constitution." Biggs, 66 F.3d at 60 (quoting Atascadero, 473 U.S. at 242 and citing Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590 (1949)).

208. Biggs, 66 F.3d at 60.

209. Id.

210. Larson v. Kempker, 414 F.3d 936 (8th Cir. 2005). Though in this case the omission was not fatal, the court nevertheless stated that "[t]echnically, Larson's complaint had to 'contain a clear statement of his wish to sue defendants in their individual capacities,'" id. at 939 (quoting Egerdahl v. Hibbing Cmty. Coll., 72 F.3d 615, 620 (8th Cir. 1993)), and went on to reiterate that "without a clear statement that officials are
The Supreme Court noted the disagreement among the circuits in 1992, but at the time declined to resolve the matter, as it was not properly before the Court.\textsuperscript{211} The Court suggested, echoing the Court of Appeals for the Third Circuit, that it is preferable that a plaintiff be clear in the first instance, so as to avoid any ambiguity.\textsuperscript{212} However, the very term “course of proceedings,” as it is used here, comes from another Supreme Court decision wherein the Court indicated, in a slightly different situation, that the course of proceedings would be sufficient to indicate the nature of the claims at issue.\textsuperscript{213} As will be seen, much of this debate is characterized by a profusion of various and contradictory dicta statements of the Supreme Court.

\textbf{IV. Analysis}

So where are we left? It is a basic principle that the federal courts are courts of limited jurisdiction.\textsuperscript{214} They cannot act beyond the authority granted in Article III of the Constitution and the laws passed in pursuance thereof. It is equally basic, however, that courts of all kinds—whether state or federal, general or limited in their jurisdiction—exist to do justice in accord with the laws and principles of equity. Further, the Federal Rules of Civil Procedure set up a system wherein matters are to be decided on their merits whenever possible.

In the case of a § 1983 action against a local official, i.e., an official of a municipal or county government, the effect of the official or personal capacity nature of the suit is more or less confined to the damages that may be awarded.\textsuperscript{215} However, as Robert Biggs found out, in the case of a § 1983 action against a state employee,
the question of official or personal capacity can be determinative of whether the plaintiff is allowed to proceed with his action at all.216 Everyone agrees that a § 1983 plaintiff should be clear in the first instance to avoid any confusion, but this begs the question. If plaintiffs were clear this issue would not come up. Are those who leave capacity ambiguous to be denied the opportunity to litigate their rights because of a possible Eleventh Amendment violation? Conversely, should a federal court be permitted to entertain a matter over which its jurisdiction is not apparent from the outset?

The plaintiff who sees his claim dismissed under the bright-line analysis may seek leave to amend his complaint, but depending on the posture of the case, such leave may not be his as a matter of right and may be denied.217 Bringing the suit in state court seemed at one time to be a second option, but the Supreme Court recently held that a state's sovereign immunity is just as applicable there as in federal court.218 Thus, unless the state has consented to suit, it may not be sued in its own courts, either. Quite simply, it seems that from time to time, based on the rationale of the Eighth Circuit and a substantial minority of the Sixth Circuit, the § 1983 plaintiff will find himself without remedy despite the fact that he has brought a meritorious claim.

Both sides to this debate cast their arguments in Eleventh Amendment terms. Therefore, this analysis will begin by examining the bright-line and course-of-proceedings positions from that perspective. It will go on to argue, however, that this characterization as an Eleventh Amendment problem is inaccurate, and stems from a misapplication of Will v. Michigan Department of State Police. Specifically, in reaching and discussing the Eleventh Amend-

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216. See supra text accompanying notes 1-10.
217. Nix v. Norman, 879 F.2d 429, 433 n.3 (1989). Although Nix neglected to name Norman in his individual capacity, she may seek to do so on remand. Rule 15(a) of the Federal Rules of Civil Procedure permits a party, on motion to the district court, to amend her pleadings "when justice so requires." It is a settled rule of practice that the trial court is vested with sound discretion to grant or to refuse such a request. If the district court subsequently allows Nix to add an individual-capacity claim against Norman, she may also seek to reinstate her request for compensatory and punitive damages.
218. Alden v. Maine, 527 U.S. 706, 754 (1999) ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts . . .").
ment issue, the courts of appeals, like the dissenters in Will, are presuming that § 1983 applies to states and their officers. The holding of Will, however, was that the reach of § 1983 simply does not include such parties. The issue, therefore, is not constitutional, but rather statutory in scope.

