HAB

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

From: Mr. Justice Brennan

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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.

[January —, 1978]

Memorandum of MR. JUSTICE BRENNAN.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.[1] The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.[2]

[1] The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261–262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

[2] The plaintiffs alleged that the city had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy. Amended Complaint ¶ 28, App. 13–14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶ 13, App. 32–33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher could remain through the end of the school term. Amended Complaint ¶¶ 39, 42, 45, App. 18–19, 21. This allegation was denied. Answer ¶¶ 17, 18, App. 35.

Cf. *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974). The suit sought injunctive relief and backpay for periods of unlawful forced leave. Named as defendants in the action were the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor. In each case, the individual defendants were sued solely in their official capacities.[3]

On cross-motions for summary judgment, the District Court for the Southern District of New York held moot petitioners' claims for injunctive and declaratory relief since the city of New York and the Board, after the filing of the complaint, had changed their policies relating to maternity leaves so that no pregnant employee would have to take leave unless she was medically unable to continue to perform her job. 394 F. Supp. 853, 855. No one now challenges this conclusion. The court did conclude, however, that the acts complained of were unconstitutional under *LaFleur*, *supra*. 394 F. Supp., at 855. Nonetheless plaintiff's prayers for backpay were denied because any such damages would come ultimately from the city of New York and, therefore, to hold otherwise would be to "circumvent" the immunity conferred on municipalities by *Monroe* v. *Pape*, 365 U. S. 167 (1961). See 394 F. Supp., at 855.

On appeal, petitioners renewed their arguments that the Board of Education[4] was not a "municipality" within the meaning of *Monroe* v. *Pape*, *supra*, and that, in any event, the District Court had erred in barring a damage award against the individual defendants. The Court of Appeals for the Second Circuit rejected both contentions, however. The court first held that the Board of Education was not a person under § 1983 because "it performs a vital governmental function . . . , and, significantly, while it has the right to determine how the

[3] Amended Complaint ¶ 24, App. 11–12.

[4] Petitioners conceded that the Department of Social Services enjoys the same status as New York City for *Monroe* purposes. See 532 F. 2d, at 263.

funds appropriated to it shall be spent . . . , it has no final say in deciding what its appropriations shall be." 532 F. 2d 259, 263 (1976). The individual defendants, however, were "persons" under § 1983, even when sued solely in their official capacities. *Id.*, at 264. Yet, because a damage award would "have to be paid by a city that was held not to be amenable to such an action in *Monroe* v. *Pape*," a damage action against officials sued in their official capacities could not proceed. *Id.*, at 265.

I

Our grant of certiorari in this case, 429 U. S. 1071, was limited to the question:

> "Whether local governmental officials and/or local independent [5] school boards are "persons" within the meaning of 42 U. S. C. § 1983 when equitable relief in the nature

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[5] Contrary to petitioners' characterization of the Board's status, the appeals court suggested that the Board is not in fact independent. See 532 F. 2d, at 263–264. The factual basis for this conclusion is not apparent—the summary judgment motions did not address the issue. If, as I suggest, we overrule *Monroe*, the dependent/independent distinction makes no difference. If, however, we do not overrule *Monroe*, but merely limit its reach short of school boards, we will be faced with the factual and legal quagmire of distinguishing between various types of school boards. Indeed, one of the best reasons to overrule *Monroe* outright is to avoid having to make such distinctions.

I frankly do not understand Bill's suggestion in Part III–A of his memorandum that some school boards may be simply aggregations of individuals with no corporate existence. I know of no such case and would suppose that, if it exists, then the individuals must still be some sort of state officers and the board a state agency. In either case, such a hybrid legal entity would be a nonperson under *Monroe*'s theory of § 1983 since the debates are very clear that the constitutional infirmity perceived in the Sherman Amendment ran to *all* state instrumentalities, regardless of legal form. See *infra*, at pp. ~~26–27~~ 28-29.

In any case, I agree with Bill that we should not attempt to distinguish between those types of board that may be sued and those that may not. In my judgment, however, this argues for allowing all boards to be sued.

of back pay is sought against them in their official capacities?" Pet., at 8.

For analytic purposes, this question is best considered as two:

1. Whether local independent school boards are "persons" within the meaning of § 1983?

2. If local independent school boards are not such persons, what actions against officials in their official capacities will be considered actions against the school board "in fact" (if any) with the result that such actions are also barred by *Monroe* v. *Pape, supra?*

Obviously, if we hold that independent school boards may be sued in their corporate names under § 1983, there is no need to reach the second question. If, however, we hold that school boards may not be sued in their corporate names, then we must grapple with the question whether school officials can be sued only in their personal capacities or whether it is possible to adopt the theory of *Edelman* v. *Jordan*, 415 U. S. 651 (1973), and *Milliken* v. *Bradley*, — U. S. — (1977) (*Milliken II*), or possibly some other theory, to allow a bifurcation between equitable and declaratory relief, on the one hand, and damage actions on the other.

Before addressing the first question, it is important to note that the decision on the first question logically determines the answer to the second.

Monroe stands for the principle that this Court is bound to recognize any limitations however archaic or erroneous put on § 1983 by the Congress that enacted it. As a matter of logic, this view of our function in § 1983 cases cannot be made to vary with the type of relief sought in a particular § 1983 suit. Nor is there anything "in the legislative history discussed in *Monroe*, or in the language actually used by Congress, [which suggests] that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought

against them." [6] *City of Kenosha* v. *Bruno*, 412 U. S. 507, 513 (1973). Moreover, the "historic construction" theory is apparently to be maintained even though we now know what *Monroe* (erroneously, see Part II, *infra*) says the 1871 Congress did not know: That Congress has plenary constitutional power—unlimited by the Tenth Amendment, see *Ex parte Virginia*, 100 U. S. 339, 347–348 (1880); *Milliken* v. *Bradley*, against state and local governments under § 5 of the Four— U. S. —, — (1977) (*Milliken II*) [7]—to authorize suits against state and local governments under § 5 of the Fourteenth Amendment.

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[6] *A fortiori*, nothing in the legislative history or language of § 1983 suggests that such a bifurcation can be achieved simply by redrafting a complaint to name officials in their official capacity rather than the corporate entity of which they are officials.

[7] "Finally, there is no merit to the petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." 45 U. S. L. W., at 4880.

For this reason, *National League of Cities* v. *Usury*, 426 U. S. 833 (1976), is irrelevant to our consideration of this case.

Nor is there any basis for concluding that the 1871 Congress had Eleventh Amendment problems in mind. That Congress knew that municipalities were routinely sued in federal courts, see p. 17 and n. 32, *infra*. See also *Lincoln County* v. *Luning*, 133 U. S. 529, 530 (1890) ("With regard to the [Eleventh Amendment] objection, it may be observed that the records of this court for the last thirty years are full of suits against counties. . . . [This] jurisdiction of the Circuit courts is beyond question"). In any case, we now know that the Eleventh Amendment establishes no limits on legislation adopted under § 5 of the Fourteenth Amendment:

"[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . We think that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976).

Applying the historic construction theory to 1871 practice in representative capacity actions, it is quite clear that at least some official capacity suits against municipal officers would be barred were municipalities "as such" not suable under § 1983. In 1871, official capacity suits against municipal officers were conceptualized as suits against the body corporate of the municipality. See, *e. g.*, *Thompson* v. *United States*, 103 U. S. 480, 483–484 (1881) (citing many cases). And, while this "subject . . . is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity," [9] a lawyer of the 1870's would likely have assumed that a suit against an official—whether or not styled as an official capacity suit—which "demanded relief calling for an assertion of what was unquestionably official authority," [10] was a suit against the government unit of which the officer was an agent.[11]

If, therefore, we are to take *Monroe* and *City of Kenosha* seriously, relief under § 1983 would have to be limited to declaratory relief, damages against the officer personally, and that form of injunctive relief which could be given against an officer in his personal capacity. However, we have obviously paid little heed to these dictates of *Monroe* and *Kenosha*. Instead, in *Edelman* [12] and in *Milliken II*, we have felt free to expand injunctive relief to the limit of the federal courts' constitutional power as we *now* understand it. But, if Congress in 1871 had any idea at all about the complex problems

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[9] *Snyder* v. *Buck*, 340 U. S. 15, 29 (1950) (Frankfurter, J., dissenting).

[10] *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 729 (1949) (Appendix to opinion of Frankfurter, J.).

[11] See *ibid.* and cases collected therein. There would apparently have been a limited exception to this principle for those instances in which mandamus could give all the requested relief. See *Thompson* v. *United States*, 103 U. S. 480, 485 (1881).

