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Local Governmental Entities No Longer Absolutely Immune under Section 1983 - Monell v. New York City Department of Social Services

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LOCAL GOVERNMENTAL ENTITIES NO LONGER ABSOLUTELY IMMUNE UNDER SECTION 1983— *MONELL V. NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES*

For a number of years, actions based on section 1983[1] and other civil rights statutes have been a source of considerable litigation in federal courts.[2] Attempts have been made under those statutes to vindicate alleged deprivations of constitutional guarantees. Whether a municipality could be liable for such conduct under section 1983 was first significantly addressed by the United States Supreme Court in *Monroe v. Pape*.[3] In that case, the Court held that officers of local governments could be liable for civil damages under section 1983,[4] but it declined to include municipal corporations within the ambit of the term "person," thereby immunizing them from such liability.[5]

The progeny of *Monroe, viz., Moor v. County of Alameda*,[6] *City of Kenosha v. Bruno*,[7] and *Aldinger v. Howard*,[8] had all but closed the federal

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1. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 (1970) provides in pertinent part:

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

28 U.S.C. § 1343(3) is the jurisdictional counterpart to 42 U.S.C. § 1983. *See* Aldinger v. Howard, 427 U.S. 1, 16 (1976); Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 583-84 (1976).

2. The number of civil rights suits filed nationwide in 1960 was 280, (1960) Ad. Off. U.S. Courts Ann. Rep. 232, table C2 (1961); in 1970: 3,985, (1970) Ad. Off. U.S. Courts Ann. Rep. 232, table C2 (1971); and in 1977: 13,113, (1977) Ad. Off. U.S. Courts Ann. Rep. table C2 (1977). There is no specific breakdown of § 1983 actions. The other civil rights statutes include the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-(e) 15 (1970).

3. 365 U.S. 167 (1961). The plaintiff alleged that Chicago police officers broke into his home, ransacked it while he and his family were forced to stand naked in the living room and detained him at the police station for ten hours before he was released. The police acted without a search or arrest warrant. *Id.* at 169.

4. *Id.* at 187.

5. *Id.* at 192.

6. 411 U.S. 693 (1973). *See* notes 19-23 and accompanying text *infra*.

7. 412 U.S. 507 (1973). *See* notes 24-26 and accompanying text *infra*.

8. 427 U.S. 1 (1976). *See* notes 27-29 and accompanying text *infra*.

courthouse door to parties seeking relief against local governmental entities.[9] To circumvent that precedent, some lower federal courts were forced to rely upon inappropriate legal fictions, while others attempted to halt that trend by a questionable analogy to the eleventh amendment.[10] Confusion often resulted and adequate relief was denied to section 1983 plaintiffs on numerous occasions.[11]

In *Monell v. New York City Department of Social Services*,[12] the Supreme Court overruled the *Monroe* municipal immunity doctrine and held that municipalities and other local governmental entities are "persons" under section 1983.[13] Therefore, they now can be sued for monetary, declaratory or injunctive relief when the conduct in question "implements or executes" a policy, rule or regulation adopted by the governmental unit.[14] Also, "governmental custom" was held to be a source of actionable conduct under section 1983.[15] The Court, however, refused to impute liability to a municipal

9. These include entities such as counties and local agencies. *See* Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1485-87 (1977) [hereinafter cited as Levin]; *Developments in the Law–Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1194 (1977) [hereinafter cited as *Developments in the Law*]. *See also* notes 31-34 and accompanying text *infra*.

10. *See* notes 39, 41-42 and accompanying text *infra*.

11. *See* Levin, *supra* note 9, at 1494-1519. Levin cogently traces the expansion of the *Monroe* immunity doctrine by the holdings of *Moor* and *Kenosha* and then analyzes the use of the official capacity suit as a way to circumvent that Supreme Court precedent. Finally he indicates how other lower federal courts halted that trend through the wrongful use of an analogy to eleventh amendment cases. The salient point of his discussion is the confusion in the lower federal courts caused by the municipal immunity doctrine. *Developments in the Law*, *supra* note 9, at 1190-97. The authors point out, "*Monroe* and *City of Kenosha* have had the effect of foreclosing, with few exceptions, an assertion of liability against entities resembling municipal corporations." *Id.* at 1194. *See generally* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972) [hereinafter cited as Kates & Kouba]. In this article, the authors analyze how *Monroe* frustrated the goals of § 1983, compensation of the injured plaintiff and deterrence of official abuses. *Id.* at 136. They called for the reconsideration of *Monroe*. *Id.* at 167.

12. 436 U.S. 658 (1978).

13. *Id.* at 690. Of added significance is the fact that the Court overruled the *Monroe* municipal immunity doctrine without being directly asked to do so. The petitioner sought injunctive relief and back pay only from the officials of the department and from the board under § 1983. Brief for Petitioner at 3, Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).

14. *Id.* at 690. The Court limited its holding to "local government units which are not considered part of the State for eleventh amendment purposes." *Id.* at 690 n.54. *See* notes 70-72 and accompanying text *infra*.

15. *Id.* at 690-91. This custom could be the grounds for suit "even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 691. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In *Adickes* the Court was confronted with the § 1983 claim of a white schoolteacher who was denied service in a Mississippi restaurant while in the company of six black students and arrested for vagrancy when she left the lunchroom. The Court held that she would have a valid § 1983 claim if she could show the denial of service resulted from a state enforced custom of segregation of races in restaurants. *Id.* at 173. Justice Harlan for the majority in describing "custom" wrote, "[a]lthough not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 167-68.

corporation for the tortious conduct of an employee under the doctrine of respondeat superior.[16]

This Note will examine the problems created by *Monroe* and its successors. It also will discuss the *Monell* opinion and examine its impact in three key areas: the approaches taken by the lower federal courts when section 1983 actions involved local governmental entities; the status of school boards *vis-à-vis* municipal corporations in section 1983 suits; and the general posture assumed by the Burger Court with regard to civil rights litigation. Finally, this Note will examine certain questions left unresolved by *Monell*.

MONROE AND ITS PROGENY

Monroe and the cases it spawned created confusion in the lower federal courts faced with section 1983 suits against local governmental entities. The source of that confusion was the tension between the Supreme Court's decided devotion to its doctrine of municipal immunity and the statutory command of section 1983.[17] In practical terms, that tension often translated into the denial of adequate compensation for the deprivation of fundamental rights.[18]

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16. 436 U.S. at 691. The Court rejected the two traditional arguments for imputing responsibility, deterrence and spreading the loss, because it found that the 42nd Congress had rejected them. *Id.* at 691-94.