A. The Disagreement in Terms of the Eleventh Amendment

The Court of Appeals for the Eighth Circuit stated in Nix and reiterated in subsequent cases that "[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees."219 The Court of Appeals for the Sixth Circuit adopted the same view in Wells.220 In so doing, these courts treated the Eleventh Amendment as a restriction on the subject-matter jurisdiction of the court, akin to the complete diversity requirement.221 As such, according to these courts, the complaint must contain a clear statement that the defendant is sued in his individual capacity in order to establish that the court has jurisdiction over the claim.

In contrast, the Court of Appeals for the Fourth Circuit asserted in Biggs that the Amendment "is not truly a limit on the subject-matter jurisdiction of the federal courts, but a block on the exercise of that jurisdiction."222 The court declared that the reasoning of the Eighth and Sixth Circuits improperly conflated the separate principles of immunity and jurisdiction.223 For the Fourth Circuit, and others adopting a course-of-proceedings approach, the effect of the Amendment is more akin to other forms of common law immunity available to public officials. The court did recognize,  

219. Nix, 879 F.2d at 431 (citing Rose v. Nebraska, 748 F.2d 1258, 1262 (8th Cir. 1984); see Larson v. Kempker, 414 F.3d 936, 939-40 (8th Cir. 2005); Murphy v. Arkansas, 127 F.3d 750, 755 (8th Cir. 1997).

We . . . strictly enforce this pleading requirement because 'the Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees.' Although other circuits have adopted a more lenient pleading rule, we believe our rule is more consistent with the Supreme Court's Eleventh Amendment jurisprudence.

Id. (quoting Nix, 879 F.2d at 431) (internal citations omitted).


221. 28 U.S.C. § 1332 provides in relevant part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different States . . . ." 28 U.S.C. § 1332 (2000); see also Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806).

222. Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995).

223. Id. at 59-60.
however, that the Amendment is at least somewhat jurisdictional.\(^{224}\)

At least partially, the divide among federal courts regarding the proper treatment of the unclear § 1983 plaintiff is a reflection of a disagreement regarding the nature of the barrier imposed by the Eleventh Amendment itself. That is, whether it represents a limitation on the subject-matter jurisdiction of the federal courts, or rather presents a bar to the exercise of jurisdiction that otherwise exists. The Fourth Circuit provided three examples of how the Eleventh Amendment was unlike a limitation on the federal courts' subject-matter jurisdiction: (1) the immunity conferred by the Amendment may be waived by the defendant state whereas no action or consent of the parties can cure a jurisdictional defect;\(^{225}\) (2) the Eleventh Amendment immunity of the states can be abrogated by Congress, whereas Congress has no power to expand the jurisdiction of the federal courts beyond the bounds set out in Article III of the Constitution;\(^{226}\) and (3) courts have discretion to raise the Eleventh Amendment on their own motion, whereas other questions of subject-matter jurisdiction must be raised by a court \textit{sua sponte} as soon as it appears there may be a defect.\(^{227}\)

That a state may consent to defend a suit otherwise barred by the Amendment is well-settled,\(^{228}\) as is the principle that Congress can abrogate the immunity of the states by express statement when legislating pursuant to § 5 of the Fourteenth Amendment.\(^{229}\) The veracity of the Fourth Circuit's statement regarding the permissive nature of a \textit{sua sponte} assertion of the Amendment is less clear, however.\(^{230}\)

In making this assertion, the Fourth Circuit relied on a footnote in the Supreme Court's decision in \textit{Patsy v. Board of Regents}\(^{224}\)

\(^{224}\) Id. at 60 (quoting in part the statement in \textit{Patsy v. Bd. of Regents of Fla.}, 457 U.S. 496, 516 n.19 (1982), that "'the Eleventh Amendment defense ... partakes of the nature of a jurisdiction bar'").

\(^{225}\) Id.

\(^{226}\) Id.

