To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy

STYLISTIC CHANGES THROUGHOUT

From: **Justice Brennan**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 87-1207

RAY WILL, PETITIONER *v.* MICHIGAN DEPARTMENT OF STATE POLICE ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1989]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Because this case was brought in state court, the Court concedes, the Eleventh Amendment is inapplicable here. See *ante*, at 5. Like the guest who wouldn't leave, however, the Eleventh Amendment lurks everywhere in today's decision and, in truth, determines its outcome.

I

Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, renders certain "persons" liable for deprivations of constitutional rights. The question presented is whether the word "persons" in this statute includes the States and state officials acting in their official capacities.

One might expect that this statutory question would generate a careful and thorough analysis of the language, legislative history, and general background of § 1983. If this is what one expects, however, one will be disappointed by today's decision. For this case is not decided on the basis of our ordinary method of statutory construction; instead, the Court disposes of it by means of various rules of statutory interpretation that it summons to its aid each time the question looks close. Specifically, the Court invokes the following interpretative principles: the word "persons" is ordinarily construed to exclude the sovereign; congressional intent to affect

the federal-state balance must be "clear and manifest"; and intent to abrogate States' Eleventh Amendment immunity must appear in the language of the statute itself. The Court apparently believes that each of these rules obviates the need for close analysis of a statute's language and history. Properly applied, however, only the last of these interpretative principles has this effect, and that principle is not pertinent to the case before us.

The Court invokes, first, the "often-expressed understanding" that "'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Ante*, at 5, quoting *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 667 (1979). This rule is used both to refute the argument that the language of § 1983 demonstrates an intent that States be included as defendants, *ante*, at 5, and to overcome the argument based on the Dictionary Act's definition of "persons" to include bodies politic and corporate, *ante*, at 10–11. It is ironic, to say the least, that the Court chooses this interpretive rule in explaining why the Dictionary Act is not decisive, since the rule is relevant only when the word "persons" has no statutory definition. When one considers the origins and content of this interpretive guideline, moreover, one realizes that it is inapplicable here and, even if applied, would defeat rather than support the Court's approach and result.

The idea that the word "persons" ordinarily excludes the sovereign can be traced to the "familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words." *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239 (1874). As this passage suggests, however, this interpretive principle applies only to "the enacting sovereign." *United States* v. *California*, 297 U. S. 175, 186 (1936). See also *Jefferson County Pharmaceutical Assn., Inc.* v. *Abbott Laboratories*, 460 U. S. 150, 161, n. 21 (1983). Furthermore, as explained in *United States* v. *Herron*, 20 Wall. 251, 255 (1874), even the

principle as applied to the enacting sovereign is not without limitations: "Where an act of Parliament is made for the public good, as for the advancement of religion and justice or to prevent injury and wrong, the king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words." It would be difficult to imagine a statute more clearly designed "for the public good," and "to prevent injury and wrong," than § 1983.

Even if this interpretative principle were relevant to this case, the Court's invocation of it to the exclusion of careful statutory analysis is in error. As we have made clear, this principle is merely "an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." *United States* v. *California*, *supra*, at 186. Indeed, immediately following the passage quoted by the Court today, *ante*, at 5, to the effect that statutes using the word "person" are "ordinarily construed to exclude" the sovereign, we stated:

> "But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.
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> . . . . .
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> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construc-

tion." *United States* v. *Cooper Corp.*, 312 U. S. 600, 604–605 (1941).

See also *Wilson* v. *Omaha Indian Tribe*, *supra*, at 667 ("There is . . . 'no hard and fast rule of exclusion,' *United States* v. *Cooper Corp.*, *supra*, at 604–605; and much depends on the context, the subject matter, legislative history, and executive interpretation"); *Pfizer Inc.* v. *India*, 434 U. S. 308, 315–318 (1978); *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 155 (1912); *Lewis* v. *United States*, 92 U. S. 618, 622 (1875); *Green* v. *United States*, 9 Wall. 655, 658 (1870).

The second interpretative principle that the Court invokes comes from cases such as *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 16 (1981); *South Dakota* v. *Dole*, 483 U. S. 203, 207–208 (1987); and *United States* v. *Bass*, 404 U. S. 336, 349 (1971), which require a "clear and manifest" expression of congressional intent to change some aspect of federal-state relations. *Ante*, at 6–7. These cases do not, however, permit substitution of an absolutist rule of statutory construction for thorough statutory analysis. Indeed, in each of these decisions the Court undertook a careful and detailed analysis of the statutory language and history under consideration. *Rice* is a particularly inapposite source for the interpretative method that the Court today employs, since it observes that, according to conventional pre-emption analysis, a "clear and manifest" intent to pre-empt state legislation may appear in the "scheme" or "purpose" of the federal statute. See 331 U. S., at 230.

