To: Mr. Justice Powell
From: Sam Estreicher February 1, 1978
Re: No. 75-1914, Monell v. Dep't of Social Services

I

WJB's tome may contain precious nuggets of wisdom, but the mode of presentation of his ideas does not permit of easy digestion. His essential point is that Monroe's holding as to municipal immunity must be overruled as an erroneous reading of the legislative history. He is willing to say that a governmental entity should not be vicariously liable for the unauthorized torts of its employees (Memorandum, p.47), and suggests that liability must be premised on the concept of fault. As in Rizzo v. Goode, neither the supervisory official nor the municipal employer is liable --whether in an action for injunctive relief or one for damages-- for the tortious excess of a subordinate acting "under color of" his official position. But both the supervisory official and the municipal employer are subject to liability for conduct as to which they bear a "significant responsibility for the harm suffered by a § 1983 plaintiff." (Memorandum, pp. 46-47). WJB declines to pass, however, on the question of whether the governmental entity may assert a "good faith" defense (Memorandum, p. 50).

I am not going to try to give you a "road map" to WJB's exhaustive and exhausting exegesis. Much of the discussion is unnecessary and confusing; I suggest that you reread the appendix to the NEA amicus brief and the Georgetown L.J. article. His "bottom line" is
that Congress rejected the Sherman Amendment, not out of solicitude for municipal treasuries, but because the proposal imposed a duty upon municipalities to curb private mob violence. This was deemed an unwarranted intrusion by the federal government into an area of primary state competence because the obligation sought to be imposed, addressed to state inaction in the face of private lawlessness, was not based on the mandate of the Fourteenth Amendment. There was also concern with the specific terms of the Sherman proposal, e.g., the apparent imposition of liability without requiring a showing that the municipality knew or should have known of the riotous conduct; and the apparent breadth of the provision for execution of a judgment lien against all of the monies and property of the governmental subdivision, even though the law of judgments at the time recognized an exception for public property and made provision for the continued functioning of government.

II

WHR writes a concise, persuasive piece. Notwithstanding his superior advocacy, I adhere to my original position.

A. Legislative History

WHR has excerpted a few passages to prove his point that the rejection of the Sherman Amendment evidences an intent "to preserve the financial capacity of municipalities to carry out basic governmental functions...." (Memorandum, pp. 7-8, 10). I have xeroxed a copy of the pages in which these fragments appear to give you a sense
of context. (The remarks relied upon by WHR are boxed off in red squares (and other passages supportive of his cause are sidelined in red). Language which helps to place these remarks in their appropriate setting are sidelined in blue.) Perhaps the best spokesman for WHR's view is Rep. Kerr (Cong. Globe 787-789), but his words were addressed to the specific evils of imposing liability for a municipal failure to prevent private riots, and subjecting all of the resources of a municipality to a judgment lien founded on the nonperformance of this extra-constitutional obligation. The excerpted remarks of Reps. Bingham and Farnsworth are to the same effect.

Almost every one of the leading Republican opponents to the measure expressed his opposition in terms of the unprecedented imposition of a duty to keep the peace which was without basis in the commands of the Fourteenth Amendment. Rep. Bingham opposed the Sherman Amendment, but he deliberately drafted §1(now § 1983) to overrule Barron v. Baltimore, 7 Pet. 243 (1834), which he viewed as a case where "the city had taken private property for public use, without compensation ..., and there was no redress for the wrong...." Cong. Globe App. 84; WJB Memorandum, pp. 33-34. See also Rep. Burchard:

"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.
Rep. Blair:

"[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." Cong. Globe 795.

Rep. Poland:

"But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by our Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens." Cong. Globe 514.

"We would go as far as [the Senate conferees] chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs." Cong. Globe 804.

I have exercised selectivity in setting out these fragments, but I believe they are representative of the views of the oppositionists.

B. Stare Decisis

I agree with the general proposition that the Court should be hesitant to overrule prior construction of statutes, but this cautionary principle may be overridden in appropriate circumstances. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2549 (1977). This is such a case.

Stare decisis cuts in both directions. On
the one hand, we have a series of rulings holding that municipalities are not "persons" for purposes of § 1983. These were not "considered holdings," however, because the only discussion of the legislative history appears in cases where the plaintiffs sought recovery on a respondeat superior theory; there was no incentive to present a view of the legislative evidence that would have precluded maintenance of their claims. The issues ventilated in the WJB-WHR interchange were simply not briefed on any previous occasion (aside from a short footnote in Morris Ernst's brief for Monroe).

On the other hand, an affirmance of CA2's decision requires a rejection of this Court's sub silentio exercise of jurisdiction over school boards in a great number of cases. WHR concedes that at least two decisions involved claims for money damages. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Although individual defendants were named in addition to the school entity in several of the decisions, the opinions of this Court often made explicit reference to the school-board party, particularly in the sections discussing the relief to be awarded. WHR suggests that some of these latter decisions may have involved independent school districts (Memorandum, pp. 14,16), but the force of this point is lost because, at a later point, he makes clear that every school board, even one that is simply
"the governing body of an incorporated school district separate from the city," is immune from § 1983 liability. (Memorandum, p.21).

It should be noted that the only decision that will have to be squarely overruled is City of Kenosha v. Bruno. There, the Court determined sua sponte that there was no § 1983 jurisdiction to issue an injunction against a municipality for its own failure to hold a due process hearing with respect to the denial of liquor licenses. The municipality was held to be a non-"person" under § 1983 regardless of the nature of the relief being sought. Obviously, no discussion of the legislative history bearing on the distinct proposition that Congress intended liability for a city's own wrongdoing was advanced in that case. Moreover, Kenosha's rationale will have to be disturbed even if CA2 is affirmed. As WJB points out, importation of the Ex parte Young approach requires a "bifurcated" view of the term "person" depending on the nature of the relief being sought. A public official sued in his official capacity, concededly a "person" for purposes of injunctive relief, becomes a non-"person" in a suit for damages. WHR's opinion in Kenosha purports to reject such "bifurcation," but he implicitly approves this device here, in order to preserve the possibility of obtaining injunctive relief from a constitutional violation by state officials.

