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

Dear Potter,

As you know, I am very troubled by this case. I have always thought that, in some respects, this Court's rulings in the § 1983 area have been unfortunate. This Court has construed the delphic terms of the 1871 measure to create a cause of action for all adverse actions affecting federal rights undertaken by state and local officials, even where an adequate remedy may exist under local law, and administrative procedures may be available to provide swifter, more certain relief in a manner that is faithful to the values of cooperative federalism. Moreover, in the understandable urge to narrow the occasions for federal court supervision of local government, we have submitted occasionally to the temptation to read major areas of human conduct out of the Constitution. See, e.g., Paul v. Davis, 424 U.S. 693 (1976).

While I am not predisposed to extend § 1983's reach, this case presents the issue of the proper treatment of conduct which lies at the core of the considerations that animated the 42d Congress. Affirmance of Judge Gurfein's ruling for the Second Circuit means that § 1983 does not authorize compensatory relief for the actions of local governmental units bearing a direct

responsibility for a constitutional deprivation, even though such actions are fully consistent with, indeed mandated by, state law. Suits against the public official in his private capacity are likely to be defeated by the assertion of good-faith reliance on state law. Thus, the "under color of" state law debate in Monroe v. Pape, 365 U.S. 167 (1961), is stood on its head. A monetary recovery will be possible only for unauthorized state action, the very conduct that Felix Frankfurter argued was not encompassed by the "under color of" wording of the statute.

A second consideration is that 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 propel this Court to recognize a Bivens remedy for all constitutional rights made applicable to the States through the Fourteenth Amendment. In light of accepted principles of sovereign immunity, it is unlikely that a Bivens action will be recognized for authorized federal action. But I doubt if we can avoid for long recognition of similar claims against local government entities. See, e.g., Lowell School District No. 71 v. Ker, No. 77-688, March 3, 1978 Conference. Reexamination of Monroe's interpretation of

Why?
 §1983 would seem preferable to the predictable alternative of judicial imposition of a Bivens cause of action for all constitutional violations working a compensable harm.

I am fairly convinced that Bill Douglas' reading of the legislative history in Monroe was wrong, and I do not understand Bill Rehnquist's memorandum to present a defense of that interpretation. Section 1983 was enacted as § 1 of the Civil Rights Act of 1871. That section passed both Houses virtually without debate. Representative Bingham, a leading supporter, had drafted §1 of the Fourteenth Amendment with the case of Barron v. Baltimore, 7 Pet. 243 (1834), in mind. As he explained during the debates over the 1871 Act, "[i]n that case the city had taken private property for public use, without compensation ..., and there was no redress for the wrong" Cong. Globe App. 84. He viewed §1983's predecessor as an appropriate vehicle for seeking redress from takings by municipalities that Barron had held to fall outside of the reach of the Fifth Amendment. Id., at 84-85. Bill Brennan is quite right in saying that "it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit

✓ that had the benefit of the property taken." While the term "person" may be a unusual way of expressing an intention to reach units of government, the passage of the so-called "Dictionary Act," a month before the civil rights bill was introduced, evinces a congressional understanding that "the word 'person' may extend and be applied to bodies politic" And the same language in Senator Sherman's antitrust measure, enacted 19 years later, has been construed to include municipalities, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906), and even foreign governments, Pfizer, Inc. v. Government of India, No. 76-749 (decided Janaury 11, 1978), slip op. 7-10.

Point
 Representative Bingham and other Republican members of the House broke ranks with their party over the Sherman Amendment. That proposal was rejected because it sought to impose a duty upon municipalities to curb private mob violence. This was deemed an unwarranted, extra-constitutional Federal intrusion into an area of primary State competence because the obligation sought to be imposed -- one addressed to State inaction in the face of private lawlessness -- was without basis in the commands of the Fourteenth Amendment. As Representative Burchard explained: "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. And Representative Blair added: "[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." Ibid.

