Re 4-5, 8
+ Footnotes
Renumbered

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

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3rd 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.

[April —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

Seventeen years ago, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a "person" within the meaning of 42 U. S. C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at least three separate occasions. *Aldinger* v. *Howard*, 427 U. S. 1 (1976); *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973); *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). See also *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274, 277–279 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961. Because I cannot agree that this Court is "free to disregard these precedents," which have been "considered maturely and recently" by this Court, *Runyon* v. *McCrary*, 426 U. S. 160, 186 (1976) (POWELL, J., concurring), I am compelled to dissent.

## I

As this Court has repeatedly recognized, *Runyon, supra*, at 175 n. 12; *Edelman* v. *Jordan*, 415 U. S. 651, 671 n. 14 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this

Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by 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. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (dissenting opinion) (footnotes omitted).

Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents. The best exposition of the proper burden of persuasion was delivered by Mr. Justice Harlan in *Monroe* itself:

> "From my point of view, the policy of *stare decisis,* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear *beyond doubt* from the legislative history of the 1871 statute that *Classic* [v. *United States,* 313 U. S. 299 (1941)] and *Screws* [v. *United States,* 325 U. S. 91 (1945)] misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." *Monroe, supra,* at 192 (concurring opinion) (footnote omitted) (emphasis added).

The Court does not demonstrate that any exception to this general rule is properly applicable here. The Court's first assertion, that *Monroe* "was a departure from prior practice," *ante*, at 35, is patently erroneous. Neither in *Douglas* v. *City*

*of Jeannette*, 319 U. S. 157 (1943), nor in *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955), nor in any of the school board cases cited by the Court, *ante*, at 3–4, n. 5, 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).[1] While the Chief Justice also said that such decisions may "have much weight, as they show that this point neither occurred to the bar or the bench," *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 88 (1809), unconsidered assumptions of jurisdiction simply cannot outweigh four consistent decisions of this Court, explicitly considering and rejecting that jurisdiction.

Nor is there any 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.[2] The Act provides that attorneys' fees may be

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[1] 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.

[2] The other statutes cited by the Court, at 37–39, n. 63 make no mention of § 1983, but refer generally to suits against "a local educational agency." As noted by the Court of Appeals, 532 F. 2d 259, 264–266, such suits may be maintained against board members in their official capacities for

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. As the Court admits, *ante,* at 39, the language in the Senate report stating that liability may be imposed "whether or not the agency or government is named as a party," S. Rep. No. 94–1101, at 5, suggests that Congress did not view its purpose as being in any way inconsistent with the well-known holding of *Monroe.*

The Court's assertion that municipalities have no right to act "on an assumption that they can violate constitutional rights indefinitely," *ante,* at 40, is simply beside the point. Since *Monroe,* municipalities *have* had the right to expect that they would not be held liable retroactively for their officers failure to predict this Court's recognition of new constitutional rights. No doubt innumerable municipal insurance policies and indemnity ordinances have been founded on this assumption, which is wholly justifiable under established principles of *stare decisis.* To obliterate those legitimate expectations without more compelling justification than those advanced by the Court is a significant departure from our prior practice.

I cannot agree with MR. JUSTICE POWELL's view that "[w]e owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Ante,* at 6 n. 6 (POWELL, J., concurring). Private parties must be able to rely upon explicitly stated holdings of this Court, without being obliged to peruse the briefs of

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injunctive relief under either § 1983 or *Ex parte Young,* 209 U. S. 123 (1908). 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.

the litigants to predict the likelihood that this Court might change its mind. To cast such doubt upon each of our cases, from *Marbury* v. *Madison*, 1 Cranch 137 (1803), forward, in which the explicit ground or decision "was never actually briefed or argued," *ante*, at 5 (POWELL, J., concurring), would introduce intolerable uncertainty into the law. Indeed, in *Marbury* itself, the argument of Charles Lee on behalf of the applicants—which, unlike the arguments in *Monroe*, is reproduced in the Reports of this Court where anyone can see it—devotes not a word to the question of whether this Court has the power to invalidate a statute duly enacted by the Congress. Neither this ground of decision nor any other was advanced by Secretary of State Madison, who evidently made no appearance. 1 Cranch, at 153–154. That *Marbury* and countless other decisions retain their vitality despite their obvious flaws is a necessary by-product of the adversary system, in which both judges and the general public rely upon litigants to present "all the relevant considerations." *Ante*, at 6 n. 6 (POWELL, J., concurring). More recent landmark decisions of this Court would appear to be likewise vulnerable under my Brother POWELL's analysis. In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), none of the parties requested the Court to overrule *Wolf* v. *Colorado*, 335 U. S. 25 (1949); it did so only at the request of an *amicus curiae*. 367 U. S., at 646 n. 3. While it undoubtedly has more latitude in the field of constitutional interpretation, this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing.[3]

