To: Mr. Justice Powell
From: Sam Estreicher

February 1, 1978

Re: No. 75-1914, Monell v. Dep't of Social Services

I

WJB's tome may contain precious nuggets of wisdom, but the mode of presentation of his ideas does not permit of easy digestion. His essential point is that Monroe's holding as to municipal immunity must be overruled as an erroneous reading of the legislative history. He is willing to say that a governmental entity should not be vicariously liable for the unauthorized torts of its employees (Memorandum, p.47), and suggests that liability must be premised on the concept of fault. As in Rizzo v. Goode, neither the supervisory official nor the municipal employer is liable --whether in an action for injunctive relief or one for damages-- for the tortious excess of a subordinate acting "under color of" his official position. But both the supervisory official and the municipal employer are subject to liability for conduct as to which they bear a "significant responsibility for the harm suffered by a § 1983 plaintiff." (Memorandum, pp. 46-47). WJB declines to pass, however, on the question of whether the governmental entity may assert a "good faith" defense (Memorandum, p. 50).

I am not going to try to give you a "road map" to WJB's exhaustive and exhausting exegesis. Much of the discussion is unnecessary and confusing; I suggest that you reread the appendix to the NEA amicus brief and the Georgetown L.J. article. His "bottom line" is
that Congress rejected the Sherman Amendment, not out of solicitude for municipal treasuries, but because the proposal imposed a duty upon municipalities to curb private mob violence. This was deemed an unwarranted intrusion by the federal government into an area of primary state competence because the obligation sought to be imposed, addressed to state inaction in the face of private lawlessness, was not based on the mandate of the Fourteenth Amendment. There was also concern with the specific terms of the Sherman proposal, e.g., the apparent imposition of liability without requiring a showing that the municipality knew or should have known of the riotous conduct; and the apparent breadth of the provision for execution of a judgment lien against all of the monies and property of the governmental subdivision, even though the law of judgments at the time recognized an exception for public property and made provision for the continued functioning of government.

II

WHR writes a concise, persuasive piece.
Notwithstanding his superior advocacy, I adhere to my original position.
A. Legislative History

WHR has excerpted a few passages to prove his point that the rejection of the Sherman Amendment evidences an intent "to preserve the financial capacity of municipalities to carry out basic governmental functions...." (Memorandum, pp. 7-8, 10). I have xeroxed a copy of the pages in which these fragments appear to give you a sense
of context. (The remarks relied upon by WHR are boxed off in red squares (and other passages supportive of his cause are sidelined in red). Language which helps to place these remarks in their appropriate setting are sidelined in blue.) Perhaps the best spokesman for WHR's view is Rep. Kerr (Cong. Globe 787-789), but his words were addressed to the specific evils of imposing liability for a municipal failure to prevent private riots, and subjecting all of the resources of a municipality to a judgment lien founded on the nonperformance of this extra-constitutional obligation. The excerpted remarks of Reps. Bingham and Farnsworth are to the same effect.

Almost every one of the leading Republican opponents to the measure expressed his opposition in terms of the unprecedented imposition of a duty to keep the peace which was without basis in the commands of the Fourteenth Amendment. Rep. Bingham opposed the Sherman Amendment, but he deliberately drafted §1(now § 1983) to overrule Barron v. Baltimore, 7 Pet. 243 (1834), which he viewed as a case where "the city had taken private property for public use, without compensation ..., and there was no redress for the wrong...." Cong. Globe App. 84; WJB Memorandum, pp. 33-34. See also Rep. Burchard:

"But there 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." Cong. Globe 795.
Rep. Blair:

"[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." Cong. Globe 795.

Rep. Poland:

"But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by our Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens." Cong. Globe 514.

"We would go as far as [the Senate conferees] chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs." Cong. Globe 804.

I have exercised selectivity in setting out these fragments, but I believe they are representative of the views of the oppositionists.

B. Stare Decisis

I agree with the general proposition that the Court should be hesitant to overrule prior construction of statutes, but this cautionary principle may be overriden in appropriate circumstances. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2549 (1977). This is such a case.

Stare decisis cuts in both directions. On
the one hand, we have a series of rulings holding that municipalities are not "persons" for purposes of § 1983. These were not "considered holdings," however, because the only discussion of the legislative history appears in cases where the plaintiffs sought recovery on a respondeat superior theory; there was no incentive to present a view of the legislative evidence that would have precluded maintenance of their claims. The issues ventilated in the WJB-WHR interchange were simply not briefed on any previous occasion (aside from a short footnote in Morris Ernst's brief for Monroe).