The only principle of statutory construction employed by the Court that would justify a perfunctory and inconclusive analysis of a statute's language and history is one that is irrelevant to this case. This is the notion "that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the stat-

ute.'" *Ante*, at 6, quoting *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985). As the Court notes, *Atascadero* was an Eleventh Amendment case; the "constitutional balance" to which *Atascadero* refers is that struck by the Eleventh Amendment as this Court has come to interpret it. Although the Court apparently wishes it were otherwise, the principle of interpretation that *Atascadero* announced is unique to cases involving the Eleventh Amendment.

Where the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other situation. Indeed, just this Term, the Court has intimated that this clear-statement principle is not simply a means of discerning congressional intent. See *Dellmuth* v. *Muth*, —— U. S. ——, ——, (1989) (slip op., at 8) (concluding that one may not rely on a "permissible inference" from a statute's language and structure in finding abrogation of immunity); *id.*, slip op., at —— (BRENNAN, J., dissenting); but see *Pennsylvania* v. *Union Gas Co.*, —— U. S. ——, —— (1989). Since this case was brought in state court, however, this strict drafting requirement has no application here. The Eleventh Amendment can hardly be "a consideration," *ante*, at 8, in a suit to which it does not apply.

That this Court has generated a uniquely daunting requirement of clarity in Eleventh Amendment cases explains why *Quern* v. *Jordan*, 440 U. S. 332 (1979), did not decide the question before us today. Because only the Eleventh Amendment permits use of this clear-statement principle, the holding of *Quern* v. *Jordan* that § 1983 does not abrogate States' Eleventh Amendment immunity tells us nothing about the meaning of the term "persons" in § 1983 as a matter of ordinary statutory construction. *Quern*'s conclusion thus does not compel, or even suggest, a particular result today.

The singularity of this Court's approach to statutory interpretation in Eleventh Amendment cases also refutes the Court's argument that, given *Quern*'s holding, it would make no sense to construe § 1983 to include States as "persons."

See *ante*, at 7–8. This is so, the Court suggests, because such a construction would permit suits against States in state but not federal court, even though a major purpose of Congress in enacting § 1983 was to provide a federal forum for litigants who had been deprived of their constitutional rights. See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961). In answering the question whether § 1983 provided a federal forum for suits against the States themselves, however, one must apply the clear-statement principle reserved for Eleventh Amendment cases. Since this principle is inapplicable to suits brought in state court, and inapplicable to the question whether States are among those subject to a statute, see *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 287 (1973); *Atascadero*, *supra*, at 240, n. 2, the answer to the question whether § 1983 provides a federal forum for suits against the States may be, and most often will be, different from the answer to the kind of question before us today. Since the question whether Congress has provided a federal forum for damages suits against the States may no longer be answered merely by considering Congress' actual intent, see *supra*, at 5, the Court should not pretend that we have, in *Quern*, answered the question whether Congress *intended* to provide a federal forum for such suits, and then reason backwards from that "intent" to the conclusion that Congress must not have intended to allow such suits to proceed in state court.

In short, the only principle of statutory interpretation that permits the Court to avoid a careful and thorough analysis of § 1983's language and history is the clear-statement principle that this Court has come to apply in Eleventh Amendment cases—a principle that is irrelevant to this state-court action. In my view, a careful and detailed analysis of § 1983 leads to the conclusion that States are "persons" within the meaning of that statute.

II

Section 1983 provides:

> "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."

Although § 1983 itself does not define the term "person," we are not without a statutory definition of this word. "Any analysis of the meaning of the word 'person' in § 1983 . . . must begin . . . with the Dictionary Act." *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 719 (1978) (REHNQUIST, J., dissenting). Passed just two months before § 1983, and designed to "suppl[y] rules of construction for all legislation," *ibid.*, the Dictionary Act provided:

> "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense . . . ." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

In *Monell*, we held this definition to be not merely allowable but mandatory, requiring that the word "person" be construed to include "bodies politic and corporate" unless the statute under consideration "by its terms called for a deviation from this practice." 436 U. S., at 689–690, n. 53. Thus, we concluded, where nothing in the "context" of a particular statute "call[s] for a restricted interpretation of the word 'person,' the language of that [statute] should prima facie be construed to include 'bodies politic' among the entities that could be sued." *Ibid.*

