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Federal Jurisdiction—Municipal Immunity Under the Civil Rights Act—Closing the Loopholes

In *Monroe v. Pape*¹ the United States Supreme Court held that 42 U.S.C. section 1983² does not contemplate municipal liability for the unconstitutional acts of municipal employees.³ Since that decision, however, the lower federal courts and several commentators have developed a number of ways to distinguish *Monroe* and thus hold municipalities vicariously liable. The Court, in two recent cases, closed some of these "loopholes" in *Monroe* by reaffirming the controversial interpretation of section 1983 that a municipality is not a "person" within the meaning of that section. In *Moor v. County of Alameda*⁴ the Court refused to allow incorporation of municipal liability under the California Tort Claims Act into a section 1983 claim and similarly upheld the district court's refusal to exercise pendent jurisdiction over the state claim against the municipal defendant. In *City of Kenosha v. Bruno*⁵ the Court held that equitable relief was unavailable against a municipal corporation for violations of section 1983.

Moor involved injuries to appellants during a civil disturbance in Berkeley, California. The injuries allegedly resulted from the wrongful discharge of a shotgun by a deputy sheriff who was attempting to quell the disturbance. Appellants brought suit in federal district court, alleging a conspiracy to deprive them of their constitutional rights to freedom of speech and assembly and due process. The federal claims arose under section 1983, and jurisdiction was alleged under 28 U.S.C. section 1343.⁶ Joined as defendants were the sheriff and several deputies individually and the County of Alameda as their employer. The latter was alleged to be amenable to suit under 42 U.S.C. section

1. 365 U.S. 167 (1961).

2. 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). This section 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.

3. 365 U.S. at 187-92.

4. 411 U.S. 693 (1973).

5. 412 U.S. 507 (1973).

6. 28 U.S.C. § 1343 (1970). This is the general jurisdictional statute, giving original jurisdiction to the federal district courts over civil rights claims.

1988⁷ which, the plaintiff contended, incorporated municipal liability under the California Tort Claims Act⁸ into section 1983. Both appellants urged the district court to exercise pendent jurisdiction over the state law claims against the county.⁹ The district court dismissed all claims against the county, and the Ninth Circuit affirmed.¹⁰

The Supreme Court affirmed the dismissal of the section 1983 claim on the authority of *Monroe v. Pape*.¹¹ The Court, in refusing to accept appellants' argument that section 1988 incorporated municipal liability into a federal section 1983 cause of action, pointed out that section 1988 "is intended to complement the various acts which do create federal causes of action for the violations of federal civil rights."¹² The provisions of section 1988 authorizing use of state law are meant to furnish suitable remedial measures when the federal substantive provisions provide insufficient or unsuitable remedies.¹³ The cause of action must arise under the federal civil rights act¹⁴ initially in order for section 1988 to be operative. An entire state cause of action cannot be "federalized" through section 1988.¹⁵

Furthermore, the Court stated that section 1988 provides for the use of state law by federal courts only when "not inconsistent with the Constitution and the laws of the United States."¹⁶ Since the *Monroe*

7. 42 U.S.C. § 1988 (1970) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and 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 and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal 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, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

8. CAL. GOV'T CODE § 815.2 (West 1966).

9. *Rundle v. Madigan*, 331 F. Supp. 492 (N.D. Cal. 1971).

10. *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972), noted in 4 U. TOLEDO L. REV. 201 (1973). The court of appeals also dismissed Moor's diversity jurisdiction argument, holding that the county was not a citizen for diversity purposes.

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

12. *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973). The Court reversed the Ninth Circuit on the diversity issue, holding that the county was a citizen of California because, under state law it was a "body corporate and politic" and not the mere arm or alter ego of the State. *Id.* at 717-22.

13. *Id.* at 702-03.

14. For purposes of this Note, the Civil Rights Act refers to those acts which are now codified at 42 U.S.C. §§ 1981-89 (1970).

15. 411 U.S. at 703-04.