III

We should try to encourage WJB to avoid
overruling Monroe, but rather to restrict Monroe to its facts. Such a tack may soften the force of WHR's stare decisis attack. We should say that we have not had occasion previously to consider the availability of a § 1983 damages remedy for constitutional violations which are the direct result of a policy of the municipality or school board, rather than simply its failure to curb the unauthorized torts of its employees. There are line-drawing problems, as WHR notes, but this case involves a formal, written policy of the school board; it is the clear case. I would also try to encourage WJB to recognize a defense for rights not clearly defined at the time of violation, cf. Procunier v. Martinez. In all likelihood, this maternity leave case does not involve such a clearly defined right. I would reserve decision on the question of whether there is available to a municipality a defense for "good-faith" violations of a clearly defined constitutional right.

If Monroe is not to be reexamined, I agree with WHR that no meaningful distinction can be drawn between school boards and municipalities.

S.E.
to go the ground. It seems to me the prudent course for the Government is for the Senate to adjourn and bring up the first part of conference, and see if these
obnoxious provisions cannot be changed.

The PRESIDENT pro tempore. Will the Senate come to the report of the committee of conference upon which question the yeas and
nays have been ordered.

Mr. MORRILL, of Vermont. If that is not agreed to, I will insist on the motion which I
made to insist further and ask for another conference will come up.

Mr. THURMAN. Is the question on the motion of the Senator from California, to con-
continue the consideration of the Senate from Virginia, to con-

The PRESIDENT pro tempore. The question is on the report of the committee of conference, upon which question the yeas and
nays have been ordered.

Mr. CONKLING. I offer a resolution to
be on the table until I call it up:

Resolved by the Senate, (the House of Representa-
tives concurring), That on Wednesday, the 19th of
April next, at 11 o'clock, the President of the Senate and the Speaker of the House shall call the
requisite adjournment of the House without day.

EXECUTIVE SESSION.

Mr. CAMERON. I move that the Senate proceed to the consideration of executive business.

Mr. THURMAN. I move that the Senate adjourn.

Mr. CAMERON. I move a motion before the Senate.

The PRESIDENT pro tempore. The question is on the motion of the Senator from Ohio, that
the Senate adjourn.

The motion was not agreed to.

The PRESIDENT pro tempore. The question
recurs on the motion of the Senator from Pennsylvania.

The motion was agreed to; and after fifteen minutes spent in executive session, the doors were opened, and (at eleven o'clock and fifty minutes p.m.) the Senate adjourned.

HOUSE OF REPRESENTATIVES.

Wednesday, April 19, 1871.

The House met at twelve o'clock p.m. by

Brev. Dr. Rawes, of Washington, D. C.

On motion of Mr. Blair, of Michigan, the reading of the Journal of yesterday was dispensed with.

ENFORCEMENT OF FOURTEENTH AMENDMENT.

The House resumed the consideration of the report of the committee of conference on the disagreeing votes of the two Houses on the
amendments of the Senate to the bill (H. R. No. 320) to enforce the provisions of the four-
thirteenth amendment to the Constitution of the

United States and for other purposes, upon

which Mr. Kats was entitled to the floor.

Mr. KATS. It is not my purpose to detain
the House by any very lengthy discussion of this report, but I will as
briefly as I can state the reasons why I was
upset by the action of the Senate in the House of

Sect 2. And be it further enacted, That at each and
ev ery term of any court of the United States
the Secretary of War, or other officer to be
appointed by him, or the court directly or
indirectly, given any assistance, in money or
any other thing, to any person or persons who
you have not adhered to any insurrection or rebell-
onion against the United States, or who have
not been tried and convicted of treason, or of
adhered to any insurrection or rebellion against
the United States.

Any person or persons desiring to take
said oath shall be discharged by the court from
serving on the grand or petit jury, or venire, to
which he may have been summoned.

Contemplate for a moment the practical effects
which would arise from the passage of this sec-
tion. It is true, I verily believe, that less than	honeseventhousand white men in the Commonwealth of
Virginia, under this section if enforced by the
President and the Government, could not sit upon
in any Federal court without the unanimous consent of the
people. And although himself loyal, it is safe to
assume that during the war the judge, directly or indi-
rectly, gave some assistance in money or some other
thing, or in some way, to his son. So it
is throughout the South. It is impossible, if
this law be enforced, to organize competent,
trustworthy, intelligent, and respectable juries in
the South. The jury is the grandeur of liberty, to
the sole occupancy of ignorance, vicious-
ness, and incompetence. Can such mean and
wretched policy promote the public peace, in-
terest, and safety? Does it not tend to the
better iniquities of all good and humane
men? Does it not mock the spirit of mag-
ficence and decent civilization?

Many, many more objections find it imme-

section I will read. at the to that and its cruel and
offensive character may be better under-

...
which relates to the destruction of houses, tenements, and other property. It is any gentleman who will be confined in the application to its portion which relates to injuries to the person, not the property. I believe that the true, legal, and just definition will enable it to be divided into a class of injuries to the property from the necessity of establishing the intent stated in the subsequent words of that I have read. The offenses against which it is designed are all offenses of proof of the intent. It is, therefore, an assumption by Congress of power to go into a State and punish, without such an intent, any person whom the General Government have not such power. It is altogether a question of public policy and discretion whether any offense committed in a State must, therefore, it is entirely without the view of anything contained in the fourteenth or any other amendment to the Constitution, or in the text of the Constitution itself.

In reference to that part of the section which I have read, I wish to ask the attention of the House to the further fact that, for the first time in the history of the United States, it is attempted by a law of Congress to punish criminally a civil division of a State of this Union for crimes committed under the laws of the United States committed by the citizens of the United States within that municipal subdivision of the State. It is said by gentlemen that this is not in the principle of the law when it was enforced in many of the States of this Union, in several of the New England States, New York, especially in the county of New York in the United States, and in the State of Pennsylvania and especially in the city of Philadelphia. But I assure gentlemen that the judicial tribunals of those States, and the courts of justice, will find any example for this bill. There is none. There are some enactments that give remote analogy for it. But they are all most manifestly so, in principle, and the belief that better guarded in their provisions, and infinitely less liable to abuse. There is no attempt anywhere to punish a citizen of the United States for any crime committed in a State for the benefit of the State subdivision of the State by the person of another, by transferring the offense which has been committed to the county, parish, or city in which it resides, and committing it to the State or local subdivision, to the extent of the guilty, to respond for him in damages.

