

To: Mr. Justice Powell Date: October 18, 1977

From: Sam Estreicher

(thoughtful memo)

75-1914 Monell v. Dept. of Social Services

of the City of New York

The petition presents the following question:

Whether local governmental officials and/or local independent school boards are "persons" within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

The "school board" half of the question was reserved in Mt. Healthy School District v. Doyle, 97 S.Ct. 568, 572 (1977).

At the outset, I would like to identify my general outlook on this case. In my view, Monroe's exclusion of municipalities from the coverage of § 1 of the 1871 Civil Rights Act, now 42 U.S.C. § 1983, is a judicial redefinition of the statute not supported by its text or legislative history.

The Monroe Court premised its holding on the House's rejection of the Sherman Amendment, an unprecedented measure which sought to impose vicarious liability on governmental subdivisions for riots and conspiracies of private citizens. There was no attempt to examine the specific legislative intent behind passage of § 1 of the Act, which in terms admits of no exceptions and which passed both houses without significant difficulty. Amici in this case argue,

persuasively that the sponsors of Section 1 intended the measure to be coextensive with the Fourteenth Amendment and "nowhere indicated an intention to rein in its sweep short of the municipal treasury. They knew that the prohibitions of the Fourteenth Amendment . . . applied to municipalities, and they knew that municipalities did not enjoy the protection of the Eleventh Amendment." (Amici Br., App. 15a-16a)

Only a month before the civil rights bill was introduced, Congress enacted a "dictionary act," which provided in pertinent part:

That in all Acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a much more limited sense

Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. J. Douglas in Monroe dismissed the "dictionary act" definition of "person" as "merely an allowable, not a mandatory one." 365 U.S. 167, 191.

The Court's reading of the Sherman Amendment debates displayed little sensitivity to the context in which the remarks were made. The statements of opposition were addressed to a particular proposal, one involving the feature of vicarious liability, the use of the Fourteenth Amendment to reach private conduct, and the imposition of police-power responsibilities on local governments which may not have been

so endowed by their state legislatures. Given the unrestricted sweep of § 1, and the virtual absence of debate over a measure which sought to make actionable the broad commands of the Fourteenth Amendment, and Congress' contemporaneous awareness that the term "person" could be given a special meaning to encompass "bodies politic and corporate," the Sherman Amendment debates provide but marginal support for any generalized intention to exclude state government subdivisions from the reach of § 1983.

My predisposition is to limit Monroe, rather than extend it as far as logic will permit. But if Monroe and its progeny stand for the proposition that the 42d Congress intended a broad exclusion for political subdivisions of a state, whether because of a perceived constitutional barrier to federal power or a desire to shield municipal and county treasuries, I doubt whether a principled stopping point can be found.

Sam would limit Monroe

The logic of Monroe and its progeny leads to certain ironical results. First, § 1983 does not authorize restitutionary or retroactive relief for the actions of state and local governmental units working a constitutional deprivation, even though such actions are fully consistent with, or indeed mandated by, state law. The "under color of" state law debate in Monroe is stood on its head. Section 1983 provides a monetary recovery only for unauthorized state action, the very conduct that J. Frankfurter argued was not

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encompassed by the "under color" language of § 1983. Second, and perhaps more importantly, the absence of any remedy -- outside of the types of employment discrimination proscribed by the 1972 amendments to Title VII -- for authorized state action in violation of constitutional requirements may very well pressure the Court to recognize a Bivens remedy for all constitutional rights made applicable to the states by the Fourteenth Amendment. Reexamination of Monroe's interpretation of § 1983 would seem preferable to the predictable alternative of a judicial implication of a monetary cause of action for all constitutional violations working a compensable harm.

I. Prior Decisions of this Court

Before discussing the question presented, I think it would be useful to set out the Court's previous rulings in this area.