17. The root cause of this tension lies in the relationship between the modern perception of Federalism and the rationale for § 1983. Three principles germane to this area have been suggested:

> (1) States are 'independent' governments, not simply administrative subdivisions of the national government.
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> (2) Consequently they must be allowed to perform some of the functions of government and they must be allowed to perform those functions 'effectively,' free of undue federal impairment.
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> (3) But there are no specific governmental roles or areas of substantive lawmaking or administrative competence wholly reserved to the states or entirely immune from either federal preemption or the imposition of federal requirements and standards.

Developments in the Law, supra note 9, at 1178. The debate focuses on the tension between the first two principles and the third. For recent examples of the modern approach to Federalism, *see generally* National League of Cities v. Usery, 426 U.S. 833 (1976) (struck down 1974 amendments to the Fair Labor Standards Act which extended federal minimum wage and maximum hour provisions to most state and local employers as matters to be confined within state authority); Oregon v. Mitchell, 400 U.S. 112 (1970) (states, not Congress, have the power to establish voter qualifications in state and local elections).

18. *See* Curtis v. Everette, 489 F.2d 516 (3d Cir. 1975), *cert. denied*, 416 U.S. 995 (1974) (prisoner denied recovery from Commonwealth of Pennsylvania or Bureau of Corrections under § 1983 for their failure to protect plaintiff from assault by fellow prisoner known to be dangerous); Patrum v. City of Greensburg, Ky., 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) (City of Greensburg held to be immune under § 1983 from damages resulting from unlawful arrest and beating of plaintiff by police officers); United States *ex rel.* Gettlemacher v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970) (plaintiff barred from recovering under § 1983 for improper medical treatment received while a state prisoner); Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970) (former employee unable to collect damages from City of San Antonio for unlawful dismissal from civil service position); Barbaccia

Thus, in the first of the *Monroe* line of precedent, *Moor v. County of Alameda*,[19] plaintiffs sought to circumvent the municipal immunity doctrine by bringing a federal cause of action against Alameda County under both sections 1983 and 1988.[20] The latter provision allows federal courts to look to state law where a federal law governing the action is absent or deficient in provision of a remedy.[21] The Supreme Court, therefore, was asked to apply section 1988 to enforce the provisions of section 1983, through the adoption of a California law that would allow counties to be held vicariously liable under section 1983.[22] This argument was rejected in part because such an action was thought to be contrary to the holding of *Monroe* that municipal corporations were not liable for damages under section 1983.[23]

In the second of the cases that relied on *Monroe*, *City of Kenosha v. Bruno*,[24] the plaintiffs tried another strategy to avoid the municipal immunity doctrine. Instead of seeking damages, they sought only declaratory and injunctive relief against two Wisconsin cities for alleged deprivations of their fourteenth amendment due process rights.[25] The Supreme Court emphatically rejected this relief-based distinction, holding that municipalities never could be liable under section 1983,[26] either in equity or at law.

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v. County of Santa Clara, 451 F. Supp. 260 (N.D. Cal. 1978) (plaintiffs denied recovery from County of Santa Clara for unconstitutional taking of their property).

19. 411 U.S. 693 (1973). In this case, the plaintiffs filed federal and state claims against four deputy sheriffs, the sheriff and the County of Alameda after they suffered injuries from the wrongful discharge of a shotgun by one of the deputy sheriffs who was attempting to end a civil disturbance. Under the California Tort Claims Act, counties could be held vicariously liable for the torts of their officials. The plaintiffs argued that § 1988 could be construed to allow the federal court to adopt the California law to enforce the provisions of § 1983.

20. *Id.*

21. 42 U.S.C. § 1988 (1970) provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and Laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

22. 411 U.S. 693, 696 (1973).

23. *Id.* at 706-10. Thus, the Court brought counties within the purview of *Monroe* and the federal courthouse door closed a bit further.

24. 412 U.S. 507 (1973). In this case, appellees were denied renewal of their liquor licenses by the cities of Kenosha and Racine because of alleged nude dancing in their establishments.

25. *Id.* at 508.

26. *Id.* at 513. Justice Rehnquist, writing for the majority, stated, "[w]e 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 munic-

In the third of the cases fostered by *Monroe*, *Aldinger v. Howard*,[27] the Supreme Court turned back another attempt to circumvent the municipal immunity doctrine. The plaintiff joined Spokane County as a party to her state law claim and argued that under the doctrine of pendent party jurisdiction[28] the federal court should hear her federal section 1983 claim against the county treasurer, other county officials, and the county together with her state law claim. The Supreme Court rejected that argument because Congress, as *Monroe* had indicated, had not intended for local governmental entities to be among those bodies over which the federal courts would have original jurisdiction in section 1983 suits.[29]

Thus, in these three cases, the Supreme Court had all but barred federal relief under section 1983 for alleged deprivations of constitutional rights by local governmental entities.[30] Also, although *Monroe* referred only to

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ipal corporations depending on the nature of the relief sought against them." *Id.* at 513. There is considerable argument to the contrary. *See* Turner v. City of Memphis, 369 U.S. 350 (1962) (injunctive relief granted against discrimination practiced by municipal airport restaurant holding lease from city); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (City of Atlanta enjoined from refusing blacks the right to use public golf courses on substantially equal basis with whites); Douglas v. City of Jeannette, 319 U.S. 157 (1943) (claim seeking injunctive relief against city and mayor would ordinarily be entertained by federal courts, but the Court decided to interfere by injunction with threatened criminal prosecution in state court); Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971) (school district and school district trustees were "persons" within 1983 where equitable relief was sought).

27. 427 U.S. 1 (1976). In this case, the plaintiff was discharged without a hearing from her job in the Spokane County Treasurer's office for allegedly living with her boyfriend, even though her job performance was excellent. *Id.* at 3. She filed an action in federal district court under § 1983 for a violation of her first, ninth and fourteenth amendment rights against the county treasurer, other county officials and the county. *Id.* at 3-4. She also filed a state law claim against the county on the basis of state law which waived sovereign immunity of the county and provided for vicarious liability of the county for the torts of its officials. *Id.* at 4-5. The Court held that Congress had not intended local governmental entities to be within the jurisdictional reach of § 1983 and therefore that the county could not be brought into federal court as a pendent party. *Id.* at 17.

28. *See* note 87 and accompanying text *infra*.

29. 427 U.S. 1, 17 (1976).