The first bill which has been passed is, I agree, somewhat common to regard the organization of the militia by those States, which are part and parcel of the local machinery adopted by the State governments in the execution of their reserved powers, power to perform the duties which are necessary in the police regulation, government, and protection of society, and to punish them where they fail to execute the duties thus imposed upon them, sometimes by fines and penalties, to be exacted in ways indicated in the laws of those States. But there is no example of the precise character involved in this bill. It is not in the case of ordinary crimes, or of personal wrongs and injuries, such as arson, murder, larceny, assault and battery, and many others, that counties or cities have been made the instruments of the power of the individual citizens. Those offenses for which the counties and other municipal organizations are required to answer, are failures to keep up the public highways, failures to keep the bridges of the county in good repair, or failures of cities to keep their streets in safe condition, or failures to protect the citizens from assaults, riots, tumultuous reunions, riotous, tumultuous uprisings of the people, leading to the destruction of property. All that is generally done upon the theory, although I do not say that it is always made their duty to interpose every means in their power to prevent their commission. But in such an application there is no violation by the States either of fundamental principles or of the Constitution as the division of the State of its original police jurisdiction. The power it obtains from that great fountain of undegraded authority in the States. All power not conferred upon the Federal Government abides still in the States or the people.

It is said that this is borrowed from the common law of England. So it may be. But why go through the long and laborious process of acquiring the common law? It is rather the idea of punishing a community for offenses committed by its citizens is bor

What was the theory upon which this policy was originally adopted? It was the very one to which I have referred. Where certain offenses were committed with demonstrations of violence, noise, and tumult, they attracted the attention of the few inhabitants in the particular cases of the day, and were called "hundreds," very incomprehensible and limited portions of country, almost within the reach of a single human voice, there being many centuries ago, and was the result of a very imperfect civilization. I am sure we are not to-day, and under our system of government, called upon to go back to those ages for guidance in the interpretation of our conditional and delegated powers.

But it must be remembered, in reference to this attempted application of the principle in this bill, that wherever Congress, in the exercise of any power under a State, gives it to another by mere existence, the exercise of such power is above all other considerations of the common law of the United States. It has been declared by the Supreme Court of the United States that the judicial power of the United States cannot be exercised by the courts of the United States in the States, and that there is no example of the precise character of one power now held by the Federal Government to punish the citizens of the United States for any offenses punishable by it that may be expressed and not conferred upon the Federal Government.

It has been said that, if the people of the hundred, called the county, are engaged in agricultural employments, and the inhabitants are, in other words, the people are, in other words, when the inhabitants were, in other words, the inhabitants were. It bas been declared by the Supreme Court of the United States, in the case of the United States against Jones, and was the result of a very imperfect civilization. I am sure we are not to-day, and under our system of government, called upon to go back to those ages for guidance in the interpretation of our conditional and delegated powers.

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exclusive regulation of the States. There is no safety in any other doctrine. If Congress can invade the counties or cities for the purpose contemplated by this measure, it can also the States themselves, and can thus abuse the property, safety, and rights of the State.

Let us now take a view of some further provisions of this section. Gentleman will remember what I have already read; and in continuation I read the following:

And the courts, or any other tribunals, may be recovered in an action on the case by such person or his representative, by a suit in any court of the United States of competent jurisdiction in which a suit may be joined, in the name of the person so recovered, and upon what proceedings, and against said county, city, or parish.

Right here I may step to remark that it is not even the courts recoverable in this action, but may be recovered against the county, parish, or city, the wrong-doer himself shall have been either arrested, tried, or convicted. You may prosecute the individual defendant, in his person, unless evading the execution, or evading the act of conviction, or evading the punishment. Evading the punishment of the wrong-doer. You may in his absence, and in this manner, as to him, prove his guilt, establish the crime, and recover the money, although the wrong-doer goes unwhipped of justice. The attempt being made to prosecute him or to find him, thus violating the very principles of justice, which are to be avoided without any regard to the person or the property. But let it be said, the Federal courts have the jurisdiction under the Constitution, to compel these municipalities to execute their contracts, and that is all. To execute their contracts, but let it be said, that the Federal court has gone to the extreme of saying that any one of these divisions should execute its own contracts except in precise compliance with the act of Congress. In this bill, the court has gone to the extreme of saying that any one of these divisions, or the county, or city, shall be liable for its own contract. If the court has gone to the extreme of saying that any one of these divisions shall execute its own contracts except in precise compliance with the act of Congress, the court will not allow the judgment to be enforceable against the county, or city, or parish, with its own contract, and the law upon which it was based, and not in pursuance of any law of the United States, but in pursuance of laws of any other State or of the United States. In other words, the extent of judicial power is that which is exercised in that direction has been confined to the execution of civil contracts, such as the payment of corporation, and municipal bonds issued by the county or city. The judiciary power of the United States has jurisdiction, and then only according to the law of the State recognizing and enforcing fully and completely the contracts of the United States, or the Constitution, the right of the State to govern itself, to regulate its municipal interests, to say whether a county or State may subscribe to, or are liable on, the bonds, and securities in a particular way, how those securities may be made payable and their payment made certain. If any county or city be made liable to perform its obligations on its contracts can be enforced.

Any gentleman at a glance can see that the courts give no ground for the assumption of the power supposed to be vested in them, to say what they will. If the jury, or the county or city, are satisfied with no more than twenty minutes of its time has expired.

Mr. KERR. I yield five minutes to the gentle- man from Kentucky, [Mr. Beek.]

