Volume 24 | Issue 5 Article 6

1979

Federal Courts - 42 U.S.C. 1983 - Suing Municipalities under 42 U.S.C. 1983: The Impact of Monell v. Department of Social Services

Howard M. Klein

FEDERAL COURTS—42 U.S.C. § 1983—SUING MUNICIPALITIES UNDER 42 U.S.C. § 1983: THE IMPACT OF *MONELL v. DEPARTMENT OF SOCIAL SERVICES*.

I. INTRODUCTION

When the Supreme Court decided *Monroe v. Pape*,[1] it resurrected the Civil Rights Act of 1871 (Act)[2] "from ninety years of obscurity"[3] by broadening the scope of section 1983.[4] That same decision, however, provided the basis for returning the Act from whence it came, as it severely limited section 1983's effect by refusing to allow municipalities to be subject to its sanctions.[5] In the years following *Monroe*, various methods were developed to circumvent its municipal immunity rule.[6] The Supreme Court rejected every such attempt[7] to circumvent *Monroe* until it decided *Monell v. Department of Social Services*,[8] in which the Court reversed *Monroe*'s municipal immunity doctrine and held that municipalities could be sued under section 1983.[9]

In *Monell*, petitioners, female employees[10] of the New York City Board of Education and Department of Social Services, brought a class action[11] against respondent employers[12] under section 1983, seeking injunctive and monetary relief.[13] The gravamen of petitioners' complaint was that the employers had, as a matter of official policy, compelled pregnant female employees to take unpaid leaves of absence despite the lack of medical justification for such a policy.[14] The United States District Court for the

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

2. 42 U.S.C. § 1983 (1976) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). For the text of this statute, *see* note 24 *infra*.

3. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169 (1977) [hereinafter cited as *Section 1983 and Federalism*].

4. For a discussion of how *Monroe* broadened the scope of the § 1983 cause of action, *see* note 43 *infra*.

5. 365 U.S. at 191.

6. For a general discussion of the ways in which the courts attempted to circumvent *Monroe*, *see* notes 51-78 and accompanying text *infra*.

7. *See, e.g.*, Aldinger v. Howard, 427 U.S. 1 (1976); City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973).

8. 436 U.S. 658 (1978).

9. *Id.* at 690.

10. Monell v. Dep't of Social Servs., 394 F. Supp. 853, 854 (S.D.N.Y. 1975). The original complaint was filed on July 26, 1971, with the plaintiffs being Monell, an employee of the Department, and Terrall and Zapata, employees of the Board. *Id.* An amended complaint was filed on September 14, 1972, which added plaintiff Abbey, who was also employed by the Board. *Id.*

11. *Id.* It had been previously determined that the action could be brought as a class action. Monell v. Dep't of Social Servs., 357 F. Supp. 1051, 1054 (S.D.N.Y. 1972).

12. 436 U.S. at 661. The defendants were the Department of Social Services and its Commissioner, the Board of Education and its Chancellor, and the City of New York and its Mayor. *Id.* The individual defendants were sued solely in their official capacities. *Id.* For a discussion of official capacity suits and the municipal immunity doctrine, *see* notes 66-69 and accompanying text *infra*.

13. 394 F. Supp. at 854.

14. *Id.* at 855. The record showed that each of the four plaintiffs was directed to take maternity leave approximately one month before her doctor would have ordered her to do so. *Id.*

Southern District of New York held that the claims for injunctive relief were rendered moot by an interim official change in maternity leave policy,[15] and that although petitioners' civil rights had been violated,[16] their claims for back pay were barred by *Monroe*.[17] The United States Court of Appeals for the Second Circuit affirmed,[18] but the United States Supreme Court reversed, holding that municipalities were to be considered "persons" for the purposes of the Civil Rights Act of 1871.[19]

This comment will discuss the *Monell* Court's holding in light of the relevant legislative history of section 1983 and the relevant underlying case law.[20] The anticipated impact of *Monell* and the question of whether the decision has provided new impetus to the Civil Rights Act of 1871 will also be explored.[21]

II. BACKGROUND

A. *Legislative History*

The Civil Rights Act of 1871[22] was, in the view of one author, enacted by Congress in order to achieve two broad goals: "(1) to provide civil and criminal sanctions to deter infringements upon civil rights; and (2) to provide authority to the government to meet with force unlawful combinations and violence which interfered with civil rights or the execution of justice or federal law."[23] Section 1 of the Act, now codified in section 1983,[24] re-

15. *Id.* The Department of Social Services changed its maternity leave policy to provide that a woman may remain on her job as long as she is able to continue her duties. *Id.* The City and the Board of Education soon followed this policy. *Id.*

16. *Id.* The United States Supreme Court has held that this practice is unconstitutional. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

17. 394 F. Supp. at 855.

18. Monell v. Dep't of Social Servs., 532 F.2d 259 (2d Cir. 1976).

19. 436 U.S. at 690. The Court also determined that although a municipality could now be sued under § 1983, municipal liability could not be predicated upon a theory of respondeat superior. *Id.* at 691.

20. *See* notes 22-100 and accompanying text *infra*.

21. *See* notes 139-69 and accompanying text *infra*.

22. Act of April 20, 1871, ch. 22, 17 Stat. 13. This Act was entitled: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes." *Id.* In enacting this legislation, Congress was responding to a message from President Grant in which he had urged the enactment of legislation to deal with "[a] condition of affairs . . . in some of the States of the Union rendering life and property insecure." CONG. GLOBE, 42d Cong., 1st Sess. 236 (1871) [hereinafter cited as CONG. GLOBE]. As one author has stated: "The President was . . . referring to the rising tide of terrorism . . . led by the Ku Klux Klan." B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES 591 (1970). *See* CONG. GLOBE, *supra*, at 320 (remarks of Rep. Stoughton).

23. *See* B. SCHWARTZ, *supra* note 22, at 591.

24. 42 U.S.C. § 1983 (1976) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). Section 1983 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.

flected the first of these purposes,[25] and provided a cause of action for anyone who alleges that he has been deprived of his constitutionally protected rights by a person who has acted under color of state law.[26]

Neither section 1983 nor the Act as a whole specifically discusses whether a municipal corporation can be held liable for constitutional deprivations under color of law occurring within its corporate boundaries.[27] The issue of municipal liability under the Act was initially raised during the debates on the Sherman amendment,[28] which, as originally introduced and passed by the Senate,[29] would have held all inhabitants of a municipality

---

Id. Its jurisdictional counterpart is found in § 1343(3) of the Judicial Code. 28 U.S.C. § 1343(3) (1976). Section 1343(3) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . . (3) 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.

Id.

25. *See* B. SCHWARTZ, *supra* note 22, at 591. This section has been the source of volumes of civil rights litigation. *See Section 1983 and Federalism*, *supra* note 3, at 1172-74. Justice Stewart described this section's purpose as being "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." Mitchum v. Foster, 407 U.S. 225, 242 (1972). Justice Douglas has viewed § 1983 as having the following purposes: "*First*, it might, of course, override certain kinds of state laws. . . . *Second*, it provided a remedy where state law was inadequate. . . . [*t*]*hird*, . . . [it] provide[d] a federal remedy where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, 365 U.S. 167, 173-74 (1961).

26. 42 U.S.C. § 1983 (1976). For the text of this statute, *see* note 24 *supra*. The term "color of law" was defined in two criminal cases brought under the criminal sections of the Civil Rights Act of 1871. *See* 18 U.S.C. §§ 241-242 (1976); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941). The Court determined that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 326. The Court in *Monroe* expanded this definition of "color of state law" to civil actions brought under § 1983. *See* 365 U.S. at 187. For an extended discussion of the emergence of the § 1983 cause of action, *see Section 1983 and Federalism*, *supra* note 3, at 1167-75.

27. *See, e.g.*, B. SCHWARTZ, *supra* note 22, at 591-93; Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 133 (1972). *Cf.* Monroe v. Pape, 365 U.S. 167, 187-92 (1961) (Court looked to legislative debates for its finding).

28. *See* CONG. GLOBE, *supra* note 22, at 663; Monell v. Dep't of Social Servs., 436 U.S. 658, 665 (1978); Monroe v. Pape, 365 U.S. 167, 188-91 (1961).

29. *See* CONG. GLOBE, *supra* note 22, at 663. As originally proposed, the Sherman amendment read as follows:

> That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or

liable for civil rights violations occurring within the municipality.[30] When this version of the Sherman amendment was rejected by the House of Representatives,[31] the first Conference Committee substituted a version which would have held a municipality vicariously liable for damage done to the person or property of its inhabitants by private persons, "riotously and tumultuously assembled."[32] The House, concerned as to whether Congress

---

to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

Id. The Sherman amendment was introduced by Senator Sherman immediately prior to the Senate's vote on H.R. 320 of the Civil Rights Act of 1871. Monell v. Dep't of Social Servs., 436 U.S. 658, 666 (1978). The rules of the Senate prohibited discussion of the amendment, and although attempts were made to amend the amendment, it was passed as introduced. *Id.*, *citing* CONG. GLOBE, *supra* note 22, at 663.

30. CONG. GLOBE, *supra* note 22, at 663. The amendment as passed by the Senate did not make municipalities liable, but rather made individual inhabitants of the municipalities liable. *See* 436 U.S. at 666 n.14., *citing* CONG. GLOBE, *supra* note 22, at 663.

31. CONG. GLOBE, *supra* note 22, at 725.

32. *Id.* at 749. The Conference Committee substitute amendment provided that the government would be liable for damages assessed against its own inhabitants if the judgment was not satisfied by the inhabitants who had committed the deprivation of civil rights. *Id.* If a municipality were held liable, the judgment against it could be collected through a lien on all public property. *Id.* The complete text of the first conference substitute for the Sherman amendment read as follows:

That if any house, tenement, cabin, shop, building, barn or granary shall be unlawfully or feloniously demolished, pulled down, burned or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously or tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with

could constitutionally obligate municipalities to uphold the peace,[33] rejected this substitute as well.[34] As finally promulgated, the Sherman amendment contained no reference to municipal liability.[35]

The debates on the Sherman amendment were the only instances in which Congress considered the issue of municipal liability under the Act.[36] Furthermore, the primary focus of those discussions was whether a municipality could be held vicariously liable for a deprivation of constitutional rights within its boundaries,[37] and the debates never discussed the issue of whether a municipality is a person within section 1.[38] The Sherman amendment debates thus provide only a limited tool for evaluating the propriety of section 1983 liability of municipalities.[39]

B. *Case Law*

1. *Monroe v. Pape*

The leading decision on the section 1983 cause of action is *Monroe v. Pape*,[40] in which the Court held, *inter alia*, that municipalities were not to be considered "persons" under that section.[41] In so defining the word "person," the Court reasoned that Congress' rejection of the first two versions of the Sherman amendment implied that Congress did not wish to hold municipalities liable in any way for violations of section 1983.[42] The result

---

costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.

Id.

33. For a discussion of the issue of the Sherman amendment's constitutionality, *see* notes 82-84 and accompanying text *infra*.

34. *See* CONG. GLOBE, *supra* note 22, at 800-01.

