Same - my editing is self-evident, I think - except for Q on p 8. I think there is a helpful opinion & would like to circulate as soon as editing can be completed & a 1st draft printed. LFP

CHAMBERS DRAFT 5/13

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.

[May —, 1978]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and add these additional views.

Few cases in the history of the Court have been cited more frequently than *Monroe* v. *Pape*, 365 U. S. 167 (1961), decided less than two decades ago. Focusing new light on 42 U. S. C. § 1983, that decision widened access to the federal courts and permitted expansive interpretations of the reach of the 1871 measure. But curiously *Monroe* exempted local governments from liability at the same time it opened wide the courthouse door to suits against officers and employees of those entities—presumably, even when they act pursuant to express authorization. The oddness of this result, and the weakness of the historical evidence relied on by the *Monroe* Court in support of it, are well demonstrated by the Court's opinion today. Yet, the gravity of overruling a portion of so important a decision prompts me to write.

I

Addressing a complaint alleging unconstitutional police conduct that probably was unauthorized and actionable under state law,[1] the *Monroe* Court treated the 42d Congress' re-

[1] The gravamen of the complaint in *Monroe* was that Chicago police officers acting "under color of" state law had conducted a warrantless, early morning raid and ransacking of a Negro family's home. Although

jection of the Sherman Amendment as conclusive evidence of an intention to immunize local governments from all liability for constitutional injury under the statute. That reading, in light of today's thorough canvass of the legislative history, clearly "misapprehended the meaning of the controlling provision," *Monroe, supra,* at 192 (Harlan, J., concurring). In this case, involving formal, written policies of the Department of Social Services and the Board of Education of the City of New York that are alleged to conflict with the command of the Due Process Clause, *Cf. Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), the Court correctly decides "not to reject [wisdom] merely because it comes too late," *Henslee* v. *Union Planters Bank,* 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

As the Court demonstrates, the ill-conceived Sherman Amendment presented an extreme example of "riot act" legislation that sought to impose vicarious liability on government subdivisions for the consequences of private lawlessness. As such, it implicated concerns that are of marginal pertinence to the operative principle of § 1 of the 1871 legislation—now § 1983—that "[a]ny person" acting "under color of" state law may be held liable for affirmative conduct that "subject[s], or cause[s] to be subjected, any person to the deprivation of any" constitutional or federal statutory right. Of the many reasons for the defeat of the Sherman proposal,

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at least one of the allegations in the complaint could have been construed to charge a custom or usage of the Police Department of the City of Chicago that did not violate state law, see 365 U. S., at 258–259 (Frankfurter, J., dissenting in part), and there is a hint of such a theory in petitioners' brief, O. T. 1960, No. 39, pp. 41–42, that feature of the case was not highlighted in this Court. The dispute that divided the Court was over whether a complaint alleging police misconduct in violation of state law, for which state judicial remedies were available, stated a § 1983 claim in light of the statutory requirement that the conduct working injury be "under color of" state law. Compare 365 U. S., at 172–183 (opinion of the Court), and *id.,* at 193–202 (Harlan, J., concurring), with *id.,* at 202–259 (Frankfurter, J., dissenting in part).

none supports *Monroe*'s observation that the 42d Congress was fundamentally "antagonistic," 371 U. S., at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation. Opponents in the Senate appear to have been troubled primarily by the proposal's unprecedented lien provision, which would have exposed even property held for public purposes to the demands of § 1983 judgment lienors. Opinion of the Court, *ante*, at 14 n. 30. The opposition in the House of Representatives focused largely on the Sherman Amendment's attempt to impose a peacekeeping obligation on muncipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces. *Ante*, at 20–22.[2]

The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.[3]

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[2] If, in the view of these Representatives, a municipality obligated by state law to keep the peace could be held liable for a failure to provide equal protection against private violence, it seems improbable that they would have opposed imposition of liability on a municipality for the affirmative implementation of policies promulgated within its proper sphere of operation under state law. Such liability is premised not on a failure to take affirmative action in an area outside the contemplation of the state-law charter, but on the consequences of activities actually undertaken within the scope of the powers conferred by state law.

[3] The view taken today is consistent with the understanding of the 42d Congress that unless the context revealed a more limited definition,

As elaborated in Part II of today's opinion, the rejection of the Sherman Amendment can best be understood not as evidencing acceptance of a rule of absolute municipal immunity, but as limiting the statutory ambit to actual wrongdoers, *i. e.*, a rejection of *respondeat superior* or any other principle of vicarious liability. Thus, a public official may be held liable in damages when his actions are found to violate constitutional right and there is no qualified immunity under *Wood* v. *Strickland*, 420 U. S. 208 (1975); *Procunier* v. *Navarette*, No. 76–446, — U. S. — (1978). Similarly, local government may have to answer in damages "when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional] injury. ~~Opinion of the Court, *ante*, at 33–34.~~