Mr. Speaker, I thank my friend from Indiana [Mr. Kerr] for his very able and eloquent speech. I allow it to enter my protest against this bill. If once I will not attempt to dismiss the subject of the day—I beg pardon, it has nothing to do, it is simply a question of power. Authority to the President by the representatives of the people, who will be, I hope, the best representatives of the man who has thus betrayed the cause of liberty, compelled to them shall have no chance to do any more. But argument avails nothing. Denunciation such as a plain man can indulge in is cut off, parliamentary language being unsuited to the exercise of the acridities; nothing short of vigorous and repeated profanity, in which, of course, I do not indulge, can do justice to the subject.

With regard to the private rights of men under the despotic rule established, the most valuable of which have been stricken out by the Constitution, the right of the gentleman from Ohio [Mr. Garfield] was adopted by the House, requiring all military officers who arrested citizens when the right of habeas corpus was suspended to deliver them over to the courts for trial, I felt that a fair trial was allowed them a great point was gained, as the outrage of the Federal Government, the President and his officials, if the arrest was wrongful, could be exposed and the perpetrators brought to justice, or at least held up to public condemnation; and when the amended property, [Mr. Hale.] which I took more interest in than all else, repealing the infamous jury law of July 17, 1862, was passed, I felt that the thing was out of the bill. The restoration of the second section of that law by the commit- tee of conference is a surrender to the more bitter and malignant Radicals of the Senate on the part of the President and his officials, if the arrest was wrong, could be exposed and the perpetrators brought to justice, or at least held up to public condemnation; and when the amended property, [Mr. Hale.] which I took more interest in than all else, repealing the infamous jury law of July 17, 1862, was passed, I felt that the thing was out of the bill. The restoration of the second section of that law by the commit- tee of conference is a surrender to the more bitter and malignant Radicals of the Senate on the part of the President and his officials, if the arrest was wrongful, could be exposed and the perpetrators brought to justice, or at least held up to public condemnation; and when the amended property, [Mr. Hale.] which I took more interest in than all else, repealing the infamous jury law of July 17, 1862, was passed, I felt that the thing was out of the bill. The restoration of the second section of that law by the commit- tee of conference is a surrender to the more bitter and malignant Radicals of the Senate on the part of the President and his officials, if the arrest was wrongful, could be exposed and the perpetrators brought to justice, or at least held up to public condemnation; and when the amended property, [Mr. Hale.] which I took more interest in than all else, repealing the infamous jury law of July 17, 1862, was passed, I felt that the thing was out of the bill. The restoration of the second section of that law by the commit-
to the Committee for the District of Columbia when appointed.

ENFORCEMENT OF FOURTEENTH AMENDMENT.

The House resumed the consideration of the report of the committee of conference on the bill (H. R. No. 3250) to enforce the provisions of the fourteenth amendment, and for other purposes.

Mr. SHELLABARGER. I now call the question.

The previous question was seconded and the main question ordered.

Mr. SHELLABARGER. I now call the attention of gentlemen to the provisions of the fourteenth amendment.

Mr. SHELLABARGER. I now propose to myself to occupy any portion of that hour. I will yield the first ten minutes of the hour to my colleague, [Mr. BINGHAM].

Mr. BINGHAM. I ask the attention of gentlemen of the House, especially those on the Republican side of it, to the statement which I make of some facts touching this bill. I desire, in the first place, to say that every part and parcel of the bill reported from the committee of conference meets my entire approval, except the seventh section of the fourteenth amendment, or the seventh section of the bill as reported by the committee of conference. I am the freer to make that remark for the reason that the rejection of that seventh section as reported, the bill is substantially the bill that received the vote of every Republican member of this House.

The object of the bill, as now reported, is largely the same as that of the bill that received the vote of every Republican member of this House that went back to the Senate.

The exceptions to this section now reported by the conference committee are without due consideration. The principle involved in that section was printed and before the House; therefore we had the measure from the Senate. The learned special committee of the House ignored it, and would have nothing to do with it, for manifest and good reasons.

The special committee of the House, in report, brings the bill before the House. I stand for the bill to day as it passed the House originally. I stand for it with the exception of the Sherman amendment, as it is called, in the House, which I have always understood to be a vote of some thirty or thirty-two votes in the Senate against the votes of some one hundred and forty or more in the House who supported this bill without that amendment. The House, according to the judgment of this House, is entitled to the floor in the destruction of property by mobs.

Mr. BUTLER, of Massachusetts. Will the gentleman now answer a question? Mr. BINGHAM. I have only a few minutes; otherwise I would yield with pleasure.

The provision of this section is:

"Every citizen of the United States shall have the right and be entitled to vote for President, Vice President, Senators, Representatives, and all civil officers of the United States," etc.

Mr. SHELLABARGER. I now call the attention of this House that this is the best method of ascertaining the rights of the American people. We have had a rule that a State may be held liable with the rioters, and all money in its treasury and all its property charged with the payment thereof.

Mr. BUTLER, of Massachusetts. A proceeding of this character is the greatest invasion of the rights of the people.

Mr. FARNsworth. I cannot give my assent to the report of the conference committee. I dislike what they have introduced here, but by saying, sir, the law which we repealed, and which requires jurors to take an oath substantially like the test-oath, would prevent any man stating a case or an affirmative in a court of law. He may be asked, in other respects, and no matter how well qualified his heart may be also, to do justice. The man may be relieved of disabilities, in paralyzing the power of the jury in the Fourth Amendment of the Constitution by Congress, yet be cannot take that oath as a juror. He may be ever so good a friend of the colored man who brings suit, but if he cannot take that oath he cannot sit on the jury. It seems to me that the courts in the impanneling of the jury to determine whether the juror is liable to challenge for cause, or to the parties to challenge peremptorily. The courts will see to it that the rights of all parties are taken care of.

I do not think, either, that the seventh, or Sherman amendment, has been improved by the conference committee.

I anticipate some such work as this when I insisted on having the yeas and nays on that section, and it was rejected by the Republican party in this House. I expected there would be some sort of modification, and it would be sent back to us, and therefore I desired that the members of the committee of conference should say "yes" and "no," that the Senate and the country might see it.

