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# Civil Rights: Discarding Section 1983 Municipal Immunity--Is That Enough?

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# CASE COMMENTS

## CIVIL RIGHTS: DISCARDING SECTION 1983 MUNICIPAL IMMUNITY – IS THAT ENOUGH?*

*Monell v. Department of Social Services*, 98 S. Ct. 2018 (1978)

Petitioners, four city employees, brought a class action for back pay[1] against the Department of Social Services, the Board of Education, and the City of New York[2] under 42 U.S.C. §1983.[3] The complaint charged that the school board and the department had unlawfully required pregnant employees to take unpaid leaves of absence before medical reasons necessitated their leaving.[4] The district court, relying on *Monroe v. Pape*,[5] held that the department, board, and city were immune to suit under section 1983 and dismissed the petitioners' claims.[6]

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1. The original complaint, filed on July 26, 1971, included an employee of the department and two employees of the school board. On September 14, 1973, another employee of the school board joined in an amended complaint alleging employment discrimination under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e (1970 & Supp. V 1975). In addition to their claim for back pay, the petitioners sought declaratory and injunctive relief. Monell v. Department of Social Servs., 394 F. Supp. 853, 854 (S.D.N.Y. 1975).

2. The petitioners also sued the Commissioner of the Department, the Chancellor of the Board, and the Mayor of New York in their official capacities. 394 F. Supp. at 854.

3. 42 U.S.C. §1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The jurisdictional counterpart of §1983 is 28 U.S.C. §§1343, 1343(3) (1970), which provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

4. The underlying constitutional violation alleged by the petitioners was that the maternity leave policies created an irrebutable presumption that the pregnant employee was not fit to continue work and that the cutoff dates for the mandatory leave periods were arbitrary, having no valid relationship to the state's interest in preserving the continuity of the job. 394 F. Supp. at 854.

5. 365 U.S. 167 (1961). The Supreme Court in *Monroe* held that an action for damages could not be brought directly against a municipal corporation. See next accompanying notes 16, 17 & 18 *infra*.

6. Pursuant to the petitioners' request for equitable relief, the district court found the acts of the department and school board unconstitutional under Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). In *LaFleur*, the Supreme Court found similar maternity leave policies violative of the Due Process clause of the fourteenth amendment, U.S. CONST. amend. XIV, §1. *Id.* at 643. However, due to a change of the official maternity leave policy in the fall of 1971, the district court in the instant case held the petitioners' claims for equitable relief

The Second Circuit Court of Appeals affirmed, finding that the city, department and board were not "persons" within the ambit of section 1983.[7] On certiorari, the United States Supreme Court reversed and HELD, that municipalities and other local government bodies, as "persons" within the meaning of section 1983, no longer enjoy immunity to actions under that statute.[8]

Prior to 1961, the issue of municipal liability under 42 U.S.C. §1983 was rarely considered.[9] An increase in constitutional litigation involving section 1983[10] led the United States Supreme Court to consider the issue of municipal

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moot. 394 F. Supp. at 855. The district court also held that the municipality's immunity could not be circumvented by suing the mayor, commissioner or chancellor in their official capacities, because the damage award would actually have to be paid by the city. *Id.* See note 7 *infra.*

7. Monell v. Department of Social Servs., 532 F.2d 259 (2d Cir. 1976). The circuit court found that the school board was not a "person" because all of its funds were appropriated by the city, and all public funds appropriated by the state for the school board were paid into the city treasury. Thus, the court found a nexus between the city and the board sufficient to extend the city's immunity to the school board. *Id.* at 263-64. The circuit court affirmed the district court's finding that the defendant officials when sued in their official capacities were immune from suit under §1983. The court not only recognized the fiction of *Ex parte* Young, 209 U.S. 123 (1908) (holding that by stripping a state officer of his official character, a suit against the state official to restrain him from taking action in his official capacity is a suit against the individual officer and not against the state), but also recognized that the eleventh amendment, U.S. CONST. amend. XI, has no direct application to cities. Nevertheless, the court did find a compulsory analogy to Edelman v. Jordan, 415 U.S. 651 (1974). In *Edelman,* the Supreme Court held that where the state is immune to suit under the eleventh amendment, such immunity could not be circumvented by suing a state official where the damage award would be payable from the state treasury. The circuit court concluded that to allow petitioners to sue the city officials in their official capacities would circumvent the municipal immunity conferred by *Monroe* because the award would actually be paid by the city of New York. 532 F.2d at 264-66.

8. 98 S. Ct. 2018, 2021-22 (1978). The Supreme Court overruled *Monroe's* holding that local governments are totally immune to §1983 suits; but the Court affirmed *Monroe's* holding that local governments are not liable under §1983 on a respondeat superior theory for the constitutional torts of their employees. *Id.* at 2022 n.7.