35. *Id.* at 804. The relevant text of the second Conference Committee substitute for the Sherman amendment read as follows:

> [A]ny person or persons having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives.

Id.

36. *See* note 28 and accompanying text *supra*.

37. *See* CONG. GLOBE, *supra* note 22, at 751-52, 754-66, 787-95, 798-800.

38. *Id.*

39. For a general discussion of the various criticisms which have been directed at *Monroe's* use of legislative history, *see* notes 44-50 and accompanying text *infra*.

40. 365 U.S. 167 (1961). In *Monroe*, plaintiffs brought an action under § 1983, seeking damages from the City of Chicago and 13 of its police officers. *Id.* at 168-69. The gravamen of the complaint was that the police officers had violated plaintiffs' fourteenth amendment rights as a result of a warrantless search and subsequent brutual acts. *Id.* at 169-71. The Court held that the complaint stated a valid cause of action against the police officers. *Id.* at 184-87. The Court, however, dismissed the complaint as to the City of Chicago. *Id.* at 192.

41. *Id.* at 191-92. For the text of § 1983, *see* note 24 *supra*.

42. 365 U.S. at 187-91. More fully, the *Monroe* Court stated: "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal

of the *Monroe* decision was to severely limit the efficacy of the section 1983 cause of action by eliminating an important potential defendant.[43]

Monroe has been criticized for wrongly inferring from the legislative history of the Sherman amendment that Congress did not intend that municipalities be held liable for section 1983 causes of action.[44] The debates indicate that Congress, in rejecting vicarious liability under the Sherman amendment,[45] did not necessarily intend to make municipalities completely immune from suit under section 1983.[46] The *Monroe* Court thus

---

purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Id.* at 191. For a general discussion of the Sherman amendment, *see* notes 28-39 and accompanying text *supra*.

43. *See* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1208-09 (1971) [hereinafter cited as *Developing Governmental Liability*]. In one sense, however, the Court in *Monroe* greatly expanded the § 1983 cause of action. The Court held that the police officers acted under color of state law in violation of § 1983, even though their actions were unlawful under state law. 365 U.S. at 184-85. This holding expanded the rule of United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945), which had defined the term "color of state law" in criminal actions, to civil actions under § 1983. 365 U.S. at 184-85. For a further discussion of the phrase "under color of state law," *see* note 26 *supra*. This aspect of the *Monroe* holding, in the words of one author, "resurrect[ed] section 1983 from ninety years of obscurity." *Section 1983 and Federalism*, *supra* note 3, at 1169.

By granting municipalities immunity, however, the Court rendered the cause of action to a large degree illusory. As another writer has stated:

> [W]hile section 1983 provides a federal right of action for damages against state and local officials, practical and legal obstacles may thwart many meritorious claims. First, it may be difficult to identify the individual officials responsible for a violation. Second, many officials lack the financial means to pay substantial judgments. Third, a jury—even when it is convinced that a plaintiff's constitutional rights have been violated—may be reluctant to assess damages against an official who is perceived to be under legal attack for doing what he thought to be his job. Finally, local officials, even when they have violated an individual's constitutional rights, enjoy a good faith defense to section 1983 actions.

Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 923 (1975-76) [hereinafter cited as *Damage Remedies*]. *See also* Monell v. Dep't of Social Servs., 436 U.S. 658, 707-08 (1978) (Powell, J., concurring); Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U. L. REV. 770, 778 (1975); *Developing Governmental Liability*, *supra*, at 1209.

44. *See* 365 U.S. at 191. For criticisms of *Monroe*'s use of legislative history, *see, e.g.*, Kates & Kouba, *supra* note 27, at 132-36 (the *Monroe* Court's reliance on those debates is misplaced; § 1983 was not directed to the same considerations as was the Sherman amendment); Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L. J. 1483, 1491-92, 1519-31 (1977) (the Sherman amendment debates do not suggest that § 1983 should restrict in any way the remedies that courts may decree to redress the consequent injury when a city is itself guilty of a constitutional violation); *Section 1983 and Federalism*, *supra* note 23, at 1192 ("*Monroe*'s review of legislative history is highly questionable. First, the debates involved no explicit discussion of the definition of the word 'person.' Second, the penalties provided by the Sherman Amendment went well beyond those of section 1983 . . . ."); *Developing Governmental Liability*, *supra* note 43, at 1205-07 ("[t]o determine what Congress would have thought had it been thinking about something it was not is speculative at best and it provides a weak foundation on which to base a judicial decision."). *See also* notes 107 & 108 and accompanying text *infra*.

45. For a general discussion of the Sherman amendment, *see* notes 28-39 and accompanying text *supra*.

46. *Section 1983 and Federalism*, *supra* note 3, at 1191-92. As one author has stated: "At best, the legislative history is ambiguous with respect to the liability of municipalities for actions taken under color of law . . . ." *Id.* at 1192. *See also* Monell v. Dep't of Social Servs., 437 U.S. 658, 719-24 (1978) (Rehnquist, J., dissenting). For a general discussion of the *Monell* Court's analysis of the legislative history, *see* notes 79-100 and accompanying text *infra*.

failed to distinguish between vicarious liability under the Sherman amendment and any form of liability under section 1983.[47] As a result of this view, which has become accepted as a faulty interpretation of the debates,[48] the *Monroe* Court, without any discussion of the policy issues which support or refute municipal immunity,[49] severely limited the remedial effect of section 1983.[50]

2. *Circuit court attempts at circumventing* Monroe *and Supreme Court expansion of the* Monroe *doctrine*

Dissatisfaction with *Monroe* resulted in numerous calls for its reversal.[51] Prior to *Monell*, however, the Supreme Court continuously rejected the devices developed to ameliorate the harsness of *Monroe* and expanded the notion of municipal immunity under section 1983.[52]

In *Moor v. County of Alameda*,[53] the Court expanded the concept of section 1983 municipal immunity to include county immunity.[54] The *Moor* Court also held: 1) that a state law abrogating municipal immunity could not be adopted into federal law through section 1988 of title 42 of the United States Code;[55] and 2) that the district court's refusal to hear the state claims

---

47. *See Section 1983 and Federalism*, *supra* note 3, at 1192. *Cf. Levin*, *supra* note 44, at 1519-31 (Congress, in rejecting the Sherman amendment, was rejecting vicarious liability). For a list of criticisms of the *Monroe* holding and for a discussion of the *Monell* Court's view of the legislative history, *see* notes 81-92 and accompanying text *infra*.

48. Regarding Justice Rehnquist's basic acceptance in *Monell* of the unpersuasiveness of the *Monroe* Court's legislative interpretation, *see* note 96 and accompanying text *infra*.

49. *See* 365 U.S. at 191. The Court in *Monroe* specifically stated: "[W]e do not reach those policy considerations." *Id.*

50. For a discussion of the criticisms of *Monroe*, *see* note 44 and accompanying text *supra*.

51. There have been numerous bills introduced in Congress seeking reversal of *Monroe*. *See* Turpin v. Mailet, 579 F.2d 152, 177 n.32 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam). *See also* CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE: HEARINGS BEFORE THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94th Cong., 2d Sess. 62 (1976). *See also* U.S. COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 179 (1965). *Cf.* JUSTICE: 1961 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, Bk. V at 78-82 (1961) (*Monroe* has a serious limitation in that it does not reach the guilty officer's employers: the city).

52. *See* Aldinger v. Howard, 427 U.S. 1 (1976); City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973).

53. 411 U.S. 693 (1973).

54. *Id.* at 710. There is dicta in *Moor* to the effect that all political subdivisions of a state may fall within the rule of *Monroe*. *Id.* at 708.

55. *Id.* at 710. In *Moor*, petitioners attempted to circumvent *Monroe* by invoking § 1988 of title 42 of the United States Code, 42 U.S.C. § 1988 (1976), which authorizes the federal courts to look to state law in all cases where federal laws are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies under the civil rights statutes. 411 U.S. at 698-99. Utilizing § 1988, plaintiff Moor attempted to incorporate the California statute, which "created vicarious liability against the County for the actions of its officers that violated petitioners' federal civil rights." *Id.* at 698. *See* CAL. GOV'T CODE § 815.2 (West 1963). The Court, in rejecting this argument, pointed out that § 1988 permits the utilization of state law only when the state law is not inconsistent with the Constitution or the laws of the United States. 411 U.S. at 706-10. In *Moor*, on the other hand, the application of the California statute that imposed vicarious liability on municipalities would require the Court to utilize a law in direct conflict with § 1983 as interpreted in *Monroe*. *Id.*

as an exercise of its pendent jurisdiction[56] was not an abuse of its discretion.[57] In *Aldinger v. Howard*,[58] the Court rejected the use of pendent party jurisdiction[59] to circumvent municipal immunity,[60] and thereby im-

---

56. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The doctrine of pendent jurisdiction gives the district courts power to hear state claims joined with federal claims where there is no independent ground of federal jurisdiction for the state claim. *See id.* at 725. There are three factors to be viewed in determining whether to apply the doctrine: 1) the underlying federal claim should be substantial enough to confer subject matter jurisdiction on the court, *id.*; 2) the relationship between the state and federal claims must be such that it comprises "but one constitutional case," meaning that if the state and federal nature of the claims were disregarded, the claims would normally be joined together, *id.*; and 3) the doctrine of pendent jurisdiction is a doctrine of discretion and not one of right. *Id.* at 725-26. The *Gibbs* Court further stated: "Its [pendent jurisdiction's] justification lies in considerations of judicial economy, convenience and fairness to litigants . . . ." *Id.* at 726. For a general discussion of the doctrine of pendent jurisdiction, *see, e.g.*, 3A MOORE'S FEDERAL PRACTICE ¶¶ 18.07, 18.29-74 (2d ed. 1978) [hereinafter cited as MOORE'S]; C. WRIGHT, LAW OF FEDERAL COURTS 72-77 (3d ed. 1976).

57. 411 U.S. at 713-17. The *Moor* Court reasoned that since there were no independent grounds of jurisdiction over the county, the state law issue was unsettled, and there were various defenses which might have led to jury confusion, the district court did not err in dismissing the pendent claim. *Id. Cf.* Aldinger v. Howard, 427 U.S. 1 (1976) (pendent party jurisdiction is discretionary). For a general discussion of *Aldinger*, *see* notes 58-61 and accompanying text *infra*. In *Moor*, the Court did not decide the question of whether the county could be joined in a proper factual situation, deeming the issue to be "subtle and complex." 411 U.S. at 715. The Court instead rested its determination solely on the discretionary nature of the pendent jurisdiction doctrine. *Id. See* note 56 *supra*. The question of whether a court had the power to hear pendent state claims against the county was therefore left open. *See* 3A MOORE'S, *supra* note 56, ¶20.07, at 20-75 & 20-76. For a general discussion of *Moor* and municipal immunity under § 1983, *see generally* Levin, *supra* note 44, at 1495-96 & n.48; 2 FORDHAM URB. L.J. 109 (1974).

58. 427 U.S. 1 (1976).

59. *See id.* The issue involved in "pendent party" jurisdiction is "whether a plaintiff may join together a claim under the laws of the United States against one party and a claim against another party under state law." 3A MOORE'S, *supra* note 56, at ¶ 20.07, at 20-72 to 20-76; C. WRIGHT, *supra* note 56, at 75-77 & nn.11-25.