30. As a result of the Supreme Court's adherence to the municipal immunity doctrine in *Monroe* and its progeny, plaintiffs sought to read directly into the fourteenth amendment a cause of action against local governmental entities by relying on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Court allowed damage action against defendant under the fourth amendment for unlawful search and seizure). The lower federal courts were split over allowing this type of action. *See* Hostrop v. Bd. of Junior Colleges, 523 F.2d 569 (7th Cir. 1974), *cert. denied*, 425 U.S. 963 (1975); Wright v. Houston Indep. School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975) (allowing this type of claim). *But see* Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977); Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D. Pa. 1974) (rejecting this type of claim). In *Monell*, Justice Powell in concurrence was the only member of the Court to speak to this question. He noted, "rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today." 436 U.S. at 713 (Powell, J., concurring). The Court in a recent summary order apparently

municipal corporations, the list of governmental entities held to be immune eventually included townships,[31] municipal agencies,[32] states,[33] and state agencies.[34]

Because of *Monroe* and the cases that followed it, local governmental entities were immune under section 1983. Although officers of those entities were held liable in their *individual* capacities for the commission of constitutional violations,[35] those officers often were judgment-proof. Thus a plaintiff's attempt at recovery under section 1983 frequently was frustrated.[36] However, several lower federal courts held local or state governmental units financially accountable in cases involving attacks on government officers in their *official* capacities.[37] This confusing development arose from the decision in *Kenosha*, in which the Court was silent on the question of the liability of government leaders when sued in their official capacities rather than as individuals.[38]

As a result, after *Kenosha*, plaintiffs began to sue officers such as a mayor or a department head, in their official capacities "because he [the official] has the authority to take any corrective action ordered,"[39] even though he may

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agreed with Justice Powell. In City of West Haven v. Turpin, 99 S. Ct. 554 (1978), the Court vacated a decision of the Second Circuit which allowed a damage action to be brought against a municipality directly under the fourteenth amendment. Presumably the rationale in so holding was their decision in *Monell*.

31. *See, e.g.*, Pressman v. Chester Township, 307 F. Supp. 1084 (E.D. Pa. 1969).

32. *See, e.g.*, Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974) (city planning commission); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (county planning board). The theory was that these agencies were "but arms" of the municipal government.

33. *See, e.g.*, Cheramie v. Tucker, 493 F.2d 586 (5th Cir. 1974), *cert. denied*, 419 U.S. 868 (1974) (states and arms of state government are not "persons" under § 1983).

34. *See, e.g.*, Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197 (9th Cir. 1974).

35. Monroe v. Pape, 365 U.S. 167, 187 (1961). *See* Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977) (Court reversed and remanded a district court decision that denied plaintiff damages under § 1983 from South Carolina highway patrolman who took plaintiff into custody, removed him from Georgia, and returned him to South Carolina without extraditing him); Lehman v. City of Pittsburgh, 474 F.2d 21 (3d Cir. 1973) (city officials and employees could be liable under § 1983 for depriving plaintiff of opportunity to apply for civil service job because of durational residency ordinance).

36. Kates & Kouba, *supra* note 11, at 136.

37. *See* Burt v. Bd. of Trustees, 521 F.2d 1201 (4th Cir. 1975) (school board members could be sued for equitable relief, including backpay, in their official capacities under § 1983); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974) (county sheriff sued in official capacity could be liable for attorney's fees as part of equitable award under § 1983); Freitag v. Carter, 489 F.2d 1377 (7th Cir. 1973) (award of damages against Commissioner of City of Public Vehicle License Commission in his official capacity).

38. Levin, *supra* note 9, at 1497. Levin identifies the Court's silence as the "Kenosha loophole" which allowed § 1983 plaintiffs to sue officers in their official capacities while recovering from the governmental entity for which that officer served, thereby avoiding a judgment-proof individual officer and an immune governmental unit. *Id.*

39. Levin, *supra* note 9, at 1497. In *Ex parte* Young, 209 U.S. 123 (1908), the Supreme Court held that the eleventh amendment does not confer sovereign immunity upon an indi-

have played no actual part in the wrongdoing. Under this theory departments of government and governments themselves, supposedly shielded by the *Monroe* immunity, were having to pay money damages, as part of an equitable award, in section 1983 actions.[40] Accordingly, some of the lower federal courts had succeeded at least partially in circumventing *Monroe*.[41]

Recognizing the practical consequences of official capacity relief, several other circuits rejected that approach. They did so, however, by way of an inappropriate analogy to cases involving the eleventh amendment.[42] For example, the Second Circuit, in *Monell*,[43] reasoned that just as the eleventh amendment had been held to bar awards of retroactive money damages from a state treasury,[44] by analogy, so should section 1983 be seen as forbidding the payment of money damages in the form of back pay from municipal coffers.[45] The Fifth Circuit applied the eleventh amendment approach and held that it precluded even injunctive or declaratory relief in the form of monetary compensation from a municipal treasury.[46]

Thus, the post-*Monroe* atmosphere in the federal courts was one of confusion as they groped for a way to reconcile the reality of damage caused by

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vidual state officer acting in his or her official capacity. *Id.* at 160. Plaintiffs attempting to utilize the official capacity suit as a method of recovery thus relied on the *Young* pleading fiction and sued the government officer while recovering from the governmental entity. Levin, *supra* note 9, at 1499. *See* note 37 *supra*.

40. Typically this result is accomplished pursuant to an indemnification statute, *see* ILL. REV. STAT. ch. 85, § 7-102 (1977), or a judgment tax fund, *see* ILL. REV. STAT. ch. 24, § 8-1-16 (1977).

41. *See* note 37 *supra*.

42. U.S. CONST. amend. XI provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This amendment consistently has been held to be a bar to suits against a state by its own residents. Edelman v. Jordan, 415 U.S. 651 (1974). Several commentators harshly have criticized the eleventh amendment analogy approach. Levin, *supra* note 9, at 1508-14. They argue that the eleventh amendment was designed to inhibit the federal courts from reaching into state treasuries, while the Reconstruction Congress intended § 1983 to be a broad remedial measure.

43. 532 F.2d 259 (2d Cir. 1976).

44. Edelman v. Jordan, 415 U.S. 651 (1974). The plaintiffs in that case sought injunctive and declaratory relief against Illinois state officials for alleged constitutional violations in their administration of the federal-state program of Aid to the Aged, Blind, and Disabled. The Court held that the eleventh amendment barred the payment of retroactive payments because those payments would come from the state treasury although sought from a state official.

45. 532 F.2d 259, 265 (1976). The Court stated, however, that officers sued in their official capacities are "persons" under § 1983 when sued for declaratory or injunctive relief. *See* Rochester v. White, 503 F.2d 263 (3d Cir. 1974) (officials sued in official capacities are "persons" under § 1983).

46. Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (*en banc*) (firemen and policemen sued the City of San Antonio, the pension fund board of trustees, and the individual trustees under 42 U.S.C. § 1983, seeking declaratory and injunctive relief as well as their mandatory contributions to the city pension fund). *See* note 69 *infra*.

municipalities with the fact that the Supreme Court would not allow those bodies to be held accountable. As a result, many section 1983 plaintiffs in effect were forced to bear the cost of a violation of their constitutional rights.