What is this new measure presented to our attention?

Mr. SHELLABARGER. I now yield to the gentleman from New York, [Mr. FARNSWORTH].

Mr. FARNSWORTH. I am grateful to the gentleman for the explanation which he has given the House. I think it is entitled to the floor in the destruction of property by mobs.
If a Chinaman should be robbed by four men in California or Nevada, can Congress pass a law under which the Constitution to suppress these outrages—these alleged outrages in the State or county have been adjudged to be within the meaning of this act.

Now, sir, the objects sought by this act are two in number: it gives a remedy in cases where there is an inability to sell upon execution, and provides a method of selling the property of the county or parish liable for damages caused by tumultuous assemblies.

Mr. FARNSWORTH. Do I understand the gentleman to claim that the power of Congress to levy taxes is only to be governed by the opinion of the Congress that passes the measure?

Mr. SMITH, of New York. I am glad the gentleman has asked me that question.

Mr. FARNSWORTH. Is that so? I want to know.

Mr. SMITH, of New York. I say this: that there is no limitation or restriction, either on the part of State or on the taxing power of the General Government. I hold in my hand a decision of the court of last resort in the State of New York, made by a Demo- cratic judge of high distinction, sitting and holding the court and making the finding of eminent domain is restricted; there must be compensation; the power of taxation is utterly unrestricted, and there is no re- duction or exemp- tion of property under the exercise of this power provided in the amendment which is now pending before the House, to lay a tax or provide for the entry of a judgment against the local government of the Union, if we have the same power, which is assumed in the amendment which is now pending before the House, to lay a tax or provide for the entry of a judgment against the local government, where the offense is committed for which redress is sought.

Mr. FARNSWORTH. May I ask the gentle- man a question?

Mr. SMITH, of New York. Certainly.

Mr. FARNSWORTH. Do I understand the gentleman to claim that the power of Congress to levy taxes is only to be governed by the opinion of the Congress that passes the measure?

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Mr. SMITH, of New York. I say this: that there is no limitation or restriction, either on the part of State or on the taxing power of the General Government. I hold in my hand a decision of the court of last resort in the State of New York, made by a Demo- cratic judge of high distinction, sitting and holding the court and making the finding of eminent domain is restricted; there must be compensation; the power of taxation is utterly unrestricted, and there is no re- duction or exemp- tion of property under the exercise of this power provided in the amendment which is now pending before the House, to lay a tax or provide for the entry of a judgment against the local government, where the offense is committed for which redress is sought.

Mr. FARNSWORTH. May I ask the gentle- man a question?

Mr. SMITH, of New York. Certainly.

Mr. FARNSWORTH. Do I understand the gentleman to claim that the power of Congress to levy taxes is only to be governed by the opinion of the Congress that passes the measure?

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To: Mr. Justice Powell  
From: Sam Estreicher  
Date: February 3, 1978  

Re: 75-1914, Monell v. Dep't of Social Services

Forgive me for writing another memo in this case. The issue is an important one, and there is one point which did not receive adequate treatment in my previous efforts.

WHR places considerable emphasis on a presumed legislative intent, as of 1871, to protect municipal treasuries. It is important to note that the prior decisions of this Court have not identified that purpose as a principal reason for the rejection of the Sherman Amendment. It was thought by the Court in Monroe and its progeny that the 1871 Congress doubted it had constitutional power to impose civil obligations on municipalities. As I pointed out in my earlier memo, this is an overstatement. The opponents of the Sherman Amendment were troubled by the prospect of imposing a duty not derived from the Constitution on state and local governments, rather than by the prospect of attaching liability for noncompliance with an acknowledged constitutional obligation. Rep. Bingham drafted both the Fourteenth Amendment and § 1 of the 1871 Act with Barron v. Baltimore in mind, which suggests that he was willing to hold municipalities liable for takings of property without just compensation (Chief Justice Marshall held that the Fifth Amendment did not reach state and local governments). But he opposed the
Sherman Amendment because that proposal threatened an interference with state power not authorized by the Fourteenth Amendment.

Adhering closely to Monroe's understanding of the legislative history, the Court has declined to recognize § 1983 jurisdiction even where a raid on the municipal treasury, not authorized by local law, would not result. Thus, in Moor v. County of Alameda, Justice Douglas, in dissent, urged that permitting a damages action under § 1988 would not be inconsistent with § 1983, where state law recognized liability in damages for the conduct in question. The Court, per TM, declined this invitation, however, noting that "the root of the [Sherman] proposal's difficulties stemmed from serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States." 411 U.S., at 708.

My thesis is best illustrated by WHR's opinion in City of Kenosha v. Bruno. Raising the jurisdictional question on its own motion, the Court held that a municipality could not be sued for injunctive relief, even though no monetary recovery was sought. Justice Douglas' dissent again urged that "the legislative history on which [Monroe's] construction of 'person' as used in 42 U.S.C. §1983 was based related to the fear of mulcting municipalities with damage awards for unauthorized acts of its police officers." 412 U.S., at 516. The holding in Kenosha stands as a rejection of that
view of the legislative intent. A municipality was simply not a "person" because the 1871 Congress thought it could not reach such entities. 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 public official sued in his official capacity, whom all, including WHR, concede to be a "person" under the Act.

* * *

My "bottom line" is 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 which Congress can be said to have acquiesced to by its inaction. Whatever the Court does will work an alteration of prior precedent. Why not decide the case on an accurate reading of the legislative history, rather than perpetuate the misconception of Monroe?
February 13, 1978

Dear Bill:

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

My absence from Washington attending a series of Judicial Conference committee meetings has prevented me from acting on your memorandum in this case.

I have now read it, and I am in general agreement with the position you express and would be prepared to join an opinion along those lines.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference
No. 75-1914 Monell v. Depart of Social Services

MEMORANDUM TO THE CONFERENCE:

I have now had an opportunity to review carefully

the memoranda circulated by our two "Bills", (WJD and WHR)

As I think,

Both are impressive and persuasive memos. Either could

form the basis of a principled decision, and this reaction

particularly

indicates why I have found the case so troublesome. In any

event, being satisfied that further delay will not make my

decision any easier, I will now firm up the tentative to

reverse that I expressed at Conference.

