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STYLISTIC CHANGES THROUGHOUT

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

From: **Justice Stevens**

Circulated: _____

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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 STEVENS, dissenting.

Legal doctrines often flourish long after their *raison d'être* has perished.[1] The doctrine of sovereign immunity rests on the fictional premise that the "King can do no wrong."[2] Even though the plot to assassinate James I in 1605, the execution of Charles I in 1649, and the Colonists' reaction to George III's stamp tax made rather clear the fictional character of the doctrine's underpinnings, British subjects found a gracious means of compelling the King to obey the law rather than simply repudiating the doctrine itself. They held his

[1] "A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received." O. Holmes, The Common Law 8 (M. Howe ed. 1963).

[2] See 1 W. Blackstone, Commentaries *246 ("The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing").

advisors and his agents responsible.[3]

In our administration of § 1983, we have also relied on fictions to protect the illusion that a sovereign State, absent consent, may not be held accountable for its delicts in federal court. Under a settled course of decision, in contexts ranging from school desegregation to the provision of public assistance benefits to the administration of prison systems and other state facilities, we have held the States liable under § 1983 for their constitutional violations through the artifice of naming a public officer as a nominal party. Once one

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[3] In the first chapter of his classic History of England, published in 1849, Thomas Macaulay wrote:

"Of these kindred constitutions the English was, from an early period, justly reputed the best. The prerogatives of the sovereign were undoubtedly extensive.

. . . . .

"But his power, though ample, was limited by three great constitutional principles, so ancient that none can say when they began to exist, so potent that their natural development, continued through many generations, has produced the order of things under which we now live.

"First, the King could not legislate without the consent of his Parliament. Secondly, he could impose no tax without the consent of his Parliament. Thirdly, he was bound to conduct the executive administration according to the laws of the land, and, if he broke those laws, his advisers and his agents were responsible." 1 T. Macaulay, History of England 28–29 (1849).

In the United States as well, at the time of the passage of the Civil Rights Act of 1871, actions against agents of the sovereign were the means by which the State, despite its own immunity, was required to obey the law. See, *e. g.*, *Poindexter* v. *Greenhow*, 114 U. S. 270, 297 (1885) ("The fancied inconvenience of an interference with the collection of its taxes by the govenment of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible, except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State, and in violation of the Constitution of the United States"); *Davis* v. *Gray*, 16 Wall. 203, 220 (1873) ("Where the State is concerned, the State should be made a party, it it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record").

strips away the Eleventh Amendment overlay applied to actions in federal court, it is apparent that the Court in these cases has treated the State as the real party in interest both for the purposes of granting prospective and ancillary relief and of denying retroactive relief. When suit is brought in state court, where the Eleventh Amendment is inapplicable, it follows that the State can be named directly as a party under § 1983.

An official-capacity suit is the typical way in which we have held States responsible for their duties under federal law. Such a suit, we have explained, "'generally represent[s] only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky* v. *Graham*, 473 U. S. 159, 165 (1985) (quoting *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690, n. 55 (1978)); see also *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 101 (1984). In the peculiar Eleventh Amendment analysis we have applied to such cases, we have recognized that an official-capacity action is in reality always against the State and balanced interests to determine whether a particular type of relief is available. The Court has held that when a suit seeks equitable relief or money damages from a state officer for injuries suffered in the past, the interests in compensation and deterrence are insufficiently weighty to override the State's sovereign immunity. See *Papasan* v. *Allain*, 478 U. S. 265, 278 (1986); *Green* v. *Mansour*, 474 U. S. 64, 68 (1985); *Edelman* v. *Jordan*, 415 U. S. 651, 668 (1974). On the other hand, although prospective relief awarded against a state officer also "implicate[s] Eleventh Amendment concerns," *Mansour*, 474 U. S., at 68, the interests in "end[ing] a continuing violation of federal law," *ibid.*, outweigh the interests in state sovereignty and justify an award under § 1983 of an injunction that operates against the State's officers or even directly against the State itself. See, *e. g.*, *Papasan*, *supra*, at 282; *Quern* v. *Jordan*, 440 U. S.

332, 337 (1979); *Milliken* v. *Bradley*, 433 U. S. 267, 289 (1977).

In *Milliken* v. *Bradley*, *supra*, for example, a unanimous Court upheld a federal court order requiring the State of Michigan to pay $5,800,000 to fund educational components in a desegregation decree "notwithstanding [its] *direct* and substantial impact on the state treasury." *Id.*, at 289 (emphasis added).[4] As Justice Powell stated in his concurring opinion, "the State [had] been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate." *Id.*, at 295 (concurring in judgment). Subsequent decisions have adhered to the position that equitable relief—even "a remedy that might require the expenditure of state funds," *Papasan*, *supra*, at 282—may be awarded to ensure future compliance by a State with a substantive federal question determination. See also *Quern* v. *Jordan*, 440 U. S., at 337.

Our treatment of States as "persons" under § 1983 is also exemplified by our decisions holding that ancillary relief, such as attorneys fees, may be awarded directly against the State. We have explained that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Kentucky* v. *Graham*, *supra*, at 165. Nonetheless, we held in *Hutto* v. *Finney*, 437 U. S.