In *Aldinger*, petitioner brought suit against a county official and the county under § 1983, claiming that her discharge as a county employee violated her first, ninth, and fourteenth amendment rights. 427 U.S. at 4. She also claimed that the district court had pendent jurisdiction over the state law claims against the parties. *Id.* Plaintiff's theory was that although *Monroe* and *Moor* mandated that jurisdiction not be exercised as to the county, the state law claims should be heard as being pendent to a valid § 1983 claim against the official. *See id.* at 16-17. The Court refused to develop an encompassing rule as to whether pendent party jurisdiction was generally allowed. *Id.* at 13. Instead, the Court determined that the resolution of the issue of pendent party jurisdiction depends "upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts." *Id.* at 17.

In *Aldinger*, the Court held that "a fair reading of the language used in § 1343, together with the scope of § 1983, requires a holding that the joinder of a municipal corporation, like the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court." *Id.* (footnote omitted). While *Aldinger* foreclosed the possibility of using pendent party jurisdiction to join a municipality under § 1983, it continued to leave the contours of the doctrine generally undefined, making its application turn on a reading of the underlying jurisdictional statute. *Id.* For a general discussion of this issue, *see* 3A MOORE'S, *supra* note 56, ¶ 20.07, at 20-72 to 20-75; C. WRIGHT, *supra* note 56, at 75-77. For a discussion of *Moor*, *see* note 57 *supra*.

60. In an analogous circumvention attempt, the United States Court of Appeals for the Third Circuit has deemed that the district court has discretion to hear a state law claim against a

plicitly reaffirmed the *Monroe* doctrine.[61]

The Court further expanded *Monroe* in *City of Kenosha v. Bruno*,[62] in which it held that municipalities were immune from actions requesting injunctive as well as monetary relief.[63] While *Kenosha* appeared to be one of the clearest possible expressions of judicial support for *Monroe* and municipal immunity,[64] it did little to clarify the confusion concerning which gov-

---

municipality when the underlying claim is a direct cause of action under the fourteenth amendment. *See* Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), *cert. denied*, 438 U.S. 312 (1978). *See also* Patzig v. O'Neil, 577 F.2d 841, 850-51 (3d Cir. 1978); Pitrone v. Mercadante, 572 F.2d 98 (3d Cir.), *cert. denied*, 438 U.S. 1074 (1978).

61. *See* Monell v. Dep't of Social Servs., 436 U.S. 658, 696 n.61 (1978). Justice Rehnquist's dissent in *Monell* placed great emphasis on the fact that *Aldinger*, *Moor* and City of Kenosha v. Bruno, 412 U.S. 507 (1973), reaffirmed *Monroe*. *See* 436 U.S. at 714 (Rehnquist, J., dissenting). For a discussion of Justice Rehnquist's dissent, *see* notes 132-38 and accompanying text *infra*.

62. 412 U.S. 507 (1973).

63. *Id.* at 513. *Kenosha* involved a suit for declaratory and injunctive relief in which the petitioners, retail liquor establishment owners, claimed that the Wisconsin liquor licensing procedure violated their fourteenth amendment procedural due process rights. *Id.* at 508. Petitioners brought this action under § 1983, and claimed that the Court had jurisdiction due to the equitable relief sought. *Id.* at 511-13. The Court, in rejecting the monetary–injunctive relief distinction, held:

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations. . . . [T]hey are outside its [§ 1983's] ambit for purposes of equitable relief as well as for damages.

Id. at 513. Justice Douglas, the author of the majority opinion in *Monroe*, dissented in *Kenosha*, contending that one could infer the monetary–injunctive distinction from dicta in *Monroe*. *Id.* at 516 (Douglas, J., dissenting).

Prior to *Kenosha*, a number of circuit courts had recognized that suits could be brought against municipalities in the form of requests for injunctive relief. *See, e.g.*, Garren v. Winston-Salem, 439 F.2d 140, 141 (4th Cir.), *vacated*, 403 U.S. 1052 (1971); Harless v. Sweeny Independent School Dist., 427 F.2d 319, 321-23 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Dailey v. City of Lawton, 425 F.2d 1037, 1038-39 (10th Cir. 1970); Sher v. Board of Educ., 424 F.2d 741, 744 (3d Cir. 1970); Adams v. City of Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961). *Cf.* Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (Court ordered injunctive relief under § 1983 when municipal immunity was not raised by the parties and not discussed by the Court). *Contra*, Rosado v. Wyman, 414 F.2d 170, 178 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970); Diamond v. Pitchess, 411 F.2d 565, 567 (9th Cir. 1969); Deane Hill Country Club v. Knoxville, 379 F.2d 321, 323-24 (6th Cir. 1967).

Many of the courts which allowed the equitable–monetary distinction had been confused by a footnote in *Monroe* in which the Court referred to two cases in which it had granted equitable relief against cities. *See* 365 U.S. at 191 n.50, *citing* Holmes v. City of Atlanta, 350 U.S. 879 (1955); Douglas v. City of Jeannette, 319 U.S. 157 (1943). The *Monroe* Court had said the following regarding previous cases where the distinction was allowed: "The question 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." 365 U.S. at 191 n.50 (citations omitted). Despite this language in *Monroe*, lower courts continued to draw the inference. *See, e.g.*, Kates & Kouba, *supra* note 27, at 149-50; 52 N.C.L. REV. 1289, 1293-94 (1974).

For an extended discussion of the ways in which the circuit courts treated the issue of municipal liability during the time between *Monroe* and *Kenosha*, *see, e.g.*, *Developing Governmental Liability*, *supra* note 43, at 1210-22; Comment, *Suing Public Entities Under the Federal Civil Rights Act:* Monroe v. Pape *Reconsidered*, 43 U. COLO. L. REV. 105, 108-17 (1971); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 253 (1973).

64. *See* 412 U.S. at 513. *Cf. Levin*, *supra* note 44, at 1496 (municipalities could never be defendants in § 1983 cases); *Section 1983 and Federalism*, *supra* note 3, at 1183 ("the Supreme Court [in *Kenosha*] flatly rejected a bifurcated approach").

ernmental entities were persons under section 1983.[65] Furthermore, *Kenosha* failed to comment on the status of the official capacity doctrine,[66] a *Monroe* circumvention device which lower courts had developed by analogy to *Ex parte Young*.[67] In *Young*, the Court had held that despite a state's eleventh amendment immunity, a state attorney general could be enjoined from enforcing an allegedly unconstitutional state statute.[68] Pursuant to the

---

65. *See* 412 U.S. 507 (1973). The *Monroe* immunity doctrine had been expanded to various entities and subdivisions of the states. *See, e.g.*, Cheramie v. Tucker, 493 F.2d 586 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974) (state department of highways); United Farmworkers of Florida Housing Projects, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (state department of pollution control); Sykes v. California, 497 F.2d 197 (9th Cir. 1974) (state department of motor vehicles); Burris v. State Dep't of Pub. Welfare, 491 F.2d 762 (4th Cir. 1974) (state department of public welfare); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (state bureau of corrections); Avins v. Mangum, 450 F.2d 932 (2d Cir. 1971) (state university); Zuckerman v. Appellate Div., Second Dep't Supreme Court of New York, 421 F.2d 625 (2d Cir. 1970) (N.Y. App. Div.); Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970) (state department of social services); Clark v. Washington, 366 F.2d 678 (9th Cir. 1966) (state bar association). For a discussion of the factors courts consider in determining what is a municipality, and a critique of this unsettled area, *see* Muzquiz v. City of San Antonio, 520 F.2d 993, 1004-05 nn.4-8 (5th Cir. 1975) (Godbold, J., dissenting), *rev'd on rehearing en banc*, 528 F.2d 499 (5th Cir. 1976), *vacated*, 438 U.S. 901 (1978) (remanded in light of *Monell*) (entities not possessing broad governmental powers and functions can fall within the *Monroe-Kenosha* exemption).

66. For a discussion of the nature of the official capacity doctrine as a means of circumventing *Monroe*, *see Levin, supra* note 44, at 1496-518. Levin, in describing the doctrine, has stated:

> In cases in which a state or local policy is under attack, it is customary to name as the defendant the officer ultimately responsible for administering the challenged policy, such as a mayor or a department head. His presence in the litigation is essentially nominal. It does not depend on his immediate connection with the alleged wrong; he may indeed have had absolutely no role in putting the challenged policies into effect. He is made a party to the case for a different reason—because he has authority to use the machinery of government to take any corrective action ordered. It is generally said, therefore, that he is sued as a defendant in his official capacity.

Id. at 1497. When an official is sued in his official capacity, there may be no damages awarded against him individually because he is partially protected by the various immunities of § 1983. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). One might therefore conclude that a suit brought against an officer in his official capacity is a suit against the municipality itself, as any damages the plaintiff would recover would have to come from the city treasury. *See, e.g., Levin, supra* note 44, at 1498; *Section 1983 and Federalism, supra* note 3, at 1197; 47 MISS. L.J. 799, 804-06 (1976). Because the municipality is ultimately liable in such suits, some courts refused to grant relief in § 1983 cases although an official was joined. *See, e.g.*, Monell v. Dep't of Social Servs., 532 F.2d 259, 264-66 (2d Cir. 1976); Muzquiz v. City of San Antonio, 518 F.2d 499, 501 (5th Cir. 1976), *vacated*, 438 U.S. 901 (1978) (remanded in light of *Monell*). *Contra*, Thomas v. Ward, 529 F.2d 916, 920-21 (4th Cir. 1975); Burt v. Board of Trustees, 521 F.2d 1201, 1204, 1206 (4th Cir. 1975). For a discussion of the official capacity doctrine and its relation to the eleventh amendment sovereign immunity doctrine, *see* notes 67-69 and accompanying text *infra*.

67. 208 U.S. 123 (1908).

68. *Id.* at 159-60. In so holding, the Court developed the fiction that the attorney general, when acting unconstitutionally, could be treated as though he is "stripped" of his official character and subjected in his person to the consequences of his official conduct. *Id.* This fiction was limited by the Supreme Court in Edelman v. Jordan, 415 U.S. 561 (1974), in which the Court held that official capacity suits seeking equitable relief against state officials could overcome the eleventh amendment bar only if the relief sought was prospective, and not retrospective. *Id.* at 677.

