Excellent lawyer's argument based on stare decisis (Monroe, ~~Hampton~~, Kenosha, Moor - especially Moor extending 1983 exemption to counties - 4).

Bill distinguishes all eight "school board" cases relied on by petitioners - 15-17.

Bill says only LaFleur + Turner involved "damages" - 17

He distinguishes other as injunctive cases, following Ex parte Young - 15-16

Relies on good quote from H.L.R. - 16

Thinks we should leave an change to Congress

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JAN 31 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, v. Department of Social Services of the City of New York et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1977]

Memorandum of MR. JUSTICE REHNQUIST.[1]

While petitioners in my view tender only two bases for reversal of the judgment of the Court of Appeals for the Second Circuit in this case, the Conference discussion ranged a little more extensively than the limits of the questions on which we granted certiorari. This memorandum will therefore address what seem to me to be three seemingly separate, but nonetheless related, grounds for reversal: (1) Overrule the conclusion reached in *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961), that "Congress did not undertake a bring municipal corporations within the ambit of § 1979 [§ 1983]"; (2) Allow that conclusion in *Monroe* to stand as a matter of form, but permit federal courts who have individual municipal officials before them as defendants to require those officials to use their statutory authority to draw checks upon the bank account of the municipal corporation in order to satisfy a judgment for damages; (3) conclude that the "school board" in this case is not the sort of "municipal corporation" exempted from liability under *Monroe* v. *Pape*, and therefore is a "person"

[1] Since only the Chief and Harry joined me in my vote to affirm at conference, I have not felt warranted in structuring this memorandum as a potential Court opinion in all but name. Should I persuade Potter and Lewis of the correctness of my view, I will obviously rearrange the form if not the substance of this memorandum.

within the meaning of § 1983 and suable as a defendant under 28 U. S. C. § 1343. Contentions two and three, though nominally separate, both depend to a greater or lesser extent on the conclusion that the Court's reading of the legislative history in connection with the adoption of the Civil Rights Act of 1871 was so plainly erroneous as to warrant abandonment of the principle of *stare decisis* in connection with it and with subsequent cases which have reaffirmed it. This memo therefore addresses that question first.

I

Are municipal corporations persons under § 1983? Bill Douglas' opinion for the Court in *Monroe* sets forth relevant portions of the debates at pp. 187–192 of 365 U. S. It seems to me worth noting that although an elaborate canvass of the history surrounding the adoption of the Act of 1871 for the purpose of determining the meaning of the phrase "under color of law" produced a Court opinion written by Bill Douglas, a concurring opinion written by John Harlan in which Potter concurred, and a dissenting opinion by Felix Frankfurter, the Court was unanimous in the conclusion that the word "person" in the Act did not include a municipal corporation.

John Harlan's opinion, which Potter joined, commented, "Were this case here as one of first impression, I would find the 'under color of any statute' issue very close indeed." 365 U. S., at 192. He went on to say that because of previous interpretations of the phrase in *Classic* v. *United States*, 313 U. S. 299 (1941), and *Screws* v. *United States*, 325 U. S. 91 (1945), the policy of *stare decisis* should govern, even though the previous interpretations had involved different though substantially identical phraseology, unless it were to "appear beyond doubt from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision." 365 U. S., at 192. A similar burden

of persuasion must rest upon those who submit that *Monroe* incorrectly resolved the question of municipal liability.

The best statement of the argument against the *Monroe* Court's construction of § 1983 with respect to the meaning of "person" appears in the Appendix to the brief of the National Education Association in this case, pp. 1a–31a. Unquestionably the brief makes out a very plausible case for the proposition that the rejection of the so-called "Sherman Amendment," which was in fact proposed as a new section to the bill which would become the Civil Rights Act of 1871, did not require the limitation which the *Monroe* Court placed upon the word "person" in the first section of the Act. The first section was never amended in either House.

While I have said I think the case made out by the brief is plausible, it is quite understandably a very good piece of advocacy rather than an objective discussion of what Congress intended in 1871. The brief repeats arguments raised in law review criticism of the *Monroe* Court's treatment of the meaning of the word "person" as defined in § 1983. Law review comment at the time *Monroe* was decided paid little attention to this point. The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 213 (1961), simply mentions the holding as to municipal liability in passing; a more extensive treatment of the issue is contained in 49 Calif. L. Rev. 145, 153–154 (1961), but the result reached by the Court is not criticized there, either. Four years later, in an otherwise exhaustive discussion of the possible import of *Monroe*, Professor Shapo merely mentions the municipal exclusion without offering any discussion or criticism of it. Shapo, Constitutional Tort, Monroe v. Pape and the Frontiers Beyond, 60 Nw. U. L. Rev. 277, 295–296 (1965).