9. *See* T. EMERSON, C. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1447-48 (3d ed. 1967) (§1983 used in only 21 cases between 1871 and 1920). The Fifth Circuit Court of Appeals, in Charlton v. City of Hialeah, 188 F.2d 421 (5th Cir. 1951), considered the issue and was "unable to find any indication that the civil rights statute was intended by Congress to create a liability on the part of the municipality itself, as distinguished from the 'person' who committed the acts . . . ." *Id.* at 423. The *Charlton* court's interpretation has been criticized because it interpreted §1983 in accordance with state tort laws regarding immunities. See Levin, *The Section 1983 Municipal Immunity Doctrine,* 65 GEO. L. REV. 1483, 1525 (1977). Other circuits that also found municipalities immune under §1983 simply followed the *Charlton* holding without analyzing the congressional intent behind §1983. *See, e.g.,* Cuiksa v. City of Mansfield, 250 F.2d 700, 703 04 (6th Cir. 1957) (action against city and judges by persons convicted of various minor crimes), *cert. denied,* 356 U.S. 937 (1958); Cobb v. City of Malden, 202 F.2d 701, 703 (1st Cir. 1953) (suit against city and officials for allegedly conspiring to repeal teachers' contract rights); Hewitt v. City of Jacksonville, 188 F.2d 423, 424 (5th Cir. 1951) (companion case to *Charlton* involving an action by prison farm inmate allegedly shot by superintendent). Before 1961, the Supreme Court itself had never expressly addressed the issue of municipal liability under §1983. In Holmes v. City of Atlanta, 350 U.S. 879 (1955) and Douglas v. City of Jeannette, 319 U.S. 157 (1943), municipalities were defendants in §1983 suits and the Court never questioned its jurisdiction.

10. For a brief discussion of the central role of §1983 played in that era of expansive

immunity in *Monroe v. Pape*.[11] In *Monroe*, the petitioners sought damages under section 1983 against the city of Chicago and thirteen of its police officers for unlawful search in violation of petitioners' fourth amendment rights.[12] While finding that the lower courts erred in dismissing the complaint against the police officers,[13] the Court declined to hold the city accountable for its officers' actions.[14] Basing that municipal exemption on the legislative history of the Civil Rights Act of 1871,[15] the *Monroe* Court concluded that the House's rejection of municipal liability under the Sherman Amendment[16] indicated congressional intent also to create a section 1983 immunity.[17] Indeed, the Court found that Congress' response to "the proposal to make municipalities liable ... was so antagonistic that [the Court could not] believe that the word 'person' was used in this particular Act to include them."[18]

The *Monroe* Court provided neither a policy rationale for its finding of municipal immunity,[19] nor any determination whether public entities other

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litigation, *see generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 U. VA. L. REV. 1, 1 & n.2 (1974).

11. 365 U.S. 167 (1961).

12. *Id.* at 169. The petitioners alleged that the police officers, without any search or arrest warrants, broke into their home in the morning, forced them from bed and made them stand naked in the living room while the officers ransacked the home. *Id.* The petitioners also charged that the father was taken to the police station and was detained and interrogated without being permitted to call his attorney and without being taken before an available magistrate. *Id.* He was subsequently released without being criminally charged. *Id.*

13. *Id.* at 170-87.

14. *Id.* at 187-92.

15. Act of April 20, 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. §1983 (1970)). The Civil Rights Act of 1871 was passed primarily for the purpose of dealing with the Ku Klux Klan violence in the southern states.

16. The Sherman Amendment would have "made 'the inhabitants of the county, city or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged . . . ." 365 U.S. at 188. The amendment was passed by the Senate but rejected by the House. The House then rejected a conference committee substitute. In substance, the amendment would have given a cause of action to persons injured by "any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States . . . ." *Id.* at 188-89 n.41.

17. *Id.* at 190-91.

18. *Id.* at 191.

19. *Id.* Such policy considerations have long indicated a need for change. Although §1983 provides a federal cause of action for damages against municipal officials, practical and legal obstacles to recovery have frustrated many worthwhile claims. First, identification of the particular officer responsible for the violation is often difficult. Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 923 (1976) [hereinafter cited as Note, *Damage Remedies*]. In Burton v. Waller, 502 F.2d 1261, 1281-82, 1284, 1286 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), the Fifth Circuit Court of Appeals held that the plaintiffs had the burden to establish which of the individual defendant policemen had fired the harmful shots. *Accord*, Howell v. Cataldi, 464 F.2d 272, 282-84 (3d Cir. 1972) (upholding a directed verdict where the plaintiff had failed to prove that the defendants were the policemen who actually administered the beating). Second, most municipal officials lack the financial resources to pay substantial judgments. *See, e.g.*, Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966); Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-37 n.28 (1972). Third, a jury may be re-

than municipal corporations could be sued under section 1983. Thus, *Monroe* left lower courts uncertain of the reach of municipal immunity.[20] Some courts interpreted *Monroe* to prohibit damage actions against a broad range of public bodies;[21] others, aware of the significant role section 1983 could play in protecting individual rights, began to limit its scope.[22] Such limiting decisions often confined immunity to liability for monetary damages, thereby allowing equitable relief under section 1983.[23] One court, choosing to interpret *Monroe* narrowly, suggested that the decision should not control if a state had abrogated common law immunity to suit. That court reasoned that Congress did not intend to create absolute municipal immunity, but rather to yield to the immunity that prevailed under local common law.[24]

