Dear Bill:

I now have had an opportunity to read your revised draft, circulated April 21.

Thank you for the revisions directed to the points raised in my letter of April 11. The new part III on stare decisis is quite persuasive, and includes much of what I would have said on this question in a concurring opinion. Moreover, if I could persuade you to accept my suggestions below, I can join Part II. It contains a helpful—and I think correct—explanation of why §1983 does not impose liability on government entities for the unauthorized misconduct of employees. In view of the fact that our previous cases—with the exception of Kenosha v. Bruno—primarily involved claims of respondeat superior liability against municipalities and counties, I think it appropriate for the Court to make clear that theory does not support a §1983 claim against entities of government.

In sum, I believe my previously expressed concerns have now been reduced to the following narrowly focused suggestions:

1. As you know, I do not view §1983 as coextensive with the full power of Congress under the Fourteenth Amendment. A number of scholars share this view, including Gunther and Monaghan. I would therefore appreciate your considering the following clarifications:

(a) Page 24, first sentence in full paragraph: I would substitute "broad" for "complete".

(b) Page 25, the long paragraph in footnote 45: Rather than say that §1983 "represented an attempt broadly to exercise the power conferred by §5 of the Fourteenth Amendment", I would simply say that §1983 "represented an
attempt to include all officials and entities within the
constitutional reach of Congress". It is unnecessary to
suggest that other features of §1983 are dictated either by
the Constitution or by 1871 understandings of
constitutional limits.

(c) Page 26, middle of first full paragraph: I
would modify the description of §1 as the only civil remedy
"coextensive" with the Fourteenth Amendment. Perhaps you
could say that the section provided a "broad" or
"expansive" civil remedy to implement the guarantees of the
Fourteenth Amendment.

2. Page 30, last sentence in footnote 55 & page
34, proposed footnote 60: I concur in Potter's view that
explicit reference to Estelle v. Gamble is undesirable in
this opinion. There may well be several tenable ways to
read our decision in Estelle, but I am unwilling to suggest
in this case that the "deliberate indifference" standard
has application in contexts other than that of prisons,
where the inmate is wholly dependent on prison officials
for the satisfaction of basic human needs. Your discussion
on pp. 29-30 makes quite clear that official policy can be
expressed as unwritten, informal "custom." I can accept
this where the custom is unmistakably sanctioned by the
municipality. And your language at the top of p.34 does
not foreclose a "deliberate indifference" theory in an
Eighth Amendment context, where a prison department's
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medical needs "itself inflicts [constitutional] injury...." In short, I hope you will be willing to drop
the Estelle sentence in note 55 (or proposed note 60) as
unnecessary, reserving all mention of the reach of Estelle
until we have a specific case.

3. I also agree with Potter that footnote 57 on
page 32 (with respect to "fault") is unnecessary and
touches on an issue yet to be resolved. While the
footnote, as amended in your letter of April 25 to Potter,
does not commit the Court to any particular proposition of
law, it may be read as a "signal". In light of our
reservation of the negligence issue in Procunier v.
Navarette, I would remain silent here. We will have to
confront the negligence issue soon enough without inviting
it.

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Act of 1976: You describe this as allowing "prevailing
parties in §1983 suits to obtain attorneys' fees from the losing party". I am sure you intend only to state, in accord with the statutory language, that the Act merely confers discretion on the Court to allow such fees. Also, in light of Hutto v. Finney, I am somewhat troubled by your characterization of the congressional intent on page 39. I would simply say that Congress has "attempted to allow" such awards, not that Congress has "attempted to limit Monroe."

5. Your revision of Part IV as to immunity—leaving the issue entirely open—is quite acceptable. I no longer will write on the immunity issue, although my previously expressed view remains firm.

* * * *

I appreciate your efforts to accommodate the various suggestions from other Brothers and me. This is, however, a major new precedent and I am strongly disposed to move cautiously. If you will make the changes suggested above, I will be happy to join you—although I do not foreclose the possibility of having minor editing suggestions as I reread your comprehensive opinion.

Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,

[Signature]

Mr. Justice Brennan

lfp/ss

cc: The Conference
Leroy:

This seems fair to me. Although, as you know, I have concluded myself that I'll not join any II.

