

*Sam - a most incisive and perceptive memo.*

SE

To: Mr. Justice Powell

From: Sam Estreicher

Date: April 5, 1978

Re: No. 75-1914, Monell v. Dept of Social Services --WJB  
1st Opinion Draft

I

I am afraid that WJB has written another weighty, but improved draft. In my view, you can certainly join the judgment of reversal, but there are some problems with the draft that may require a separate writing or skillful negotiations with WJB's chambers. The following points cause me the greatest concern (the relevant passages are sidelined in red):

1. On pp. 21-22, WJB writes that "there is no basis in holdings of this Court..to find in the Constitution...a bar to Federal Government power to enforce the Fourteenth Amendment against the States...." The sentence, read in context, is understandable: Congress did not believe that it lacked the power to impose liability on the States for violations of the Fourteenth Amendment. My problem is that this sentence may be read as suggesting that the Eleventh Amendment presents no obstacle to § 1983 suits against the States as entities. The implications of Edelman v. Jordan, 415 U.S. 651, 674-676 (1974), are to the contrary:

"But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought against state officers, rather than against the State itself.

Though 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...."

Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976), makes clear that no effective waiver of the Eleventh Amendment was found in Edelman because "none of the statutes relied upon by plaintiffs in Edelman contained any authorization by Congress to join as defendant." Under Bitzer, it would seem that the Eleventh Amendment remains a barrier to the extent that the legislation does not rest on an explicit waiver of the Eleventh Amendment bar. The § 1983 - attorney's fees case, No. 76-1660, Hutto v. Finney, presents this issue.

*Yes*

Language in note 54 on p. 29 presents the same problem:

*Omit*

"Nor is there any basis for concluding that the Eleventh Amendment is a bar to such liability.... Our holding today is, however, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."

Since no one is raising the Tenth Amendment issue, and municipalities simply do not come within the protection of the Eleventh Amendment, Lincoln County v. Luning, 133 U.S. 529, 530 (1890), I do not understand the need for any discussion that appears to deal with the general reach of the Eleventh Amendment. However, WJB's cite to Edelman v. Jordan may be sufficient to allay any fears.

*Service problem*

2. The first sentence on page 25 states that "the debates show that Congress intended to exercise its full power under the Fourteenth Amendment...." The problem

*I'll not accept this!*

with this sentence, as it stands, is that it appears to constitutionalize § 1983. The qualified immunity decisions, the negligence issue sidestepped in Procurier v. Navarette, and Carey v. Phipus, are all premised on the view that the scope of § 1983 and the reach of the Fourteenth Amendment are not necessarily coextensive. As Professor Monaghan has pointed out, it is important to retain a flexible view of § 1983 to avoid transforming every case requiring an interpretation of §1983 into an exercise in constitutional exegesis. Bob Litt and I have spoken to WJB's clerk, Whit Peters, and Whit appears to be willing to modify the sentence by indicating that Congress' view of the reach of the Fourteenth Amendment may have been unduly conservative, with a citation to supporting language in Moor v. County of Alameda. In my view, WJB could simply say that Congress intended the term "person" to reach all officials and entities suable under the Constitution, without discussing whether other features of the statute --e.g., the causation requirement-- are dictated either by the Constitution or by 1871 understandings of constitutional limits.

3. The language on pp. 29-30 & n.55 should be softened. First, there is no need to say in this case that "unwritten practices or predilections which have by force of time and consistent application crystallized into official policy can also, on an appropriate factual showing, provide a basis for a suit against a local

Imp.  
Point

Yes

Yes

Omit

4.

government." The sentence is not wrong, and is supported by Justice Harlan's reading of the term "custom" in the Adickes decision cited at the top of p. 30, but it is unnecessary dicta. Second, I also recommend deletion of the last seven lines of note 55. WJB's point is implicit in the quotation from WHR's opinion in Rizzo v. Goode. And this passage can be read as bearing on the negligence issue "ducked" in Procunier v. Navarette.

*you delete*

*|| ↙*

4. On page 31, WJB states that "[s]ince City of Kenosha is flatly inconsistent with the correct construction of § 1983, it is hereby overruled." It seems to be that WJB should make clear that he is simply overruling the holding of City of Kenosha on its facts, without disturbing the ratio decidendi, i.e., that § 1983 does not admit of a bifurcated reading of the term "person" depending on the nature of the relief sought.

*Negotiable*

*you*

5. In note 57 on page 31, WJB advances a fairly unpersuasive case for ignoring the doctrine of stare decisis. He does not make any of the points that we suggested in our memorandum to the Conference. Also, WJB is being coy in stating that "we have from time to time intimated that stare decisis has more force in statutory analysis than in constitutional adjudication...." This Court's pronouncements on that point have been explicit and direct.

*you*

*of course*

6. I also do not like note 60 on pp. 33-34. In my view, the footnote should be substantially revised or

*yes*

5.

deleted. As it stands, there is language that can be read to undercut the force of our vicarious-liability limit on the reach of § 1983: "Nonetheless, it is important to recognize that the legal basis for such liability was not some sort of respondeat superior theory but fault on the part of the community in its exercise of its peace-keeping powers." What WJB is trying to say is that the proponents of the Sherman Amendment viewed it as premised on a somewhat attenuated theory of "fault." But the remainder of the footnote and the discussion in the text at pp. 34-35 make clear that the successful opposition to the Sherman Amendment was based on grounds which support a vicarious-liability limitation on the reach of § 1983. The footnote can be written in a much clearer fashion to avoid that both Bob Litt and I experienced.

Reverse

7. The discussion of Aldinger v. Howard on pp. 35-36 is pure dicta and should be deleted. Indeed, although WJB introduces the section saying that "it is necessary to comment briefly on" Aldinger, he concludes that the question is not before the Court. This is a classic example of a WJB attempt "to up to ante."

Delete

8. Finally, I am troubled by Part III (pp. 36-38). WJB spends too much time debunking the absolute immunity that had been available to municipalities at common law. I agree that municipalities cannot be said to enjoy an absolute immunity under § 1983, for that would eviscerate the import of our decision in Monell. That is

much too much

*you!*

all that need be said in this case. I would not endorse WJB's language concerning "the largely repudiated common-law rule of absolute municipal immunity." If we discard the common-law rule, then, we remove one basis left for finding a qualified good-faith immunity.

*Exactly -  
I doubt  
that the  
claw rule  
has been  
abandoned  
reversal the  
board in  
39 states.*

II

WJB's clerk tells me that his boss may be willing to drop some of the language discussed above, but that in all likelihood that will take some prompting from one of the Brothers. If Whit's sense is right, I would think you could join in substantial part and attach a separate opinion explaining your views. That opinion might make two points. First, you may want to explain why you are willing to join a decision overruling a statutory interpretation. This discussion would track your memorandum to the Conference. Second, you may wish to give some reasons why municipalities do enjoy a qualified immunity under § 1983. I offer a tentative list of those reasons: (a) municipalities enjoyed absolute immunity at common law; (b) the Court's rejection of the justifications for respondeat-superior liability (pp. 34-35) supports recognition of a qualified immunity; (c) at least part of the rationale for finding a qualified immunity for public officials --the reluctance to deter the exercise of official discretion-- argues in favor of a limitation on liability for the enterprise that employs the individual

*I do indeed*

7.

exercising discretion; and (d) BRW's opinion in Procunier v. Navarette offers some support for the view that irrespective of the common-law rule, § 1983 does not impose liability for adverse action taken with respect to a right not clearly defined at the time.