THE *MONELL* DECISION

Factual Background

Jane Monell and other female employees of the Department of Social Services and the Board of Education of New York City in 1971 brought a class action under section 1983 in federal district court against the department and its commissioner, the board and its chancellor and the City of New York and its mayor. Seeking injunctive relief and back pay, the plaintiffs claimed that the department officials and the board, pursuant to official policy, had compelled them as pregnant employees to take unpaid leaves of absence before they were medically required to do so.[47]

The district court considered the claim for equitable relief to be moot because the city and the board had changed the policy in question subsequent to the filing of the action.[48] With regard to the claim for back pay, it held that while the policy was unconstitutional,[49] cases interpreting the eleventh amendment indicated that the city could not be required to award such moneys consistent with *Monroe*.[50] The Second Circuit affirmed the opinion of the lower court.[51]

The Monell Opinion

Faced with these facts, the Supreme Court, as it had done in *Monroe*, looked to the legislative history of the Civil Rights Act of 1871 for guidance.[52] The Ku Klux Klan Act of 1871[53] was a manifestation of the

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47. 436 U.S. at 660-62. (The reader may find note two on page 661 helpful).

48. 394 F. Supp. 853 (S.D.N.Y. 1975). Plaintiffs also amended their complaint to charge that the policy violated the 1972 amendment to Title VII of the Civil Rights Act of 1964. *Id.* at 854-55. That amendment added the government as an employer potentially liable under Title VII. Civil Rights Act of 1964, tit. VII 703, 42 U.S.C. §2000(e)-2000(e)-15 (1970). The district court held that the amendment was enacted after the complaint was amended and could not be applied retroactively. *Id.* at 856.

49. Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974). In that case, the Court struck down mandatory school board rules requiring pregnant teachers to take maternity leave four months prior to delivery as violative of fourteenth amendment due process requirements because an irrebuttable presumption that the teachers otherwise would be physically unfit to teach was created. *Id.* at 651.

50. 394 F. Supp. 853, 855 (1975). *See* Edelman v. Jordan, 415 U.S. 651 (1974). *See* note 44 *supra*.

51. 532 F.2d 259 (2d Cir. 1976). *See* note 43 *supra*.

52. Kates and Kouba indicated that reliance on legislative history on any occasion is inappropriate. Referring to the analysis of the 1871 Civil Rights Act, they wrote: "The validity of the Court's holding thus depends on the degree of acceptance given these ancient debates by each analyst." Kates & Kouba, *supra* note 11, at 136.

53. 17 Stat. 13 (1871). What is now codified as 42 U.S.C. § 1983 was §1 of the Act.

power granted to Congress by section five of the fourteenth amendment[54] to enforce section one of that amendment.[55] As the bill proceeded through Congress, Senator Sherman of Ohio introduced an amendment that would have made every citizen of a municipality liable for the lawlessness perpetrated by its residents.[56] In the postbellum South, however, municipalities generally did not engage in a peacekeeping function.[57] Because of the doctrine of coordinate sovereignty,[58] the liability placed on municipalities under this amendment was rejected. Congress refused to impose upon a municipality an obligation that was not compelled by state law.[59] Based on that rejection, the Court in *Monroe* refused to include municipalities within the ambit of the term "person" in section 1983 and thereby established the municipal immunity doctrine.[60]

In *Monell*, the Supreme Court found the *Monroe* construction of section 1983 to be erroneous.[61] Justice Brennan, writing for the majority, indicated that the 42nd Congress had no objection to holding a municipality liable for its failure to fulfill the obligation to maintain order that was created by state law.[62] The precedent relied upon by the opposition to the Sherman

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54. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

55. U.S. CONST. amend. XIV, § 1 provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As Justice Douglas eloquently stated in *Monroe*:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

365 U.S. 167, 180 (1961). The 42nd Congress was responding in general to violence perpetrated by the Ku Klux Klan in the Reconstruction South, and, in particular, to a message from President Grant urging it to promulgate legislation to ameliorate those conditions. *Id.* at 172-73.

56. CONG. GLOBE, 42nd Cong., 1st Sess. 663 (1871).

57. Kates & Kouba, *supra* note 11, at 134-35.

58. According to this doctrine, limitations were placed on the powers of the federal government to protect state prerogatives. 436 U.S. 658, 676 (1978).

59. CONG. GLOBE, 42nd Cong., 1st Sess. 788, 792-93, 795 (1871).

60. 365 U.S. 167, 191 (1961).

61. 436 U.S. at 679-90. In so holding, the Court joins a host of commentators who have criticized the *Monroe* construction. *See* Kates & Kouba, *supra* note 11, at 132-36; Levin, *supra* note 9, at 1491-94, 1591-31; Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 455-56 n.33 (1978); *Developments in the Law*, *supra*, note 9, at 1192; *Developing Governmental Liability Under 42 U.S.C.* § 1983, 55 MINN. L. REV. 1201, 1212-13 (1971); Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CAL. L. REV. 1142, 1164-69 (1969).

62. Justice Brennan relied on passages from the Congressional debates. One such passage, (from the remarks of Senator Poland), is particularly instructive:

amendment's imposition of a *new* duty on a municipality,[63] he reasoned, did not pertain to the enforcement of an *existing* legal duty, and the two therefore could not be equated.[64] Also, he argued that a municipality's legal duty could be enforced by analogy to the enforcement of the contract clause against local governments,[65] and showed that the 42nd Congress would have understood the word "person" to include legal, as well as natural, persons.[66] The *Monell* Court's reading of the legislative history of section 1983 clearly refutes that of the *Monroe* Court and its analysis was of greater depth than that of *Monroe*.[67]

IMPACT OF *MONELL*

Clearly, by overruling the *Monroe* municipal immunity doctrine, the Supreme Court has reduced significantly the tension which has permeated the

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> I presume, too, that when a state had imposed a duty upon a municipality, and provided they should be liable for any damages caused by failure to perform such duty, that an action would be allowed to be maintained against them in the Courts of the United States under the ordinary instructions as to jurisdiction. But enforcing a liability, existing by their own contract, or by State law, in the courts, is a very widely different thing from developing a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever.

CONG. GLOBE, 42nd Cong., 1st Sess. 794 (1871). 436 U.S. at 679-83 (1978).

63. Collector v. Day, 78 U.S. (11 Wall.) 113 (1870); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). These cases later were overruled by Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939); *Ex parte* Virginia, 100 U.S. 339 (1879).

64. 436 U.S. at 672-83.

65. *Id.* at 681-82.

66. *Id.* at 687-89. Justice Brennan relied on the understanding of the Dictionary Act, passed a few months before § 1983. That Act provides in pertinent parts "in all acts hereinafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, ch. 71, § 2, 12 Stat. 431 (1871). *Id.* at 688-89. Justice Brennan also points out that the 42nd Congress intended § 1983 to be broadly construed. *Id.* at 700.

