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

From: Mr. Justice Rehnquist

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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.

[April —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

Seventeen years ago, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a "person" within the meaning of 42 U. S. C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at least three separate occasions. *Aldinger* v. *Howard*, 427 U. S. 1 (1976); *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973); *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). See also *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274, 277–279 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961, and a single footnote, *ante*, at 31 n. 57, brushing aside the doctrine of *stare decisis*. Because I cannot agree that this Court is "free to disregard these precedents," which have been "considered maturely and recently" by this Court, *Runyon* v. *McCrary*, 426 U. S. 160, 186 (1976) (POWELL, J., concurring), I am compelled to dissent.

I

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

Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis:

> "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnett* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (dissenting opinion) (footnotes omitted).

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

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

The Court does not suggest that this standard has been satisfied, but rather implies that in certain circumstances it need not be applied. *Ante*, at 31 n. 57. The cases relied upon by the Court are manifestly inapposite. In *Girouard* v. *United*

States, 328 U. S. 61, 70 (1946), the Court explicitly noted that "the affirmative action taken by Congress in 1942 negatives any inference that might otherwise be drawn from its silence." By contrast, the Court today points to no affirmative action of the Congress which is in any way inconsistent with the holding in *Monroe*. Likewise, in *Continental T. V., Inc.* v. *G. T. E. Sylvania, Inc.*, 433 U. S. 36 (1977), the Court overruled a recent precedent which was inconsistent with an established line of earlier cases. The Court acknowledged that it need not adhere "to the latest decision, however recent or questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.*, at 58 n. 30, quoting *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). The Court today does not, and indeed cannot, suggest that *Monroe* is in any way inconsistent with previously established authority.

Most disturbing, however, is the Court's suggestion that it has some special competence to devise principles of law in the field of civil rights legislation. As the Court's citations suggest, *ante*, at 31 n. 57, we have exercised such authority in the fields of admiralty and labor law. In admiralty, such a practice is appropriate, because "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975), quoting *Fitzgerald* v. *United States Lines, Co.*, 374 U. S. 16, 20 (1963). Even in this field, the will of Congress, where expressed, is controlling. *Mobil Oil Corp.* v. *Higginbotham*, No. 76–1726. Likewise, this Court has undertaken to fashion substantive principles of labor law only because "Congress has indicated by § 301 (a) [29 U. S. C. § 185 (a)] the purpose to follow that course." *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957).

It is simply impossible to maintain that the 42d Congress

indicated any purpose to follow such a course in the construction of § 1983. It beggars the imagination to suppose that the same Reconstruction legislators who had proposed the Fourteenth Amendment for the purpose of overturning this Court's decision in *Scott* v. *Sandford,* 19 How. 393 (1857), see *Afroyim* v. *Rusk,* 387 U. S. 253, 284–285 (1967) (Harlan, J., dissenting), and who truncated this Court's jurisdiction for the purpose of protecting their own legislative authority, *Ex parte McCardle,* 7 Wall. 506 (1869), ever intended that we "take[] upon ourselves, without guidance from Congress, to construe the broad language of § 1983 in light of its history, reason, and purpose." *Ante,* at 31 n. 57. The 42d Congress intended this Court to implement the congressional will, and nothing else.

Indeed, in all of our cases defining the scope of immunity under § 1983, we have explicitly endeavored to be guided by the intent of that Congress. In our earliest effort, *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), we examined the state of the common law of legislative immunity as it existed in 1871, and concluded, "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Id.,* at 376. Likewise, in *Pierson* v. *Ray,* 386 U. S. 547, 554–555 (1967), we observed, "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." We went on to recognize a defense of good faith and probable cause in favor of police officers making an arrest because it was "[p]art of the background of tort liability" in the context of which the 42d Congress had legislated. *Id.,* at 556. The Court later recognized a similar defense for other executive officers in *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), without any suggestion that we were exercising any special competence of our own to shape the substantive law. Indeed, we have only recently rejected such an invitation to

fashion a federal common law of civil rights remedies in *Robertson* v. *Wegmann*, No. 77–178.

Thus, our only task is to discern the intent of the 42d Congress. That intent was first expounded in *Monroe*, and it has been followed consistently ever since. This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference. Indeed, this very year, the Senate has been holding hearings on a bill, S. 35, 95th Cong., 1st Sess. (1977), which would remove the municipal immunity recognized by *Monroe*. 124 Cong. Rec. D117 (daily ed. Feb. 8, 1978). In these circumstances, it cannot be disputed that established principles of *stare decisis* require this Court to pay the highest degree of deference to its prior holdings. *Monroe* may not be overruled unless it has been demonstrated "beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision." *Monroe*, *supra*, at 192 (Harlan, J., concurring). I am satisfied that no such showing has been made.

