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

From: Mr. Justice Powell

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1914

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

[May —, 1978]

MR. JUSTICE POWELL, concurring.

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

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

I

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

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

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

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

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

defeat of the Sherman proposal, none supports *Monroe's* observation that the 42d Congress was fundamentally "antagonistic," 365 U. S., at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation. Opponents in the Senate appear to have been troubled primarily by the proposal's unprecedented lien provision, which would have exposed even property held for public purposes to the demands of § 1983 judgment lienors. Opinion of the Court, *ante,* at 14 n. 30. The opposition in the House of Representatives focused largely on the Sherman Amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces. *Ante,* at 20–22.[2]

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

[2] If in the view of House opponents, such as Representatives Poland, Burchard, and Willard, see opinion of the Court, *ante,* at 20–21, a municipality obligated by state law to keep the peace could be held liable for a failure to provide equal protection against private violence, it seems improbable that they would have opposed imposition of liability on a municipality for the affirmative implementation of policies promulgated within its proper sphere of operation under state law. Such liability is premised not on a failure to take affirmative action in an area outside the contemplation of the state-law charter, but on the consequences of activities actually undertaken within the scope of the powers conferred by state law.

ernment employer to be *exclusively* liable for resulting constitutional injury.[3]

As elaborated in Part II of today's opinion, the rejection of the Sherman Amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity, but as a limitation of the statutory ambit to actual wrongdoers, *i. e.*, a rejection of *respondeat superior* or any other principle of vicarious liability. Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity, see *Wood* v. *Strickland,* 420 U. S. 208 (1975); *Procunier* v. *Navarette,* No. 76-446, — U. S. — (1978). Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.

II

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

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[3] The view taken today is consistent with the understanding of the 42d Congress that unless the context revealed a more limited definition, "the word 'person' may extend and be applied to bodies politic and corporate . . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. It also accords with the interpretation given the same word when it was used by Senator Sherman in the antitrust legislation of 1890 bearing his name. See *Lafayette* v. *Louisiana Power & Light Co.,* No. 76-864, — U. S. — (1978) (plurality opinion); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 396 (1906); cf. *Pfizer, Inc.* v. *Government of India,* No. 76-749, — U. S. — (1978)

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

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

Nor is this the usual case in which the Court is asked to overrule a precedent. Here considerations of *stare decisis* cut in both directions. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. On the other hand, many decisions of this Court have been premised on the amenability of school boards and similar entities to § 1983 suits.

In *Monroe* and its progeny, we have answered a question that was never actually briefed or argued in this Court—whether a municipality is liable in damages for injuries that are the direct result of its official policies. "The theory of the complaint [in *Monroe* was] that under the circumstances [t]here alleged the City [was] liable for the acts of its police officers, by virtue of *respondeat superior.*" Brief for Petitioners. O. T. 1960, No. 39, p. 21.[5] Respondents answered that adoption of petitioners' position would expose "Chicago and every other municipality in the United States . . . to Civil Rights liability through no action of its own and based on

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Griffin v. *Breckenridge,* 403 U. S. 88 (1971); *Boys Market* v. *Retail Clerks Union,* 398 U. S. 235 (1970); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406–407 n. 1 (1932) (Brandeis, J., dissenting).

[5] The District Court in Monroe ruled in the municipality's favor, stating: "since the liability of the City of Chicago is based on the doctrine of *respondeat superior,* and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself." Record, O. T. 1960, No. 39, p. 30. The Court of Appeals affirmed for the same reason. 272 F. 2d 365–366 (CA7 1959).

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

action contrary to its own ordinances and the laws of the state it is a part of [*sic*]." Brief for Respondents, *supra*, p. 26. Thus the ground of decision in *Monroe* was not advanced by either party and was broader than necessary to resolve the contentions made in that case.[6]

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

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

This line of cases—from *Monroe* to *Kenosha*—is difficult to reconcile on a principled basis with a parallel series of cases in which the Court has assumed *sub silentio* that some local

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

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

government entities could be sued under § 1983. If now, after full consideration of the question, we continue to adhere to *Monroe,* grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction over school boards. See opinion of the Court, *ante,* at 3 n. 5. Since "the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards," *ante,* at 36, the conflict is squarely presented. Although there was an independent basis of jurisdiction in many of the school board cases because of the inclusion of individual public officials as nominal parties, the opinions of this Court make explicit reference to the school board party, particularly in discussions of the relief to be awarded, see, *e. g., Green* v. *County School Board,* 391 U. S. 430, 437-439, 441-442 (1968); *Milliken* v. *Bradley,* 433 U. S. 267, 292-293 (1977) (POWELL, J., concurring in the judgment). And, as the Court points out, *ante,* at 36-39, Congress has focused specifically on this Court's school board decisions in several statutes. Thus the exercise of § 1983 jurisdiction over school boards, while perhaps not premised on considered holdings, has been longstanding. Indeed, it predated *Monroe.*

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

Cf. *Edelman* v. *Jordan*, 415 U. S. 651 (1974).* Moreover, the rationale of *Kenosha* would have to be disturbed, to avoid closing all avenues under § 1983 to injunctive relief against constitutional violations by local government. The Court of Appeals in this case suggested that we import, by analogy, the Eleventh Amendment "fiction" of *Ex parte Young* into § 1983, 532 F. 2d 259, 264–266 (CA2 1976). That approach, however, would create tension with *Kenosha* because it would require "a bifurcated application" of "the generic word 'person' in § 1983" to public officials "depending on the nature of the relief sought against them." 412 U. S., at 513. A public official sued in his official capacity for carrying out official policy would be a "person" for purposes of injunctive relief, but a non-"person" in an action for damages. The Court's holding avoids this difficulty. See *ante*, at 30 n. 55.

Finally, if we continued to adhere to a rule of absolute municipal immunity under § 1983, we could not long avoid the question whether "we should, by analogy to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983 . . . ." *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 278 (1977). One aspect of that inquiry would be whether there are any "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens, supra*, at 396, such as an "explicit congressional declaration that persons injured by a [municipality] may not recover money damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress," *id.*, at 397. In light of the Court's persuasive re-examination in

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*To the extent that the complaints in those cases asserted claims against the individual defendants in their personal capacity, as well as official capacity, the Court would have had authority to award the relief requested. There is no suggestion in the opinions, however, that the practices at issue were anything other than official, duly authorized policies.

today's decision of the 1871 debates, I would have difficulty inferring from § 1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today.[9]

III

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

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