In response to this growing confusion in the lower courts,[25] the Supreme Court began in 1973 to delineate the parameters of *Monroe*. In *Moor v. County of Alameda*[26] the Court held that section 1988,[27] which provides for the adop-

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luctant to find an official liable for damages for actions that he took attempting to perform his job. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 421-22 (1971) (Burger, J., dissenting); Note, *Damage Remedies, supra* at 952-58. Fourth, municipal officers enjoy a well-established good faith defense to §1983 actions. *See* Scheur v. Rhodes, 416 U.S. 232, 247-49 (1974) (executive officer enjoys immunity if he acts in good faith and in a reasonable manner in light of all circumstances); Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (police officers entitled to defense of good faith and reasonable belief). Finally, a fifth policy consideration is that municipal liability could deter constitutional violations because imposing direct liability on the government would prompt it to abolish the unconstitutional behavior. *See* Comment, *Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the* Bivens *Doctrine*, 36 MD. L. REV. 123, 126 (1976) [hereinafter cited as Comment, Bivens *Doctrine*].

20. *See generally* Kates & Kouba, *supra* note 19, at 131-32; *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1136, 1191-94 (1977).

21. *See, e.g.*, United States *ex rel.* Gittlemacker v. County of Philadelphia, 413 F.2d 84, 86 (3d Cir. 1969) (municipal hospital), *cert. denied*, 396 U.S. 1046 (1970); Johnson v. City of Albany, 413 F. Supp. 782, 787 (M.D. Ga. 1976) (city board of commissioners); Sams v. New York State Bd. of Parole, 352 F. Supp. 296, 298-99 (S.D.N.Y. 1972) (city transit authority). According to the courts, the state and state agencies were not persons for §1983 purposes. *See, e.g.*, Blanton v. State Univ. of N.Y., 489 F.2d 377, 382 (2d Cir. 1973) (state university); Zuckerman v. Appellate Div., Second Dept., S. Ct. of State of N.Y., 421 F.2d 625 (2d Cir. 1970) (appellate division); Williford v. California, 352 F.2d 474, 476 (9th Cir. 1965) (state).

22. See notes 23 and 24 *infra*.

23. For decisions allowing equitable relief, *see, e.g.*, Dailey v. City of Lawton, 425 F.2d 1037, 1038-39 (10th Cir. 1970); Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969); Mayhue v. City of Plantation, 375 F.2d 447, 452 (5th Cir. 1967); Adams v. City of Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961). *But see, e.g.*, Deanne Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 324 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967); Johnson v. City of Albany, 413 F. Supp. 782, 787 (M.D. Ga. 1976); Nyberg v. City of Virginia, 361 F. Supp. 932, 937 (D. Minn. 1973), *aff'd*, 495 F.2d 1342 (8th Cir.), *app. dismissed*, 419 U.S. 891 (1974).

24. Carter v. Carlson, 447 F.2d 358, 369 (D.C.Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 408 U.S. 418 (1973). *See also* Kates & Kouba, *supra* note 19, at 155-61; Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CALIF. L. REV. 1142, 1164-69 (1969).

25. See notes 21-24 *supra* and accompanying text.

26. 411 U.S. 693 (1973).

27. 42 U.S.C. §1988 (1970) provides: "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18 . . ., shall be exercised and

tion of state common law into federal law, "[could not] be used to accomplish what Congress clearly refused to do [by] enacting §1983."[28] The petitioners in *Moor* sought damages from the county and its police officers under section 1983 for injuries resulting from gunshot wounds inflicted by a deputy sheriff attempting to suppress a civil disturbance.[29] Petitioners argued that California, unlike Illinois,[30] had waived the immunity of its municipalities; consequently, section 1983 created a federal cause of action by adopting into federal law that state waiver of immunity.[31] The Supreme Court rejected this approach, stating that Congress did not intend section 1988 "to authorize the federal courts to borrow entire causes of action from state law."[32] Thus, the Court held that counties, as political subdivisions of the state, are also immune to section 1983 suits.[33] Although the Court again noted that the 1871 Congress had rejected the Sherman Amendment entirely, its decision in *Moor* focused not upon *Monroe's* immunity doctrine, but rather upon the limited scope of section 1988.[34]

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enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . ., the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

28. 411 U.S. at 710.

29. *Id.* at 695.

30. Illinois, the state in which the violations in *Monroe* had occurred, had not abrogated municipal immunity.

31. 411 U.S. at 698-99.

32. *Id.* at 701-02.