P.S. I appreciate the service you are performing for all I am seeking to limit at.
Dear Bill:

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Thank you for the revisions directed to the points raised in my letter of April 11. The new part III on *stare decisis* is quite persuasive, and includes much of what I would have said on this question in a concurring opinion. Moreover, if I could persuade you to accept my suggestions below, I can join Part II. It contains a helpful — and I think correct — explanation of why §1983 does not impose liability on government entities for the unauthorized misconduct of employees. In view of the fact that our previous cases —with the exception of *Kenosha v. Bruno*— primarily involved claims of *respondeat superior* liability against municipalities and counties, I think it appropriate for the Court to make clear that that theory does not support a §1983 claim against entities of government.

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Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,
May 1, 1978

No. 75-1914

Dear Bill:

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2. Page 30, last sentence in footnote 55 & page 34, proposed footnote 60: I concur in Potter's view that explicit reference to Estelle v. Gamble is undesirable in this opinion. There may well be several tenable ways to read our decision in Estelle, but I am unwilling to suggest in this case that the "deliberate indifference" standard has application in contexts other than that of prisons, where the inmate is wholly dependent on prison officials for the satisfaction of basic human needs. Your discussion on pp. 29-30 makes quite clear that official policy can be expressed as unwritten, informal "custom." I can accept this where the custom is unmistakably sanctioned by the municipality. And your language at the top of p.34 does not foreclose a "deliberate indifference" theory in an Eighth Amendment context, where a prison department's established policy or "custom" with regard to prisoner medical needs "itself inflicts [constitutional] injury..." In short, I hope you will be willing to drop the Estelle sentence in note 55 (or proposed note 60) as unnecessary, reserving all mention of the reach of Estelle until we have a specific case.

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Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,

Mr. Justice Brennan

lfp/ss
May 2, 1978

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

Dear Lewis,

Thank you for your memo on this case. As you know, my clerks have been meeting informally with the clerks from a number of chambers (including your own) to hammer out rough spots in the second draft of my opinion for the Court. I think that this process has produced new language which meets all but two of the points raised in your memorandum, although in some cases the language adopted is slightly different from that you have suggested.

The two remaining points are footnote 57 and Estelle. As Byron's recent memorandum indicated, I have agreed to delete note 57. And, although I must say that I am quite reluctant to drop the Estelle point, in the interest of avoiding a flurry of opinions I will drop the last part of note 55 as well as any attempt to resurrect the point in note 60. I have also gone through Part II with care to remove the word "fault" whenever it might, by negative implication, indicate that we are creating a negligence cause of action under § 1983. To accommodate the dropping of Estelle and references to municipal fault, I will recast the last paragraph of Part II as follows (replacing what is now the carry-over paragraph on pp. 33-34):

"We conclude, therefore, that a local government may not be sued for the tort purely of its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see pp. 1-2 and n. 2, supra, we must reverse the judgment below. In so doing, we have no occasion to
address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and we expressly leave further development of this action to another day."

The suggested text will require both footnotes 59 and 60 to be deleted.

Rather than attempt to make any more detailed response to your memorandum, I will send our well marked-up copy of Monell draft 2 to the printer for a third draft. I agree with you that "it [is] appropriate for the Court to make clear that [respondeat superior] does not support a §1983 claim against entities of government," and, accordingly, will keep Part II in the third draft. If it appears that we cannot attract a fifth vote for that Part, I will convert it into a plurality opinion in the fourth draft.

Sincerely,

Mr. Justice Powell

Copies to the Conference
To: Mr. Justice Powell

From: Sam Estreicher

Date: May 2, 1978

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

WJB's proposed language is open-ended ("we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be"), but it may be innocuous because it says nothing. In light of his willingness to drop the last sentence in note 55, note 57, note 59 & note 60, we should permit him a measure of author's license.
May 2, 1978

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Mr. Justice Powell

Copies to the Conference
by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan recognized: "Congress included custom and usage [in § 1983] because of persistent and widespread discriminatory practices of State officials . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168 (1970).

On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless official municipal action of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.