II

This Court traditionally has been hesitant to overrule prior constructions of statutes or interpretations of common-law rules. *Stare decisis* is "usually the wise policy," *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting), but this cautionary principle must give way to countervailing considerations in appropriate circumstances.[4]

"the word 'person' may extend and be applied to bodies politic and corporate. . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. It also accords with the interpretation given the same word, used by Senator Sherman in the antitrust legislation of 1890 bearing his name. See *City of Lafayette* v. *Louisiana Power & Light Co.*, No. 76–864, — U. S. — (1978) (plurality opinion); *Chatanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 396 (1906); cf. *Pfizer, Inc.* v. *Government of India*, No. 76–749, — U. S. — (1978). See also *First National Bank of Boston* v. *Bellotti*, No. 76–1172, p. 4 n. 13, — U. S. —, — n. 15 (1978).

[4] See, *e. g.*, *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36 (1977); *Machinists* v. *Wisconsin Emp. Rel. Comm.*, 427 U. S. 132 (1976); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973); *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971); *Boy's Market, Inc.* v. *Retail*

I concur in the Court's view that this is not a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 70 (1946).

It is important to note that considerations of *stare decisis* cut in both directions in this case. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. In the somewhat accidental manner that characterizes some of the Court's decisions in this area, cf. *Runyon* v. *McCrary*, 427 U. S. 160, 186 n. * (1976), we have answered a questioin that was never actually briefed or argued in this Court. In *Monroe*—which announced the principle of absolute municipal immunity—"[t]he theory of the complaint [was] that under the circumstances [t]here alleged the City [was] liable for the acts of its police officers, by virtue of *respondeat superior*." Brief for Petitioners, O. T. 1960, No. 39, p. 21.[5] Respondents answered that adoption of petitioners' position would expose "Chicago and every other municipality in the United States . . . to Civil Rights liability through no action of its own and based on action contrary to its own ordinances and the laws of the state it is a part of." Brief for Respondents, *supra*, p. 26. Thus the

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Clerks Union, Local 770, 398 U. S. 235 (1970); *Burnet* v. *Coronado Oil & Gas Co.*, *supra*, at 406 n. 1.

[5] The District Court in *Monroe* ruled against municipal liability, stating: "since the liability of the City of Chicago is based on the doctrine of *respondeat superior*, and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself." Record, O. T. 1960, No. 39, p. 30. The Court of Appeals affirmed for the same reason. 272 F. 2d 365–366 (CA7 1959).

Petitioners in this Court also offered an alternative argument that the city of Chicago was a "person" for purposes of § 1983, Brief for Petitioners, O. T. 1960, No. 39, p. 25, but the underlying theory of municipal liability remained one of *respondeat superior*.

But this line of cases - from Monroe to Kenosha - is difficult to reconcile on a principled basis with a parallel series of cases in which the Court has assumed sub silentio that a local government entity could be sued under § 1983. If now, after full consideration of the question, we continue to adhere to Monroe, grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction

decision in *Monroe* went beyond the issue as viewed and argued by the parties themselves.[6]

Similarly, in *Moor* v. *County of Alameda*, 411 U. S. 693 (1973)—the only other relevant case presenting a substantial discussion of the legislative history of § 1983—petitioners asserted that "the county was vicariously liable for the acts of its deputies and sheriff," *id.*, at 696, under 42 U. S. C. § 1988. In rejecting this vicarious-liability claim, *id.*, at 710, and n. 27, we reaffirmed *Monroe*'s reading of the statute, but there was no challenge in that case to "the holding in *Monroe* concerning the status under § 1983 of public entities such as the County," *id.*, at 700; Brief for Petitioners, O. T. 1972, No. 72–10, p. 9.

Only in *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and the direct cause of the claimed constitutional injury. But in *Kenosha* we raised the jurisdictional question on our own initiative.[7]

Continued adherence to *Monroe*'s account of the legislative debates, however, would require upsetting other lines of decision. We would have to reject this Court's *sub silentio* exercise of jurisdiction over school boards. See opinion for the Court, *ante*, at 3 n. 5. Since "the principle of blanket

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[6] We owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations The fact that until this case the Court has not had to confront squarely the consequences of a ruling holding § 1983 inapplicable to official municipal policies may be considered in assessing the quality of the precedent that we are being asked to re-examine.