33. *Id.* at 698-710. The circuit courts accepted the *Monroe* immunity, but they split over whether mere agencies of the municipality or state were sufficient political subdivisions of the state to qualify for exclusion under §1983. *Compare* Forman v. Community Servs., Inc., 500 F.2d 1246, 1248 (2d Cir. 1974), *rev'd on other grounds sub nom.* United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1975) (city agency a "person" for §1983 purposes) *and* Gordenstein v. Univ. of Del., 381 F. Supp. 718, 724-25 (D. Del. 1974) (state university a "person") *with* Muzquiz v. City of San Antonio, 528 F.2d 499, 500 (5th Cir. 1976) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3057 (U.S. May 27, 1976) (No. 75-1723) (board of trustees of pension fund not a "person") *and* Gay Students Org. of Univ. of N.H. v. Bonner, 409 F.2d 652, 655 (1st Cir. 1974) (dictum) (board of trustees of university not a "person"). The resulting split of judicial opinion was particularly evident with regard to school boards, the frequent targets of §1983 suits. *Compare* Keckeisen v. Independent School Dist., 509 F.2d 1062, 1065 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975) *and* Aurora Educ. Ass'n E. v. Board of Educ., 490 F.2d 431, 435 (7th Cir. 1973), *cert. denied*, 416 U.S. 985 (1974) *and* Green v. Dumke, 480 F.2d 624, 629 (9th Cir. 1973) *with* Burt v. Board of Trustees, 521 F.2d 1201, 1205 (4th Cir. 1975) *and* Adkins v. Duval County School Bd., 511 F.2d 690, 692-93 (5th Cir. 1975) *and* Singleton v. Vance County Bd. of Educ., 501 F.2d 429, 430 (4th Cir. 1974). *See generally* Note, *Suing the School Board Under Section 1983*, 21 S.D.L. REV. 452 (1976). In general, the courts determined whether such entities are "persons" by looking to such factors as whether the agency performs a governmental function, the degree to which it exercises powers free from state or local control, its basis of funding, and its status under state or local law. The Supreme Court in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977) left open the question of whether school boards are "persons" under §1983.

34. 411 U.S. at 710. The Court emphasized that the language of §1983 permitted incorporation of state laws only to the extent that these laws were "not inconsistent with the Constitution and laws of the United States." 411 U.S. at 706. The paramount issue pro-

A month later, the Supreme Court in *City of Kenosha v. Bruno*[35] held that a city was not a person for section 1983 purposes, even if only equitable relief were sought.[36] In reaffirming the *Monroe* construction of section 1983, the Supreme Court reasoned that the 1871 Congress did not intend the word "person" in section 1983 to "have a bifurcated application to municipal corporations depending on the nature of the relief sought against them."[37] Accordingly, the Court ruled that, regardless of the relief sought, municipalities were not persons amenable to suit under section 1983.[38]

Although the Supreme Court had severely circumscribed relief for deprivations of constitutional rights through its holdings in *Monroe, Moor* and *Kenosha,* parties aggrieved by municipalities' actions nonetheless retained other measures of federal relief.[39] For example, the Supreme Court in *Kenosha* remanded the case to determine whether the petitioners could meet the requirements of section 1331(a),[40] the general federal question jurisdiction

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pounded by that language was whether the petitioners' claims against the county were incompatible with §1983. *See* Levin, *supra* note 9, at 1495 n.48. Section 1988 does not extend substantive liability to someone not independently liable under another civil rights act. *See* Note, *Damage Remedies, supra* note 19, at 941.

35. 412 U.S. 507 (1973).

36. *Id.* at 513. *See* cases cited at note 23 *supra.* Indicating an overriding concern for the immunity issue, the Court raised that jurisdictional question *sua sponte,* as neither the parties to the action nor the lower courts had questioned the jurisdiction of the federal district court. 412 U.S. at 511.

37. 412 U.S. at 513.

38. *Id.* Justice Douglas, who had written the majority opinion in *Monroe,* dissented in part, suggesting that the Sherman Amendment debates could indicate that the members were primarily concerned with the fiscal impact related to the proposal rather than with constitutional restraints. *Id.* at 516-20 (Douglas, J., dissenting).

39. The lower courts have split on the availability of a damage remedy against a municipality when the claim is founded on the fourteenth amendment. The *Bivens* analogy, implicit in the Supreme Court's decision in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), recognized that the Constitution itself gave rise to a cause of action for damages against federal agents based directly on the fourth amendment. Some courts have extended *Bivens* to fourteenth amendment claims. *See, e.g.,* Brault v. Town of Milton, 527 F.2d 730, 734-35 (2d Cir. 1975) (taking of property without due process); Williams v. Brown, 398 F. Supp. 155, 157-58 (N.D. Ill. 1975) (illegal arrests and detention). *Cf.* Donohue Construction Co., Inc. v. Maryland-National Capital Park and Planning Comm., 398 F. Supp. 21, 24 (D. Md. 1975) (taking of property without compensation). Other courts have rejected the extension of *Bivens* because of a concern for federalism (*see, e.g.,* Perzanowski v. Salvio, 369 F. Supp. 223, 229-30 (D. Conn. 1974)) or because of §1983 municipal immunity (*see, e.g.,* Perry v. Linke, 394 F. Supp. 323, 325-26 (N.D. Ohio 1974); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972)). For a more extensive discussion of the applicability of a *Bivens*-type cause of action, *compare* Comment, *The* Bivens *Doctrine, supra* note 19 *with* Note, *Damage Remedies, supra* note 19 *and* Bodensteiner, *Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivation of Constitutional Rights,* 8 VAL. L. REV. 213, 224-29 (1974) *and* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1558-59 (1972).