We begin with the language of § 1983 as passed:

"[A]ny person who, under color of any law, statute,

See also Justice Frankfurter's statement in Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362, 369 (1940):

"It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

Moreover, will not in general create a violation of the Constitution as we affirmed two Terms ago, where the Constitution imposes a duty on state officials to act, and they are deliberately indifferent to that duty—a form of inaction which by its nature will seldom be officially adopted or written local policy—§ 1983 provides an avenue of redress. See Estelle v. Gamble, 429 U.S. 97, 104-105 (1976)."
ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person... to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress..." Globe App., at 335 (emphasis added).

The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach "as absent."


Support for such a conclusion can be found in the legislative history. As we have indicated, there is virtually no discussion of § 1 of the Civil Rights Act. Again, however, Congress' treatment of the Sherman amendment gives a clue to whether it would have desired to impose respondent superior liability.

The primary constitutional justification for the Sherman amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens as the Privileges or Immunities Clause of the Fourteenth Amendment required. See pp. 10-13, supra. And according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had neglected its duty to provide protection. See Globe, at 761 (Sen. Sherman); id., at 750 (Sen. Edmunds); id., at 751-752 (Rep. Shellabarger). But other proponents of the amendment apparently viewed it as a form of vicarious liability for the unlawful acts of the citizens of the locality. See id., at 792 (Rep. Butler). And whether intended or not, the amendment as drafted did impose a species of vicarious liability on municipalities since it could be construed to impose
Equally important, creation of a federal law of *respondeat superior* where state law did not impose such an obligation would raise all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional. To this day, there is disagreement about the basis for imposing vicarious liability on an employer for the torts of an employee when the employer itself is not at fault. See W. Prosser, Law of Torts, § 69, at 369 (4th ed. 1971). Nonetheless, two justifications tend to stand out. First in the commonsense notion that no matter how blame-

liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithall to do anything about it. Indeed, the statute held a municipality liable even if it had done everything in its power to curb the riot. See p. 8, supra; Globe, at 761 (Sen. Stevens); id., at 771 (Sen. Thurman); id., at 788 (Rep. Kerr); id., at 791 (Rep. Willard). While the first conference substitute was rejected principally on constitutional grounds, see id., at 894 (Rep. Poland), it is plain from the text of the second conference substitute—which limited liability to those who, having the power to intervene against Ku Klux violence, "neglect[ed] or refuse[d] so to do," see Appendix, infra, at 41, and which was enacted as § 6 of the 1871 Act and is now codified as 42 U.S. C. § 1983—that Congress also rejected those elements of vicarious liability contained in the first conference substitute even while accepting the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan. Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality’s employees. Nonetheless, when Congress’ rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1863 which can easily be construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong.

*We note, however, that where there is fault in hiring, training, or direction, that fault is the basis for liability under the common law, see 2 F. Harper & F. James, The Law of Torts, §§ 29.1, at 1362–1363 (1956), not the fault of the employee-tortfeasor vicariously applied to the employer.*
less an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the cost of accidents. See, e.g., ibid.; 2 F. Harper & James, The Law of Torts, § 26.3, at 1368-1369 (1956). Second is the argument that the cost of accidents should be spread to the community as a whole on an insurance theory. See, e.g., id., § 26.5; W. Prosser, supra, at 459.84

The first justification is of the same sort that was offered for the Sherman amendment: “The obligation to make compensation for injury resulting from riot is, by arbitrary enactment of statutes, affirmative law, and the reason of passing the statute is to secure a more perfect police regulation.” Globe, at 777 (Sen. Frelinghuysen). This justification was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable. The second justification was similarly put forward as a justification for the Sherman amendment: “we do not look upon [the Sherman amendment] as a punishment . . . . It is a mutual insurance.” Id., at 792 (Rep. Butler). Again, this justification was insufficient to sustain the amendment.

In sum, a local government may be sued for monetary, declaratory, or injunctive relief under § 1983 when it is at fault, but not for the fault purely of its employees or agents.85

84 A third justification, often cited but which on examination is apparently insufficient to justify the doctrine of respondeat superior, see, e.g., 2 F. Harper & F. James, supra, n. 61, § 26.3, is that liability follows the right to control the actions of a tortfeasor. By our decision in Rizzo v. Goode, 423 U. S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See id., at 370-371.

85 Given the variety of ways that official policy may be demonstrated, we do not today attempt to establish any firm guidelines for determining when individual action executes or implements official policy. However, given
It is only when the government'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 government is responsible under § 1983. In all other cases, a § 1983 action must be brought against the individual officers whose acts form the basis of the § 1983 complaint.