[12] The Court treated *Edelman* as a case involving a right of action implied under the Constitution, but plaintiffs in fact plead § 1983. See Appendix in No. 72-1410, at 5 (Complaint ¶ 3 (b)).

of government immunity from suit, capacity of defendant parties, and scope of permissible relief, that idea was certainly not that of *Edelman* and *Milliken II*.

The plain thrust of the analysis above is that, were we to hold school boards exempt from suit under § 1983, we would as a matter of logic and history overrule many if not all of our school desegregation decisions, since virtually all these cases mandate "relief calling for an assertion of what [is] unquestionably official authority." Nor can our earlier school board cases be reconciled by adopting an "Eleventh Amendment analogy" as suggested by the Court of Appeals.[12a] The 1871 Congress certainly had no Eleventh Amendment analogy in mind [12b] and therefore it would be indulging in anachronistic brute force for us to adopt such a theory if we are serious about maintaining Monroe's "historic understanding" theory of § 1983 interpretation. Moreover, even on Bill's, I submit erroneous (see pp. 19–20, *infra*), analysis that Congress did not impose civil rights liability on local government agencies lest federal remedies sap limited municipal resources, it is logically impossible to draw a line between damages and the massive spending ordered by our school cases for, *e. g.*, busing or magnet schools. Cf. 20 U. S. C. § 1601 (a) (1970 ed., Supp. V) ("Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access"). Alternatively, if the court below is correct and we are in fact free to substitute our present views for those of the 1871 Congress, the justification for this must be that we interpret § 1983 to be an effort by Congress to exercise the full of its power under § 5 of the Fourteenth Amendment. On this view, there is no continued vitality to *Monroe*, since that case put the municipal exemption exclusively on the ground

[12a] See 532 F. 2d, at 265–266.

[12b] See Part II, *infra*. See also n. 7, *supra*.

of legislative history which was said to show that Congress doubted its constitutional power to put obligations on municipalities. See Part II, *infra*.

In short, I think there is already an element of "casuistry" in our § 1983 analysis and that we would only compound that element if in the future we insist that municipalities, and by extension school boards, are exempt from suit while continuing to allow complete injunctive relief in official capacity suits. Rather than adopt such a course, I think we would do better to recognize what is in fact the case: That Congress in 1871 did indeed intend to create a cause of action against municipalities and to confer jurisdiction on the federal courts to implement that cause of action. *Monroe* must, of course, be overruled to the extent it holds otherwise. This does not mean, however, that *Monroe* was wrong on its facts. Instead, as developed in Part IV below, Congress would have thought it had no power to create a remedy against a municipal corporation unless that corporation "as such" had violated a citizen's federal rights. For this reason, the unauthorized and apparently unratified behavior of the Chicago policemen in *Monroe*, while under "color" of Chicago's authority, could not be charged to Chicago. Thus, in my view, our proper role here as in other areas of § 1983 jurisprudence, cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1957); *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967); *Scheuer* v. *Rhodes*, 416 U. S. 232, 243–244 (1974), is to fashion a doctrine of municipal "fault" as required by history, reason, and the purpose of § 1983.

Because of the difference in viewpoint of those indicating an interest in reversing, I shall first discuss why *Monroe* should be overruled. I will then discuss the extent to which our cases involving remedies against school boards require us notwithstanding *Monroe* to hold that school boards are "persons" within the meaning of § 1983. Finally, I will briefly discuss the question of municipal defenses and in particular whether *Monroe* might be left to stand for the proposition

that municipalities have a defense to both damages and injunctive relief when an officer acts "under color of" its laws but in a way that is in fact unauthorized by the municipality.

II

In *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961), we held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." The sole basis for this conclusion was an inference drawn from Congress' rejection of the "Sherman amendment" to the Civil Rights Act of 1871—the precursor of § 1983—which would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons "riotously and tumultuously assembled." [12c] Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (hereinafter "Globe"). Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, we nonetheless concluded that Congress must have meant to exclude municipal corporations from the coverage of § 1 because "the House [in voting against the amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any *obligation* upon county and town organizations, the mere instrumentality for the administration of state law." 365 U. S., at 190 (emphasis added), quoting Globe, at 804 (remarks of Rep. Poland). This statement, in our view, showed that Congress doubted its "constitutional power . . . to impose *civil liability* on municipalities," 365 U. S., at 190 (emphasis added), and that such doubt would have extended to any type of civil liability.[13]

[12c] We expressly declined to consider "policy considerations" for or against municipal liability. See 365 U. S., at 191.

[13] Mr. Justice Douglas, the author of *Monroe*, has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities. See *City of Kenosha* v. *Bruno*, 412 U. S. 507, 517–520

An analysis of debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that we improperly equated the "obligation" of which Representative Poland spoke with "civil liability."

A. An Overview

There are three distinct stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H. R. 320, a bill "to enforce the provisions of the Fourteenth Amendment to the Constitution and for other purposes." H. R. 320 contained four sections. Section 1, now codified as 42 U. S. C. § 1983, was the subject of only limited debate and was passed without amendment.[14] Sections 2 through 4 dealt primarily with the "other purpose[]" of suppressing Ku Klux Klan violence in the southern States.[15] The wisdom and constitutionality of these sections—not § 1, now § 1983—was the subject of almost all congressioanl debate and each of these sections was amended. The House finished its initial debates on H. R. 320 on April 7, 1871 and one week later the Senate also voted out a bill.[16] Again, debate on § 1 of the bill was limited and that section was passed as introduced.

(1973). However, this view has never been shared by the Court, see *Monroe* v. *Pape*, *supra*, 365 U. S., at 190; *Moor* v. *County of Alameda*, 411 U. S. 693, 708 (1973), and there is not one shred of support for this view in the debates.

[14] Globe, at 522.

[15] Briefly, § 2 created certain federal crimes in additon to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily those thought to obtain where Klan violence was rampant. See Globe App., at 335–336.

[16] Globe, at 709.

Immediately prior to the vote in the Senate, after time for discussion had expired, Senator Sherman introduced his amendment.[17] I emphasize that this was *not* an amendment to § 1 of the bill, but was to be added as § 7 at the end of the bill. Under the Senate rules, no discussion of the amendment was allowed and, although attempts were made to amend the amendment, it was passed as introduced. In this form, the amendment did *not* place liability on the municipal corporation, but made any inhabitant of the municipality liable for the damage inflicted by persons "riotously or tumultuously assembled." [18]

The House refused to acquiesce in a number of amendments made by the Senate, including the Sherman amendment, and the respective versions of H. R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.

On April 18, 1871, the first conference committee completed its work on H. R. 320. The main features of the conference committee draft of the Sherman amendment were these.[19] First, a cause of action was given to persons injured by

> "any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color or previous condition of servitude . . . ."

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[17] See *id.*, at 663, quoted in Appendix, *infra*.

[18] Globe, at 663. An action for recovery of damages was to be in the federal courts and denominated as a suit against the county, city, or parish in which the damage had occurred. *Ibid.* Execution of the judgment was not to run against the property of the government unit, however, but against the private property of any inhabitant. *Ibid.*

[19] See Globe, at 755, quoted in Appendix, *infra*.

Second, the act provided that the action would be against the county, city, or parish in which the riot had occurred and that it could be maintained by either the person injured or his legal representative. Unlike the amendment as proposed, however, the conference substitute made the government defendant liable on the judgment if it was not satisfied against individual defendants who had committed the violence. If a municipality were liable, the judgment against it could be collected

> "by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment [would become] a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof."

In the ensuing debate on the first conference report, which was the first debate of any kind on the Sherman amendment, Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property "responsible" for Ku Klux Klan damage.[20] Statutes drafted on a similar theory, he stated, had long been in force in England and were in force in 1871 in a number of the States.[21] Nonetheless there were critical differences between the con-

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[20] "Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome." Globe, at 761.

Senator Sherman was apparently unconcerned that the conference committee substitute, unlike the original amendment, did not place liability for riot damage directly on the property of the well-to-do, but instead placed it on the local government. Presumably he assumed that taxes would be levied against the property of the inhabitants to make the locality whole.

[21] According to Senator Sherman, the law had originally been adopted in England immediately after the Norman Conquest and had most recently

ference substitute and extant state and English statutes: the conference substitute, unlike most state riot statutes, lacked a short statute of limitations and imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished.

In the Senate, opponents, including a number of Senators who had voted for § 1 of the bill, criticised the amendment as an imperfect and impolitic rendering of the state statutes. Moreover, as drafted, the conference substitute could be construed to protect rights that were not protected by the Constitution.[22] However, their major argument was that the lien created by the amendment, which would have made it impossible for a municipality to conduct its normal business, violated an implicit limit on Congress' power under § 5 of the Fourteenth Amendment. Notwithstanding these objections, the Senate voted to adopt the report of the first conference committee.