40. 28 U.S.C. §1331(a) (1976) states: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." It should be noted that the petitioners in the instant case alleged no claim under 28 U.S.C. §1331, nor the requisite jurisdictional amount. Therefore, the circuit court had no

statute.[41] Additionally, the Court implied that suits against municipal officers in their official capacities would be permitted.[42] By adopting the *Kenosha* Court's rationale[43] for this official capacity loophole, subsequent circuit court decisions implicitly recognized that to extend immunity to officers carrying out city policy would limit section 1983 to actions against officers exceeding the scope of their authority.[44]

In 1976, the Supreme Court in *Aldinger v. Howard*[45] closed another avenue to the federal courts that had been utilized to circumvent *Monroe* immunity.[46]

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occasion to consider if such a claim against the municipal corporations would lie. 532 F.2d at 260 n.1.

41. 412 U.S. at 145. The circuit courts after *Kenosha* followed a pattern of dismissing §1983 suits against municipal corporations, but sustaining §1331 actions if the requisite jurisdictional amount were present. *See, e.g.*, Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975) (allowing additional of punitive damages to reach jurisdictional amount); United Farmworkers of Fla. Hous. Proj., Inc. v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974) (city could be properly named as defendant under §1331, if the requisite jurisdictional amount were present); Sanabria v. Village of Monticello, 424 F. Supp. 402, 407 (S.D.N.Y. 1976) (under §1331, village could be liable for alleged denial of medical treatment to prisoner); Maybanks v. Ingraham, 378 F. Supp. 913, 915-16 (E.D. Pa. 1974) (city department of health not immune under §1331). As a result of §1331 suits, municipalities could be sued for damages. For an evaluation of the use of 1331 in civil rights cases see Bodensteiner, *supra* note 39.

42. The Supreme Court recognized the importance of allowing officers to be sued in their official capacities. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 350 (1976) (suit against Democratic sheriff by Republican employees alleging that they had been fired for political beliefs); Bishop v. Wood, 426 U.S. 341, 343 n.I (1976) (city dismissed from suit, but Court considered case against police chief and city manager in their official capacities); City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 284 n.1 (1976) (district court had jurisdiction over the individual members of city council); Gilmore v. City of Montgomery, 417 U.S. 556, 558 (1974) (city officials sued for having assigned a public park to exclusive all-white private school); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 609 (1974) (suit against mayor and nominators of panel for failure to select school board candidates reflecting makeup of community).

43. 412 U.S. at 514. The second basis for remand in *Kenosha* was to determine whether the intervention of the attorney general as a party would "cure the jurisdictional defect" found to exist in the petitioners' §1983 complaints. *Id.* Apparently, the petitioners had been thrown out of court because of a pleading error. Although there is no report on the proceedings on remand in *Kenosha*, in a similar case in the same circuit, Manos v. City of Green Bay, 372 F. Supp. 40, 45 (E.D. Wis. 1974), the court allowed the plaintiff to add the individual city council members as defendants. Levin, *supra* note 9, at 1500 & n.64.

44. For cases in which officers were sued in their official capacities, *see, e.g.*, Greene v. City of Memphis, 535 F.2d 976, 979 (6th Cir. 1976) (mayor and council chairman); Wright v. Chief of Transit Police, 527 F.2d 1262, 1263 (2d Cir. 1976) (members of transit authority); Thomas v. Ward, 529 F.2d 916, 920-21 (4th Cir. 1975) (members of school board); Rochester v. White, 503 F.2d 263, 266-67 (3d Cir. 1974) (state secretary of health and social services and director of social services); Ybarra v. City of Los Altos Hills, 503 F.2d 250, 252-53 (9th Cir. 1974) (town officials). It had also been suggested that when the responsibility for an unconstitutional procedure is disseminated through a government body so that it cannot be fairly imputed to any one individual, a bar against placing liability on the governmental unit might forestall any relief at all. *See* Comment, *Suing Public Entities Under the Federal Civil Rights Act:* Monroe v. Pape *Reconsidered*, 43 U. COLO. L. REV. 105, 105-06 (1971).

45. 427 U.S. 1 (1976).