On the other hand, an affirmance of CA2's decision requires a rejection of this Court's sub silentio exercise of jurisdiction over school boards in a great number of cases. WHR concedes that at least two decisions involved claims for money damages. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Although individual defendants were named in addition to the school entity in several of the decisions, the opinions of this Court often made explicit reference to the school-board party, particularly in the sections discussing the relief to be awarded. WHR suggests that some of these latter decisions may have involved independent school districts (Memorandum, pp. 14,16), but the force of this point is lost because, at a later point, he makes clear that every school board, even one that is simply
"the governing body of an incorporated school district separate from the city," is immune from § 1983 liability. (Memorandum, p.21).

It should be noted that the only decision that will have to be squarely overruled is City of Kenosha v. Bruno. There, the Court determined sua sponte that there was no § 1983 jurisdiction to issue an injunction against a municipality for its own failure to hold a due process hearing with respect to the denial of liquor licenses. The municipality was held to be a non-"person" under § 1983 regardless of the nature of the relief being sought. Obviously, no discussion of the legislative history bearing on the distinct proposition that Congress intended liability for a city's own wrongdoing was advanced in that case. Moreover, Kenosha's rationale will have to be disturbed even if CA2 is affirmed. As WJB points out, importation of the Ex parte Young approach requires a "bifurcated" view of the term "person" depending on the nature of the relief being sought. A public official sued in his official capacity, concededly a "person" for purposes of injunctive relief, becomes a non-"person" in a suit for damages. WHR's opinion in Kenosha purports to reject such "bifurcation," but he implicitly approves this device here, in order to preserve the possibility of obtaining injunctive relief from a constitutional violation by state officials.

III

We should try to encourage WJB to avoid
overruling Monroe, but rather to restrict Monroe to its facts. Such a tack may soften the force of WHR's stare decisis attack. We should say that we have not had occasion previously to consider the availability of a § 1983 damages remedy for constitutional violations which are the direct result of a policy of the municipality or school board, rather than simply its failure to curb the unauthorized torts of its employees. There are line-drawing problems, as WHR notes, but this case involves a formal written policy of the school board; it is the clear case. I would also try to encourage WJB to recognize a defense for rights not clearly defined at the time of violation, cf. Procunier v. Martinez. In all likelihood, this maternity leave case does not involve such a clearly defined right. I would reserve decision on the question of whether there is available to a municipality a defense for "good-faith" violations of a clearly defined constitutional right.

If Monroe is not to be reexamined, I agree with WHR that no meaningful distinction can be drawn between school boards and municipalities.

S.E.
to go over the ground. It seems to me the prudent course of the Senate is to adjourn. It is for the Senate at that time to report this and have a new committee of conference, and see if these objections produced will not lead to any new

The PRESIDENT pro tempore. Will the Senator from Vermont agree to the report of the committee of conference upon which question the yeas and nays have been called for?

Mr. MOTT, of Vermont. If that is not agreed to, of course the motion which I made to insist on it and ask for another conference will come up.

Mr. THURMAN. Is the question on the motion of the Senator from California, to concur?

The PRESIDENT pro tempore. The question is on concurrence in the report.

The question being taken by yeas and nays, the result was—yeas 20, nays 26—so follows:


So the report was not concurred in.

The PRESIDENT pro tempore. The Senator from Vermont [Mr. Mott] moves that the Senate further insist on its amendments, and ask for a second committee of conference.

The motion was agreed to—yeas thirty-three, nays not stated.

By previous agreement, the President pro tempore was authorized to appoint the second committee of conference; and Messrs. Cato, Scott, and others were appointed.

FINAL ADJOURNMENT.

Mr. CONKLING. I offer a resolution to lie on the table until I call it up:

Resolved by the Senate, (the House of Representatives concurring), that at eight o'clock, the President of the Senate, and the Speaker of the House of Representatives adjourn their respective Houses without day.

EXECUTIVE SESSION.

Mr. CAMERON. I move that the Senate proceed to the consideration of executive business.

Mr. THURMAN. I move that the Senate adjourn.

Mr. CAMERON. I have a motion before the Senate.

The motion was not agreed to.

The PRESIDENT pro tempore. The question is on the motion of the Senator from Ohio, that the Senate adjourn.

The motion was agreed to.

The PRESIDENT pro tempore. The question recurs on the motion of the Senator from Pennsylvania.

The motion was agreed to; and after fifteen minutes spent in executive session, the doors were reopened, and (at eleven o'clock and fifteen minutes p. m.) the Senate adjourned.