67. In this dissent, Justice Rehnquist, joined by Chief Justice Burger, conceded that the majority was "probably correct" in demonstrating that the grounds for the opposition to the Sherman amendment were not the same as the desire to enforce a municipality's legal obligation. 436 U.S. 658, 722 (1978) (Rehnquist, J., dissenting). Also, he admitted that the rejection of the amendment did not necessarily indicate how Congress felt about including a municipality within the term "person" and that "the reasoning of *Monroe* on this point is subject to challenge" as a result. *Id.* at 723.

His objection to the majority's construction is tied to his perception of the doctrine of stare decisis. He believed that the legislature should correct the wording of the statute if it felt corrections were needed. *Id.* at 714-19.

The majority also recognized the importance of stare decisis. Nevertheless, it noted that several factors necessitated the overruling of *Monroe*. 436 U.S. at 695-701. As Justice Powell wrote in his concurrence, "[I] think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all relevant considerations [including the legislative history]." 436 U.S. at 709 n.6 (Powell, J., concurring).

federal courts. Persons whose constitutional rights have been violated by the execution of a policy, rule or regulation or by "governmental custom," can sue the local governmental entity directly for legal and equitable relief.[68] There now is a responsible government defendant from whom a section 1983 plaintiff may recover. Further, since *Monell*, the Court has vacated three appellate court decisions upholding municipal immunity under section 1983 and remanded them for further consideration.[69]

Also, the Court has directly addressed the eleventh amendment questions that had been raised in section 1983 litigation. In *Hutto v. Finney*,[70] a deci-

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68. The Court did not reject the holdings of *Moor*, that § 1988 does not create a federal cause of action to enforce § 1983, or *Kenosha*, that there can be no bifurcated application of relief from a local government entity. 436 U.S. at 701 n.66. That fact is entirely consistent with the overruling of the municipal immunity doctrine and does not negate the impact *Monell* has on ameliorating the past confusion in the lower federal courts. A § 1983 plaintiff now can sue a local government entity directly. Also, the Court recognized official capacity suits, holding "[l]ocal government officials sued in their official capacities are 'persons' under § 1983 in those cases in which, as here, a local governmnt would be suable in its own name." *Id.* at 690 n.55.

69. In the first case, Muzquiz v. City of San Antonio, 98 S. Ct. 3117 (1978), firemen and policemen sued the City of San Antonio, the pension fund board of trustees, and the individual trustees under 42 U.S.C. § 1983, seeking declaratory and injunctive relief as well as return of their mandatory contributions to the city pension fund. The Fifth Circuit originally followed the official capacity approach and allowed recovery from the trustees. 520 F.2d 993 (5th Cir. 1975). That decision was reversed in a hearing *en banc* as the Court employed the eleventh amendment analogy to bar the recovery that would come from the city treasury. 528 F.2d 499 (5th Cir. 1976).

In this second case, Thurston v. Deckle, 98 S. Ct. 3118 (1978), nonprobationary city employees filed a class action against certain city officials under 42 U.S.C. § 1983, attacking the suspension and dismissal rules of the City of Jacksonville, Florida, seeking declaratory and injunctive relief and back pay. They claimed they had been denied due process for being terminated without adequate procedural safeguards. 531 F.2d 1204, 1266 (5th Cir. 1976). The Fifth Circuit agreed but held it did not have subject-matter jurisdiction over a claim for back pay that ultimately would come from the city's treasury because of the municipality's § 1983 immunity. *Id.* at 1269. The Fifth Circuit in turn remanded to the district court. 578 F.2d 1167 (5th Cir. 1978).

In the third case, City of Independence, Mo. v. Owen, 98 S. Ct. 3118 (1978), a discharged police chief sued the City of Independence, the city manager, the mayor and councilmen under the fourteenth amendment and under § 1983 for declaratory and injunctive relief and back pay. He claimed he was denied due process in being discharged without notice or a hearing. 560 F.2d 925, 926 (8th Cir. 1977). The Eighth Circuit held that the plaintiff could bring a cause of action directly under the fourteenth amendment and could recover back pay from funds under the defendant officials' control as part of an equitable decree. *Id.* at 937. However, the court held that an action against the city was barred by the municipal immunity doctrine. *Id.* at 931. In all these cases, the courts, to be consistent with *Monell*, likely would hold the cities liable under § 1983.

70. 98 S. Ct. 2565 (1978). In this case, state prisoners filed suit under the eighth amendment against Arkansas state prison officials claiming that conditions in their cells violated the cruel and unusual punishment clause. The Supreme Court affirmed the appeals court finding of unconstitutional practice and its award of attorney's fees from the State Department of Correction. *Id.* at 2576.

sion handed down shortly after *Monell*, the Court rejected the utilization of the eleventh amendment to deny monetary awards from state treasuries.[71] Justice Brennan, in his concurring opinion in *Hutto*, stated that "it is surely at least an open question whether section 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the eleventh amendment."[72]

Although less obvious, *Monell* also will affect other areas of at least equal significance. These areas include pendent party jurisdiction, suits against school boards under section 1983 and the Burger Court approach to civil rights.

Impact on Pendent Party Jurisdiction

Monell is likely to have a significant impact upon judicial applications of the doctrines of pendent[73] and ancillary[74] jurisdiction. It casts serious doubt that the third of *Monroe's* progeny, *Aldinger v. Howard*,[75] an important decision involving these doctrines, would be decided in the same way today.

The Court in *Aldinger* was confronted with the earlier decision of *United Mine Workers v. Gibbs*,[76] and subsequent lower court precedent.[77] In *Gibbs*, the plaintiff filed suit in federal district court claiming a violation of federal law and a pendent state claim asserting a violation of Tennessee law against the same defendant.[78] In deciding that the federal district court had jurisdiction over both claims, the Supreme Court devised what has come to

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71. *Id.*

72. Hutto v. Finney, 98 S. Ct. 2565, 2581 (1978) (Brennan, J., concurring). Justice Brennan was relying on *Monell* and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Claiming the state's retirement plan discriminated against them on the basis of sex, employees of the State of Connecticut brought a class action under Title VII of the Civil Rights Act of 1964. The Court held that the eleventh amendment was not a bar to an award of backpay because it was limited by the provisions of § 5 of the fourteenth amendment. *See* text accompanying note 135 *infra*.

73. Under the doctrine of pendent jurisdiction, a federal plaintiff may bring both a single federal action and a state claim arising from the same set of facts against one defendant. The rationales for this doctrine are convenience to both parties and economy of judicial resources. United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966). *See also* J. WRIGHT, LAW OF FEDERAL COURTS 62-65 (1970).

74. According to the doctrine of ancillary jurisdiction,

> [i]t is held that a district court acquires jurisdiction of a case or controversy as an entirety, and may, as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently pressed. Thus if the court has jurisdiction of the principal action, it may hear also any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that would normally determine [subject matter] jurisdiction.

J. WRIGHT, LAW OF FEDERAL COURTS 19 (1970).

75. 427 U.S. 1 (1976). *See* note 27 *supra*.