✓ Although the matter is not entirely free from doubt, as are few things in the realm of legislative history, I submit that Republican opponents of the Sherman proposal perceived no similar difficulty with § 1 of the 1871 Act because it sought to impose directly upon the official wrongdoer constitutional obligations derived from the Fourteenth Amendment. Given the unrestricted sweep of § 1, the virtual absence of debate over its intended reach, and Congress' contemporaneous awareness that the term "person" could include "bodies politic," the Monroe Court was wrong to read the Sherman Amendment debates as definitive evidence of a generalized intention to exclude local government units from the reach of § 1983. The legislative history can best be understood as limiting the statutory ambit to actual wrongdoers, i.e., a rejection of

respondeat superior or other principle of vicarious liability.

As a general proposition, the Court should be hesitant to overrule prior construction of statutes or common law rules, but this cautionary principle may be overridden in appropriate circumstances. See, e.g., Continental TV, Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2549 (1977); State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973); Griffin v. Breckenridge, 403 U.S. 88 (1971); Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). This case presents a similar occasion to apply Felix Frankfurter's epigram, which you quoted in Boys Market: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters Bank, 335 U.S. 595, 600 (1949).

Considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings holding that municipalities and counties are not "persons" for purposes of § 1983. In the somewhat accidental manner that characterizes many of our § 1983 decisions, cf. Runyon v. McCrary, 427 U.S. 160, 186* (1976), we have answered a question that was never briefed or argued in

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this Court. The claim in Monroe was that the City of Chicago should be held "liable for acts of its police officers, by virtue of respondeat superior," Brief for Petitioners 21, namely, a warrantless, early morning raid and ransacking of a ^{negro} black family's home. Although Morris Ernst's brief for petitioners in Monroe contains a footnote reference to the Sherman Amendment, he ~~obviously~~ had no incentive to present a view of the legislative history that would have foreclosed relief on a theory of respondeat superior. ¶ In Moor v. County of Alameda, 411 U.S. 693 (1973), the only other ^{relevant} case presenting a discussion of the legislative history of § 1983, petitioners asserted a claim of vicarious liability against a county under § 1988 and, moreover, did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County," id., at 700. Aldinger v. Howard, 427 U.S. 1 (1976), did not involve a claim based on § 1983, and petitioners conceded that Spokane County was not a "person" under the statute. Only in City of Kenosha v. Bruno, 412 U.S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and directly -- rather than vicariously -- responsible for the claimed constitutional injury. But ⁱⁿ ~~the~~ Kenosha ^{we} Court raised the

jurisdictional question on ^{our} ~~its~~ own ^{initiative} motion. Thus, the issues identified in the exchange between ^{scholarly} ~~the~~ Rehnquist ^{Bill and Bill Rehnquist simply} ~~and Brennan~~ ~~chambers~~ have not been ventilated on any previous occasion.

On the other hand, affirmance in this case requires a rejection of this Court's sub silentio exercise of jurisdiction over school boards in a great many cases. As Bill Rehnquist acknowledges, at least three of these ~~school board~~ decisions involved claims for monetary relief, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); also Vlandis v. Kline, 412 U.S. 441 (1973). ^{There was an} ~~I concede the presence of an~~ independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. I do not understand, however, Bill Rehnquist's point that some of the decisions involved independent school districts, for he also contends that "the governing body of an incorporated school district separate from the city" is immune to § 1983 damages liability. ^{But} Nonetheless, the opinions of this Court often made explicit reference to the school-board party, particularly in discussions of the relief to be awarded,

see, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977). And Congress has specifically focused on this Court's school-board decisions in several statutes. The exercise of § 1983 jurisdiction over school boards, even if not premised on considered holdings, has been longstanding, ^{Indeed,} ~~and~~

~~it predated Monroe, which did not cite~~ ^{notorious. Cf. Runyon v. McCrary, the then recent school cases.}

In my view, the only decision that ~~will have to~~ ^{we would} be overruled is ~~City of Kenosha v. Bruno~~. I would ^{simply} limit

Monroe and Moor to their facts. The preclusion of governmental liability for the tortious conduct of individual officials that was neither mandated nor specifically authorized by, and indeed ^{was} ~~may have been~~ violative of, state or local law, is consistent with the 42d Congress' rejection of vicarious liability as an operative principle of the 1871 Civil Rights Act.