III

Although we have stated that stare decisis has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes, our conclusion that Congress did not intend to enact a regime of vicarious liability, whatever official action is involved must be sufficient to support a conclusion that a local government itself is to blame or is at fault.

For example, in Rizzo v. Goode, 423 U. S. 362 (1976), we recognized that fault is a crucial factor in determining whether relief may run against a party for its alleged participation in a constitutional tort. Distinguishing the relief approved by the lower courts in Rizzo from that sanctioned by this Court in school desegregation cases, the Court explained:

"Respondents . . . ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as Swann [v. Charlotte-Mecklenberg Board of Education, 402 U. S. 1 (1971)] and Brown [v. Board of Education, 347 U. S. 483 (1954),] were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. 423 U. S., at 377 (emphasis in original).

See, however, n. 55, supra.
MEMORANDUM TO THE CONFERENCE

RE: No. 75-1914 Monell v. Department of Social Services
of the City of New York

Enclosed is completed draft revised primarily to accommodate the suggestions of Potter, Byron and Lewis. Those appear at pages 25, 26, 27, 30-35, 38-39 and 41.

The changes at 11, 13-14 and 20-22 are for purposes of clarification and organization only.

I hope that this circulation can be the basis for a final resolution of the Court's opinion.

W.J.B. Jr.

5/4/78

WJB has made all the changes that we asked him to make. You should not feel any reluctance in joining this opinion. I wonder if you could point out a problem that I have with the first sentence at the top of p. 12. Although WJB does not intend such a meaning, the phrase "where state law did not impose such an obligation" could lead to an interpretation that respondeat-superior liability is possible where state law imposes such liability. I would prefer that the phrase be deleted. I recognize that this language appeared in previous drafts, but I just noticed for the first time.
May 5, 1978

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

Dear Bill:

As your 3rd draft substantially accommodates my concerns (for which I thank you), I am glad to join you.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

Bill:

There is one language change that I would appreciate your making. The phrase "where state law did not impose such an obligation" (p. 33) could lead to an interpretation that respondeat-superior liability is possible where state law imposes such liability. I would prefer that the phrase be deleted. I recognize that this language appeared in previous drafts, but I just noticed it.

L.F.P., Jr.
May 5, 1978

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

Dear Bill:

I am still with you and hope you will not have to make any further changes.

sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference
Few cases in the history of the Court have been cited more frequently than *Monroe v. Pape*, 365 U.S. 167 (1961), decided less than two decades ago. Focusing new light on § 1983, the decision offered wider access to the federal courts to redress wrongs far beyond those contemplated in 1871. It enlarged the concept of "color of law", and made clear that exhaustion of state remedies was not a precondition to the federal remedy. But *Monroe* curiously exempted local government entities from liability at the same time it opened wide the courthouse door to suits against officers and employees of such entities — even when they had acted pursuant to express authorization. The illogic of this result, and the unsoundness of the historical reason asserted by the *Monroe* Court in support of it, have been well demonstrated by the Court's opinion today.

Yet, the seriousness of overruling a portion of so famous a decision where the Congress by its inaction apparently has accepted that portion, prompts me to write.
To: Sam

From: L.F.P., Jr.

Date: May 8, 1978

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

Over the weekend, I reviewed and edited your draft (5/1/78) of a concurring opinion.

I like the opinion and am inclined to render it. It would be ostentatious, however, for me to repeat the substance of points or arguments already well made by Justice Brennan. As I have not had his opinion with me, I have not been able to check back to see whether there is undue repetition in my concurrence. In view of your own intimate familiarity with this whole subject, including the Brennan opinion, I would like your considered judgment on this question.

Also, I have some lingering doubt as to the appropriateness of including the paragraph on Bivens. I like the paragraph, and you are familiar with my thinking about Bivens, but I would like your view as to whether inclusion of the paragraph weakens the overall force of the concurrence.
Finally, I am hesitant to add a ten or twelve page concurrence to the long opinions already written by Justices Brennan and Rehnquist. I therefore suggest that you consider possible marginal statements both in the text and notes that could be omitted. For example, I have marked portions of pages 3 and 4 to be cut from the text and placed in a note. On second thought, I believe the Brennan opinion quotes so elaborately from the debate on the Sherman Amendment, we need not include the quotations from Burchard and Blair. Perhaps the note could simply make a reference to their statements. I also invite your thought as to whether the paragraph on Moore (p. 7) can be summarized in a conclusory sentence without loss of impact. My recollection, however, is that the Brennan opinion does not deal adequately with Moore.