I add the following observations. As to the

legislative history debate, I am persuaded that Bill

Douglas' reading of its in Monroe was wrong. Bill

Rehnquist's memorandum makes a stronger argument in favor

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concern was centered on the inequity of imposing liability

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of Monroe's dictum, but I am persuaded that congressional
concern was centered on the inequity of imposing liability
on local units of government on a respondeat superior or
some other principle of vicarious liability. This seems
reasonably clear. My principal doubt was whether the word
"person" was intended to include inanimate bodies. Its use
hardly would seem an appropriate way of including
municipalities or similar entities. Yet, I suppose this
"plain meaning" approach has long since been ignored
Moreover, doubts about congressional power expressed in the debates related to the attempted imposition of a power not duty to curb private lawlessness which was deemed not to flow from the commands of the an extra-constitutional duty to curb private lawlessness, not from the perception a perception that municipalities were beyond the reach of their legislative authority under § 5 of the Fourteenth Amendment.

with respect to the word "person." There is the so-called
"Dictionary Act" passed a month before the Civil Rights
bill was introduced, that indicates a congressional
understanding that "the word 'person' may extend . . . to
bodies politic . . . " Moreover, I was painfully reminded
only a few weeks ago that a majority of my Brothers

that the same word, used by the same Senator (Sherman), in
1890 included foreign governments as well as municipalities,

and at their later date,

With me, policy considerations weigh more heavily
than trying to read meaning into ambiguous speeches by
Senators or speculating whether the word "person" embraces
the universe. Everyone agrees that §1983 authorizes suits
against officials of governmental units both in their
official and individual capacities. If one assumes that
the municipality (for example) will invariably indemnify an
official suit for conduct within the scope of his
authority, it does not really matter which way one goes on
this argument. The municipality pays in either event. On
the other hand, where the municipality does not indemnify
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With me, policy considerations weigh more heavily than trying to read meaning into ambiguous speeches by Senators or speculating whether the word "person" embraces the universe. Everyone agrees that §1983 authorizes suits against officials of governmental units both in their official and individual capacities. If one assumes that the municipality (for example) will invariably indemnify an official for conduct within the scope of his authority, it does not really matter which way one goes on this argument. The municipality pays in either event. On the other hand, where the municipality does not indemnify an official who has acted within the scope of his authority, one can reason that this is a default that somehow should be rectified. Putting this differently, as a matter of fairness there should be indemnification, and a unit of local government that fails to afford this...
Furthermore, an additional consideration is that affirnance of the Second Circuit's decision means that § 1983 does not authorize compensatory relief for the actions of local government units bearing a direct responsibility for a constitutional violation. This is true even though such actions are fully consistent with, indeed mandated by state law, and individual suits against public officials are likely to founder in the face of assertion of the assertion of good-faith reliance on local law. The absence of an effective remedy for authorized state action in violation of constitutional requirements may propel this Court to recognize a Bivens remedy to fill the gap. It would seem there would seem a measure of futility in adhering to an erroneous reading of legislative history in order, in the interest of protecting the municipal coffers, when the predictable consequence may be judicial imposition of a Bivens cause of action for all constitutional violations leading working a compensable
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protection is unlikely to attract and retain competent officers, board members and employees.

In addition we have enshrined the fiction that allows mandatory injunctions in §1983 actions (e.g., Milliken v. Bradley, 475 U.S. 711 (1986)), at the same time that we proscribe recovery of damages. In short, on this aspect of the matter before us, I must say that I would find it difficult to justify these distinctions as based on either expediency or principle. The truth probably is that the local governments already bear the financial burden of 1983 suits, whether for damages or injunctive relief. Bill Rehnquist does make an arguable point when he suggests that juries may be more likely to escalate damages if a local government itself is named as a defendant. I am not sure, however, that the average juror would view his or her local government or school board in the same light that jurors view insurance companies or railroads. After all, most jurors are taxpayers.

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This brings me to what I suppose is the most troublesome aspect of a reversal in this case: its effect on the doctrine of stare decisis. But 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
Technically, the holding of *Moor* does not extend beyond the recognition that Congress did not intend, as a matter of federal law, to impose 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 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 family's home. Although Morris Ernst's brief for petitioners in *Monroe* contains a footnote reference to the Sherman Amendment, he 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 §1983, and did not challenge "the holding in *Monroe* concerning the status under §1983 of public entities such
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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 § 1983. 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), involved a claim of pendent-party jurisdiction 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. Although we reaffirmed Monroe's reading of the debates over the 1871 Act, petitioners in that case...
based on conduct that was both authorized under state law and directly -- rather than vicariously -- responsible for the claimed constitutional injury. But in *Kenosha* we raised the jurisdictional question on our own initiative. Thus, the issues identified in the scholarly exchange between Bill Brennan and Bill Rehnquist simply 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 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 independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. But the opinions of this Court
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§ 1983 jurisdiction over school boards, even if not premised on considered holdings, has been longstanding. Indeed, it predated Monroe which did not cite the then recent school cases.

In my view, the only decision that we would overrule is Kenosha. 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 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.

I would think that the rationale of Kenosha will have to be disturbed in some fashion, whichever course the Court adopts in this case. Acceptance of Bill Rehnquist's view would require, if I understand him correctly, a "bifurcated application [of §1983] to municipal corporations depending on the nature of the relief sought against them." 412 U.S., at 513. A public official sued in
neither mandated nor specifically authorized by, and indeed was 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.

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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 award 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 coherence in the relevant body of precedents. Indeed, there is a degree of confusion in principle that we now have an opportunity to rationalize.

Although, as indicated, I generally agree with Bill Brennan, I differ with his memo in two respects:

First, *Monroe* and *Moor* should be restricted to their facts, rather than overruled. The Court simply could say that we have had no occasion previously to consider the
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 coherence in the relevant body of precedents. Indeed, there is a degree of confusion in principle that we now have an opportunity to rationalize.