Young analogy, lower courts sustained a cause of action against a municipality if an officer of that body was included as a nominal party in the pleadings.[69]

By way of dicta,[70] the Court in *Kenosha* had also left open the question of whether there was a direct cause of action under the fourteenth amendment[71] and section 1331 of the Judicial Code.[72] Lower courts which had allowed municipalities to be sued in this manner did so by analogy to the Court's decision in *Bivens v. Six Unknown Agents*.[73] The *Bivens* Court, basing its decision on the principle that for every violation of a federally guaranteed right there should be an appropriate remedy, held that federal courts exercising general federal question jurisdiction can give monetary relief to parties whose fourth amendment rights had been violated.[74] A split

---

69. *See Levin, supra* note 44, at 1501 n.67. Regarding the official capacity doctrine, *see* notes 66 & 67 and accompanying text *supra*. In Edelman v. Jordan, 415 U.S. 651 (1974), the Court mandated that relief in an official capacity suit against the state be limited to prospective relief. *Id.* at 677. Circuit courts have also applied this rationale to § 1983 actions. *See, e.g.*, Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976), *vacated*, 438 U.S. 901 (1978) (remanded in light of *Monell*). In following the eleventh amendment rationale, however, courts in § 1983 cases apply to the word "person" the bifurcated approach that was categorically disapproved in *Kenosha*. *See* 412 U.S. at 513. *See also* Monell v. Dep't of Social Servs., 436 U.S. 658, 712 (1978). For a discussion of this point, *see* note 118 *infra*. For a general overview of official capacity suits, *Young*, and § 1983, *see, e.g., Levin, supra* note 44, at 1496-518; *Section 1983 and Federalism, supra* note 3, at 1195-99. *See also* Muzquiz v. City of San Antonio, 528 F.2d 449 (5th Cir. 1976), *vacated*, 438 U.S. 901 (1978) (remanded in light of *Monell*), *noted in* 55 TEX. L. REV. 501 (1977); 47 MISS. L. REV. 799 (1976).

70. 412 U.S. at 513-15. The Court remanded the case to the district court to consider whether the jurisdictional requirements of § 1331 of the Judicial Code, 28 U.S.C. § 1331 (1976), were met. 412 U.S. at 513. For the text of § 1331(a), *see* note 72 *infra*.

71. U.S. CONST. amend. XIV.

72. 28 U.S.C. § 1331 (1976). Section 1331(a) provides in pertinent part: "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 . . . ." *Id.* § 1331(a).

73. 403 U.S. 388 (1971).

74. *Id.* at 396-97. Justice Brennan, writing for the *Bivens* Court, stated that there should be a federal remedy for every violation of a legal right where a federal statute provides for a general right to sue for such violation. *Id.* at 396. Justice Brennan, however, states that before granting the remedy, the Court should look to see if "special factors counselling hesitation in the absence of affirmative action by Congress" are present. *Id.* For a discussion of *Bivens* and direct causes of action under the fourteenth amendment, *see, e.g.*, Hundt, *supra* note 43, at 778-88; Comment, *Implying a Damage Remedy Directly Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to the Extension of the* Bivens *Doctrine*, 36 MD. L. REV. 123 (1976); *Damage Remedies, supra* note 43, at 925-29; Comment, *Municipality Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits*, 16 DUQ. L. REV. 373 (1978) [hereinafter cited as *Circuit Survey*]. Prior to *Monell*, a number of circuit courts had recognized the *Bivens* cause of action as applicable to municipalities. *See, e.g.*, Turpin v. Mailet, 579 F.2d 152, 160-63 (2d Cir. 1978), *vacated sub nom.* West Haven v. Mailet, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam) (remanded in light of *Monell*). On remand, the Second Circuit held that since *Monell* facilitates a cause of action under § 1983, there is no need for the fourteenth amendment cause of action. 591 F.2d at 427. *See* Amen v. City of Dearborn, 532 F.2d 554, 559 (6th Cir. 1976). The only circuit which had expressly rejected the *Bivens* cause of action with respect to municipalities was the First Circuit. *See Circuit Survey, supra*, at 381-401, *citing* Kostka v. Hogg, 560 F.2d 37, 41-45 (1st Cir. 1977). For a pre-*Monell* survey of this issue with a circuit by circuit breakdown, *see Circuit Survey, supra*, at 381-401. One author has intimated

of authority has developed concerning whether municipalities can be held liable on the basis of respondeat superior[75] under this theory.[76]

The Supreme Court, in the seventeen years since its decision in *Monroe v. Pape*, has thus consistently rejected challenges to the municipal immunity rule.[77] It was in the face of these challenges that the Court decided to reexamine the *Monroe* rule.[78]

III. ANALYSIS

A. *The* Monell *Analysis of the Legislative History of 1983 and the Sherman Amendment*

In light of *Monroe's* exclusive reliance on the legislative history of section 1983 and the Sherman amendment as its basis for holding that municipalities were immune from suit under section 1983,[79] the *Monell* Court had to reexamine that history in order to overrule the municipal im-

---

that although few circuit courts have expressly recognized the cause of action, a reading of the cases in this area shows that, prior to *Monell*, most courts would have accepted the *Bivens* approach. *Id.* at 398. Even where the *Bivens* analogy had not been recognized, there existed the possibility of suing municipalities under state law in federal court pursuant to the doctrine of pendent party jurisdiction. *See* notes 56-59 and accompanying text *supra*. The question of whether an action against municipalities under the fourteenth amendment exists, however, may be an academic one, as the necessity of implying such an action is dubious in light of *Monell*. *See, e.g.*, Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir., 1979) (per curiam); Molina v. Richardson, 578 F.2d 846, 849-54 (9th Cir. 1978); Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978). *But see* Molina v. Richardson, 578 F.2d 846, 854-56 (9th Cir. 1978) (Grant, J., dissenting). For a discussion of the continued vitality of the fourteenth amendment cause of action after *Monell*, *see* notes 165-69 and accompanying text *infra*.

An argument may be raised that the Court ultimately should have implied a cause of action under the fourteenth amendment and § 1331 as opposed to overruling *Monroe*. Such an argument would be based on the fact that the jurisdictional amount requirement would protect the courts from a torrent of trivial litigation. It is submitted that such an argument is unconvincing, as a plaintiff has a cause of action against the individual officer under § 1983, and there is no jurisdictional amount under § 1343(3). Even prior to *Monell*, therefore, if a plaintiff had wished to bring a trivial lawsuit, he would merely sue the individual officer. *See Damage Remedies*, *supra* note 43, at 960. *Cf.* Hundt, *supra* note 43, at 797 (no claim under § 1983 is too insignificant for federal jurisdiction).

75. For a discussion of the respondeat superior standard in civil rights actions, *see* notes 139-51 and accompanying text *infra*.

76. For cases recognizing the applicability of respondeat superior in the *Bivens* cause of action, *see, e.g.*, Santiago v. City of Philadelphia, 435 F. Supp. 136, 148 (E.D. Pa. 1977); Williams v. Brown, 398 F. Supp. 155, 160 (N.D. Ill. 1975). *See also* Hundt, *supra* note 43, at 795. *Contra*, Turpin v. Mailet, 579 F.2d 152, 168 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam); McDonald v. Illinois, 557 F.2d 596, 604 (7th Cir. 1976), *cert. denied*, 434 U.S. 966 (1977). For an excellent discussion of the policy reasons against applying respondeat superior in this instance, *see, e.g.*, Turpin v. Mailet, 579 F.2d 152, 164-67 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978); *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam); Adekalu v. New York City, 431 F. Supp. 812, 819-20 (S.D.N.Y. 1977).

77. *See* note 52 *supra*.

78. Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).

79. *See* 365 U.S. at 187-91. For a discussion of *Monroe*, *see* notes 40-50 and accompanying text *supra*.

munity rule. In so doing, the Court accepted the views of the scholars who believe that the *Monroe* Court misinterpreted the debates.[80]

Justice Brennan, writing for the majority in *Monell*, found that nothing in the congressional debates of the Sherman amendment led to the conclusion that Congress had intended that municipalities be immune from liability under section 1983.[81] Justice Brennan supported this conclusion by contending that the Sherman amendment was rejected not because Congress had intended that municipalities be immune from section 1983 liability, but rather because Congress had correctly perceived the amendment as an unconstitutional imposition of obligations upon the states by the federal government.[82] The majority further contended that although the first two

---

80. 436 U.S. at 665. In accepting those views, the *Monell* Court stated: "A fresh analysis of debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the 'obligation' [contained in the Sherman amendment] . . . with 'civil liability' [under § 1983]." *Id.* For a discussion of the views of the various authors concerning the *Monroe* interpretation of the relevant legislative history, *see* notes 44-49 and accompanying text *supra*.

81. *See* 436 U.S. at 683. Justice Brennan stated: "It is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 [§ 1983] of the Civil Rights Act for its own violations of the Fourteenth Amendment." *Id.*

82. *Id.* at 679. In so concluding, Justice Brennan viewed the constitutional arguments of both the supporters and opponents of the Sherman amendment. *Id.* at 669. The majority pointed out that the debates on the Sherman amendment focused on whether Congress had the power to create an obligation that municipalities keep the peace. *Id. See* CONG. GLOBE, *supra* note 22, at 751-52, 754-66, 787-95, 798-800, 67 App. According to the Court, the proponents of the Sherman amendment relied on Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), wherein the Court upheld the constitutionality of a statute implementing the fugitive from justice provision and fugitive slave provision of article four of the United States Constitution. U.S. CONST., art. 4, § 2. *See* 436 U.S. at 672-83, *citing* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). The Court in *Prigg* reasoned that when the Constitution guaranteed a right, it in turn required a remedy to enforce that right. *See* 41 U.S. at 616. Building upon this premise, Representative Shellabarger, a major proponent of the Sherman amendment, argued that since the fourteenth amendment guaranteed certain rights, municipal liability was an appropriate means of enforcing those rights. *See* 436 U.S. at 672, *citing* CONG. GLOBE, *supra* note 22, at 751 (remarks of Rep. Shellabarger). Representative Shellabarger, in claiming that imposing obligations on municipalities was constitutionally valid, also relied on Board of Comm'rs v. Aspinwall, 65 U.S. (24 How.) 376 (1861). *Aspinwall* was the first of many cases upholding the power of the federal courts to enforce the contract clause, U.S. CONST. art. 1, § 10, cl. 1, against municipalities. 65 U.S. at 383-85. *See* 436 U.S. at 672.

The *Monell* Court used the remarks of Congressman Blair in analyzing the arguments against the Sherman amendment. *See* 436 U.S. at 673-75, *quoting* CONG. GLOBE, *supra* note 22, at 795 (remarks of Rep. Blair). The Court, in analyzing Representative Blair's remarks, stated that the major concern of the opponents of the amendment was

> that the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities.

436 U.S. at 673. The opponents of the Sherman amendment based their constitutional argument on the then prevalent doctrine of coordinate sovereignty, which placed "limits on the enumerated powers of the National Government in favor of protecting State prerogatives." *Id.* 676, *citing* Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). The opponents believed that both *Collector* and *Prigg* stood for the proposition that Congress could not insist that "states . . . provide means to carry into effect the duties of the

drafts of the Sherman amendment probably would have been unconstitutional legislation,[83] section 1983 did not suffer from the same deficiency.[84] The Court therefore reasoned that Congress would have had no constitutional objection to holding municipalities liable under section 1983.[85]

Having concluded that Congress would have had no constitutional objection to imposing municipal liability under section 1983, the *Monell* Court then faced the issue of whether Congress intended that municipalities be treated as "persons" for purposes of the Act.[86] The Court found that Congress did intend that a municipality be held accountable for its deprivations of constitutional rights under section 1983.[87] This finding was based on the

---

national government." 436 U.S. at 677, *quoting* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615-16 (1842) (footnote omitted).