HOUSE OF REPRESENTATIVES.

WEDNESDAY, April 19, 1871.

The House met at twelve o'clock. Prayer by Rev. Dr. Rankin, of Washington, D. C.

On motion of Mr. Blair, of Michigan, the reading of the Journal of yesterday was dispensed with.

ENFORCEMENT OF FOURTEENTH AMENDMENT.

The House resumed the consideration of the report of the committee of conference on the disagreement on the fourteenth amendment, and on the amendments of the Senate to the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes, upon which Mr. Kernan was entitled to the floor.

Mr. KERNAN. Mr. Speaker, it is not my purpose to detain the House by any very lengthy dissertation, but I will as briefly as I can state the reasons why I was unable to concur in the majority of the House in the action taken by the committee of conference on the fourteenth amendment, with the action of the Senate upon that subject was not very material, but that the provision of the bill, as it is now reported to the House, is really an entire reformation of the constitution of the State. From the second disagreement of the House and the two committees require the House to recede. I think it is at this time that the action of the fourth section of the bill shall cease to have validity, and my objection to the action of the committee is this, that it enables the dominant party in Congress, by indirection, by a trick to continue this obnoxious section in operation until the first Monday of December, 1872, instead of suffering it to expire on the 1st day of June, 1872.

This result will be accomplished by the Congress, at the time of the next regular adjournment, by making a recess of the House and Senate, or some other unaccustomed thing, until a day named, instead of an adjournment without day, a recess, for example, until the first Monday of December, 1872. It cannot be said that there has yet arrived an end of "the next regular session of Congress," and therefore the courts will be expected to hold that this obnoxious section continues in force until the first Monday of December, 1872.

The object of this provision is manifestly to enable the majority, the present Administration, the Republican military candidate for renomination and refection to the Presidency, and those who are in power, to maintain and continue that, in an unworthy manner. They want the power of this section will afford in the conduct of the great political campaigns of 1872, the power which they want to retain that power, not for the public welfare, but for personal and selfish, if not utterly unlawful, ends. I could not assent to the continuance of such a law a day longer than by possibility could not be prevented.

The third point of disagreement relates to the repeal of what is called the jury test oath. To the jury test oath the Senate adheres. It is that all persons voting in the Federal courts, as the right to any rights in the courts to require the application of those oaths to jurors to be taken and sworn in. It is a great point gained, I agree, to secure the repeal of that section; but why retain in operation the second section of that law? Is it less obnoxious or less objectionable than the first? Are its purposes any less vicious or oppressive than the purposes of the first? I submit that it is in every sense a mere reenactment of the first section, with this qualification only, that it shall not be used in the States of Missouri, Arkansas, and Tennessee in any case, unless the State shall be in a state of insurrection. It is a great point gained, I agree, to secure the repeal of that section; but why retain in operation the second section of that law? Is it less obnoxious or less objectionable than the first? Are its purposes any less vicious or oppressive than the purposes of the first? I submit that it is in every sense a mere reenactment of the first section, with this qualification only, that it shall not be used in the States of Missouri, Arkansas, and Tennessee in any case, unless the State shall be in a state of insurrection. It is, therefore, in the opinion of the House of Representatives, that the Senate, in good faith, should have repealed this whole section, and that there shall be no stated period of time for the operation of the law; and that it is not necessary to the accomplishment of the purposes that are claimed for the law or to the protection of the rights of citizens.

Contemplate for a moment the practical effect of the proscription contained in this section. It is true, I verily believe, that less than one per cent of the adult white population of Virginia, under this section if enforced by the court, would be competent jurors. It is true, I verily believe, that not even one per cent of the adult white population of the district courts of the United States in that State, could not sit upon a jury in any Federal courts, because of his own color. It is true, I verily believe, that although himself loyal, it is safe to assume that during the war the judge, directly or indirectly, gave some assistance in money or some other way in the prosecution of his own case. So it is throughout the South. It is impossible, if this law be enforced, to organize competent, trustworthy, intelligent, and respectable juries in the north, or even in any part of the South. It is impossible, and that to the sole occupancy of ignorance, viciousness, and incompetence. Can such mean and wicked measure of intimidation be allowed to pass with impunity? Does it not violate the better impulses of all good and humane men? Does it not mock the spirit of magnanimity and its best civilization?

But it may be said that the courts will not enforce this section. They may not; in many cases they may not; but the law is there, and therefore it should be repealed at once. Sincerity in your professions demands its immediate and unconditional repeal.