Both before and after the time when the Dictionary Act and § 1983 were passed, the phrase "bodies politic and corporate" was understood to include the States. See, *e. g.*, J. Bouvier, 1 A Law Dictionary Adapted to the Constitution and Laws of the United States of America 185 (11th ed., 1866); W. Shumaker & G. Longsdorf, Cyclopedic Dictionary of Law 104 (1901); *Chisholm* v. *Georgia*, 2 Dall. 419, 447 (1793) (Iredell, J.); *id.*, at 468 (Cushing, J.); *Cotton* v. *United States*, 11 How. 229, 231 (1851) ("Every sovereign State is of necessity a body politic, or artificial person"); *Poindexter* v. *Greenhow*, 114 U. S. 270, 288 (1885); *McPherson* v. *Blacker*, 146 U. S. 1, 24 (1892); *Heim* v. *McCall*, 239 U. S. 175, 188 (1915). See also *United States* v. *Maurice*, 2 Brock. 96, 109 (CC Va. 1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a body politic and corporate"); *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154 (1886) (same). Indeed, the very legislators who passed § 1 referred to States in these terms. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 661–662 (1871) (Sen. Vickers) ("What is a State? Is it not a body politic and corporate?"); *id.*, at 696 (Sen. Edmunds) ("A State is a corporation").

The reason why States are "bodies politic and corporate" is simple: just as a corporation is an entity that can act only through its agents, "[t]he State is a political corporate body, can act only through agents, and can command only by laws." *Poindexter* v. *Greenhow*, *supra*, at 288. See also Black's Law Dictionary 159 (5th ed. 1979) ("body politic or corporate": "[a] social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good"). As a "body politic and corporate," a State falls squarely within the Dictionary Act's definition of a "person."

While it is certainly true that the phrase "bodies politic and corporate" referred to private and public corporations, see *ante*, at 10, and n. 9, this fact does not draw into question the conclusion that this phrase also applied to the States.

Phrases may, of course, have multiple referents. Indeed, each and every dictionary cited by the Court accords a broader realm—one that comfortably, and in most cases explicitly, includes the sovereign—to this phrase than the Court gives it today. See 1 Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence 155 (1879) ("[T]he term body politic is often used in a general way, as meaning the state or the sovereign power, or the city government, without implying any distinct express incorporation"); Anderson, A Dictionary of Law 127 (1893) ("body politic": "The governmental, sovereign power: a city or a State"); Black's Law Dictionary 143 (1st ed. 1891) ("body politic": "It is often used, in a rather loose way, to designate the state or nation or sovereign power, or the government of a county or municipality, without distinctly connoting any express and individual corporate charter"); Burrill, A Law Dictionary and Glossary 212 (2d ed. 1871) ("body politic": "a body to take in succession, framed by *policy*"; "particularly applied, in the old books, to a corporation sole"); *id.*, at 383 ("corporation sole" includes the sovereign in England).

Because I recognize that both uses of this phrase were deemed valid when § 1983 and the Dictionary Act were passed, the Court accuses me of "confus[ing the] precise definition of this phrase with its use 'in a rather loose way,' to refer to *the* state (as opposed to *a* State)." *Ante*, at 11, n. 9, quoting Black, *supra*, at 143. It had never occurred to me, however, that only "precise" definitions counted as valid ones. Where the question we face is what meaning Congress attached to a particular word or phrase, we usually—and properly—are loath to conclude that Congress meant to use the word or phrase in a hypertechnical sense unless it said so. Nor does the Court's distinction between "*the* state" and "*a* State" have any force. The suggestion, I take it, is that the phrase "bodies politic and corporate" refers only to nations rather than to the states within a nation; but then the Court must explain why so many of the sources I

have quoted refer to states *in addition to* nations. In an opinion so utterly devoted to the rights of the States as sovereigns, moreover, it is surprising indeed to find the Court distinguishing between our sovereign States and our sovereign Nation.

In deciding what the phrase "bodies politic and corporate" means, furthermore, I do not see the relevance of the meaning of the term "public corporation." See *ante*, at 10–11, n. 9. That is not the phrase chosen by Congress in the Dictionary Act, and the Court's suggestion that this phrase is coterminous with the phrase "bodies politic and corporate" begs the question whether the latter one includes the States. Nor do I grasp the significance of this Court's decision in *United States* v. *Fox*, 94 U. S. 315 (1877), in which the question was whether the State of New York, by including "persons" and "corporations" within the class of those to whom land could be devised, had intended to authorize devises to the United States. *Ante*, at 10, n. 9. Noting that "[t]he question is to be determined by the laws of [New York]," the Court held that it would require "an express definition" to hold that the word "persons" included the Federal Government, and that under state law the term "corporations" applied only to corporations created under the laws of New York. 94 U. S., at 320–321. The pertinence of these state-law questions to the issue before us today escapes me. Not only do we confront an entirely different, *federal* statute, but we also have an express statement, in the Dictionary Act, that the word "persons" in § 1 includes "bodies politic and corporate." See also *Pfizer Inc.* v. *India*, 434 U. S., at 315, n. 15.