46. The district court in Redding v. Medica, 402 F. Supp. 1260, 1261 (W.D. Pa. 1975), would have allowed pendent jurisdiction over a §1331 claim against the city in a §1983 suit

The petitioner in *Aldinger* asserted that the district court had pendent federal jurisdiction over her state law claim against the county.[47] Reaffirming *Monroe's* immunity doctrine, the Supreme Court rejected the petitioner's claim, holding that federal pendent jurisdiction would not extend to a party who had no independent basis of federal jurisdiction.[48] The Court reasoned that because Congress had excluded counties from liability under section 1983,[49] the county was not subject to the jurisdiction of the district court.[50] Re-examining the legislative history of section 1983, Justice Brennan in his dissent stated that the 42d Congress had recognized the power of the federal courts to enforce duties imposed upon municipalities by state law.[51]

Two years after the *Aldinger* affirmation of immunity, the instant case provided the Supreme Court with a setting[52] for a stark reversal of precedent.[53] Directly overruling *Monroe* and its progeny, the Court held that Congress had in fact intended that municipalities be brought within the ambit of section

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against its police officers, even if the plaintiffs had failed to prove the $10,000 requisite amount.

47. 427 U.S. at 4-5. The petitioner was a discharged county clerical worker who brought a §1983 suit for reinstatement against the county treasurer. She added to her complaint a state law claim against the county.

48. *Id.* at 18.

49. *Id.* at 5-6. The Court cited to Moor v. County of Alameda, 411 U.S. 693 (1973). See text accompanying note 33 *supra.*

50. 427 U.S. at 18-19. Relying on the *Monroe* municipal immunity doctrine, the Court concluded that "[p]arties such as counties, whom Congress *excluded* from liability in §1983, and therefore by reference in the grant of jurisdiction under §1343(3), can argue with a great deal of force that the scope of that 'civil action' over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law." *Id.* at 17.

51. *Id.* at 29. (Brennan, J., dissenting). Justice Brennan's review of the legislative history of §1983 foreshadowed the re-examination in the instant case.

52. 98 S. Ct. 2018, 2021-22 (1978). The issue before the instant Court was whether school boards were "persons" within the meaning of §1983. Because §1983 was the only basis for jurisdiction, the Court could not abstain from deciding this issue as it had in Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977), in which the Court was able to decide the case on §1331 jurisdiction. 98 S. Ct. at 2022.

53. The principle of stare decisis did not inhibit the Court from a sharp reversal of an entire line of cases. 98 S. Ct. at 2038. The Court reasoned that *Monroe's* complete immunization of municipalities from §1983 liability was itself a "departure from prior practice." *Id.* The Court cited Holmes v. City of Atlanta, 350 U.S. 879 (1955); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Hannan v. City of Haverhill, 120 F.2d 87 (1st Cir. 1941); City of Manchester v. Leiby, 117 F.2d 661 (1st Cir. 1941); Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393 (C.C.N.D. Ill. 1873) (No. 10, 336) — all §1983 suits in which municipalities were defendants. 98 S. Ct. at 2038. Analyzing recent manifestations of congressional intent, the Court further concluded that school boards, as mere subsidiaries of municipalities, had no precedent on which to claim immunity. *Id.* at 2039-40. Additionally, the Court rejected reliance claims: despite a presumptive immunity to §1983 suits, cities should not have been conducting their everyday affairs with intentional disregard for individuals' constitutional rights. *Id.* at 2040. Finally, the Court concluded that because §1983 was intended to be broadly construed in order to provide a remedy "against all forms of official violation of federally protected rights," municipal immunity to §1983 suits had no merit. *Id.* at 2041. Consequently, the Court admitted its error and overruled *Monroe*, rather than place the burden on Congress to cure the mistake. *Id.* at 2038.

1983.[54] Justice Brennan, now writing for the majority,[55] again reviewed the legislative history of the Civil Rights Act of 1871, focusing particularly upon the Sherman Amendment[56] and upon congressional debates over section 1 of the Act.[57] The Sherman Amendment, a futile attempt to make municipalities responsible for damages caused by post-Civil War riots and Ku Klux Klan activities, had been rejected by the 1871 House.[58] According to the Court, congressmen then had reasoned that the federal government was powerless to dictate to the states any means of fulfilling their peacekeeping obligations.[59] Consequently, the Supreme Court concluded that Congress believed it could not force states to delegate to municipalities these obligations, nor could it impose liability upon such municipalities by creating a federal peacekeeping obligation.[60]

Focusing next on the congressional debates over section 1 of the Civil Rights Act of 1871, the Court concluded that Congress presumed its authority to impose civil liability on municipalities for violation of the federal Constitution.[61] First, the Court found that the 1871 Congress had distinguished the usurpatory obligations unsuccessfully proposed by the Sherman Amendment from those lawful ones imposed by section 1 of the Civil Rights Act.[62] Secondly, the Court found that Congress had also differentiated the governments to whom municipalities owed separate obligations; therefore, the doctrine of dual sovereignty did not limit "the power of federal courts to enforce the Constitution against municipalities that violated it."[63] Finally, the Court reasoned that because opponents of the Sherman Amendment had voted for section 1, they must have recognized the distinctions and believed in the constitutionality of section 1.[64]

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54. 98 S. Ct. at 2035. Rather than confining itself to deciding the liability of school boards, the Court noted that school boards, like municipalities, are instrumentalities of state administration. The Court then rejected the *Monroe* policy of municipal immunity, not only for school boards, but also for other local government bodies. *Id.* at 2038.