L.F.P., Jr.
Re: 75-1914 - Monell v. Department of Social Services of the City of New York

Dear Bill,

I am content with your circulation of May 4, 1978.

Sincerely yours,

[Signature]

Mr. Justice Brennan

Copies to the Conference
May 15, 1978

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

Dear Bill,

I have now carefully read your revised opinion from beginning to end and I am glad to join. Many thanks for your generous and effective efforts in meeting the recalcitrant quibbles from your obstinate colleagues.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference
To: Mr. Justice Powell
From: Sam Estreicher
Date: May 15, 1978

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

1. I have incorporated your editorial changes with some minor exceptions. I explain my actions in notational comments on pp. 7 and 9 of your draft. With respect to the question you raise on p. 8, the Young fiction is that the public official is enjoined even though the relief in substance operates against the State. As the Court explained it in Ex parte Young, an individual enforcing an unconstitutional state statute is shorn of any official authority derived from that statute and may be sued as an ordinary person. In later usage, the Ex parte Young fiction has been extended to official-capacity suits.

2. I have also made some additional changes of my own. Most are self-explanatory, if difficult to read on my copy. Insert 5-A is in response to Jim's point that the language on p. 5 was unduly critical of the Court. Insert 6-A offers language that is more precise than the prior text. I have deleted the joinder discussion on p. 7 because in rethinking the point, I have concluded that misjoinder does not raise a jurisdictional question if individual public officials are codefendants.
May 17, 1978

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

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

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

MEMORANDUM TO CONFERENCE:

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

L.F.P.
L.F.P., Jr.
6. The doctrine of *stare decisis* advances two important values of a rational system of law:

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

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. *Marbury v. Madison*, 1 Cranch 137
(1803), cited by the dissent, post, at 5, is a case in point. But the Court's recognition of its power to invalidate legislation not in conformity with constitutional command was essential to its judgment in Marbury. And on numerous subsequent occasions, the Court has been required to apply the full breadth of the Marbury holding. In Monroe, on the other hand, the Court's rationale was broader than necessary to meet the contentions of the parties and to decide the case in a principled manner. The language in Monroe cannot be dismissed as dicta, but we may take account of the fact that the Court simply was not confronted with the implications of holding § 1983 inapplicable to official municipal policies. It is an appreciation of those implications that has prompted today's reexamination of the legislative history of the 1871 measure.
action contrary to its own ordinances and the laws of the state it is a part of [sic]." Brief for Respondents, supra, p. 26. Thus the ground of decision in Monroe was not advanced by either party and was broader than necessary to resolve the contentions made in that case.6

Similarly, in Moor v. County of Alameda, 411 U. S. 603 (1973), petitioners asserted that "the County was vicariously liable for the acts of its deputies and sheriff." id., at 606, under 42 U. S. C. § 1988. In rejecting this vicarious-liability claim, id., at 710, and n. 27, we reaffirmed Monroe's reading of the statute, but there was no challenge in that case to "the holding in Monroe concerning the status under § 1983 of public entities such as the County." id., at 700; Brief for Petitioners, O. T. 1972, No. 72-10, p. 9.

Only in City of Kenosha v. Bruno, 412 U. S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and the direct cause of the claimed constitutional injury. In Kenosha, however, we raised the issue of the City's amenability to suit under § 1983 on our own initiative.7

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

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

7 In Adinap v. Howard, 427 U. S. 1 (1976), we reaffirmed Monroe, but petitioner did not contest the proposition that counties were excluded from the reach of § 1983 under Monroe, id., at 16, and the question before us concerned the scope of prudential-jurisdiction, with respect to a state-law claim. Similarly, the parties in Mt. Healthy City Board of Ed. v. Doyle, 429 U. S. 274 (1977), did not seek a re-examination of our ruling in Monroe.
May 31, 1978

Dear Bill:

Re: 75-1914 - Monell v. Dept. of Social Service

Please join me in your dissent.