But I do not mean that some time in reference to this section, I pass to the fourth cause of disagreement between the two Houses. It relates to the extraordinary section of the House, and relates to the section of the House, usually, and I believe properly, called the "Sherman section." Gentlemen remember what that section is as it was sent to us by the Senate and non-concurred in by such an emphatic vote of the House. What it is now, I think I can best indicate by reading it as it goes along, breaking it into paragraphs and interspersing my objections to it in that way. It provides:

That any house, building, scaffold, shop, building, or other place whatever shall be unlawfully or feloniously demolished, pulled down, burned, or otherwise wholly or in part destroyed, by the riotous and tumultuous assembling together of persons with intent to deprive any person of any right of property in the United States, or to deter him or punish him for exercising any right secured to him by the Constitution of the United States, or to deter him or punish him for exercising any right secured to him under the laws of the United States, or to deter him or punish him for exercising any right secured to him under the laws of the United States, shall be liable to the person or persons injured for the full value of such property or for the value of the property saved....

I suggest, first of all, that the grammatical construction of this paragraph is such that it is left in extreme doubt whether the intent which is referred to in a subsequent part of the section is at all applicable to the first paragraph,
which relates to the destruction of houses, tenements, and property. Let any gentleman read it critically and see if the intent is not confused in its application to the portion which he speaks to prevent the person from property. I believe that the true, legal, and judicial construction will entirely exempt that class of cases from that license to commit that kind of property. I say that the statute is in such an application there is no violation by the States either of fundamental principles or of constitutional law. It’s the exercise by the States of its police regulation. The power it obtain from that great fountain of delegated authority in the States. All power not conferred upon the Government by the Constitution is reserved to the States or the people.

It is said that this is borrowed from the common law of England. So it may be. But why go to England for a provision in cases like these? I submit, however, that even there, and in the dark and curiosities of the history of men and the inmost recesses of the laws and statutes for the protection of themselves and property. I say that the original instrument, many centuries ago, and was the result of a very imperfect civilization. I am sure we are not to that extent, therefore, it is entirely without the purview of the Constitution and cannot be a part of it, or any other amendment to the Constitution, or in the text of the Constitution itself.

I refer to that part of the section of which I have read, I wish to ask the attention of the House to the further fact that, for the first time in the history of the United States, it is attempted by a law of Congress to punish criminally a civil division of a State of this Union for crimes or wrongs against the laws of the United States or citizens of the United States within that municipal subdivision of the State. It is said by gentlemen that this is no extraordinary kind of legislation; that there is no act of Congress in which the same or any similar provision has been inserted; that it has been enforced in many of the States of this Union, in several of the New England States, in the State of New York, in and near New York City, in the State of New York, and in the State of Pennsylvania and especially in the cities of Philadelphia. But I assure gentlemen that there is not the least reason to believe that it can be found anywhere, or at any time, to find any example for this bill. There is none. There are some enactments that give remote analogy for its power. It is said that many of the States have have such a conception of an ordinary crime against the person of one’s fellow-man, by transgressing the laws of the State, to the effect that he could not escape from the laws of the State if he could, and cannot be put upon the instant that the laws of the State have been observed, and is not possible to arrest him. And under the operation of the earliest of this class of laws, the chief of which was called the law in the State of Virginia, (Edwin J., chapter 1, page 1) it was provided that if the people of the hundred, called the hundredists, did this promptly rise and make pursuit of him, they should not be held liable for the result of his crime. But it should not forgotten that in all cases the obligation or liability of the inhabitants rested upon the theory that by reason of the public and demonstrative character and manner of the crime, they had such a notice and therefore, as good citizens, it was their duty to take every preventive step at once. The inhabitants were, in other words, chargeable with guilty knowledge, as in the case of the State of Delaware in 1854-55, for the outrages on those cities of the State, under their State laws, made to pay. The practical effect of that system in those very small territorial limits was to make each citizen a conservator of the peace, a sort of bodyguard for the public authority, and thus would enable any number of them to be selected as the exclusive instruments of the Federal Government; that the power of the Federal Government over them is above all other control; that in the very nature of things there can be in these divisions of power no partnership. The power of the Federal Government must be exclusive. The power of the State government within the State limits, and as to the reserved powers of the States, must be exclusive, and in an important sense sovereignty. But what becomes of all this theory under the practical working of this bill?