I do not find any law review criticism of the *Monroe* Court's treatment of municipal liability until eight years after the decision, in a comment in 57 Calif. L. Rev. 1142, 1164–1172 (1969). Two years later, a note in 55 Minn. L. Rev. 1201,

1205–1207 (1971), was likewise critical of the Court's use of legislative history with respect to this question. A third article that same year, Suing Public Entities under the Federal Civil Rights Act: Monroe v. Pape Reconsidered, 43 U. Colo. L. Rev. 105, 118–120 (1971), echoed the objections made in the other two articles. The most extensive attack on the Court's reasoning is found in Kates & Kouba, Liability of Public Entities under § 1983 of the Civil Rights Act, 45 S. Calif. L. Rev. 131 (1972).

The year after this last article appeared, we decided *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), and *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). *Bruno* held that Congress could not have intended to allow a municipal corporation to be a "person" within the meaning of § 1983 where the relief sought was equitable, and still have intended to exclude it from the definition of "person" when monetary damages were sought. *Moor* held that a county as well as a city was a "municipal corporation" for purposes of § 1983, and therefore not suable as a defendant under § 1343.

While *Bruno* made no effort to do more than rely upon the holding of *Monroe* for its interpretation of the word "person," *Moor* went back into the question and, it seems to me, reaffirmed the reasoning of *Monroe* on the issue:

> "In effect, petitioners are arguing that their particular actions may be properly brought against this County on the basis of § 1983. But whatever the factual premises of *Monroe*, we find the construction which petitioners seek to impose upon § 1983 concerning the status of municipalities as 'persons' to be simply untenable.
>
> "In *Monroe*, the Court, in examining the legislative evolution of the Ku Klux Klan Act of April 20, 1871, which is the source of § 1983, pointed out that Senator Sherman introduced an amendment which would have added to the Act a new section providing expressly for municipal liability in civil actions based on the depriva-

tion of civil rights. Although the amendment was passed by the Senate, it was rejected by the House, as was another version included in the first Conference Committee report. The proposal for municipal liability encountered strongly held views in the House on the part of both its supporters and opponents, but the root of the proposal's difficulties stemmed from serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States.

"As in *Monroe*, we have no occasion here to 'reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.' 365 U. S., at 191. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries* v. *Lynskey*, 452 F. 2d, at 175. In this respect, it cannot be doubted that the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities, and thus, according to Representative Poland, the Senate Conferees were informed by the House Conferees that the 'section imposing liability upon towns and counties must go out or we should fail to agree.' To save the Act, the proposal for municipal liability was given up. It may be that even in 1871 municipalities which were subject to suit under state law did not pose in the minds of the legislators the constitutional problems that caused the defeat of the proposal. Yet nevertheless the proposal was rejected *in toto*, and from this action we cannot infer any congressional intent other than to exclude all municipalities—regardless of whether or not their immunity has been lifted by state law—from the civil liability created in the Act of April 20, 1871, and

> § 1983. Thus, § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." 411 U. S., at 707–710 (1972). (Footnotes omitted.)

It is especially noteworthy that eight Members of this Court subscribed to the holdings in *Moor* and *Bruno* in the face of dissents by Bill Douglas which essentially agreed with these petitioners that *Monroe* should be limited to its peculiar circumstances. Since the issue now presented "has been considered maturely and recently" in these two cases, the Court should "not feel free to disregard these precedents." *Runyon* v. *McCrary*, 427 U. S. 160, 186 (1976) (POWELL, J., concurring).

Bill Brennan's memorandum makes a very comprehensive and by no means unpersuasive argument that, for several different but related reasons, Congress intended the word "person" as used in § 1983 to include a municipal corporation. He draws the conclusion, as do the law review pieces referred to *supra*, at 3–4, that the reason for congressional rejection of the Sherman Amendment was not an unwillingness to impose liability on municipal corporations for their own violations of constitutional guarantees, but only an unwillingness to impose liability upon such corporations when they failed to protect private individuals within their boundaries from actions which they should have prevented in the exercise of their police power. Undoubtedly many of the quotations that he cites *do* support this line of reasoning. But it seems to me that in view of the holding in *Monroe*, and statements such as those contained in John Harlan's concurrence in that case and in Lewis' concurrence in *Runyon* v. *McCrary*, the burden upon those who wish to overrule a decision of this Court involving only a matter of statutory construction is not merely the civil burden of a preponderance of the evi-

My concurrence in Runyon

dence, but more nearly the burden in a criminal case: to show, as John Harlan said that it appeared "beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision." 365 U. S., at 192. This I do not think he has done.