76. 383 U.S. 715 (1966).

77. *See* note 89 *infra*.

78. *Id.* at 720.

be known as the "power-discretion" test.[79] The threshold requirement, the power element, is that a substantial federal claim[80] and a state claim must be derived from a "common nucleus of operative fact."[81] If they are, the federal court then may exercise subject-matter jurisdiction over both claims. But as Justice Brennan noted, "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."[82] Therefore, according to *Gibbs*, the court should use discretion, the second element of the test, to decide if it will hear the state law claim. The factors to be weighed in exercising discretion were held to be judicial economy, convenience and fairness.[83]

Subsequent to *Gibbs*, lower federal court decisions have synthesized the doctrines of pendent and ancillary jurisdiction. They have done so by extending pendent jurisdiction to diversity cases[84] and to pendent party cases,[85] areas previously only within the ambit of ancillary jurisdiction.[86] Pendent party jurisdiction, significant in the context of *Aldinger*, has been defined as "[t]he expansion of pendent jurisdiction to include state claims against parties not involved in the jurisdiction-conferring action."[87]

As a result of the *Gibbs* and post-*Gibbs* decisions, not only could a federal court hear a federal claim and a state claim together against the same defendant, it also could adjudicate the interests of additional parties to the state law claim.[88] In fact, faced with pendent party questions, as was the Court in *Aldinger*, a majority of the circuits have upheld the exercise of jurisdiction

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79. Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of the Two Doctrines*, 22 U.C.L.A. L. REV. 1263, 1272-73 (1975).

80. Such a claim would be one over which a federal court would have subject matter jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 725(1966).

81. *Id.* The claims would be such "that a plaintiff would ordinarily be expected to try them all in one judicial proceeding." *Id.*

82. *Id.* at 726.

83. *Id.*

84. *See, e.g.*, Jacobsen v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968). In that case, the court held, "These considerations [the power-discretion test elements] seem as applicable to cases in which federal jurisdiction is based on diversity of citizenship as to federal question cases." *Id.* at 155.

85. *See, e.g.*, Astor Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971). As Judge Friendly noted, "Although the pendent claim in *Gibbs* did not include a party not named in the federal claim, Mr. Justice Brennan's language and common sense considerations underlying it seem broad enough to cover that problem also." *Id.* at 629.

86. *See* Aldinger v. Howard, 427 U.S. 1, 10-11 (1976).

87. Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263, 1277-78 (1975). In this Comment, the author analyzes the trend toward the synthesis of the doctrines of pendent and ancillary jurisdiction. The gap between what historically were two separate doctrines began to be closed in *Gibbs*. It was further narrowed, according to the author, by the extension of pendent jurisdiction to diversity cases and to pendent party cases. *Id.* at 1274-81. The author argues further that pendent jurisdiction, specifically the *Gibbs* power-discretion test, should be extended to cross-claims and counterclaims. *Id.* at 1281.

88. *See* Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753, 754-55 (1978) (cogent analysis of whole pendent party area).

over the pendent party by the federal court.[89] Those circuits that have not, relied on pre-*Gibbs* precedent which was much more restrictive in allowing such an exercise of judicial power.[90]

In *Aldinger*, Justice Rehnquist, writing for the majority, noted that a federal court might entertain a pendent party where Congress, by statute, had conferred jurisdiction.[91] But confronted with the facts of *Aldinger*, he reasoned that because counties were immune from the jurisdictional reach of section 1983, in compliance with *Monroe* and *Kenosha*, they could not be joined as a pendent party.[92] As such, *Aldinger* can be interpreted as a further manifestation of the Court's philosophy of keeping local governmental entities out of federal court in civil rights litigation.[93]

By contrast, *Monell* could be viewed as representing a significant shift in the Court's attitude toward municipalities in general under the Civil Rights Statutes[94] and toward local governmental entities as pendent parties in particular. Prior to *Aldinger*, a plaintiff would have to attempt the pending of a local governmental entity to a state claim in order to get that body into federal court. Now, after *Monell*, the plaintiff can sue the municipal corporation directly under section 1983. Thus *Monell* has severely weakened the foundation upon which *Aldinger* stood.

Moreover, circumstances will remain in which a plaintiff may want to attach a local governmental entity to a state law claim. For example, if a secondary school teacher were to be discharged from his or her position because of race, that person likely would bring a federal claim against the president or chairman of the school board under section 1981.[95] He or she

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89. *See, e.g.*, Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); Transok Pipeline Co. v. Darks, 565 F.2d 1154 (10th Cir. 1977) (the case was decided after *Aldinger*); Florida E.C.R.R. v. United States, 519 F.2d 1184 (5th Cir. 1975); Schulman v. Huck Finn, Inc., 472 f.2d 864 (8th Cir. 1973); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Beautytuft, Inc. v. Factory Inc. Ass'n, 431 F.2d 1122 (6th Cir. 1970); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968).

90. Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975). *See* Hurn v. Ousler, 289 U.S. 238 (1933); Moore v. New York Cotton Exch., 270 U.S. 593 (1926).

91. 427 U.S. 1, 16-17 (1976).

92. *Id.* at 17. The Court held, "[i]n short, as against a plaintiff's claim of *additional* power over a 'pendent party,' the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress."

93. *See* note 27 and accompanying text *supra*.

94. *E.g.*, 42 U.S.C. §§ 1981-1985 (1970).

95. 42 U.S.C. § 1981 (1976) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

might also bring a state law claim against the school board and/or city for violation of contract. Because in many states there is compulsory joinder of both parties, the plaintiff would join the municipality as a party to the state claim. They might also join that body in an attempt to ensure recovery, as the school board might not carry sufficient insurance protection. It could be argued that after the Court's apparent philosophical shift in *Monell*, if all other requirements were met,[96] the federal court hearing the section 1981 suit should allow the municipality to be brought in as a pendent party subject to possible liability.

The Court in *Monell* did not address these factors directly. Based on *Monell* and the majority of the post-*Gibbs* lower federal court decisions, however, a strong argument can be made that the opinion will have a significant impact on this important area of federal court jurisdiction.[97]

Impact on Suits Against School Boards

Monell also clarified the relationship of a school board to a municipal corporation. The Supreme Court had left open the question of whether a school board was a "person" under section 1983.[98] The lower courts were divided in their answer[99] and hinged their determination on the board's dependence on, or independence from, the municipality. The *Monell* Court's holding that a school board is not to be distinguished from a municipality for section 1983 purposes[100] should put an end to the debate on the status of school boards in section 1983 actions.[101] They are now "persons" under the Act and can be held liable under section 1983 when their policies, rules or regulations cause the deprivation of constitutional guarantees.[102]

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96. The *Gibbs* power-discretion test. *See* note 79 *supra*.

97. *See* note 89 *supra*.