In *Monell*, Justice Brennan therefore concluded that the House had rejected the first two versions of the Sherman amendment because it believed that the amendment, "by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. Justice Brennan also stated that there was ample support for such a view. *Id.* at 682, *citing* Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). For a general discussion of the legislative history of § 1983 and the Sherman amendment, *see* notes 22-39 and accompanying text *supra*.

83. 436 U.S. at 679. *See also* notes 80-82 and accompanying text *supra*.

84. 436 U.S. at 679. In support of this conclusion, Justice Brennan stated: "First, opponents [of the Sherman amendment] expressly distinguished between imposing an obligation to keep the peace and merely imposing 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." *Id.* Justice Brennan, relying on the remarks of Representative Poland during the debates of the Sherman amendment, contended that the opponents of the amendments had recognized that municipalities could constitutionally be held liable for civil rights violations. *See id.*, *citing* CONG. GLOBE, *supra* note 22, at 794. Representative Poland, whose views were considered controlling in *Monroe*, 365 U.S. at 190, agreed that the federal courts could entertain suits alleging that a municipality was liable for using its authorized powers in violation of the Constitution. *See* 436 U.S. at 680, *citing* CONG. GLOBE, *supra* note 22, at 794 (remarks of Rep. Poland).

Justice Brennan also concluded that liability under § 1983 would not have been deemed to have been unconstitutional under the legal theories prevailing in 1871. *See* 436 U.S. at 692. In reaching this conclusion, the Court relied on the doctrine of coordinate sovereignty as set out in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). The Court interpreted this theory as placing no limits on the power of the federal courts to act affirmatively in order to vindicate federal rights. 436 U.S. at 680. *See* note 82 *supra*. Since § 1983 was an act which sought to confer jurisdiction on the federal courts to entertain suits seeking to hold those acting under color of law liable for their civil rights violations, there was, the Court concluded, "no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 [§ 1983] suits against municipalities." 436 U.S. at 682. Justice Brennan supported his observations by pointing out that the same Court which adhered to the doctrine of coordinate sovereignty had no hesitation in enforcing the contract clause against municipalities. *Id.* at 681 & n.40. As a result, he concluded that the jurisdiction granted under § 1 [§1983] was analogous to the diversity jurisdiction under which the contract clause was enforced, and therefore there was no constitutional barrier. *Id.*

85. 436 U.S. at 683. In reaching this conclusion, the Court stated that "it is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 [§ 1983] of the Civil Rights Act for its own violations of the Fourteenth Amendment." *Id.*

86. *Id.* at 683-89.

87. *Id.* at 690.

following considerations: 1) the broad remedial goals of section 1983;[88] 2) statements by members of Congress that actions by cities were redressable under section 1983;[89] 3) the state of the law concerning municipal corporations in 1871;[90] and 4) the definition of the word "person" in the Dictionary Act of 1871,[91] which provided that unless the context indicated to the contrary, the word "person" may be applied to "bodies politic and corporate."[92]

Justice Rehnquist, in his dissenting opinion,[93] disagreed with the majority's outright rejection of the *Monroe* Court's interpretation of the congressional intent regarding municipal immunity under section 1983.[94] Conceding that the *Monroe* interpretation may have been incorrect,[95] Justice Rehnquist nevertheless contended that Congress' rejection of the original versions of the Sherman amendment was arguably an expression of congressional intent to reject municipal liability under section 1983.[96] Since no clear evidence of Congress' intent concerning this issue exists, the dissent questioned the propriety of overruling *Monroe* on the basis of the relevant legislative history.[97]

---

88. *Id.* at 685. The Court utilized the statements of Representative Shellabarger, who concluded that § 1 [§ 1983] should be given a liberal construction. *Id.*, *citing* CONG. GLOBE, *supra* note 22, at 68 app. (remarks of Rep. Shellabarger). The Court then stated that other members of Congress agreed that § 1 [§ 1983] was a broad remedy for violations of federally protected civil rights. *See* 436 U.S. at 685 & n.45. The Court therefore concluded that since municipalities could create the harms which § 1 [§ 1983] was intended to remedy, there would have been no reason for Congress to have excluded municipalities from the section. *See id.* at 685-86.

89. 436 U.S. at 686-87, *citing* CONG. GLOBE, *supra* note 22, at 84 app. (remarks of Rep. Bingham). Justice Rehnquist took issue with the Court concerning this point, claiming that Representative Bingham never directly related his remarks to the provisions of § 1983. *See* 436 U.S. at 721-22 (Rehnquist, J., dissenting).

90. 436 U.S. at 687-88. The Court stated that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Id.* at 687. The Court further relied on Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 121-22 (1896), in which this doctrine was extended to municipal corporations. *See* 436 U.S. at 688, *citing* Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 121-22 (1869). The Court indicated that the legal status of municipal corporations was known to Congress in 1871. *See* 436 U.S. at 688 & n.50.

91. 436 U.S. at 688 & n.50, *quoting* Dictionary Act of 1871, ch. 71, § 2, 16 Stat. 431.

92. Dictionary Act of 1871, ch. 71, § 2, 16 Stat. 431. The Dictionary Act was designed to define and interpret various terms for Congress. *Id. See* Monroe v. Pape, 365 U.S. 167, 190 n.47 (1961). *See also* 436 U.S. at 689. In *Monroe*, Justice Douglas stated that the adoption of the definition in the Dictionary Act was merely permissive. *See* 365 U.S. at 190-91. The Court in *Monell* noted, however, that pursuant to judicial interpretation, municipal corporations were included within the phrase "bodies politic and corporate." *See* 436 U.S. at 689, *citing* Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873).

93. Justice Rehnquist was joined by Chief Justice Burger in his dissent.

94. 436 U.S. at 714 (Rehnquist, J., dissenting). *See* Monroe v. Pape, 365 U.S. 167, 191 (1961).

95. 436 U.S. at 722 (Rehnquist, J., dissenting).

96. *Id.* at 723 (Rehnquist, J., dissenting). Justice Rehnquist stated: "Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented." *Id.* For a discussion of how Justice Rehnquist views the ambiguity of the Court's historical analysis and its relationship to considerations of stare decisis, *see* notes 98-100 and accompanying text *infra*.

97. 436 U.S. at 722-24 (Rehnquist, J., dissenting). Justice Powell also contended that although the historical weakness of *Monroe* was evident from analysis of the relevant legislative

It is submitted that Justice Rehnquist's dissent highlights the analytical problem of using legislative history as a basis for overruling *Monroe*.[98] While it does seem that Congress' rejection of municipal liability under the Sherman amendment does not expressly evidence an intent to reject municipal liability under section 1983,[99] it is submitted that, contrary to the majority opinion in *Monell*, it is quite unclear whether Congress affirmatively intended to hold municipalities liable.[100]

B. *The* Monell *Analysis of Considerations of Stare Decisis*

Although the Court recognized the principle that "*stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct . . . [the Court's] mistakes through legislation,"[101] it nevertheless decided to overrule in *Monell*, listing four reasons that rejected considerations of stare decisis as controlling.[102] Initially, the Court observed that the *Monroe* holding itself had been a de-

---

history, the gravity of overruling as important a precedent as *Monroe* could not rest on legislative history alone. *Id.* at 708-14. (Powell, J., concurring).

98. *Id.* at 719-24 (Rehnquist, J., dissenting). As one author has commented: "[l]egislative history is a poor bulwark for any statutory interpretation since the wealth of conflicting evidence legitimates inconsistent conclusions." Kates & Kouba, *supra* note 27, at 135. Another author has stated:

> The text of the statute is subjected to analysis into its minutest parts and the nicest inferences are drawn from what was said to determine legislative thinking on what was not said. Committee reports and hearings, legislative debates, discarded bills, chronologies of amendment are picked clean. In this treasure trove what judge could not find the answer to his statutory problem? Perhaps only the least imaginative.

Id., *quoting* Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 3 (1965).

99. For a general discussion of the Sherman amendment, *see* notes 22-39 & 79-97 and accompanying text *supra*.

100. *See* 436 U.S. at 719-24 (Rehnquist, J., dissenting). For a discussion of the ambiguity of the legislative history, *see* notes 93-99 and accompanying text *supra*.

101. 436 U.S. at 695, *citing* Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974). The Court in *Edelman* stated that because it was dealing with a constitutional question, it was less constrained by principles of stare decisis. 415 U.S. at 671. This principle is founded upon the following considerations, enunciated by Justice Brandeis:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (footnotes omitted). The majority in *Monell*, while accepting the basic soundness of this principle, cited it as also being authority for the proposition that stare decisis should not be mechanically applied. 436 U.S. at 695. Within Justice Brandeis' statement is a footnote which supports the view that the legislative–constitutional differentiation is not absolute; Justice Brandeis cites a multitude of cases wherein the "Court has, in matters deemed important, occasionally overruled its earlier decisions, although correction might have been secured by legislation." 285 U.S. 393, 406-07 n.1 (Brandeis, J., dissenting). *But cf.* 436 U.S. at 714-15 (Rehnquist, J., dissenting) (*Monell* is not a proper case to overcome the general principle). For a general discussion of considerations of stare decisis, *see* notes 102-08 and accompanying text *infra*.

102. *See* 436 U.S. at 695-700.

parture from precedent,[103] stating that "it can scarcely be said that *Monroe* is so consistent with the warp and woof of civil rights law as to be beyond question."[104] The Court also urged that while school boards should not logically be excepted from the *Monroe* doctrine, Congress has refused to extend the benefits of *Monroe* immunity to school boards.[105] Furthermore, the Court flatly rejected an assertion by dissenting Justice Rehnquist that the municipal immunity principle should be reaffirmed because municipalities which have heavily relied on *Monroe* would be unjustly injured by a reversal of that decision.[106] Finally, the Court concluded that the *Monroe* Court's interpretation of the relevant legislative history was clearly incorrect,[107] and therefore stare decisis did not mandate adherence to *Monroe*.[108]

1. Monroe, *Precedent, and the School Board Cases*

As support for the contention that *Monroe* represented a departure from precedent, the *Monell* Court cited five cases[109] in which jurisdiction to hear substantive section 1983 claims against a municipality had been granted pursuant to section 1983's jurisdictional counterpart.[110] As Justice Rehnquist

---

103. *Id.* at 695.

104. *Id.* at 696. For an analysis of this contention, *see* notes 109-14 and accompanying text *infra*. The Court also pointed out that "the constitutional defect that led to the rejection of the Sherman amendment would not have distinguished between municipalities and school boards, each of which is an instrumentality of state administration." 436 U.S. at 695-96. For a discussion of the school board cases and *Monroe*, *see* notes 109-21 and accompanying text *infra*.

105. 436 U.S. at 696. The Court determined that Congress had rejected efforts to strip the federal courts of jurisdiction over school boards at various times during the busing furor. *Id.* at 696-99 & nn.62-63. The Court interpreted this congressional response as being consistent with the Court's previous decisions that school boards were persons under § 1983. *Id.* at 696. For a general discussion of the school board cases, *see* note 104 *supra*, and notes 109-21 and accompanying text *infra*.

106. 436 U.S. at 699-700. For a discussion of the reliance issue, *see* notes 132-38 and accompanying text *infra*.