Debate in the House raised similar points to that in the Senate, except that House opponents, within whose ranks were also some who had supported § 1, were more concerned with the question whether the Federal Government consistent with the Constitution could obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters. This concern, as

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been promulgated as the law of 7 & 8 Geo. IV, ch. 31. See Globe, at 760. During the course of the debates, it appeared that Kentucky, Maryland, Massachusetts, and New York had similar laws. See *id.*, at 751 (Rep. Shellabarger); *id.*, at 762 (Sen. Stevenson); *id.*, at 771 (Sen. Thurman); *id.*, at 791 (Rep. Butler). Such a municipal liability was apparently common throughout New England. See *id.*, at 761 (Sen. Sherman).

[22] Senator Thurman gave the most complete critique of the conference substitute, showing that it was abominably drafted. See Globe, at 770–772.

will be developed in Part II–B, *infra*, was simply another facet of the lien problem discussed in the Senate and is the branch of the opponents' argument which Representative Poland was addressing in his statement that is quoted in *Monroe*.[23]

Because the House rejected the first conference report a second conference was called and it duly issued its report. The second conference substitute for the Sherman amendment abandoned municipal liability and, instead, made "any person or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same," who did not attempt to stop the same, liable to any person injured by the conspiracy.[24] The amendment in this form was adopted by both Houses of Congress and is now codified as 42 U. S. C. § 1986.

The meaning of the legislative history sketched above can most readily be developed by first considering the debate on the report of the first conference committee. This debate shows conclusively that the constitutional objections raised against the Sherman amendment would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights. Because § 1 of the Civil Rights Act does not state expressly that municipal corporations come within its ambit, it is finally necessary to interpret § 1 to confirm that such corporations were indeed intended to be covered.

B. Debate on the First Conference Report

The style of argument adopted by both proponents and opponents of the Sherman amendment in both Houses of Congress was largely that of a legal brief, with frequent references to cases decided by this Court or by the supreme courts of the several States. Proponents of the Sherman amendment did not, however, discuss in detail the argument in favor

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[23] See 365 U. S., at 190, quoted at p. 9, *supra*.

[24] See Globe, at 804.

of its constitutionality. Nonetheless, it is possible to piece together such an argument from the debates on the first conference report and those on § 2 of the civil rights bill, which because it allowed the Federal Government to prosecute crimes "in the states" had also raised questions of federal power. The account of Representative Shellabarger, the House sponsor of H. R. 320, is the most complete.

Shellabarger began his discussion of § 2 by stating that "there is a domain of constitutional law involved in the right consideration of this measure which is wholly unexplored." Cong. Globe, 42d Cong., 1st Sess., App., at 67 (1871) (hereinafter "Globe App."). There were analogies, however. With respect to the meaning of § 1 of the Fourteenth Amendment, and particularly its Privileges or Immunities Clause, Shellabarger relied on the statement of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (CCED Pa. 1825), which defined the privileges protected by Art. IV:

> "'What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government';—
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> "*Mark that*—
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> "'*protection by the Government;* the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . .'" Globe App., at 69 (emphasis added), quoting 4 Wash. C. C., at 380.

Having concluded that citizens were owed protection,[25]

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[25] Opponents of the Sherman amendment agreed that both protection and equal protection were guaranteed by the Fourteenth Amendment. See Globe, at 758 (Sen. Trumbull); *id.*, at 772 (Sen. Thurman); *id.*, at 777 (Sen. Frelinghuysen); *id.*, at 790 (Rep. Willard). And the Supreme Court of Indiana had so held in giving effect to the Civil Rights Act of 1866. See *Smith* v. *Moody*, 26 Ind. 299 (1866) (following *Coryell*), referred to in Globe App., at 68 (Rep. Shellabarger). Moreover, § 2 of the 1871 Act as

Shellabarger then considered Congress' role in providing that protection. Here again there were precedents:

> "[Congress has always] assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in [Art. I, § 10,] relate to the divisions of the political powers of the State and General Government. . . . These prohibitions upon political powers of the States are all of such nature that they can be, and even have been, . . . enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.
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> "These are three: first, that as to fugitives from justice [26]; second, that as to fugitives from service, (or slaves [27];) third, that declaring that the 'citizens of each

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passed, unlike § 1, prosecuted persons who violated federal rights whether or not that violation was under color of official authority, apparently on the theory that Ku Klux Klan violence was infringing the right of protection defined by *Coryell*.

[26] U. S. Const., Art. IV, § 2, cl. 2:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

[27] *Id.*, cl. 3:

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

> State shall be entitled to all the privileges and immunities of citizens in the several States.' [28]
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> And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect . . . such persons." Globe App., at 69–70.

Of legislation mentioned by Shellabarger, the closest analog of the Sherman amendment, ironically, was the statute implementing the fugitives from justice and fugitive slave provisions of Art. IV—the Act of Feb. 12, 1793, ch. 7, 1 Stat. 301—the constitutionality of which had been sustained in 1842, in *Prigg* v. *Pennsylvania*, 16 Pet. 539. There, Mr. Justice Story, writing for the Court, held that Art. IV gave slaveowners a federal right to the unhindered possession of their slaves in whatever State such slaves might be found. 16 Pet., at 611. Because state process for recovering runaway slaves might be inadequate or indeed hostile to the rights of the slaveowner, the right intended to be conferred could be negated if left to state implementation. *Id.*, at 614. Thus, since the Constitution guaranteed the right and this in turn required a remedy, Story held it to be a "natural inference" that Congress had the power itself to ensure an appropriate (in the Necessary and Proper Clause sense) remedy for the right. *Id.*, at 615.

Building on *Prigg*, Shellabarger argued that a remedy against municipalities and counties was an appropriate method for ensuring the protection which the Fourteenth Amendment made every citizen's federal right.[29] This much was clear from the adoption of such statutes by the several States as devices for suppressing riot.[30] Thus, said Shellabarger, the only seri-

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[28] *Id.*, cl. 1.

[29] See Globe, at 751.

[30] *Ibid.*; see n. 21, *supra*.

ous question remaining was "whether, since a county is an integer or part of a state, the United States can impose upon it, as such, *any obligation to keep the peace* in obedience to United States laws." [31] This he answered affirmatively, citing *Board of Commissioners* v. *Aspinwall*, 24 How. 376 (1861), the first of many cases [32] upholding the power of federal courts to enforce the Contract Clause against municipalities.[33]

The most complete statement of the constitutional argument of the House opponents of the Sherman amendment—whose views are particularly important since only the House voted down the amendment—was that of Representative Blair: [34]

> "The proposition known as the Sherman amendment . . . is entirely new. It is altogether without a precedent in this country. . . . The amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone.

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[31] Globe, at 751 (emphasis added). Compare this statement with Representative Poland's remark upon which our holding in *Monroe* was based. See p. 9, *supra*.

[32] See, *e. g.*, *Gilman* v. *City of Sheboygan*, 2 Black 510 (1863); *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (1867); *Riggs* v. *Johnson County*, 6 *id.*, 166 (1868); *Weber* v. *Lee County*, 6 *id.*, 210 (1868); *Supervisors* v. *Rogers*, 7 *id.*, 175 (1869); *Benbow* v. *Iowa City*, 7 *id.*, 313 (1869); *Supervisors* v. *Durant*, 9 *id.*, 415 (1870).

[33] See Globe, at 751–752.

[34] Representative Willard took a somewhat different position. He thought that the Constitution would not allow the Federal Government to dictate the manner in which a State fulfilled its obligation of protection. That is, he thought it a matter of state discretion whether it delegated the peacekeeping power to a municipal or county corporation, to a sheriff, etc. He did not doubt, however, that the Federal Government could impose on the *States* the obligation imposed by the Sherman amendment, and presumably he would have enforced the amendment against a municipal corporation to which the peacekeeping obligation had been delegated. See Globe, at 791.

> ". . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to. . . .
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> ". . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State government. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality.
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> "Now, only the other day, the Supreme Court . . . decided [in *Collector* v. *Day*, 11 Wall. 113 (1871)] that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a State officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the States in any respect. It was held also in the case of Prigg *vs.* Pennsylvania [16 Pet. 539 (1843)] that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality with is equally the creature of the State, to perform a duty." Globe, at 795.