Thus, our only task is to discern the intent of the 42d Congress. That intent was first expounded in *Monroe*, and it

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[3] I find it somewhat ironic that, in abandoning the supposedly ill-considered holding of *Monroe*, my Brother POWELL relies heavily upon cases involving school boards, although he admits that "the exercise of § 1983 jurisdiction . . . [was] perhaps not premised on considered holdings." *Ante*, at 7 (POWELL, J., concurring).

has been followed consistently ever since. This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference. Indeed, this very year, the Senate has been holding hearings on a bill, S. 35, 95th Cong., 1st Sess. (1977), which would remove the municipal immunity recognized by *Monroe*. 124 Cong. Rec. D117 (daily ed. Feb. 8, 1978). In these circumstances, it cannot be disputed that established principles of *stare decisis* require this Court to pay the highest degree of deference to its prior holdings. *Monroe* may not be overruled unless it has been demonstrated "beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision." *Monroe, supra,* at 192 (Harlan, J., concurring). The Court must show not only that Congress, in rejecting the Sherman Amendment, concluded that municipal liability was not unconstitutional, but also that, in enacting § 1, it intended to impose that liability. I am satisfied that no such showing has been made.

II

Any analysis of the meaning of the word "person" in § 1983, which was originally enacted as § 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, must begin, not with the Sherman Amendment, but with the Dictionary Act. The latter Act, which supplied rules of construction for all legislation, provided:

> "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense . . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

The Act expressly provided that corporations need not be included within the scope of the word "person" where the context suggests a more limited reach. Not a word in the legislative history of the Act gives any indication of the contexts

in which Congress felt it appropriate to include a corporation as a person. Indeed, the chief cause of concern was that the Act's provision that "words importing the masculine gender may be applied to females," might lead to an inadvertent extension of the suffrage to women. Cong. Globe, 41st Cong., 3d Sess., 777 (remarks of Sen. Sawyer).

There are other factors, however, which suggest that the Congress which enacted § 1983 may well have intended the word "person" "to be used in a more limited sense," as *Monroe* concluded. It is true that this Court had held that both commercial corporations, *Louisville R. Co.* v. *Letson*, 2. How. 497, 558 (1844), and municipal corporations, *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869), were "citizens" of a State within the meaning of the jurisdictional provisions of Art. III. Congress, however, also knew that this label did not apply in all contexts, since this Court, in *Paul* v. *Virginia*, 8 Wall. 168 (1868), had held commercial corporations not to be "citizens" within the meaning of the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2. Thus, the Congress surely knew that, for constitutional purposes, corporations generally enjoyed a different status in different contexts. Indeed, it may be presumed that Congress intended that a corporation should enjoy the same status under the Ku Klux Act as it did under the Fourteenth Amendment, since it had been assured that § 1 "was so very simple and really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (remarks of Sen. Edmunds). At the time § 1983 was enacted the only federal case to consider the status of corporations under the Fourteenth Amendment had concluded, with impeccable logic, that a corporation was neither a "citizen" nor a "person." *Insurance Co.* v. *New Orleans*, 13 F. Cas. 67 (C. C. D. La. 1870) (No. 7,052).

Furthermore, the state courts did not speak with a single voice with regard to the tort liability of municipal corporations. Although many Members of Congress represented

States which had retained absolute municipal tort immunity, see, *e. g., Irvine* v. *Town of Greenwood,* 89 S. C. 511, 72 S. E. 228 (1911) (collecting earlier cases), other States had adopted the currently predominant distinction imposing liability for proprietary acts, see generally 2 F. Harper & F. James, The Law of Torts § 29.6 (1956), as early as 1842, *Bailey* v. *City of New York,* 3 Hill 531 (N. Y. 1842). Nevertheless, no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons.

The general remarks from the floor on the liberal purposes of § 1 offer no explicit guidance as to the parties against whom the remedy could be enforced. As the Court concedes, only Representative Bingham raised a concern which could be satisfied only by relief against governmental bodies. Yet he never directly related this concern to § 1 of the Act. Indeed, Bingham stated at the outset, "I do not propose now to discuss the provisions of the bill in detail," Cong. Globe, 42d Cong., 1st Sess., App. 82, and, true to his word, he launched into an extended discourse on the beneficent purposes of the Fourteenth Amendment. While Bingham clearly stated that Congress could "provide that no citizen in any State should be deprived of his property by State law or the judgment of a State court without just compensation therefor," *id.,* at 85, he never suggested that such a power was exercised in § 1.[4] Finally, while Bingham has often been advanced as the chief