The legislative debates are there in the Congressional Globe for anyone to read; they went on over a period of three weeks, and, in mining terminology, one must pan a good deal of sand in order to get any gold from them. It seems to me that there are portions of the debates, not cited by the NEA brief or Bill Brennan's memo, which tend to undercut their view of the limited import of the rejection of the Sherman Amendment. Congressman Bingham, for example, said:

> "Everybody knows an honest jury in such a case, when the rioters are impleaded with the county and an innocent person is slain in the street, will find, and no man can find fault with them, damages perhaps to the extent of $50,000 or $100,000. The counties to be held liable with the rioters, and all money in its treasury and all its property charged with the payment thereof. Such a proceeding would deprive the county of the means of administering justice." Congressional Globe, 42d Cong., 1st Sess., Pt. 2, p. 798.

In a similar vein are these remarks of Representative Farnsworth:

> "Suppose a judgment obtained under this section, and no property can be found to levy upon except the court-house, can we levy on the court-house and sell it? So this section provides, and that too in an action of tort, in an action *ex delicto*, where the county has never entered into any contract, where the State has never authorized the county to assume any liability of the sort or imposed any liability upon it. It is in my opinion simply absurd." *Id.*, at 799.

Portions of debates not mentioned by W & B

Finally, see the comments of Representative Kerr:

> "How are they to perform their necessary and customary functions if you may send a Federal officer to put his arms into the treasury of the county, or parish, or city in this way and withdraw therefrom all the revenues, or if you can authorize the sale of a county court-house, or county jail, or the county schools, or any other of the property of the people? I ask you, if that can be done, where is the security that has hitherto been supposed to exist in this country for self-government in the States of the Union?" *Id.*, at 789.

These statements can leave no doubt that these Members of Congress were troubled by something deeper than doubts about their authority to prescribe a federal form of execution in place of the ordinarily applicable state procedures. They wished to preserve the financial capacity of municipalities to carry out basic governmental functions and, as Bill Brennan points out, at 20, to insure the security of businessmen who traded with them. These purposes would be seriously impaired by a tort judgment against the municipality regardless of the form of execution which followed such a judgment.

The tort remedy created by the Act would have seriously compromised these concerns in a way which the contract cases, familiar to Congress and cited by Bill Brennan, at 18, and n. 32, did not. The availability of a federal forum for the enforcement of contracts, strictly according to the terms dictated by the State, see, *e. g.*, *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 554–555 (1866), insured the continued availability of municipal credit by providing creditors with a sure means of enforcement. Conversely, the ordinary business affairs of a municipality would be seriously impaired by the threat of massive and unpredictable tort judgments under this Act.

This concern with the solvency of municipalities, and not only doubts about federal power to impose affirmative obligations upon them, underlay the complete rejection of municipal

tort liability. Even if Bill Brennan is correct that Congress never doubted its power to impose liability on municipalities for their own violations of civil rights,[2] the debates suggest that it chose not to impose such liability out of solicitude for municipal financial stability. The continuing validity of that concern is confirmed by the notoriously insecure position of the creditors of these respondents.

Furthermore, it is readily apparent that at least some Members of Congress concluded, though incorrectly, "that Congress lacked the constitutional power to impose liability on municipalities." *Moor, supra,* at 709. Representative Shellabarger felt it necessary to rebut the contention "that it is incompetent to authorize a judgment for a tort to be rendered under Federal law against any municipal corporation." Globe, *supra,* at 752. After the Sherman Amendment had been rejected by the House, Senator Sherman himself took the floor to explain its defeat: "Sir, we are told, by some mystic process, by some mode of reasoning, which I cannot comprehend, which seems to me so absurd that I cannot even fashion its face, that the Constitution of the United States does not allow a county to be sued in the courts of the United States." *Id.,* at 820. If that was the belief upon which Congress acted, as we have previously concluded, we are bound thereby, for "we must construe the statute in light of the impression under which Congress did in fact act." *Moor, supra,* at 709.

