Statement of Z. Payvand Ahdout (June 9, 2022)
Statement to the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Examining Civil Rights Litigation Reform, Part 2: State and Local Government Employer Liability
Thursday, June 9, 2022

Thank you for having me today to talk about this critical issue. My name is Payvand Ahdout and I am an associate professor of law at the University of Virginia School of Law. My research centers on federal courts and constitutional law, with a focus on the constitutional separation of powers. Prior to joining the faculty at the University of Virginia, I served as Bristow Fellow in the Solicitor General's Office and as a law clerk to Justice Ruth Bader Ginsburg. I am here today to talk about Congress's authority to abrogate state sovereign immunity in the context of civil rights litigation generally and § 1983 litigation.

Today, I will talk about four things. First, I will describe state sovereign immunity and highlight the ways in which it is different from federal sovereign immunity. Second, I will describe Congress's role in prescribing the boundaries of state sovereign immunity. Third, I will discuss what Congress can do in the context of civil rights litigation generally and § 1983 in particular. I will conclude with brief recommendations based on the current state of the law.

I. What is state sovereign immunity?

Sovereign immunity is the legal principle that sovereign entities cannot be hauled into court without their consent. Sovereign immunity is an immunity from *suit*, not an immunity from *liability*. This means that the sovereign generally can set the terms for how, to what extent, and in which courts they will face legal liabilities. For example, the federal government has sovereign immunity over all claims against it, but has chosen to waive that immunity to face tort liability under the Federal Tort Claims Act, which prescribes when, how, in which courts, and for what relief the federal government can be sued for torts.

State sovereign immunity is slightly different. Although it shares some attributes of federal sovereign immunity, there are fundamental differences because the United States recognizes dual sovereignty and federal supremacy. It is not solely within a state's hands to shape the contours of its sovereign immunity. The federal government—and specifically, Congress—has limited power to define the boundaries of state sovereign immunity.

State sovereign immunity is grounded in the Eleventh Amendment. That amendment was passed as a constitutional override of the 1793 Supreme Court decision *Chisolm v. Georgia*, which held that a South Carolina citizen could maintain a suit against the state of Georgia.[1] By its terms,

[1] *Chisolm v. Georgia*, 2 U.S. 419 (1793).

the Eleventh Amendment applies to suits brought only by citizens of another state against a state.[2] But the Eleventh Amendment has been read non-literally almost since its inception to provide broad immunity to the states in a variety of contexts.[3]

II. Congress's role in defining the bounds of state sovereign immunity

Importantly, state sovereign immunity is not absolute, and its contours are not entirely within a states' own hands. Congress has the main role in defining its boundaries. Under Section 5 of the Fourteenth Amendment, "Congress has the power to authorize Federal courts" to enter damages awards against states "as a means of enforcing the substantive guarantees of the Fourteenth Amendment."[4] In an opinion by Chief Justice Rehnquist, the Supreme Court recognized that the Fourteenth Amendment shifted "the federal-state balance [that] has been carried forward."[5] Not only does Section 5 of the Fourteenth Amendment contain an express grant of plenary legislative authority, but it does so in the context of an amendment "whose other sections by their own terms embody limitations on state authority."[6] For this reason, Congress may choose to abrogate state sovereign immunity to enforce the substantive guarantees of the Fourteenth Amendment.[7]

To successfully abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment, a statute must satisfy a two-prong test. First, the statute must evince a clear congressional intent to abrogate state sovereign immunity in the text of the statute.[8] For example, the Supreme Court has found this satisfied by a clearly provided right of action for money damages against a state in the context of the Family Medical Leave Act.[9]

Second, in order to have requisite constitutional authority, the statutory provision must be "congruen[t] and proportional[ ]" to the targeted violation.[10] This test is not well defined. But we do know that Congress may enact "prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct."[11] We also know that courts look to and depend upon evidentiary findings that Congress makes in proscribing unconstitutional conduct.[12] It is important for Congress to document, for example, whether there is a history or pattern of unconstitutional conduct or discrimination. It is important to note that Congress has latitude to abrogate state sovereign immunity only to remedy rights that are protected by the Fourteenth Amendment. This means that Congress has broader latitude to abrogate state sovereign

---

[2] U.S. Const. Amend. XI.
[3] *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890) (states have sovereign immunity in suits brought by their own citizens); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (states retain sovereign immunity from private suits in the courts of sister states).
[4] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976).
[5] *Id.* at 455.
[6] *Id.* at 456.
[7] This power applies equally to the other Reconstruction Amendments as well.
[8] *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).
[9] *Id.* at 730-32.
[10] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).
[11] *Id.* at 526.
[12] *See, e.g., Coleman v. Ct. of App. of Md.*, 566 U.S. 30 (2012).

immunity in the contexts of race-based or gender-based discrimination, for example, than for age-based discrimination.

There is an interesting federal-state balance in recognizing that Section 5 of the Fourteenth Amendment provides authority for abrogation of immunity. Ordinarily, states are treated as coequal sovereigns whose monetary fiscs are protected. But when states engage in systemic subversion of federal rights, the Constitution provides mechanisms for federal supremacy, one form of which is congressional authority to provide a cause of action for monetary damages.

III. Section 1983

I want to now clarify why it is that Section 1983 does not, by its terms, apply to the states or act as an abrogation of state sovereign immunity. As of now, states may not be sued under 42 U.S.C. § 1983 for two independent statutory reasons. First, in *Quern v. Jordan*, the Supreme Court held that Congress did not clearly manifest an intention to abrogate state sovereign immunity in § 1983.[13] The Court cited the limited debate on the point of state sovereign immunity as evidence that Congress did not intend to abrogate immunity in this context.[14]

Second, the Supreme Court has held that states are not considered "persons" within § 1983's statutory text.[15] In *Will v. Michigan Department of State Police*, the Supreme Court reasoned that Congress ordinarily does not use the word "person" to apply to states. What is more, in statutory interpretation, there is a default rule that Congress must use "unmistakably clear language" in the statute where it intends to alter the "usual constitutional balance between the States and the Federal Government."[16]

Together, these two decisions show that it is in Congress's hands to determine whether to provide a monetary damages remedy against the states. There is no constitutional barrier to providing such a remedy.

IV. Recommendations

I recommend that you be as specific as possible in any legislation seeking to abrogate state sovereign immunity, both in your intent to abrogate immunity and in your reasons for doing so. Be clear in the text of the statute that you are providing a statutory cause of action for monetary damages against states. I recommend that you make necessary evidentiary findings of state subversion of federal rights to fortify your statute in judicial review. Although § 1983 includes a damages remedy for both constitutional and statutory violations of federal law, it is important to note that your authority to abrogate state sovereign immunity is broader with respect to federal constitutional violations than federal statutory violations.

---

[13] *Quern v. Jordan*, 440 U.S. 332 (1979).
[14] *Id.* at 343 ("§ 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1.").
[15] *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989).
[16] *Atascadero State Hosp. v. Scanlon*, 472 U.S. 234, 242 (1985).