16. 42 U.S.C. § 1988 (1970).

decision was part of the laws of the United States, the imposition of vicarious municipal liability would be inconsistent with the *Monroe* interpretation of section 1983.¹⁷ The Court rejected the argument that *Monroe* was distinguishable because the municipality involved in that case had not been deprived of common-law sovereign immunity, whereas in the present case California counties were no longer immune under state law. Since Congress had rejected a municipal liability proposal in passing the Civil Rights Act, it was difficult to infer an intent to include liability for those municipalities not clothed with immunity under state law.¹⁸ The Court, therefore, held that the existence of municipal liability under state law was irrelevant to liability under section 1983.

The Court also affirmed the refusal by the district court to exercise pendent jurisdiction over the state law claim against the County.¹⁹ The question whether the district court had the *power* to exercise such jurisdiction over a party not subject to independent federal jurisdiction was left open by the Court. However, under the doctrine of *United Mine Workers v. Gibbs*²⁰ the district court had the *discretion* to decline pendent jurisdiction. Since the claim against the county involved defenses not available to the individual defendants and complicated issues of state law, the Supreme Court held that the lower court's dismissal of the pendent state claims did not constitute an abuse of discretion. The *Gibbs* decision specifically recognized the possibilities of jury confusion and the complexity of the state law as factors to be considered in exercising discretion.²¹

In *City of Kenosha v. Bruno*²² the Court held that a municipal corporation was not liable for the conduct of its employees for purposes of equitable relief under section 1983. Appellants were owners of retail liquor establishments that featured nude dancers. The city councils of Racine and Kenosha, Wisconsin denied renewal of their liquor licenses after holding legislative hearings provided for by state statute. Alleging deprivation of procedural due process, appellants brought suits for declaratory and injunctive relief against the cities under section 1983. The district court declared the state statute unconstitutional and granted the injunctions.²³ On direct appeal the Supreme Court

17. 411 U.S. at 706.

18. *Id.* at 706-10.

19. *Id.* at 710-17.

20. 383 U.S. 715 (1966).

21. *Id.* at 727.

22. 412 U.S. 507 (1973).

23. *Misurelli v. City of Racine*, 346 F. Supp. 43 (E.D. Wis. 1972).

reversed because of lack of jurisdiction over the municipalities under *Monroe v. Pape*.²⁴ The Court reasoned that there was no evidence in the legislative history of section 1983 that Congress meant to provide a bifurcated approach to municipal liability, making municipalities "persons" for purposes of equitable relief while excluding them from liability for damages.²⁵

MONROE V. PAPE

Monroe involved a section 1983 action for damages against the City of Chicago for alleged brutality at the hands of Chicago police officers. The Court, after an extensive discussion of the legislative history of the Civil Rights Act of 1871,²⁶ concluded that legislative reaction had been so "antagonistic" to the concept of municipal liability for civil rights violations that Congress could not have meant to include municipalities within the word "person" as used in section 1983. This conclusion was based upon the rejection of a proposed amendment to the Act during congressional debates.²⁷

Mr. Justice Douglas, writing for the majority in *Monroe*, noted that a few months prior to legislative consideration of the Civil Rights Act, Congress had passed an act that had provided rules of construction for acts of Congress.²⁸ One provision of this Act declared that "the word 'person' may extend and be applied to bodies politic and corporate."²⁹ He found this provision to be "an allowable, not a mandatory, one." Since the Court interpreted the legislative history as con-

24. 365 U.S. 167 (1961).

25. 412 U.S. at 513.

26. 365 U.S. at 187-91. *Monroe* has been severely criticized for its interpretation of congressional intent on the municipal liability issue. See the convincing treatment of the legislative history in Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132-36 (1972). See generally Kates, *Suing Municipalities and Other Public Entities Under the Civil Rights Act*, 4 CLEARINGHOUSE REV. 177 (1970); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Note, *Federal Jurisdiction—Governmental Immunity and Pendent Jurisdiction*, 4 U. TOLEDO L. REV. 201 (1973).

27. Senator Sherman of Ohio proposed the amendment to provide for municipal liability for any civil rights violation occurring within the boundaries of the municipality whether committed by public officials or private citizens. The Senate passed the bill, but it was rejected by the House. The conference committee failed to agree on the amendment, and it was finally deleted in order to save the act and get it through the House.