\(^{227}\) Id.


of Florida. There the Court stated that "because of the importance of state law in analyzing Eleventh Amendment questions and because the state may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."232

The Fourth Circuit does not mention, however, a case decided by the Supreme Court just two years later that contradicts the Patsy footnote. In *Pennhurst State School and Hospital v. Halderman*, the Court stated that "[t]he Eleventh Amendment is an explicit limitation of the judicial power of the United States,"233 and that a court must look at each claim before it in order to determine whether the Amendment bars that claim.234 The quoted language clearly places the Eleventh Amendment on a par with other forms of subject-matter jurisdiction, and the further admonition that the "court must examine" each claim before it determines the claim's status under the Amendment mandates the raising of the issue on the court's own motion.235

If the Amendment operates as a barrier to the subject-matter jurisdiction of the federal courts, as *Pennhurst* indicates, the position of the bright-line courts is strengthened. Since a court would have no authority to decide a case against a state officer unless the suit was brought against the officer in his individual capacity,

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232. *Id.* at 516 n.19. This was a § 1983 case that was decided without reference to the Eleventh Amendment. Though there were potential Eleventh Amendment issues in the case, these issues had not been argued or briefed by the parties at any stage of the trial or appeal process. The Court's footnote seems to be offering an explanation for the appearance that the Court is ignoring the elephant in the room.
234. *Id.* at 121.
235. *Id.* (emphasis added). Elsewhere in the opinion, the Court characterizes the Eleventh Amendment as an "exemplification" in the Constitution's text of the underlying doctrine of sovereign immunity. *Id.* at 98-99 (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)). The doctrine itself is incorporated into the Constitution on a structural and historical level, according to the Court, hence, "the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III." *Id.* at 98. The right of a sovereign state not to be sued without its consent is so fundamental and had such a powerful bearing on the framing of the Constitution that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

*Id.* at 98-99 (emphasis omitted) (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)).
statement in the complaint to that effect would be necessary under Federal Rule of Civil Procedure 9(a).

But the Fourth Circuit's contention that the Amendment operates as a "block" on subject-matter jurisdiction that would otherwise be present finds some support in the Pennhurst decision as well. In the same discussion referenced above, the Court states that the Amendment "deprives a federal court of power to decide certain claims against states that otherwise would be within the scope of Article III's grant of jurisdiction."236 The Court used § 1983 as an example, asserting that even a claim of violation of a constitutional right, brought pursuant to § 1983, would be barred by the Eleventh Amendment if brought against a state.237 This is so despite the fact that the claim arises under the Constitution and the federal courts have jurisdiction over such claims pursuant to Article III and 28 U.S.C. § 1331.238

If the Amendment operates more as a block on jurisdiction than a denial of jurisdiction altogether, it would be closer in nature to personal, rather than subject-matter jurisdiction. Personal jurisdiction may be waived by a party who appears and defends a suit, and the court is under no call to raise the matter on its own.239 The question would thus lose the threshold nature it has under the bright line view and become more akin to an affirmative defense.

The Court's statements in both Patsy and Pennhurst are dicta and therefore have led to some disagreement in the courts of appeals as to the proper rule.240 Moreover, the Supreme Court in two more recent cases issued further contradictory statements regarding the nature of the Eleventh Amendment as a jurisdictional bar.241

236. Id. 119-20.
237. Id. at 120.
238. Section 1331 provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty . . . . Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.

Id.

240. See Keith, supra note 230, at 1049, 1077 (concluding that "[t]he Pennhurst standard is both preferable as a matter of policy and more accurate as a matter of present Eleventh Amendment jurisprudence").
Seminole Tribe of Florida v. Florida\textsuperscript{242} used much of the same language found in Pennhurst to declare that the jurisdiction of the federal courts did not include suits against non-consenting states.\textsuperscript{243} This seemed to place the Eleventh Amendment and the underlying principles of sovereign immunity squarely in the category of subject-matter jurisdiction and largely to nullify the Patsy footnote.\textsuperscript{244}

Two years later, however, the Court resurrected the Patsy footnote in a unanimous opinion that made no mention of Seminole Tribe.\textsuperscript{245} In deciding the question of the effect of the Eleventh Amendment on the removal jurisdiction of the federal courts, the Court stated that the original jurisdiction of the federal courts is not necessarily destroyed by the Amendment.\textsuperscript{246}

Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.\textsuperscript{247}

According to this definition, the Eleventh Amendment takes on almost the same attributes as any other affirmative defense.\textsuperscript{248} It is up to the defendant to raise the defense and the court is under no obligation to take up the matter on its own.