107. 436 U.S. at 700-01.

108. *Id.* at 700. The Court quoted the test for determining the propriety of overruling a statutory decision, as enunciated by Justice Harlan in *Monroe*: "[I]t [must] appear beyond doubt from the legislative history . . . that [*Monroe*] misapprehended the meaning of the [section]." *Id.*, *citing* Monroe v. Pape, 365 U.S. 167, 192 (1961) (Harlan, J., concurring). For a discussion of the *Monell* analysis of the legislative history, *see* notes 79-100 and accompanying text *supra*. Justice Powell agreed with the majority that *Monell* was a proper case to overrule a statutory construction. 436 U.S. at 708 (Powell, J., concurring). For a discussion of Justice Powell's concurring opinion, *see* notes 122-31 and accompanying text *infra*.

109. 436 U.S. at 695, *citing* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (court exercised jurisdiction over a municipality); Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943) (court exercised jurisdiction over a claim against a municipality in order to dismiss plaintiff's claims for injunctive relief); Hannan v. City of Haverhill, 120 F.2d 87, 88 (1st Cir.), *cert. denied*, 314 U.S. 641 (1941) (First Circuit upheld the district court's assumption of jurisdiction against a municipality); City of Manchester v. Leiby, 117 F.2d 661, 664 (1st Cir.), *cert. denied*, 313 U.S. 562 (1941) (district court had jurisdiction to enjoin enforcement of a municipal ordinance which plaintiffs alleged violated their constitutional rights); Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873) (a corporation is a person who may sue a municipality).

110. 28 U.S.C. § 1343(3) (1976). For the relevant text of this statute, *see* note 24 *supra*.

indicated, however, such a reading of these cases is misleading[111] because in none of the cases cited by the *Monell* Court[112] was the issue of a federal court's jurisdiction to hear a section 1983 claim against a municipality ever raised.[113] As *sub silentio* determinations of jurisdiction are not binding precedent,[114] the Court was thus free to consider the jurisdictional question in *Monroe*.

The *Monell* Court also found it very difficult to reconcile *Monroe* with a series of subsequent school board cases in which it had granted jurisdiction to hear section 1983 claims.[115] The Court argued that due to the inconsistency between *Monroe* and the school board cases, precedent required that *Monroe* be overruled.[116] Such reliance on the school board cases appears to

---

111. *See* 436 U.S. at 715 (Rehnquist, J., dissenting). Justice Rehnquist stated: "The Court's first assertion, that *Monroe* 'was a departure from prior practice,' . . . *is patently erroneous.*" *Id.* (citation omitted) (emphasis added).

112. For a list of these cases, *see* note 109 *supra*.

113. *Id. See* 436 U.S. at 715-16 (Rehnquist, J., dissenting). It is submitted that Justice Rehnquist is correct as to this point. While all of the cases which the Court cited involved a suit against a municipality under § 1983, in none of these cases was the issue of the municipality's amenability to suit ever raised. *See* cases cited note 109 *supra*.

114. *See* 436 U.S. at 716, (Rehnquist, J., dissenting) *citing* Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974) (Court is not bound by previous *sub silentio* decisions granting jurisdiction under § 1343 in order to hear welfare recipient's claims). *See also* Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 87-88 (1960) (Frankfurter, J., dissenting) (Court should not have been bound by *sub silentio* determination that there was a direct appeal from three judge federal district courts under 28 U.S.C. § 1253 where a state statute was sought to be enjoined on both federal constitutional and non constitutional grounds); King Mfg. Co. v. City of Augusta, 277 U.S. 100, 134-35 n.21 (1928) (Brandeis, J., dissenting) (Court should not be bound by decisions granting jurisdiction *sub silentio* to hear appeals from state courts sustaining municipal ordinances); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) (Court not bound by *sub silentio* grant of appellate jurisdiction in a criminal case).

While Justice Rehnquist states that *sub silentio* determinations are not binding on the Court, it is interesting to note the precedential effect he gives to cases in which issues were decided without the benefit of argument. *See* 436 U.S. at 711-18 (Rehnquist, J., dissenting).

Justice Powell claimed that *Monroe* was not entitled to full precedential effect because the issue of municipal immunity was neither orally argued nor briefed. *Id.* at 708 (Powell, J., concurring). Justice Rehnquist answers this claim by stating that such reasoning would "cast . . . doubt upon each of our cases, from *Marbury* v. *Madison* . . . forward, in which the explicit ground of decision 'was never actually briefed or argued.' " 436 U.S. at 718 (Rehnquist, J., dissenting) (citation omitted).

115. *See* 436 U.S. at 663. The Court had heard a number of cases against school boards in which § 1983 and § 1343 provided the only basis of jurisdiction. *See id.* n.6, *citing* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 636 (1974) (Court assumed jurisdiction to determine whether a school board's mandatory termination provisions for pregnant employees were unconstitutional); Keyes v. School Dist. No. 1, 413 U.S. 189, 191 (1973) (Court had jurisdiction to determine that intentional segregative school board actions in meaningful portion of school system created prima facie case of unlawful segregated design on part of school authorities); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5 (1971) (Court assumed jurisdiction in a school desegretation case); Northcross v. Board of Educ., 397 U.S. 232, 233 (1969) (school desegregation case); Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 504 (1969) (Court had jurisdiction to issue an injunction against a regulation which forbade the wearing of armbands during the Vietnam war); McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1963) (Court assumed jurisdiction in a school desegregation case). The Court also lists a number of other cases which were brought under § 1983 against a school board. *See* 436 U.S. at 663 n.5.

116. *See* 436 U.S. at 696-99. The Court further argued that "the principle of blanket immunity cannot be cabined short of school boards." *Id.* at 696.

be inapposite, however, because the school board cases, like the five cases previously discussed,[117] did not involve the issue of municipal liability under section 1983.[118]

It is therefore submitted that the majority overstated its position when it determined that *Monroe* was a contradiction of precedent.[119] Nevertheless, the *Monell* Court was correct in considering the school board cases because the exercise of jurisdiction in those cases cannot be reconciled with *Monroe*.[120] Indeed, as the Court points out, Congress has rejected attempts to deprive the federal courts of jurisdiction over the school boards.[121] It is thus submitted that to the extent of any inconsistency between the school board cases and *Monroe*, the policy embodied in the school board cases counsels in favor of ultimately dispensing with the *Monroe* doctrine of municipal immunity.

2. *Justice Powell and the pragmatic justifications for* Monell

Despite this policy consideration, it would seem from the foregoing that the stringent requirements for overturning a prior statutory construction were not present in *Monell*.[122] A strong argument can be made that the

---

117. *See* cases cited note 109 *supra*.

118. 436 U.S. at 711 (Powell, J., concurring). Justice Powell stated in reference to the school board cases that "the Court has assumed *sub silentio* that some local government entitites could be sued under § 1983." *Id.* Justice Rehnquist stated, however, that the school board cases are distinguishable on the basis of the *Ex Parte Young* official capacity doctrine. *See id.* at 716-17 n.2 (Rehnquist, J., dissenting). Justice Powell pointed out that while some of the cases may be distinguishable on the basis of the official capacity doctrine, there is a problem in reconciling cases in which damages were awarded against a school board. *Id.* at 711 (Powell, J., concurring), *citing* Cohen v. Chesterfield County School Bd., 414 U.S. 632 (1974); Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 504 (1969). The awarding of damages in these cases would seem to be barred by the Court's holding in Edelman v. Jordan, 415 U.S. 651 (1974), which barred retroactive relief against a state. *See* 436 U.S. at 711-12 (Powell, J., concurring). Justice Powell stated that if the official capacity analogy were still applicable, it would create tension with the Court's holding in *Kenosha*. *Id.* The Court's rejection of the bifurcated approach in *Kenosha* was reaffirmed in *Monell*. *See id.* 701 n.66. That approach held that the word "person" in § 1983 suits would have but one meaning regardless of the type of relief sought. 412 U.S. at 513. The use of the official capacity doctrine and its recognition of the prospective–retroactive dichotomy would, therefore, "fly in the face" of *Kenosha*. *See* 436 U.S. at 711-12 (Powell, J., concurring).

It is interesting to note that Justice Rehnquist was the author of the Court's opinion in *Kenosha*. It is therefore submitted that the use of the official capacity doctrine to sue a municipality no longer survives *Monell*. For a discussion of the official capacity doctrine, *see* notes 66-69 and accompanying text *supra*.

119. *See* 436 U.S. at 695. For a discussion of this issue, *see* notes 109-18 *supra*.

120. *See* 436 U.S. at 695. There is nothing in *Monroe* or the relevant legislative debates which would show that some municipal entities could be sued and others could not. *See id.*

121. *See id.*

122. Regarding the test for overruling a statutory construction, *see* notes 101 & 107-08 and accompanying text *supra*. Indeed, most authors have not gone as far as the Court in *Monell* in definitely stating that Congress intended that municipalities be liable under § 1983. *See, e.g.*, Comment, *supra* note 63, at 119 ("Congress was at least neutral to the possibility of a public entity being a 'person' "); *Developing Governmental Liability*, *supra* note 43, at 1206 (stating only that Congress did not disapprove of using the word "person" to encompass a municipality under certain circumstances); Levin, *supra* note 44, at 1531 (legislative history shows that the

Court should have delayed such action pending a specific showing of congressional disfavor with *Monroe*.[123] Justice Powell's concurring opinion, however, discusses the factors that necessitated a resolution of the municipal immunity issue in *Monell*.[124] Recognizing that the result in *Monroe* created an "anomalous result" when viewed in light of the purposes of section 1983,[125] Justice Powell alluded to the fact that the *Monroe* decision[126] had led to numerous lower court attempts to circumvent that case.[127] It is thus submitted that Justice Powell indicated the actual reason for the necessity of overruling *Monroe*.[128]

Prior to *Monell*, the Supreme Court was faced with myriad attempts to circumvent *Monroe*,[129] and every time the Court rejected one method, another circumvention method would arise.[130] It is therefore suggested that

---

Sherman amendment debates did not suggest that § 1983 should restrict in any way the remedies that courts may decree to redress the consequent injury). *See generally* Kates & Kouba, *supra* note 27, at 136. In criticizing the Court's use of legislative history in *Monroe*, one author has made the following statement, which is equally applicable to the *Monell* Court's interpretation of the relevant legislative history: "The validity of the Court's holding thus depends on the degree of acceptance given these ancient debates by each analyst. Given this weakness, the Court's sole reliance upon the debates over the Sherman Amendment is inadequate." *Id.* As the Court in *Monell* offered no new historical evidence in support of its conclusion, it is suggested that Congress' intent as to the liability of municipalities remains ambiguous. *See* 436 U.S. at 660-702.

123. A bill is presently before Congress, its purpose being

> to amend section 1979 [1983] of the Revised Statutes to provide that States, municipalities, and agencies or units of government thereof, may be sued under the provisions of such section; to establish rules of liability with respect to such States, municipalities, and agencies or units of government thereof; and for other purposes.

S. 35, 95th Cong., 1st Sess. (1978). Since 1962, various bills have been introduced with the purpose of overruling *Monroe*. For a list of the bills, *see* Turpin v. Mailet, 579 F.2d 152, 177 n.32 (2d Cir. 1978), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam).