Kenosha, however, cannot stand, unless we adopt the view, suggested by Byron, that Bill Rehnquist's decision in that case simply did not address the remedial limits of actions against public officials in their official capacity. Because I ^{certainly} would still recognize a vicarious-liability limitation on § 1983 relief in such actions, I do not find Byron's approach helpful.

What did Byron say this?

~~Although overruling a statutory decision is~~ ^{If indeed I am mistaken,} ~~strong medicine for error, it is of significance to me~~

, if I understand him correctly,

If I would think that

~~that whatever course the Court adopts in this case, the~~
rationale of Kenosha will have to be disturbed in some
fashion, Acceptance of Bill Rehnquist's view ^{would} require a
"bifurcated application to municipal corporations

[of § 1983]

depending on the nature of the relief sought against
them." 412 U.S., at 513. A public official sued in his
official capacity, concededly a "person" for purposes of
injunctive relief, becomes a non-"person" in a suit
seeking a monetary recovery. Further impairment of
Kenosha's reasoning ^{would} will be necessary because, as Bill
Rehnquist's memorandum illustrates, we ^{would} will have to say
that Congress rejected the Sherman Amendment out of a
desire to protect municipal treasuries. Kenosha held that
a municipality could not be sued for injunctive relief
under § 1983 even though no monetary recovery was sought,
for a municipality was simply not a "person." The question
arises why protection of the municipal fisc is now viewed
as the dominant reason for rejection of the Sherman
Amendment, when a suit seeking redress from authorized
conduct is brought against a defendant who is conceded to
be a "person" under the Act.

I have concluded that

the prior decisions in this area do not require
application of the usual stare decisis principle. There is

~~no clear, coherent strand of authority in which Congress~~
^{no} is no coherence in the ^{relevant} body of precedents.
Indeed, there is ^{manifest disharmony} a degree of confusion in principle that
we now have an opportunity to rationalize.

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Although, as indicated, I generally agree with Bill Brennan, I differ ^{11.} with his memo in two respects:

can be said to have acquiesced by its inaction. Whatever the Court does will work some alteration of precedent. I would suggest that we decide this case on an accurate reading of the legislative history, rather than perpetuate the misconception of Monroe and set in motion the pressures that may compel the constitutionalization of a damages action against municipalities and school boards.

There are at least two conditions that I would insist upon before joining an opinion by Bill Brennan.

First, Monroe and Moor should be restricted to their facts, rather than overruled. ^{that we} ~~We should say that we have~~ ^{The Court simply could say,}

~~we~~ ^{no} had occasion previously to consider the availability of a §1983 damages remedy for constitutional violations that are the direct result of a policy ^{decision by} of the government entity, rather than simply its failure to curb the unauthorized torts of its employees. See Rizzo v. Goode, 423 U.S. 362, 377 (1976), discussing ~~the~~ Swann and Brown decisions. There are substantial line-drawing problems, as

Bill Rehnquist notes, but this case involves a formal, written policy of the municipal department and school board. ^{It is the clear case.} ~~It is the clear case.~~ ^{Second, I would urge that}

~~the Court~~ recognize a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation, cf. Procunier v.

We have ~~re~~ relied on the common law
in denying immunities under § 1983.
See, e.g. Imbler. 12.

Navarette, No. 76-446; Wood v. Strickland, 420 U.S. 308

(1975). ~~At~~ all likelihood, the imposition of a mandatory
maternity-leave in this case, occurring before ~~your~~ ^{our}
~~decision~~ ^{would} ~~does~~ not involve such a clearly
defined right, and no liability should ensue. The
recognition of such a defense will represent a
modification, required by the policies underlying § 1983,
of the immunity that the common law generally afforded
municipal bodies in the performance of their
"governmental" functions, and should mitigate the impact
of our decision on the municipal treasury.

S.E.

The absolute immunity accorded
governmental bodies under
the common law would be
modified to this extent.
But this would be ~~not~~
a departure ~~from~~ merely a
modification rather than
an abandonment of the
common law rule.

Yud