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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 75-1914 Monell v. Dept. of Social Services

MEMORANDUM TO CONFERENCE:

I propose to substitute the attached for present footnote 6 on page 6 of my concurring opinion in the above case.

L.F.P.

L.F.P., Jr.

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6. The doctrine of stare decisis advances two important values of a rational system of law: (i) the certainty of legal principles, and (ii) the wisdom of the conservative vision, that existing rules should be presumed rational and not subject to modification "at any time a new thought seems appealing," dissenting opinion of Mr. Justice Rehnquist, post, at 5; cf. O. Holmes, The Common Law 36 (1881). But, at the same time, the law has recognized the necessity of change, lest rules "simply persist . . . from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Any overruling of prior precedent, whether of a constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 imapplicable to official municipal policies.

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. Marbury v. Madison, 1 Cranch 137

(1803), cited by the dissent, post, at 5, is a case in point. But the Court's recognition of its power to invalidate legislation not in conformity with constitutional command was essential to its judgment in Marbury. And on numerous subsequent occasions, the Court has been required to apply the full breadth of the Marbury holding. In Monroe, on the other hand, the Court's rationale was broader than necessary to meet the contentions of the parties and to decide the case in a principled manner. The language in Monroe cannot be dismissed as dicta, but we may take account of the fact that the Court simply was not confronted with the implications of holding § 1983 inapplicable to official municipal policies. It is an appreciation of those implications that has prompted today's reexamination of the legislative history of the 1871 measure.

action contrary to its own ordinances and the laws of the state it is a part of [*sic*]." Brief for Respondents, *supra*, p. 26. Thus the ground of decision in *Monroe* was not advanced by either party and was broader than necessary to resolve the contentions made in that case.[6]

Similarly, in *Moor* v. *County of Alameda*, 411 U. S. 693 (1973), petitioners asserted that "the County was vicariously liable for the acts of its deputies and sheriff," *id.*, at 696, under 42 U. S. C. § 1988. In rejecting this vicarious-liability claim, *id.*, at 710, and n. 27, we reaffirmed *Monroe*'s reading of the statute, but there was no challenge in that case to "the holding in *Monroe* concerning the status under § 1983 of public entities such as the County." *id.*, at 700; Brief for Petitioners, O. T. 1972, No. 72-10, p. 9.

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 the direct cause of the claimed constitutional injury. In *Kenosha*, however, we raised the issue of the City's amenability to suit under § 1983 on our own initiative.[7]

This line of cases—from *Monroe* to *Kenosha*—is difficult to reconcile on a principled basis with a parallel series of cases in which the Court has assumed *sub silentio* that some local

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[6] We owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. The fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies may be considered in assessing the quality of the precedent that we are asked to re-examine.

[7] In *Aldinger* v. *Howard*, 427 U. S. 1 (1976), we reaffirmed *Monroe*, but petitioner did not contest the proposition that counties were excluded from the reach of § 1983 under *Monroe*, *id.*, at 16, and the question before us concerned the scope of pendent-party jurisdiction with respect to a state-law claim. Similarly, the parties in *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274 (1977), did not seek a re-examination of our ruling in *Monroe*.