The House also raised questions about whether the imposition of liability by Congress on the subdivisions of the states would be constitutional. The Court, however, did not reach these constitutional issues. *Monroe v. Pape*, 365 U.S. 167, 191 (1961).

28. *Id.*

29. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

clusively precluding municipal liability,³⁰ the policy considerations favoring municipal liability were not reached.

Monroe was extended beyond its holding by several lower federal courts. It has been applied by analogy to immunize city agencies from liability.³¹ It was interpreted, moreover, as prohibiting use of respondeat superior, even when the employer is a non-municipal entity or public official, on the theory that only those who are personally involved in the deprivation of an individual's civil rights are "persons" within section 1983.³² This expansion was not universal, however, and a number of courts held non-municipal public entities liable under section 1983.³³

MONROE UNDER FIRE—THE LOOPHOLES DEVELOP

Equitable Relief

The Seventh Circuit was the first lower court to test the boundaries of the *Monroe* holding. In *Adams v. City of Park Ridge*³⁴ the court distinguished *Monroe* as having involved a claim for damages only. The court concluded that *equitable* relief against the city was permissible under section 1983. The reasons for denying damages against a municipality, in the court's view, were not persuasive when applied to prospective equitable liability that would not substantially impair the public treasury. The distinction would appear valid and reasonable except for a footnote in *Monroe* that seems to preclude equitable relief as well as damages.³⁵ In this footnote the *Monroe* Court noted:

In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U.S.C. § 1983 were alleged The question

30. See text accompanying notes 66-67 *infra*.

31. *E.g.*, *Davis v. United States*, 439 F.2d 1118 (8th Cir. 1971) (per curiam); *Sellers v. Regents of Univ. of Cal.*, 432 F.2d 493 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971); *United States ex rel. Gittelmacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); *Sams v. Board of Parole*, 352 F. Supp. 296 (S.D.N.Y. 1972).

32. *E.g.*, *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Potts v. Wright*, 357 F. Supp. 215 (E.D. Pa. 1973); *Barrows v. Faulkner*, 327 F. Supp. 1190 (N.D. Okla. 1971).

33. *Scher v. Board of Educ.*, 424 F.2d 741 (3d Cir. 1970) (by implication); *Local 858, Teachers v. School Dist. No. 1*, 314 F. Supp. 1069 (D. Colo. 1970). This position is supported by cases in which the Supreme Court held non-municipal public entities vicariously liable. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969); *Turner v. City of Memphis*, 369 U.S. 350 (1962). See Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548, 677-79 (1972).

34. 293 F.2d 585 (7th Cir. 1961).

35. See *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967).

dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases.³⁶

The *Adams* court did not discuss this footnote in holding that equitable relief was available although the court cited the cases mentioned in the footnote as authority for its decision.³⁷ The Fifth Circuit in *Harkless v. Sweeney Independent School District*³⁸ discussed the footnote and decided that it did not preclude equitable relief against a municipality.³⁹ The grant of equitable relief, moreover, seems to be bolstered by Supreme Court decisions that allowed such relief under section 1983 without mention of *Monroe*.

In *Turner v. City of Memphis*⁴⁰ the Supreme Court ordered issuance of an injunction against a municipality and a restaurant operator under section 1983. The Court did not discuss the implications of the footnote in *Monroe* although the alleged racially discriminatory practices by the restaurant occurred on property leased from the city. If the footnote was intended to preclude equitable relief against a municipality under section 1983, the result in *Turner* is not easily explained.⁴¹

Incorporation of State Law Through Section 1983

Most of the courts that have considered the question whether a state law providing for municipal liability could be incorporated through

36. 365 U.S. at 191 n.50. Two cases in which equitable relief was granted against municipalities under section 1983 were mentioned in the footnote. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

37. 293 F.2d at 587.

38. 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971).