Addressing a claim that the City of Chicago "is liable for the acts of its police officers, by virtue of respondeat superior" (Petrs' Br. 21), namely, a warrantless, early morning raid and ransacking of a black family's home, the Court in Monroe v. Pope, 365 U.S. 167, 189 (1961), held that "Congress did not undertake to bring municipal corporations within the ambit of [§1983]." In the Court's view, the defeat of the Sherman Amendment stemmed from Congress' uncertainty that it had the constitutional power to impose "any obligation upon county and town organizations, the

mere instrumentality for the administration of state law." Cong. Globe, 42d Cong. 1st Sess 804 (Rep. Poland). The Court's ultimate conclusion was that "[t]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1971, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 365 U.S. at 191.^{1/}

Moor v. County of Alameda, 411 U.S. 693 (1973), involved a claim of vicarious liability against a county for injuries allegedly suffered as a result of a wrongful discharge of a shotgun by a county deputy sheriff engaged in quelling a civil disturbance. Petitioners in Moor did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County." Id. at 700. Their argument was that since the county was vicariously liable for the sheriff's actions under state law, 42 U.S.C. § 1988, the general civil rights "borrowing statute," "authorizes the adoption of such state law into federal law in order to render the Civil Rights Acts fully effective, thereby creating a federal cause of action against the County. Id. at 698-99.

J. Marshall, for the Court, declined the invitation. He reasoned that the 1871 Congress' doubts as to "its constitutional power to impose liability on political subdivisions of the States," 411 U.S. at 708, led it to reject

in toto the Sherman Amendment although "even in 1871 municipalities which were subject to suit under state law did not pose in the minds of the legislators the constitutional problem that caused the defeat of the proposal," id. at 710. The Moor Court refused to permit § 1988, particularly in light of its requirement of conformity with federal law, to be used "to accomplish what Congress clearly refused to do in enacting § 1983." Id., at 710.^{2/}

In City of Kenosha v. Bruno, 412 U.S. 507 (1973), for the first time, the Court applied Monroe to conduct which was both authorized under state law and directly - rather than vicariously - responsible for the claimed constitutional injury. Appellee owners of retail liquor establishments sought declaratory and injunctive relief against the cities of Racine and Kenosha because their governing bodies had denied renewal of appellees' one-year liquor licenses without holding a full-blown advisory hearing and because the local licensing scheme was unconstitutional.

Raising the jurisdictional question as its own motion, the Kenosha Court held that a municipality is not a "person" under the Act regardless of the nature of the relief sought. J. Rehnquist stated:

We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest 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.

412 U.S. at 513. ^{3/}

The Court's fourth and last encounter with the question was Aldinger v. Howard, 427 U.S. 1 (1976). Aldinger involved a discharge of a clerk pursuant to a state statute authorizing the appointing county officer to "revoke each appointment at pleasure." The disappointed ex-clerk brought suit against the appointing county officer, his wife, the named county commissioners, and the county. While conceding that counties were not "persons" under § 1983, petitioners argued that the DC could exercise "pendent party" jurisdiction with respect to a claim brought under §§ 1343(3) and 1983.

The Aldinger Court rejected this new effort to circumvent Monroe because "Congress has by implication declined to extend federal jurisdiction over a party such as Spokane County." 427 U.S. at 19. J. Rehnquist recognized that the 1871 Congress was aware of the exercise of federal diversity jurisdiction over municipal corporations, but found that "the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of §1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction." Id. at 17-18 n. 12.

II. Resolution Consistent With Monroe And Its Progeny

A. School Boards

1. Considerations of Stare Decisis.

No. 75-1443 This Court has entertained a great many actions against school boards, and petitioners identify at least eight which were premised solely on § 1983 and 28 U.S. § 1343 (see Petrs' Br. 15 fn.**). However, petitioners do not dispute CA 2's assumption that individual public officials were co-defendants in every one of the cases (id. at 17; CA op., p. A51).^{4/} Thus, there may have been an independent basis for subject matter jurisdiction in each case. Admittedly, at least after Aldinger, there can be no pendent party jurisdiction over a non-"person" for purposes of § 1983. Misjoinder of the school board, however, would not defeat the Court's jurisdiction over the case. In some of the decisions, the Court's language is addressed to the school board defendant, qua school board.^{5/} This language does not constitute an explicit determination of jurisdiction, and can be reinterpreted as simply a directive to the individual defendants, the individuals who would have been responsible for ensuring compliance with the Court's mandate in any event. Of course, even if there were no independent basis of jurisdiction, the Court is "not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio" Brown Shoe Co. v. United States, 370 U.S. 294, 307 (1962). Both in Monroe,

But individuals were co-def's in each

365 U.S. at 191 n. 50 and Kenosha, 412 U.S. at 512, the Court felt no compulsion to adhere to the unreflective exercise of jurisdiction in prior decisions. Accord, Califano v. Sanders, No. 75-1443 (decided February 23, 1977), slip op. 6; Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); United States v. Tucker Truck Lines, 344 U.S. 33, 38 (1952).

Petitioners counter that here, as in Brown Shoe Co., 370 U.S. at 306-07, the exercise of jurisdiction over school boards has been longstanding and notorious. The likelihood of an independent basis of jurisdiction undercuts the argument that the Court may not lightly "disregard the implications of an exercise of judicial authority assumed to be proper for over" 20 years.

The notoreity contention enjoys somewhat more force. Congress has not only been aware of, but has specifically focused on, this Court's school board decisions on a number of occasions (see Petr's Br. 21-23; Amici Br. 15-16). Here, too, the absence of an explicit prior ruling, compare Flood v. Kuhn, 407 U.S. 258 (1972), and the likely presence of an independent basis of jurisdiction in the school board cases cut against considerations of stare decisis. Of course, the Court can take the position that § 1983 jurisdiction over school boards has been implicitly ratified by the prevailing sense of justice today. Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J.,

concurring). However, there are no "considered holdings" of recent vintage, id. at 186-87 (Powell, J., concurring) counseling against reexamination of precedents.

2. Non-independent School Boards.

The Court, if it wishes to, can pretermite the question of whether a truly independent school board, enjoying the taxing and spending powers of an independent government entity, is a "person" within the meaning of § 1983. In this case, however, the New York City Board of Education must be considered an adjunct, a department of, the municipality, and thus within the express holding of Monroe.^{6/}

Although it enjoys an independent corporate existence, N. Y. Educ. Law § 2551, and has some discretion over spending, Davisich v. Marshall, 281 N.Y. 170, 173-74 (1939), the New York City Board of Educ. lacks requisite independence because the city controls the purse strings. The Board enjoys no independent taxing or bond issuing authority. All monies appropriated to the use of the Board, regardless of source, are paid into the municipal treasury. N. Y. Educ. Law § 2580. The Board prepares an annual estimate for the fiscal year which it submits to the Mayor. If the budget exceeds a predetermined point, the excess must be approved by the Board of Estimate, City Council and the Mayor. N.Y. Educ. Law § 2576(5). Thus, a damages award against the Board may require additional, unbudgeted disbursements from the municipal fisc. Moreover, the Board holds title in the name

The School Bd here is a dept. of N.Y. City

of the City. N.Y.C. Charter § 521. Furthermore, although petitioners emphasize the fixed terms and day-to-day independence of Board members, respondents point out that members, who receive their appointments from the Mayor and borough presidents, must make yearly reports to the Mayor and may be removed "for cause." N.Y. Educ. Law § 2590-b(1)(a); N.Y.C. Charter §§ 522-23.

3. Independent School Boards.

Assuming there is requisite independence, the Court must decide the question left open in Mt. Healthy. The circuits are split over the issue.^{7/}

The argument against inclusion of school boards within § 1983 is based largely upon this Court's recognition in Moor, by way of dicta, that "the root of the [Sherman] proposal's difficulties stemmed from serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States." 411 U.S. at 708.

Petitioners urge the Court to limit Monroe-Kenosha to municipalities and counties, on the premise that 1871 Congress was not concerned with immunizing all governmental entities from liability for unconstitutional policies or practices. They note that public school boards were not generally in existence in 1871, see Brown v. Board of Education, 347 U.S. 483, 489-90 (1954), and that this Court has recognized that school boards are uniquely autonomous entities, Milliken v.

Court.
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of any other principle of vicarious liability. In Kenosha,
plaintiffs sought relief from the denial of liquor licenses 12.
v. Bradley, 418 U.S. 717, 741 (1974).

Petitioners offer no principled basis for their suggested limitation, other than the factual argument that the Sherman Amendment addressed only municipalities, counties and perhaps other units with general governmental powers. Moor's reading of the legislative history refutes their contention. If the 1871 Congress believed it lacked the power to legislate with respect to political subdivisions of a state, it is unlikely that it would have drawn a distinction, relevant to congressional power, between subdivisions with general powers and special purpose governmental units. And to the extent Congress was concerned with protecting local treasuries, school boards are likely to have limited powers to borrow and tax, and thus are in even a less flexible position to respond to damage and back-pay awards.

In essence, petrs are calling for a reappraisal of the Sherman Amendment history. This is a call for a more restrictive reading of Congress' rejection of the Sherman proposal, as representing simply (1) a refusal to impose vicarious liability on governmental subdivisions, or (2) a refusal to interfere with a state's internal allocation of its general police powers.

The first view is not tenable after Kenosha and Aldinger. Both cases involved claims for relief which were premised on the conduct of the city and county as governmental entities, not on a theory of respondeat superior

or any other principle of vicarious liability. In Kenosha, plaintiffs sought relief from the denial of liquor licenses by municipal governing bodies. Similarly, in Aldinger, plaintiffs sought damages against the county because its official, acting with the authorization of a state statute, discharged plaintiff from his clerical position without providing a due process hearing.

The second view argues that school boards are suable because they have no police power responsibilities, and thus would not have been subject to the Sherman Amendment even if it had become law. This view, too, does not square with the Court's language in Moor.

In sum, school boards, even those enjoying independent taxing and spending powers, cannot be regarded as "persons" within the meaning of § 1983, unless the Court is willing to adopt a reading of the legislative history of the Sherman Amendment which focuses on the specific features of the Sherman proposal found odious by Congress, Monroe's reading, however, supports a broad principle of immunity for all governmental units.

B. Public Officials Sued in Their Representative Capacity

1. Prior Decisions. Petrs place a great deal of reliance on this Court's affirmance of judgments involving retroactive monetary awards against public officials sued in their representative capacity. See Vlandis v. Kline, 412 U.S. 441, 445 (1973); Cleveland Board of Educ. v. LaFleur, 414 U.S.

632, 638 (1974). However, the Court in these cases was not passing on the lawfulness of the relief. Thus, for example, the Court's reference to "appropriate relief" in LaFleur, 414 U.S. at 638, was simply part of the statement of facts, not a "considered decision" on the permissibility of retroactive recovery in § 1983 suits against public officials sued in their official capacity.

Petrs also refer to Edelman v. Jordan, 415 U.S. 651, 677 (1974), maintaining that the Court would not have passed on the Eleventh Amendment issue, had there been a dispositive statutory ground for denying recovery. The Edelman Court may have acted contrary to the Ashwander doctrine, but here, too, there was no "considered decision." The same must be said for the language in Edelman, that "[t]hough a § 1983 action may be instituted by public aid recipients, such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury." 415 U.S. at 677. This language simply states that a § 1983 action may be brought against public officials in their representative capacity; it does not pass on the permissible scope of § 1983 relief in such a case.

Although there is no "considered decision" on point, there are at least two decisions which touch on the issue. In Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974), the Court held

the Eleventh Amendment to be inapplicable in the context of a § 1983 action against public officials in their personal capacity. Chief Justice Burger noted: "Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the named defendants for what they claim -- but have not yet established by proof -- was a deprivation of federal rights by these defendants under color of state law." Id. at 238. The language suggests that the Eleventh Amendment barrier to monetary recovery from state officials is inapplicable only where the "individual and personal liability" is sought to imposed.

A contrary indication signal is found in Rizzo v. Goode, 423 U.S. 362, 377 (1976). Justice Rehnquist stated:

Respondents, in their effort to bring themselves within the language of Swann, 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 such cases 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 constitutional 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.

Although neither Swann nor Brown involved retroactive monetary awards, the public officials in those cases were sued in their representative capacities. Justice Rehnquist's language suggests that a § 1983 suit against a public official in his representative capacity is not a suit against the governmental entity which the officials represents, but is a suit against the official for conduct violative of the Constitution. On the other hand, the language is fully consistent with the Eleventh Amendment distinction between prospective relief against the individual, which is permitted, and retroactive monetary relief against the public fisc, which is barred. See Edelman v. Jordan.

2. Petr's Position. Scheuer v. Rhodes is of little avail to petrs because, in all likelihood, resps could defeat personal liability by interposing a reasonable, good faith defense in the maintenance of a mandatory maternity leave policy prior to Cleveland Board of Educ. v. LaFleur.^{8/} Rather, petrs argue that municipal officials are indisputably "persons" for § 1983 purposes, and resps may be compelled "to exercise the power that is theirs," Griffin v. School Board of Prince Edward County, 377 U.S. 218, 233 (1964), to remedy their own unconstitutional, albeit authorized, conduct.