124. 436 U.S. at 704-14 (Powell, J., concurring). Justice Stevens concurred without opinion, joining only part I (legislative analysis), part III (stare decisis), and part V (reversal of court of appeals) of the Court's opinion. *See id.* at 714 (Stevens, J., concurring).

125. *Id.* at 705-07 (Powell, J., concurring).

126. *Id.* Justice Powell characterized the result in *Monroe*, which was rejected in *Monell*, as follows: "The Court correctly rejects a view of the legislative history that would produce the *anomalous result* of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under state law." *Id.* at 707 (Powell, J., concurring) (emphasis added).

127. *See id.* at 708-13 (Powell, J., concurring). For a discussion of *Monroe* and the various attempts made to circumvent its holding, *see* notes 51-78 and accompanying text *supra*. While Justice Powell does not directly address the lack of judicial compliance, he does in fact discuss the problem of a number of circumvention methods. *See* 436 U.S. at 708-13 (Powell, J., concurring).

128. *See* 436 U.S. at 708-13 (Powell, J., concurring). Justice Powell recognized that the Court could no longer avoid the question of a direct cause of action under the fourteenth amendment, nor avoid the fact that the official capacity exception created tension with the holding in *Kenosha*. *See id.* at 712 (Powell, J., concurring). Justice Powell contended that rather than deciding the various issues which had developed under the circumvention attempts, "the better course is to confess error and set the record straight." *Id.* at 713 (Powell, J., concurring).

129. *See* notes 40-78 and accompanying text *supra*.

130. For a discussion of the ways in which the Court dealt with a number of circumvention attempts, *see* notes 40-78 and accompanying text *supra*.

the majority opinion is much more understandable if viewed as the Supreme Court's reaction to this situation. The *Monell* holding is far more defensible as a recognition that *Monroe* was analytically unsound, as evidenced by the circumvention attempts, rather than as a discourse on legislative history.[131] It is submitted that the Court's decision would be far more supportable if the Court had based its decision more on concern for certainty and equal application of the law under section 1983 than on legislative history and dubious precedent.

3. *Justice Rehnquist's dissent and the municipality reliance argument*

Justice Rehnquist argued in dissent that the *Monell* Court totally disregarded the right of municipalities to rely on the Court's adherence to stare decisis,[132] stating that the Court in *Monell* had "obliterate[d] . . . legitimate expectations [of municipalities]."[133] The majority countered this contention by stating that "municipalities simply cannot arrange their affairs on an assumption that they can violate constitutional rights indefinitely."[134]

It is submitted that while the majority's assertion that a municipality cannot act under the assumption that it can violate constitutional rights is self-evident, Justice Rehnquist's considerations of the potential financial burden *Monell* imposes on municipalities are also compelling.[135] Both of these meritorious positions could have been furthered by limiting *Monell* to prospective application,[136] and the Court's failure to do so may lead to serious economic consequences.[137] It is suggested that at a time when many cities

---

131. It is submitted that the Court's interpretation of the legislative history is somewhat open to question. The ambiguity of statutory interpretation through legislative history would seem to counsel against overturning a prior statutory construction on that basis alone. *See* 436 U.S. at 719-24 (Rehnquist, J., dissenting). *See also* notes 107-08 and accompanying text *supra*. It is suggested, however, that when the lack of judicial adherence to the Court's holding in *Monroe* is combined with the questionable statutory interpretation in that case, the decision in *Monell* becomes more understandable.

132. *See* 436 U.S. at 714-24 (Rehnquist, J., dissenting). Justice Rehnquist contended that "[s]ince *Monroe*, municipalities *have* had the right to expect that they would not be held liable retroactively for their officers [*sic*] failure to predict this Court's recognition of new constitutional rights." *Id.* at 717 (Rehnquist, J., dissenting) (emphasis in original).

133. *Id.* at 717 (Rehnquist, J., dissenting).

134. *Id.* at 700. More fully, the Court rejected this argument by stating: "Municipalities can assert no reliance claim which can support an absolute immunity. . . . Indeed, municipalities simply cannot 'arrange their affairs' on the assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement." *Id.*

135. *Id.* at 724 (Rehnquist, J., dissenting).

136. *See, e.g.*, Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam) (decision invalidating a "property taxpayer" limitation on the franchise is entitled only to prospective effect); Halliday v. United States, 394 U.S. 831, 832 (1969) (per curiam) (setting forth criteria for prospective application); Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (limiting Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. United States, 378 U.S. 478 (1964), to prospective application); Linkletter v. Walker, 381 U.S. 618, 629 (1965) (limiting Mapp v. Ohio, 367 U.S. 643 (1961), to prospective application, and establishing the principle that "the Constitution neither prohibits nor requires retroactive effect").

137. It is impossible to determine at this point what the ultimate cost to municipalities will be. Had the Court limited its holding to prospective application, however, municipalities would

are in the midst of financial crisis,[138] the Court should have shown some sensitivity to this situation.

C. *The Impact of* Monell: *The Present Scope of Liability of Municipalities*

Although the *Monell* Court specifically left open the question of the contours of municipal liability under section 1983,[139] it did resolve two points concerning the scope of that liability. Initially, the Court held that relief is not only available when the constitutional deprivation stems from an officially enunciated policy,[140] but also that "local governments . . . 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 decision making channels."[141] The Court also concluded that "a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words . . ., on a *respondeat superior* theory."[142]

---

have been able to obtain insurance against liability for most possible civil rights violations. *Cf.* 436 U.S. at 717 (Rehnquist, J., dissenting) (numerous insurance policies and indemnity ordinances were issued under the assumption that *Monroe* would not be overruled). Prior to *Monell*, there was very little insurance coverage for civil rights liability. *See* Hagarty, *Insurance Coverage and Civil Rights Litigation*, 27 FED'N OF INS. COUNSEL 3, 11 (1976). For an interesting hypothetical of how the imposition of municipal liability could lead to fiscal disaster, *see Damage Remedies*, *supra* note 43, at 958.

138. For a discussion of the urban fiscal crisis, *see generally* U.S. NEWS AND WORLD REPORT, July 3, 1978, at 59-60; THE AMERICAN CITY, May, 1975, at 20; FORTUNE, March 1977, at 194-98. One may argue, however, that the Court's refusal to find liability on a respondeat superior basis evidenced a concern for the fiscal plight of municipalities. *See* 436 U.S. at 691. The Second Circuit viewed the respondeat superior issue as a fiscal safeguard in a recent case brought directly under the fourteenth amendment. *See* Turpin v. Mailet, 579 F.2d 152, 165-66 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam).

139. *See* 436 U.S. at 694-95. The Court stated that "we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be." *Id.* at 695.

140. *Id.* at 690.

141. *Id.* at 691. The Court stated that this result is mandated by the very terms of the statute. *Id.*, *quoting* Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970). In *Adickes*, Justice Harlan said: "Congress included customs and usages . . . [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* (footnote omitted).

142. 436 U.S. at 691 (emphasis by the Court). Justice Brennan, in rejecting vicarious liability of municipalities under § 1983, specified the following justifications for the imposition of the doctrine: 1) accidents may be reduced if the employer is held liable, *id.* at 693, *citing* W. PROSSER, LAW OF TORTS 459 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.3, at 1368-69 (1956); and 2) the costs of accidents should be spread to the community as a whole on an insurance theory. 436 U.S. at 693-94, *citing* W. PROSSER, LAW OF TORTS 459 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAWS OF TORTS § 26.5, at 1370-74 (1956). Justice Brennan suggested that both of the aforementioned justifications were stated as rationales for the Sherman amendment itself, thus making it clear that Congress rejected the notion of municipal vicarious liability under § 1983. *See* 436 U.S. at 694. For a persuasive analysis contending that the rejection of the Sherman amendment was in fact a rejection of respondeat superior, *see* Levin, *supra* note 44, at 1519-31. Another justification often given for limiting municipal liability by precluding liability under respondeat superior is that such a narrowing of liability protects city treasuries from excessive depletion due to civil rights suits. *See* note 138 *supra*.

On the other hand, it has been argued that liability should be imposed on the basis of respondeat superior, for without such liability, § 1983 will continue to be an ineffective remedy.

Pursuant to *Monell*, therefore, section 1983 liability will be imposed on a municipality only when it has been alleged and proven that the municipality actually caused the civil rights violation.[143] The formulation of the standards to be employed in determining when a municipality is responsible for a given civil rights violation will undoubtedly be the key post-*Monell* issue.[144] While this question is currently unresolved, the case law seems to indicate the emergence of a limited view of municipal liability.[145]

In limiting liability to situations wherein the municipality causes the violation, the *Monell* Court relied heavily on the restrictive holding of *Rizzo v. Goode*.[146] In *Rizzo*, the Court held that injunctive relief could not be granted against upper echelon municipal employees who had played no affirmative part in depriving the plaintiffs of their constitutional rights.[147] The difficulty in finding liability under *Rizzo* is further illustrated by *Lewis v. Hyland*.[148] In *Lewis*, the United States Court of Appeals for the Third Cir-

---

See, e.g., Hundt, *supra* note 43, at 795; *Damage Remedies*, *supra* note 43, at 995. For a discussion of the inefficacy of § 1983 prior to *Monell*, *see* note 43 *supra*. One author has stated the following regarding the *Bivens* fourteenth amendment analogy:

> The first policy argument in favor of municipal damages liability is that a municipality, rather than the individual officers who are the defendants in section 1983 suits, can best afford to pay damages. In the event that the officers are judgment-proof, municipal liability would guarantee payment from the deep pocket of the public fisc. It is arguable, however, that a municipality should only be required to pay such awards if it is in some way responsible for the deprivation of a constitutional right. The problem is solved by applying the tort theory of respondeat superior: a municipality should be held liable for the misconduct of its employees when that misconduct is in furtherance of the employer's purposes and not purely private in nature. Because deprivations of civil rights can be viewed as constitutional torts, it is proper to borrow this doctrine from tort theory.

Hundt, *supra*, note 43, at 779 (footnotes omitted) (regarding municipal liability in the context of the fourteenth amendment). *See also Damage Remedies*, *supra* note 43, at 955. Consider also the following remarks of another author who does not favor the imposition of liability on a respondeat superior basis: "Admittedly, municipal immunity from vicarious liability will often have the effect of denying any substantial compensation to the proven victim of a constitutional tort . . . ." Levin, *supra* note 44, at 1535.

143. *See* 436 U.S. at 692, *citing* Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). For a discussion of *Rizzo*, *see* notes 146-51 and accompanying text *infra*.

144. *See* Levin, *supra* note 44, at 1539 (calling for a common law development of the issue).

145. *See* Rizzo v. Goode, 423 U.S. 362, 379-81 (1976). Most of the cases that have discussed this problem since *Monell* have done so in terms of the *Bivens* cause of action, and have held that there is no vicarious liability. *See, e.g.*, Turpin v. Mailet, 579 F.2d 152, 168 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam); Molina v. Richardson, 578 F.2d 846, 848 (9th Cir. 1978); Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978). For a discussion of the issue of respondeat superior and the *Bivens* cause of action, *see* notes 76 & 145 and accompanying text *supra*.