98. Mt. Healthy City School Dist., Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977). In this case, the plaintiff brought suit against the board of education under 28 U.S.C. § 1331 for failure to renew his contract in violation of his first and fourteenth amendment rights. *Id.* at 276. The Court remanded the case for consideration of the due process issue and left open the question of whether the school board was a "person" under § 1983. *Id.* at 279.

99. *See* Monell v. New York City Dept. of Social Servs., 532 F.2d 259, 262-64 (2d Cir. 1976); Adkins v. Duval County School Bd., 511 F.2d, 690, 692-93 (5th Cir. 1975); Singleton v. Vance County Bd. of Educ., 501 F.2d 429, 430 (4th Cir. 1974). (All holding board of education is not a "person"). *But see* Keckeisen v. Independent School Dist., 509 F.2d 162, 1065 (8th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975); Aurora Educ. Ass'n E. v. Bd. of Educ., 490 F.2d 431, 435 (7th Cir. 1973); Scher v. Bd. of Educ., 424 F.2d 741, 743-44 (3d Cir. 1970). (All holding board of education is a "person"). *See also* Note, *Suing the School Board Under Section 1983*, 21 S.D.L. REV. 452 (1976).

100. 436 U.S. at 695-96.

101. *See* 436 U.S. at 711-13 (Powell, J., concurring).

102. 436 U.S. at 690. As an indication of the impact of *Monell*, the Supreme Court recently remanded a case brought under § 1983 against a school board for reconsideration. Kornit v. Board of Educ., 542 F.2d 593 (2d Cir. 1976), *vacated*, 438 U.S. 902 (1978). In that case a teacher filed suit under § 1983 alleging that the school board had unlawfully deducted pay, because of his participation in an illegal strike, in violation of his fourteenth amendment rights.

Impact on Burger Court Approach to Civil Rights

Finally, *Monell* is likely to affect the approach of the current Supreme Court to civil rights litigation. The Burger Court has come under sharp criticism for restricting access to the federal courts by individuals or classes of persons seeking vindication of their constitutional guarantees.[103] Prior to *Monell*, a host of legislation was introduced in Congress to remedy the effects of *Monroe* and its successors on section 1983 actions.[104]

The Court has restricted federal protection of federally guaranteed rights in three general areas:[105] access to federal courts,[106] federal court deference to state proceedings,[107] and the ability of the federal courts to shape remedies and provide relief for harm caused by state officials.[108] Two solutions called for,[109] in the context of section 1983 actions, have been: 1) the amendment of section 1983 to include government entities within the scope

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The Eighth Circuit also vacated O'Hern v. School Dist., 578 F.2d 220 (8th Cir. 1978), for reconsideration.

103. *See* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977) [hereinafter cited as Morrison]; Shaman & Turkington, *Huffman v. Pursue, Ltd.: The Federal Courthouse Door Closes Further*, 56 B.U.L. REV. 907 (1976) [hereinafter cited as Shaman & Turkington]; *Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or Other Unlawful Actions: The Record of the Burger Court*, A Statement of the Board of Governors of the Society of American Law Teachers (1977) [hereinafter cited as *Supreme Court Denial*]; Wicker, *Closing the Courts*, N.Y. Times, Dec. 3, 1976, at col. 3.

104. *See, e.g.*, S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S201 (1977). Senator Mathias, in introducing the bill, noted, "[w]hile I am aware of the concerns of the Court's new priority—especially the growing problem of overburdened Federal Courts—I am struck by the consistency and severity with which these decisions have hurt those most in need of judicial relief."

105. *See* Morrison, *supra* note 103; Shaman & Turkington, *supra* note 103.

106. Aldinger v. Howard, 427 U.S. 1 (1976); Simon v. Eastern Ky. Welfare Rights Organ., 426 U.S. 26 (1976) (Article III "case or controversy" not established unless injury can be traced to defendant, not a third party); Warth v. Seldin, 422 U.S. 490 (1975) (assertion of "generalized grievances" or third parties rights insufficient to establish injury in fact necessary to have standing).

107. Stone v. Powell, 428 U.S. 465 (1976) (state prisoner denied federal habeas coprus relief where a state provided for a full and fair litigation of a fourth amendment claim); Francis v. Henderson, 425 U.S. 536 (1976) (state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him was barred from bringing his challenge in a federal habeas corpus proceeding); Hicks v. Miranda, 422 U.S. 332 (1975) (unnamed, but interested parties in a pending state proceeding could not seek federal injunctive relief absent a clear showing that their claims could not be answered in the state proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (greater deference given to state court civil proceedings as well as criminal proceedings). The Court repeatedly has stressed the principles of comity and federalism in this area.

108. Rizzo v. Goode, 423 U.S. 362 (1975) (U.S. District Court order to Philadelphia Police Commissioner to revise police manuals along court guidelines because of police misconduct was an unwarranted federal judicial intrusion into the discretionary authority of city police to perform according to state law); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (federal court will not award attorney's fees in public interest cases where applicant is trying to recover fees under theory that attorney is acting as a private attorney general).

109. Morrison, *supra* note 103, at 861.

of the term "person,"[110] and 2) the abolishment of the good faith defense in damage actions in order to keep the individual victim from becoming a self-insurer.[111] *Monell* provides both solutions. It demonstrates that the Court in *Monroe* was incorrect in its analysis of the legislative history and, by overruling the municipal immunity doctrine, obviates the concern of attempting to recover from a government official who may possess a qualified immunity.

There are additional considerations which highlight the impact of *Monell* in the context of its increasing the access to federal courts for section 1983 plaintiffs. As Justice Douglas stated in *Monroe,* section 1983 was passed to provide a federal forum for the vindication of federal rights.[112] Further, the federal courts are thought to be better equipped to address constitutional questions for several reasons.[113] First, federal judges routinely decide federal questions and thereby develop a special competence in those areas.[114] Next, the federal judiciary is more isolated from the influences of the political arena.[115] Third, federal judges are more aware of the needed uniformity

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110. *Id. See* note 98 *supra*.

111. This defense was articulated by the Court as,

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). *See also* Wood v. Strickland, 420 U.S. 308, 314-22 (1975) (school officials liable under § 1983 only if they acted with impermissible motivation or conscious disregard of students' constitutional rights; otherwise are immune). *See* note 130 and accompanying text *infra*.

As Justice Powell noted in *Monell*,

> Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity. . . . Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.

436 U.S. at 707-08 (Powell, J., concurring).

112. 365 U.S. 167, 180 (1961).

113. *See* Kates & Kouba, *supra* note 11, at 145, where it is stated:

> Federal district court judges . . . deal primarily with federal law flowing from the Supreme Court and the circuit courts of appeals. The precedents which bind them and the superiors who guide them all focus on federally derived rights and duties. They are, therefore, more likely, to be well versed in the interrelationships of federal due process, equal protection, and Bill of Rights rulings of recent years. A plaintiff whose federal claim is in any way novel may expect, then, a more educated analysis from federal courts than from state remedial tribunals—judicial or administrative.