While House debate primarily concerned the question whether Congress had the power to require municipalities to keep the peace, opponents of the Sherman amendment in the Senate primarily questioned the constitutionality of the judgment lien created by the Sherman amendment, a lien which ran against *all* money and property of a defendant munici-

pality, including property held for public purposes, such as jails or courthouses. Opponents argued [35] that such a lien once entered would have the effect of making it impossible for the municipality to function, since no one would trade with it. Moreover, everyone knew that sound policy prevented execution against public property since this too was needed if local government was to survive.[36] (This is the only point being made by Congressmen Farnsworth and Kerr, whose speeches are quoted by Bill, at 7–8. In addition, Farnsworth's constitutional objection was based on *Day* and Kerr's analysis applied to both municipalities and *officers*. Thus, if Kerr is credited, then § 1 of the Act would also be unconstitutional, which no one thought it was, see pp. ~~26–27~~ 25-27, *infra*). Thus, whereas constitutional objection in the House had rested on *potential* danger to the independence of the States if the Federal Government were allowed to mandate the duties of state officers, objection in the Senate rested on the *actual probability* that municipal government would be extinguished if ever made subject to the lien.

I must stress at this point that I have to say that Bill is simply wrong in asserting, at 8, that "the tort remedy created by the Act would have seriously compromised [municipal financial stability] in a way which the contract cases, familiar to Congress, . . . did not." He forgets that the enforcement of contracts by the federal courts

> "led to a lively resistance in Iowa and then in Missouri; more limited conflicts occurred elsewhere in the Mid-West, and even in up-State New York. The clash with Iowa in the '60's, and that with Missouri in the '70's, were

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[35] See, *e. g.*, Globe, at 762 (Sen. Stevenson); *id.*, at 763 (Sen. Casserly).

[36] See, *e. g.*, *id.*, at 763 (Sen. Casserly). Opponents were clearly correct that public property was generally immune from execution. See *Meriwether* v. *Garrett*, 102 U. S. 472, 513 (1880); *The Protector*, 20 F. 207 (CCD Mass. 1884); 2 Dillon, Municipal Corporations §§ 445–446 (1873 ed.).

> comparable to the well-known episodes of defiance by the Virginia court under Spencer Roane . . . ." C. Fairman, History of the Supreme Court of the United States, Reconstruction and Reunion, 1864–1888, pt. 1, at 919 (1971).

The reason for this unrest was often that the bonds being enforced were for enormous sums, were often fraudulently obtained or passed in a manner not in accord with state law—but were nonetheless enforced in federal court!—and often put great financial burdens on the issuing municipalities, frequently ending in municipal bankruptcy. See *id.*, at 918–1009.

If all this was constitutional and acquiesced in by the 1871 Congress—and it clearly was—it is difficult to see how tort liability would be unconstitutional simply because it might force a municipality to pay a lot of damages. The only way to reconcile these facts, which were notorious, with what was said about the lien remedy is to recognize that the Sherman amendment's lien attached to *all* money and property, whether or not that money or property was needed to discharge the judgment, thereby disabling the municipality from providing essential public functions. As I understand it, not even bankrupt communities were stripped of the ability to perform public functions, and similarly the judgments of federal courts under the Process Acts (see n. 36a, *infra*)—which would have included a judgment under § 1 of the 1871 Act—would not have prevented municipalities from discharging essential public functions. See *Meriwether* v. *Garrett*, 102 U. S. 472 (1880). I submit, therefore, that no inference with respect to the constitutionality of tort remedies executed under the Process Acts can be drawn from the unprecedented and almost punitive remedy imposed by the Sherman amendment. Certainly a judgment was not unconstitutional simply because it was large.

The position of the Senate opponents, although not relevant

to the question whether municipalities could be sued under § 1 of the Civil Rights Act,[36a] nonetheless underscores the fact that opponents of the Sherman amendment were arguing primarily that the Constitution, in Blair's words, did not "inten[d] to give the Government of the United States power to destroy the government of the States," and yet, somehow, proponents of the Sherman amendment were intending to exercise just such a power. To understand why this was so—and, more important, why § 1 of the civil rights bill did not threaten the government of the States in an impermissible manner—it is necessary to examine the cases cited by opponents of the Sherman amendment.

The first case is *Prigg* v. *Pennsylvania*, *supra*, which had also been cited by Shellabarger in support of the Sherman amendment. In addition to confirming a broad federal power to enforce federal rights against the States, Mr. Justice Story in *Prigg* held that Congress could not insist that the States create an adequate remedy for a federal right:

> "[Art. IV] is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that states are bound to provide means to carry into effect the duties of the national government." 16 Pet., at 615–616.

Indeed, Story suggested that those parts of the Act of 1793 which conferred jurisdiction on local magistrates to assist in

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[36a] Execution in suits under § 1, like all other civil suits in federal courts in 1871, would have been governed by *state* procedures under the process acts of 1792 and 1828. See Act of May 8, 1792, ch. 36, 1 Stat. 275; Act of May 19, 1828, ch. 68, 4 Stat. 278.

the arrest and return of slaves were unconstitutional, see *id.*, at 622, a proposition with which other Justices agreed.[37]

The principle enunciated in *Prigg* was applied in *Kentucky* v. *Dennison*, 24 How. 66 (1861). There, the Court was asked to require Dennison, the Governor of Ohio, to hand over Lago, a fugitive from justice wanted in Kentucky, as required by § 1 of the Act of 1793,[38] *supra*, which implemented Art. IV, § 2, cl. 2, of the Constitution. Chief Justice Taney, writing for a unanimous Court, refused to enforce that section of the Act:

> "[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State,

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[37] "The state officers mentioned in the law [of 1793] are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power if it thinks proper, to prohibit them. The Act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it." 16 Pet., at 630 (Taney, C. J.).

Mr. Justice McLean agreed that "[a]s a general principle" it was true that "that Congress had no power to impose duties on state officers, as provided in the act [of 1793]," but he wondered whether the "positive" obligation created by the Fugitive Slave Clause did not create an exception. See *id.*, at 664–665.

[38] "Be it enacted . . . That whenever the executive authority of any state in the Union . . . shall demand any person as a fugitive from justice . . . and shall moreover produce a copy of an indictment found . . . charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state . . . from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured . . . and to cause the fugitive to be delivered to such agent [of the demanding state] when he shall appear . . ." 1 Stat. 302.

and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How., at 107–108.

Although no one cited *Dennison* by name, the principle expressed there by Chief Justice Taney was well known to Members of Congress.[39] Reasoning identical to Taney's—that maintenance of the federal structure of the Nation was inconsistent with allowing Congress any power which might be used to impede the States from carrying out programs within their "legitimate spheres" of power, for, if it had such power, it would inevitably override the independence of the States in violation of the federal plan of the Constitution [40]—had provided the ground for the Court's decision in *Collector* v. *Day*, 11 Wall. 113 (1871), to which Blair and many others referred,[41] in which the Court held that the Federal Government could not subject the salary of a state officer to a general income tax. Although *Day* and *Dennison* were the only Supreme Court cases setting a limit on the enumerated powers of the Federal Government, a series of state supreme court cases [42] in the mid-1860's had invalidated a federal tax on the process of state courts for the same reasons *Dennison* had invalidated the Act of 1793 and these cases were cited with approval by opponents of the amendment.[43]

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[39] Representative Farnsworth, for example, stated the holding of *Dennison* without mentioning it by name. See Globe, at 799.

[40] This is the principle of *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), applied to protect States from federal interference in the same manner the Federal Government was protected from state interference.

[41] See, *e. g.*, Globe, at 764 (Sen. Davis); *id.*, at 764, 772 (Sen. Thurman); *id.*, at 777 (Sen. Frelinghuysen); *id.*, at 788–789 (Rep. Kerr) (reciting logic of *Day*); *id.*, at 793 (Rep. Poland); *id.*, at 799 (Rep. Farnsworth) (also reciting logic of *Day*).

[42] *Warren* v. *Paul*, 22 Ind. 279 (1864); *Jones* v. *Estate of Keep*, 19 Wis. 369 (1865); *Fifield* v. *Close*, 15 Mich. 505 (1867); *Union Bank* v. *Hill*, 3 Cold. (43 Tenn.) 325 (1866); *Smith* v. *Short*, 40 Ala. 385 (1867).

[43] See Globe, at 764 (Sen. Davis); *id.*, (Sen. Casserley). See also T. Cooley, Constitutional Limitations *482–*484 (1871 ed.).

Prigg obviously prohibited Congress from insisting that state officers or instrumentalities keep the peace. But it stands for only the narrow proposition for which it was cited by Representative Blair: that the Federal Government cannot compel a state government, agency, or officer to provide a remedy, either executive or judicial, for a federal right. Therefore, equally obviously, *Prigg* has no bearing whatsoever on the question whether a federal court could award damages under § 1 of the 1871 Act against a state agency or officer for a violation of a federal right, since when a federal court makes a damage award under that section, the positive government action required to implement the federal right is carried out by that court, not by an agency or officer of the State.