On balance, however, the weight of the Supreme Court's ex-

\textsuperscript{242} 517 U.S. 44 (1996).
\textsuperscript{243} See id. at 64.
\textsuperscript{244} Keith, supra note 230, at 1068.
\textsuperscript{245} Wis. Dep't of Corr. v. Schacht, 524 U.S. 381 (1998); see Keith, supra note 230, at 1069.
\textsuperscript{246} Schacht, 524 U.S. at 389.
\textsuperscript{247} Id. (citations omitted).
\textsuperscript{248} The word "almost" is used here because, unlike other defenses which are deemed waived if not raised at the outset or made in a motion, Fed. R. Civ. P. 12(b), a state's Eleventh Amendment immunity can be raised at any time. This creates the possibility that a state may assert the Eleventh Amendment on appeal, even though not asserted at trial, and have any judgment rendered against it reversed or vacated for lack of jurisdiction. The unfairness of this circumstance concerned Justice Kennedy, who expressed his "doubts about the propriety of this rule" in his concurring opinion in Schacht:

In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

Schacht, 524 U.S. at 394 (Kennedy, J., concurring).
isting precedent and dicta regarding the Eleventh Amendment comes down against the proposition that the Eleventh Amendment is not truly a jurisdictional barrier. To be sure, the Amendment operates differently than other subject-matter jurisdiction limits. This can be seen in the fact that jurisdiction may be had if the state consents to suit.

But this ability of the states to consent flows from their nature as sovereigns in the federal system. It should not be held to detract from the effect of the Amendment on the authority of the federal courts to entertain suits by private parties against a state. Under our federal system, the individual states "retain 'a residuary and inviolable sovereignty.'" 249 Although their authority is curtailed by their entrance into the Union under the Constitution, the states themselves do not become organs of the federal government. Rather, they "retain the dignity . . . of sovereignty." 250 It is part of the nature of its retained sovereignty that a state cannot be made amenable to suit by an individual without its consent. 251 It would seem no less an infringement of that sovereignty to declare that a state may not so consent. Rather than being viewed as a demonstration of how Eleventh Amendment immunity is not jurisdictional, the ability of a state to consent is more properly seen as simply a manifestation of its status as a residual sovereign.

Moreover, the statements in *Patsy* and *Schacht* notwithstanding, the proposition that the judicial power of the United States does not, and never did, extend to private suits against the states is one that the Court has expressed since 1890. 252 If this is the correct view, then the issue of state immunity becomes a threshold matter and absent a showing that jurisdiction exists, a federal court cannot proceed. This view mandates that a court address possible sovereign immunity problems on its own motion. This in turn supports the Eighth Circuit’s reading of Federal Rule of Civil Procedure 9(a) requiring the plaintiff to state that the defendant is being sued in his individual capacity.

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250. *Id*.


252. *Id*. "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Id*. (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) and citing twenty-four subsequent cases in support).
B. The Disagreement as a Misapplication of Will

In instances where the defendant is a state officer, both the bright-line courts and the course-of-proceedings courts discuss capacity pleading requirements in the context of the Eleventh Amendment. However, the relevant Supreme Court precedent indicates that the Eleventh Amendment does not matter—at least not as much as it would seem from the opinions of the U.S. courts of appeals.

When the Court of Appeals for the Sixth Circuit adopted the bright-line standard expounded by the Eighth Circuit, it relied primarily on the Supreme Court's decision in Will v. Michigan Department of State Police. The Sixth Circuit characterized the Will decision, as the Eighth Circuit had previously, as holding that "state officials sued in [their] official capacity for damages are absolutely immune from liability under the Eleventh Amendment." Will, however, was not an Eleventh Amendment case. Will's holding was that the word "persons," as used in § 1983, does not include the states. Since state agents sued in their official capacities are deemed to be "the state" as well, such agents, when sued officially, are not "persons" under § 1983 either.

The Will Court's reasoning in reaching these conclusions is based in substantial part on Eleventh Amendment considerations, but the decision itself is more a matter of statutory construction.