Id. quoting Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352, 1357 (1970) [hereinafter cited as Chevigny].

114. Chevigny, *supra* note 106, at 1357.

115. U.S. CONST. art. III, § 1. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 385-87 (1821).

in constitutional interpretations.[116] Finally, article III requirements and institutional prudential rules often inhibit review of constitutional claims by the United States Supreme Court.[117] The Court itself has commented on the adequacy of its review of state court decisions, noting that it is an "inadequate substitute for [lower federal] court determination."[118] In sum, "both the need to safeguard against erroneous constitutional interpretation and the need for uniformity in constitutional rights militate in favor of the exercise of original jurisdiction in the federal courts."[119] The *Monell* decision clearly furthers these ideals by providing a federal forum to section 1983 litigants seeking relief from the unconstitutional policies of local governmental entities.

Monell also can be seen to represent a significant shift in the Burger Court's approach to the role of the federal government in this area. As Justice Brennan noted in his discussion of the legislative history, the Civil Rights Act, of which section 1983 was a part, was introduced in the 42nd Congress to enforce the provisions of the fourteenth amendment.[120] As the Court held in *Mitchum v. Foster:*[121]

> Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th Century. . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as the guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law "whether that action be executive, legislative or judicial."[122]

Monell clearly is a manifestation of that purpose.

QUESTIONS UNANSWERED BY *MONELL*

In *Monell,* the Supreme Court held that a local government entity no longer is absolutely immune under section 1983 when the execution or implementation of one of its policies, rules or regulations violates a person's constitutional guarantees.[123] At the same time, the Court held that municipalities are immune under the doctrine of respondeat superior.[124] As to the degree of immunity to be afforded a local governmental entity, the

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116. *See* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 VA. L. REV. 250, 264 (1974).

117. Shaman & Turkington, *supra* note 103, at 928.

118. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

119. Shaman & Turkington, *supra* note 103, at 929.

120. 436 U.S. at 665.

121. 407 U.S. 225 (1972).

122. *Id.* at 242, *citing Ex parte* Virginia, 100 U.S. 339, 346 (1879).

123. 436 U.S. at 690.

124. *Id.* at 691. *See* Reimer v. Short, 578 F.2d 621, 626 (5th Cir. 1978). This is a post-*Monell* decision which cites *Monell* as changing precedent. The Court held that the city of Houston could not be held liable under respondeat superior for alleged harrassment and unlawful searches of plaintiff's business by police. *Id.* at 626.

Court stated, "we express no views on the scope of any municipal immunity. . ."[125] Thus, the salient question left open by the decision is when, if ever, other than under respondeat superior, may a municipality be shielded from liability under section 1983.

There are several crucial considerations in the determination of a possible answer to that question. Municipal corporations historically were immune from tort liability in the exercise of their governmental function, but not in the performance of their corporate responsibilities.[126] State legislatures, anxious to abandon municipal immunity because of the difficulty in distinguishing the two functions, often have required municipal corporations to obtain insurance to cover adverse judgments.[127] *Monell* could pose an insurance problem for these bodies. Some would argue that no municipality could anticipate when the implementation of one of its policies would cause the deprivation of another's constitutional guarantees, especially in the context of a dynamic constitutional jurisprudence.[128] However, those concerns perhaps are inflated. Municipalities could, as the larger ones now do,[129] self-insure through the development of special judgment funds. It hardly seems fair or reasonable that an individual should be more certain of relief in a tort action against a municipality than when his or her civil rights have been violated.

There also are other considerations which seem to tip the balance in favor of municipal liability. Absent such liability, a section 1983 plaintiff often is without a remedy. It may be impossible to identify the responsible officials. Those that can be, often are judgment-proof or have some degree of official immunity,[130] and juries may hesitate to impose liability on a city official whom they view as an individual just doing his or her job.[131] Municipal liability thus would provide a responsible defendant from whom a plaintiff could recover under section 1983.

In addition, municipal liability could compel government officials to be more careful in considering the legal ramifications of their policies. The number of suits filed under section 1983[132] would indicate that training and

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125. 436 U.S. at 701.

126. 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 104-05 (3d ed. rev. 1977).

127. *Id.* at 105-06.

128. *See* Brief for Respondent at 34, Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).

129. ILL. REV. STAT. ch. 24, § 8-1-16 (1977). The City of Chicago does self-insure by the establishment of a judgment tax fund.

130. In several instances, government officials have been held to be immune in § 1983 actions. *See* Butz v. Economou, 98 S. Ct. 2894 (1978) (federal officials); Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (superintendent of state hospital); Wood v. Strickland, 420 U.S. 308 (1975) (school board official); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor, state university president and members of National Guard); Pierson v. Ray, 386 U.S. 547 (1967) (police).

131. Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 923 (1976); Kates & Kouba, *supra* note 11, at 142-44.

132. *See* note 2 *supra*.

education of those officials and the adoption of general risk management techniques would be appropriate.[133]

Thus, the scope of municipal immunity/liability has been left by *Monell* for determination on another day. The eagerness of many states to abandon municipal immunity in the tort context, the need of a section 1983 plaintiff for a responsible defendant and the value of the deterrence of future abuses militate in favor of municipal liability, except under respondeat superior, under section 1983.

CONCLUSION

The Supreme Court has rejected the municipal immunity doctrine. In this regard, *Monell* represents a long-overdue shift in the Court's approach to the question of municipal liability. By immunizing governmental entities, the *Monroe* line of precedent forced the federal courts into confusing positions and denied many section 1983 plaintiffs adequate relief. *Monell* should clear the air of that confusion. It also should afford litigants a responsible defendant against whom they may litigate deprivations of constitutional rights in a federal forum. Further, *Monell* likely will result in the deterrence of future abuses of constitutional rights by local governmental entities.

It is clear that section 1983 was the statutory enactment of the commands of the fourteenth amendment. As the Court noted in *Fitzpatrick v. Bitzer:*[134]

> [W]hen Congress acts pursuant to section five [of the fourteenth amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.[135]

In *Monell*, the Supreme Court clearly indicated that the 42nd Congress, in acting pursuant to section five of the fourteenth amendment when it promulgated section 1983, intended to hold accountable those local governmental entities who did not obey the commands of the Constitution.

Lance D. Taylor

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133. The Court in *Monell* did not accept the rationales of compensation and deterrence as justification for holding a municipality liable under respondeat superior because those arguments were not strong enough in 1871 to allow passage of the Sherman amendment. 436 U.S. at 692-95. However, these arguments are definitely pertinent in the context of holding a local government entity liable for failing to perform a duty it is obligated by law to perform.

134. 427 U.S. 445 (1976).

135. *Id.* at 456.