The limits of the principle of *Dennison* and *Day* are somewhat more difficult to discern as a matter of logic but more apparent as a matter of history. It must be remembered that *Dennison* and *Day* coexisted with vigorous federal judicial enforcement of the Contracts Clause. Thus, federal judicial enforcement of express limits on state power found in the Constitution, at least so long as interpretation of constitutional limits was left in the hands of the judiciary, apparently was seen to create no threat to federalism. Since § 1 of the 1871 Act simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment—a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalities—there is no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 suits against municipalities.

Indeed, opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment. Representative Poland, for example, reasoning from Contract Clause precedents, indicated

that a federal law that sought only to hold a municipality liable for using its authorized powers in violation of the Constitution—which is as far as § 1 of the 1871 Act went—would be constitutional:

> "I presume . . . that where a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever." *Id.*, at 794.

Representative Burchard agreed:

> "[T]here is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties . . . do not have any control of the police . . . ." *Id.*, at 795.

Moreover, if *Dennison* and *Day* are read broadly to prohibit federal courts from directing municipalities or their officers to the extent needed to enforce federal decrees, they would be in conflict with many other cases. The power to enforce decrees against state officers to prevent them from violating the Constitution or to force them to hand over money or property

taken or held in violation of the Constitution was repeatedly exercised by federal courts both before and after 1871, see, *e. g., Osborn* v. *The Bank of the United States*, 9 Wheat. 738 (1820); *Davis* v. *Gray*, 16 Wall. 203, 220 (1871) (collecting cases); *Board of Liquidation* v. *McComb*, 92 U. S. 531 (1876), and, in the same Term in which *Dennison* was decided, the Court held contrary to an expansive reading of *Dennison* or *Day* that federal courts could issue mandamus to municipal officers to enforce judgments in Contract Clause suits, see *Board of Commissioners* v. *Aspinwall*, 24 How. 376 (1861), discussed in Globe, at 751–752. The *Dennison* issue was not argued in *Aspinwall*, but if *Dennison* was meant to create a restriction on the power of the federal judiciary, that restriction would be "jurisdictional" and should have been noted *sua sponte*. Moreover, if *Dennison* established such a limit, it would have overruled *Osborn*, yet that case was repeatedly reaffirmed by this Court after *Dennison* was decided. See, *e. g., Davis* v. *Gray*, *supra*. Indeed, cases applying the principle announced in *Aspinwall* are legion, see n. 32, *supra*, yet in none of them does it appear to have occurred to counsel that the federal courts lacked power to issue decrees because of the federalism principle announced in *Prigg*, *Dennison*, or *Day*. These cases, of course, do not establish that *Prigg-Dennison-Day* did not bar federal judicial decrees against state officers, "but they have much weight, as they show that [the *Prigg-Dennison-Day*] point neither occurred to the bar or the bench; and that the common understanding of intelligent men [was otherwise]." *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 88 (1809) (Marshall, C. J.). In 1879, moreover, when the question of the limits of the *Prigg* principle was squarely presented in *Ex parte Virginia*, 100 U. S. 339, this Court held that *Dennison* and *Day* and the principle of federalism for which they stand did not prohibit federal enforcement of § 5 of the Fourteenth Amendment through suits directed to state officers. See 100 U. S., at 345–348.

That those who voted for § 1 but against the Sherman amendment would not have thought § 1 unconstitutional if it applied to municipalities is also confirmed by considering what exactly those voting for § 1 of the civil rights bill had approved. Section 1 without question could be used to obtain a damage judgment against state or municipal officials who violated federal constitutional rights while acting under color of law.[44] However, for *Prigg-Dennison-Day* purposes, as Blair and others recognized,[45] there was no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State: both were state instrumentalities and the State could be impeded no matter over which sort of instrumentality the Federal Government sought to assert its power. *Dennison* and *Day*, after all, were not suits against municipalities but against *officers* and Blair was quite conscious that he was extending *Prigg* by applying it to municipal corporations.[46] Nonetheless, Senator Thurman, who gave the most exhaustive critique of § 1—*inter alia* complaining that it would be applied to state officers, see Globe, at 217—and who opposed both § 1 and the Sherman amendment, the latter on *Prigg* grounds, agreed unequivocally that § 1 was constitutional.[47] Those who voted for § 1 must similarly have

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[44] See, *e. g.*, Globe, at 334 (Rep. Hoar); *id.*, at 365 (Rep. Arthur); *id.*, at 374–375 (Rep. Lowe); *id.*, at 385 (Rep. Lewis); Globe App., at 217 (Sen. Thurman); *id.*, at 216 (Sen. Sumner). In addition, officers were included among those who could be sued under the second conference substitute for the Sherman Amendment. See Globe, at 805 (exchange between Rep. Willard and Rep. Shellabarger). There were no constitutional objections to the second report.

[45] See Globe, at 795 (Rep. Blair); *id.*, at 788 (Rep. Kerr); *id.*, at 795 (Rep. Burchard); *id.*, at 799 (Rep. Farnsworth).

[46] "[W]e cannot command a state *officer* to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality . . . ." Globe, at 795.

[47] See Globe App., at 216–217, quoted, *infra*, at ~~31–32~~ 33

believed in its constitutionality despite *Prigg*, *Dennison*, and *Day*.

Thus, there is no basis in holdings of this Court, the common understanding of the bar, or the debates to find in *Prigg*, *Dennison*, or *Day* a bar to Federal Government power to enforce the Fourteenth Amendment against the States, or their agents, officers, instrumentalities, or subdivisions, through federal judicial action even though such enforcement would necessarily involve sanctions against officers or instrumentalities who violated that Amendment.

C. Debate on § 1 of the Civil Rights Bill

From the discussion in Part B, *supra*, it is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment. The question remains, however, whether the general language describing those to be liable under § 1—"any person"—covers more than natural persons. An examination of the debate on § 1 and application of appropriate rules of construction shows unequivocally that § 1 was intended to cover legal as well as natural persons.

1. The Substance of the Debate

The civil rights bill was introduced in the House on March 28, 1871 by its author and manager, Representative Shellabarger, and he was the first to explain the function of the first section of the bill:

> "[Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Globe App., at 69.

By extending a remedy to all people, including whites, § 1 went well beyond the mischief to which the remaining sections

of the 1871 Act, including the Sherman amendment, were addressed.

Although he had adverted to difficult questions of constitutional law at the outset of his speech, Representative Shellabarger stated without reservation that the constitutionality of § 2 of the Civil Rights Act of 1866 controlled the constitutionality of § 1 of the 1871 Act, and that the former had been approved by "the supreme courts of at least three States of this Union" and by Mr. Justice Swayne, sitting on circuit,[49] who had concluded "We have no doubt of the constitutionality of every provision of this act." Globe App., at 67. He then went on to describe how the courts would and should interpret § 1:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:
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> "'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.' 1 *Story on Constitution*, sec. 429." Globe App., at 67.

The sentiments expressed in Representative Shellabarger's

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[49] The reference is to *United States* v. *Rhodes*, 27 F. Cas. 785 (CCD Ky. 1866) (Swayne, J.) (No. 16,151).

opening speech were echoed by Senator Edmunds, the manager of the civil rights bill in the Senate:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any state law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution. . . . [Section 1 is] so very simple and really reenacting the Constitution." Globe, at 569.

And he agreed that the bill "secure[ed] the rights of white men as much as of colored men." *Id.*, at 696.

In both Houses, statements of the supporters of § 1 corroborated three points made by its managers: (1) that Congress in enacting § 1 would exercise the entirety of its power under § 5 of the Fourteenth Amendment; (2) that right thinking required a liberal construction of the jurisdiction thus conferred on the federal courts; and (3) that the constitutionality of § 1 followed immediately from the constitutionality of § 2 of the 1866 Act under the enforcement provisions of the Thirteenth Amendment.

Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution." Globe App., at 81. He continued:

> "The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws. . . . [A]nd the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States . . . , as I have shown, the

> citizen had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" *Id.*, at 85.

Representative Perry, commenting on Congress' action in passing the civil rights bill also stated:

> "Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate." Globe, at 800.

Other supporters were quite clear that § 1 of the act extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State refused to carry out the law:

> "But the chief complaint is [that] by a systematic maladministration of [state law], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe that [§ 5 of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.*, at 153.

Importantly for our inquiry, even the opponents of § 1 agreed that it was constitutional and, further, that it represented an attempt to exercise the full power conferred by § 5 of the

Fourteenth Amendment. Thus, Senator Thurman, who gave the most exhaustive critique of § 1, said:

> "This section relates wholly to civil suits. . . . Its whole effect is to give to the Federal Judiciary that which now does not belong to it—*a jurisdiction that may be constitutionally conferred upon it, I grant*, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . . [T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used." Globe App., at 216–217 (emphasis added).