55. See text accompanying note 51 *supra.*

56. 98 S. Ct. at 2023-32.

57. *Id.* at 2032-35. Section 1 of the Civil Rights Act is now 42 U.S.C. §1983 (1970) and was passed without amendment.

58. *Id.* at 2024. The House also rejected the conference committee substitute. *Id.* at 2025. See note 16 *supra* and text accompanying notes 15-17 *supra.*

59. *Id.* at 2028-29. The Court quoted from Representative Blair, one of the leaders of the House opposition. He found the Sherman Amendment unconstitutional essentially on the ground that it would have imperiled the independence of the states because the municipalities, the instrumentalities of the states, would become subject to the control of the federal government. *Id.* at 2030.

60. *Id.*

61. 98 S. Ct. at 2030-31.

62. *Id.* at 2030. The Sherman Amendment would impose on municipalities a federal obligation to keep the peace. See notes 16 and 59 *supra.* Section 1, on the other hand, "merely impose[d] civil liability for damages on a municipality that was obligated by state law to keep the peace but which had not in violation of the Fourteenth Amendment." 98 St. Ct. at 2030.

63. *Id.* at 2031. The Court reasoned under the doctrine of dual sovereignty that "[s]o long as federal courts were vindicating the Federal Constitution, they were providing the 'positive' government action required to protect federal constitutional rights and no question was raised of enlisting the States in 'positive' action." *Id.*

64. *Id.* at 2032.

Therefore, the Court concluded that *Monroe* incorrectly implied from congressional incapacity to impose the Sherman Amendment obligations an equivalent federal infirmity regarding section 1983.[65]

In reviewing the debate on section 1 of the Civil Rights Act, the Court deduced that Congress not only understood its authority to make cities liable for infringement of constitutional rights but also intended section 1 to cover such municipalities. First, the Court stated that Congress in 1871 had recognized that municipalities as well as individuals could engender the harm that section 1 sought to remedy.[66] Secondly, congressmen knew that corporations, including municipal corporations, were treated as natural persons for substantially all other purposes of constitutional and statutory analysis.[67] Finally, the Court noted that the Dictionary Act,[68] passed only a few months before the Civil Rights Act, defined the word "person" to include "bodies politic and corporate," a phrase that included municipal corporations.[69]

The Court found in its examination of legislative history that the 1871 Congress intended to bar municipal liability only in those actions brought under the theory of respondeat superior.[70] In reviewing the language of section 1983, the Court determined that Congress had not intended to impose liability on a municipality where there was no evidence that some official policy "caused" the violation of the individual's constitutional rights.[71] The Court premised its conclusion on the House's rejection of the Sherman Amendment, which would have imposed municipal liability regardless of whether the municipality had any means of protecting against or preventing an impending riot.[72]

Analyzing Congressional intent in this manner, the Supreme Court stated that the creation of a federal law of respondeat superior under section 1983 would have aroused all the constitutional questions related to the obligation

65. *Id.* at 2023. After the debates over the Sherman Amendment, Representative Poland explained that "the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." Monroe v. Pape, 365 U.S. at 190, *citing* Cong. Globe, 42d Cong., 1st Sess., 800-01 (1871). The Court in *Monroe* equated the Sherman Amendment "obligation" with all types of 'civil liability' and held that Congress had not intended to bring municipal corporations within the meaning of §1983. 365 U.S. at 190.

66. 98 S. Ct. at 2033-34. The Court stated that in a suit concerning the uncompensated taking by a municipality for its benefit, Congress did not intend to place the liability for compensation on the individual officer rather than on the municipality. *Id.*

67. *Id.* at 2034. The Court cited Louisville R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (equating corporations with "persons") and Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 121 (1869) (extending *Letson* to municipal corporations).

68. Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431 (1871).

69. 98 S. Ct. at 2035.

70. *Id.* at 2036.

71. *Id.*

72. *Id.* at 2037 n. 57. Justice Powell stated that "the rejection of the Sherman Amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity, but as a limitation on the statutory ambit to actual wrongdoers, i.e., a rejection of respondeat superior or any other principle of vicarious liability." *Id.* at 2044 (Powell, J., concurring).

to keep the peace, an imposition thought unconstitutional by Congress.[73] The Court rejected two policy considerations espoused by commentators[74] for liability under respondeat superior: first, the notion that employers' liability for injuries caused by their employees would reduce such accidents;[75] second, the concept that recovery against municipal employers under respondeat superior would spread the cost risk of constitutional injury to the community as a whole.[76] The Court found that similar arguments had been advanced by proponents of the Sherman Amendment and had been rejected by the House.[77] Therefore, the Court concluded that a municipality may not be sued for a constitutional violation inflicted by its employees except when the injury is caused by the implementation of a government policy or custom.[78]

Through re-examination of the legislative history of section 1983, the Supreme Court has achieved a more realistic interpretation of the liability that Congress intended to impose on municipal corporations.[79] The earlier, strict interpretations in *Monroe* and its progeny were rejected because they subverted section 1983 as a vital instrument for challenging unconstitutional municipal conduct.[80] The Court in the instant case recognized the pragmatic value of section 1983 as a means of redressing constitutional injury, a value probably unforeseen before the *Monroe* era.[81]

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73. *Id.* at 2037.

