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

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference
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.

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

"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.

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
with this sentence, as it stands, is that it appears to constitutionalize § 1983. The qualified immunity
decisions, the negligence issue sidestepped in Procunier
v. Navarette, and Carey v. Piphus, 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
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.

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.

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.

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

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."

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...
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.

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.
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.
April 10, 1978

Re: No. 75-1914, Monell v. Dept. of Social Services of the City of New York

Dear John:

Perhaps I can save you some unnecessary effort by responding quickly to your memo on the above.

First, with respect to the "full power" argument, I agree that this argument goes farther than is necessary and have already planned to rewrite this section.

Second, with respect to Part II-B, I had thought my footnote 58 on page 32 answered the concern you expressed at conference. As I indicate there, plaintiffs in Monroe interpreted their own complaint as stating a respondeat superior action.

Finally, Parts II-C and III were at least implicit in my earlier memorandum in which I thought a majority joined. I therefore included them explicitly in the draft since each seems to follow directly from Part I. Of course, both are open to modification, but I'd be better able to make changes if I knew the views of my colleagues concerning them. Accordingly, I confirm that I'd welcome expressions of such views.

Sincerely

Mr. Justice Stevens

Copies to the Conference
April 10, 1978

Re: 75-1914 - Monell v. Dept. of Social Services of the City of New York

Dear Bill:

Although I expect to join Parts I-A, I-B, most of I-C, and II-A of your opinion, I do not presently plan to join Parts II-B, II-C, or III.

I plan to write a separate opinion in which I take issue with II-B and suggest that the discussion in Parts II-C and III is unnecessary and is not embraced within the question presented by the certiorari petition.

With respect to I-C, I cannot accept "the full power" argument; if that argument were valid, there would be no room for immunity for judges or other officials.

Respectfully,

Mr. Justice Brennan

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[Signature]

Mr. Justice Brennan

Copies to the Conference
April 11, 1978

No. 75-1914  Monell v. Dept. of Social Services of City of New York

Dear Bill:

As suggested in your note of April 10 to John, I am writing to give you my comments on your fine draft of an opinion for the Court in this case.

I intend to write separately at least for the purpose of stating the view that municipalities are entitled to a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation. The absolute immunity accorded to governmental bodies at common law should be modified, lest we eviscerate the import of our decision in this case, but I would not abandon all common-law protection. While the considerations are somewhat different from those governing our qualified-immunity decisions, a rule of strict municipal liability imposes substantial costs in terms of the inhibition of the discretionary activities of governmental bodies. Moreover, the emphasis in your opinion on the "fault" principle and your recognition of the 42d Congress' rejection of the justifications for vicarious liability argue against the imposition of liability for innocent failure to predict the often uncertain course of constitutional adjudication.

These matters aside, while I would like very much to join your opinion, I am troubled by some of the language in the present draft. There are some sentences which can be worked out among the law clerks (who have conferred), and need not be stated here. But there are several areas that require revision before I would feel free to join your opinion in its entirety.
First, I have considerable difficulty with your discussion in Part III. While I agree that a recognition of absolute municipal immunity would be inconsistent not only with our decision in Monell but also with the considerations that were controlling in Imbler v. Pachtman, Pierson v. Ray and Bradley v. Fisher, I see no need for an extended discussion of the wisdom, or lack thereof, of the common-law rule. The Chief's opinion in Scheuer v. Rhodes is ample authority for the proposition that on occasion the absolute immunity available to a class of defendants at common law must give way to the policies of §1983. A discussion that emphasizes modern criticisms and dismisses the doctrine of municipal immunity as "the largely repudiated common-law rule of absolute immunity" is unnecessary, does not address the question of the intention of the 1871 Congress, and has the effect of removing the historical basis for finding a qualified municipal immunity.

Second, I am in full agreement with John that Part II-C of your opinion is unnecessary. Since Aldinger v. Howard involved a pendent state claim, not a cause of action premised on §1983 or other federal law, I do not consider it proper to cast doubt on Aldinger in this case.

Third, I see no need to discuss in this case whether "unwritten practices or predilections which have by force of time and consistent application crystallized into official policy" may "provide a basis for a suit against a local government" (pp. 29-30). I do not necessarily disagree with the proposition, as such, but I prefer to allow these points to develop in a case-by-case fashion. In a similar vein, I hope that you will delete the last seven lines in footnote 55 (p.30). Your quote from Rizzo v. Goode is quite persuasive, and I would not go further and suggest to the reader that Rizzo simply involved a pleading error. The relevance of Estelle v. Gamble to the matter at hand will be apparent to practitioners; ordinarily it is not our province to suggest legal theories for overcoming obstacles presented by our decisions.