2. The Meaning of the Debate

Since the debates show that Congress intended to exercise its full power under the Fourteenth Amendment and, further, that Congress intended the statute to be construed broadly in favor of persons injured in their constitutional rights, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1. One need not rely on this inference alone, however, for the debates show that Members of Congress might well have understood "persons" to include municipal corporations.

Representative Bingham, for example, in discussing § 1 of the bill, explained that he had drafted § 1 of the Fourteenth Amendment with the case of *Barron* v. *Baltimore*, 7 Pet. 243 (1834), especially in mind. "In that case the *city* had taken private property for public use, without compensation . . . , and there was no redress for the wrong . . . ." Globe App., at 84 (emphasis added). Bingham's further remarks clearly indicate his view that such takings as had occurred in *Barron* would be redressable under § 1 of the bill. See *id.*, at 85.

More generally, and as Bingham's remarks confirm, § 1 of the bill would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy coextensive with the Fourteenth Amendment and that Amendment unequivocally prohibited uncompensated takings.[50] Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.[51]

In addition, by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Chief Justice Marshall, writing for the Court, denied that corporations "as such" were persons as that term was used in Art. III and the Judiciary Act of 1789.[52] See *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 86 (1809). By 1844, however, the *Deveaux* doctrine was unhesitatingly abandoned:

> "A corporation created by and doing business in a particular state, is to be deemed *to all intents and purposes as a person*, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." *Louisville R. Co.* v. *Letson*, 2 How. 497, 558 (1844) (emphasis added), discussed in Globe, at 751.

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[50] That takings would be covered by § 1 of the Fourteenth Amendment was not merely a pet theory of Rep. Bingham, but the general understanding, can be seen by comparing Story, Commentaries on the Constitution of the United States § 1956 (Cooley ed. 1873).

[51] Indeed the federal courts found no obstacle to awards of damages against municipalities for common-law takings. See *Sumner* v. *Philadelphia*, 23 F. Cas. 396 (CCED Pa. 1873) (No. 13,611) (awarding damages of $2,273.36 and costs of $346.35 against the city of Philadelphia).

[52] Nonetheless, suits could be brought in federal court if the natural persons who were members of the corporation were of diverse citizenship from the other parties to the litigation. See 5 Cranch, at 91.

And only two years before the debates on the Civil Rights Act, in *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts [53] and this fact was well known to Members of Congress.[54]

That the "usual" meaning of the word person would extend to municipal corporations is also evidenced by an Act of Congress, the so-called "Dictionary Act," which had been passed only months before the Civil Rights Act was passed. This Act 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.

Municipal corporations in 1871 were included within the phrase "bodies politic and corporate" [55] and, accordingly, the

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[53] See ~~n. 7 n. 24~~ n. 34, *supra*.

[54] See, *e. g.*, Globe, at 777 (remarks of Sen. Sherman); *id.*, at 752 (remarks of Rep. Shellabarger) ("counties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States.").

[55] See *Northwestern Fertilizing Co.* v. *Hyde Park*, 18 F. Cas. 393, 394 (CCND Ill. 1873) (No. 10,336); 2 Kent's Commentaries *278–*279 (12th O. W. Holmes ed. 1873). See also *United States* v. *Hodson*, 10 Wall. 395, 407 (1870) (the United States described as a body politic); *United States* v. *Maurice*, 2 Brock. 96, 109 (CCxxx 1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a body politic and corporate"). Indeed, the thought that bodies politic and corporate included governments was sufficiently common in 1871 that the draftsmen of the Revised United States Statutes removed the phrase from the Dictionary Act one year later to avoid the inconvenience of requiring words

"plain meaning" of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act. Indeed, a Circuit Judge, writing in 1873 in what is apparently the first reported case under § 1, read the Dictionary Act in precisely this way in a case involving a corporate plaintiff and a municipal defendant.[56] See *Northwestern Fertilizing Co.* v. *Hyde Park*, 18 F. Cas. 393, 394 (CCND Ill. 1873) (No. 10,336).[57]

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limiting the reach of statutes to private corporations. 1 Revision of the United States Statutes 19 (1872).

[56] The court also relied on "principle," noting that there was no discernible reason why persons injured by municipal corporations should not be able to recover. See 18 F. Cas., at 394.

[57] In considering the effect of the Dictionary Act in *Monroe*, however, Justice Douglas, apparently focusing on the word "may," stated: "this definition [of person] is merely an allowable, not a mandatory, one." 365 U. S., at 191. A review of the legislative history of the Dictionary Act shows this conclusion to be incorrect.

There is no express reference in the legislative history to the definition of person, but Senator Trumbull, the Dictionary Act's sponsor, discussed the phrase "words importing the masculine gender may be applied to females," which immediately precedes that definition, and stated:

"The only object [of the act] is to get rid of a great deal of verbosity in our statutes by providing that when the word 'he' is used it *shall* include females as well as males[]." Congressional Globe, 41st Cong., 3d Sess., 775 (Jan. 27, 1871) (emphasis added).

Thus, in Trumbull's view the word "may" meant "shall." Such a mandatory use of the extended meanings of the words defined by the Dictionary Act is also required for it to perform its intended function—to be a guide to "rules of construction" of Acts of Congress. See *id.*, at 775 (Remarks of Sen. Trumbull). Were the defined words "allowable, [but] not mandatory" constructions, as *Monroe* suggests, there would be no "rules" at all. Instead, Congress must have intended the definitions of the Dictionary Act to apply across-the-board except where the Act by its terms called for a deviation from this practice—"[where] the context shows that [defined] words were to be used in a more limited sense." Certainly this is how the *Northwestern Fertilizing* court viewed the matter. Since there is nothing in the "context" of § 1 of the civil rights bill calling for a restricted interpretation of the word "person," the language of that section should

III

This Court has not frequently followed *stare decisis* with the punctiliousness argued for by Bill. Nonetheless, assuming that John Harlan was correct that one seeking to set aside precedent has a heavy burden to bear, that burden is discharged here. In addition, in considering how much weight *Monroe* and its progeny ~~or~~ due, it is useful to keep in mind that no party briefed the municipal liability issue in *Monroe*. Nor, indeed, did anyone brief the issue in *City of Kenosha* or *Moor*. Indeed, petitioners in *Moor* did not even challenge *Monroe*'s holding. See Brief of Petitioner, *Moor* v. *County of Alameda*, at 9. Therefore, with all humility, I suggest that the arguments presented by *amici* here and in Part II, *supra*, are wholly new and go substantially beyond anything so far presented to the Court.

Moreover, I suggest that one can find ambiguity in the congressional debates only by attributing to all Members of Congress, as Bill does, the clearly erroneous beliefs of a few. If, however, one attributes to Congress an intent to apply the then recently announced constitutional doctrine of *Collector* v. *Day*, *supra*, which is the case cited most frequently in the debates, the debates become very clear. When a correct constitutional theory, under which the Sherman amendment was unconstitutional, is available and repeatedly referred to in the debates, I ask what possible justification there can be for assuming that Congress had some other, erroneous constitutional limit in mind?

Even if a majority does not agree with me that *Monroe* should be overruled outright, certainly the error of our ways is sufficiently clear that *Monroe* should not be extended to cover school boards.

The Reconstruction Congress that passed the Civil Rights Act of 1871 did not, of course, directly address the question

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prima facie be construed to include "bodies politic" among the entities that could be sued.

whether quasi-municipal bodies such as school boards were subject to suit under the Act. Indeed, since public education was in its rudimentary stages at the time the Act was adopted, compulsory school attendance being virtually unknown, *Brown* v. *Board of Education*, 347 U. S. 483, 490 (1954), it would have been most surprising had it done so. Given that the Dictionary Act of 1871, enacted only months before the passage of the provision that became § 1983, 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 [the word was] intended to be used in a more limited sense," the only plausible basis for concluding that the Congress that enacted § 1983 did not envision, and would not have approved, school boards being sued under that provision is the reason we found the explicit language of the Dictionary Act unpersuasive in *Monroe*, namely the rejection of the Sherman amendment. With respect to congressional power, there is simply no reason to suppose that the 1871 Congress would have thought itself at a greater disability in acting to impose obligations on, and reach the conduct of, quasi-municipal bodies than it was in regulating the municipalities themselves. Thus the demonstration in Part II that the rejection of the Sherman amendment cannot be interpreted as evincing a firm congressional decision to place municipalities outside the ambit of § 1983 applies with at least equal force to the question whether school boards are subject to suit under that section.