[7] In *Aldinger* v. *Howard*, 427 U. S. 1 (1976), we reaffirmed *Monroe*, but petitioner did not contest the proposition that counties were excluded from § 1983 as a result of *Monroe*, *id.*, at 16, and the question before us concerned the scope of pendent-party jurisdiction with respect to a state-law claim. Similarly, the parties in *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274 (1977), did not seek a re-examination of our ruling in *Monroe*.

immunity established in *Monroe* ~~cannot be~~ cabined short of school boards, *ante*, at 36, ~~the~~ conflict ~~is squarely presented~~. Although there was an independent basis of jurisdiction in many of the school board cases because of the inclusion of individual public officials as nominal parties, the joinder of the school board itself was a question of jurisdictional magnitude. See *City of Kenosha* v. *Bruno*, *supra*, at 511–514; *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 278–279 (1977). Moreover, the opinions of this Court make explicit reference to the school board party, particularly in discussions of the relief to be awarded, see, *e. g.*, *Green* v. *County School Board*, 391 U. S. 430, 437–439, 441–442 (1968); *Milliken* v. *Bradley*, 433 U. S. 267, 292–293 (1977) (POWELL, J., concurring in the judgment). And, as the Court points out, *ante*, at 36–39, Congress has focused specifically on this Court's school board decisions in several statutes. Thus the exercise of § 1983 jurisdiction over school boards, while perhaps not premised on considered holdings, has been longstanding. Indeed, it predated *Monroe*.

Even if one attempts to explain away the school board decisions as involving suits which "may be maintained against board members in their official capacities for injunctive relief either under § 1983 or *Ex parte Young*, 209 U. S. 123 (1908)," dissenting opinion of MR. JUSTICE REHNQUIST, *post*, at 3 n. 2, there remains ~~some~~ difficulty in rationalizing the ~~relevant~~ bodies of precedents. ~~First~~, at least two of the school board cases involved claims for monetary relief. *Cohen* v. *Chesterfield County School Board*, 326 F. Supp. 1159, 1161 (ED Va. 1971), rev'd, 474 F. 2d 395 (CA4 1973), rev'd, 414 U. S. 632 (1974); *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 504 (1969); also *Vlandis* v. *Kline*, 412 U. S. 441, 445 (1973). Although our decisions did not focus on the point, these claims could not be asserted in official-capacity suits if the government entity was not otherwise suable. Cf. *Edelman* v. *Jordan*, 415 U. S. 651

hardly could be

irreconcilable in principle would exist.

The ↑ irreconcilability in principle point is made in the previous sentence.

a

serious

I would rather not say "serious" difficult. An ingenious writer, like WHR, might be able to put it all together.

two

yes

We are not really talking about "two bodies of precedents." I would rather use the softer phrase in the original text.

Same - is there "person" - "non-person" point some? Under the Young fiction the City (not the official) would be a person for injunction purposes but a non-person for damage suit purposes

Moreover,

(1974).[8] ~~Second, and more importantly~~, the rationale of *Kenosha* would have to be disturbed, unless all avenues under § 1983 to injunctive relief against constitutional violations by local government were to be closed. The Court of Appeals in this case suggested that we import the Eleventh Amendment "fiction" of *Ex parte Young* into § 1983, 532 F. 2d 259, 264–266 (CA2 1976). That approach, however, would create tension with *Kenosha* because it would require "a bifurcated application" of "the generic word 'person' in § 1983" to public officials "depending on the nature of the relief sought against them." 412 U. S., at 513. A public official sued ~~in his official capacity~~ for carrying out official policy would be a "person" for purposes of injunctive relief, but a non-"person" in an action for damages.

Finally, if we continue to adhere to a rule of absolute municipal immunity under § 1983, we cannot long avoid the question whether "we should, by analogy to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983. . . ." *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S., at 278. One aspect of that inquiry would be whether there are any "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens*, *supra*, at 396, such as an "explicit congressional declaration that persons injured by a [municipality] may not recover money damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress," *id.*, at 397. In light of the Court's persuasive re-examination of the 1871 debates in today's decision, I would have difficulty inferring from § 1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies

[8] To the extent that the complaints in those cases asserted claims of personal liability, as well as official capacity, the Court had jurisdiction to render decision. There is no suggestion in the opinions, however, that the practices at issue were anything other than official, duly authorized policies.

in violation of the Constitution. Rather than constitutionalize a cause of action that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today.[9]

III

Difficult questions remain for another day. There are substantial line-drawing problems in determining "when execution of a government's policy or custom" can be said to inflict constitutional injury such that "government as an entity is responsible under § 1983." Opinion for the Court, *ante*, at 33–34. This case, however, involves formal, written policies of a municipal department and school board; it is the clear case. The Court also reserves decision on the availability of any qualified municipal immunity. *Ante*, at 41. Initial resolution of the question whether the protection available at common law for municipal corporations, see dissenting opinion of MR. JUSTICE REHNQUIST, *post*, at 6–7, or other principles support a qualified municipal immunity in the context of the § 1983 damages action, is left for the lower federal courts.

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[9] MR. JUSTICE REHNQUIST's dissent makes a strong argument that "[s]ince *Monroe*, municipalities *have* had the right to expect that they would not be liable retroactively for their officers' failure to predict this Court's recognition of new constitutional rights." *Post*, at 4. But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members and employees. In any event, the possibility of a qualified immunity, as to which we reserve decision for another day, may remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication.