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PERSONAL

Monell and the Rejection of the Sherman Amendment

Given the Court's penchant for extending the reach of Section 1983 far beyond the expectations of even the Radical Republicans, e.g., Maine v. Thiboutot, No. 79-838, and the refusal to extend a "good-faith" defense to municipalities in Owen v. City of Independence, No. 78-1779, I can appreciate your sense of disquiet on reading David Stewart's memorandum.

As I understand David's position, it is (i) that the rejection of the Sherman Amendment is persuasive evidence of the intention of the 42nd Congress to exclude municipalities from the reach of §1983, and, moreover, (ii) that the use of the word "person" in the eventual compromise that became 42 U.S.C. §1986 demonstrates conclusively "that Congress in 1871 did not think it was creating municipal liability."

I quote from page 11 of David's memorandum:

Thus, my argument is simple. When the Forty-Second Congress wished to exclude municipal liability for the failure to act, it used the phrase "any person or persons." The repeated references to "citizen," "individual," and the use of personal pronouns buttress the inescapable conclusion that "any person or persons" did not include local governments. Since the term "any person" was used in the predecessor to Section 1983,

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17 Stat. 13, it is logical that that phrase also excludes municipal liability.

In my view, David has simply restated the argument that prevailed for a time in Monroe v. Pape, 365 U.S. 167 (1961), but was properly overturned in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

I deal first with David's second argument, that when Congress used the word "person" in what is now §1986 to exclude municipal immunity, it must have intended to exclude municipal liability when it used the word "person" in §1983. Aside from the surface appeal of this point, little illumination is derived from the use of the term "person" in §1986. One would hope that legislators drafted with greater precision, and avoided the use of words capable of several meanings. This was one reason for the Dictionary Act, passed only months before the Civil Rights Act was enacted, to clarify 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. I think it likely that members of the 42nd Congress intending to preserve municipal liability for municipal action under §1983, while excluding municipal liability for private rioting under §1986, agreed to the use of the word "person" without focusing on the effect this would have on the far less controversial provision that earlier had passed both houses with little debate.

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Great consequences should not attach to careless draftsmanship, absent substantial evidence of an intention to save local governments from liability for their own wrongdoing under §1983. Thus, David's argument ultimately rests on his first premise.

As David himself recognizes, there are good reasons for proceeding with caution before equating the rejection of the Sherman Amendment with a decision to immunize local governments from liability for their own conduct under §1983. Section 1 of the Civil Rights Act of 1871, the predecessor to §1983, was the subject of only limited debate and was passed without amendment. The purpose of the measure was to impose liability on those committing constitutional violations causing compensable injury. The literal reach of Section 1983 is quite broad and comprehensive. The statements of its proponents suggest that such a reach was indeed intended. The Sherman Amendment, by contrast, elicited much debate and several revisions. The theory of the first two versions was that local governments should be held liable not only for their own unconstitutional wrongdoing, but for their inaction in failing to prevent private rioting.

Justice Brennan's opinion for the Court in Monell canvasses the arguments presented by the opponents of the Sherman Amendment. As you stated in your Monell concurring opinion: "Of the many reasons for the 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." 436 U.S., at 706 (Powell, J., concurring).

I suppose that fragments of the legislative history can be marshalled in favor of either position on the "meaning" of the rejection of the Sherman Amendment. What counts for me is that Congress in 1871 intended §1983 to serve as a broad remedial measure for violations of constitutional rights; that Congress knew municipalities were capable by their own conduct of committing violations causing compensable wrong, e.g., Representative Bingham's manifest intention to overrule Barron v. Baltimore, 7 Pet. 243 (1834), and make takings by cities without compensation redressable under the Fourteenth Amendment and its implementing legislation, Cong. Globe, 42d Cong., 1st Sess., App., at 84-85 (1871);\*

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\* In Barron v. Baltimore, petitioner had sued the city for making his wharf in Baltimore harbor useless. The trial court awarded petitioner \$45,000, but the state appellate court reversed. Barron then claimed in the Supreme Court that his private property had been "taken for public use, without just compensation" in violation of the fifth amendment. Chief Justice Marshall's opinion held that no federal question was presented because the fifth amendment did not apply to relations between the individual and a state.

In a speech on the floor of the House, Representative Bingham explained that he drafted §1 of the Fourteenth Amendment with Barron in mind:

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and that unambiguous evidence of a legislative intention to save municipalities from the rule of accountability established in §1983 is lacking. As you observed in your Monell concurrence, adherence to Monroe had the effect of standing the Douglas-Frankfurter debate on its head:

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 government employer to be exclusively liable for resulting constitutional injury.

436 U.S., at 707.

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I had read--and that is what induced me to attempt to impose by constitutional amendment new limitations upon the power of the States --the great decision of Marshall in Barron vs. the Mayor and City Council of Baltimore, wherein the Chief Justice said, in obedience to his official oath and the Constitution, as it then was:

"The amendments [to the Constitution] contain no expression indicating an intention to apply them to State governments. The court cannot so apply them."  
7 Peters, p. 250

In this case the city had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States; and only for this reason, the first eight amendments were not limitations on the power of the States. Globe App. 84.

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Your concluding remarks in the Monell concurrence state the best argument for overturning Monroe. Adherence to Monroe would not obviate a decision on municipal liability in the context of a constitutional tort action under Bivens, and the "difficulty" would remain of "inferring from §1983 'an explicit congressional declaration' against municipal liability for the implementation of official policies in violation of the Constitution." 436 U.S., at 713.

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As your dissent in Owen demonstrates with great force, the decision in Monell did not lead inexorably to the outcome in Owen. The force of the Owen dissent is ultimately strengthened by the fact that your position has never been one of reflexive opposition to the claims of §1983 plaintiffs.

*Sam*  
S.E.