39. We think the [Supreme Court in *Monroe*] was saying in the footnote that the issue of damages against municipalities under respondeat superior was a question not raised in the equitable relief cases cited and that no inference may be drawn from those cases that a municipal corporation is a person within § 1983 for the purposes of a damage claim against it under respondeat superior. We do not perceive that the court was expanding its holding by a footnote dictum to eliminate municipalities as "persons" under § 1983 for the purposes of equitable relief, a question not expressly considered in the cited equitable relief cases.

Id. at 322. See also *Butts v. Dallas Indep. School Dist.*, 436 F.2d 728 (5th Cir. 1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Wolfe v. O'Neill*, 336 F. Supp. 1255 (D. Alas. 1972).

40. 369 U.S. 350 (1962) (per curiam).

41. Mr. Justice Douglas, dissenting in *Moor*, cited *Mitchum v. Foster*, 407 U.S. 225 (1970) as authority for his argument that equitable relief was not foreclosed by *Monroe*. In *Mitchum* the Court held that section 1983 was a specific exemption to a federal statute barring injunctions against state court proceedings. Section 1983 was, therefore, properly the basis of a suit to restrain unconstitutional state court actions. The decision, however, appears to be less than persuasive as support for municipal liability under section 1983.

section 1988 into a section 1983 cause of action have rejected it.⁴² In *Carter v. Carlson*,⁴³ however, the District of Columbia Court of Appeals held the District liable for violations of section 1983 by District police. The court pointed out that *Monroe* had involved an Illinois municipality that had not waived its common-law immunity. The District of Columbia, on the other hand, had no such immunity and "the scope of immunity under section 1983 should follow the local rule."⁴⁴ Since the local rule provided for more effective implementation of the Civil Rights Act than the federal statutes, the court reasoned that section 1988 should be available to incorporate that rule into the section 1983 action.

Several other courts have considered the *Carter* rationale and have rejected it. Some have distinguished it on the basis of congressional control of the District of Columbia and on the ability of Congress to provide for section 1983 liability for the District.⁴⁵ The Seventh Circuit seems to have stated the basic objection to *Carter*, however, in *Yumich v. Cotter*.⁴⁶ "With all respect, however, we read *Monroe* as a binding statutory construction, not dependent upon state law immunity, and not related to a deficiency in federal remedies, but establishing that section 1983 does not impose liability for damages upon a city."⁴⁷

Section 1988 has been used to borrow remedial measures from state law where the substantive sections of the Civil Rights Act were inadequate to implement its policies. Most notable is *Sullivan v. Little Hunting Park*⁴⁸ in which the Supreme Court incorporated the state law of damages into a section 1982 claim. This type of incorporation appears to be the correct application of section 1988, *i.e.* where the cause of action arises under the substantive provisions of the Civil Rights Act and no adequate redress is available within the Act. Since municipal liability cannot arise under section 1983 because of the bar of *Monroe*, a state law that waives municipal immunity cannot cure this jurisdictional defect.⁴⁹

42. *E.g.*, *Gonzales v. Doe*, 476 F.2d 680 (2d Cir. 1973).

43. 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* *District of Columbia v. Carter*, 409 U.S. 418 (1973). The Supreme Court did not reach the issue of section 1988 incorporation; holding that the District of Columbia was not a "State or Territory" within section 1983.

44. *Id.* at 369.

45. *E.g.*, *Ries v. Lynskey*, 452 F.2d 172 (7th Cir. 1971).

46. 452 F.2d 59 (7th Cir. 1971).

47. *Id.* at 61.

48. 396 U.S. 229 (1969).

49. While § 1988 may allow use of state *remedies* in redressing deprivations

Pendent Jurisdiction

Where none of the foregoing methods of obtaining jurisdiction over a municipal defendant are available, a federal court might still retain jurisdiction over the state law claim under the doctrine of pendent jurisdiction. Since providing a federal forum to litigants who could get no relief from the state courts, even where state law ostensibly provided such relief, was one of the primary objectives of Congress in enacting the Civil Rights Act,⁵⁰ the avenue of pendent jurisdiction, if open under the circumstances, is valuable in fulfilling this objective. There is some dispute, however, over whether a federal court has the power to join a party, not otherwise subject to its jurisdiction, in a federal action against different parties properly before the court.⁵¹