Although, as indicated, I generally agree with Bill Brennan, I differ with his memo in two respects: First, Monroe and Moor should be restricted to their facts, rather than overruled. The Court simply could say that we have had no occasion previously to consider the availability of a §1983 damages remedy for constitutional violations that are the direct result of a policy decision by 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 Swann and Brown). 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.

Second, I would 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. Navarette, No. 76-446; Wood v. Strickland, 420 U.S. 308 (1975). We have relied on the common law in defining immunities under §1983. See, e.g., Imbler. The absolute immunity accorded governmental bodies under the common law would be modified to this extent. But this would be merely a modification rather than an abandonment of the common law rule.

I am grateful to both "Bills" for their most helpful contributions to our deliberations in this case.

Sincerely,

The absolute immunity accorded governmental bodies under the common law would be modified to this extent. But this would be merely a modification rather than an abandonment of the common law rule.

If I am grateful to both "Bells" for their most helpful contributions to our deliberation in this case.

Sincerely,

The result in the case probably would be a demand to consider whether qualified immunity entitles the respondents to judgment in their favor.
MEMORANDUM TO THE CONFERENCE:

I have now had an opportunity to review carefully the memoranda circulated by our two "Bills". Both are impressive and persuasive memos. As I think either could form the basis of a principled decision, I have found the case particularly troublesome. In any event, being satisfied that further delay will not make decision any easier, I will now firm up the tentative vote to reverse that I expressed at Conference. I add the following observations.

As to the legislative history debate, I am persuaded that Bill Douglas' reading of it in Monroe was wrong. Bill Rehnquist's memorandum makes a reasonable argument in favor of Monroe's interpretation of the Sherman Amendment's rejection. But I rather think that congressional concern was centered on the inequity of imposing liability on local units of government on the basis of respondeat superior or some other principle of
vicarious liability. Moreover, doubts about congressional power expressed in the debates stemmed from the attempted imposition of an extra-constitutional duty to curb private lawlessness, not from a perception that municipalities per se were beyond the reach of legislative authority under §5 of the Fourteenth Amendment. These points seem reasonably clear.

I have had some doubt that the word "person" was intended to include inanimate bodies. Its use is hardly an artful way to include municipalities or similar entities. Yet, I suppose the "plain meaning" approach was eroded long ago. There is the so-called "Dictionary Act," passed a month before the Civil Rights bill was introduced, which indicates a congressional understanding that "the word 'person' may extend and be applied to bodies politic and corporate. . . ." Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431. While "an allowable not a mandatory" definition, Monroe, 365 U.S., at 191, it is evidence of special usage of the term "person". Moreover, I was painfully reminded only a few weeks ago that a majority of my Brothers thought the same word, used by Senator Sherman in 1890, included foreign governments, Pfizer, Inc. v. Government of India, No. 76-749 (decided January 11, 1978), as well as municipalities, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1960).
With me, policy considerations weigh more heavily than any attempt to read meaning into ambiguous speeches by members of Congress a century ago or speculation whether the word "person" embraces the universe. Everyone agrees that §1983 authorizes suits against officials of governmental units both in their official and individual capacities. If one assumes that the municipality generally will indemnify an official sued for conduct within the scope of his authority, as it must if it is to attract and retain competent officers, board members and employees, it really does not matter which way one goes on the fiscal-impact argument. The municipality pays in either event.

In addition we have enshrined the fiction that allows mandatory injunctions, requiring the expenditure of large sums of money, in §1983 actions, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977), at the same time that we proscribe recovery of damages. While the Eleventh Amendment requires application of the fiction to suits against the States, I am not inclined to extend it to suits against local governments. Local governments probably already bear the financial burden of 1983 suits, for damages as well as injunctive relief. Bill Rehnquist does make an arguable point when he suggests that juries may be more likely to escalate damages if a local government itself is named as a
defendant. I am not sure, however, that the average juror would view his or her local government or school board in the same light that jurors view insurance companies and railroads. After all, most jurors are taxpayers.

This brings me to what I suppose is the most troublesome aspect of a reversal in this case: its effect on the doctrine of stare decisis. To my mind, considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings 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. McCrory, 427 U.S. 160, 186* (1976), we have answered a question that was never briefed or argued in 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, O.T. 1960, No. 39, p. 21, namely, a warrantless, early morning raid and ransacking of a Negro family's home. Although Morris Ernst's brief for petitioners in Monroe contains a footnote reference to the Sherman Amendment, he 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 substantial discussion of the legislative history of § 1983,
petitioners asserted that "the county was vicariously liable for the acts of its deputies and sheriff," id., 696, under § 1988. Although we reaffirmed explicitly Monroe's reading of the debates over the 1871 Act, petitioners in that case did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County." Id., at 700. Technically, the holding of Moor does not extend beyond the recognition that "Congress did not intend, as a matter of federal law, to impose vicarious liability on municipalities for violations of federal civil rights by their employees," and that §1988 "cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." Id., at 710 & n. 27.

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 Kenosha we raised the jurisdictional question on our own initiative. Thus, the issues identified in the scholarly exchange between Bill Brennan and Bill Rehnquist simply have not been thoughtfully 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 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 independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. But 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 focused specifically 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, thus has been longstanding. Indeed, it predated Monroe.

In my view, reversal would require the overruling only of Kenosha. 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 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.

The rationale of Kenosha may have to be disturbed in some fashion, whichever course the Court follows in this case. Acceptance of Bill Rehnquist's view would require, if I understand him correctly, importing into §1983 the approach of Ex parte Young, 209 U.S. 123 (1908), to preserve the availability of injunctive relief. While this is an understandable position, it does entail a "bifurcated application [of §1983] to municipal corporations 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, would become a non-"person" in a suit seeking a monetary recovery.