Nor do our cases compel us to exempt school boards from suit. Far from it. As we and anyone in this country who reads the newspapers knows, the situation is precisely the contrary. We have, after plenary consideration, decided the merits of well over a score of cases brought under § 1983 in which the principal defendant was a school board.[58] In a

[58] *Milliken* v. *Bradley*, — U. S. — (1977); *Dayton Board of Education* v. *Brinkman*, — U. S. — (1977); *Vorchheimer* v. *School District*

number of these cases, § 1983, coupled with 28 U. S. C. § 1343, was the only alleged basis of jurisdiction.[59] Moreover, the relief sought against the school boards in these cases has not been limited to declaratory and injunctive relief. In *LaFleur*'s companion case, *Cohen* v. *Chesterfield County School Board*, 414 U. S. 632 (1974), a case brought solely under § 1983, 414 U. S., at 638, the petitioning plaintiff sought an award of backpay and attorney's fees against the school board as well as declaratory and injunctive relief. In none of these cases did we even intimate that school boards could not be sued because they are not "persons" within the meaning of that statute. Indeed, I believe that Lewis capsuled our understanding about the suability of school boards under § 1983 is

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of Philadelphia, 430 U. S. 703 (1977); *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976); *Milliken* v. *Bradley*, 418 U. S. 717 (1974); *Bradley* v. *School Board of the City of Richmond*, 416 U. S. 696 (1974); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974); *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973); *San Antonio School District* v. *Rodriguez*, 411 U. S. 1 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Northcross* v. *City of Memphis Board of Education*, 397 U. S. 232 (1970); *Carter* v. *West Feliciana Parish School Board*, 396 U. S. 226 (1969); *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Tinker* v. *Des Moines Independent School District*, 393 U. S. 621 (1969); *Monroe* v. *Board of Commissioners*, 391 U. S. 450 (1968); *Raney* v. *Board of Education*, 391 U. S. 443 (1968); *Green* v. *County School Board of New Kent County*, 391 U. S. 430 (1968); *District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963); *Goss* v. *Board of Education*, 373 U. S. 683 (1963); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Bush* v. *Orleans Parish School Board*, 365 U. S. 569 (1961); *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

[59] *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 636 (1974); *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973), Appendix, at 4a; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), Appendix, at 465a; *Northcross* v. *City of Memphis Board of Education*, 397 U. S. 232 (1970), Petition for Certiorari, at 3; *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 504 (1969); *McNeese* v. *Board of Education*, 373 U. S. 668, 671 (1963).

his discussion of the nature of school desegregation suits in *Milliken II*, where he observed:

> "Normally, the plaintiffs in this type of litigation are students, parents and supporting organizations who desire to desegregate a school system alleged to be the product, in whole or in part, of *de jure* segregative action by the public school authorities. *The principal defendant is usually the local board of education or school board.* Occasionally the state board of education and state officials are joined as defendants." *Milliken* v. *Bradley*, — U. S. —, — (1977) (45 U. S. L. W. 4873, 4880 (June 27, 1977)) (POWELL, J., concurring) (emphasis added).

Although we did not expressly address the jurisdictional question of a school board's amenability to suit under § 1983 in our previous decisions, too much water has flowed under the bridge to consider the issue anything but settled. As Chief Justice Warren said in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 307 (1962):

> "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio* . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over [33] years."

Over a century and a half earlier, Chief Justice Marshall rendered a similar admonition. In holding that a corporation was capable of bringing suits in federal court under the Judiciary Act of 1789, he reasoned:

> "Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the

> bench; and that the common understanding of intelligent men is [that jurisdiction exists]." *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 88 (1809).

Congressional action taken in the wake of our decisions, far from showing any dissatisfaction with our notion that school boards can be sued under § 1983, has presumed that school boards are subject to suit under the statute and approved that principle. In 1972, spurred by a finding "that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access," 20 U. S. C. § 1601 (a) (1970 ed., Supp. V), Congress passed the 1972 Emergency School Act. Section 643 (a)(1)(A)(i) of that Act, 20 U. S. C. § 1605 (a)(1)(A)(i) (1970 ed., Supp. V), authorizes the Assistant Secretary

> "to make a grant to, or a contract with, *a local educational agency* [*w*]*hich is implementing a plan which has been undertaken pursuant to a final order issued by a court of the United States* . . . which requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of such agency, or otherwise requires the elimination or reduction of minority group isolation in such schools." (Emphasis added.)[60]

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[60] A "local educational agency" is defined by 20 U. S. C. § 1619 (8) as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, public elementary or secondary schools in a city, county, township, school, or other political subdivision of a State, or a federally recognized Indian reservation, or such combination of school districts, or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools, or a combination of local educational agencies; and includes any other public institution or agency having administrative control and direction of a public elementary or secondary school and where responsibility for the control and direction of the activities in such schools which are to be assisted under this chapter is vested in an agency subor-

Congress thus clearly recognized that school boards were often parties to federal school desegregation suits. Since virtually every federal school desegregation case brought up until the time the 1972 Emergency School Act was passed was brought, at least in part, under § 1983, it simply cannot be said that the federal desegregation suits Congress had in mind were not brought under that provision. In § 718 of the Act, 20 U. S. C. § 1617, Congress gave its explicit approval to the institution of federal desegregation suits against school boards—presumably under § 1983. That section provides:

> "Upon the entry of a final order *by a court of the United States against a local education agency* . . . for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis added.)

Two years later, Congress found that "the implementation of desegregation plans that require extensive student transportation has, in many cases, required *local educational agencies* to expand [*sic*] large amounts of funds, thereby depleting their financial resources . . . . 20 U. S. C. § 1702 (a)(3) (1970 ed., Supp. V). (Emphasis added.) Congress did not respond by declaring that school boards were not subject to suit under § 1983 or any other federal statute,[61] "but simply

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dinate to such a board or other authority, the Assistant Secretary may consider such subordinate agency as a local educational agency for purpose of this chapter."

[61] Indeed, Congress expressly reiterated that a cause of action, cognizable in the federal courts, exists for discrimination in the public school

[legislated] revised evidentiary standards and remedial priorities to be employed by the courts in deciding such cases." Brief for National Education Assn. and Lawyers' Committee for Civil Rights Under Law, at 15–16.

Congress' most recently legislated in light of the fact that school boards have long been deemed "persons" within the meaning of § 1983 in enacting the Civil Rights Attorney's Fees Award Act of 1976, 42 U. S. C. A. § 1988. That act allows the award of attorney's to the prevailing party, other than the United States, in a number of civil rights actions, including "any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title [42 U. S. C.] . . . ." The Senate Report on the Act observed:

> "[D]efendants in these cases are often state or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is named as a party)."

Both the Senate and House Reports cited with approval a number of cases brought under § 1983 in which a school board

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context. 20 U. S. C. §§ 1703, 1706, 1708, 1710, 1718. The Act assumes that school boards will usually be the defendants in such suits. For example, § 211 of the Act, 20 U. S. C. § 1710 provides:

"The Attorney General shall not institute a civil under section 1706 of this title [which allows for suit by both private parties and the Attorney General to redress discrimination in public education] before he—

"(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part [the prohibitions against discrimination in public education]."

Section 219 of the Act, 20 U. S. C. § 1718, provides for the termination of court ordered busing "if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof."

was the primary defendant.[62] Congress was thus well aware, as it was in passing the 1972 Emergency School Aid Act and the Equal Educational Opportunities Act of 1974, that school boards and other local governmental bodies could be, and very often were, sued under § 1983. In passing the Civil Rights Attorney's Fees Award Act of 1976, Congress affirmatively built upon this principle and displayed its willingness to hold those bodies liable for monetary as well as declaratory and injunctive relief.

Just as Congress' passage of legislation premised on the assumption that school boards are properly the subject of civil rights suits, the vast majority of which are brought under § 1983, bespeaks its acceptance of that notion, so too does its persistent refusal to enact legislation limiting the jurisdiction of the federal courts over school boards. During the heyday of the furor over busing, both the House and the Senate refused to adopt bills that would have removed from the federal courts jurisdiction

> "to make any decision, enter any judgment, or issue any order requiring any *school board* to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any *school board* to transport any students from public school to another public school or

[62] The Senate Report cited *Bradley* v. *School Board of the City of Richmond*, 416 U. S. 696 (1974), for the proposition that under the Act, counsel's fees could be awarded *pendente lite*. S. Rep. No. 94–1011, at 5. The Report also cited with approval several lower court cases in which attorney's fees were awarded against school boards in actions brought under § 1983. *Ibid.* The House Report, in addition to approvingly citing *Bradley*, H. R. Rep. No. 94–1558, at 4 nn. 6, 8, and *Northcross* v. *Memphis Board of Education*, 412 U. S. 427 (1973), *id.*, at 6, 9, observed: "Section 1983 is utilized to challenge official discrimination, such as racial segregation imposed by law. *Brown* v. *Board of Education*, 347 U. S. 483 (1954)." *Id.*, at 4.