Petr's offer the following approach, which they claim is consistent with Monroe:

We contend only that the city official who committed the constitutional violation, and who is thus a proper party defendant in a section 1983 action, must use all his official powers to remedy that violation.

Such a rule will only entail monetary relief where the defendant who engaged in the violation was the chief executive or policy making body of the city or country, or some other high ranking official authorized to direct the expenditure of funds. The primary application of this construction will be in instances where, as here, the highest officials of a city or county adopt or effect an official policy directing, in violation of the constitution, that money be taken or withheld.

This issue, we contend, goes to the remedial authority of a court, not to its jurisdiction. It is not denied that the district court in this action had jurisdiction over both the persons of the mayor and other individual defendants, and over the subject matter of the action Absent some special constraint the federal court would have plenary authority to order the individuals to take any action within their legal and physical ability to remedy the constitutional violation which occurred.

Yes (Petr's Br. 34-35). Amici add that a public official is a "person" under the Act, and Kenosha counsels against a bifurcated interpretation of the statutory term depending on the nature of the relief sought. According to amici, CA 2's analogy to the Eleventh Amendment principles was inapposite. The Court's resolution of competing constitutional provisions in the line of authority beginning with Ex Parte Young and culminating in Edelman v. Jordan is not a line drawn from first principles, and has no applicability to a § 1983 action against municipal officials where no constitutional barrier to retroactive recovery is present.

3. Resps' Position. Resps restate the position of CA 2, as to which there is some division among the circuits.^{9/} J. Gurfein held that retroactive recovery was barred because such relief necessarily implicates the municipal treasury. Thus, the argument goes, the municipal official is merely a nominal defendant, and the real party-in-fact is the municipality, a non-"person" for purposes of § 1983.

4. Analysis. Petrs' position rests on the premise that Congress' rejection of the Sherman Amendment represents a refusal to impose vicarious liability on the subdivisions of a state, and that there was no intention to shield the "wrongdoer" from liability, even if the "wrongdoing" in question is simply a public official's execution of a statute or policy authorized by local law. This view, I would argue, is more consistent with the Congressional intent than Monroe-Kenosha's broad rule of exclusion of state and local government units.

Section 1 of the 1871 Act passed without significant opposition. And the Sherman proposal itself was not completely discarded. In the substitute measure, now 42 U.S.C. § 1986, Congress conditioned liability for failure to prevent private conspiracies to violate civil rights on proof of knowledge of the conspiracy and ability to prevent its occurrence. Even Representative Poland, whose remarks are quoted in Monroe for the proposition that

liability outside of the specific context of the Sherman proposal.

Congress believed it lacked the power to impose liability for civil rights violations on local governments, was willing to impose sanctions for actual wrongdoing. Immediately following the very statement quoted in Monroe, 365 U.S. at 187, Rep. Poland cautioned:

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 to the suppression of those wrongs.

Cong. Globe, 42d Cong., 1st Sess. 804.

An interpretation of the legislative history to permit an action to recover monies withheld or appropriated in violation of the Constitution by local officials acting under the specific authorization of local law would be consistent with the congressional determination to rule out recovery premised on respondeat superior or other principles of vicarious liability, would not involve the unfairness of imposing liability on municipalities who were without legal authority to prevent the unconstitutional conduct, and would be consonant with the view of some of the Congressmen that congressional power extended only to individuals, not governments. Such a view would permit incursions into local treasuries. But given the undisputed availability of prospective relief which may involve significant expenditures (Amici Br. 15), I doubt whether Congress can be said to have intended to erect a complete shield to prevent monetary liability outside of the specific context of the Sherman proposal.

On the other hand, the legislative history as interpreted in this Court's prior rulings supports CA 2's Eleventh Amendment analogy. If the 42d Congress excluded local governments because of a perceived absence of power, CA 2 properly relied Eleventh Amendment principles to bar suits where the municipality or the county is the party-in-fact. In sum, CA 2 should be affirmed unless the Court is willing to reexamine Monroe.