The Supreme Court established the accepted test for the exercise of pendent jurisdiction in *United Mine Workers v. Gibbs*.⁵² The test involves two issues: (1) does the court have the constitutional *power* to hear the state claim, and (2) in the court's *discretion*, will the policies of "judicial economy, convenience and fairness to the litigants"⁵³ be promoted by hearing both claims in one trial? The court has the power to hear the state claim if:

[T]he relationship between the [federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have

under § 1983, at least where federal remedies are deficient, . . . we are here confronted with the preliminary issue of whether liability exists at all under § 1983, not what remedy would be appropriate if liability should exist. Manifestly the nature of an appropriate remedy, which assumes the existence of liability, is irrelevant to the question of whether liability can attach in the first place.

Gonzalez v. Doe, 476 F.2d 680, 685 (2d Cir. 1973).

50. See, *Monroe v. Pape*, 365 U.S. 167, 180 (1961); *Kates & Kouba*, *supra* note 26, at 145-46.

51. Compare *Hymmer v. Chai*, 407 F.2d 136 (9th Cir. 1969), and *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), and *Drennan v. City of Lake Forest*, 356 F. Supp. 1277 (N.D. Ill. 1972), with *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971), and *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968), and *Eidschun v. Pierce*, 335 F. Supp. 603 (S.D. Iowa 1971); cf. *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971).

52. 383 U.S. 715 (1966). This decision changed the earlier test of *Hurn v. Oursler*, 289 U.S. 238 (1933). The *Hurn* prerequisite for the exercise of pendent jurisdiction was that the federal and state claims be merely different *grounds* for the same *cause of action*. If the federal claim constituted a different cause of action, there could be no pendent jurisdiction; *id.* at 246. *Gibbs* called this approach "unnecessarily grudging", and therefore the Court liberalized the criteria for pendent jurisdiction. 383 U.S. at 725. See Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Note, 4 U. TOLEDO L. REV., *supra* note 26, at 216-28.

53. 383 U.S. at 726.

substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.⁵⁴

If the court has the power under this test, it must then decide whether to exercise its discretion to grant or deny pendent jurisdiction. "Its justification lies in considerations of judicial economy, convenience and fairness to the litigants; if these are not present a federal court should hesitate to exercise jurisdiction over the state claims. . . ."⁵⁵

The *Gibbs* decision did not consider the troublesome problem of "pendent parties," *i.e.* where pendent jurisdiction is used to bring into federal court a party not independently subject to a federal claim by joining a state claim against him to federal claims against other parties.⁵⁶ The lower federal courts have divided on the question of the power to hear such claims under the *Gibbs* test,⁵⁷ and some have avoided the issue by declining to grant pendent jurisdiction as a matter of discretion.⁵⁸

The pendent party question in the context of section 1983 and municipal liability was considered by a federal district court in *Tauss v. Rizzo*.⁵⁹ Plaintiffs attempted to enter Frank Rizzo's mayoralty campaign headquarters to protest his policies as Police Commissioner of Philadelphia. The plaintiffs were brutally beaten by police officers guarding the headquarters and arrested on numerous charges. Subsequently acquitted of all charges, plaintiffs brought action against Rizzo and the assaulting policemen under section 1983. They joined the City of Philadelphia in an amended complaint. The court held that the city was not a "person" within section 1983. But the court then asserted pendent jurisdiction over the municipality. The court pointed out that

54. *Id.* at 725.

55. *Id.* at 726.

56. *See* Kates & Kouba, *supra* note 26, at 161-67; Note, 4 U. TOLEDO L. REV., *supra* note 26, at 216-28. *See also* Note, 81 HARV. L. REV., *supra* note 52.

57. *Compare, e.g.,* Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971), with Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).