146. 423 U.S. 362 (1976).

147. *Id.* at 367, 376. In *Rizzo*, the Court rejected respondent's attempts to hold high municipal policymakers subject to injunctions under § 1983 for their failure to act in the face of a statistically proven pattern of police abuse. *Id.* at 376. The Court stated that a statistically proven pattern of police abuse is not enough to make higher echelon municipal officers subject to injunctions, but that there must be proof that these officers deprived the plaintiff of his constitutional rights. *Id.* at 376-77. *See also* 436 U.S. at 692-93. For a discussion of the difficult problems of proof under *Rizzo*, *see* notes 148-51 and accompanying text *infra*.

148. 554 F.2d 93 (3d Cir.), *cert. denied*, 434 U.S. 931 (1977).

cuit held that a finding of thirty-four constitutional violations by New Jersey state troopers out of a total of sixty-six incidents[149] did not constitute a "deliberate pattern and practice."[150] In light of these holdings, it is submitted that *Monell's* effect on municipal immunity will be limited because express municipal policies or customs will seldom be the apparent cause of a civil rights violation.[151]

Furthermore, the *Monell* Court left open the question of whether there should be a qualified municipal immunity under section 1983.[152] Such a limitation may be predicated upon immunities available under state law[153] or the good faith immunities available to officials pursuant to section 1983.[154] In *Ohland v. City of Montpelier*,[155] the United States District Court for the District of Vermont, relying on *Monell* and *Rizzo*, held that a good faith immunity is available to a municipality.[156] In so doing, the Court equated the municipality's immunity to that of its officers[157] and concluded that as

149. 554 F.2d at 96. Plaintiffs in this class action sought injunctive relief from unreasonable automobile searches against long haired travellers along New Jersey roads. *Id.* at 95.

150. *Id.* at 95. The Third Circuit was of the opinion the *Rizzo* precluded the granting of the relief sought. *Id.* at 94.

151. It is submitted that *Rizzo* represents a barrier to making § 1983 an effective remedy. *Rizzo* has been interpreted by commentators as being a substantive restriction on § 1983. *See, e.g., The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 243 (1976); 30 RUTGERS L. REV. 103, 141-43 (1977). One author has stated that *Rizzo* "virtually assured local police officials of immunity from answering to federal courts for the unlawful behavior of their underlings. . . . The result is a severe attenuation of the viability of section 1983 to support federal jurisdiction to prevent or to remedy state violations of federal rights." *Id.* (footnote omitted). However, another author has stated: "The case thus may be read to stand for the proposition that when power touching on individual rights is widely dispersed, some random abuses of that power are to be expected and cannot be equated with a violation on the part of the government as a whole." Levin, *supra* note 44, at 1541. In support of this contention, the author points out that courts nevertheless continue to hear civil rights cases alleging liability on the basis of negligent supervision. *Id.* at 1541-42, 1541 n.226 (wherein the author asserts that the decision of the amount of leeway municipalities should have is an open question). It is submitted, however, that the development of the § 1983 cause of action is inextricably intertwined with the way the courts read *Rizzo*. If negligent supervision by high municipal policymakers is not actionable under *Rizzo*, § 1983, it is submitted, will become a weak remedy, as rarely will a policy be so express that it can be proven. One court has stated: "The standard for municipal liability predicated on inaction of senior personnel must be frankly acknowledged as difficult to meet." Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978). *But see* Sims v. Adams, 537 F.2d 829 (5th Cir. 1976), wherein damages were assessed against supervisory officials for their failure to control a policeman who had a known propensity for violence. *Id.* at 832. *Rizzo* was distinguished on the grounds that in *Sims* there was no request for injunctive relief to prevent future abuses. *Id.*

152. *See* 496 U.S. at 701.

153. *See* W. PROSSER, LAW OF TORTS 977-84 (4th ed. 1971).

154. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). For a discussion on the various forms of official immunity, *see, e.g.*, Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and A Critique*, 72 NW. U.L. REV. 526 (1977); *Section 1983 and Federalism*, *supra* note 3, at 1209-17.

155. 467 F. Supp. 324 (D. Vt. 1979).

156. *Id.* at 343.

157. *Id.* The *Ohland* court stated that "§ 1983 liability of local governmental entities should be limited by a qualified good faith immunity parallel to that applicable to individual government employees." *Id.*

there was no malice involved in the imposition of an unconstitutional policy, there could be no liability.[158] It should be noted that *Ohland* represents a virtually insurmountable barrier to the imposition of municipal liability. The deprivation in *Ohland* was clearly a result of a defined custom,[159] yet there was no liability due to the policymakers' belief that their actions were constitutional.[160]

The development of such a restrictive view of municipal liability cannot truly be justified by either a legislative determination or adherence to *Rizzo* and *Monell*. The answer, therefore, must lie elsewhere. Although discounted in *Monell*,[161] it is submitted that the current municipal fiscal crisis is and will continue to be a major factor in the imposition of a restrictive view of municipal liability.[162]

While the ultimate scope of municipal liability remains an open question, it is clear that *Monell* will put an end to the numerous alternative theories of liability which had developed in response to *Monroe*.[163] For example, the use of official capacity suits to bypass *Monroe's* liability bar is no longer feasible in light of the *Monell* Court's reaffirmation of *Kenosha*.[164]

Furthermore, the movement towards an implied cause of action under the fourteenth amendment has been effectively stalled. In *Turpin v. Mailet*,[165] which was decided the day before *Monell*, the Second Circuit implied a direct cause of action against a municipality under the fourteenth amendment.[166] The Supreme Court vacated that judgment,[167] and on remand the Second Circuit stated that "there is no place for a cause of action against a municipality directly under the 14th Amendment because the

---

158. The *Ohland* court stated that the test for the municipality is the same as that for its officers in that there is no liability if "they [the officials] reasonably believed that their actions were constitutional and they did not act with any malicious intention toward the injured plaintiff." *Id.* at 347 (citations omitted).

159. *See id.* at 339. Plaintiff was discharged without a hearing under the belief that his probationary period was one year when in fact it was only six months. Discharges after the probationary period could only take place after a hearing. *Id.*

160. *Id.* at 347. The result in *Ohland* is subject to criticism. *Ohland* would seem to require that the law be certain before officials or municipalities are liable. *Id.* at 345, *citing* Procunier v. Navarette, 434 U.S 555, 565 (1978). One commentator has suggested that the imposition of a "settled law" approach is "akin to an absolute immunity." Freed, *supra* note 154, at 564. *See also* Comment, Monell v. Department of Social Services: *The Court Compromises on Municipal Liability Under Section 1983*, 57 N.C.L. REV. 459, 474 (1979).

161. *See* 436 U.S. at 699-700. For a discussion of the Court's failure to truly address the municipal fiscal crisis, *see* note 138 and accompanying text *supra*.

162. *See* notes 152-54 and accompanying text *supra*. A number of courts have discussed the fiscal situation in determining the scope of § 1983 liability. *See, e.g.*, Turpin v. Mailet, 579 F.2d 152, 165–66 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979).

163. *See* notes 53-78 and accompanying text *supra*.

164. *See* note 118 and accompanying text *supra*.

165. 579 F.2d 152 (2d Cir.), *vacated sub nom.* West Haven v. Turpin, 99 S. Ct. 554 (1978), *on remand*, Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam).

166. *See* 579 F.2d at 164.

167. 99 S. Ct. 554 (1978).

plaintiff may proceed against the . . . [city] under § 1983."[168] Other courts have similarly followed suit.[169]

IV. CONCLUSION

Despite the unresolved areas, *Monell* clearly granted the possibility of recourse for civil rights violations caused by a municipality. It is submitted that this recognition of municipal liability will also provide a municipality with a potent impetus to deter constitutional violations by its employees.[170] Aside from these meritorious results, the *Monell* holding can also be supported on the basis of legal consistency. The holding remedied the anomaly of municipality immunity in federal court when a majority of states had abrogated that immunity.[171]

Furthermore, *Monell* was responsive to the major criticism of the section 1983 municipal immunity doctrine—that it vitiated "the elaborate statutory scheme to protect individuals from governmental abuses."[172] The lower courts, through the various circumvention attempts, had tried to reinstate that scheme, leading to a great deal of confusion.[173] By overruling *Monroe*, *Monell* obviated the need for such machinations, and thus allowed the lower courts to finally focus on the true issue concerning the contours of municipal liability under section 1983.[174] Since it is the resolution of this

---

168. 591 F.2d at 427.

169. For a general discussion of the implied cause of action under the fourteenth amendment, *see* notes 75-81 and accompanying text *supra*.

170. One author has stated:

> Deterrence of constitutional torts should be enhanced by holding municipalities liable for damages. The municipality could be expected to make its employees aware of the risk of this liability and would probably act vigorously to secure their adherence to constitutional standards. Moreover, the present rule of personal liability is not an effective weapon against the nefarious official, if he exists. At present the official has recourse to two defenses . . . . If the municipality itself is exposed to liability, the hypothetical ill-inclined official will not have these defenses available when the municipality fixes blame internally for constitutional torts.

Hundt, *supra* note 43, at 782-83.

171. As of 1978, a total of 36 states and the District of Columbia had either judicially or legislatively abrogated the common law doctrine of municipal tort immunity. *See* Oroz v. Board of County Comm'rs, 575 P.2d 1155, 1157 (Wyo. 1978). The states which have so acted are: Alaska; Arizona; Colorado; Connecticut; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Michigan; Minnesota; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Oklahoma; Oregon; Rhode Island; South Carolina; Tennessee; Texas; Utah; Vermont; Washington; West Virginia; Wisconsin; and the District of Columbia. *See, e.g.*, Hicks v. State, 88 N.M. 588, 593, 544 P.2d 1153, 1158 (1975); Ayala v. Philadelphia Bd. of Educ., 453 Pa. 584, 608-09, 305 A.2d 877, 889 (1973); Oroz v. Board of County Comm'rs, 575 P.2d 1155, 1157 (Wyo. 1978). For a general discussion of the movement to abrogate municipal immunity, *see* W. PROSSER, LAW OF TORTS 984-87 (4th ed. 1971).

172. Kates & Kouba, *supra* note 27, at 132. It is submitted that it is not so clear that *Monell* completely revitalized § 1983 since the scope of a municipality's liability may be narrow. *See* notes 139-60 and accompanying text *supra*.

173. For a discussion of lower court attempts to circumvent the municipal immunity doctrine, *see* notes 51-78 and accompanying text *supra*.

174. *Cf.* Levin, *supra* note 44, at 1539-41 (*Monroe* should be interpreted as a bar to respondeat superior, and lower courts should be free to develop the scope of liability).

question that will determine whether section 1983 can provide an effective means of vindicating civil rights violations by a municipality, however, *Monell* does not resolve that issue, but merely poses it.

In conclusion, it is submitted that the Supreme Court, by overruling the section 1983 municipal immunity doctrine, took a major step toward giving new meaning to the Civil Rights Act of 1871. Within *Monell*, however, remain the seeds for the eventual perpetuation of the prior inefficacy of section 1983.

Howard M. Klein