III. A Call for Reexamination of Monroe's Reading of the Legislative History.

The National Educational Ass'n. and Lawyers' Committee for Civil Rights Under Law, as amici curiae, have written a very persuasive brief that Monroe's reading of the legislative history is in substantial measure erroneous. I recommend a perusal of the 32-page appendix to that brief. That discussion has convinced me that Congress did not doubt its power to remedy "wrongdoing" by public officials, whether acting pursuant to explicit statutory direction or "under color of" local law, and there was no general intent to protect municipal treasuries. The expressions of doubt as to legislative power and of concern to limit municipal liability were made in response to the Sherman Amendment. That proposal was defeated because (1) it sought to impose vicarious liability; (2) it concerned private conduct, not state action; (3) it was unfair because many municipalities lacked general police powers; and (4) it interfered with a state's internal delegation of police powers. Those concerns are not present in this case.

I was surprised to learn that a full account of the legislative history of the 1871 Act has not been made previously to this Court. In Monroe, petrs argued that Chicago should be held liable "for the acts of its police officers, by virtue of respondeat superior." (Petrs' Br. 21). Petrs' only reference to the legislative history was to the "dictionary act" and a short footnote on the Sherman Amendment (*id.* at 29, 30 n. 22). Resps, on the other hand, simply argued that municipalities should not be held liable "no matter how innocent of wrongdoing they might be, and no matter what ordinances they might enact, or laws that the state might enact to prevent." (Resps' Br. 26).

Moor v. County of Alameda was also a vicarious liability case. See 411 U.S. at 693, 694, 696, 698, 700, 710 n. 27. Petrs did not take issue with the holding of Monroe, see *id.* at 700. Petrs' legislative history argument was to the effect that Congress' reluctance to impose liability on municipalities should not result in a conferral of an immunity not found in state law. (Petrs' Br. 14-15). Resps argued broadly that Congress intended to exclude public entities. (Resps' Br. 9).

City of Kenosha v. Bruno was the first case not to involve vicarious liability. But there was no one to argue for a limited reading of Monroe, as the Court raised the question of jurisdiction on its own motion. 412 U.S. at 511.

In Aldinger v. Howard, petr did not contest Monroe's

exclusion of counties from the coverage of § 1983. 427 U.S. at 16. The briefs contain no discussion of legislative history.

I recommend a reexamination of the legislative history of the 1871 Act. This would not be for the purpose of overruling the Monroe-Kenosha line of authority. The results in those decisions would not be disturbed by a reversal here on the ground that retroactive relief is available in a suit against public officers in their representative capacity. Rather, reexamination is needed to permit a reformulation of the Congressional concerns which prompted the rejection of the Sherman Amendment.

IV. CONCLUSION

Unless Monroe's reading of the legislative history is reexamined, CA 2's ruling should be affirmed. If the Court is willing to reexamine Monroe's exposition of the reasons why the Sherman proposal met defeat, I would reverse on petrs' second theory. Such an outcome would not require overruling any decision. However, it would remove some of the pressure to extend Bivens beyond the Fourth Amendment context. And it would ensure the availability of complete redress from unconstitutional conduct which violates no state or local law.

FOOTNOTES

FB-2.

^{1/} Neither J. Harlan nor J. Frankfurter addressed the municipalities issue in their separate opinions. 378 U.S. 259 (1964) (Joseph of social services); Inquis v. City of San Antonio, 411 U.S. 723 (1967).

^{2/} The author of Monroe dissented, taking the view that a county is a "person" under § 1983 for "a narrow group of equity actions," 411 U.S. at 723, and that a state action for damages could be appended under § 1988, id. at 725. Beach, 411 U.S. 739 (1967) (county planning board); Johnson v. City, 412 U.S. 507 (1967) (police dept.); United States ex rel. Gittler v. County of, 412 U.S. 507 (1967) (police dept.).

^{3/} J. Douglas again dissented on the same grounds as in his Moor dissent. 412 U.S. 507, 516. United States ex rel. Gittler v. County of, 412 U.S. 507 (1967) (police dept.); United States ex rel. Gittler v. County of, 412 U.S. 507 (1967) (police dept.).

^{4/} I have not checked all the cases cited, but neither petr nor amici have identified a case which was brought against the school board alone. It is also possible that some of the cases involved allegations of § 1331, e.g., Home Tel. & Telegr. Co. v. Los Angeles, 227 U.S. 278 (1913), but I doubt if any inquiry was made as to satisfaction of the jurisdictional amount requirement. Blanton v. State of New York, 489 U.S. 26 (1979) (192 U.S. 132 (1904) (City of New York)).