[4] It has not been generally thought, before today, that § 1983 provided an avenue of relief from unconstitutional takings. Those federal courts which have granted compensation against state and local governments have resorted to an implied right of action under the Fifth and Fourteenth Amendments. *Richmond Elks Hall Assn.* v. *Richmond Redevelopment Agency,* 561 F. 2d 1327 (CA9 1977), aff'g 389 F. Supp. 486 (ND Cal. 1975); *Foster* v. *City of Detroit,* 405 F. 2d 138, 140 (CA6 1968). Since the Court today abandons the holding of *Monroe* chiefly on the strength of Bingham's arguments, it is indeed anomalous that § 1983 will provide relief only when a local government, not the State itself, seizes private property. See *ante,* at 30 n. 54; *Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 452 (1976); *Edelman, supra,* at 674–677.

expositor of the Fourteenth Amendment, *Duncan* v. *Louisiana*, 391 U. S. 145, 165 (1968) (Black, J., concurring); *Adamson* v. *California*, 332 U. S. 46, 73–74 (1947) (Black, J., dissenting), there is nothing to indicate that his colleagues placed any greater credence in his theories than has this Court. See *Duncan*, *supra*, at 174–176 (Harlan, J., dissenting); *Adamson*, *supra*, at 64 (Frankfurter, J., concurring).

Thus, it ought not lightly to be presumed, as the Court does today, *ante*, at 30 n. 53, that § 1983 "should prima facie be construed to include 'bodies politic' among the entities that could be sued." Neither the Dictionary Act, the ambivalent state of judicial decisions, nor the floor debate on § 1 of the Act give any indication that any Member of Congress had any inkling that § 1 could be used to impose liability on municipalities. Although Senator Thurman, as the Court emphasizes, *ante*, at 26 n. 45, expressed his belief that the terms of § 1 "are as comprehensive as can be used," Cong. Globe, 42d Cong., 1st Sess., App., 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, this "old Roman," who was one of the Act's most implacable opponents, suggested that state legislatures, Members of Congress, and state judges might be held liable under the Act. *Ibid.* If, at that point in the debate, he had any idea that § 1 was designed to impose tort liability upon cities and counties, he would surely have raised an additional outraged objection. Only once was that possibility placed squarely before the Congress—in its consideration of the Sherman Amendment—and the Congress squarely rejected it.

The Court is probably correct that the rejection of the Sherman Amendment does not lead ineluctably to the conclusion that Congress intended municipalities to be immune from liability under all circumstances. Nevertheless, it cannot be denied that the debate on that Amendment, the only explicit

consideration of municipal tort liability, sheds considerable light on the Congress' understanding of the status of municipal corporations in that context. Opponents of the Amendment were well aware that municipalities had been subjected to the jurisdiction of the federal courts in the context of suits to enforce their contracts, Cong. Globe, 42d Cong., 1st Sess., 789 (remarks of Rep. Kerr), but they expressed their skepticism that such jurisdiction should be exercised in cases sounding in tort:

> "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 (remarks of Rep. Farnsworth).

Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented. Admittedly this fact is not conclusive as to whether Congress intended § 1 to embrace a municipal corporation within the meaning of "person," and thus the reasoning of *Monroe* on this point is subject to challenge. The meaning of § 1 of the Act of 1871 has been subjected in this case to a more searching and careful analysis than it was in *Monroe,* and it may well be that on the basis of this closer analysis of the legislative debates a conclusion contrary to the *Monroe* holding could have been reached when that case was decided 17 years ago. But the rejection of the Sherman Amendment remains instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected. Any inference which might be drawn from the Dictionary Act

or from general expressions of benevolence in the debate on § 1 that the word "person" was intended to include municipal corporations falls far short of showing "beyond doubt" that this Court in *Monroe* "misapprehended the meaning of the controlling provision." Errors such as the Court may have fallen into in *Monroe* do not end the inquiry as to *stare decisis;* they merely begin it. I would adhere to the holding of *Monroe* as to the liability of a municipal corporation § 1983.

III

The decision in *Monroe* v. *Pape,* was the fountainhead of the torrent of civil rights litigation of the last 17 years. Using § 1983 as a vehicle, the courts have articulated new and previously unforseeable interpretations of the Fourteenth Amendments. At the same time, the doctrine of municipal immunity enunciated in *Monroe* has protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence. None of the Members of this Court can foresee the practical consequences of today's removal of that protection. Only the Congress, which has the benefit of the advice of every segment of this diverse Nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision.

I would affirm the judgment of the Court of Appeals.