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[2] The adoption of his suggested interpretation of § 1983 would insert into every case the question of whether the act of an official was authorized so as to be attributable to the corporation itself. As Bill notes, at 46, those cases involving duly enacted ordinances will be "[t]he most clear-cut," but as all the members of our litigious profession know, it is not just "[t]he most clear-cut" of cases that will be brought. The inevitable result of the litigation of marginal cases will be to plague the federal courts with the nice distinctions which presently abound in the *respondeat superior* law of every State in the Union. If the good-faith defense were not extended to municipalities, the lure of the relatively deep public pocket would make such suits all the more attractive.

The basis of this impression emerges from a brief examination of the constitutional and judicial world in which the Congress of 1871 lived and acted. It should be recalled that the Dictionary Act did not include "bodies politic and corporate" within the definition of the word "person" where "the context show[ed] that such words were intended to be used in a more limited sense[ ]." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. Before 1871, municipal corporations had been sued in the federal courts in only a single "context." Citizens of different States were permitted to enforce a municipal corporation's contractual obligations under state law through the ordinary diversity jurisdiction of the federal courts.[3] Representative Kerr described this context in some detail:

> "[T]he Federal courts in the exercise of this grant of judicial powers may, where they have the jurisdiction under the Constitution, compel these municipalities to execute their contracts, and that is all. To execute their contracts; but let it be remembered that no decree of a Federal court has gone to the extent of saying that any one of these divisions should execute its own contracts except in precise compliance with the law of the State, in precise accordance with its own contract and the law upon which it was based, and not in pursuance of any law dictated to it by Congress." *Globe, supra,* at 789.

In these years—before the establishment of federal question jurisdiction of the federal courts in 1875—it is hardly surprising that some Members of Congress should have doubted their authority to hale state instrumentalities into the federal

[3] And it seems too well known to be worth elaborating in any detail that the reason for conferring diversity jurisdiction upon the federal courts was not a concern that municipal corporations would violate the constitutional rights of private individuals, but that state judges and state juries would not deal evenhandedly with citizens of another State suing or defending upon a claim based upon state law. The contract cases arising under this jurisdiction are considered further, *infra,* at 16 n. 5.

courts. Indeed, although Senator Thurman, as Bill Brennan notes, at 33, expressed his belief that the terms of § 1 "are as comprehensive as can be used," *Globe, supra*, App., at 217, an examination of his lengthy remarks demonstrates that it never occurred to him that § 1 did impose or could have imposed any liability upon municipal corporations. In an extended parade of horribles, the Senator suggested that state legislators, Members of Congress, and state judges might be held liable under the act. *Ibid.* If, at that point in the debate, he had any inkling that § 1 was designed to impose tort liability upon cities and counties, he would surely have raised on outraged objection. When the spectre of municipal liability was unmistakably raised for the first time by the Sherman Amendment, Thurman, Kerr, and their allies struck it down.

I think as good a summary of the balance that would lead me to reaffirm the construction adopted in *Monroe* and followed in *Bruno* and *Moor* is contained in The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1, 257 (1973) (a publication not known for its lack of sympathy for civil rights plaintiffs):

> "Critics of the *Monroe* decision stress that rejection of the broad liability proposed by the Sherman Amendment is not at all inconsistent with holding municipalities liable for the acts of their own officers. On the other hand, the debates on the amendment do reveal that some members of Congress opposed the amendment on grounds which would apply to any municipal liability. Moreover, while the debates do not center on the meaning of the word 'person,' they do provide evidence that Congress did not intend that the word encompass municipalities: if that had been the understanding, the debates surely would include some reference to the municipal liability being created by the statute even without the addition of the Sherman Amendment. Thus, although *Monroe* can be criticized for relying so heavily on ambiguous legisla-

H.L.R. – good statement supporting Monroe (+ WHR's views)

tive history and ignoring policy considerations, its result does not seem so plainly wrong that the *Bruno* Court could have overruled *Monroe*'s interpretation of section 1983 without a sharp departure from traditional notions of stare decisis in statutory construction." (Footnotes omitted.)

II

May board members as individuals be required to exercise their official authority to draw funds for payment of damages? Petitioners argue that, even if the board itself is not subject to suit, a board member may be required "to exercise the powers of his office" to expend public funds for the payment of damages. Petitioners Brief, at 32. The problem with this theory is that school board members may not ordinarily have the authority to order the expenditure of funds. As we were advised at oral argument, these respondents can only submit a voucher to the Comptroller of the city, who may refuse to pay it if he sees fit. In my view, the Comptroller could not be required to satisfy the judgment of the Court, since he could not be made an individual defendant, having done nothing to violate the constitutional rights of these petitioners.

That conclusion is consistent with the ordinary rule that a corporation may not be subjected to liability in damages merely by a suit against its officers or shareholders. As this Court held in *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, 610 (1893):

> "Now, it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising from them. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither

True as to members individually — & in N.Y. (or in Richmond) the money comes from City Gov't

> they nor their other stockholders would be concluded by the decree."

This same rule has been applied in determining indispensable parties under Fed. Rule Civ. Proc. 19. "Unless the corporation is defunct, the debtor corporation is an indispensable party to an action by a creditor to establish his claim. . . ." 3A Moore's Federal Practice § 19.13 (1), at 2377. Thus, in order to require payment from the funds of a municipal corporation, whether that corporation be a city or a school district, the corporation as well as its officers must be made parties to the suit.

More importantly, to adopt the fiction advanced by petitioners would totally frustrate the intent of Congress as perceived in our earlier opinions. Rightly or wrongly, Congress believed it lacked the power to impose tort liability on municipalities. The relief sought by petitioners would negate the congressional intent to protect municipal treasuries whenever named defendants have authority to draw funds. Where, as here, the defendants lack such authority, the court's decree could provide no relief. To remain consistent with the principles of *Monroe*, the fiction must be rejected.

III

Are school boards municipal corporations under the holding in Monroe? Last year, in the opinion for a unanimous Court which I wrote in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274 (1977), we treated the question of exclusion of municipal corporations from the definition of "person" in § 1983 as settled. See *id.*, at 277–278. Since what was involved there was a "school board," to use the term colloquially, we stated that the proper mode of analysis was to determine "whether petitioner Board in this case is sufficiently like the municipal corporations in [*Monroe* and *Bruno*] so that it, too, is excluded from § 1983 liability." *Id.*, at 278. Although that question did not need to be answered in *Mt.*

Healthy, I believe that it states the proper approach to the question before us. As will be seen, nothing in our prior decisions or in recent congressional pronouncements suggests that this approach was incorrect.

A

Before turning to the merits of this question, I think it appropriate to point out a confusion of terminology which makes it difficult to generalize about entities colloquially referred to as "school boards." It is impossible to decide whether a "school board" is a municipal corporation unless one knows the law of the State where it exists. "School board" may be simply a shorthand term for the aggregate of the members of the board who manage the affairs of a municipal corporation charged with the administration of schools. In *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), the "Pasadena City Board of Education," which was a named party to the case, operated the Pasadena Unified School District. *Id.*, at 427. So far as can be told from the opinion, the "Pasadena City Board of Education" is simply a name for the aggregate of elected officials who manage the affairs of the Pasadena Unified School District. That aggregate is no more a "municipal corporation" than would the entire membership of the Board of Directors of a private corporation be itself a "corporation." *A fortiori*, where a school board does not govern a separate school corporation but merely administers the educational facilities of a city or a county, it cannot be considered a "corporation" in itself.[4]

Thus even if municipal corporations concerned solely with school affairs are not "persons" within § 1983, it is by no means

[4] "A school district may be a separate and distinct corporation from the local governmental unit in which situate, e. g., the municipal corporation, county or township, even though the territorial extent of the two is the same. On the other hand, it may be simply one of the agencies of the municipal corporation or the state." (Footnotes omitted.) 16 E. McQuillin, Law of Municipal Corporations § 46.03, at 652 (3d ed. 1972).

possible to tell simply from the fact that a "school board" appears as a party defendant in the name of a case which this Court has decided that such a defendant was a "municipal corporation" and therefore not suable under § 1983. Only where the parties have explored these issues of state law, as they have done in this case and as they did in *Mt. Healthy, supra*, can a court say that the entity named as a defendant is or is not a "municipal corporation" sufficiently analogous to a city or county to be excluded from the definition of person in § 1983.

B

Petitioners rely upon eight decisions of this Court in which § 1983 was the sole basis asserted for relief against a school board. Petitioners' Brief, at 15 n.** In none of these cases, however, was the question now before us raised by any of the litigants or addressed by this Court. As recently as four Terms ago, we said in *Hagans* v. *Lavine*, 415 U. S. 528 (1974);

> "Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when the case finally brings the jurisdictional issue before us." *Id.*, at 535 n. 5.

The source of this doctrine that jurisdictional issues decided *sub silentio* are not binding in other cases seems to be Chief Justice Marshall's remark in *United States* v. *More*, 3 Cranch 159, 172 (1805). As we pointed out in *Mt. Healthy*, the existence of a claim for relief under § 1983 is "jurisdictional" for purposes of invoking 28 U. S. C. § 1343, even though the existence of a meritorious constitutional claim is not similarly required in order to invoke jurisdiction under 28 U. S. C. § 1331. See *Bell* v. *Hood*, 327 U. S. 678, 682 (1946); *Mt. Healthy, supra*, at 278–279.

Although the cases relied upon by petitioner failed to address the suability of a school district which is a municipal corporation and are therefore not binding as precedents on that point, I would not at all favor disposing of them in a

footnote on that basis. As important as school desegregation litigation has been in this Court's history in the past generation, one is entitled to ask whether the same substantive constitutional law principles decided in those cases could have been decided under the doctrine that a school district may be a "municipal corporation" which is not suable under § 1983.

I think there is more than one answer to this concern. In the first place, it is not clear from the case names alone that true municipal corporations were even involved. The school boards named as defendants, like the one in *Pasadena City Board of Education, supra,* at 427, may have been mere collections of individual persons, clearly suable under § 1983.[5]

W.H.R. Unless our school cases could have been decided as they were even if S/B is not suable under 1983

[5] In this respect, I agree with Judge Gurfein's view expressed in his opinion for the Court of Appeals in this case that there is an analogy, albeit an incomplete one, between the balance struck in *Ex parte Young,* 209 U. S. 123 (1908), between the Eleventh and Fourteenth Amendments, and that struck by *Monroe* because of the conflicting considerations which went into congressional enactment of the Civil Rights Act of 1871. Our conclusion that individual officials may not be compelled to pay damages from the public treasury under § 1983 does not mean that they may not be subjected to prospective equitable decrees.

The cases cited by Bill Brennan, at 6–7, do not establish that suits against officers in their official capacities were invariably treated as suits against their corporations. Each of those suits was a mere contract action, brought under the ordinary diversity jurisdiction of the federal courts. See, *e. g., Cowles* v. *Mercer County,* 7 Wall. 118, 122 (1868). Controlling state law was regarded as a part of the contract, see, *e. g., Von Hoffman, supra,* at 554–555, and officials were subject to mandamus only to the extent of their duties under state law, see, *e. g., Edwards* v. *United States,* 103 U. S. 471 (1880). Under such circumstances, it is hardly surprising that the Court would consider the corporation and its officers interchangeable, since the obligations of both had been defined by the State under the same contract.

It cannot be supposed that Congress would have expected the same principle to apply in actions sounding in tort. Indeed, the very novelty of the tort remedy was one of the chief objections raised by opponents of the Sherman Amendment. See, *e. g.,* Cong. Globe, 42d Cong., 1st Sess., 789 (1871) (remarks of Rep. Kerr); *id.,* at 799 (Rep. Farnsworth). It was not until *Ex parte Young* that it became apparent that relief could

In the second place, in six of these cases relied upon by petitioners, *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976); *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Northcross* v. *Board of Education*, 397 U. S. 232 (1970); *School District of Abington* v. *Schempp*, 374 U. S. 203 (1963); and *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), only equitable relief was sought by the plaintiffs. As Judge Gurfein pointed out, in each of these cases and in the remaining two discussed *infra*, individual defendants were named as well as the school entity. The equitable relief actually awarded ran against them as well as the school entity, and certainly a long line of our cases following *Ex parte Young*, 209 U. S. 123 (1908), attest to the fact that such relief against individual public officials, even in the absence of § 1983, can effectuate the purposes of the Fourteenth Amendment without requiring that the State be named as a defendant.

In two of the eight cases cited by petitioners, *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), and *Tinker* v. *Des Moines Independent Community School Dis-*

Only eq. relief in 6 cases (available since Ex parte Young)

But in LaFleur + Tinker damages were granted

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be granted in tort against public officials without endangering to the same extent the public treasury which Congress sought to protect by relieving municipalities themselves of liability. Since officials are clearly "persons" under § 1983, injunctive relief has quite properly been available against them, in order to carry out the liberal purposes of the Act. See The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1, 259–260 (1973).

Because we have allowed such prospective relief requiring future expenditures of public funds, *Edelman* v. *Jordan*, 415 U. S. 651 (1974); *Milliken* v. *Bradley*, — U. S. — (1977), the question is obviously not one of all or nothing. But petitioners are quite candid about the fact that they would not ask us to overrule *Monroe* if it were not for the prospect that damage judgments in their favor would thereby be more easily satisfied. And if we were to accede to their request, we would unquestionably saddle municipal treasuries with liabilities to which they are not now subject and about which Members of the Congress were genuinely concerned in 1871.

trict, 393 U. S. 503 (1969), the plaintiffs did seek damages as well as equitable relief in the District Court. Under my view of § 1983, the damages remedy could be awarded only against individual defendants[6] and not against a municipal corporation; it is only in such a case that it makes a practical difference whether a school district which is a municipal corporation is suable under § 1983. But in neither *LaFleur* nor in *Tinker* did this Court address the propriety of an award of damages against any of the parties defendant. In *Tinker*, after deciding that complaint stated a claim for relief, the Court remanded the case for further proceedings, and concluded, "We express no opinion as to the form of relief which should be granted, this being a matter for lower courts to determine." 393 U. S., at 514. Likewise, in *LaFleur*, the Court's opinion held that the Court of Appeals for the Fourth Circuit had been wrong in ruling against the constitutional claims of the teachers in the companion case of *Cohen* v. *Chesterfield County School Board*, 474 F. 2d 395 (CA4 1973), rev'g 326 F. Supp. 1159 (ED Va. 1971), but it did not go so far as to reinstate the judgment for damages awarded against the school board by the District Court in the first instance. It merely remanded the case "for further proceedings consistent with this opinion," 414 U. S., at 651.

Thus it seems to me that all of the substantive constitutional questions decided in the cases cited by petitioner, and all of the relief approved by this Court in those cases, are entirely consistent with the holding that respondent in the present case is a "municipal corporation" immune from suit under § 1983,[7] even though there *may* have been in some of

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[6] Those defendants are, of course, entitled to a qualified immunity. See, *e. g.*, *Wood* v. *Strickland*, 420 U. S. 308 (1975).

[7] Even if the matter were otherwise, there is obviously no possibility of reopening those cases since "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166 (1932).

the cases a municipal corporation charged with the administration of school matters which was not suable under § 1983.

C

There is no indication that any later Congress has ever approved suit against any municipal corporation under § 1983. Of all its recent enactments, only the Civil Rights Attorneys' Fees Act, Pub. L. 94–559, § 2, 90 Stat. 2641 (1976), codified at 42 U. S. C. § 1988, explicitly deals with the Civil Rights Act of 1871.[8] The Act provides that attorneys' fees may be awarded to the prevailing party "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title." There is plainly no language in the 1976 Act which would enlarge the parties suable under those substantive sections; it simply provides that parties who are already suable may be made liable for attorneys' fees. Although the Senate report states that "defendants in these cases are often state or local bodies," S. Rep. No. 94–1011, at 5, it can hardly be inferred from this brief reference that the Congress believed that municipal corporations were proper defendants under every section covered by the Act. Certainly Congress knew by virtue of *Monroe* v. *Pape* that most state and local bodies were not subject to suit under § 1983 itself, as demonstrated by the report's conclusion that fees could be awarded "whether or not the agency or government is a named party." *Ibid.*[9]

atty's fee act did not enlarge "the parties suable"

But →

[8] The other statutes cited by Bill Brennan, at 41–43, make no mention of § 1983, but refer generally to suits against "a local educational agency." As already noted, *supra*, at 16 n. 5, such suits may be maintained against board members in their official capacities for injunctive relief under either § 1983 or *Ex parte Young*. Congress did not stop to consider the technically proper avenue of relief, but merely responded to the fact that relief was being granted. The practical result of choosing the avenue suggested by petitioners would be the subjection of school corporations to liability in damages. Nothing in recent congressional history even remotely supports such a result.

