

To: Mr. Justice Powell

From: Sam Estreicher

Re: No. 75-1914, Monell v. Dept of Social Services

Date: May 15, 1978

*OK - But lets have*

*a second Chambers*

*Draft*

1. I have incorporated your editorial changes with some minor exceptions. I explain my actions in notational comments on pp. 7 and 9 of your draft. With respect to the question you raise on p. 8, the Young fiction is that the public official is enjoined even though the relief in substance operates against the State. As the Court explained it in Ex parte Young, an individual enforcing an unconstitutional state statute is shorn of any official authority derived from that statute and may be sued as an ordinary person. In later usage, the Ex parte Young fiction has been extended to official-capacity suits.

2. I have also made some additional changes of my own. Most are self-explanatory, if difficult to read on my copy. Insert 5-A is in response to Jim's point that the language on p. 5 was unduly critical of the Court. Insert 6-A offers language that is more precise than the prior text. I have deleted the joinder discussion on p. 7 because in rethinking the point, I have concluded that misjoinder does not raise a jurisdictional question if individual public officials are codefendants.