These systems of local government by counties and cities are adopted by the States as instrumentalities to aid them in the wise and just and just and judicious regulation and protection of the local self-government. It will never do to say that they may be tampered with, impeded, or arrested in the discharge of their duties, as this bill proposes. It would do away with the very existence of the local self-government. It has many times been solemnly decided by the Supreme Court that the agencies adopted by the States for local administration are above the touch or control of any power, are subject only to the
exclusive regulation of the States. There is no safe government in the States or in the Union if Congress can intrude into the States or the States can intrude into Congress. The States themselves, and thus the Union, can be saved by a decision pronounced by the Supreme Court of the United States, declaring that the power to make laws on that subject is not given to Congress by the Constitution. I also take it for granted that if Congress, by any act of law, has created a sheriff in any State, it cannot, by a similar act, create a sheriff in the United States at large. The whole Union is to be regarded as a single State, and the Constitution itself must be respected in every part of that Union.

I shall not occupy the time of the House with any further remarks on the subject of the Constitution, but I shall refer the gentlemen to the able and able-written book of Mr. Calhoun. I shall only say, that I think the power of the Union is not greater than the power of the States. I cannot therefore say that the power of the Union can be exercised without the consent of the States. I think that the power of the Union is limited to the execution of the Constitution, and that the States are not bound to obey the Constitution of the Union.

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April 19

laws of the several States without the 1393 constitutional or civil law, or the persons of any of the inhabitants of the State, which under any form of government, or in which the right to vote at elections for the State legislature is conditioned by religious tests, or by any other test than that of residency or good moral character, shall be deemed to deprive any citizen of the United States of the equal protection of the laws, or to subject any citizen of the United States to the deprivation of any rights secured by the Constitution of the United States; or that any State shall be deprived of its representation in the Congress of the United States, or of any of the powers therein granted to the Congress of the United States, by the deprivation of any right secured by the Constitution of the United States.

Mr. Speaker, how can States exist, how can you enforce the provisions of the Constitution of the United States as States, if you cannot maintain the secessions of the several counties of States? There can no more be a State under the Constitution and laws of the several States without the 1393 constitutional or civil law, or the persons of any of the inhabitants of the State, which under any form of government, or in which the right to vote at elections for the State legislature is conditioned by religious tests, or by any other test than that of residency or good moral character, shall be deemed to deprive any citizen of the United States of the equal protection of the laws, or to subject any citizens of the United States to the deprivation of any rights secured by the Constitution of the United States; or that any State shall be deprived of its representation in the Congress of the United States, or of any of the powers therein granted to the Congress of the United States, by the deprivation of any right secured by the Constitution of the United States.

Mr. Speaker, how can States exist, how can you enforce the provisions of the Constitution of the United States as States, if you cannot maintain the secessions of the several counties of States? There can no more be a State under the Constitution and
gress has the power to make the perpetrators liable to a civil action for damages. Now, sir, if Congress has the power under the Constitution to suppress these outrages, I submit that Congress has the incidental power to adopt such measures as may be conducive to the end desired to be gained, to wit, the suppression of these outrages. And the question is, whether this amendment, making it obligatory on the several states to protect the county and recover damages occasioned by a tumultuous assemblage, is legislation appropriate to the end desired to be attained. The purpose of the House, in the passage of this bill before it went to the Senate, the question is foreclosed that Congress has the power to suppress these outrages or to punish any offense under any appropriate legislation to suppress them.

Then, sir, the question remains whether there is any constitutional inhibition against the exercise of this power provided in the amendment which we are discussing. If there be any—and the gentlemen upon the opposite side of the House have not pointed it out—then must be that clause of the Constitution which prohibits the taking of property without due process of law, or that clause of the Constitution which prevents Congress from appropriating private property for public use without just compensation. Now, sir, it has been adjudged over and over again, in the courts of this country and in the courts of England, that the property of a person is not liable for damages caused by tumultuous assemblages is not, in our country, a violation of these constitutional provisions, and is no violation of the provisions of Magna Charta in the old country. I desire to call the attention of the House to the provisions of the act in the State of New York which have been subjected to the most rigorous criticism and examination in our courts of justice. The language of the act is as follows:

Whenever any building or other real or personal property shall be destroyed or injured in consequence of any riot or tumultuous assemblage, such building or property, or any part thereof, which shall be injured by reason of being in the immediate neighborhood of, or contiguous to the place where the riot or tumultuous assemblage is committed, shall be liable to be recovered by the person or persons whose property shall be so injured, by action in the courts of law. And it is provided that the ordinary laws of the land shall be applicable to the pretended offenses and, in the action for the recovery of damages occasioned by a tumultuous assemblage, the rights of persons and property shall be the same as if the riot or tumultuous assemblage had taken place in a county or city.