The relevance of the fact that § 2 of the Civil Rights Act of 1866, 14 Stat. 27,—the model for § 1 of the 1871 Act—was passed before the Dictionary Act, see *ante*, at 10, similarly eludes me. Congress chose to use the word "persons" in the 1871 Act even after it had passed the Dictionary Act, presumptively including "bodies politic and corporate" within

the category of "persons." Its decision to do so—and its failure to indicate in the 1871 Act that the Dictionary Act's presumption was not to apply—demonstrate that Congress did indeed intend "persons" to include bodies politic and corporate. In addition, the Dictionary Act's definition of "persons" by no means dropped from the sky. Many of the authorities cited above predate both the Dictionary Act *and* the 1866 Act, indicating that the word "persons" in 1866 ordinarily would have been thought to include "bodies politic and corporate," with or without the Dictionary Act.

This last point helps to explain why it is a matter of small importance that the Dictionary Act's definition of "persons" as including bodies politic and corporate was retroactively withdrawn when the federal statutes were revised in 1874. See T. Durant, Report to Joint Committee on Revision of Laws 2 (1873). Only two months after presumptively designating bodies politic and corporate as "persons," Congress chose the word "persons" for § 1 of the Civil Rights Act. For the purpose of determining Congress' intent in using this term, it cannot be decisive that, three years later, it withdrew this presumption. In fact, both the majority and dissent in *Monell* emphasized the 1871 version of the Dictionary Act, but neither saw fit even to mention the 1874 revision of this statute. 436 U. S., at 688–689, and nn. 51, 53 (opinion for the Court); *id.*, at 719 (REHNQUIST, J., dissenting). Even in cases, moreover, where no statutory definition of the word "persons" is available, we have not hesitated to include bodies politic and corporate within that category. See *Stanley* v. *Schwalby*, 147 U. S. 508, 517 (1893) ("the word 'person' in the statute would include [the States] as a body politic and corporate"); *Ohio* v. *Helvering*, 292 U. S. 360, 370 (1934); *United States* v. *Shirey*, 359 U. S. 255, 257, n. 2 (1959).

Thus, the question before us is whether the presumption that the word "persons" in § 1 of the Civil Rights Act of 1871 included bodies politic and corporate—and hence the States—is overcome by anything in the statute's language

and history. Certainly nothing in the statutory language overrides this presumption. The statute is explicitly directed at action taken "under color of" state law, and thus supports rather than refutes the idea that the "persons" mentioned in the statute include the States. Indeed, for almost a century—until *Monroe* v. *Pape*, 365 U. S. 167 (1961)—it was unclear whether the statute applied at all to action not authorized by the State, and the enduring significance of the first cases construing the Fourteenth Amendment, pursuant to which § 1 was passed, lies in their conclusion that the prohibitions of this Amendment do not reach private action. See *Civil Rights Cases*, 109 U. S. 3 (1883). In such a setting, one cannot reasonably deny the significance of § 1983's explicit focus on state action.

Unimpressed by such arguments, the Court simply asserts that reading "States" where the statute mentions "persons" would be "decidedly awkward." *Ante*, at 5. The Court does not describe the awkwardness that it perceives, but I take it that its objection is that the under-color-of-law requirement would be redundant if States were included in the statute because States necessarily act under color of state law. But § 1983 extends as well to natural persons, who do not necessarily so act; in order to ensure that *they* would be liable only when they did so, the statute needed the under-color-of-law requirement. The only way to remove the redundancy that the Court sees would have been to eliminate the catch-all phrase "persons" altogether, and separately describe each category of possible defendants and the circumstances under which they might be liable. I cannot think of a situation not involving the Eleventh Amendment, however, in which we have imposed such an unforgiving drafting requirement on Congress.

Taking the example closest to this case, we might have observed in *Monell* that § 1983 was clumsily written if it included municipalities, since these, too, may act only under color of state authority. Nevertheless, we held there that

the statute does apply to municipalities. 436 U. S., at 690. Similarly, we have construed the statutory term "white persons" to include "'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,'" see *Wilson* v. *Omaha Indian Tribe*, 442 U. S., at 666, quoting 1 U. S. C. § 1, despite the evident awkwardness in doing so. Indeed, virtually every time we construe the word "person" to include corporate or other artificial entities that are not individual, flesh-and-blood persons, some awkwardness results. But given cases like *Monell* and *Wilson*, it is difficult to understand why mere linguistic awkwardness should control where there is good reason to accept the "awkward" reading of a statute.