> from one place to another place or from one school district to another school district or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any *school board* to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any *school board* from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract." S. 179, 93d Cong., 1st Sess., § 1207 (1973); H. R. 159, 92d Cong., 1st Sess., § 1207 (1971) (emphasis added).

Other bills designed either completely to remove the federal courts from the school desegregation controversy, S. 287, 93d Cong., 1st Sess. (1973), or to limit the ability of federal courts to subject school boards to remedial orders in desegregation cases, S. 619, 93d Cong., 1st Sess. (1973); S. 179, 93d Cong., 1st Sess., § 2 (a) (1973); H. R. 13534, 92d Cong., 2d Sess., § 2922 (1972), have similarly failed.

In sum, support for the proposition that school boards are not "persons" subject to suit under § 1983 cannot be found in the congressional understanding at the time § 1983 was passed, our subsequent construction of that provision, or the congressional response to our decisions. To the contrary, each of these considerations compels precisely the opposite conclusion. The only possible justification for holding that school boards cannot be sued under § 1983 is a desire for some modicum of consistency with *Monroe*'s holding barring § 1983 suits directly against municipalities. Yet such an outcome stretches *stare decisis* beyond its breaking point by extending a clearly

erroneous decision at the price, as John said at Conference, of making ourselves "look like fools."

IV

The following practical consequences flow from the preceding examination and analysis of § 1983. Quasi-municipal bodies such as school boards at the very least, and, ideally, municipalities themselves as well, may be sued directly under § 1983 for both monetary and injunctive relief when the municipality or quasi-municipal body bears a significant degree of responsibility for a constitutional deprivation. The most clear-cut cases are those in which the unconstitutional action is taken pursuant to a municipal ordinance or regulation. Because unwritten practices and predilections may, by force of time and consistent application, crystalize into official policy, these too may provide a basis for direct suit against municipal and quasi-municipal bodies. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–169 (1970).

The cornerstone of this approach is that a municipal or quasi-municipal body may be directly sued under § 1983 for any relief necessary to redress a constitutional deprivation when it bears some blame or fault for the constitutional infringement.[63] Conversely, where the body bears no signifi-

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[63] In *Rizzo* v. *Goode*, 423 U. S. 362 (1976), we recognized that fault is a crucial factor in determining whether relief may run against a party for its alleged participation in a constitutional tort. Distinguishing the relief approved by the lower courts in the case at hand from that sanctioned by this Court in school desegregation cases such as *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and *Brown* v. *Board of Education*, 347 U. S. 483 (1954), JUSTICE REHNQUIST explained:

"Respondents . . . ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such

cant responsibility for the harm suffered by a § 1983 plaintiff, it should not be vicariously liable to suit under the doctrine of respondeat superior: for such liability without fault is precisely analogous to the liability imposed by the Sherman amendment, which the 1871 Congress refused to impose. This Court recognized as much in *Moor*, where we observed that "Congress did not intend, *as a matter of federal law*, to impose vicarious liability on municipalities for violations of federal civil rights by their employees." 411 U. S., at 710 n. 27 (emphasis in original).[64]

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as *Swann* and *Brown* were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constiutional rights to a unitary school system. They were administrators and school board members who were found by their *own* conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. 423 U. S., at 377 (emphasis in original).

Had the Mayor and Police Commissioner of Philadelphia been responsible for the constitutional deprivations, as were the school boards in *Swann* and *Brown*, appropriate relief could have ordered against them.

For purposes of a defendant's amenability to suit, this approach treats all constitutional violations perpetrated by a municipal or quasi-municipal body, consistently, without regard to the type of relief that is sought to redress them. Bill, on the other hand, would permit suits against municipal officials in their official capacity where the relief requested is injunctive only, and would bar such suits only where monetary relief is sought. This approach would resurrect precisely the type of inconsistency we condemned in *Kenosha*.

[64] Most lower courts confronted with the issue have also found the doctrine of respondeat superior inapplicable to a § 1983 action. See Note, Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1207 (1977); Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L. J. 1483, 1533–1534 (1977). As the Seventh Circuit recently with respect to monetary relief:

"We are not aware of any decision which holds a local government entity liable in money damages for the constitutional deprivations committed by its agents, independently of any official policy. The principle of

Thus, municipal and quasi-municipal entities, like governmental officials, must bear responsibility for their unconstitutional acts. Where injunctive relief is sought, the effect of this doctrine on extant law will be negligible. Virtually all decisions since *Moor* have read that case, in effect, simply as announcing a rule of pleading that prohibits the issuance of injunctive relief directly against a municipality, and have permitted any injunctive relief necessary to remedy a constitutional violation to issue against the governmental official responsible for formulating or implementing the unconstitutional act or policy. Where monetary damages are sought against a municipal body under § 1983 to redress a constitutional violation, however, the matter is a bit more complicated.

Under cases such as *Wood* v. *Strickland*, 420 U. S. 308 (1975), and *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), many governmental officials are entitled to a qualified good-faith immunity, which is, in effect, a defense. At first blush, there would appear to be little reason to hold municipal and quasi-municipal bodies, as such, to a higher standard for safeguarding constitutional rights than the standard the officials who comprise those bodies and formulate their policies are held to. This initial impression is buttressed by the fact that the common law generally afforded municipal bodies immunity in the performance of their "governmental" functions [65] coupled with the approach we have consistently taken in determining whether and to what extent a given defendant is entitled to immunity in a § 1983 action—namely "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pacht-*

respondeat superior has not been applied under § 1983, although it must be noted that the opportunity to apply it to municipal bodies was foreclosed by the statutory interpretation that such bodies were not subject to § 1983 liability." *McDonald* v. *State of Illinois*, 557 F. 2d 596, 604 (CA7 1977).

[65] See 18 E. McQuillin, Municipal Corporations § 53.24 (3d ed. 1963).

man, 424 U. S. 409, 421 (1976). However, for two reasons I believe that it is both unwise and unwarranted, at this point, to announce a flat rule that municipal and quasi-municipal bodies are entitled to precisely the same type of immunity afforded governmental officials under *Wood* and *Scheuer*. First, the common law of municipal immunity "[f]or well over a century . . . has been subjected to vigorous criticism." W. Prosser, Handbook of the Law of Torts 984 (4th ed. 1971). As a consequence, there has been "a minor avalanche of decisions repudiating municipal immunity" that portends "a radical change in the law. *Id.*, at 985. Second, the policy considerations that underlie the doctrine of municipal immunity differ significantly from the concerns we identified as the source of the qualified good-faith immunity recognized in *Scheuer*. Neither of those concerns—"(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [or] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good" [66]—seems particularly poignant where the § 1983 defendant is a municipal or quasi-municipal body. With respect to the first concern, it could be argued that, far from being unjust, it is quite fair to saddle a governmental entity that has harmed an individual with the responsibility for rectifying that harm; for this spreads the cost of the unconstitutional action among the members of the polity—those who reap the benefits of the municipal body's actions and who are ultimately responsible for them.[67] With respect to the second concern, "the risk that imposing liability unqualified by an immunity or good-faith defense upon municipalities

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[66] *Scheuer* v. *Rhodes*, 416 U. S. 232, 240 (1974).

[67] See Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 956–958 (1976); Note, Vicarious Liability Under Section 1983, 6 Ind. L. Rev. 509, 515 (1973).

would deter their officials from conscientiously executing their public duties seems much more attenuated than the risk attendant to imposing such liability upon the officials themselves." Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 957 (1976) (a journal whose wisdom Bill apparently recognizes). Indeed, it might even be that the imposition of liability directly on governmental bodies could have a beneficial effect on performance by providing responsible officials with an incentive to correct abuses.

Given these considerations, the most judicious course is clearly to permit the lower courts to grapple with the question of the nature of the immunity municipal and quasi-municipal bodies are entitled to when sued for monetary relief under § 1983. Cf. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 389, 397–398 (1971). Only after the issue has received sufficient ventilation and percolation in the lower courts will it be meet for our consideration.

APPENDIX

As proposed, the Sherman amendment was as follows:

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be com-

> mitted shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs, and interest, from any person or persons engaged as principle or accessory in such riot in an action in any court of competent jurisdiction." Globe, at 663.

The complete text of the conference substitute for the Sherman amendment is:

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous conditions of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the

case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish; and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment." Globe, at 755.