Regards,

W.E.B.

Mr. Justice Rehnquist

Copies to the Conference
Re: No. 75-1914, Jane Monell v. Dept of Social Services

Dear Potter,

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

While I am not predisposed to extend § 1983's reach, this case presents the issue of the proper treatment of conduct which lies at the core of the considerations that animated the 42d Congress. Affirmance of Judge Gurfein's ruling for the Second Circuit means that § 1983 does not authorize compensatory relief for the actions of local governmental units bearing a direct
responsibility for a constitutional deprivation, even though such actions are fully consistent with, indeed mandated by, state law. Suits against the public official in his private capacity are likely to be defeated by the assertion of good-faith reliance on state law. Thus, the "under color of" state law debate in Monroe v. Pape, 365 U.S. 167 (1961), is stood on its head. A monetary recovery will be possible only for unauthorized state action, the very conduct that Felix Frankfurter argued was not encompassed by the "under color of" wording of the statute.

A second consideration is that the absence of any remedy -- outside of the types of employment discrimination proscribed by the 1972 amendments to Title VII -- for authorized state action in violation of constitutional requirements may propel this Court to recognize a Bivens remedy for all constitutional rights made applicable to the States through the Fourteenth Amendment. In light of accepted principles of sovereign immunity, it is unlikely that a Bivens action will be recognized for authorized federal action. But I doubt if we can avoid for long recognition of similar claims against local government entities. See, e.g., Lowell School District No. 71 v. Ker, No. 77-688, March 3, 1978 Conference. Reexamination of Monroe's interpretation of
§1983 would seem preferable to the predictable alternative of judicial imposition of a Bivens cause of action for all constitutional violations working a compensable harm.

I am fairly convinced that Bill Douglas' reading of the legislative history in Monroe was wrong, and I do not understand Bill Rehnquist's memorandum to present a defense of that interpretation. Section 1983 was enacted as § 1 of the Civil Rights Act of 1871. That section passed both Houses virtually without debate. Representative Bingham, a leading supporter, had drafted §1 of the Fourteenth Amendment with the case of Barron v. Baltimore, 7 Pet. 243 (1834), in mind. As he explained during the debates over the 1871 Act, "[i]n that case the city had taken private property for public use, without compensation ..., and there was no redress for the wrong ...." Cong. Globe App. 84. He viewed §1983's predecessor as an appropriate vehicle for seeking redress from takings by municipalities that Barron had held to fall outside of the reach of the Fifth Amendment. Id., at 84-85. Bill Brennan is quite right in saying that "it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit
that had the benefit of the property taken." While the term "person" may be a unusual way of expressing an intention to reach units of government, the passage of the so-called "Dictionary Act," a month before the civil rights bill was introduced, evinces a congressional understanding that "the word 'person' may extend and be applied to bodies politic ...." And the same language in Senator Sherman's antitrust measure, enacted 19 years later, has been construed to include municipalities, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906), and even foreign governments, Pfizer, Inc. v. Government of India, No. 76-749 (decided January 11, 1978), slip op. 7-10.

Representative Bingham and other Republican members of the House broke ranks with their party over the Sherman Amendment. That proposal was rejected because it sought to impose a duty upon municipalities to curb private mob violence. This was deemed an unwarranted, extra-constitutional Federal intrusion into an area of primary State competence because the obligation sought to be imposed -- one addressed to State inaction in the face of private lawlessness -- was without basis in the commands of the Fourteenth Amendment. As Representative Burchard explained: "But there is no duty imposed by the
Constitution of the United States, or usually by State laws, upon a county to protect the people of that county, against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person." Cong. Globe 795. And Representative Blair added: "[H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to." Ibid.