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[4] We noted in *Hutto* v. *Finney*, 437 U. S. 678, 692, n. 20 (1978):

"In *Milliken* v. *Bradley*, [433 U. S. 267 (1977)], we affirmed an order requiring a state treasurer to pay a substantial sum to another litigant, even though the District Court's opinion explicitly recognized that 'this remedial decree will be paid for by the taxpayers of the City of Detroit and the State of Michigan,' App. to Pet. for Cert. in *Milliken* v. *Bradley*, O. T. 1976, No. 76–447, pp. 116a–117a, and even though the Court of Appeals, in affirming, stated that 'the District Court ordered that the State and Detroit Board each pay one-half the costs' of relief. *Bradley* v. *Milliken*, 540 F. 2d 229, 245 (CA6 1976)."

678 (1978), a case challenging the administration of the Arkansas prison system, that a Federal District Court could award attorneys fees directly against the State under § 1988,[5] *id.*, at 700; see *Brandon* v. *Holt*, 469 U. S. 464, 472 (1985), and could assess attorneys fees for bad faith litigation under § 1983 "'to be paid out of Department of Corrections funds.'" 437 U. S., at 692. In *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 739 (1980), JUSTICE WHITE reaffirmed for a unanimous Court that an award of fees could be entered against a State or state agency, in that case a State Supreme Court, in an injunctive action under § 1983.[6] In suits commenced in state court, in which there is no independent reason to require parties to sue nominally a state officer, we have held that attorneys fees can be awarded against the State in its own name. See *Maine* v. *Thiboutot*, 448 U. S. 1, 10–11 (1980).[7]

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[5]We explained that the legislative history evinced Congress' intent that attorneys fees be assessed against the State:

"The legislative history is equally plain: '[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).' S. Rep. No. 94–1011, p. 5 (1976) (footnote omitted). The House Report is in accord: 'The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.' H. R. Rep. No. 94–1558, p. 7 (1976). The Report added in a footnote that: 'Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpartick* v. *Bitzer*.' *Id.*, at 7 n. 14. Congress' intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act and immunize state and local governments from awards." *Hutto*, *supra*, at 694.

[6]The Court is surely incorrect to assert that a determination that a State is a person under § 1983 was unnecessary to our decision awarding attorney's fees against a State or state agency. *Ante*, at 4, n. 4. If there was no basis for liability because the State or state agency was not a party under § 1983, it is difficult to see how there was a basis for imposition of fees.

[7]Indeed, we have never questioned that a State is a proper defendant

The Civil Rights Act of 1871 was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell* v. *New York City Dept. of Social Services*, *supra*, at 700–701. Our holdings that a § 1983 action can be brought against state officials in their official capacity for constitutional violations properly recognize and are faithful to that profound mandate. If prospective relief can be awarded against state officials under § 1983 and the State is the real party in interest in such suits, the State must be a "person" which can be held liable under § 1983. No other conclusion is available. Eleventh Amendment principles may limit the State's capacity to be sued as such in federal court. See *Alabama* v. *Pugh*, 438 U. S. 781 (1978). But since those principles are not applicable to suits in state court, see *Thiboutot*, *supra*, at 9, n. 7; *Nevada* v. *Hall*, 440 U. S. 410 (1979), there is no need to resort to the fiction of an official-capacity suit and the State may and should be named directly as a defendant in a § 1983 action.

The Court concludes, however, that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983, *ante*, at 12, n. 10, while that same party sued in the same official capacity is not a person when the plaintiff seeks monetary relief. It cites in support of this proposition cases such as *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), in which the Court through Chief Justice Marshall held that an action against a state auditor to recover taxes illegally collected did not constitute an action against the State. This line of authority, the Court states, "would not have been foreign to the nineteenth-century Congress that enacted § 1983." *Ante*, at 12, n. 10.

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under § 1983 action when the State has consented to being joined in its own name in a suit in federal court, see *Missouri* v. *Jenkins*, —— U. S. —— (1989); *Alabama* v. *Pugh*, 438 U. S. 781 (1978), or has been named as a defendant in an action in state court. See *Maine* v. *Thiboutot*, 448 U. S. 1 (1980); *Martinez* v. *California*, 444 U. S. 277 (1980).

On the Court's supposition, the question would be whether the complaint against a state official states a claim for the type of relief sought, not whether it will have an impact on the state treasury. See, *e. g.*, *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 124 (1828). At least for actions in state court, as to which there could be no constitutional reason to look to the effect on the State, see *Edelman* v. *Jordan*, 415 U. S. 651 (1974), the Court's analysis would support actions for the recovery of chattel and real property against state officials both of which were well-known in the nineteenth century. See *Poindexter* v. *Greenhow*, 114 U. S. 270 (1884); *United States* v. *Lee*, 106 U. S. 196 (1882). Although the conclusion that a state officer sued for damages in his or her official capacity is not a "person" under § 1983 would not quite follow,[8] it might nonetheless be permissible to assume that the 1871 Congress did not contemplate an action for damages payable not by the officer personally but by the State.

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. As JUSTICE BRENNAN has demonstrated, there is also a compelling textual argument that States are parties under § 1983. In addition, the Court's construction draws an illogical distinction between wrongs committed by county or municipal officials on the one hand, and those committed by state officials on the other. Finally, there is no necessity to import into this question of statutory construction doctrine created to protect the fiction that one sovereign cannot be

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[8] Cf. *City of Kenosha* v. *Bruno*, 412 U. S. 507, 513 (1973) ("We find nothing in the legislative history discussed in *Monroe* [v. *Pape*, 365 U. S. 167 (1961)], or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them").

sued in the courts of another sovereign. Aside from all of these reasons, the Court's holding that a State is not a party under § 1983 departs from a long line of judicial authority based on exactly that premise.

I respectfully dissent.