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253. See, e.g., Reames v. Oklahoma ex rel. Okla. Health Care Auth., 411 F.3d 1164, 1168 (10th Cir. 2005), cert. denied, No. 05-807, 2006 U.S. LEXIS 1994 (U.S. Feb. 27, 2006). "The Eleventh Amendment does not prevent plaintiffs from bringing suits against state officials . . . in their individual and personal capacities." Id. However, after applying the course-of-proceedings test, the court found this plaintiff's suit to be against the state and "therefore money damages [were] barred under the Eleventh Amendment." Id.; see also Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997) ("[T]he Eleventh Amendment does not bar damage claims against state officials acting in their personal capacities."); Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995) ("The minority view neglects the considerable differences between Eleventh Amendment immunity and federal jurisdiction."); Pride v. Does, 997 F.2d 712, 715 (10th Cir. 1993) ("It is well-settled that the Eleventh Amendment bars § 1983 civil actions against the states but permits such suits brought against state officials sued in their individual capacities."); Wells v. Brown, 891 F.2d 591, 593 (6th Cir. 1989) ("[T]he Eleventh Amendment places a jurisdictional limit on federal courts in civil rights cases against states and state employees . . . .").

254. Wells, 891 F.2d at 592.

255. Id.

256. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.").

257. Id.
than constitutional explication. The courts of appeals therefore miss the mark in conducting the capacity debate solely on Eleventh Amendment terms.

The effect of *Will* is that neither suits against states nor official-capacity suits for damages against state officers may go forward under § 1983—not because of the Eleventh Amendment, but because the statute does not provide for such a claim. In contrast, the dissenting Justices would have held that states are, in fact, "persons" within the meaning of § 1983. Under this alternative, the states would still enjoy immunity from suit, but could nevertheless consent to being sued. Under the majority's holding, a state could never itself be held liable for civil rights violations. Justice Brennan, writing in dissent and joined by Justices Marshall, Blackmun, and Stevens, stated,

[A description of the far-reaching impact] of the Court's holding . . . demonstrate[s] its unwisdom. If states are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. Even if . . . a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.

For the dissenting Justices, a holding that would invalidate the express consent of a state to be sued was incongruent with the principles of sovereignty and federalism that underlie Eleventh Amendment doctrine. This is intuitive—if a state's immunity from suit is an attendant part of its sovereign status, the corollary ability to consent to suit would seem to be no less a part of that status. Thus, a holding that nullifies a state's consent represents no less an infringement of state sovereignty than did the *Chisholm* holding in 1793.

258. The majority looks at the statutory language and legislative history of § 1983, but according to Justice Brennan's dissent does not do a thorough job of either. *Id.* at 72 (Brennan, J., dissenting). Justice Brennan suggests that the majority wrongfully applies Eleventh Amendment standards of deciphering legislative intent in a case where the Amendment is not implicated (this was a pre-*Alden*, state-court action). *Id.* at 75-76. Brennan flatly disagrees with the majority's holding, finding that the 42d Congress did intend to include states in the definition of "persons" under § 1983. *Id.* at 77.

259. *Id.* at 71 (majority opinion).

260. *Id.* at 77 (Brennan, J., dissenting); *id.* at 93-94 (Stevens, J., dissenting).

261. *Id.* at 85 (Brennan, J., dissenting).

262. *Id.* at 86.

263. As earlier stated, *supra* text accompanying note 22, *Chisholm v. Georgia* allowed a private citizen to sue the State of Georgia for the recovery of debts incurred during the Revolutionary War and led directly to the drafting and ratification of the
In discussing pleading requirements on Eleventh Amendment terms, the courts of appeals are necessarily assuming that §1983 has the potential to bring a state government or state officer within its reach. Close adherence to the Will holding, that states and officially-sued state officers are not within the statute's ambit, would foreclose the need to consider the question on constitutional grounds. These courts are going beyond the question of whether states are "persons" to reach the question of whether the Eleventh Amendment removes such a case from the jurisdiction of the federal courts.

Only if states were, in fact, "persons" under §1983 would it become necessary to determine the jurisdictional effect of the Eleventh Amendment. As noted by the majority in Alden, Will's "holding that 42 U.S.C. §1983 did not create a cause of action against the states rendered it unnecessary to determine the scope of the States' constitutional immunity from suit in their own courts." The fact that Will originated in a state court system does not matter here. The Court's construction of §1983 is applicable regardless of whether the claim is brought in federal or state court. The category of "persons" to whom the statute applies should not vary depending on forum. Such a variance would give rise to a situation wherein a state could consent to be sued in federal court, but be precluded from doing so in its own courts. If, as stated by Alden, the fact that the statute does not create a cause of action against states makes it unnecessary in the state court context to consider the issue on sovereign immunity grounds, the same should hold true in federal court. Thus, in reaching the sovereign immunity discussion, the approach of the courts of appeals seems more in line with the reasoning of the dissenting opinions in Will, rather than the holding of the majority.