58. *E.g.,* Gonzalez v. Doe, 476 F.2d 680 (2d Cir. 1973); Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

59. 361 F. Supp. 1196 (E.D. Pa. 1973). This case was decided after the Supreme Court handed down *Moor v. County of Alameda*, 411 U.S. 693 (1973). *See* Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973); *cf.* Salinas v. Flores, 359 F. Supp. 233 (S.D. Tex. 1973); Gaison v. Scott, 59 F.R.D. 347 (D. Hawaii 1973); Schwab v. First Appalachian Ins. Co., 58 F.R.D. 615 (S.D. Fla. 1973).

"[t]he now permissible claim against the City is based upon the simple application of the principle of respondeat superior which would present no difficulty to a fact finder. The factors of judicial economy and the avoidance of a multiplicity of suits dictate that these claims should be tried in a single lawsuit."⁶⁰

MOOR AND KENOSHA—WHAT WEIGHT TO GIVE MONROE?

The Court in *Monroe* regarded the legislative history of the Civil Rights Act as conclusively establishing the proposition that municipalities were not to be held liable for violations by their employees. Since Congress had not provided for such liability and the Court could not expand the statute without congressional approval, it considered policy factors irrelevant.⁶¹ In the Court's two recent decisions on the issue, *Monroe* was reaffirmed without question, and policy was again dismissed as irrelevant to the inquiry.⁶²

The desirability of municipal liability under section 1983 cannot be questioned.⁶³ The arguments are generally the same as those against common-law sovereign immunity, and a justification for such immunity is difficult to formulate.⁶⁴ However, given the *Monroe* decision, these policies, indeed, become irrelevant to a subsequent court proceeding, and the arguments for change must be made to Congress.⁶⁵ This does not mean the Court was necessarily justified in *extending* the

60. 361 F. Supp. at 1199.

61. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level. We do not reach those policy considerations.

Monroe v. Pape, 365 U.S. 167, 191 (1961).

62. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973).

63. "Governmental liability is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made." Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955). See also UNITED STATES COMM'N ON CIVIL RIGHTS, 1961 COMM'N ON CIVIL RIGHTS REPORT: JUSTICE, Book V, at 111, 113.

64. The usual justifications are presented in *Kates v. Kouba*, *supra* note 26, at 142-44. See generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 449 (1961); Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 39 (1969).

65. Since the *Monroe* holding has been reaffirmed and extended in *Moor and Kenosha*, the Court appears unwilling to change that interpretation of section 1983. Legislative change was suggested soon after *Monroe* in UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 63, at 113.

Monroe holding without considering the purposes behind enactment of the Civil Rights Act.

The Civil Rights Act was enacted pursuant to the enforcement clause of the fourteenth amendment for the purpose of providing a federal forum to persons deprived of their rights under the newly enacted amendment. The federal courts were necessary to enforcement because state courts were suspected of not enforcing the rights of Negroes and of allowing civil rights violators to go unpunished either criminally or civilly.⁶⁶ The provisions for federal jurisdiction were not made dependent upon the presence or absence of an adequate state law remedy but were meant to provide a federal forum despite state laws.⁶⁷

In *Moor* the Court assumed the correctness of the *Monroe* holding that Congress had not made municipalities answerable in damages for the acts of employees that violated section 1983. The Court then held that section 1988 could not be used as a means of obtaining federal jurisdiction over a municipality.⁶⁸ This holding was the result, however, of the Court's reading of section 1988 and was not based merely upon the force of *Monroe*.⁶⁹ The construction given section 1988 seems consistent with its apparent purpose in the civil rights scheme⁷⁰ to provide suitable remedies for violations of the substantive provisions of the Act. Of course, the Court's assumption was implicit that municipalities could not violate these substantive provisions under *Monroe*.⁷¹ The purpose of the Act in providing a federal forum should

66. See *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

67. "It is no answer that the State has a law which if enforced would give relief." *Id.* at 183.

68. See text accompanying notes 12-15 *supra*.

69. The Court briefly reviewed the legislative history of section 1983 in rejecting the argument that where state law provided for vicarious municipal liability, section 1983 should not prohibit such liability. 411 U.S. at 707-10.

70. The Court looked to the legislative origins of section 1988 in order to discover its intended scope. The Court concluded that:

Considered in context, this latter portion of § 3 [of the original 1866 Civil Rights Act], which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act including § 1 [now § 1982]. To hold otherwise would tear § 1988 loose from its roots in § 3 of the 1866 Civil Rights Act. This we will not do.