^{5/} See, e.g., Davis v. Board of Comm'rs, 402 U.S. 33, 35 (1971); Carter v. West Feliciana School Bd., 396 U.S. 226, 228 (1969); Alexander v. Board of Education, 396 U.S. 19, 20 (1969); Green v. School Bd. of New Kent County, 391 U.S. 430, 437-39, 441-42 (1968); Bradley v. School Bd., 382 U.S. 103 (1965). U.S. 566 (1969) (parade board); State of Washington, 384 U.S. 678 (1966) (state tax board).

6/ The lower courts have uniformly held that state and municipal agencies are excluded from § 1983. denied.

Municipal agencies: See, e.g., Monell, 532 F.2d 259 (CA 2 1976) (dept of social services); Musquiz v. City of San Antonio, 528 F.2d 499 (CA 5 1976) (en banc) (firemen and policemen's pension fund); Garrett v. City of Hamtramck, 503 F.2d 1236, 1294 (CA 6 1974) (planning comm'n); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (CA 5 1974) (county planning board); Lehman v. City of Pittsburgh, 474 F.2d 21 (CA 3 1973) (civil service comm'n); Henschel v. Worcester Police Dep't., 445 F.2d 624 (CA 1 1974) (police dep't.) United States ex rel. Gittlemacker v. County of Phila., 413 F.2d 84, 86 n. 2 (CA 3 1969), cert. denied, 396 U.S. 1046 (1970) (city hospital).

State agencies: See, e.g., Vick v. Texas Emp. Comm'n., 514 F.2d 734 (CA 5 1975) (employment comm'n); Sykes v. California, 497 F.2d 197, 201 (CA 9 1974) (motor vehicles bureau); Cheramie v. Tucker, 493 F.2d 586 (CA 5) cert denied, 419 U.S. 868 (1974) (highways dep't); Blanton v. State Univ. of New York, 489 F.2d 377, 382 (CA 2 1973); Curtis v. Everette, 489 F.2d 516 (CA 3 1973), cert. denied, 416 F.2d 995 (1974) (bureau of corrections); Henschel v. Worcester Police Dept., 445 F.2d 624 (CA 1 1971); Sellers v. Regents of Univ. of Calif., 432 F.2d 493 (CA 9 1970), cert. denied, 401 U.S. 981 (1971); Bennett v. Calif., 406 F.2d 36 (CA 9), cert. denied, 394 U.S. 966 (1969) (parole board); Clark v. Washington, 366 F.2d 678 (CA 9 1966) (state bar ass'n).

7/ "Persons" Within § 1983: See Keckeisen v. Indep. School Dist., 509 F.2d 1062, 1065 (CA 8), cert. denied, 423 U.S. 833 (1975); Aurora Educ. Ass'n. v. Board of Educ., 490 F.2d 431, 435 (CA 7), cert. denied, 416 U.S. 985 (1974); Scher v. Board of Educ., 424 F.2d 741, 743-44 (CA 3 1970); cf. Brenden v. Indep. School Dist. 742, 477 F.2d 1292 (CA 8 1973) (state high school league, a non-profit corporation claiming membership of state's 485 public schools.

Excluded from § 1983: See Monell, 532 F.2d at 262-64; Burt v. Board of Trustees of Edgefield City School Bd., 521 F.2d 1201 (CA 4 1975) (county school bd); Adkins v. Duval County School Bd., 511 F.2d 690 (CA 5 1975); cf. Jordan v. Metropolitan Utilities Dist., 498 F. 2d 514 (CA 8 1974).

8/ But see Myers v. Alabama, 238 U.S. 368 (1915), cited in Scheuer, 416 U.S. at 237. Myers was a § 1983 action against election officials who refused to allow plaintiffs to vote because of a state law disqualifying them according to a standard unconstitutional under the Fifteenth Amendment, see Guinn v. United States, 238 U.S. 347 (1915).

9/ Compare Monell, 532 F.2d 259, 264-67 (CA 2 1976), Musquiz v. City of San Antonio, 528 F.2d 499 (CA 5 1976) (en banc), with Thomas v. Woods, 529 F.2d 916 (CA 4 1975) (back pay); Burt v. Board of Trustees of Edgefield City School Bd., 521 F.2d 1201 (CA 4 1975) (dicta), and Incarcerated Men of Allen County v. Farr, 507 F.2d 281 (CA 6 1974) (counsel fees).