Under Will, a §1983 suit against a state or against a state officer in his official capacity would be subject to dismissal because the statute does not provide a remedy. Therefore, the strict re-

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Eleventh Amendment. 2 U.S. (2 Dall.) 419 (1793), superseded by statute, U.S. Const. amend. XI, as recognized in Hans v. Louisiana, 134 U.S. 1 (1890).


265. Justice Stevens, in a separate dissent, points out the logical discord caused by the Will holding:

The Court having constructed an edifice for the purposes of the Eleventh Amendment on the theory that the State is always the real party in interest in a §1983 official-capacity action against a state officer, I would think the majority would be impelled to conclude that the State is a "person" under §1983. Will, 491 U.S. at 93 (Stevens, J., dissenting).
quirements of the Eighth Circuit again are justified, though for different reasons. The only way, under Will, for a § 1983 plaintiff to recover damages against a state officer is to sue that officer in his individual capacity. Otherwise, the plaintiff will have failed to make a "statement of the claim showing that [she] is entitled to relief."266

CONCLUSION

Whether the reasons are constitutional or statutory, it is necessary that a § 1983 plaintiff seeking damages make clear that he is suing the defendant in the defendant's individual capacity. However, in light of the premium the Federal Rules place on the adjudication of claims on their merits, it seems unduly harsh to require the plaintiff to make an express statement to that effect or face dismissal. Looking instead to the nature of the claims, the defenses, and the course of proceedings appears more equitable, particularly in the case of a pro se plaintiff like Robert Biggs.

Nevertheless, the course-of-proceedings approach goes too far. It seems unlikely that any plaintiff would be found to have intended to sue the defendant solely in her official capacity, since to do so would be litigation suicide.267 Further, allowing an examination of the defenses raised in response to the complaint can be misleading because affirmative defenses are often perfunctorily inserted into an answer, whether applicable or not, in order to ensure the defense is not waived.

Likewise, looking to the direction the litigation has taken will tend to lead to an individual capacity conclusion. Whether a government official is sued individually or officially, he is still a person (though perhaps not a § 1983 "person") and the course of proceed-

266. FED. R. CIV. P. 8(a)(2).
267. See John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 63-65 (1998). Professor Jeffries's survey of cases from 1991 through 1997 found that suits against state officers where capacity was left ambiguous were "generally allowed . . . to proceed. . . . Almost never did the courts refuse to accept a properly pleaded complaint by coercively recharacterizing the complaint as being 'really' against the state and therefore barred by the Eleventh Amendment." Id. But see Reames v. Oklahoma ex rel. Okla. Health Care Auth., 411 F.3d 1164, 1168 (10th Cir. 2005) (applying course-of-proceedings analysis to § 1983 claims against employees of two state agencies and finding the suit to be against the defendants in their official capacity and properly dismissed on Eleventh Amendment grounds); United States ex rel. Adrian v. Regents of the Univ. of Cal., 363 F.3d 398, 402-03 (5th Cir. 2004) (reaching the same result in application of course-of-proceedings analysis to action brought under False Claims Act).
ings will almost certainly be replete with references to the official as an individual, from which a court could determine that the plaintiff intended to sue him as such and that the defendant knew he was being so sued.

In short, the course-of-proceedings approach, while perhaps founded on good intentions, is standardless and easily manipulated. When capacity is left ambiguous in the complaint, the inquiry should be confined to the four corners of the complaint. Within those four corners, however, the complaint should be read substantively, rather than be held fatally deficient for lack of a certain sentence or formulation. This will ensure that federal courts remain within their statutory and constitutional boundaries, while still affording the unclear plaintiff the fairness our system requires.

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* My deepest thanks to my loved ones, colleagues, and teachers. Their support, guidance, and criticism made this possible. Any remaining mistakes are mine alone. This Note is dedicated to the memory of Marion B. Langone, February 11, 1913 - February 28, 2006.