Moreover, under Bill's approach, I suppose we would have to say that Congress rejected the Sherman Amendment because it "wished to preserve the financial capacity of municipalities to carry out basic governmental functions" and "to insure the security of businessmen who traded with them." Our previous decisions have not identified these concerns as the principal reasons for the defeat of the Sherman proposal. Indeed, such considerations were minimized in Kenosha itself, which held that a municipality could not be sued for injunctive relief
under §1983 even though no monetary award was sought because a municipality is simply not a "person."

I have concluded that the prior decisions in this area do not require application of the usual stare decisis principle. There is no coherence in the relevant body of precedents. Indeed, there is a degree of confusion in principle that we now have an opportunity to rationalize.

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strengthen the argument for *Bivens* relief. I would prefer to avoid this pressure.

I am grateful to both "Bills" for their most helpful contributions to our deliberations in this case.

L.F.P., Jr.
February 21, 1978

MEMORANDUM TO THE CONFERENCE:

I have now had an opportunity to review carefully the memoranda circulated by our two "Bills". Both are impressive and persuasive memos. As I think either could form the basis of a principled decision, I have found the case particularly troublesome. In any event, being satisfied that further delay will not make decision any easier, I will now firm up the tentative vote to reverse that I expressed at Conference. I add the following observations.

As to the legislative history debate, I am persuaded that Bill Douglas' reading of it in Monroe was wrong. Bill Rehnquist's memorandum makes a reasonable argument in favor of Monroe's interpretation of the Sherman Amendment's rejection. But I rather think that congressional concern was centered on the inequity of imposing liability on local units of government on the basis of respondeat superior or some other principle of
vicarious liability. Moreover, doubts about congressional power expressed in the debates stemmed from the attempted imposition of an extra-constitutional duty to curb private lawlessness, not from a perception that municipalities per se were beyond the reach of legislative authority under §5 of the Fourteenth Amendment. These points seem reasonably clear.

I have had some doubt that the word "person" was intended to include inanimate bodies. Its use is hardly an artful way to include municipalities or similar entities. Yet, I suppose the "plain meaning" approach was eroded long ago. There is the so-called "Dictionary Act," passed a month before the Civil Rights bill was introduced, which indicates a congressional understanding that "the word 'person' may extend and be applied to bodies politic and corporate. . . ." Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431. While "an allowable not a mandatory" definition, Monroe, 365 U.S., at 191, it is evidence of special usage of the term "person". Moreover, I was painfully reminded only a few weeks ago that a majority of my Brothers thought the same word, used by Senator Sherman in 1890, included foreign governments, Pfizer, Inc. v. Government of India, No. 76-749 (decided January 11, 1978), as well as municipalities, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1960).
With me, policy considerations weigh more heavily than any attempt to read meaning into ambiguous speeches by members of Congress a century ago or speculation whether the word "person" embraces the universe. Everyone agrees that §1983 authorizes suits against officials of governmental units both in their official and individual capacities. If one assumes that the municipality generally will indemnify an official sued for conduct within the scope of his authority, as it must if it is to attract and retain competent officers, board members and employees, it really does not matter which way one goes on the fiscal-impact argument. The municipality pays in either event.

In addition we have enshrined the fiction that allows mandatory injunctions, requiring the expenditure of large sums of money, in §1983 actions, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977), at the same time that we proscribe recovery of damages. While the Eleventh Amendment requires application of the fiction to suits against the States, I am not inclined to extend it to suits against local governments. Local governments probably already bear the financial burden of 1983 suits, for damages as well as injunctive relief. Bill Rehnquist does make an arguable point when he suggests that juries may be more likely to escalate damages if a local government itself is named as a
defendant. I am not sure, however, that the average juror would view his or her local government or school board in the same light that jurors view insurance companies and railroads. After all, most jurors are taxpayers.

This brings me to what I suppose is the most troublesome aspect of a reversal in this case: its effect on the doctrine of stare decisis. To my mind, considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings 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. McCrory, 427 U.S. 160, 186* (1976), we have answered a question that was never briefed or argued in 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, O.T. 1960, No. 39, p. 21, namely, a warrantless, early morning raid and ransacking of a Negro family's home. Although Morris Ernst's brief for petitioners in Monroe contains a footnote reference to the Sherman Amendment, he 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 substantial discussion of the legislative history of § 1983,
petitioners asserted that "the county was vicariously liable for the acts of its deputies and sheriff," id., 696, under § 1988. Although we reaffirmed explicitly Monroe's reading of the debates over the 1871 Act, petitioners in that case did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County." Id., at 700. Technically, the holding of Moor does not extend beyond the recognition that "Congress did not intend, as a matter of federal law, to impose vicarious liability on municipalities for violations of federal civil rights by their employees," and that §1988 "cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." Id., at 710 & n. 27.

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 Kenosha we raised the jurisdictional question on our own initiative. Thus, the issues identified in the scholarly exchange between Bill Brennan and Bill Rehnquist simply have not been thoughtfully 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 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 independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. But 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 focused specifically 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, thus has been longstanding. Indeed, it predated Monroe.

In my view, reversal would require the overruling only of Kenosha. 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 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.

The rationale of Kenosha may have to be disturbed in some fashion, whichever course the Court follows in this case. Acceptance of Bill Rehnquist's view would require, if I understand him correctly, importing into §1983 the approach of Ex parte Young, 209 U.S. 123 (1908), to preserve the availability of injunctive relief. While this is an understandable position, it does entail a "bifurcated application [of §1983] to municipal corporations 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, would become a non-"person" in a suit seeking a monetary recovery.

Moreover, under Bill's approach, I suppose we would have to say that Congress rejected the Sherman Amendment because it "wished to preserve the financial capacity of municipalities to carry out basic governmental functions" and "to insure the security of businessmen who traded with them." Our previous decisions have not identified these concerns as the principal reasons for the defeat of the Sherman proposal. Indeed, such considerations were minimized in Kenosha itself, which held that a municipality could not be sued for injunctive relief
under §1983 even though no monetary award was sought because a municipality is simply not a "person."

I have concluded that the prior decisions in this area do not require application of the usual stare decisis principle. There is no coherence in the relevant body of precedents. Indeed, there is a degree of confusion in principle that we now have an opportunity to rationalize.

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