

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 75-1914 Monell v. Dept. of Social Services

MEMORANDUM TO CONFERENCE:

I propose to substitute the attached for present footnote 6 on page 6 of my concurring opinion in the above case.

L.F.P.
L.F.P., Jr.

SS

6. The doctrine of stare decisis advances two important values of a rational system of law: (i) the certainty of legal principles, and (ii) the wisdom of the conservative vision, that existing rules should be presumed rational and not subject to modification "at any time a new thought seems appealing," dissenting opinion of Mr. Justice Rehnquist, post, at 5; cf. O. Holmes, *The Common Law* 36 (1881). But, at the same time, the law has recognized the necessity of change, lest rules "simply persist . . . from blind imitation of the past." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). Any overruling of prior precedent, whether of a constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies.

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. Marbury v. Madison, 1 Cranch 137

(1803), cited by the dissent, post, at 5, is a case in point. But the Court's recognition of its power to invalidate legislation not in conformity with constitutional command was essential to its judgment in Marbury. And on numerous subsequent occasions, the Court has been required to apply the full breadth of the Marbury holding. In Monroe, on the other hand, the Court's rationale was broader than necessary to meet the contentions of the parties and to decide the case in a principled manner. The language in Monroe cannot be dismissed as dicta, but we may take account of the fact that the Court simply was not confronted with the implications of holding § 1983 inapplicable to official municipal policies. It is an appreciation of those implications that has prompted today's reexamination of the legislative history of the 1871 measure.