Id. at 705-06.

71. The petitioners did not attack *Monroe* but sought to circumvent it by arguing that since a municipality could not be held liable under section 1983 as interpreted in *Monroe*, the federal law was inadequate to redress civil rights violations against judgment proof individual defendants. Therefore, petitioners contended, section 1988 makes state law available to federal courts, and the County should be made liable under section 1983 as supplemented by the state law of vicarious liability for municipalities. *Monroe*

not be implemented at the cost of a tortured interpretation of one of its provisions. Since section 1988 was interpreted reasonably,⁷² only by overruling *Monroe* could the Court have allowed federal jurisdiction, and then only through section 1983 and not section 1988.

The decision in *City of Kenosha v. Bruno*,⁷³ however, rested entirely on *Monroe*. The latter contains strong support for the proposition that "the generic word 'person' in § 1983 was [not] intended to have a bifurcated application to municipal corporations depending on the nature of relief sought against them."⁷⁴ However, that conclusion is not compelled by the facts of *Monroe*, and the Court could have distinguished *Kenosha* on that basis and promoted the purposes of the Civil Rights Act without overruling *Monroe*.⁷⁵

Since *Monroe* was based on Congress' rejection of the Sherman Amendment, which provided for damages against a municipality, the Court in *Kenosha* could easily have held that a bifurcated approach allowing equitable relief was consistent with *Monroe* and its interpretation of the legislative history. Such a holding would allow federal courts to issue injunctions against municipalities and thereby correct

governed, therefore, only to the extent of defining the substantive limits of section 1983; the Court in *Moor* conducted an independent investigation of the legislative history of section 1988 and concluded that this section was intended to incorporate state law in order to supply remedies. However, since a claim against the County could not arise under section 1983, there could be no substantive liability on which to append a state law remedy, and section 1988 was not intended to create substantive liability through state law incorporation. *But see Note, Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971).

72. The Court distinguished cases in which state laws of vicarious liability were incorporated into section 1983 through section 1988 where the person held vicariously liable was an individual superior public official, who was subject to the substantive provisions of section 1983, rather than a municipality that could not be substantively liable. 411 U.S. at 704 n.17.

At least one lower court has voiced concern over this distinction.

The court remains concerned about a possible anomaly in these Civil Rights laws. [*Monroe*] could be evaded by joining the directors of a state agency and not the agency itself if the relevant state law, applicable through § 1988, included vicarious liability for governmental employees In contrast, a state agency cannot be vicariously liable under the Civil Rights laws regardless of possible state law of respondeat superior. [*Moor*]. Thus individuals and not a state government, may have to bear the financial burden of a civil rights judgment in a case in which they are not charged with having committed any specific acts against the plaintiffs.

Furumoto v. Lyman, 362 F. Supp. 1267, 1275 n.9 (N.D. Cal. 1973).

73. 412 U.S. 507 (1973); see text accompanying note 22 *supra*.

74. 412 U.S. at 513.

75. The plaintiffs in *Monroe* sought only damages whereas in *Kenosha* plaintiffs sought declaratory and injunctive relief. Had the Court undertaken an independent investigation of the legislative history of section 1983, the Court could undoubtedly have held that equitable relief would not be inconsistent with congressional disapproval of damages. See *Kates & Kouba, supra* note 26, at 147-48.

abuses by applying pressure on local policy making officials to deter their employees from violations of the Civil Rights Act.⁷⁶ Moreover, the holding that equitable relief is not available in *Kenosha* is difficult to reconcile with decisions of the Court, subsequent to *Monroe*, that allowed such relief in somewhat analogous circumstances.⁷⁷

If injunctions were issued against municipalities under section 1983, this alone would not completely overcome the general objections to municipal immunity,⁷⁸ but such relief would go far in supporting the purposes of the Civil Rights Act.⁷⁹ A federal forum would be provided to protect federal civil rights against municipalities acting or condoning action by their servants in disregard of those rights. Such relief seems to be the essence of the Civil Rights Act. Yet *Kenosha* blindly follows *Monroe* and, without discussing these policies, cuts off the possibility of equitable relief.