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

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

Considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings holding that municipalities and counties are not "persons" for purposes of § 1983. In the somewhat accidental manner that characterizes many of our § 1983 decisions, cf. Runyon v. 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 21, namely, a warrantless, early morning raid and ransacking of a black family's home. Although Morris Ernst's brief for petitioners in Monroe contains a footnote reference to the Sherman Amendment, he obviously had no incentive to present a view of the legislative history that would have foreclosed relief on a theory of respondeat superior. In Moor v. County of Alameda, 411 U.S. 693 (1973), the only other case presenting a discussion of the legislative history of § 1983, petitioners asserted a claim of vicarious liability against a county under § 1988 and, moreover, did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County," id., at 700. Aldinger v. Howard, 427 U.S. 1 (1976), did not involve a claim based on § 1983, and petitioners conceded that Spokane County was not a "person" under the statute. Only in City of Kenosha v. Bruno, 412 U.S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and directly -- rather than vicariously -- responsible for the claimed constitutional injury. But the Kenosha Court raised the
jurisdictional question on its own motion. Thus, the issues identified in the exchange between Rehnquist and Rehnquist simply and Brennan (members have not been ventilated on any previous occasion.

On the other hand, affirmance in this case requires a rejection of this Court's sub silentio exercise of jurisdiction over school boards in a great many cases. As Bill Rehnquist acknowledges, at least three of these school board decisions involved claims for monetary relief, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); also Vlandis v. Kline, 412 U.S. 441 (1973). I concede the presence of an independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. I do not understand, however, Bill Rehnquist's point that some of the decisions involved independent school districts, for he also contends that "the governing body of an incorporated school district separate from the city" is immune to § 1983 damages liability. Nonetheless, the opinions of this Court often made explicit reference to the school-board party, particularly in discussions of the relief to be awarded,
see, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977). And Congress has specifically focused on this Court's school-board decisions in several statutes. The exercise of § 1983 jurisdiction over school boards, even if not premised on considered holdings, has been longstanding. Indeed, it predated **Monroe**, which did not cite notorious **Ruble v. McCrary**, the then recent school cases.

In my view, the only decision that will have to be overruled is **City of Kenosha v. Monroe**. I would 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 may have been violative of, state or local law, is consistent with the 42d Congress' rejection of vicarious liability as an operative principle of the 1871 Civil Rights Act.

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

Although overruling a statutory decision is strong medicine for error, it is of significance to me...
Acceptance of Bill Rehnquist's view required a "bifurcated application 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, becomes a non-"person" in a suit seeking a monetary recovery. Further impairment of Kenosha's reasoning will be necessary because, as Bill Rehnquist's memorandum illustrates, we will have to say that Congress rejected the Sherman Amendment out of a desire to protect municipal treasuries. Kenosha held that a municipality could not be sued for injunctive relief under §1983 even though no monetary recovery was sought, for a municipality was simply not a "person." The question arises why protection of the municipal fisc is now viewed as the dominant reason for rejection of the Sherman Amendment, when a suit seeking redress from authorized conduct is brought against a defendant who is conceded to be a "person" under the Act.

I have concluded that the prior decisions in this area do not require application of the usual stare decisis principle. There is no clear, coherent strand of authority in which Congress intended a degree of confusion in principle that we now have an opportunity to rectify.
Although, as indicated, I generally agree with Bill Brennan, I differ with his memo in two respects. I can be said to have acquiesced by its inaction. Whatever the Court does will work some alteration of precedent. I would suggest that we decide this case on an accurate reading of the legislative history, rather than perpetuate the misconception of *Monroe* and set in motion the pressures that may compel the constitutionalization of a damages action against municipalities and school boards.

There are at least two conditions that I would insist upon before joining an opinion by Bill Brennan. First, *Monroe* and *Moor* should be restricted to their facts, rather than overruled. We should say that we have no occasion previously to consider the availability of a §1983 damages remedy for constitutional violations that are the direct result of a policy of the government entity, rather than simply its failure to curb the unauthorized torts of its employees. See *Rizzo v. Goode*, 423 U.S. 362, 377 (1976), discussing *Swann* and *Brown* decisions. There are substantial line-drawing problems, as Bill Rehnquist notes, but this case involves a formal, written policy of the municipal department and school board. It is the clear case. Second, I would urge that the Court recognize a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation, cf. *Procunier v.*
Navarette, No. 76-446; Wood v. Strickland, 420 U.S. 308 (1975). It is all likelihood, the imposition of a mandatory maternity-leave in this case, occurring before the lesson, would not involve such a clearly defined right, and no liability should ensue. The recognition of such a defense will represent a modification, required by the policies underlying § 1983, of the immunity that the common law generally afforded municipal bodies in the performance of their "governmental" functions, and should mitigate the impact of our decision on the municipal treasury.

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