The legislative history and background of the statute confirm that the presumption created by the Dictionary Act was not overridden in § 1 of the 1871 Act, and that, even without such a presumption, it is plain that "persons" in the 1871 Act must include the States. I discussed in detail the legislative history of this statute in my opinion concurring in the judgment in *Quern* v. *Jordan*, 440 U. S., at 357–365, and I shall not cover that ground again here. Suffice it to say that, in my view, the legislative history of this provision, though spare, demonstrates that Congress recognized and accepted the fact that the statute was directed at the States themselves. One need not believe that the statute satisfies this Court's heightened clear-statement principle, reserved for Eleventh Amendment cases, in order to conclude that the language and legislative history of § 1983 show that the word "persons" must include the States.

As to the more general historical background of § 1, we too easily forget, I think, the circumstances existing in this country when the early civil rights statutes were passed. "[V]iewed against the events and passions of the time," *United States* v. *Price*, 383 U. S. 787, 803 (1966), I have little doubt that § 1 of the Civil Rights Act of 1871 included States

as "persons." The following brief description of the Reconstruction period is illuminating:

> "The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States. It had declared the governments in 10 'unreconstructed' States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.
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> "For a few years 'radical' Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.
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> "Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866 . . . . On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, and it was ratified in February 1870. On May 31, 1870, the En-

forcement Act of 1870 was enacted." *Id.*, at 803–805 (footnotes omitted).

This was a Congress in the midst of altering the "'balance between the States and the Federal Government.'" *Ante*, at 6, quoting *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 242. It was fighting to save the Union, and in doing so, it transformed our federal system. It is difficult, therefore, to believe that this same Congress did not intend to include States among those who might be liable under § 1983 for the very deprivations that were threatening this Nation at that time.

III

To describe the breadth of the Court's holding is to demonstrate 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, in other words, 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.

This is indeed an exceptional holding. Not only does it depart from our suggestion in *Alabama* v. *Pugh*, 438 U. S. 781, 782 (1978), that a State could be a defendant under § 1983 if it consented to suit, see also *Quern* v. *Jordan*, 440 U. S., at 340, but it also renders ineffective the choices some States have made to permit such suits against them. See, *e. g.*, *Della Grotta* v. *Rhode Island*, 781 F. 2d 343 (CA1 1986). I do not understand what purpose is served, what principle of federalism or comity is promoted, by refusing to give force to a State's explicit consent to suit.

The Court appears to be driven to this peculiar result in part by its view that "in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law." *Ante*, at 8. But the question whether States are "persons" under § 1983 is separate and distinct from the question whether they may assert a defense

of common-law sovereign immunity. In our prior decisions involving common-law immunities, we have not held that the existence of an immunity defense excluded the relevant state actor from the category of "persons" liable under § 1983, see, *e. g.*, *Forrester* v. *White*, 484 U. S. 219 (1988), and it is a mistake to do so today. Such an approach entrenches the effect of common-law immunity even where the immunity itself has been waived.

For my part, I would reverse the judgment below and remand for resolution of the question whether Michigan would assert common-law sovereign immunity in defense to this suit and, if so, whether that assertion of immunity would preclude the suit.

Given the suggestion in the court below that Michigan enjoys no common-law immunity for violations of its own constitution, *Smith* v. *Department of Public Health*, 428 Mich. 540, 641–642, 410 N. W. 2d 749, 793–794 (1987) (Boyle, J., concurring) (case below), there is certainly a possibility that that court would hold that the State also lacks immunity against § 1983 suits for violations of the federal Constitution. Moreover, even if that court decided that the State's waiver of immunity did not apply to § 1983 suits, there is a substantial question whether Michigan could so discriminate between virtually identical causes of action only on the ground that one was a state suit and the other a federal one. *Cf. Testa* v. *Katt*, 330 U. S. 386 (1947); *Martinez* v. *California*, 444 U. S. 277, 283, n. 7 (1980). Finally, even if both of these questions were resolved in favor of an immunity defense, there would remain the question whether it would be reasonable to attribute to Congress an intent to allow States to decide for themselves whether to take cognizance of § 1983 suits brought against them. *Cf. Martinez*, *supra*, at 284, and n. 8; *Owen* v. *City of Independence*, 445 U. S. 622, 647–648 (1980).

Because the court below disposed of the case on the ground that States were not "persons" within the meaning of § 1983,

it did not pass upon these difficult and important questions. I therefore would remand this case to the state court to resolve these questions in the first instance.