

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

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

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

May 9, 1989

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Re: No. 87-1207-Will v. Michigan Dept. of State Police

Dear Bill: RAY WILL, PETITIONER v. MICHIGAN DEPARTMENT OF STATE POLICE ET AL.

Please join me.

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF  
MICHIGAN

(May —, 1989)

Sincerely,

*JM.*

JUSTICE BRENNAN, dissenting.

Because this case was brought in state court, T.M.'s 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.

Justice Brennan of the Civil Rights Act of 1971, 42 U.S.C. § 1983, renders certain "persons" liable for deprivations of life, liberty, and property. The question presented is whether the word "persons" in this statute includes the States and state officials acting in their official capacities.

cc: The Conference

One might expect that this statutory question would generate a careful and thorough analysis of the language, including the history and general background of § 1983. If this is what we expect, however, we will be disappointed by today's opinion. For this case is not decided on the basis of our ordinary method of statutory construction; instead, the Court bypasses it by means of various sorts of statutory interpretation that amount to its aid each time the question arises. Specifically, the Court invokes the following interpretive principles: (1) the word "persons" is ordinarily construed to exclude the sovereign; congressional intent to affect the sovereign state balance must be "clear and manifest"; and