[9] Since fees are to be awarded "like other items of costs," Congress

Certainly, nothing in this 1976 congressional discussion of the recent uses of § 1983 sheds any light on the intent of an earlier Congress in 1871. That Congress realized that municipal corporations were creatures of the State, and had only such powers as the State granted to them. The Congress was reluctant to impose liability upon these corporations for carrying out duties thrust upon them by the State or for failing to protect constitutional rights which the State had given them no power to protect. See *Bruno, supra,* at 518–519 (Douglas, J., dissenting). Because of this concern, this Court has properly excluded cities and counties, municipal corporations having broad and varied governmental authority, from liability under § 1983. It can hardly be supposed that the Congress would have wished to subject school districts, which are burdened with exactly those limitations on their authority and their duties which gave rise to the original congressional concern, to liability under the Act.[10] See The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1, 258, and n. 34 (1973).

D

Thus, nothing in our previous cases or in congressional pronouncements undermines the suggestion in *Mt. Healthy, supra,*

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explicitly recognized that they could be assessed only against named parties, but made no effort to enlarge the class of proper defendants.

[10] For this reason, I cannot accept Bill Brennan's distinction, at 38–39, between municipal corporations and "quasi-municipal bodies." Special corporations created by the State, such as school districts or water districts, are often described as "quasi-municipal" because they lack "many of the powers commonly and necessarily characteristic of municipal corporations." 1. E. McQuillin, *supra,* § 2.28. A Congress concerned by the limited powers of cities and counties surely would not have imposed liability upon creatures of the State having even more limited authority. Further, the congressional purpose of protecting municipal treasuries applies with equal force to financially pressed school districts. Cf. *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1 (1973). Thus, an affirmance here of the decision of the Court of Appeals represents, not an extension of *Monroe,* but a simple application of the basis of its holding.

that a "school board" which is a municipal corporation may not be sued under § 1983. Our analysis recognized only two alternatives: Either "the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." 429 U. S., at 280. If the New York City Board of Education is an arm of the State of New York, it may not be sued for damages, even though its individual members may be sued for equitable relief. *Edelman* v. *Jordan*, 415 U. S. 651 (1974). If the Board is an arm of the city of New York, it must partake of the city's immunity from suit under § 1983. If, on the other hand, as petitioners contend, the board is the governing body of an incorporated school district separate from the city, that district must be a "political subdivision" of the State. *Mt. Healthy*, *supra*, at 280.

Since this Court has already concluded that the limited definition of "person" under § 1983 "stemmed from serious legislative concern as tc Congress' constitutional power to impose liability on political subdivisions of the States," *Moor*, *supra*, at 708, I can see no reason for concluding that Congress would not have entertained the same doubts about school districts as it did about cities and counties. Accordingly, any school board, to the extent that it is not merely an arm of the State or of the city or county, is the governing body of a separate municipal corporation which is not itself subject to suit under § 1983.

IV

Thus, it appears to me that none of the three suggested grounds for reversal is consistent with the basis of our holding in *Monroe*, as amplified by *Moor*. Accordingly, only a rejection of that holding can support a reversal of the judgment of the Court of Appeals. I cannot conclude that such a rejection can be justified.

Sixteen years have gone by since this Court unanimously held in *Monroe* that a municipal corporation was not a person for purposes of § 1983. Only two years have gone by since Potter, speaking for the Court in *Runyon, supra*, at 175 n. 12, reaffirmed the rationale of *stare decisis* as enunciated by Justice Brandeis and cited by my opinion for the Court in *Edelman:*

> "The Court in *Edelman* stated as follows:
>
> "'In the words of Mr. Justice Brandeis: *"Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. . . ."' 415 U. S., at 671 n. 14 (citation omitted)."

As counsel for respondent pointed out, Congress has presently pending before it S. 35 and a H. R. counterpart which would substantially modify the immunity of municipal corporations which has resulted from the *Monroe* holding. Ordinary principles of *stare decisis* dictate that we should leave the decision to them.

If the 16 years that had passed between the time of the *Screws* decision in 1945 and the time of the *Monroe* decision in 1961 was sufficient to move John Harlan and Potter to require "that it appear beyond doubt from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision," 365 U. S., at 192, the same test should be particularly applicable here where precisely the same number of years have elapsed since the *Monroe* decision. There is no way of encapsulating these 1871 debates that went on over three weeks into a few paragraphs. The "revisionists" who have criticized the *Monroe* opinion have shown that the exclusion of municipal corporations was a closer question than that opinion treated it as being. But in my view they have fallen far short of showing

"beyond doubt from the legislative history of the 1871 statute," Harlan, J., concurring, 365 U. S., at 192, that *Monroe* "misapprehended the meaning of the controlling provision." Accordingly, I would affirm the judgment of the Court of Appeals.