74. The Court cited to W. PROSSER, LAW OF TORTS, §69, at 569 (4th ed. 1971) and 2 F. HARPER & F. JAMES, THE LAW OF TORTS §26.3, at 1368-69 (1956). *Id.* The Court also cited a third consideration — that "liability follows the right to control the actions of a tortfeasor." *Id.* at 2037 n.58. However, in view of the Court's holding in Rizzo v. Goode, 423 U.S. 623 (1976), the mere right to control an employee's actions without further evidence of responsibility for the injury will not suffice to support §1983 liability. *Id.*

75. *Id.* at 2037.

76. *Id.*

77. *Id.* at 2037-38.

78. *Id.* at 2038. The Court noted that the principles of Moor v. County of Alameda, 411 U.S. 693 (1973) (section 1988 "cannot be used to create a federal cause of action where §1983 does not otherwise provide one"); City of Kenosha v. Bruno, 412 U.S. 507 (1973) (the word "person" in §1983 was not intended to have a bifurcated application); and Aldinger v. Howard, 427 U.S. 1 (1976) (pendent federal jurisdiction could not extend to a party that has no independent basis of federal jurisdiction) were not affected by the instant decision. The Court also did not determine whether *Monroe* was correct, on its facts. *Id.* at n.66.

79. Justice Powell in his concurrence also suggested that by overruling *Monroe*'s municipal immunity rule, the Court would not have to constitutionalize a cause of action against local governments based directly on the fourteenth amendment, in the same way the Court had implied a cause of action against federal officers directly from the Constitution in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). 98 S. Ct. at 2047 (Powell, J., concurring).

80. For a discussion of the lower court's circumvention of the municipal immunity rule, see text accompanying notes 39-43 *supra*.

81. Before 1961, §1983 was not often used as a method of remedying constitutional wrongs. *See generally* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1953). *Monroe* is considered a seminal case in civil rights litigation for resolutely securing a civil action for damages against state officials for violations of individual civil rights. *See* Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904, 908-10 (1976). However, as Justice Powell indicated, the *Monroe* Court had not confronted the importance of holding municipalities immune under §1983 in terms of unconstitutional policies. 98 S. Ct. at 2045 n.6 (Powell, J., concurring).

By limiting section 1983 liability under the theory of respondeat superior, however, the Court has still not dealt with the essential problem in suing municipalities and other local government units that have violated individuals' rights. Although the Court did briefly consider some of the justifications for respondeat superior liability,[82] it nonetheless failed to realize that the only way a municipality can act is through its employees; yet under the instant decision, municipalities are not liable for their employees' misconduct.[83] While government employees may be sued in their official capacities for violating others' rights, such suits generally are ineffective.[84]

To surmount such problems, the Courts could impose municipal liability on a theory of negligent supervision[85] or excessive delegation.[86] Both negligent supervision and excessive delegation, however, require an element of fault either in the actions or inactions of the principal. Liability exists only if all the requirements of an action of tort for negligence exist.[87] Both theories are thus distinguishable from respondeat superior, which would impose liability on the municipality without any degree of fault.[88]

Government entities should incur some liability for failure to prevent employee actions that violate individual rights. Such liability would be in accord with the intent of the 42d Congress which believed that it could not constitutionally impose liability on a municipality that had no effective means to avert the harm.[89] However, the Court's refusal to hold municipalities vicariously liable is consonant with the pattern of the current Court to limit liability

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82. See text accompanying notes 74-77 *supra*.

83. Apparently, under the decision in the instant case, the petitioners in *Monroe* would still be foreclosed from recovering damages from the city of Chicago because their claims against the city were based on a vicarious liability theory. *See* Levin, *supra* note 9, at 1521 & n.154.

84. See note 19 *supra*.

85. *See* RESTATEMENT (SECOND) OF AGENCY §213 (1957): "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (a) in giving improper or ambiguous orders, or in failing to make proper regulations, or (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[;] (c) in the supervision of the activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control."

86. *See* RESTATEMENT (SECOND) OF AGENCY §214 (1957): "A master or other principal who is under duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty."

87. RESTATEMENT (SECOND) OF AGENCY §213, Comment a (1957).

88. 98 S. Ct. at 2036. *But cf.* Levin, *supra* note 9, at 1539-43 (in practice the theories of negligent supervision and excessive delegation are not so easily distinguished from vicarious liability).

89. *Id.* at 2024. The House rejected the Sherman Amendment conference committee substitute because it "imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exercised all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished." See text accompanying notes 57-59 *supra*.