CONCLUSION

Pendent jurisdiction appears to be the only "loophole" remaining after *Moor* and *Kenosha* that provides a federal forum for actions under section 1983 against municipalities. Although *Moor* upheld a denial of pendent jurisdiction on discretionary grounds, it refused to decide the question of the *power* of the federal courts to hear "pendent party" claims.⁸⁰ Until that question is resolved by the Supreme Court, the lower courts are likely to continue reaching divergent results in joining municipal defendants to federal section 1983 claims against individuals.

The logical approach for the Supreme Court to take on the question would be to deny the power to join parties through the judicially developed doctrine of pendent jurisdiction. However desirable this

76. See note 63 *supra*.

77. See notes 40-41 and accompanying text *supra*.

78. Even if injunctions could secure freedom from deprivation of constitutional rights for the plaintiff, their non-compensatory nature renders them an incomplete remedy. Not only are private attorneys less likely to take the case, but the injured parties, knowing the costs of litigation and the lack of monetary award, will often choose to endure the abuse. This reduces the likelihood of reform and increases the boldness of the offending agency.

Kates & Kouba, *supra* note 26, at 151.

79. Some commentators have suggested that if equitable relief were available in civil rights actions against municipalities, it would be possible to get a damage claim, based on state law, into federal court through pendent jurisdiction. Kates, *supra* note 26, at 201.

80. 411 U.S. at 413-15. The Court noted the analogy of pendent parties to "joinder of new parties under the well established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13(a) and 13(b) and in the context of third-party claims under . . . 14(a)." *Id.* at 414-15.

method of joinder, it would be somewhat inconsistent, after the Court has determined that Congress intended to deny a federal claim against a party, then to grant federal jurisdiction by merely joining the party to a closely connected claim against a party properly before the federal court.⁸¹

Since the Court has refused to limit or overrule *Monroe*, it seems logical to expect that it will not allow that decision to be circumvented through pendent party jurisdiction. However, the Court could allow such joinder of a municipality to a federal section 1983 claim on the theory that such joinder does no violence to the *Monroe* holding since the municipality would not be held liable under section 1983, a possibility foreclosed by *Moor* and *Kenosha*, but only under applicable *state law*. Pendent party jurisdiction would serve merely as a convenient method of trying the state claim together with a federal claim arising out of the same facts in a single proceeding in federal court.

Until the Court finally resolves the question, the availability of pendent party jurisdiction will continue in some federal courts. The doctrine satisfies the purposes of the Civil Rights Act by providing a federal forum to hear claims against municipalities in section 1983 actions. However, pendent jurisdiction is not a panacea, for it depends absolutely on the state law governing sovereign immunity and respondeat superior.⁸² Furthermore, the ease with which some courts deny pendent jurisdiction in their discretion and the reluctance to find abuses of that discretion tends to reduce the effectiveness of this method of getting municipalities into federal court for section 1983 violations.

The holding of the Court in *Monroe* was virtually the death blow to section 1983 actions against municipal corporations, and the loopholes that developed were destined to be short-lived in the absence of a reconsideration of that decision.⁸³ The closing of these loopholes in *Moor* and *Kenosha* forces a difficult decision upon section 1983 litigants; forego the federal forum and join the municipality in a state action, or sue only individuals in federal court and, if pendent jurisdiction is denied, forego the benefits of a municipal defendant.

WILLIAM R. SAGE

81. See *Bevan v. Columbia Broadcasting Sys., Inc.*, 293 F. Supp. 1366 (S.D.N.Y. 1968).

82. See *Salinas v. Flores*, 359 F. Supp. 233 (S.D. Tex. 1973).

83. Mr. Justice Douglas, the author of *Monroe*, dissented in both *Moor* and *Kenosha* arguing that the loopholes should remain open. He added to his opinion in *Kenosha* an appendix that developed the legislative history of section 1983 beyond that considered in *Monroe*, 412 U.S. at 517-20.