II

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

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

The Act expressly provided that corporations need not be included within the scope of the word "person" where the context suggests a more limited reach. Not a word in the legis-

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

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

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

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

Thus, it ought not lightly to be presumed, as the Court does today, *ante,* at 28 n. 53, that § 1983 "should prima facie be construed to include 'bodies politic' among the entities that could be sued." Neither the Dictionary Act, the ambivalent state of judicial decisions, nor the floor debate on § 1 of the Act give any indication that any Member of Congress had any inkling that § 1 could be used to impose liability on municipalities. Although Senator Thurman, as the Court emphasizes, *ante,* at 25 n. 45, expressed his belief that the terms of § 1 "are as comprehensive as can be used," * Cong. Globe, 42d Cong., 1st Sess., App., 217, an examination of his lengthy remarks demonstrates that it never occurred to him that § 1 did impose or could have imposed any liability upon municipal corporations. In an extended parade of horribles, this "old Roman," who was one of the Act's most implacable opponents, suggested that state legislatures, Members of Congress, and state judges might be held liable under the

*Senator Thurman's fears notwithstanding, this Court has squarely rejected the view that "Congress in enacting § 1 intended to exercise the entirety of its power to enforce § 1 of the Fourteenth Amendment." *Ante,* at 24. We have previously held in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976), that Congress has the power to authorize suits for damages against the States, but we have likewise held, in *Edelman* v. *Jordan,* 415 U. S. 651, 674–677 (1974), that Congress did not intend to exercise that power in enacting § 1983. See *Fitzpatrick, supra,* at 451–452. These recent precedents describing the limited reach of § 1983 further undermine today's facile assumption that the term "person" was intended to include "bodies politic."

Act. *Ibid.* If, at that point in the debate, he had any idea that § 1 was designed to impose tort liability upon cities and counties, he would surely have raised an additional outraged objection. Only once was that possibility placed squarely before the Congress—in its consideration of the Sherman Amendment—and the Congress squarely rejected it.

The Court is probably correct that the rejection of the Sherman Amendment does not lead ineluctably to the conclusion that Congress intended municipalities to be immune from liability under all circumstances. Nevertheless, it cannot be denied that the debate on that Amendment, the only explicit consideration of municipal tort liability, sheds considerable light on the Congress' understanding of the status of municipal corporations in that context. Opponents of the Amendment were well aware that municipalities had been subjected to the jurisdiction of the federal courts in the context of suits to enforce their contracts, Cong. Globe, 42d Cong., 1st Sess., 789 (remarks of Rep. Kerr), but they expressed their skepticism that such jurisdiction should be exercised in cases sounding in tort:

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

Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented. Admittedly this fact is not conclusive as to whether Congress intended § 1 to embrace a municipal corporation within the meaning of "person," and

thus the reasoning of *Monroe* on this point is subject to challenge. The meaning of § 1 of the Act of 1871 has been subjected in this case to a more searching and careful analysis than it was in *Monroe*, and it may well be that on the basis of this closer analysis of the legislative debates a conclusion contrary to the *Monroe* holding could have been reached when that case was decided 17 years ago. But the rejection of the Sherman Amendment remains instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected. Any inference which might be drawn from the Dictionary Act or from general expressions of benevolence in the debate on § 1 that the word "person" was intended to include municipal corporations falls far short of showing "beyond doubt" that this Court in *Monroe* "misapprehended the meaning of the controlling provision." Errors such as the Court may have fallen into in *Monroe* do not end the inquiry as to *stare decisis;* they merely begin it. I would adhere to the holding of *Monroe* as to the liability of a municipal corporation § 1983.

III

The Court is quite correct that we need not determine today whether municipalities enjoy a more limited immunity under § 1983 now that the absolute immunity recognized by *Monroe* has been abrogated. The Court of Appeals, however, will be required to face this issue squarely on remand. Since the Court has offered gratuitous guidance in this regard, I feel obliged to point out the manner in which its approach differs from that of our earlier cases.

As I have already pointed out, *supra*, at 4–5, this Court has consistently recognized that its task in considering claims of official immunity is "one essentially of statutory construction." *Wood* v. *Strickland*, 420 U. S. 308, 316 (1975). The Court of Appeals must examine the congressional debates and reach its conclusion on the basis of "the background of tort liability," *Pierson*, *supra*, at 556, as it existed at the time § 1983 was

enacted. Thus, it is utterly irrelevant that the doctrine of municipal immunity " '[f]or well over a century . . . has been subjected to vigorous criticism,' " *Ante,* at 37 (citation omitted). The Court of Appeals ought not to consider " 'the trend of judicial decisions,' " *ante,* at 37 n. 65 (citation omitted), but must direct its attention to the intent of the Congress in 1871. In this regard, the Court's conclusion today that the Congress drew no distinction between a municipal government and its officers, *ante,* at 21, should not escape notice.

IV

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

I would affirm the judgment of the Court of Appeals.