Finally, I could not agree with the language on pp. 24 and 25 which states that Congress in §1983 "intended to exercise its full power under the Fourteenth Amendment...." I am opposed to any view of §1983 which
transforms every case requiring an interpretation of § 1983 into an exercise in constitutional exegesis. The qualified immunity decisions, the negligence issue raised in Procunier v. Navarette, and my opinions in Ingraham v. Wright and Carey v. Piphus, are all premised on the proposition that the scope of §1983 and the reach of the Fourteenth Amendment are not necessarily coextensive. It seems to me that you can accomplish your objective by simply saying that Congress intended the term "person" to include all officials and entities within its constitutional reach, without suggesting that other features of the statute -- e.g., the causation requirement -- are dictated either by the Constitution or by 1871 understandings of constitutional limits.

If these points are resolved and a few additional word changes are made, I believe I can join your entire opinion, although I also would write briefly to state my views on qualified municipal immunity, and perhaps my own separate reasons for being willing to reach our conclusion.

I apologize for this extended commentary, but after all you have written 38 eloquent pages!

Sincerely,

Mr. Justice Brennan

Copies to the Conference

LFP/lab
Re: 75-1914 - Monell v. Department of Social Services of the City of New York

April 12, 1978

Dear Bill:

With all respect, I am persuaded that you have given the discussion of respondeat superior in petitioners' brief in Monroe v. Pape, an unwarranted interpretation.

The City had argued that the complaint was properly dismissed because (1) it was not a "person," and (2) it was entitled to immunity. In an argument in the nature of a rebuttal, the petitioners referred to the doctrine of respondeat superior as an alternative basis for supporting the conclusion that the City is a person. See xeroxed page 25 attached.

In Part II of petitioners' brief in Monroe, which addressed the doctrine of immunity, petitioners argued that "all doubts as to the liability of the City under the act should be resolved in petitioners' favor." In support of that position they specifically argued:

"This case portrays a standard police procedure—whose victims are often innocent. This case is, among other things, a 'custom or usage' case." See xeroxed page 42 attached.

It seems to me that the Court must either overrule Monroe v. Pape, or else hold that the Monroe complaint did not allege a sufficient claim for relief against the City.

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Respectfully,

Mr. Justice Brennan

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April 12, 1978

Dear Bill,

Under your draft, as I understand it, a local governmental entity may be sued under § 1983 for its own transgressions but not for the fault purely of its employees or agents. The line between official policy for which the cities may be sued and vicarious responsibility for the sins of others is not immediately obvious. I take it, however, that the city would not be exposed to § 1983 liability where under its policies, such as those expressed in ordinances, its officials are given general missions together with some or a great deal of discretion as to how to implement them and the executing official, in good or bad faith, then invades an individual's constitutional rights. Officers authorized to make arrests on probable cause inevitably make mistakes, and it may be held in such cases that the Fourth...
Amendment has been violated. Under your draft, I would not think the city would be responsible in such situations since it was not its policy to make arrests except on probable cause.

Similarly, under a city wiretap ordinance, the city would not be liable for an officer's mistaken view that the ordinance did not require his superior's consent before applying for a warrant; but if the ordinance itself is held unconstitutional and it is for this reason that a citizen's protected privacy is invaded, the city would be liable unless otherwise immune from suits for damages under § 1983.

Although this oversimplifies the matter, I am sure, I gather that a city would never be liable when its officer or agent exceeds his authority under statute, ordinance or regulation or when he exercises discretionary authority of the kind given to him by the city but in good or bad faith, exercises it so as to invade the constitutional rights of the citizen. It is only when the city's policy, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, itself inflicts the injury or itself authorizes or directs the specific act charged against its officer that the city is responsible under § 1983.
It is only then that it would be necessary to consider municipal immunity.

You are convinced, I gather, that foreclosing suits against a city for the wrongful acts of its officers or employees as well as shielding the city from liability for its failure to curb the lawlessness of some of its citizens, is required by the legislative history of § 1983. I am tentatively prepared to go along with you but will be very interested in the views of others on this matter.

I have no objection to Part III or Part II-C, but neither would I object if you modified or eliminated them.

I am in agreement with Lewis Powell's remarks directed at indicated matters on pages 24 and 25, on pages 29-30, and in footnote 55.

Sincerely yours,

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Mr. Justice Brennan

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